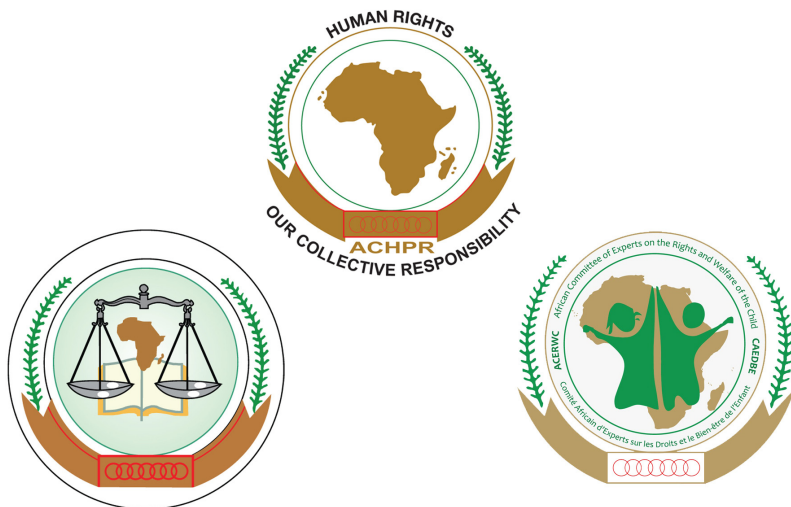


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Annuaire africain des droits de l'homme

2019 (Volume 3)



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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 2019 is 'Refugees, returnees and internally displaced persons: towards durable solutions to forced displacement in Africa'.

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L'Annuaire Africain des Droits de l'Homme publie des contributions relues portant sur les aspects du système africain des droits de l'homme touchant à ses normes et au fonctionnement de ses institutions ainsi qu'aux relations entre les droits de l'homme et le thème de l'Union africaine pour l'année de publication qui est, pour 2019 « Année des Réfugiés, des Rapatriés et des Personnes Déplacées: vers des solutions durables aux déplacements forcés en Afrique »

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.pulp.up.ac.za

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Contents

Table des matières

Acknowledgments **xi**

Preface / Préface **xii**

I

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

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

Le système africain de protection des droits de l'homme et la question des enfants soldats

1

Abelungu, Junior Mumbala

L'émergence d'un juge électoral régional africain

22

Adjolohoun, Sègnonna Horace & Youmbi, Eric M. Ngango

O direito ao desenvolvimento como um direito fundamental: a sua proteção jurídica na União Africana e na ordem jurídica dos Países Africanos de Língua Oficial Portuguesa

49

Baldé, Aua

Le temps du procès et la sécurité juridique des requérants dans la procédure devant la Cour africaine des droits de l'homme et des peuples

72

Dzesseu, Serges Frédéric Mboumegne

Patterns of discrimination based on sexual orientation in Africa: is there a Lusophone exception?

93

Garrido, Rui

Children's right to sustainable development under the African human rights framework	119	<i>Getaneh, Samrawit</i>
Journalism and human rights standards in Africa: reportage of violence against persons with albinism in Malawian newspapers	142	<i>Mlenga, Joe</i>
Droits de l'homme et justice climatique en Afrique	157	<i>Owona, Daniel</i>
Mental health and exploitation, violence and abuse: the domestication of articles 5 and 16 of the African Charter on Human and Peoples' Rights in Ghana and its implication for conventional and traditional mental healthcare	179	<i>Schuck, Natalie</i>
The privacy awakening: the urgent need to harmonise the right to privacy in Africa	202	<i>Singh, Avani & Power, Micheal</i>
The settlement option: friend or foe to human rights protection in Africa?	221	<i>Zarifis, Ismene Nicole</i>

II

ARTICLES RELATED TO THE THEME OF THE YEAR 2019: 'REFUGEES, RETURNEES AND INTERNALLY DISPLACED PERSONS: TOWARDS DURABLE SOLUTIONS TO FORCED DISPLACEMENT IN AFRICA'

ARTICLES PORTANT SUR LE THÈME DE L'ANNÉE 2019: « ANNÉE DES RÉFUGIÉS, DES RAPATRIÉS ET DES PERSONNES DÉPLACÉES: VERS DES SOLUTIONS DURABLES AUX DÉPLACEMENTS FORCÉS EN AFRIQUE »

The protection of climate refugees under the African human rights system: proposing a value-driven approach	242	<i>Addaney, Michael; Jegede, Ademola Oluborode and Matinda, Miriam</i>
The African Union Protocol on Free Movement of Persons in Africa: development, provisions and implementation challenges	260	<i>Adeola, Romola</i>

La prévention de l'apatridie dans le système africain des droits de l'homme	276	<i>Avlessi, Renaud Fiacre</i>
Legal protection of refugee children in Africa: positive aspects and shortcomings	298	<i>d'Orsi, Cristiano</i>

III

CASE COMMENTARIES

COMMENTAIRES DE DECISIONS

Entre imperium illimité et <i>decidendi</i> timoré: la réparation devant la Cour africaine des droits de l'homme et des peuples	318	<i>Adjolohoun, Sègnonna Horace & Oré, Sylvain</i>
Le droit à l'autodétermination en tant que droit fondamental de l'homme et des peuples à la lumière de l'avis de la Cour internationale de Justice sur l'archipel des Chagos	344	<i>Ben Achour, Rafaâ</i>
Commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire <i>Mariam Kouma et Ousmane Diabaté c. Mali</i>	355	<i>Bizimana, Eric</i>
Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights	374	<i>Dersso, Solomon</i>
Silences that speak volumes: the significance of the African Court decision in <i>APDF and IHRDA v Mali</i> for women's human rights on the continent	389	<i>Kombo, Brenda K</i>
The Advisory Opinion of the International Court of Justice on Chagos: a critical overview	414	<i>Mahadew, Roopanand</i>

State compliance with decisions of the African Court: the case of <i>Alfred Agbesi Woyeme v Ghana</i>	435	<i>Morhe, Renee Aku Stitsofe and Mensah, Richard Obeng</i>
A missed opportunity on the mandatory death penalty: a commentary on <i>Dexter Eddie Johnson v Ghana</i> at the African Court on Human and Peoples' Rights	456	<i>Novak, Andrew</i>
Is the African Court's decision in <i>Dexter Eddie v Ghana</i> a missed opportunity? A reply to Andrew Novak	470	<i>Nkhata, Mwiza Jo</i>
L'affaire <i>Armand Guehi c. Tanzanie</i> et la question du droit à l'assistance consulaire: l'intrusion d'une nouvelle préoccupation dans le corpus juridique des droits de l'homme en Afrique	483	<i>Oulepo, Nemlin Hie Arnaud</i>

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Editorial Éditorial

The African Charter on the Rights and Welfare of the Child (African Children's Rights Charter) is the continental instrument for protecting and promoting the rights and welfare of the Child. The Children's Charter, adopted in 1990, forms part of the salient features of the African human rights system, complementing the parent human rights instrument, the African Charter on Human and Peoples Rights (African Charter).

To give meaning and effect to its provisions, the African Children's Rights Charter in article 34 establishes an organ namely the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee or Committee) to monitor implementation by member states, to advocate for children's rights and to hold state parties accountable to their obligations as state parties. Working collaboratively on the continent's human rights system, the organs comprising the African human rights, namely, the African Commission on Human and Peoples' Rights (Commission), the African Court on Human and Peoples' Rights (Court) and the African Children's Rights Committee, have undertaken to publish the *African Human Rights Yearbook*. This is an instrumental platform to highlight the mandate of the organs, to foster collaboration and to illustrate Africa's commitment to uphold human rights. It is an important initiative that highlights various aspects of the norms and institutions relevant for human rights on the continent.

This is the third volume of the *Yearbook*. It includes a focus on the 2019 theme of the African Union *Refugees, Returnees and Internally Displaced Persons: Towards Durable Solutions to Forced Displacement in Africa*. The African Children's Committee has at the same time undertaken and published a study on Children on the Move (2019), focusing not only on refugees, detainees and internally displaced persons, but also drawing inspiration from the protective mandate of the African Children's Rights Charter to draw the continent's attention to the protection and promotion of the rights and welfare of children who are on the move.

The focus on themes of the African Union enables a critical analysis of the extent of their implementation and relevance to the human rights discourse in the continent. Furthermore, the special focus of the *Yearbook* on various groups of people in vulnerable situation, such as children and women, signals the need to enhance their protection and prioritise their plight.

The role of academic writing in advancement of human rights deserves due notice and appreciation by human rights implementing

bodies. Peer reviewed academic research provides credible and independent knowledge about human rights in a specific country or region, as well as in various contexts and thematic areas. Academia plays a major role in the development of a human rights resource base that enables sustainable enhancement of human rights protection and promotion. The *African Human Rights Yearbook* is an excellent example of the important role played by academia in strengthening human rights protection and promotion in Africa. The breadth of knowledge enveloped in the *Yearbook* is evidenced by the long list of highly established scholars that informed it.

By questioning and analysing the institutional architecture and the work of the three human rights bodies, the *Yearbook* has an invaluable role of ameliorating their functioning as a collective system. For this reason, it is critical that the Committee, Commission and Court take note of the various recommendations stemming from the research and apply them when relevant, for better protection and promotion of human rights in Africa.

Mrs. Goitseone Nanikie Nkwe

Chairperson of the African Committee of Experts on the Rights and Welfare of the Child

La Charte africaine des droits et du bien-être de l'enfant (Charte des droits de l'enfant) est l'instrument central en matière de protection et de promotion des droits et du bien-être de l'enfant en Afrique. Adoptée en 1990, elle fait partie intégrante des instruments clés du système africain des droits de l'homme et complète, à cet effet, la Charte africaine des droits de l'homme et des peuples, le traité fondateur du système africain des droits de l'homme.

Pour mieux protéger les droits des enfants, le Comité africain d'experts sur les droits et le bien-être de l'enfant (Comité) fut créé à travers l'article 34 de la Charte des droits de l'enfant. Cet organe a pour mission de surveiller et de contrôler l'application et la mise en œuvre de la Charte. Il veille que les Etats respectent et rendent compte de la mise en œuvre des obligations qui leur incombent en vertu de la Charte. Travaillant en étroite collaboration dans le cadre de la protection des droits de l'homme en Afrique, la Commission africaine des droits de l'homme et des peuples, la Cour africaine des droits de l'homme et des peuples et le Comité africain d'experts sur les droits et le bien-être de l'enfant ont mis en place l'*Annuaire africain des droits de l'homme*. Cette initiative sert d'opportunité pour promouvoir les missions dévolues auxdits organes, raffermir les liens de collaboration entre eux et rappeler l'engagement pris par l'Afrique afin de protéger les droits humains. L'*Annuaire* est une initiative importante car elle met en exergue les différents aspects normatifs et institutionnels des droits de l'homme en Afrique.

Ce troisième volume de l'*Annuaire* est dédié au thème que l'Union africaine a retenu pour l'année 2019; *Année des réfugiés, des rapatriés et des personnes déplacées: Vers des solutions durables aux*

déplacements forcés en Afrique. En parallèle, le Comité a entrepris et publié une cartographie des enfants en mouvement en Afrique (2019) axée sur les réfugiés, les détenus et les déplacés internes. Tirant ses fondements du mandat de protection que confère la Charte des droits de l'enfant, la cartographie attire l'attention du continent sur la protection et la promotion des droits et du bien-être des enfants en mouvement.

L'emphase sur les thèmes de l'Union africaine dans l'Annuaire permet d'examiner le degré de leur mise en œuvre et leur importance au débat sur la question des droits de l'homme en Afrique. Par ailleurs, l'accent mis sur les catégories et groupes en situations de vulnérabilité dont les enfants et les femmes, sert à réitérer la nécessité de renforcer leur protection et de prioriser leur infortune.

Les organes de protection des droits de l'homme devraient reconnaître, à sa juste valeur, le rôle que jouent les travaux scientifiques dans la promotion des droits de l'homme. Les travaux de recherche scientifique relus et examinés par les pairs fournissent des connaissances crédibles et indépendantes sur les droits de l'homme dans un pays ou une région spécifique, ainsi que dans divers contextes et domaines thématiques. Les universités jouent un rôle prépondérant dans la mise en place des ressources adéquates en matière des droits de l'homme en vue de renforcer durablement leur protection et promotion. *L'Annuaire africain des droits de l'homme* est un parfait exemple de l'important rôle joué par les universités dans le renforcement de la protection et de la promotion des droits de l'homme en Afrique. La profondeur des connaissances que regorge *L'Annuaire* peut être illustrée de par la longue liste d'universitaires et des chercheurs qui le constituent.

En interrogeant et en analysant l'architecture institutionnelle et le travail des trois organes de défense des droits de l'homme, *L'Annuaire* joue un rôle inestimable dans l'amélioration de leur fonctionnement en tant que système collectif. Pour cette raison, il est essentiel que le Comité, la Commission et la Cour prennent note des diverses recommandations découlant des recherches entreprises et les appliquent le cas échéant pour une meilleure protection et promotion des droits de l'homme en Afrique.

Mme Goitseone Nanikie Nkwe

Président du Comité africain d'experts sur les droits et le bien-être de l'enfant

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**

Le système africain de protection des droits de l'homme et la question des enfants soldats

*Junior Mumbala Abelungu**

RÉSUMÉ: Le présent article s'emploie à analyser les règles et mécanismes africains de lutte contre le phénomène « enfants soldats », un phénomène particulièrement dévastateur pour l'Afrique. Il se dégage que le système africain des droits de l'homme érige un standard éminemment protecteur de l'enfant contre le recrutement et la participation aux hostilités. Un standard plus élevé que celui observé au niveau universel. Cependant, cette avancée significative du droit africain est confrontée à une mise en œuvre mitigée. Le système africain des droits de l'homme ne se prête pas au souci d'efficacité, c'est-à-dire celui d'améliorer le sort des enfants soldats. Et pour lutter efficacement contre cette pratique, l'étude appuie l'idée de nomination d'un Rapporteur spécial pour les enfants et les conflits armés en Afrique.

TITLE AND ABSTRACT IN ENGLISH:

The African human rights system and the question of child soldiers

Abstract: This contribution examines rules and mechanisms dealing with one of the most devastating phenomena in Africa, 'child soldiers'. It emerges, from the analysis that the African human rights system set out a standard that is particularly protective of the child with respect to the enlistment and participation in armed conflicts. Such standard is higher than the one observed at the universal level. However, this commendable development in African law faces a mixed implementation. The African human rights system has not been effective in addressing the plight of child soldiers. As a proposal to improve the effectiveness of curbing that practice, this study supports the idea of appointing a Special Rapporteur on child soldiers and armed conflicts in Africa.

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MOTS CLÉS: enfants soldats, système africain des droits de l'homme, Cour africaine des droits de l'homme et des peuples, Commission africaine des droits de l'homme et des peuples, Comité africain d'experts sur le droit et bien-être de l'enfant, recrutement, participation, hostilités

SOMMAIRE:

1	Introduction.....	2
2	Le caractère éminemment protecteur du système africain des droits de l'homme contre le recrutement et la participation des enfants aux hostilités.....	4
2.1	Des obligations plus protectrices que celles du système universel.....	4
2.2	Des obligations ancrées dans le droit international coutumier.....	9
3	Une mise en œuvre mitigée de la protection.....	12
3.1	La faible activité de contrôle de la Cour et de la Commission africaines.....	13
3.2	La « jurisprudence » encourageante du Comité africain sur les droits de l'enfant.....	17
4	Conclusion.....	21

1 INTRODUCTION

Le phénomène « enfants soldats » ne date pas d'aujourd'hui¹ et ne concerne pas seulement l'Afrique. Il s'agit d'un phénomène global et omniprésent auquel aucune région du monde n'échappe.² Cependant, suivant plusieurs études,³ le continent africain compterait plus d'enfants soldats qu'ailleurs. Et c'est au cours de dernières décennies du siècle dernier que ce phénomène a atteint une ampleur jusqu'alors

- 1 Pour l'historique du phénomène 'enfants soldats', lire P Chapleau *Enfants-soldats. Victimes ou criminels de guerre ?* (2007) 20 et ss; JV Ntuda Ebode 'Les enfants soldats dans les crises africaines: entre logique militaire et stratégies politiques' (2006) n 222(2) *Guerres mondiales et conflits contemporains* 112-113; M Schmitz 'Les enfants-soldats, un phénomène universel de plus en plus préoccupant' in M Schmitz (dir) *La guerre. Enfants admis. 300.000 enfants-soldats dans le monde: comment combattre ce fléau?* (2001) 20 et ss; JB Habibu *L'effectivité du Statut de la Cour Pénale Internationale: Référence spéciale à la situation concernant la République Démocratique du Congo* (2007) 53; J-H Jézéquel 'Les enfants soldats d'Afrique, un phénomène singulier? Sur la nécessité du regard historique' (2006) 89(1) 20e siècle, *Revue d'histoire* <https://www.cairn.info/revue-vingtieme-siecle-revue-d-histoire-2006-1-page-99.htm> (consulté le 4 juillet 2019).
- 2 Lire M Maystre *Les enfants soldats en droit international. Problématiques contemporaines au regard du droit international humanitaire et du droit international pénal* (2010) 22; Schmitz (n 1) 23-25; A Louyot *Les enfants soldats* (2007) 10-11; A Kalonji 'La protection des enfants au cœur des premières poursuites intentées devant la Cour pénale internationale et le tribunal spécial pour la Sierra Leone' (2008) 6 *Sociétés et jeunesses en difficulté* 2 <http://sejed.revues.org/index4933.html> (consulté le 29 mai 2019); Habibu (n 1) 53.
- 3 A Escorial *et al* *La violation et la protection internationale des droits de l'enfant* (2008) 7; Ntuda Ebode (n 1) 113; N Arzoumanian et F Pizzutelli 'Victimes et bourreaux: questions de responsabilité liées à la problématique des enfants-soldats en Afrique' in (2003) 852 *RICR*, 827; Action des Chrétiens pour l'Abolition de la Torture 'Enfants soldats. Questions-réponses' in www.acatfrance.fr (consulté le 29 mai 2019); Africa Check 'Combien d'enfants soldats y a-t-il en Afrique?', in <https://fr.africacheck.org/factsheets/fiche-dinfo-combien-denfants-soldats-y-a-t-il-en-afrique/> (consulté le 29 mai 2019); 'L'enrôlement d'enfants soldats se poursuit en toute impunité' https://www.francetvinfo.fr/monde/afrique/republique-democratique-du-congo/lenrolement-denfants-soldats-se-poursuit-en-toute-impunite_3054525.html (consulté le 3 juillet 2019);

inconnue.⁴ La présence de plus de guerres civiles,⁵ « le développement et la prolifération des armes légères »⁶ à l'échelle du continent africain et les comportements favorables des enfants soldats⁷ sont parmi les facteurs qui expliqueraient la pratique du recours aux enfants soldats.

Ainsi, la question de protection des enfants soldats est devenue un sujet majeur pour de nombreux Etats africains.⁸ Elle a été une des raisons de l'adoption de la Charte africaine des droits et du bien-être de l'enfant et a constitué une nécessité de l'instauration d'un âge minimum de dix-huit ans pour le service militaire.⁹ Il s'agit d'un standard de protection de l'enfant contre le recrutement et la participation aux hostilités le plus élevé que celui observé au niveau universel.¹⁰ Pris dans son ensemble, ce standard de protection prévoit une interdiction sans réserve de *recrutement* – enrôlement obligatoire et volontaire – et de *participation directe*, indirecte ou active des personnes de moins de dix-huit ans aux hostilités.

Cependant, cette avancée significative du droit africain contre le recrutement et la participation des enfants aux hostilités se heurte à un système de mise en œuvre qui ne se prête pas au « souci d'efficacité c'est-à-dire celui d'améliorer réellement le sort des victimes »¹¹ des conflits armés dont les enfants. En d'autres termes, cette mise en œuvre se trouve limitée par, notamment, la rareté de l'examen des questions des enfants soldats par la Cour et la Commission africaines des droits de l'homme et des peuples ainsi que par le Comité Africain d'Experts

A Ayissi 'Protéger les enfants dans les conflits armés: concrétiser les engagements pris' (2002) 3 in *Les enfants et la sécurité, Forum du désarmement* 10; para 6 et annexes de la Résolution AG/NU et CS/NU A/72/865- S/2018/465, *Le sort des enfants en temps de conflit armé*, Rapport du Secrétaire général, in <http://www.un.org/fr/sc/documents/sgreports/2018.shtml> (consulté le 6 juin 2019).

4 Chapleau (n 1) 20.

5 Schmitz (n 1) 25; Ebode (n 1) 113.

6 M Wery 'Lutter contre les armes légères: un moyen de prévention' in Schmitz (n 1) 175; Schmitz (n 1) 25. Groupe de Recherche et d'information sur la Paix et la Sécurité et Institut de Hautes internationales et du développement, Genève, *Annuaire sur les armes légères 2011*, Bruxelles, GRIP, 2011; D Ali Abdou *Réguler le commerce des armes. Utopie d'un monde sans violence* (2012) 60 et M Wery et B Adam *Armes légères. Destructions massives. 640 millions d'armes légères dans le monde, 500 000 morts par an* (2004) 111; Ebode (n 1) 114 -115.

7 Lire Ebode (n 1) 115; Schmitz (n 1) 23.

8 C Napoli 'Les valeurs partagées du partenariat. L'exemple de la protection des enfants soldats africains' in LM Ibriga (dir) *Le partenariat Europe-Afrique et les intégrations régionales* (2012) 81.

9 BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count' (2017) 1 *Annuaire africain des droits de l'homme* 139.

10 BD Mezmur et MU Kahbila 'Follow-up as a "choice-less choice": towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 *Annuaire africain des droits de l'homme* 201.

11 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, (1994) 809 *Revue internationale de la Croix-Rouge* 478.

sur les droits et le Bien-être de l'Enfant (Comité africain sur les droits de l'enfant), la complexité du système, les capacités de prise en charge limitées,¹² des longues procédures. Ainsi, cette étude s'emploie à examiner les règles – sources primaires et secondaires – et les mécanismes africains de lutte contre le recrutement et la participation des enfants aux hostilités. Concrètement, elle s'oblige de déterminer leurs contenu et efficacité, de déceler les particularités et défis du système africain de protection des droits de l'homme face à la question des enfants soldats.

Pour appréhender cet objet d'étude, dans un premier temps, l'examen portera sur les règles relatives à la protection des enfants contre le recrutement et la participation aux hostilités. Un système éminemment protecteur (2). Ce n'est que par la suite que l'analyse s'appesantira sur les mécanismes de mise en œuvre de ces règles. Une mise en œuvre mitigée (3).

2 LE CARACTERE EMINEMMENT PROTECTEUR DU SYSTEME AFRICAIN DES DROITS DE L'HOMME CONTRE LE RECRUTEMENT ET LA PARTICIPATION DES ENFANTS AUX HOSTILITES

Dorénavant, rappelons que l'Etat qui ratifie un instrument des droits humains s'oblige d'assurer la mise en œuvre des droits y énoncés. Sinon, cette ratification n'a point d'importance.¹³

En effet, des obligations plus protectrices des enfants contre le recrutement et la participation aux hostilités sont adoptées dans le cadre africain (2.1). Elles se trouvent également ancrées en droit international coutumier africain (2.2).

2.1 Des obligations plus protectrices que celles du système universel

En dehors des instruments universels se rapportant aux enfants en général et aux enfants soldats en particulier applicables en Afrique, le droit conventionnel africain qui traite de la question des enfants soldats est constitué de divers instruments régionaux. Il s'agit particulièrement de la Charte africaine des droits et du bien-être de l'enfant (2.1.1), du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes (Protocole de Maputo) (2.1.2) et de la

12 A-C Rasson 'La protection juridictionnelle des droits fondamentaux de l'enfant: une utopie?' (2016) 106 *Revue trimestrielle des droits de l'homme* 497.

13 Commission africaine des droits de l'homme et des peuples, *Purohit et Moore c. Gambie*, Communication 241/2001, para 43, *Recueil africain des décisions des droits humains 2003* (2010) 104.

Convention de l'Union africaine sur la protection et l'assistance aux personnes déplacées en Afrique (Convention de Kampala) (2.1.3).

2.1.1 La Charte africaine des droits et du bien-être de l'enfant

Centré spécifiquement sur les aspects de l'enfant africain, cet instrument s'inspire de la Convention relative aux droits de l'enfant (Convention des droits de l'enfant) et vise à la compléter au niveau africain.¹⁴

Au sujet de la protection de l'enfant en période de conflits armés, la Charte africaine des droits et du bien-être de l'enfant affirme en son article 22:

1. Les Etats parties à la présente Charte s'engagent à respecter, et à faire respecter les règles du droit international humanitaire applicables en cas de conflits armés qui affectent particulièrement les enfants.
2. Les Etats parties à la présente Charte prennent toutes les mesures nécessaires pour veiller à ce qu'aucun enfant ne prenne directement part aux hostilités et en particulier, à ce qu'aucun enfant ne soit enrôlé sous les drapeaux.
3. Les Etats parties à la présente Charte doivent, conformément aux obligations qui leur incombent en vertu du droit international humanitaire, protéger la population civile en cas de conflit armé et prendre toutes les mesures possibles pour assurer la protection et le soin des enfants qui sont affectés par un conflit armé. Ces dispositions s'appliquent aussi aux enfants dans des situations de conflits armés internes, de tension ou de troubles civils.

En effet, la présentation de cette disposition implique la détermination des contenus de ses obligations suivant une approche comparative. Précisément, il importe de dire l'implication de l'obligation de « respecter » et de « faire respecter » les règles de droit international humanitaire (DIH); ensuite le degré de l'obligation d'interdiction de participation directe et d'enrôlement des enfants; et enfin débattre sur la question d'âge retenu. Ainsi, cette analyse permettra de cerner l'apport de cette disposition par rapport au droit international existant.

A l'instar de l'article 38(1)¹⁵ de la Convention des droits de l'enfant, l'article 22(1) de la Charte africaine des droits et du bien-être de l'enfant se présente comme une porte ouverte à l'application des règles du DIH relatives aux enfants émanant, entre autres, de la coutume, des conventions internationales, des principes généraux du DIH, des résolutions. Ainsi, il est rappelé aux Etats l'obligation de « respecter » et de « faire respecter » les règles du DIH applicables aux enfants en cas de conflits armés. Cette disposition se rapporte à l'article 1er commun

14 Lire avec intérêt E Brems *Human rights: universality and diversity* (2001) 137-146; J-D Boukongou 'Le système africain de protection des droits de l'enfant. Exigences universelles et prétentions africaines' (2006) 5 *Cahier de la recherche sur les droits fondamentaux* 101; C Lavallée *La protection internationale des droits de l'enfant. Entre idéalisme et pragmatisme* (2015) 146; F Viljoen *International human rights law in Africa* (2007) 262.

15 Article 38(1) de la Convention des droits de l'enfant: 'Les Etats parties s'engagent à respecter et à faire respecter les règles du droit humanitaire international qui leur sont applicables en cas de conflit armé et dont la protection s'étend aux enfants'.

aux Conventions de Genève de 1949 et à l'article 1er du Protocole additionnel I aux Conventions de Genève de 1949.¹⁶ En effet, « à première vue, cette disposition peut paraître superfétatoire en ce qu'elle n'ajoute rien au principe général du droit des traités, *pacta sunt servanda* [...]. En réalité, il semble que les auteurs de ces textes aient voulu à la fois rappeler la règle et y insister [...] ». ¹⁷ Cette disposition est interprétée comme visant non seulement le respect du DIH dans l'ordre interne mais aussi dans l'ordre international.¹⁸ Suivant la Cour internationale de justice dans son avis consultatif sur les « conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé », cette obligation s'impose à tout Etat partie à la Convention, partie ou non à un conflit armé donné.¹⁹

Analysant l'article 38 de la Convention des droits de l'enfant en ses paragraphes 2 et 3,²⁰ il importe d'affirmer qu'il contient respectivement une obligation de moyen concernant l'interdiction de la « *participation directe* » des enfants de moins de quinze ans aux hostilités et une obligation de résultat à propos de l'interdiction de recrutement ou d'enrôlement de ces enfants. Ainsi, comparativement à l'article 22(2) de la Charte africaine des droits et du bien-être de l'enfant, celui-ci institue une obligation de résultat concernant l'interdiction de la « *participation directe* » des enfants aux hostilités. En clair, si la Convention des droits de l'enfant s'exprime en termes de « *toutes les mesures possibles* » que doivent prendre les Etats parties, la Charte africaine des droits et du bien-être de l'enfant emploie l'expression « *toutes les mesures nécessaires* ». Cette obligation de résultat vaut également pour le recrutement ou l'enrôlement de ces enfants. Suivant Jaap Doek, cette disposition « est la plus radicale car elle interdit, sans exception, l'enrôlement obligatoire, l'engagement volontaire et l'utilisation d'enfants dans les conflits armés ». ²¹

Contrairement à l'article 38 de la Convention des droits de l'enfant, l'article 22 de la Charte demeure en parfaite harmonie avec le reste du

16 Article 1er commun aux Conventions de Genève et l'article 1er du Protocole additionnel I: 'Les Hautes parties contractantes s'engagent à respecter et à faire respecter la présente convention [le présent protocole] en toutes circonstances'.

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

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

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

20 L'article 38(2-3) de la Convention des droits de l'enfant dispose: '2. Les Etats parties prennent toutes les mesures possibles dans la pratique pour veiller à ce que les personnes n'ayant pas atteint l'âge de quinze ans ne participent pas directement aux hostilités. 3. Les Etats parties s'abstiennent d'enrôler dans leurs forces armées toute personne n'ayant pas atteint l'âge de quinze ans. Lorsqu'ils incorporent des personnes de plus de quinze ans mais de moins de dix-huit ans, les Etats parties s'efforcent d'enrôler en priorité les plus âgées'.

21 J Doek 'La cadre juridique international pour protéger les enfants dans les conflits armés' (2011) 3 *Forum du désarmement* 16; Voir aussi I McConnan *et al Des enfants pas des soldats* (2002) 24; Maystre (n 2) 64.

texte conventionnel. En ce sens, il n'existe point ici une différence d'âge d'enfant en termes de protection. En effet, le texte donne une définition de l'enfant sans *exception*: « [a]ux termes de la présente Charte, on entend par « enfant » tout être humain âgé de moins de 18 ans ». Cet âge se trouve reconduit au niveau de la protection en période des hostilités. En d'autres termes, l'âge d'enrôlement obligatoire, d'engagement volontaire et de participation *directe* des enfants aux hostilités est fixé à dix-huit ans dans le cadre africain et non à quinze ans comme instauré par la Convention des droits de l'enfant. Il s'agit ici d'une avancée significative en droit international. « Il est remarquable et encourageant de penser que cette norme est celle d'un continent qui a été, et continue d'être, touché par les conflits armés ». ²² Ainsi, en interdisant *expressément* seule la participation directe et non la participation indirecte, la Charte africaine des droits et du bien-être de l'enfant n'est tout de même pas plus protectrice que le Protocole de Maputo (cf. *infra*).

La Charte reste cependant sur un même plan que la Convention des droits de l'enfant dans la mesure où elles interdisent toutes « la participation directe » et non la « participation indirecte » contrairement au Protocole additionnel II ²³ aux Conventions de Genève de 1949 qui interdit les deux. Mais bien que la Charte africaine des droits et du bien-être de l'enfant ne prohibe que la « participation directe » aux hostilités et non pas la participation *per se*, le fait qu'elle interdise impérativement et sans réserve le recrutement rend la participation des enfants aux hostilités moins probable. ²⁴ Cette protection spéciale sera davantage renforcée par un instrument assurant la protection de la femme, notamment de la jeune fille: le Protocole à la Charte africaine des droits de l'Homme et des peuples relatifs aux droits des femmes (Protocole de Maputo).

2.1.2 Le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes

Le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes (Protocole de Maputo) contient une disposition très importante pour la protection spéciale de la jeune fille, et de l'enfant en général. Il s'agit de son article 11(4) qui dispose: « [L]es États prennent toutes les mesures nécessaires pour qu'aucun enfant, surtout les filles de moins de 18 ans, ne prenne part aux hostilités et, en particulier, à ce qu'aucun enfant ne soit enrôlé dans l'armée ». ²⁵ Cet article est une nette avancée du droit international relatif à la protection de l'enfant en période de conflits armés. Il impose aux Etats non des

22 Doek (n 21) 16.

23 Art 4(3)(c): 'les enfants de moins de quinze ans ne devront pas être recrutés dans les forces ou groupes armés, ni autorisés à *prendre part* aux hostilités' (notre soulignement).

24 Doek (n 21) 16.

25 Protocole de Maputo adopté le 11 juillet 2003 et entré en vigueur le 25 novembre 2005, in <http://www.achpr.org/fr/instruments/women-protocol/#14> (consulté le 10 juillet 2019).

« *mesures possibles* » (obligation de moyen) mais des « *mesures nécessaires* » (obligation de résultat) pour empêcher l'enrôlement (obligatoire et facultatif) et la participation – directe, indirecte ou active – de l'enfant aux hostilités. A cet égard, cette disposition va encore plus loin que le texte plus protecteur existant – l'article 22 de la Charte africaine des droits et du bien-être de l'enfant – qui n'oblige que des mesures nécessaires pour la *participation directe*. Le Protocole facultatif à la Convention des droits de l'enfant concernant l'implication d'enfants dans les conflits armés, par exemple, réserve une telle disposition uniquement pour des groupes armés (cf. article 4(1)). Aux Etats, il les oblige de *veiller* que les personnes de moins de dix-huit ans ne fassent pas l'objet d'*enrôlement obligatoire* dans leurs forces armées (cf. article 2). Ainsi, le Protocole de Maputo paraît l'instrument le plus protecteur au plan africain. Il se trouve renforcé par la Convention de Kampala.

2.1.3 La Convention de l'Union africaine sur la protection et l'assistance aux personnes déplacées en Afrique

La Convention de l'Union africaine sur la protection et l'assistance aux personnes déplacées en Afrique (Convention de Kampala) réitère dans son ensemble les obligations internationales des Etats applicables et interdit expressément aux groupes armés de « [r]ecruter, en quelque circonstance que ce soit, des enfants, de leur demander ou de leur permettre de participer aux hostilités »²⁶ (article 7(5)(e)). Cette obligation telle que formulée rappelle les critiques adressées au Protocole facultatif à la Convention des droits de l'enfant concernant l'implication d'enfants dans les conflits armés. A travers cet instrument, les Etats ont jugé d'imposer à leurs forces armées l'obligation de veiller au non *enrôlement obligatoire* (article 2) et à la non *participation directe* (article 1er) des personnes de moins de dix-huit ans aux hostilités; alors qu'aux groupes armés, ils les obligent de n'enrôler en aucune circonstance (enrôlement obligatoire et facultatif) ni d'utiliser (participation directe et indirecte) aux hostilités des personnes de moins de dix-huit ans (article 4(1)). Ces obligations distinctement imposées aux parties devant s'opposer sur un même champ de bataille porte atteinte au principe d'égalité des belligérants régissant le DIH. Ainsi, leur application notamment par les groupes armés restera problématique.

Bien plus, le droit international coutumier africain va dans le même sens que le droit conventionnel africain.

26 La Convention de Kampala adoptée le 22 octobre 2009 et entrée en vigueur le 6 décembre 2012, in <http://www.refworld.org/pdfid/4ae825fb2.pdf> (consulté le 10 juillet 2019). Pour une mise en œuvre efficace de cette convention au niveau national, une loi-type de l'Union africaine, servant de ligne directrice, a été adoptée en janvier 2018.

2.2 Des obligations ancrées dans le droit international coutumier

Préalablement, il convient d'affirmer avec la Commission du droit international (CDI) qu'une règle de droit international coutumier particulier, qu'elle soit régionale ou locale, est une règle de droit international coutumier.²⁷ Par conséquent, pour déterminer son existence et son contenu, il importe de suivre la méthode d'établissement du droit international coutumier universel. Il faudrait donc rechercher l'existence d'une *pratique générale* acceptée comme étant le droit²⁸ en l'établissant séparément de l'*opinio juris*.²⁹

En effet, si la pratique de l'Etat se dégage de son comportement « dans l'exercice de ses fonctions exécutive, législative et judiciaire ou autre », elle doit cependant être générale.³⁰ Ainsi, en rapport avec le processus d'établissement des normes coutumières internationales dont la *pratique générale*, les traités sont perçus comme étant pertinents en dépit de l'inexistence de la hiérarchie entre les différentes formes de preuve d'établissement de pratique générale telle qu'affirmée par la CDI. En ce sens, sont donc pris en considération : la ratification (nombre de ratification important mais pas suffisant),³¹ l'interprétation et l'application des traités, les réserves et déclarations interprétatives effectuées mais aussi les pratiques nationales.³² Servent ainsi d'utilité, en termes des sources documentaires, des éléments objectifs et complets tels que les moyens indiquant directement la position des Etats – *moyens directs* –: les actes et correspondances diplomatiques, les résolutions des Organisations internationales, les traités non applicables à titre conventionnel, les travaux de la CDI, les autres documents établissant les positions officielles des Etats, et les *moyens indirects* : la jurisprudence, la doctrine.³³

Plusieurs instruments en Afrique confirment et renforcent le standard protecteur de ce continent (cf. *supra*). Pour la CDI, «[1]e fait qu'une règle soit énoncée dans plusieurs traités peut signifier, sans

27 CDI, *Détermination du droit international coutumier. Textes des projets de conclusion provisoirement adoptés par le Comité de rédaction, Soixante-septième session*, Genève, 4 mai-5 juin et 6 juillet-7 août 2015, 5, Projet de conclusion 16 [15], paras 1-2.

28 CDI Chapitre V *Détermination du droit international coutumier, Texte des projets de conclusion sur la détermination du droit international coutumier*, Genève 6 août 2018, 125 conclusion 2. AG/NU, Rapport de la Commission du droit international, soixante-dixième session (30 avril-1er juin et 2 juillet-10 août 2018), A/73/10.

29 n 28, 125 conclusion 3 para 2.

30 n 28, 126 conclusions 5 et 8.

31 Lire CIJ Affaire du *Plateau continental de la mer du Nord*, arrêt du 20 février 1969 (1969) *Recueil* 42 para 73.

32 Maystre (n 2) 69-70.

33 Lire O Corten *Méthodologie du droit international public* (2009) 161-178 ; TPIY, *Le Procureur c/ Dusko TADIC alias « DULE »*, Chambre d'Appel, Arrêt relatif à l'appel de la défense concernant l'exception préjudicielle, 2 octobre 1995, para 99 <http://www.icty.org/x/cases/tadic/acdec/fr/51002JN3.htm> (consulté le 10 juin 2019); CDI (n 28) 126, conclusion 6 paras 2-3.

toutefois que cela soit nécessairement le cas, que la règle conventionnelle reflète une règle de droit international coutumier ».³⁴

Suivant l'état de ratification de la Charte africaine des droits et du bien-être de l'enfant, il ressort un total de 49 ratifications.³⁵ Il est tout de même remarqué qu'aucune réserve n'a été soulevée au sujet de l'article 22 précité.³⁶ Il n'existe pas également une position officielle étatique, d'une manière quelconque, remettant en question cette disposition conventionnelle. De même, aucune *Observation générale* au sujet de l'article 22 précité n'est encore adoptée de la part du Comité africain sur les droits de l'enfant en dehors de la décision se rapportant à l'interprétation de cet article (cf. *infra*). Tout de même au plan des pratiques nationales, différentes mesures législatives et administratives sont prises par des Etats pour assurer la mise en œuvre d'interdiction de recrutement et de participation (non seulement la participation directe) des personnes de moins de dix-huit ans aux hostilités.³⁷ Rien n'atteste que la non ratification par d'autres Etats africains soit motivée par leur « désapprobation active »³⁸ de l'article 22 de cet instrument. Ainsi, par exemple, un Etat, non partie à cette convention, tel que la République de Tunisie, interdit strictement le recrutement dans le service militaire des personnes âgées de moins de

34 CDI (n 27) 3, Projet de conclusion 11 [12], para 2.; CDI (n 28) 127 Conclusion 11 para 2.

35 Voir, <http://www.acerwc.org/ratification-data/> (consulté le 5 octobre 2019).

36 Voir, <http://www.acerwc.org/reservations/> (consulté le 10 juillet 2019).

37 Lire les différents rapports initiaux soumis au Comité africain sur les droits de l'enfant par les Etats suivants: Algérie, Angola, Burkina Faso, Cameroun, Comores, Congo, Côte d'Ivoire, Erythrée, Ethiopie, Gabon, Ghana, Guinée, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mauritanie, Mali, Maurice, Mozambique, Namibie, Niger, Nigeria, Ouganda, Rwanda, République Sud africaine, Sénégal, Sierra Leone, Soudan, Tanzanie, Tchad, Togo et Zimbabwe disponibles sur <http://www.acerwc.org/initial-reports/> (consulté le 10 juillet 2019). Lire aussi, à ce sujet, les différents rapports initiaux sur la mise en œuvre du Protocole facultatif à la Convention des droits de l'enfant, concernant l'implication d'enfants dans les conflits armés adressés au Comité des droits de l'enfant par des Etats tels que: Egypte, Burkina Faso, Congo, Guinée, Madagascar, Malawi, Ouganda, RDC, Rwanda, Sierra Leone, Soudan, Tanzanie, Tunisie, voire d'autres rapports soumis au Comité des droits de l'enfant par les Etats africains principalement au sujet de la mise en œuvre de l'article 38 de la Convention des droits de l'enfant, disponibles sur http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4 (consulté le 10 juillet 2019). On signalera pour la République-Unie de Tanzanie que, bien que le recrutement des personnes âgées de moins de dix-huit ans soit autorisé, dans la pratique aucun membre des Forces de défense populaire de Tanzanie n'a moins de dix-huit ans. Voir Comité des droits de l'enfant, *Examen des rapports présentés par les Etats parties conformément au paragraphe 1 de l'article 8 du Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés, Rapports internationaux des Etats parties attendus en 2006*, République-Unie de Tanzanie, CRC/C/OPAC/TZA/1, 19 octobre 2007, 6-7, Rapport disponible sur http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4 (consulté le 11 juillet 2019).

38 Expression utilisée par CIJ (n 31) 42 para 73.

dix-huit ans et leur participation aux hostilités.³⁹ On signalera également que le Maroc, alors Etat non membre de l'UA, allait largement au-delà du standard de la Charte africaine des droits et du bien-être de l'enfant en interdisant initialement le recrutement et la participation aux hostilités des personnes âgées de moins de vingt ans. Par la suite, il interdira la conscription sous toutes ses formes et autorisera l'engagement volontaire à dix-huit ans.⁴⁰

Pour sa part, le Protocole de Maputo compte 49 signatures dont 37 ratifications.⁴¹

En tant qu'organisation régionale, l'UA, alors OUA, va dans le même sens que la Charte précitée. En effet, dans la résolution 1659 (LXIV), le Conseil des Ministres exhortait *tous* les Etats africains à « s'abstenir de recruter les enfants de moins de 18 ans dans des conflits armés ou des activités violentes de quelque nature que ce soit ». ⁴² Dans le même ordre, et ce bien avant le Statut de Rome portant création de la Cour pénale internationale, l'OUA estimait à travers cette résolution que l'utilisation des enfants dans les conflits armés devrait être appréhendée comme crime de guerre.⁴³

Par ailleurs, s'il est certes vrai que, sur le champ de bataille, le recrutement et la participation des enfants aux hostilités constituent des pratiques quotidiennes, aucun Etat ne les justifie. Ces pratiques sont non seulement niées mais également condamnées par ces Etats ou par des Organisations internationales dont ils sont membres.

De ce qui précède, il apparaît « une participation très large et représentative » au sens de la Cour internationale de justice,⁴⁴ ou encore une pratique « suffisamment répandue et représentative, ainsi

39 Voir Comité des droits de l'enfant, *Examen des rapports présentés par les Etats parties conformément au paragraphe 1 de l'article 8 du Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés, Rapports internationaux des Etats parties attendus en 2005*, Tunisie, CRC/C/OPAC/TUN/1, 30 août 2007, 5, Rapport disponible sur http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4 (consulté le 11 juillet 2019).

40 Lire Comité des droits de l'enfant, *Examen des rapports présentés par les Etats parties conformément au paragraphe 1 de l'article 8 du Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés, Rapports internationaux des Etats parties attendus en 2004*, Maroc, CRC/C/OPAC/MAR/1, 19 juin 2012, 3-4, disponible sur http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&TreatyID=10&TreatyID=11&DocTypeID=29&DocTypeCategoryID=4 (consulté le 11 juillet 2019).

41 Voir <http://www.achpr.org/fr/instruments/women-protocol/> (consulté le 19 septembre 2019).

42 OUA *Conseil des Ministres*, Rés. 1659 (LXIV), *Résolution sur la condition des enfants africains en situation de conflits armés* 2, para 5. Lire aussi le 'Communiqué de presse de la 841^{ème} réunion du CPS sur le thème: 'Les enfants touchés par les conflits armés en Afrique' in <http://www.peaceau.org/fr/article/communiqué-de-presse-de-la-841eme-reunion-du-cps-sur-le-theme-les-enfants-touchés-par-les-conflits-armés-en-afrique> (consulté le 3 octobre 2019).

43 n 42, para 6.

44 CIJ (n 31) 42 para 73.

que constante »⁴⁵ suivant la formule de la CDI, au-delà de laquelle se dégage l'*opinio juris sive necessitatis*. Car en toute logique l'*opinio juris*, bien que devant être établie séparément de la pratique générale, doit en principe « pouvoir être déduite des positions de l'ensemble des Etats concernés par la règle coutumière ». ⁴⁶

Au regard de tous ces éléments, à défaut d'admettre l'existence d'un droit international coutumier régional africain interdisant le recrutement et la participation – *directe, indirecte* ou *active* – des enfants aux hostilités, il ne serait pas exagéré d'affirmer qu'il existe un droit international coutumier régional africain interdisant *au moins* le recrutement et la participation *directe* des personnes de moins dix-huit ans aux hostilités (suivant le standard même de la Charte). Cette dernière attitude est déjà démontrée par la majorité des Etats au plan universel notamment lors de négociation de la Convention des droits de l'enfant. Bien plus, la pratique de l'ONU ou même du CICR, voire d'autres organismes de protection de l'enfant, va également dans le sens d'interdire le recrutement et la participation aux hostilités des enfants de moins de dix-huit ans.⁴⁷ Cependant, à ce niveau, rien ne démontre clairement que cette pratique doit être considérée comme formant droit international coutumier⁴⁸ comme c'est le cas en Afrique.

Il s'avère que l'interdiction *au moins* d'enrôlement et de participation *directe* d'enfants de moins de dix-huit ans aux hostilités reste une mesure minimale en parfaite harmonie avec les pratiques sociales de protection de l'enfance.⁴⁹

De tout ce qui précède, le cadre normatif africain des enfants soldats reste très avancé et protecteur. Cependant, cette avancée significative contraste nettement avec l'efficacité du volet curateur et de l'action répressive.⁵⁰

3 UNE MISE EN ŒUVRE MITIGÉE DE LA PROTECTION

La garantie des droits consacrés par les instruments juridiques précités ne vaut que par la supervision.⁵¹ Ainsi, après l'examen du droit international africain relatif à la question des enfants soldats, il y a lieu d'examiner comment le système africain des droits de l'homme – la

45 CDI (n 27) 126 conclusion 8 para 1.

46 Corten (n 33) 159; CDI (n 28) 127 conclusion 10 para 2.

47 Lire F Bugnion 'Les enfants soldats, le droit international humanitaire et la Charte africaine des droits et du bien-être de l'enfant' in (2000) 12 *Revue africaine de droit international et comparé* 269-273.

48 Lire d'ailleurs les règles 136 et 137 de l'étude du CICR sur le droit international humanitaire coutumier qui interdisent respectivement le recrutement et la participation aux hostilités des enfants de moins de 15 ans. Voir J-M Henckaerts et L Doswal-Beck *Droit international humanitaire coutumier Vol. I: Règles* (2006) 631-640.

49 Voir Bugnion (n 47) 269-270.

50 Lire aussi Napoli (n 8) 86-90.

51 Mezmur et Kahlila (n 10) 202.

Cour et la Commission africaines des droits de l'homme et des peuples (3.1) et le Comité africain sur les droits de l'enfant (3.2) – assure la mise en œuvre de ce droit.

3.1 La faible activité de contrôle de la Cour et de la Commission africaines

Affirmons d'ores et déjà que la Cour africaine des droits de l'homme et des peuples, pour sa part, n'a jusque-là pas été saisie d'une question concernant l'article 22 de la Charte africaine des droits et du bien-être de l'enfant. Ce qui vaut de même pour l'article 18 de la charte africaine des droits de l'homme et des peuples ou encore pour toute autre disposition relative à l'interdiction de recrutement et d'utilisation des enfants aux hostilités.⁵²

Dans le même sens, il n'y a quasi pas d'affaires sur les enfants soldats déferées devant la Commission africaine. Il n'y a pas non plus lieu de croire que ces questions sont efficacement prises en charge par les mécanismes nationaux, en principe mieux placés et censés appliquer en premier ces conventions par rapport aux instances africaines qui, en vertu notamment du principe de subsidiarité,⁵³ n'interviennent qu'après épuisement des voies de recours internes.⁵⁴ Très peu d'affaires donc concernant le recrutement et l'utilisation d'enfants aux hostilités sont déferées devant les instances judiciaires nationales.⁵⁵ Ces mécanismes sont généralement minimes dans leurs actions.⁵⁶

En effet, suivant les articles 30 et 45 de la Charte africaine des droits de l'homme et des peuples, la Commission africaine se charge de promouvoir et de protéger les droits de l'homme et des peuples sur le continent. Dans sa mission de protection, elle reçoit des communications interétatiques (articles 47 et 49) et individuelles

52 Voir *Recueil des arrêts, avis consultatifs et autres décisions de la Cour africaine des droits de l'homme et des peuples. Recueil de jurisprudence de la Cour africaine* (2006-2016) (2019) 785 p. Voir aussi <http://fr.african-court.org/index.php/affaires/affaires-contentieuses#résumé-statistique> (consulté le 15 juillet 2019).

53 Lire par exemple F Sudre *Droit européen et international des droits de l'homme* (2016) 193-197; 218.

54 Lire l'article 56 paras 5 et 6 de la Charte africaine des droits de l'homme et des peuples. Pour la Commission africaine dans sa Communication 247/2002, *Institut pour les Droits Humains et le Développement en Afrique (au nom de Jean Simbarakiye) c. République Démocratique du Congo*, [l']article 56 vise ainsi à permettre entre autres à l'État en cause de prendre connaissance des violations des droits de l'homme qui lui sont reprochées, afin d'y remédier, avant d'être traîné devant une instance internationale'. Voir Commission africaine des droits de l'homme et des peuples, Communication 247/2002, *Institut pour les Droits Humains et le Développement en Afrique (au nom de Jean Simbarakiye) c. République Démocratique du Congo*, para 25, in Centre for Human Rights, (2010) *Recueil africain des décisions des droits humains 2003* 136. Voir également dans ce sens The African Committee of experts on the rights and welfare of the child, *Decision on the communication submitted by Michelo Hunsungule and others (on behalf of children in northern Uganda) against the government of Uganda*, Communication n°1/2005, 15-19 avril 2013, para 24.

(article 55 et 56). Et sous l'angle de promotion, elle se charge notamment de recevoir des rapports périodiques des Etats (article 62) dont ceux relatifs au Protocole de Maputo en vertu de l'article 26 de celui-ci. Elle crée des mécanismes subsidiaires tels que les Rapporteurs spéciaux, les Comités et les groupes de travail,⁵⁷ adopte des résolutions, etc.

De ces mécanismes subsidiaires et résolutions, la question des enfants soldats n'y est spécifiquement pas inscrite à l'ordre du jour alors que c'est un fléau à l'échelle continentale. Toutefois, quelques résolutions ou rapports se préoccupent, en général, de la situation des enfants dans les conflits armés. C'est notamment le cas de la Résolution 241 sur la situation des droits de l'homme en RDC du 24 juillet 2013 par laquelle la Commission africaine se dit préoccupée par les viols et autres violences des enfants dans l'Est de la RDC. La Résolution 284 sur la répression des violences sexuelles sur les femmes en RDC, adoptée en 55^e session ordinaire de la Commission africaine tenue à Luanda du 28 avril au 12 mai 2014, invite ce pays à prendre des mesures nécessaires pour incorporer en législation nationale le Protocole de Maputo.⁵⁸ En clair, les deux résolutions précitées réitèrent de nombreuses recommandations exprimées par les résolutions 90, 103, 139 et 173 concernant le même pays. Celles-ci déploraient notamment des graves violations des droits de l'homme et du DIH dont sont victimes les civils, particulièrement les jeunes filles. Elles formulaient les vœux de voir leurs auteurs traduits en justice.⁵⁹ Les conséquences néfastes du conflit armé sur les enfants ont été également mentionnées dans le Rapport de la Mission d'enquête de la Commission africaine dans la région du Darfour (Soudan).⁶⁰ Cependant, ce rapport ne fait nullement part de

55 Pour ne citer que l'exemple de la RDC, pays ayant connu plus de 20 ans de conflits armés intermittents et qui regorgerait 10% d'enfants soldats du monde, seuls trois cas à ce sujet ont été portés devant le juge comme l'atteste une étude de 2013 (Voir TF Mwaligwa 'Réflexions sur les obstacles à réprimer le crime de recrutement et d'utilisation d'enfants soldats commis en République Démocratique du Congo' (2013) 1 *Revue de droit pénal et de criminologie* 218-223). Et dans une autre étude qui date de juillet 2015, pour la période de janvier 2009 à décembre 2014, le Centre International pour la Justice Transitionnelle (ICTJ) identifiait deux autres affaires (Voir ICTJ, *Justice pénale. Champs de la responsabilité pénale dans l'est de la RDC. Analyse du cadre législatif et de la réponse judiciaire aux crimes internationaux (2009-2014)* (2015) 41 et 61).

56 Voir Comité africain sur les droits de l'enfant, *Etude continentale sur l'impact des conflits et des crises sur les enfants en Afrique* (2017) 86 et 111.

57 Il existe au total 15 mécanismes spéciaux, Voir <http://www.achpr.org/fr/mechanisms/> (consulté le 6 juillet 2019).

58 Voir l'avant-dernier considérant de la *Résolution (284) sur la répression des violences sexuelles sur les femmes en République Démocratique du Congo* in <http://www.achpr.org/fr/sessions/55th/resolutions/284/> (consulté le 06 juillet 2019).

59 Voir les résolutions 90, 103, 139 et 173 de la Commission africaine des droits de l'homme et des peuples sur la RDC, in <http://www.achpr.org/fr/states/democratic-republic-of-congo/> (consulté le 6 juillet 2019).

60 Lire Commission africaine des droits de l'homme et des peuples, *Rapport de la Mission d'Enquête de la Commission africaine des droits de l'homme et des peuples dans la Région du Darfour, République du Soudan*, Prétorias, 20 septembre 2004, paras 114-117.

l'existence des cas des enfants soldats alors que les *modi operandi*⁶¹ des parties et le contexte conflictuel⁶² portent à croire que les enfants ont été bel et bien recrutés et utilisés dans ce conflit armé. Un autre rapport à signaler est celui de la mission d'établissement des faits de la Commission africaine sur la situation au Nord du Mali, mission effectuée du 03 au 07 juin 2013 sur décision de la Conférence des Chefs d'Etat et de Gouvernement. Ce rapport, contrairement au précédent, a épingle le recrutement des enfants soldats dont l'âge varie entre 12 et 15 ans. La présence de ces enfants, servant souvent de boucliers humains, était signalée dans les rangs de groupes armés tels que le Mouvement National de Libération de l'Azawad (MNL) et Ansar Dine, notamment à Gao et à la sortie des villes occupées. Ce qui vaut de même pour les milices d'autodéfense du gouvernement malien.⁶³ A cet effet, la Commission africaine recommanda au gouvernement malien de « [p]rendre toutes mesures nécessaires en vue de mettre fin au recrutement et à l'usage des enfants pour des fins militaires et autres; [de v]eiller à ce que les enfants enrôlés par les groupes armés [fassent] l'objet d'une réinsertion et réintégration dans les meilleurs délais ». ⁶⁴

De ce qui précède, les activités de promotion de l'interdiction de recrutement et d'utilisation des enfants soldats qu'effectue la Commission africaine n'est nullement à l'ampleur dudit phénomène sur le continent. Ainsi, la présence d'un mécanisme spécifiquement dédié à la question des enfants soldats devrait permettre une prise en charge efficace dans ce sens. Par exemple, un Rapporteur spécial pour les enfants et les conflits armés en Afrique.

Par ailleurs, concernant la protection des droits de l'homme qu'effectue la Commission africaine, la situation des enfants dans les conflits armés fera l'objet d'examen dans une première communication interétatique introduite devant elle⁶⁵ par la RDC. Cette dernière, partie demanderesse, en faisant observer à la Commission africaine les différentes « violations graves et massives des droits de l'homme et des peuples » commises par les Républiques du Burundi, de l'Ouganda et du Rwanda, avait toutefois manqué l'occasion d'y faire attester juridiquement les nombreuses violations des règles des droits de l'homme et du DIH protégeant spécialement les enfants. Elle s'est d'ailleurs limitée entre autres à demander à la Commission de considérer ces violations comme contraires aux dispositions pertinentes de la Charte africaine des droits de l'homme et des peuples (articles 2, 4, 6, 12, 16, 17, 19, 20, 21, 22 et 23).⁶⁶ Demande à la suite de

61 n 60, paras 109-110.

62 n 60, paras 101-105.

63 Commission africaine des droits de l'homme et des peuples, *Rapport de la Mission d'établissement des faits en République du Mali du 3 au 7 juin 2013* 15 para 64.

64 n 63, 22.

65 Commission africaine des droits de l'homme et des peuples, *Communication n°227/99 République Démocratique du Congo/ Burundi, Rwanda, Ouganda*, para 51 in <http://www.achpr.org/fr/communications/decision/227.99/> (consulté le 6 juillet 2019).

66 n 65, paras 8 et 10.

laquelle, la Commission indiquera les violations des articles 2, 4, 5, 12(1) et 12(2), 14, 16, 17, 18(1) et 18(3), 19, 20, 21, 22 et 23 de ladite Charte.⁶⁷

Sous l'angle précisément de la Charte africaine des droits de l'homme et des peuples, la RDC n'a pas fait mention dans sa plainte de l'article 18(3), certainement pour de raison stratégique étant donné que ses propres forces armées ont également recouru à cette pratique. Pourtant, il s'agirait d'un article considéré comme une porte largement ouverte aux instruments de protection de l'enfant dont l'enfant soldat en particulier. Cet article dispose: « L'Etat a le devoir de veiller à l'élimination de toute discrimination contre la femme et d'assurer la protection des droits de la femme et de l'enfant tels que stipulés dans les déclarations et conventions internationales » (nous soulignons). En clair, « [l]e cadre de référence nécessaire à l'accomplissement de ce devoir est largement défini [...] ».⁶⁸ Toutefois, le « devoir » dans le sens de cette disposition semble plus moral que juridique.⁶⁹ Dans cette affaire, c'était donc à la Commission africaine, agissant *proprio motu*, de constater un tel manquement pour le reprendre dans le dispositif de sa « décision ». Par ailleurs, différentes communications portant sur l'article 18 de la Charte africaine devant la Commission africaine ont été jugées irrecevables notamment pour violation de l'article 56⁷⁰ de la Charte africaine des droits de l'homme et des peuples ou retirée du rôle.⁷¹ Cependant, ces communications ne concernent point la question spécifique des enfants soldats. Cette dernière n'est pas non plus abordée par la Commission africaine s'agissant d'autres instruments juridiques.

Il va sans dire que les « recommandations » de la Commission africaine, contenues dans son rapport, dépendent du « bon vouloir » de

67 n 66, Décision.

68 A-F Ngomo 'Article 18, alinéa 3' 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) 420.

69 *Ibid.*, 422.

70 Voir Communication 247/2002, *Institut pour les Droits Humains et le Développement en Afrique (au nom de Jean Simbarakiye) c. République Démocratique du Congo*, mais non aboutie pour défaut d'épuisement des voies de recours interne. Voir Commission africaine des droits de l'homme et des peuples, Communication 247/2002, *Institut pour les Droits Humains et le Développement en Afrique (au nom de Jean Simbarakiye) c. République Démocratique du Congo*, in Centre for Human Rights, *Recueil africain des décisions des droits humains 2003* (2010) 134-138; ce qui vaut de même pour les Communications 233/99, *Interights (pour le compte de Pan African Movement et Citizens for Peace in Eritrea) c. Ethiopie* et 234/99, *Interights (pour le compte de Pan African Movement et Inter Africa Group) c. Erythré*, Centre for Human Rights, *Recueil africain des décisions des droits humains 2003*, op. cit., 74-84; Communication 248/2002, *Interights et Organisation Mondiale contre la Torture c. Nigeria*, Centre for Human Rights (2011) *Recueil africain des décisions des droits humains 2004*.

71 La Communication 238/2001, *Institut pour les droits humains et le Développement (pour le compte de Sédar Tumba Mboyo) c. République Démocratique du Congo* (2009) *Recueil africain des décisions des droits humains 2002*, 26-28.

l'organe politique et « politisé » qui est la Conférence des Chefs d'Etat et de Gouvernement.⁷² Ce dernier est l'organe décideur, seul qui peut « lui conférer une valeur plus solennelle ».⁷³ Il n'existe donc « aucune liaison obligatoire quant au résultat de la requête ».⁷⁴ Egede Manirakiza fait remarquer à cet égard l'existence de deux lacunes de la Charte africaine des droits de l'homme et des peuples : D'abord, « [l]a Charte africaine n'a pas prévu un cadre de suivi de l'exécution des décisions sur les communications après leur adoption par la Conférence des Chefs d'Etat et de Gouvernement ».⁷⁵ Ensuite, « [...] [a]ucune sanction [n'est] prévue à l'encontre d'un Etat partie qui viole les dispositions de la Charte africaine ou qui refuse d'exécuter les décisions de la Commission africaine »,⁷⁶ sauf certaines pressions que peuvent subir les Etats de la part de la Commission au sujet de la mise en œuvre de ses recommandations.

Ainsi, il se dégage que la protection de l'enfant contre son recrutement et sa participation aux hostilités souffre d'absence d'une prise en charge efficace. Au-delà des difficultés décrites ci-dessus, mentionnons à l'instar des juridictions internationales, le problème de la longueur des procédures dans le traitement des affaires. A la Commission africaine, « une durée de quatorze mois à huit ans peut s'écouler entre sa saisine et sa décision au fond ».⁷⁷

3.2 La « jurisprudence » encourageante du Comité africain sur les droits de l'enfant

La première communication devant le Comité africain sur les droits de l'enfant est celle qui porte sur la question des enfants soldats et introduite par le sieur Michelo Hunsungule et autres, en 2005 et mise à jour en 2010, pour le compte des enfants du Nord de l'Ouganda contre le gouvernement ougandais. Elle aboutira à une décision en 2013.⁷⁸ Cette communication s'inscrit dans le cadre de conflit armé qui règne et sème la terreur au Nord de l'Ouganda depuis 1986. Cibles des rebelles de l'Armée de résistance du Seigneur (LRA), des dizaines des milliers de

72 Lire les article 45, 52-54 et 58-59 de la Charte africaine des droits de l'homme et des peuples.

73 H Gherari 'La Commission africaine des droits de l'homme et des peuples (Bilan d'une jurisprudence)' in P Tavernier (dir) *Regards sur les droits de l'homme en Afrique* (2008) 138.

74 J-L Atangana Amougou 'Article 53' in M Kamto (dir) (n 68) 989.

75 E Manirakiza *La subsidiarité procédurale dans le système africain de protection des droits de l'homme* Thèse de doctorat en droit, Facultés Universitaires Notre-Dame de la Paix (janvier 2009) 195.

76 Manirakiza (n 75) 204.

77 N Eba Nguema 'La Commission africaine des droits de l'homme et des peuples et sa mission de protection des droits de l'homme' (2017) 11 *Revue des droits de l'homme* 9.

78 The African Committee of experts on the rights and welfare of the child, *Decision on the communication submitted by Michelo Hunsungule and others (on behalf of children in northern Uganda) against the government of Uganda*, Communication n°1/2005, 15-19 avril 2013.

garçons et filles ont été enlevés pour jouer divers rôles dans la promotion des causes de ce mouvement.⁷⁹ Même si généralement le rôle des forces armées ougandaises (UPDF, Ugandan People's Defense Force) était de sauver ces enfants de la captivité et de faciliter leur réintégration dans leur environnement familial, elles recouraient dans certains cas à ces enfants comme soldats dans leurs rangs. Ainsi, elles recrutaient ces enfants notamment pour collecter des renseignements auprès des rebelles de la LRA.⁸⁰ Se focalisant précisément sur les événements survenus entre 2001 et 2005 dans le Nord de l'Ouganda, la communication épingle la violation notamment de la protection des enfants contre toute implication dans un conflit armé (article 22 de la Charte africaine des droits et du bien-être de l'enfant).⁸¹

Dans l'examen de cette affaire, le Comité africain sur les droits de l'enfant fait état de différents instruments juridiques relatifs aux droits de l'homme et au DIH ratifiés par l'Ouganda, en rapport avec la protection des enfants en conflits armés. Il fait remarquer tout de même qu'avant 2005, l'arsenal juridique interne ougandais ne contenait pas des dispositions spécifiques interdisant le recrutement des enfants.⁸² Néanmoins, il se base sur l'article 34(4) de la constitution ougandaise de 1995 qui serait très utile pour garantir l'interdiction de recrutement des enfants de moins de 16 ans dans l'armée. Les enfants, âgés de 16 à 18 ans ne bénéficiant pas de cette disposition, pouvaient légitimement être considérés comme autorisés à entrer dans l'armée.⁸³ Par application de la clause de sauvegarde contenue dans l'article 1(2) de la Charte africaine des droits et du bien-être de l'enfant que rappelle d'ailleurs cette décision,⁸⁴ le Comité africain sur les droits de l'enfant devait réellement tenir compte du fait qu'en juin 2002, l'Ouganda ratifiait le Protocole facultatif à la Convention des droits de l'enfant concernant l'implication d'enfants dans les conflits armés du 25 mai 2000. Cet instrument fixe à 18 ans l'âge d'enrôlement obligatoire (article 2) et de participation directe aux hostilités (article 1er). En outre, l'Ouganda avait déposé sa déclaration contraignante fixant l'âge minimum de l'engagement volontaire dans les UPDF à 18 ans.⁸⁵ C'est d'ailleurs l'application des principes de l'indivisibilité et de l'interdépendance des droits de l'homme dans la

79 n 78, paras 2-3, 10

80 n 78, paras 6, 46.

81 n 78, paras 5, 11.

82 n 78, para 44.

83 n 78, para 45.

84 n 78, para 39.

85 Voir Comité des droits de l'enfant, *Examen des Rapports présentés par les Etats parties en application du paragraphe 1 de l'article 8 du Protocole facultatif à la Convention relative aux droits de l'enfant, concernant l'implication d'enfants dans les conflits armés, Observations finales: Ouganda*, Quarante neuvième session, CRC/OPAC/UGA/CO/1, 17 octobre 2008, para 4 a) in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fOPAC%2fUGA%2fCO%2f1&Lang=en (consulté le 18 juillet 2019).

mise en œuvre des droits de l'enfant.⁸⁶ Ce qui attestait que le droit ougandais en la matière était déjà avancé.

Des enquêtes de terrain ont été effectuées par le Comité africain sur les droits de l'enfant pour trouver finalement des preuves, ainsi que de nouvelles confirmations, sur le recrutement et l'utilisation d'enfants dans les conflits armés par les UPDF.⁸⁷ Informations confirmées par différents rapports des Nations Unies.⁸⁸ Le Comité africain sur les droits de l'enfant note et loue les efforts déployés par l'Ouganda pour la période d'après 2005 pour mettre fin à l'utilisation des enfants dans les forces ou groupes armés.⁸⁹ Concernant le consentement à rejoindre les forces ou groupes armés, le Comité africain sur les droits de l'enfant adopte une approche plus protectionniste que celle encourageant la participation des enfants aux hostilités. Il est donc d'avis que les enfants, manquant une compréhension nuancée et complète des conséquences de leur implications dans les conflits armés, ne peuvent donc donner leur consentement « en connaissance de cause » pour participer activement aux activités liées aux conflits armés.⁹⁰

Et dépit des objections de la partie défenderesse, huit ans après l'introduction de cette première communication, soit en 2013, le Comité africain sur les droits de l'enfant conclut à la violation de l'article 22 (en tant que devoir fondamental de l'article 1er(1)) de la Charte africaine des droits et du bien-être de l'enfant, principalement son paragraphe 2, interdisant le recrutement et l'utilisation d'enfants dans les conflits armés pendant la période des faits susvisés (2001-2005).⁹¹ Il faudrait apprécier le débat de droit sur l'interprétation des articles 1er (1)⁹² et 22 de la Charte africaine des droits et du bien-être de l'enfant.⁹³ Ainsi, dans une approche de droit comparé, inspirée de l'article 46 de la Charte africaine des droits et du bien-être de l'enfant, le Comité africain sur les droits de l'enfant donne un idée claire et résumée du contenu de ces dispositions.

Bien avant sa décision sur cette communication, le Comité africain sur les droits de l'enfant notait déjà une nette amélioration de la situation des droits de l'enfant dans la région concernée depuis 2006. Non seulement que la LRA n'existe plus en Ouganda⁹⁴ mais opérant en dehors de ce pays,⁹⁵ des mesures importantes ont été prises par le gouvernement ougandais en collaboration avec les Nations Unies pour

86 Comité des droits de l'enfant, *Observation générale n°5 (2003) sur les mesures d'application générales de la Convention relative aux droits de l'enfant (art. 4, 42 et 44, par. 6)*, CRC/GC/2003/5, 27 novembre 2003, p 6.

87 En particulier au sein du 105e bataillon. Voir n 78, para 46.

88 n 78.

89 n 78, paras 47-49.

90 n 78, para 57.

91 n 78, paras 60, 81.

92 n 78, para 37.

93 n 78, paras 40-42, 58-59.

94 n 78, para 33.

95 n 78, para 35.

faire respecter les droits de l'enfant pendant les conflits armés.⁹⁶ Cette situation devrait être appréciable quand on sait pertinemment qu'en septembre 2005, le Comité des droits de l'enfant adressait, pour sa part, une observation finale à l'Ouganda dans laquelle il se préoccupait du recrutement des enfants malgré la nouvelle loi sur les UPDF fixant l'âge de recrutement à 18 ans.⁹⁷ Tout de même, le Comité africain sur les droits de l'enfant était tenu de se prononcer, car sa décision aurait des conséquences sur l'intérêt supérieur actuel et futur des enfants ougandais et des victimes d'un conflit armé.⁹⁸

A l'issue de sa décision, il recommande au gouvernement ougandais : la criminalisation explicite et exhaustive de recrutement et d'utilisation des personnes de moins de 18 ans dans les conflits armés en vertu du droit international; la mise en œuvre des programmes de Désarmement, Démobilisation et Réintégration (DDR) centrés sur l'intérêt supérieur de l'enfant; l'adoption de toute urgence des mesures législatives, administratives et autres nécessaires à l'enregistrement de naissance; le non-recrutement des personnes de moins de dix-huit ans sans preuve crédible liée à l'âge; le rapport sur l'application de ces recommandations dans un délai de six mois à compter de la date de notification de cette décision, *etc.*⁹⁹

Il va sans dire que la mise en œuvre d'un tel processus se trouve limité notamment par la complexité du système africain, les ressources et les capacités limitées.¹⁰⁰ Cette mise en œuvre dépendra donc non seulement de la volonté politique mais de tant d'autre facteurs dont le suivi efficacement assuré, lequel peut donc booster à son tour la volonté politique.¹⁰¹ Le Comité africain sur les droits de l'enfant prévoit donc en termes de suivi *ad hoc*, des rapports périodiques des Etats, des directives relatives aux communications, des visites de pays concernés, des évaluations plus détaillées des progrès accomplis par l'Etat en cause, voire la possibilité de recueillir la pression des organes politiques de l'Union africaine.¹⁰² A ce titre, il a été suggéré la création d'un mécanisme de suivi institutionnalisé pouvant élaborer des lignes directrices plus détaillées à ce sujet.¹⁰³ Toutefois, grâce aux efforts du

96 n 78, paras 33, 44, 47-48.

97 Comité des droits de l'enfant, *Examen des Rapports présentés par les Etats parties en application de l'article 44 de la Convention, Observations finales : Ouganda, Quarantième session, Genève, 12-30 septembre 2005, CRC/C/UGA/CO/2*, 23 novembre 2005, 13 et 14, paras 65 et 67, in http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fUGA%2fCO%2f2&Lang=en (consulté le 18 juillet 2019).

98 n 78, para 34.

99 n 78, para 81.

100 Rasson (n 12) 497; Mezmur et Kahbila (n 10) 212. Par exemple, le Comité africain sur les droits de l'enfant souffre d'un problème de ressources financières et humaines au point que ce sont des agences internationales telles que l'UNICEF, ou des ONG telles que *Save The Children Suede, Plan international* qui lui viennent en aide (Lire M Affa'a Mindzie 'Protection régionale des droits de l'enfant en Afrique' in <http://www.pambazuka.net/fr/category.php/comment/44469> (consulté le 7 juillet 2019).

101 Mezmur et Kahbila (n 10) 212.

102 Lire avec intérêt n 10, 213-217.

103 n 10, 220.

gouvernement ougandais en collaboration avec les Nations Unies notamment (cf. *supra*), la récente étude du Comité africain sur les droits de l'enfant¹⁰⁴ relayée par le rapport du Secrétaire général des Nations Unies¹⁰⁵ ne mentionne pas les UPDF ni les groupes armés comme auteurs de recrutement et d'utilisation des enfants dans les conflits armés.

4 CONCLUSION

Une nette avancée du droit international relatif à la protection de l'enfant en période de conflits armés s'observe dans le système africain des droits de l'homme. En effet, celui-ci érige un standard de protection de l'enfant contre le recrutement et la participation aux hostilités le plus élevé que celui observé au niveau universel. Son Protocole de Maputo, en son article 11(4), interdit fermement le recrutement (enrôlement obligatoire ou volontaire) et la participation (directe, indirecte ou active) des personnes de moins de dix-huit ans aux hostilités. Une interdiction dont la teneur est supérieure à celle des conventions universelles. La pratique des Etats africains va dans le même sens.

A défaut d'admettre l'existence d'un droit international coutumier régional africain interdisant le recrutement et la participation – directe, indirecte ou active – des enfants aux hostilités, il y a lieu d'affirmer *au moins* qu'il existe un droit international coutumier régional africain interdisant le recrutement et la participation *directe* des personnes de moins dix-huit ans aux hostilités. Ce dernier standard est celui même de la Charte africaine des droits et du bien-être de l'enfant dont l'article 22(2) interdit sans « réserve » le recrutement et la participation *directe* aux hostilités des personnes de moins de dix-huit ans.

Par ailleurs, cette avancée significative du droit africain contre le recrutement et la participation des enfants aux hostilités est confrontée à une mise en œuvre mitigée. En effet, la pratique de la promotion et de la protection des droits de l'enfant à travers la jurisprudence des organes du système africain des droits de l'homme atteste que celui-ci ne se prête pas au souci d'efficacité. Il n'existe point un mécanisme spécial contre ce fléau. Les affaires concernant les enfants soldats sont quasi-inexistantes devant les organes dudit système. Dès lors, il importe d'appuyer l'idée de nomination d'un Rapporteur spécial pour les enfants et les conflits armés en Afrique, dont le mandat devrait être défini à la hauteur de l'ampleur du phénomène « enfants soldats » en Afrique.

104 Comité africain sur les droits de l'enfant (n 56) 136.

105 Lire les annexes de la Résolution AG/NU et CS/NU A/72/865- S/2018/465, *Le sort des enfants en temps de conflit armé*, Rapport du Secrétaire général, 43-47 <http://www.un.org/fr/sc/documents/sgreports/2018.shtml> (consulté le 6 juin 2019).

L'émergence d'un juge électoral régional africain

Sègnonna Horace Adjolohoun et Eric M. Ngango Youmbi***

RÉSUMÉ: Les élections en Afrique sont des moments qui cristallisent de grandes tensions et s'accompagnent bien souvent de crises politiques. Dans un contexte de perte de confiance et de disqualification du juge national, considéré comme l'allié du pouvoir, la présente contribution pose la question du recours à la solution juridictionnelle supranationale. Nous y soutenons tout d'abord, dans une approche positiviste et contentualiste, l'émergence progressive d'un juge électoral africain à l'identité plurielle. Ce juge, nous arguons, a conquis ses titres de compétences originellement sous la bannière d'instruments classiques de protection des droits de l'homme puis, progressivement, par l'avènement plus récent de conventions hybrides régulant la démocratie, les élections et la gouvernance politique. Les décisions de la Commission et de la Cour africaines des droits de l'homme et des peuples ainsi que celles des Cours de justice de la CEDEAO et de la Communauté d'Afrique de l'Est, ayant trait à la matière électorale, en donnent une parfaite illustration. Nous relevons ensuite qu'il s'agit d'un juge à la juridiction limitée, en ce que sa compétence est sujette à l'observance de la traditionnelle condition d'épuisement des recours internes et qu'il applique exclusivement la norme de référence prévue par le législateur et dont il a reçu mandat de sauvegarde. Il s'agit enfin d'un juge à l'imperium discuté, dont l'autorité des décisions est à géométrie variable et les garanties d'exécution incertaines.

TITLE AND ABSTRACT IN ENGLISH:

The rise of an African regional electoral judge

ABSTRACT: Elections in Africa are moments of great tension, which often come with political crises. In a context where the municipal election judge is untrusted and disqualified due to its perceived affiliation with the ruling party, this paper is devoted to appraising the alternative remedy of supranational mechanisms. Based on a positivistic and litigation standpoint, we observe the steady rise of an African regional electoral judge of a plural identity. This judge, we argue, was originally entrusted with jurisdiction as prescribed in traditional human rights instruments and, progressively in the recent years, in hybrid legal instruments pertaining to democracy, elections and political governance. This trend is well illustrated by the decisions of the African

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Commission and African Court on Human and Peoples' Rights, as well as those of the ECOWAS and East African Courts of Justice relating to electoral matters. We further stress that the African regional election judge enjoys a limited jurisdiction, in that he is required to observe the well-established rule of exhaustion of local remedies and that he exclusively adjudicate on the applicable law as prescribed by the legislator and which he was entrusted to supervise. The authors finally posit that the judicial powers of the regional judges are disputed, and their decisions enjoy a variable authority while guarantees of their enforcement is uncertain.

MOTS CLÉS: juge électoral africain, démocratie, élection, juridiction, imperium

SOMMAIRE:

1	Introduction.....	3
2	Un juge à l'existence affirmée.....	25
2.1	La pluralité du juge électoral africain.....	25
2.2	La production des normes électorales.....	31
3	Un juge à l'emprise limitée.....	37
3.1	La limite liée à la juridiction.....	37
3.2	La limite liée à l'imperium.....	43
4	Conclusion.....	48

1 INTRODUCTION

Peut-on dire du droit régional africain comme le fit le célèbre juriste anglais L. Denning à propos du droit européen, qu'il est aujourd'hui comparable à un raz-de-marée qui emporte nos digues et qui, pénétrant à l'intérieur de nos terres, vient submerger nos maisons et nos champs, à la grande consternation de tous?¹ En l'état du droit et de la pratique, il est prudent de relativiser une telle assertion comparative. Il n'aurait toutefois échappé à aucun observateur attentif, le bourgeonnement en Afrique d'une justice électorale supranationale.²

Il convient d'entrée de jeu de rappeler qu'il n'existe pas à proprement parler, au niveau régional africain, un juge dont l'office exclusif serait de régler les questions relatives aux élections.³ « Le juge électoral africain » doit par conséquent s'entendre dans le cadre de la présente contribution, de tout juge supranational – qu'il soit continental ou sous-régional – compétent pour examiner et trancher un différend portant sur des questions électorales.⁴

1 L Denning, cité par G Marcou *Les mutations du droit de l'administration en Europe – pluralisme et convergence* (1995) 11.

2 Voir notamment la Déclaration de Bamako du 03 novembre 2000 adoptée dans le cadre de la Francophonie lors du Symposium sur 'le bilan des pratiques de la démocratie, des droits et libertés dans l'espace francophone'; le Protocole de la CEDEAO sur la Démocratie et la bonne gouvernance adopté à Dakar, le 21 décembre 2001; la Charte Africaine de la Démocratie, des Elections et la gouvernance adopté à Addis Abeba, le 30 janvier 2007.

3 Voir M Kamto 'Le contrôle de la mise en œuvre des règles et standards internationaux de la démocratie en Afrique. Des chainons manquants?' in K Ahadzi-Nounou, D Kokoroko et FJ Aïvo (dirs) *La Démocratie en question(s)*, (Mélanges en l'honneur du Professeur Théodore HOLO) (2017).

4 F Meledje Djedro 'Le contentieux électoral en Afrique' (2009) 129 *Pouvoirs* (2009/2) 150. Cette pluralité d'acteurs traduirait une recherche d'efficacité.

En tout état de cause, la question de l'essor de ce juge régional est d'un intérêt certain eu égard à la récurrence dans le contexte africain des crises électorales (présidentielles notamment) mal jugées en droit national (entre autres, Côte d'Ivoire en 2010,⁵ Bénin en 2011, Gabon en 2016,⁶ Cameroun en 2018,⁷ et République Démocratique du Congo en 2019). L'organisation d'élections disputées⁸ demeure une gageure dans les États africains.⁹

Dans un tel contexte, l'on peut légitimement se demander si le juge électoral africain ne serait pas la pièce maîtresse de l'ambition portée par l'Union africaine et les autres organisations intergouvernementales africaines, d'une Afrique où la paix et la sécurité seraient le gage de succès d'une intégration politique et économique. Cette question simple en apparence mais qui charrie de vives controverses théoriques se pose en des termes similaires sous d'autres cieux: c'est celle de l'existence, mieux, de l'autorité de ce juge international ou supranational et celle de son identité.

La première controverse nous plonge au cœur du débat plus étendu sur le phénomène de « régionalisme constitutionnel »¹⁰ ou de l'existence d'un droit constitutionnel supranational africain dont le juge régional serait le garant, et qui se construirait à partir de la matière électorale. La seconde controverse est celle de l'identité du juge électoral africain. A la vérité, on est en présence dans le cadre supranational d'une pluralité d'acteurs aussi bien continentaux que sous-régionaux, pouvant intervenir dans le contentieux électoral. Cette question s'inscrit dans la problématique des rapports de systèmes qui,

- 5 Lire JP Dozon *Les clés de la crise ivoirienne* (2011). Voir aussi FP Tetang 'De quelques bizarreries constitutionnelles relative à la primauté du droit international dans l'ordre juridique interne: la Côte d'Ivoire et l'affaire de l'élection présidentielle' (2012) 91 *Revue Française de Droit Constitutionnel* 45-66; GF Ntwari 'La décision du Conseil constitutionnel ivoirien N° CI-2011-036 du 04 mai 2011' *Revue québécoise de droit international* (2011) 407-411.
- 6 Voir A Alerianus-Owanga et M Debain 'Demain, un jour nouveau? Un renversement électoral confisqué au Gabon' (2016) 144 *Politique Africaine* (2016/4) 157-179.
- 7 Voir EMN Youmbi 'Le nouveau Conseil constitutionnel camerounais: la grande désillusion' (2019) 5 *Revue du droit public* 1379.
- 8 KD Kokoroko 'Les élections disputées: réussites et échecs' (2009/2) *Pouvoirs* 115-125.
- 9 JD Degaudusson 'Les élections à l'épreuve de l'Afrique' (2002) 13 *Les Cahiers du Conseil Constitutionnel*, Etudes et doctrine, la sincérité du scrutin 100.
- 10 La notion de 'régionalisme constitutionnel' sublimée par SH Adjolohoun, est différente du sens que lui donne le professeur Vunduawe, c'est-à-dire un système qui serait à mi-chemin entre l'Etat unitaire décentralisé et l'Etat fédéral. Elle renvoie en revanche à la construction d'un droit constitutionnel commun aux États africains. Voir SH Adjolohoun 'The making and remaking of national constitutions in African regional courts' (2018) 1 *African Journal of Comparative Constitutional Law* 35-70.

en Europe continentale, a fait en surabondance l'objet de développements par des auteurs tels JP Jacque,¹¹ M Delmas Marty,¹² F Ost et M Van der Kerchove,¹³ M Virally,¹⁴ M Troper¹⁵ ou P Amselek.¹⁶

Par la présente contribution, nous proposons de mener une incursion de précurseurs en fournissant la preuve de l'existence affirmée d'un juge électoral africain (2), dont l'emprise reste hélas, encore limitée (3).

2 UN JUGE A L'EXISTENCE AFFIRMEE

De quelque manière que l'on tourne les choses, il est difficile pour tout observateur sérieux de contester la compétence en matière électorale, d'institutions de nature judiciaire ou quasi-judiciaire, créées sous l'égide des organisations intergouvernementales africaines. On est toutefois en présence d'un juge électoral pluriel (2.1) dont l'émergence au cœur de la conscience juridique est également attestée par son importante œuvre jurisprudentielle (2.2).

2.1 La pluralité du juge électoral africain

Par « juge électoral africain », nous entendons, comme il a été signalé ci-avant en introduction à la présente discussion, une pluralité d'instances pouvant intervenir dans la résolution des différends relatifs aux élections. Il peut être rattaché à un mécanisme à vocation continentale, et être désigné par la locution adjectivale « juge électoral continental » (2.1.1), ou revêtir une portée sous-régionale, on parlera alors de « juge électoral sous-régional » (2.1.2).

11 J Jacque 'Droit constitutionnel national, droit communautaire, CEDH, Charte des Nations-Unies –L'instabilité des rapports de systèmes entre ordres juridiques' (2007) 69(1) *Revue française de droit constitutionnel* 3-37.

12 M Delmas Marty (dir) (Introduction), Actes du 8ème congrès de l'Association internationale de méthodologie juridique, Aix- en- Provence 4-6 septembre 2003; Presses universitaires d'Aix Marseille (2005).

13 F Ost et M Van der Kerchove *De la pyramide au réseau? – Pour une théorie dialectique du droit*; Publication des FUSL (2002). L'ouvrage constate la crise du modèle pyramidal et son remplacement par des paradigmes concurrents comme celui du droit en réseaux, sans que disparaissent pour autant des résidus du premier.

14 M Virally 'Sur un pont aux ânes: les rapports entre droit international et droits internes' in *Mélanges offerts à Henri Rolin* (1964) 491.

15 M Troper 'Kelsen, la théorie de l'interprétation et la structure de l'ordre juridique' (1981) 138 *Revue internationale de philosophie* 526; voir aussi, M Troper 'La pyramide est toujours debout! Réponse à P Amselek' (1978) 6 *Revue de droit public* 1531.

16 P Amselek 'Réflexions critiques autour de la conception kelsennienne de l'ordre juridique' (1978) 1 *Revue de droit public* 13.

2.1.1 Le juge électoral continental

Au plan continental, deux organes dont la vocation première n'est pas de vider le contentieux électoral, peuvent, pour autant qu'une disposition du droit de l'Union africaine applicable en la matière est en cause, être saisis de contestations soulevées relativement à un acte se rapportant à la question des élections: il s'agit de la Commission africaine des droits de l'homme et des peuples (la Commission ou la Commission africaine) et de la Cour africaine des droits de l'homme et des peuples (la Cour ou la Cour africaine).

a La Commission africaine des droits de l'homme et des peuples

Les dispositions de la Charte pouvant être considérées comme formant la fondation de la fonction de juge électoral de la Commission de Banjul sont les articles 1 et 13.

L'article 1 dispose que « Les Etats membres de l'Organisation de l'Unité Africaine (...), reconnaissent les droits, devoirs et libertés énoncés dans cette Charte et s'engagent à adopter des mesures législatives ou autres pour les appliquer ». Cette disposition a été interprétée tant par la Commission que par la Cour africaine, comme induisant une obligation tant de légiférer, que de créer des institutions de protection des droits de l'homme.¹⁷

L'article 13 de la Charte quant à lui prévoit le droit à la participation politique (celui d'élire, d'être élu, de participer librement aux affaires publiques et d'accéder aux fonctions politiques de son pays). Dans sa jurisprudence pertinente, la Commission s'est prononcée à maintes occasions sur le respect par les Etats parties des dispositions relatives au droit électoral de portée continentale.

Avant de revenir sur cette formation du droit par interprétation, il faut épuiser la démonstration sur l'existence d'un juge électoral continental.

b La Cour africaine des droits de l'homme et des peuples

Le caractère non expressément obligatoire et exécutoire de ses décisions et son inféodation alléguée à la Commission de l'Union africaine ont valu à la Commission de Banjul d'acerbés critiques des

17 Voir pour la Commission, entre autres, *Geneviève Mbiankeu c. Cameroun*, Communication 389/10 (CADHP 2015), paras 125-127; *Jawara c. Gambie* Communication 147/95 et 149/96 (2000) RADH 107 (CADHP 2000), para 46; *Association des Victimes des Violences Post-Electorales et Interights c. Cameroun* Communication 272/03 (2009) AHRLR 47 (ACHPR 2009), paras 105-115; et pour la Cour, *Armand Guehi c. Tanzanie*, CAFDHP (fond et réparations, 7 décembre 2018), paras 149-150; *Alex Thomas c. Tanzanie*, CAFDHP (fond, 20 novembre 2015), 1 RCJA 482, para 135; *Kennedy Owino Onyachi et un autre c. Tanzanie*, CAFDHP (fond, 28 septembre 2017), paras 158-159.

commentateurs.¹⁸ A l'opposé, ou plutôt en complémentarité de la Commission, la Cour africaine est un organe de plein impérium judiciaire en tant que ses décisions sont à la fois obligatoires et exécutoires tel qu'il ressort des dispositions de l'article 30 du Protocole qui l'a créée.

D'un point de vue *ratione materiae*, la Cour est compétente pour connaître du contentieux de l'interprétation et de l'application de la Charte, et de « tout autre instrument des droits de l'homme ratifié par l'Etat concerné ». La jurisprudence de la Cour confirme qu'elle a une acception *lato sensu* ou universelle de sa compétence prévue à l'article 3 du Protocole.¹⁹ On rappellera utilement à cet égard, les décisions rendues par la Cour dans les affaires *APDH c. Côte d'Ivoire*,²⁰ *Norbert Zongo et autres c. Burkina Faso* et *Lohé Issa Konaté c. Burkina Faso*.²¹

Cette jurisprudence mise en contexte, il apparaît en effet qu'aussi bien la Charte africaine de la démocratie que le Protocole de la CEDEAO sur la gouvernance sont du droit éminemment électoral. L'entier chapitre 7 de la Charte de la démocratie est consacrée aux « élections démocratiques » et traite des questions y afférentes.

Pour ce qui est du Protocole de la CEDEAO sur la gouvernance, il érige des principes fondamentaux de la démocratie électorale en normes constitutionnelles régionales.²² Ainsi, l'article 1 du Protocole qui consacre les « principes de convergence constitutionnelle » oblige les Etats parties à, entre autres, garantir « toute accession au pouvoir à travers des élections libres, honnêtes et transparentes ». La forme substantielle la plus parachevée d'une législation régionale est illustrée par la section 2 de l'instrument consacrée exclusivement aux « élections » et qui formule la fameuse prohibition de toute « réforme substantielle de la loi électorale (...) dans les six mois de l'élection » concernée, « sans le consentement d'une large majorité des acteurs politiques ». Il revient de ces constatations que se construit progressivement un droit international africain de la gouvernance publique démocratique.²³

La présence et le fonctionnement concomitants de deux adjudicateurs au plan continental exigent une coordination qui

18 Voir SH Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: le modèle béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011).

19 Voir SH Adjolohoun 'The Njemanze ECOWAS Court ruling and "universal" jurisdiction: implications for the "grand African human rights system"' *International Journal of Constitutional Law Blog*, 16 November 2017.

20 La Charte africaine de la démocratie et le Protocole de la CEDEAO sur la bonne gouvernance sont des instruments des droits de l'homme par leurs objets et les dispositions qu'ils contiennent.

21 La Cour a conclu à la violation du Traité révisé de la CEDEAO en application de l'article 77 relatif aux droits des journalistes.

22 Voir IM Fall et A Sall 'Une Constitution régionale pour l'Espace CEDEAO: le Protocole sur la Démocratie et la Bonne Gouvernance de la CEDEAO' (2017) *JAGA Gouvernance en Afrique*.

23 AD Olinga 'La promotion de la démocratie et d'un ordre constitutionnel de qualité par le système africain des droits fondamentaux: entre acquis et défis' (2017) 1 *Annuaire africain des droits de l'homme* 221-243.

réponde à la sécurité juridique et judiciaire.²⁴ Il revient à dire qu'elles exercent à cet égard des compétences concurrentes avec un *res judicata* réciproque. Leurs jurisprudences le confirment d'ailleurs.²⁵

Certaines juridictions sous-régionales africaines se sont également découverts une vocation de protection des droits de l'homme, à l'image de la Cour de Justice de l'Union européenne qui par les *arrêts stork*,²⁶ *stauder*,²⁷ *international handelgesellschaft*,²⁸ initia un processus dont l'aboutissement fût l'adoption, en 2001, de la Charte des droits de l'homme de l'Union européenne également dite de Nice.

2.1.2 Le juge électoral sous-régional

Pour les besoins de contextualisation, nous prenons l'option de limiter notre démarche aux deux juridictions sous-régionales qui nous semblent être les plus illustratives, par leur activité, du moins dans la matière électorale. Il s'agit de la Cour de justice de la CEDEAO et de la Cour de justice de la Communauté d'Afrique de l'Est.

A partir des années 2000, la galaxie institutionnelle du système africain de protection des droits de l'homme va connaître le phénomène dit de « déclinaison du système continental vers les systèmes régionaux ». Cette tendance se manifeste d'une part, à travers une compétence « universelle » expresse de la Cour de justice de la CEDEAO et, d'autre part, dans une juridiction induite du droit communautaire par la Cour de justice de la Communauté d'Afrique de l'Est.

a *La Cour de Justice de la CEDEAO*

Créée par le Protocole de 1991, la Cour de justice de la CEDEAO se voit attribuer les fonctions traditionnelles d'une juridiction communautaire mais dont le prétoire est très peu fréquenté jusqu'en 2004. Le Protocole additionnel de 2005 met un terme à la léthargie juridictionnelle de la Cour, en ouvrant le prétoire aux victimes des violations des droits de l'homme et aux ONGs.²⁹ Entre le premier arrêt rendu dans la célèbre affaire *Hadijatou Mani Koraou c. Niger*, qui confirme sa compétence sur la DUDH³⁰ et celui par lequel elle se prononce sur le Protocole de

24 Voir les articles 5(1)(a), 6 et 33 du Protocole ; et les articles 68(3) du Règlement de la Cour et 118 du Règlement de la Commission.

25 Voir *Jean-Claude Roger Gombert c. Côte d'Ivoire*, CAFDHP (compétence et recevabilité, 22 mars 2018). Voir par ailleurs *Dexter Eddie Johnson c. Ghana*, CAFDHP (compétence et recevabilité, 28 mars 2019).

26 CJCE, 04 février 1959, *Stork c. Haute Autorité de la CECA*.

27 CJCE, 12 novembre 1969, *Erich Stauder c. Ville d'Ulm*.

28 CJCE, 17 décembre 1970, *international handelgesellschaft*.

29 Voir *SERAP c. Nigéria* (éducation) ECW/CCJ/JUD/07/10 du 30 novembre 2010; *Rencontre Africaine pour la Défense des Droits de l'Homme c. Sénégal* ECW/CCJ/JUD/20/15 du 20 octobre 2015.

30 *Hadijatou Mani Koraou c. Niger* ECW/CCJ/JUD/06/08 du 27 octobre 2008.

Maputo dans l'affaire *Njemanze c. Nigéria*,³¹ la Cour de justice de la CEDEAO se forgera une compétence quasi illimitée sur la Charte internationale des droits de l'homme.³² C'est ainsi qu'elle applique ensuite le PIDCP avec une compétence quasi ordinaire dans l'arrêt *Hissène Habré c. Sénégal*.³³

Dans la matière électorale en particulier, il suffira d'indiquer que la Cour de justice de la CEDEAO s'est principalement illustrée par l'interprétation et l'application du Protocole de la Communauté sur la gouvernance sans nécessairement écarter sa compétence pour connaître du contentieux des droits de l'homme consacrée aux termes aussi bien de la Charte africaine des droits de l'homme que de celle de la démocratie. Il serait partiel de ne pas renvoyer à la position de principe sur sa compétence dans le chef du droit électoral *stricto sensu*. Une telle position ressort de l'arrêt *Ugokwe c. Nigéria* où la Cour se déclare incompétente pour connaître de la demande du requérant d'annuler l'élection de son adversaire et la proclamation de la sienne à la Chambre des Représentants de l'Etat d'Anambra.³⁴ Par ricochet, la juridiction régionale conclut qu'elle n'est pas une juridiction d'appel des décisions rendues par les juridictions internes.³⁵ La position de principe rappelée, la pratique impose de constater qu'il n'en est rien de cette censure à exercer compétence en matière électorale qui s'est, à la réalité, révélé être un préambule à la juridiction électorale indirecte, par le moyen de l'impérium des droits de l'homme. Quid de la Cour de Justice de la Communauté de l'Afrique de l'Est ?

b La Cour de Justice de la Communauté de l'Afrique de l'Est

La Cour de justice d'Afrique de l'Est voit juridiquement le jour en 1999. Sa compétence expresse est limitée à la mise en œuvre du droit communautaire.³⁶ Il faut considérer que cette juridiction régionale a consacré, sur la base de sa compétence de droit communautaire, ce que la doctrine a qualifié de compétence induite ou inférée dans la matière des droits de l'homme.³⁷ C'est dans l'affaire *James Katabazi et autres c. Ouganda* que la Cour s'affranchit de l'argument d'absence de

31 *Dorothy Njemanze et autres c. Nigéria* ECW/CCJ/JUD/08/17 du 12 octobre 2017.

32 Voir Adjolohoun (n 19).

33 ECW/CCJ/JUD/06/10 du 18 novembre 2010, paras 59 et 64.

34 *Ugokwe c. Nigéria*, para 33.

35 *Ibid.*, paras 5 et 32. Sur les répartitions de compétence entre les juges régional et national en Afrique, voir en général, SH Adjolohoun 'Un régulateur régulé? Le juge constitutionnel à l'ère du régionalisme constitutionnel en Afrique' Colloque commémoratif du 25^{ème} anniversaire de la Cour constitutionnelle du Bénin, Association Béninoise de Droit Constitutionnel, 2 - 3 juin 2018.

36 Traité établissant la Communauté d'Afrique de l'Est (CAE) 1999, entrée en vigueur 2000.

37 S Ebobrah 'Human rights developments in sub-Regional Economic Communities during 2011' (2012) 12 *African Human Rights Law Journal* 316.

norme.³⁸ L'affranchissement est poursuivi dans l'arrêt *Sitenda Sebalu* où la Cour sanctionne le refus de lui conférer expressément la compétence des droits de l'homme.³⁹

Sous le chapitre plus spécifique des principes électoraux, si le Traité fondateur de la Communauté ne fait aucune mention expresse des élections ou de principes directement affiliés, son article 3 prescrit comme condition d'adhésion, l'acceptation des « principes universellement admis de bonne gouvernance, de démocratie, d'Etat de droit », le respect « des droits de l'homme » et la « justice sociale ». Mieux, l'article 6 du Traité fait des mêmes conditions, des « principes fondamentaux de la Communauté » auxquels sont adjoints la transparence, la reddition des comptes et les droits de l'homme. Etant stipulées par des dispositions substantielles du Traité, on peut arguer que ces prescriptions emportent obligations conventionnelles en dépit de la terminologie de « principe » qui les qualifie.

La Cour de justice d'Afrique de l'Est confirme cette approche lorsqu'elle conclut dans l'arrêt *Union des Journalistes Burundais c. Burundi*, que la seule catégorisation en « principes » des normes telles que l'Etat de droit ou la bonne gouvernance ne saurait les soustraire aux obligations des Etats membres.⁴⁰ C'est sur la même fondation jurisprudentielle que ladite juridiction déclare en violation des articles 6(d) and 7(2) du Traité, parce que contraires aux principes de bonne gouvernance, d'Etat de droit et de droits de l'homme, les dispositions de la Loi 1/11 du 4 juin 2013 portant amendement de la Loi 1/025 du 27 novembre 2015 régissant la presse au Burundi.⁴¹

Enfin, même s'il est encore en attente d'adoption par le Parlement régional, le projet de Protocole de la Communauté d'Afrique de l'Est sur la bonne gouvernance prévoit en son article 7(3) que « la promotion et l'institutionnalisation de la démocratie, des processus démocratiques et de la bonne gouvernance » seront réalisées entre autres en « créant un environnement propice à l'exercice de la liberté d'expression, d'association et de réunion; une presse libre et indépendante; une société civile forte et un secteur privé dynamique ».

Ainsi que nous en dresserons ultérieurement le tableau, cette double entreprise normative et jurisprudentielle lancera la rampe d'une

38 *James Katabazi et 21 autres c. Secrétaire général de la Communauté et République d'Ouganda*, Référence No. 01/2007, Arrêt du 1^{er} novembre 2007.

39 Voir *Hon. Sitenda Sebalu c. Secrétaire général de la Communauté et autres*, Reference no. 01 de 2010, Arrêt du 30 juin 2011. Relativement à la jurisprudence pertinente de la Cour de justice d'Afrique de l'Est, voir SH Adjolahoun *Giving effect to the human rights jurisprudence of the ECOWAS Court of Justice: compliance and influence*, thèse de doctorat, Université de Pretoria (2013) 115-121.

40 *Union des Journalistes Burundais c. Burundi* Référence no. 7 de 2013, Recueil des arrêts de la Cour de justice d'Afrique de l'Est (2012- 2015) 299.

41 Voir paras 60-102. Sur la jurisprudence récente de la Cour de justice d'Afrique de l'Est sur la matière des droits de l'homme et sur la justice de la liberté d'expression dans les juridictions régionales africaines, voir N Jansen Reventlow & SH Adjolahoun 'Will Konaté set African journalists free? Interrogating the promises of an emerging press freedom jurisprudence in African regional courts' (2018) 18 *African Human Rights Yearbook* 427-453.

justice sous-régionale qui touche largement les droits de l'homme, les libertés publiques, mais également, *in casu*, les libertés électorales.

2.2 La production des normes électorales

On notera que nous adoptons des notions de droit et de justice électoraux une tendance *lato sensu* mais objectiviste. Dès lors, l'inclusion dans ce débat sur la justice électorale des questions liées à la vie des partis politiques se justifie amplement par la nature imbriquée des éléments du droit à la participation politique. On conçoit en effet, par exemple, que le droit de s'inscrire comme candidat ne pourrait être réalisé en dehors de la garantie de pouvoir enregistrer un parti politique.

Il importe de souligner l'importante production de normes électorales par le juge régional africain en deux temps, en distinguant entre les principes liés aux libertés politiques (2.2.1) mais qui exhibent des traits fortement électoraux, et ceux relatifs à l'élection proprement dite (2.2.2).

2.2.1 Les principes liés aux libertés politiques

Les décisions rendues dans ce cadre touchent diverses dispositions de la Charte avec en fond de cause, l'article 13(1), qui consacre le droit à la participation politique. Les espèces répertoriées se rapportent, entre autres, à la création des partis politiques, au parrainage des candidats, au contentieux des candidatures, à l'éligibilité, au dépouillement du scrutin et à la proclamation des résultats.

Sur la question de l'existence et de la vie des partis politiques, il est d'un intérêt indéniable de noter la décision rendue par la Commission africaine dans l'affaire *Lawyers for Human Rights c. Swaziland*. Dans cette affaire, l'organe régional estime que « l'adoption d'une loi qui interdit la création des partis politiques porte une grave atteinte à la capacité des citoyens de participer à la direction des affaires de leur pays ». ⁴² En concluant en conséquence que ladite loi est en violation de l'article 13 de la Charte, la Commission endosse indiscutablement le rôle de juge administratif ou constitutionnel, et exerce son impérium sur l'existence légale des partis politiques. Mieux, un tel *decidendi* peut être considéré comme emblématique de l'activité d'un juge électoral régional avant-gardiste, à une époque où la législation continentale, en l'occurrence celle de l'Union africaine, restait encore à affiner. On relève en effet que ladite décision est rendue en 2005, soit avant l'adoption en 2007 de la Charte africaine de la démocratie, et son entrée en vigueur bien plus tard en 2012.

Il est vrai que c'est déjà dès le début des années 2000 que la Commission fait œuvre de censeur de la mise en œuvre du droit à la participation politique. En effet, au plus fort du régime foncièrement

42 Para 63. Voir également Olinga (n 23) 227.

violateur des libertés dirigé par Yahya Jammeh, la Commission avait estimé dans l'affaire *Dawda Jawara c. Gambie* que l'interdiction des partis politiques est constitutive d'une violation du droit à la liberté d'association protégé à l'article 10 de la Charte.⁴³

On ne peut manquer de relever que la Commission a par ailleurs fait office de juge du contentieux de l'éligibilité en ce qu'elle s'est prononcée à maintes reprises sur la conformité à la norme électorale régionale de source conventionnelle, du droit électoral de l'Etat défendeur. La décision qu'elle a rendue dans l'affaire *John Modise c. Botswana* est indiscutablement précurseur à cet égard. Dans ladite cause portée devant elle par l'homme et opposant politique déchu de sa citoyenneté, la Commission a estimé que le refus de reconnaître au requérant la nationalité *jus solis* a eu pour conséquence son inéligibilité – restreint qu'il était à la nationalité par acquisition. La Commission demandera par conséquent au défendeur de prendre toutes les mesures nécessaires pour reconnaître à Modise, la nationalité par naissance.⁴⁴ Dans l'affaire *Constitutional Rights Project et Civil Liberties Organisation c. Nigeria*, la Commission conclut, dans quasiment le même registre, que « le droit de participer librement aux affaires de son pays implique, entre autres, le droit de voter pour le représentant de son choix (...) et que l'annulation des résultats constitue une violation de ce droit ».⁴⁵

Des traits similaires marquent une autre espèce sur laquelle s'est prononcée la Commission en 2008 relativement au fameux concept « d'ivoirité ». Dans l'affaire *Mouvement Ivoirien des Droits de l'Homme (MIDH) c. Côte d'Ivoire*, l'organe continental a conclu à la violation du droit à la participation politique et demandé à l'Etat défendeur de réviser sa Constitution en vue de la mettre en conformité avec les normes régionales.⁴⁶ On ne peut s'empêcher d'associer l'affaire *MIDH* où un candidat sérieux a été empêché de participer à l'élection en Côte d'Ivoire, et la décision rendue en 2000 par la Commission dans l'affaire *Media Rights Agenda et Constitutional Rights Project c. Nigéria*. L'adjudicateur de Banjul avait conclu que « Le gouvernement par la force est incompatible avec le droit des peuples à déterminer leur avenir politique et à choisir leurs dirigeants ».⁴⁷ Il s'est agi là d'une prohibition des changements anti-constitutionnels de gouvernement consacrée textuellement plus tard, en 2007, par l'adoption de la Charte africaine de la démocratie.

Le juge électoral sous-régional ne reste pas en marge de cette tendance à la régionalisation du contentieux des matières électorales et assimilées. Au prétoire de la Cour de justice de la CEDEAO, l'arrêt *Ugokwe* cité ci-haut doit être à nouveau évoqué pour rappeler que par principe, la juridiction régionale n'est pas compétente pour connaître des demandes expresses relevant du contentieux des élections nationales. Cette position est tout de même largement infléchie par une

43 Voir *Jawara c. Gambie*, para 68.

44 Voir *Modise c. Botswana*, paras 95-98.

45 *Constitutional Rights Project et Civil Liberties Organisation c. Nigeria*.

46 *MIDH c. Côte d'Ivoire*, para 86.

47 Voir *Media Rights Agenda et Constitutional Rights Project c. Nigeria*, para 80.

compétence électorale tacite, induite du contentieux des droits de l'homme devant la juridiction communautaire. On peut convoquer à cet égard l'arrêt *Godwill Mrakpor et 5 autres (Intervention militaire en Côte d'Ivoire) c. Conférence des Chefs d'Etats de la CEDEAO*.⁴⁸ Si cette décision n'avait été rendue qu'en avant-dire droit et par conséquent en réserve du fond, la juridiction *a quo* y a tout de même ordonné au plus important des organes de la Communauté, de suspendre toute intervention militaire jusqu'à ce qu'elle se fût prononcée sur le fond de la cause devant elle. Cette cause, on s'en rappelle judicieusement, portait sur le contentieux du dépouillement et de la proclamation des résultats de l'élection présidentielle controversée de 2011 en Côte d'Ivoire.

Il y a eu mieux dans la jurisprudence de la Cour de justice de la CEDEAO, avec l'insolite arrêt *CDP c. Burkina Faso* où la juridiction conclut que « Le Code électoral, tel que modifié (...) », excluant des membres du parti du président déchu B. Compaoré des élections post-transition, « est une violation du droit de libre participation aux élections ». ⁴⁹ La motivation catalytique en l'espèce revient de ce qu'en dépit de l'invocation par la requérante des dispositions de la Charte des droits de l'homme et de celle de la démocratie relatives à l'égalité et à la participation politique, la Cour décide d'élire les seules dispositions correspondantes du Protocole communautaire sur la démocratie qui fondent exclusivement son raisonnement conclusif.⁵⁰ A en croire la doctrine d'obédience empirique, il s'agit là de l'expression la plus achevée de l'office électoral du juge régional en Afrique.⁵¹ On peut affirmer que la Cour avait déjà manqué l'opportunité d'une telle expression dans l'affaire *RADDHO c. Sénégal* où elle a plutôt rejeté la requête pour être devenue sans objet.⁵²

Dans l'affaire *Révérénd Christopher R. Mtikila c. Tanzanie*,⁵³ la Cour d'Arusha sanctionnait, quant à elle, la Tanzanie pour avoir exclu les candidatures indépendantes aux élections politiques. Elle estime que cette exclusion constitue une atteinte au droit reconnu à tout citoyen de participer aux affaires de son pays.⁵⁴ Le juge africain des droits de l'homme souligne en substance au paragraphe 99 de l'arrêt : « vu la clarté manifeste du libellé de l'article 13(1) de la Charte, (...),

48 *Godwill Mrakpor et 5 autres (intervention militaire en Côte d'Ivoire) c. Autorité des Chefs d'Etat et de Gouvernement de la CEDEAO*, Arrêt Avant Dire Droit ECW/CCJ/ADD/01/11 du 18 mars 2011.

49 Dispositif.

50 *CDP c. Burkina Faso*, paras 31, 32-37. Le droit mou et la jurisprudence de la Cour européenne des droits de l'homme viennent en sources subsidiaires.

51 Voir à cet égard, Fall et Sall (n 24); Adjolohoun (n 10).

52 Voir *Rencontre Africaine des Droits de l'Homme c. Sénégal*, Requête No. ECW/CCJ/APP/03/12, Arrêt ECW/CCJ/JUD/20/15 du 20 octobre 2015.

53 *TLS et autres (Mtikila) c. Tanzanie* (fond) (2013) 1 RJCA 34. Voir Les Commentaires de AD Olinga *Revue des droits de l'homme* (2014/6) 1-23.

54 A titre de droit comparé, la question a été déjà fait l'objet d'un avis par le Comité des droits de l'homme (Observations générales n° 25 du Comité, adoptées lors de sa 57^{ème} session le 12 juillet 1996, Participation aux affaires publiques et droit de vote) et d'une décision par la Cour interaméricaine des droits de l'homme (Cour IDH, Arrêt du 6 août 2008, *Castaneda Gutman c. Mexique*).

exiger d'un candidat qu'il soit membre d'un parti politique avant d'être autorisé à participer à la vie politique en Tanzanie, constitue certainement une violation des droits consacrés à l'article 13(1) de la Charte ».

Pour conclure sur cet aspect de l'action électorale du juge régional, il n'est pas futile de relever deux opportunités jurisprudentielles manquées. La première se solde par une irrecevabilité dans l'affaire *Bloc pour l'Alternance en Guinée c. Guinée*⁵⁵ où la Cour de justice de la CEDEAO aurait dû examiner la demande principale du requérant de voir ordonner à l'Etat défendeur d'autoriser son enregistrement comme parti politique. Elle prouve à suffisance que le juge régional avait été mis en lisière de connaître du contentieux de l'enregistrement des partis politiques.

Dans la seconde espèce, la Cour africaine se voit demander, dans l'affaire *Komi Koutché c. Bénin*,⁵⁶ de prendre une ordonnance de mesures provisoires intimant au défendeur de faire tomber les effets du mandat d'arrêt international émis à l'encontre du requérant afin de lui permettre de prendre part à l'élection législative du 28 avril 2019 au Bénin. La demande est manifestement devenue sans objet. En tout état de cause on réalise aisément que le juge africain pourrait bien, là aussi, se prononcer indirectement sur une question touchant au droit électoral.

Sur l'autre versant de l'activité du juge électoral régional en Afrique, notre intérêt porte sur les questions liées à l'élection en elle-même.

2.2.2 Les principes liés aux élections

Les décisions rendues dans ce cadre touchent aussi bien à l'indépendance et l'impartialité de l'organe d'organisation des élections, qu'à la transparence et la sincérité devant présider aux opérations électorales.

Dans ce registre, une décision de principe est sans doute celle rendue par la Commission dans l'affaire *Pierre Mamboundou c. Gabon*, où elle fixe les minimas devant déterminer les caractères libre et transparent d'une élection.⁵⁷ Outre cet énoncé majeur des grands principes électoraux de source régionale, la Commission cherche à savoir si le rejet de la demande en annulation de la présidentielle de novembre 2005 est en violation du droit à la participation politique (article 13 de la Charte). Elle procède à un examen minutieux de la

55 *Bloc pour l'Alternance en Guinée c. Guinée*, Arrêt ECW/CCJ/JUD/07/19 du 26 février 2019.

56 Voir *Komi Koutché c. Bénin*, Requête No. 020/2019.

57 La Commission souligne en substance: 'l'existence d'une loi et d'un système électoral, la transparence dans l'organisation de la gestion des élections, le droit de voter, l'inscription des électeurs, l'éducation civique et l'information des électeurs, la participation des candidats, des partis politiques et des organisations politiques, une campagne électorale au cours de laquelle la protection des droits de l'homme et l'accès libre aux médias sont assurés, un scrutin libre soumis à un contrôle indépendant et dont les résultats sont publiés, et enfin un mécanisme crédible de gestion du contentieux des élections', para 49.

parité politique dans la composition de la Commission électorale et ses démembrements, dans la composition des bureaux de vote, la régularité et la conformité aux règles équitables du mode de décompte des voix, de l'accès aux médias d'Etat et de la gestion du contentieux par la Cour constitutionnelle, pour conclure à la conformité du processus à l'article 13 de la Charte.⁵⁸

Si, dans l'affaire *Action pour la Protection des Droits de l'Homme (APDH) c. Côte d'Ivoire*, la Cour africaine n'a pas eu l'occasion d'adjudger dans une substance aussi large que la Commission, elle a certainement exercé compétence dans une cause qui va marquer fondamentalement la donne politico-électorale en Côte d'Ivoire. Dans l'arrêt qu'elle rend le 18 novembre 2016, le juge d'Arusha contrôle en effet la conformité à la Charte africaine de la démocratie de la loi portant composition de la Commission Electorale Indépendante. Le requérant faisait valoir qu'elle viole les principes d'égalité entre les candidats, ainsi que les garanties d'indépendance et d'impartialité de l'organe électoral. La Cour conclura à la violation des articles 17 et 3 du Protocole de la CEDEAO (obligation pour les Etats de créer un organe indépendant); ainsi que de l'article 13(1) et (2) de la Charte africaine (droit de participation). Elle ordonne par conséquent au défendeur dans un prononcé inédit, de réviser la loi à l'effet de la mettre en conformité avec les normes électorales régionales. Il apparaîtrait que l'Etat de Côte d'Ivoire a mis en œuvre ledit arrêt⁵⁹ même s'il s'en est suivi une double saga judiciaire devant le juge constitutionnel ivoirien⁶⁰ puis, à nouveau, devant la Cour africaine.⁶¹

En Afrique de l'Est, dans un régime plutôt sous-régional, le juge réalise également une œuvre prétorienne méritoire. Une décision de principe en l'espèce est celle rendue par la Cour de justice d'Afrique de l'Est dans l'affaire *Prof Nyongo et autres c. Kenya*.⁶² Dans cette espèce, les requérants demandent au juge communautaire de dire que l'élection par l'Assemblée nationale du Kenya, de ses neuf membres devant siéger au Parlement de la Communauté s'est faite en violation du Règlement électoral adopté en vertu de l'article 50 du Traité.

Il était reproché au parlement national d'avoir procédé à la désignation des députés concernés alors qu'ils auraient dû être élus. Le 23 mai 2007, l'Assemblée nationale du Kenya adoptait alors un nouveau Règlement en exécution de l'arrêt de la Cour de justice de la

58 Voir *Pierre Mamboundou c. Gabon* Communication 320/06 (2014).

59 Voir V Duhem 'Côte d'Ivoire: une nouvelle CEI recomposée mais toujours pas consensuelle' *Jeune Afrique* (2019).

60 Déclarée irrecevable principalement pour caractère prématuré de la requête, la loi n'ayant pas encore été votée par le Parlement, encore moins promulguée par le président de la République. Voir Décision N° CI-2019-005/DCC/05-08/CC/SG du 05 août 2019 relative à la requête de M Konan Koffi, Député à l'Assemblée nationale.

61 Voir *Suy Bi Gohoré Emile et 8 autres c. Côte d'Ivoire*, Requête No 044/2019 enregistrée au Greffe de la Cour le 10 septembre 2019. Dans sa substance, la requête porte implicitement action en défaut d'exécution de l'arrêt *APDH c. Côte d'Ivoire*.

62 *Prof Nyongo et autres c. Kenya* Référence No. 1 de 2006 Recueil de jurisprudence de la Cour de justice d'Afrique de l'Est 2005 – 2011.

Communauté⁶³ sur la base duquel de nouvelles élections étaient organisées. Malheureusement, la Cour de justice paiera son audace en subissant des réformes politiques tendant manifestement à restreindre son libéralisme jurisprudentiel.⁶⁴ En dépit de cette mauvaise fortune, le juge régional a fait œuvre utile au plan de la consolidation de l'Etat de droit électoral dans la sphère communautaire. On note ainsi avec satisfaction que, mu par le précédent dans l'affaire *Nyongo*, des requérants ougandais et tanzaniens attaquent les élections conduites par les parlements de leurs pays respectifs. Dans les affaires *Democratic Party et un autre c. Uganda*⁶⁵ et *Mtikila c. Tanzanie*,⁶⁶ la Cour ordonne aux défenseurs d'amender le droit interne applicable aux élections des députés devant siéger au Parlement communautaire.⁶⁷

En rapportant cette tendance au plan national, il est intéressant de faire référence à l'arrêt rendu par la même juridiction dans l'affaire *East African Civil Society Forum EACSOFF c. Burundi*.⁶⁸ Au principal, la requête tendait à voir dire le juge que la participation du président Pierre Nkurunziza à l'élection présidentielle de 2015 au Burundi – c'est-à-dire l'autorisation de briguer un troisième mandat – constituait une violation des principes communautaires. De manière notable, le requérant attaque expressément la décision *RCCB 303 du 5 mai 2015* du Conseil constitutionnel burundais portant contentieux des candidatures et autorisation de celle du président Nkurunziza, décision dont la conformité aux principes communautaires est requise.

Dans un premier temps, la Division de première instance de la Cour de justice d'Afrique de l'Est s'est déclarée incompétente sur le fondement de la doctrine de la question politique, concluant notamment que la demande ne relevait pas du ressort judiciaire, mais ressortissant plutôt du mandat du législateur. La division d'appel infirma cette décision, affirma la compétence, et renvoya en instance pour examen à nouveau.⁶⁹

En dépit de l'ampleur des normes pertinentes qui justifient son action, de la fréquence systématisée à son prétoire et de l'étendue des

63 Kenya National Assembly 'Approval of EAC Draft Rules on Election of EALA Members' Kenya National Assembly Official Record Parliamentary Debates (23 May 2007) 1583-1603.

64 KJ Alter, JT Gathii et LR Helfer 'Backlash against international courts in West, East and Southern Africa: causes and consequences' (2016) 27 *European Journal of International Law* 293.

65 *Democratic Party et Mukas a Mbidde c. The Secretary General of the East African Community et the Attorney General of the Republic of Uganda* EACJ Reference No. 6 de 2011, First Instance Division.

66 *Mtikila c. Attorney General of Tanzania et autres* EACJ Reference No. 1 de 2007.

67 C Basl 'What change in EALA election rules means' <https://observer.ug/news/headlines> (consulté, 19 septembre 2019); NSegawa, 'Parliament amends EALA election rules to provide for special interest groups' <https://chimpreports.com/parliaments-amends-eala-election-rules-to-provide-for-special-interest-groups/> (consulté le 19 septembre 2019).

68 *East African Civil Society Forum EACSOFF c. Burundi*, Requête No. 5 de 2015, Arrêt du 29 juillet 2015.

69 *East African Civil Society Forum EACSOFF c. Burundi*, Appel No. 4 de 2016, Arrêt du 24 mai 2018.

pouvoirs dont il jouit, le juge électoral régional subit des contraintes indiscutables. C'est en effet un juge à l'emprise limitée ou tout au moins conditionnée.

3 UN JUGE A L'EMPRISE LIMITEE

Dans un contexte pluraliste, il est plus que nécessaire pour le juge de s'autolimiter, afin d'éviter le désordre juridique, et garantir par la même occasion sa pérennité.

Le juge électoral africain n'est pas en reste. La nature de son office rassure et apaise à la fois quant aux critiques formulées en son endroit.

La première limite est liée à sa « juridiction », au sens des attributions (3.1); la seconde est liée à son « imperium », autrement dit ses pouvoirs et son autorité (3.2).

3.1 La limite liée à la juridiction

Evoquer les limites liées aux attributions du juge électoral africain, revient en particulier à examiner les différentes conditions d'exercice de sa compétence et de recevabilité d'une requête. Elles sont nombreuses. La limite dont il s'agit n'a de sens que lorsqu'elle permet de faire le départ et tracer la frontière non seulement entre lui et un autre juge électoral régional, mais également entre lui et le juge électoral national.

On songe ainsi à deux limites en particulier, qui garantissent cette coexistence pacifique : l'épuisement des recours internes (3.11) et l'application exclusive de la norme de référence qui l'a institué et qu'il a reçu mandat de sauvegarder. Il peut certes faire recours dans ses motivations à d'autres instruments juridiques, mais reste limité à la sanction du non-respect des dispositions d'une norme de référence particulière (3.1.2).

3.1.1 L'épuisement des recours internes

Cette condition est unanimement admise par le juge électoral régional africain. Elle découle aussi bien des textes que de la jurisprudence pertinente des différentes instances compétentes. Elle rend compte de l'observance des principes de subsidiarité ou de complémentarité du juge international.

La subsidiarité signifie que le juge international n'a vocation à exercer compétence qu'après que le juge national ait eu l'opportunité d'agir et qu'il n'a pu le faire ou ne l'a voulu. C'est en effet le juge national qui est juge naturel ou de proximité de la convention une fois que, par ratification suivie d'incorporation ou non, ladite norme fait corps avec le droit interne, tombant du coup dans l'assiette de compétence du juge interne.

La complémentarité signifie que le juge international vient soutenir ou se substituer à l'action de garantie des droits, entamée par le juge interne, lorsque celui-ci l'a laissée inachevée. Tout en disposant pour la recevabilité des requêtes devant le juge régional, c'est donc en primeur la compétence de ce juge que régule le principe d'épuisement des recours internes. Le but de la règle est à rechercher dans le besoin d'ériger des garde-fous à toute tentative d'atteinte à la souveraineté de l'Etat défendeur.

Il suffira de rappeler que jusqu'à une époque récente, les individus ou autres entités non-étatiques n'étaient pas autorisés à tutoyer les souverains dans un contentieux international impliquant exclusivement les Etats. L'ouverture du prétoire international, tout au moins celui des droits de l'homme, aux individus et ONG a été strictement régulée par des conditions telles l'épuisement des recours internes, l'objectif étant de permettre à l'Etat concerné de remédier à la situation par le biais de ses institutions.

Examinons un tant soit peu l'application de cette condition aussi bien devant le juge électoral continental que devant le juge électoral sous régional.

Le recours au juge continental n'est en principe recevable qu'après épuisement des recours internes.

Pour ce qui est de la procédure devant la Commission africaine, la règle est d'abord conventionnelle puisqu'édictée à l'article 56(5) de la Charte, qui dispose que la Commission ne peut connaître d'une plainte individuelle qu'après épuisement des recours internes s'ils existent, à moins qu'ils ne se soient prolongés de façon anormale.⁷⁰

Dans son œuvre d'interprétation de la Charte, la Commission a forgé une pratique remarquable de la règle d'épuisement des recours internes. Les prémices de cette pratique se trouvent dans l'affaire *Dawda Jawara c. Gambie* où la Commission pose le principe de recours dont l'existence énoncée à l'article 56(5) de la Charte ne peut plus suffire, mais qui doivent au surplus être disponibles, efficaces et satisfaisants.

Le long de ses décennies de contrôle de l'application de la Charte, la Commission a élargi le champ des exceptions à l'épuisement des recours, y compris dans les cas de violations graves et massives,⁷¹ de défaillance notoire du système judiciaire national,⁷² ou encore de la

70 Voir aussi l'article 87 du Règlement intérieur de la Commission intitulé 'Saisine de la Commission', qui dispose que les Communications doivent contenir ou être accompagnées entre autres, 'des mesures prises pour épuiser les procédures régionales [sous-régionales] ou internationales de règlement des bons offices', 'de toute procédure d'enquête internationale ou de règlement international à laquelle les Etats parties concernés ont eu recours'.

71 Voir par ex, *Open Society Justice Initiative c. Côte d'Ivoire*, Communication 318/06 (27 mai 2016), affaire des Dioulas sur le droit à la nationalité.

72 Voir par ex, *Réseau Ouest Africain des Défenseurs des Droits de l'Homme c. Côte d'Ivoire*, Communication 400/11 (1 août 2015).

crainte du requérant pour sa vie par suite de représailles réelles ou potentielles de la part des autorités de l'Etat défendeur.⁷³ Dans l'affaire *Mamboundou* citée plus haut, la Communication n'est par conséquent déclarée recevable qu'après que la Commission eut vérifié, entre autres conditions, que les recours internes avaient été épuisés par la décision de la Cour constitutionnelle du Gabon.

Pour ce qui est de la procédure devant la Cour africaine, on note qu'aux termes de l'article 5(2) du Protocole qui la crée, le droit applicable en matière de recevabilité des requêtes devant elle est le même article 56(5) de la Charte. L'analyse ci-avant relative à la Commission est par conséquent extensible à la procédure devant la Cour africaine. En application de la convention, l'article 34(4) du Règlement intérieur de la Cour dispose que « La requête doit indiquer la violation alléguée et comporter la preuve de l'épuisement des voies de recours internes ou de leur prolongation anormale (...) ».⁷⁴

Cette condition a été abondamment rappelée dans la jurisprudence de la Cour. C'est dès son premier arrêt sur le fond, dans l'affaire *Mtikila*, que la Cour en donne le ton avant que l'application de la règle et de ses nombreuses exceptions ne passe en jurisprudence constante dans la pratique.⁷⁵ On note que la juridiction se fait largement l'écho d'un libre commerce jurisprudentiel avec sa consœur de Banjul, dont elle cite abondamment les décisions en formulant ses propres positions sur l'épuisement des recours internes.⁷⁶

La condition de l'épuisement des recours internes a également fait l'objet d'application par le juge électoral sous-régional.

Pour ce qui est de la Cour de justice de la CEDEAO, elle adopte une approche *sui generis* en ce qu'elle ne prescrit par l'épuisement des recours par le requérant.

C'est dans l'arrêt *Koraou* cité *supra*, que la Cour en pose le principe en « application de la norme par silence ».⁷⁷ La Cour estime, en réponse à l'exception soulevée par le Défendeur, que la règle ne saurait être prescrite là où le législateur ne l'a pas expressément prévue. Selon la haute juridiction, le législateur CEDEAO a entendu une renonciation de la souveraineté des Etats parties qui fonde la possibilité préalable pour eux de régler le différend concerné par leurs mécanismes internes.

73 Voir par ex, *Gabriel Shumba c. Zimbabwe*, Communication 308/05 (novembre 2008).

74 Par ailleurs, les 'conditions générales de recevabilité' mentionnées à l'article 40 du Règlement intérieur de la Cour (article 56 de la Charte auquel renvoie l'article 6, alinéa 2, du Protocole), prévoient que (article 40(5)) les requêtes dont est saisie la Cour 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'.

75 Voir Recueil de jurisprudence de la Cour africaine, Volume 1 (2006-2016).

76 Voir R Ben Achour 'La mobilisation des sources extérieures par la Cour africaine. L'exemple de la liberté d'expression' in L Burgorgue-Larsen (dir) *Les défis de l'interprétation et de l'application des droits de l'homme: de l'ouverture au dialogue* (2017) 223.

77 Voir *Koraou c. Niger*, para 49.

Dans des espèces ultérieures, la Cour a fait une observance implicite du principe.⁷⁸

La Cour de justice d'Afrique de l'Est n'observe pas le principe d'épuisement des recours internes dans l'examen de la recevabilité des requêtes. Cette pratique résulte bien évidemment de ce que, ni le Traité, ni le Règlement de la juridiction ne pose cette condition. Ainsi, la Cour le rappelle déjà dans l'affaire *Plaxeda Rugumba c. Rwanda* examinée en 2010, en rejetant l'exception tirée du défaut d'épuisement des recours internes, au motif que les textes applicables n'en font pas une condition de recevabilité.⁷⁹

Cette position qui n'a pas varié s'est plutôt consolidée dans le temps jurisprudentiel, comme l'illustre bien la Cour lorsqu'elle estime dans son arrêt de 2019 rendu dans l'affaire *Media Council of Tanzania et autres c. Tanzanie*, que la seule reconnaissance de la règle dans la coutume du contentieux international ne saurait emporter exception à la volonté expresse du législateur de ne pas en faire l'option dans le Traité.⁸⁰ La référence à la jurisprudence de la Cour de justice de la CEDEAO, expressément citée par le Défendeur n'a pas convaincu le juge d'Afrique de l'Est.

Contraint par les frontières spatiales de la juridiction, le juge électoral régional est par ailleurs limité par la norme qu'il applique.

3.1.2 La limite liée à la norme de référence

Pour commencer par la Commission africaine, et tel qu'il ressort de l'argumentaire précédent sur sa compétence matérielle, la norme de référence quant au contrôle du respect des droits politiques, de la régularité de l'organe chargé des élections ou des élections proprement dites, est prioritairement, sinon exclusivement, la Charte africaine.

Il est vrai que ledit instrument autorise la Commission, lorsqu'elle interprète la Charte, à s'inspirer de nombreuses autres normes de droit international général ou spécialisé à la matière des droits de l'homme. Aux termes des articles 60 et 61 de la Charte, le champ du droit d'inspiration ouvert devant la Commission se ressourçe largement dans les dispositions de l'article 38 du Statut de la CIJ.⁸¹

Dans sa pratique, la Commission de Banjul a constamment écarté l'examen spécifique ou exclusif d'une allégation de violation des dispositions d'une convention autre que la Charte. Lorsqu'elle l'a fait, l'organe quasi-juridictionnel a toujours conclu à la violation de la seule Charte même si, dans le raisonnement qui l'y a conduit, elle a recouru aux dispositions, et bien entendu à la jurisprudence formée, du « tiers

78 Voir par exemple, *Rencontre Africain pour la Défense des Droits de l'Homme c. Sénégal*, Communication 71/92.

79 *Plaxeda Rugumba c. Rwanda* Référence No. 8 de 2010. Voir également, *Malcom Lukwiya c. Ouganda et Kenya* Référence No. 6 de 2015.

80 *Media Council of Tanzania et autres c. Tanzanie* Référence No. 2 de 2017, Arrêt du 28 mars 2019.

81 Voir F Ouguerouz 'Les articles 60 et 61 de la Charte africaine des droits de l'homme et des peuples' in Burgorgue-Larsen (n 76) 135.

instrument ». ⁸² Elle a d'abord recherché dans la Charte, les dispositions correspondantes du « tiers instrument ». ⁸³

On peut certainement noter, comme la décision *Mamboundou* citée plus haut l'illustre à suffisance, que les normes de référence formant ce que l'on pourrait appeler le « bloc de conventionalité », ne peuvent comprendre la Constitution de l'Etat en cause ou ses lois électorales nationales. La Commission rappelle sur ce point qu'« elle n'a pas compétence pour connaître de la constitutionnalité des actes de l'Etat défendeur, mais plutôt de leur conformité à la Charte africaine ». ⁸⁴

En dépit de cette apparente prudence, on admettrait, avec toutefois des nuances nécessaires, qu'elle opère incidemment en référence à la Charte, un contrôle de conventionalité de la Constitution et des lois électorales, en ce qu'elle peut déclarer celles-ci ou celle-là contraires à la Charte.

Sur la question du contrôle qu'elle exerce relativement à la conformité des lois et actes de l'Etat défendeur à la Charte et au droit international applicable, la Cour africaine adopte quant à elle un discours jurisprudentiel à trois tendances.

Primo, la Cour doit répondre à l'exception de l'Etat défendeur tiré du défaut de compétence pour juger en tant que juridiction d'instance en examinant une requête dont les juridictions internes, notamment du fond ont déjà connu la substance. Suivant la formule typique, le requérant allègue par exemple la violation du droit d'être assisté par un avocat dès l'interrogatoire de police. En réponse, l'Etat défendeur avance que la Cour africaine ne saurait examiner une telle allégation sans agir en juridiction première instance alors que le requérant aurait dû épuiser les recours internes en soulevant le grief y afférent devant les juridictions nationales. La solution désormais consacrée de la Cour est de recourir à la théorie dit du *bundle of rights and guarantees* – « faisceaux de droits et garanties ». Cette théorie postule qu'il ne saurait être exigé du requérant d'évoquer des griefs dont le juge interne aurait dû ou pu avoir connaissance lors de l'examen de la cause devant lui. La jurisprudence abondante de la Cour est devenue constante à ces égards. ⁸⁵

82 Voir par exemple, *Interights, ASADHO et Maître O. Disu c. République Démocratique du Congo* Communication 274/03 et 282/03 (novembre 2013), para 61 où la Commission fait le pont entre l'article 7 de la Charte et l'article 9 du Pacte international relatif aux droits civils et politiques; *Organisation Mondiale Contre la Torture et Ligue de la Zone Afrique pour la Défense des Droits des Enfants et Elèves (pour le compte de Céline) c. République Démocratique du Congo*, Communication 325/06 (novembre 2015), paras 83-85 où les articles 2 et 18(3) de la Charte sont interprétés en lecture croisée avec les articles 2, 3, 4, 8 et 25 du Protocole de Maputo sur les droits des femmes en Afrique.

83 *Interights et autres c. RDC* (n 82) paras 66 et 67; *OMCT et un autre c. RDC* (n 82) para 87.

84 Voir *Mamboundou c. Gabon*, Communication 320/06.

85 *Nguza Viking (BabuSeya) et Johnson Nguza (Papi Kocha) c. Tanzanie*, CAFDHP (fond, 23 mars 2018), paras 35-37; *Kijiji Isiaga c. Tanzanie*, CAFDHP (fond, 21 mars 2018), paras 30-36; *Thobias Mango et un autre c. Tanzanie*, CAFDHP (fond,

Secundo, les Etats défendeurs reprochent à la Cour de s'ériger en juridiction d'appel en examinant des questions ayant précédemment fait l'objet d'une décision définitive par les plus hautes juridictions de l'ordre interne. Par la belle parade de la subsidiarité, la Cour exerce compétence quant à l'examen de la conformité au droit international applicable, des actes de l'Etat défendeur et de ses organes ou agents.⁸⁶ Le juge continental estime toutefois, dans une variante de cette approche, qu'elle n'exerce pas compétence législative à l'égard du droit interne dont elle ne peut prononcer l'abrogation.⁸⁷ Il est notable que plusieurs Etats ont opposé une farouche contestation à cette direction jurisprudentielle.⁸⁸

Tertio, et enfin, le juge d'Arusha décline également sa compétence pour connaître de la violation de la Constitution de l'Etat défendeur ou de la conformité à la loi fondamentale, des actes de l'Etat ou de ses démembrements.⁸⁹

Mais il faut rester réaliste face à cette navigation prudente entre les deux ordres régional et municipal. En somme, alors même qu'elle s'en défend vigoureusement, la Cour africaine dit le droit en exerçant une compétence qui a pour conséquence de la voir agir comme une juridiction internationale de cassation ou un troisième ou même quatrième degré de juridiction, infirmant ou annulant les décisions des juridictions internes qu'elles soient de fond ou suprêmes. Dans une formule parachevée de cette tendance, la Cour ordonne, par exemple dans l'arrêt *Ajavon c. Bénin*, que l'Etat défendeur annule l'arrêt violateur et en efface tous les effets.⁹⁰

La Cour de justice de la CEDEAO exerce, dans le chef du droit applicable, une compétence quasi universelle. Cette juridiction a connu expressément de l'interprétation et de l'application directe de la quasi-totalité des instruments formant la Charte internationale des droits. La juridiction agit bien naturellement dans la sphère du droit de source communautaire. Sa jurisprudence inclut la DUDH prise comme droit international coutumier comme vu dans l'arrêt *Koraou c. Niger* qui fait le procès de l'esclavage moderne;⁹¹ le PIDCP dans l'arrêt *Hissène*

11 mai 2018), paras 30-36; *Anaclet Paulo c. Tanzanie*, CAFDHP (fond et réparations, 21 septembre 2018), paras 21-27; *Armand Guehi c. Tanzanie*, CAFDHP (fond et réparations, 7 décembre 2018), paras 31-34.

86 *Ernest Francis Mtingwi c. Malawi* (compétence)(2013) 1 RJCA 197, para 14 ; *Alex Thomas c. Tanzanie* (fond) (2015) 1 RJCA 482, para 130; *Mohamed Abubakari c. Tanzanie* (fond) (2016) 1 RJCA 624, paras 22- 29; *Ingabire Victoire Umuhuza c. Rwanda*, CAFDHP (fond, 24 novembre 2017), paras 52-56; 167; *George Maili Kemboge c. Tanzanie*, CAFDHP (fond, 11 mai 2018), paras 17-21; *Amiri Ramadhani c. Tanzanie*, CAFDHP (fond, 11 novembre 2018), para 24; *Oscar Josiah c. Tanzanie*, CAFDHP (fond et réparations, 28 mars 2019), paras 21-28.

87 *Ingabire Victoire Umuhuza c. Rwanda*, *idem*.

88 Voir à cet égard, 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* 45-46.

89 Voir par exemple, *Kennedy Owino Onyachi et autres c. Tanzanie*, *op. cit.*, para 39.

90 Voir *Sébastien Germain Ajavon c. Bénin*, CAFDH (fond, 29 mars 2019), para 283.

91 Cité *supra*.

Habré c. Sénégal;⁹² la Charte africaine dans l'arrêt *Mamadou Tandja c. Niger*;⁹³ la Charte africaine de la démocratie et le Protocole de la CEDEAO dans l'arrêt *CDP c. Burkina Faso*;⁹⁴ ou encore le Protocole dit de Maputo, à la Charte africaine sur les droits des femmes en Afrique dans l'arrêt *Dorothy Njemanze c. Nigéria*.⁹⁵

Le juge de la Communauté d'Afrique de l'Est a exercé, comme discuté ci-avant, une compétence implicite ou déduite sur les normes internationales des droits de l'homme, en particulier la Charte africaine érigée par le Traité au rang de principe de la Communauté. La technique jurisprudentielle a consisté, chaque fois que le requérant la sollicitait pour connaître d'une violation de ses droits, à contrôler la conformité des actes déférés, aux principes d'Etat de droit, de bonne gouvernance, de démocratie et de droits de l'homme reconnus par le Traité comme « fondamentaux ». Les arrêts *Katabazi*, *Sebalu* et *Union des Journalistes Burundais* cités plus haut, en constituent des illustrations de principe.

De manière notable, la Cour de justice d'Afrique de l'Est rejette l'exception tirée du défaut d'épuisement des recours internes fondée sur la restriction de sa compétence à celle conférée par le Traité aux organes des « Etats partenaires ». A titre illustratif, l'Etat défendeur argue, dans l'affaire *Media Council of Tanzania* citée plus haut, que la ratification du Traité et son incorporation en droit interne ont limité l'impérium du juge régional, dont la compétence a dès lors été reversée au juge interne. En rejetant un tel moyen, la Cour a conclu qu'il ne peut en être ainsi parce que: d'abord, la norme ne l'a pas prévu expressément; ensuite, elle a compétence en primauté et en suprématie pour interpréter le Traité; et enfin, la primauté du Traité et de la compétence de la Cour communautaire se fonde de manière irréversible sur la mise en conformité des Constitutions nationales au Traité et non le contraire.⁹⁶

Le juge régional africain est enfin limité dans son impérium, en l'occurrence quant à l'autorité de ses décisions et à la garantie de leur exécution.

3.2 La limite liée à l'imperium

L'impérium du juge serait vain si ses ordonnances n'étaient ni obligatoires, ni exécutoires. Quelles sont l'autorité et la portée des décisions rendues par le juge électoral régional africain ? La nature des organes concernés, leur positionnement dans la galaxie politico-juridictionnelle et les pouvoirs qui leur sont conférés obligent à appréhender la question suivant une perspective diversifiée (3.2.1). Par ailleurs, les garanties d'exécution des décisions (3.2.2) relèvent de

92 Cité *supra*.

93 Cité *supra*.

94 Cité *supra*.

95 Cité *supra*.

96 Voir *Media Council of Tanzania et autres c. Tanzanie*, *op. cit.*, paras 18-41.

paradigmes tout aussi divers que dépendant par-ci, de ce qu'en a disposé le législateur, et par-là, de la réception qu'en veut faire l'Etat défendeur souverain.

3.2.1 L'autorité diversifiée des décisions

La Charte africaine, convention fondatrice de la Commission, ne dispose pas expressément que les décisions de l'organe sont obligatoires ou exécutoires. On note d'ailleurs, à cet égard, que lesdites décisions ont aux termes de l'article 92 du Règlement de l'organe, valeur de « recommandations » conformément à l'article 53 de la Charte.⁹⁷

La nature présumée non-exécutoire, parce que non expressément obligatoire, des décisions de la Commission est confortée par l'article 59 de la Charte. La norme qui oblige l'organe à la confidentialité dans l'exercice de sa fonction juridictionnelle, et assujettit la publication du rapport d'activités contenant ses décisions à un « examen » par la Conférence.

Dans la pratique, cet « examen » va au-delà d'un simple visa administratif pour inclure un pouvoir de censure ou d'appel des organes politiques de l'Union. La plus illustrative des décisions à cet effet est celle prise par le Conseil exécutif de l'Union africaine lors de l'examen du 37ème Rapport d'activités de la Commission, demandant à cet organe, entre autres, de « supprimer les extraits concernant deux décisions sur des plaintes individuelles dirigées contre la République du Rwanda et accorder une audience audit Etat dans les deux cas » et de « retirer le statut d'observateur accordé aux ONGs qui pourraient tenter d'imposer des valeurs contraires aux valeurs africaines ». Le Conseil avait proposé et obtenu que le Rapport ne soit pas publié jusqu'à ce que la Commission mette en œuvre lesdites décisions.

Dans une perspective plus juridique et moins politique, la doctrine et la Commission elle-même ont dépassé les enfermements de la Charte pour relire les pouvoirs de l'organe à la lumière des grands principes tels que l'effet utile, le *pacta sunt servanda* et les décisions des organes politiques de l'Union africaine appelant les Etats à se conformer à ses décisions.⁹⁸

97 Cette terminologie est confirmée à l'article 58 de la Charte qui dispose que, dans les cas de violations graves et massives, et sur demande de la Conférence des Chefs d'Etat de l'Union africaine, la Commission produit un rapport accompagné de 'recommandations'.

98 Voir F Viljoen *International human rights law in Africa* (2012) 339-342; CD Atoki 'Enforcement of the recommendations of the African Commission' Colloquium of the African human rights and similar institutions (Arusha, 4-6 October 2010) 4-5; R Alapini Gansou 'Keynote Address' Colloquium on application of the African Charter on Human and Peoples' Rights by South African courts (Cape Town, 8-9 November 2012); G Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (dirs) *The African Charter on Human and Peoples' Rights: the system in practice 1986-2000* (2002) 1; J Salmon 'Convention de Vienne de 1969 Pacta Sunt Servanda' in O Corten et autres *Les conventions de Vienne sur le droit des traités: commentaire article par article* (2006) 1080-1081; Adjolohoun (n 41) 49-52.

L'autorité des décisions de la Cour africaine ne souffre d'aucune contestation juridique. Organe de plein impérium judiciaire, ses décisions sont obligatoires et doivent être exécutées par les Etats dans les délais qu'elle fixe, ainsi que le prévoit l'article 30 du Protocole. Lesdites décisions sont par ailleurs définitives et non-susceptibles d'appel comme en dispose l'article 28(2) du Protocole. On note qu'elles peuvent faire l'objet de révision ou d'interprétation, sous les conditions généralement admises à cet égard.

Lorsque la violation alléguée est établie, la Cour peut par ailleurs « ordonner toutes les mesures appropriées » afin d'y remédier « y compris le paiement d'une juste compensation ou l'octroi d'une réparation ».⁹⁹ Elle a également pouvoir pour ordonner des mesures provisoires dans « les cas d'extrême gravité ou d'urgence » en vue d'éviter des préjudices irréparables.¹⁰⁰

Les arrêts et autres décisions de la Cour de justice de la CEDEAO sont non seulement obligatoires, mais d'exécution directe et immédiate dans les Etats membres. C'est du moins ce qui ressort des dispositions de l'article 15 du Traité révisé et de l'article 24 du Protocole additionnel de 2005.

Quant à la Cour de justice d'Afrique de l'Est, ses décisions sont obligatoires mais peuvent faire objet d'appel.¹⁰¹ Une question pertinente est de savoir si ladite juridiction peut ordonner des mesures spécifiques ou se limiter à des conclusions déclaratoires en l'absence de dispositions expresses des instruments applicables. Il serait évidemment impensable, au moins sur le fondement de l'effet utile, qu'ayant investi la juridiction de la fonction de « garantir le respect du Traité par son interprétation et son application », le législateur ait pu entendre que ses décisions ne seraient pas obligatoires et exécutoires.¹⁰²

La Cour a pris une approche dynamique à cet égard comme l'illustre l'arrêt *Katabazi* où, en concluant qu'une nouvelle arrestation des requérants viole le principe d'Etat de droit, la juridiction ordonne implicitement la remise en liberté. Tel qu'on l'observe heureusement dans l'arrêt *Sebalu*, la Cour conclut que « la Communauté d'Afrique de l'Est doit prendre des actions promptes en vue de finaliser le Protocole devant opérationnaliser l'extension de compétence de la Cour de justice en vertu de l'article 27 du Traité ». La jurisprudence s'est confortée dans le temps et par des dispositifs plus expressifs comme on le note dans les arrêts *EALS v Burundi et Union des Journalistes Burundais c. Burundi*.¹⁰³

Qu'en est-il des garanties d'exécution des décisions?

99 Art 27(1).

100 Art 27(2).

101 Art 35(1), Traité de la Communauté d'Afrique de l'Est.

102 Art 23(1), Traité de la Communauté d'Afrique de l'Est.

103 *East African Law Society c. Burundi* App. No. 3 de 2014. Voir en outre, *Union des Journalistes Burundais c. Burundi*.

3.2.2 Les garanties d'exécution

Qu'advient-il si une recommandation de la Commission n'est pas exécutée? L'article 112 du Règlement de l'organe a prévu un mécanisme de suivi des décisions de la Commission et l'article 118 lui donne la possibilité de saisir la Cour en cas de non-respect de ses recommandations. Pour ce qui est des garanties d'exécution, les décisions de la Commission relatives aux plaintes individuelles sont incluses dans son rapport d'activités soumis au Conseil exécutif de l'Union africaine pour examen et adoption. Cette procédure est sanctionnée par une décision du Conseil appelant les Etats à s'exécuter. En cas de « résistance », toute garantie se résout en une réitération par la Commission dans ses rapports subséquents, et lors des sommets successifs, du défaut d'exécution rapporté lors du premier examen.

L'exécution des décisions de la Cour africaine semble jouir d'une garantie plus affirmée puisque l'article 29 du Protocole dispose d'une part, que les décisions sont notifiées à la Commission de l'Union africaine qui est le représentant juridique de l'Union et, d'autre part, au Conseil des ministres « qui veille à leur exécution au nom de la Conférence ». L'article 31 du Protocole vient compléter ce mécanisme tacite en prévoyant qu'à chaque session ordinaire de la Conférence, « la Cour soumet un rapport faisant état des cas où un Etat n'aura pas exécuté ses décisions ».

Il ressort des textes que deux mécanismes, l'un judiciaire et l'autre politique, garantissent l'exécution des décisions de la Cour, les deux ne s'excluant pas.

Si la Cour a exclu l'approche judiciaire au cours de sa première décennie de fonctionnement, la probabilité d'une audience publique dans l'affaire *Commission africaine (population autochtone Ogiek) c. Kenya* et le projet de Cadre de suivi d'exécution en attente d'adoption par le Conseil exécutif prouvent bien que le mécanisme judiciaire est inévitable.

Quant à l'approche politique, elle consiste essentiellement en l'adoption du rapport de la Cour par le Conseil exécutif de l'Union africaine. Pour l'harmonie juridique, on devrait aller plus loin en envisageant des sanctions prévues pour défaut d'observance des décisions d'un organe politique de l'Union ainsi que prévu par l'Acte constitutif.¹⁰⁴ Le projet de Cadre de suivi prévoit ces deux options tout en faisant une part belle à la diplomatie et à l'assistance technique.

La Cour de justice de la CEDEAO bénéficie d'un cadre de garantie similaire à celui de la Cour africaine, à la différence notable que les deux options judiciaire et politique de suivi d'exécution sont prévues par un instrument spécial séparé, l'Acte additionnel A/SA.13/02/12 du 17 Février 2012 portant régime des sanctions à l'encontre des États membres n'honorant pas leurs obligations vis-à-vis de la Communauté.

104 Voir art 23 Acte constitutif de l'Union africaine.

Il y est prévu une large palette de sanctions.¹⁰⁵ Si l'article 77 du Traité ne prévoit qu'un cadre général, les articles 1 et 2(2) et 3 de l'Acte dispose expressément que le défaut d'exécution d'une décision de la Cour de justice emporte violation par l'Etat de ses obligations vis-à-vis de la Communauté. L'article 15(2) du même instrument prévoit que le défaut d'un Etat membre peut être rapporté par l'un de ses pairs et que le Président de la Commission de la CEDEAO est investi des prérogatives ordinaires de rapport et de demande d'enclenchement de la procédure de sanction. On relève toutefois qu'à ce jour aucune des tentatives à cet effet n'a abouti.¹⁰⁶

Dans le régime de la Cour de justice d'Afrique de l'Est, il n'y a pas de disposition pour un mécanisme de suivi d'exécution des décisions de la juridiction. En revanche, sur le point de la mise en œuvre des décisions, l'article 38(3) du Traité dispose « qu'un Etat partenaire ou le Conseil des ministres prendra, sans délai, les mesures requises afin de mettre en œuvre les décisions de la Cour ». Les règles d'exécution sont prescrites à l'article 44 du Traité.¹⁰⁷ Par ailleurs, l'article 143 prévoit expressément pour le défaut de paiement des contributions financières, mais également pour « les autres obligations » des sanctions larges, financières,¹⁰⁸ politiques ou autres ; déterminées par la Conférence sur recommandation du Conseil des ministres. Les réformes sur ces questions peinent à prendre effet.¹⁰⁹ Il n'y a pas à proprement parler, une procédure de rapport par la Cour aux organes politiques. L'article 14 du Traité prévoit plutôt une procédure sommaire à l'issue de laquelle l'organe politique se contente presque toujours de « prendre note » du rapport.¹¹⁰

105 Elles vont de la suspension, au retrait du droit de vote, en passant par l'impossibilité de faire élire ou désigner des ressortissants à des postes au sein des organes de la Communauté, ou même le gel des avoirs et la confiscation de documents de voyage.

106 Dans la formule la plus préliminaire, la procédure d'exécution est enclenchée par la Cour elle-même. Aux termes de l'article 24 du Protocole additionnel de 2005, le Greffe de la Cour délivre un mandat d'exécution qui est transmis à une autorité nationale désignée par les Etats et qui suivra l'exécution après la seule vérification que la décision est authentiquement celle de la juridiction.

107 Voir Art 44, Traité de la Communauté d'Afrique de l'Est et Art 74(2) Règlement intérieur de la Cour de justice d'Afrique de l'Est. Voir également, JE Ruhangisa 'The East African Court of Justice: Ten Years of Operation, Achievements and Challenges' Sensitisation Workshop on the Role of the EACJ in the EAC Integration (2011) 7.

108 Voir M Anderson 'East African Community faces funding crisis' The Africa Report, 14 octobre 2016 <http://www.theafricareport.com/East-Horn-Africa/east-african-community-faces-funding-crisis.html>, consulté le 9 octobre 2019; C Ligami 'EAC ministers vote for budget rules to stay', 18 April 2017, *The East African*, consulté le 9 octobre 2019.

109 Voir E Verhaeghe et C Mathieson 'Understanding the East African Community and its Transport Agenda', European Centre for Development Policy Management (ed) <http://ecdpm.org/wp-content/uploads/EAC-Background-Paper-PEDRO-Political-Economy-Dynamics-Regional-Organisations-Africa-ECDPM-2017.pdf> (consulté 9 octobre 2019).

110 Voir par ex EAC, Report of the 33rd Meeting of the Council of Ministers, 29 February 2016, Arusha, Tanzania, Section 8.2, 123.

4 CONCLUSION

L'existence en Afrique d'un juge électoral régional est affirmée. La jurisprudence construite par ce juge pluriel n'est certes que bourgeonnante mais l'importance et le momentum de ses interventions vont immanquablement réguler les Etats de droit en construction sur le continent. Ce n'est qu'une question de temps du contentieux et de la constance de l'adjudication.

Que les Etats membres des organisations d'intégration régionale africaine l'ont ainsi entendu en légiférant expressément à cet égard est hors de contestation. Ce qui manifestement demeure un inconnu majeur, c'est bien l'adhésion que lesdits Etats ont voulu consentir à l'office du juge qu'ils ont eux-mêmes investi. Nous nous sommes proposés en précurseurs mais il s'agit d'une question à branches multiples à laquelle d'autres commentateurs devraient consacrer une énergie scientifique empirique. D'abord, l'adhésion à la Cour continentale de plein impérium remonte à 9 sur 55 Etats pouvant être appelés au prétoire du contrôle de conventionalité par les individus victimes et les ONGs d'intérêt public. Cet état d'adhésion restreint fortement l'action du juge électoral africain. Ensuite, les Etats n'ont pas démontré un attachement libéral à l'obéissance aux censeurs qu'ils se sont librement voulus. On notera que si la Cour de justice de la CEDEAO est créditée de la plus obéie d'entre elles avec un taux d'exécution d'environ 60 pour cent, la Cour africaine affiche à peu près 30 pour cent ou même beaucoup moins selon les Etats. Enfin, sur le terrain de la mise en œuvre extrajudiciaire, les élections africaines ne semblent pas connaître une embellie quant à leur gestion.

Ce tableau peu glorieux mais réaliste peut tout de même nourrir un certain optimisme. La fondation est en effet posée. Il restera pour les acteurs, Etats, juges, sociétés civiles et plaideurs d'y forger l'Etat de droit électoral voulu par les organisations régionales pour un développement humain des peuples d'Afrique.

O direito ao desenvolvimento como um direito fundamental: a sua proteção jurídica na União Africana e na ordem jurídica dos Países Africanos de Língua Oficial Portuguesa

*Aua Baldé**

RESUMO: Este artigo debruça-se sobre a proteção do direito ao desenvolvimento no sistema africano de direitos humanos e no ordenamento jurídico dos Países Africanos de Língua Oficial Portuguesa (PALOP). O artigo parte da análise da proteção do direito ao desenvolvimento no sistema regional Africano de proteção dos direitos humanos e depois analisa até que ponto esse direito foi incorporado na legislação dos PALOP. O principal instrumento regional analisado foi a Carta Africana dos Direitos Humanos e dos Povos tendo sido feita também a análise da jurisprudência da Comissão Africana dos Direitos Humanos e dos Povos e do Tribunal Africano de Direitos Humanos e dos Povos na sua aplicação das normas contidas na Carta Africana relativamente à proteção do direito ao desenvolvimento. A análise mostra que o direito ao desenvolvimento é expressamente reconhecido e têm caráter vinculativo no sistema africano dos direitos humanos. Já, nas constituições dos PALOP o direito ao desenvolvimento não goza de reconhecimento expresse. Todavia, no quadro jurídico dos PALOP, a adesão dos Estados membros à Carta Africana e o recurso à doutrina dos direitos fundamentais implícitos traduzem-se no reconhecimento do direito ao desenvolvimento. Assim, o artigo conclui alegando existência de um direito fundamental ao desenvolvimento reconhecido no ordenamento jurídico dos PALOP e pela subseqüente obrigatoriedade de efetivar o gozo e fruição do direito em causa.

TITLE AND ABSTRACT IN ENGLISH:

The right to development as a fundamental right: its legal protection in the legal order of the African Union and Portuguese-speaking African countries

ABSTRACT: This article deals with the protection of the right to development in the African human rights system and in the jurisdiction of Portuguese-speaking countries in Africa (PALOP). The article starts with an analysis of the protection of the right to development in the African regional human rights system. It then analyses the extent to which this right has been incorporated in the legal order of PALOP. The main regional instrument assessed is the African Charter on Human and Peoples' Rights. Moreover, the article examines the jurisprudence of the African Commission

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on Human and Peoples' Rights and jurisprudence of the African Court on Human and Peoples' Rights in its application of the provisions in the African Charter that speak to the protection of the right to development. The analysis shows that the right to development is expressly recognised and attributed with binding force in the African human rights system. Differently, the right to development is not explicitly recognised in the constitutions of PALOP. However, these countries recognise the right to development as a fundamental right by adherence to the African Charter and through the application of the doctrine of implied rights in force in their respective jurisdictions. The conclusion reiterates that the right to development is recognised in the jurisdiction of PALOP stating that these countries have a subsequent duty to ensure the realisation and enjoyment of the right under analysis.

TITRE ET RÉSUMÉ EN FRANÇAIS:

La protection du droit au développement dans l'ordre juridique de l'Union africaine et des pays lusophones en Afrique

RÉSUMÉ: Cet article examine la protection du droit au développement dans le système africain des droits de l'homme et les systèmes juridiques des pays lusophones en Afrique (PALOP). L'analyse est menée à deux niveaux. D'abord, la protection du droit au développement par les instruments et institutions africains de protection des droits de l'homme. Ensuite, la mesure dans laquelle les systèmes juridiques des PALOP intègrent ce droit. Cet article a principalement examiné la Charte africaine des droits de l'homme et des peuples ainsi que la jurisprudence de la Commission et de la Cour africaines des droits de l'homme et des peuples relative au droit au développement. L'analyse démontre que, contrairement au système africain des droits de l'homme qui reconnaît clairement le droit au développement, les constitutions et les lois des PALOP ne le reconnaissent pas explicitement. En revanche, ces pays reconnaissent implicitement le droit au développement à travers la ratification de la Charte africaine et l'application de la théorie des droits implicites. Dans la conclusion, cet article postule que le droit au développement est reconnu dans les systèmes juridiques des PALOP. Ce droit doit être réalisé et ses bénéficiaires doivent en jouir pleinement.

PALAVRAS CHAVE: direito ao desenvolvimento, reconhecimento do direito ao desenvolvimento, direitos humanos, direitos fundamentais, PALOP, África

ÍNDICE:

1	Introdução	50
2	A proteção do direito ao desenvolvimento no contexto africano	51
2.1	Noção e evolução do direito ao desenvolvimento	51
2.2	O direito ao desenvolvimento na Carta Africana	54
2.3	Direito ao Desenvolvimento na Jurisprudência da Comissão e do Tribunal Africano dos Direitos Humanos e dos Povos	58
3	A proteção do direito ao desenvolvimento no contexto dos PALOP	62
3.1	As Constituições dos PALOP e o direito ao desenvolvimento	62
3.2	O direito ao desenvolvimento como um direito fundamental implícito.....	66
3.3	A proteção do direito ao desenvolvimento através da aplicação da Carta Africana aos PALOP.....	68
4	Conclusão.....	70

1 INTRODUÇÃO

A Carta Africana dos Direitos Humanos e dos Povos¹ prevê o direito ao desenvolvimento como um direito humano fundamental e justiciável, contrariamente aos mais significativos instrumentos jurídicos de cariz nacional e internacional que não reconhecem expressamente o caráter vinculativo do direito ao desenvolvimento. Outrossim, a doutrina tem defendido cada vez mais a existência do direito inalienável ao desenvolvimento. Na verdade, o direito ao desenvolvimento é

atualmente entendido como um direito fundamental, integrando não apenas uma componente de reivindicação individualista, mas também e sobretudo como um direito coletivo, ou seja, como um direito dos povos.²

O direito ao desenvolvimento pode ser visto sob a perspetiva nacional e a internacional.³ Estas duas perspetivas são esplanadas com mais detalhe no quadro desta contribuição tendo como exemplo a proteção do direito ao desenvolvimento nos Países Africanos de Língua Oficial Portuguesa (PALOP).⁴ Assim, no quadro desta contribuição, proceder-se-á à análise deste direito no plano do direito internacional, através do estudo da sua consagração nos instrumentos jurídicos da União Africana, nomeadamente a Carta Africana, para depois olhar para o plano nacional onde se examinará a consagração constitucional do mesmo direito a nível dos PALOP. Este último visa esclarecer até que ponto a partilha de referência comuns – designadamente a tradição jurídico-civilista herdada do período colonial, assim como a própria língua Portuguesa – terão ou não servido de fundamento para uma perspetiva constitucional similar na proteção do direito ao desenvolvimento, e simultaneamente quais as especificidades de tais provisões normativas face ao conteúdo jurídico postulado no sistema regional africano.

2 A PROTEÇÃO DO DIREITO AO DESENVOLVIMENTO NO CONTEXTO AFRICANO

2.1 Noção e evolução do direito ao desenvolvimento

O desenvolvimento, um conceito que a partir dos anos 50 se perspetivava apenas pelo cariz económico,⁵ ganhou desde finais dos anos 60 do século passado, outras dimensões, passando a incluir

1 A Organização da Unidade Africana, Carta Africana dos Direitos Humanos e dos Povos, foi adotada em Nairobi a 27 de Junho de 1981 e entrou em vigor a 21 de outubro de 1986, CAB/LEG/67/3 ver.5, ILM 58 (1982), a versão portuguesa disponível no https://www.achpr.org/pr_legalinstruments/detail?id=49 (visitado a 28 julho 2019). Doravante a Carta Africana.

2 ME Salomon and A Sengupta, 'The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples' Minority Rights Group International (2003), disponível em <https://minorityrights.org/wp-content/uploads/old-site-downloads/download-73-The-Right-to-Development-Obligations-of-States-and-the-Rights-of-Minorities-and-Indigenous-Peoples.pdf> (consultado 28 setembro 2019).

3 K Mbaye *Les droits de l'homme en Afrique* (1992) 208.

4 Os PALOP são: Angola, Cabo Verde, Guiné-Bissau, Moçambique e São Tomé e Príncipe.

5 RR Amaro 'Desenvolvimento – um conceito ultrapassado ou em renovação? Da teoria à prática e da prática à teoria' (2003) 4 *Cadernos de Estudos Africanos*, 35–36, <https://doi.org/10.4000/cea.1573> (consultado a 14 agosto 2019).

preocupações de ordem jurídica, social, cultural e humanitária.⁶ Outrossim, se por um lado o conceito de desenvolvimento é um conceito polissêmico, englobado assim diversas outras noções; por outro lado, desenvolvimento na sua vertente jurídica é, como salienta o Robério dos Anjos Filho, um direito dinâmico que comporta diversos elementos, nomeadamente, económicos, jurídicos, sociológicos, políticos.⁷

Na verdade, na sequência da descolonização e do movimento dos não-alinhados, o desenvolvimento ganhou um novo significado, através do qual os países em vias de desenvolvimento criticaram os modelos de desenvolvimento dos países do Norte, reclamando uma Nova Ordem Económica Internacional (NOEI), assente na auto-determinação económica.⁸ A esse respeito, os autores Peixinho e Ferra salientam que:

O direito ao desenvolvimento foi durante a fase de descolonização (década de 1960) uma exigência firmada pelos Estados em desenvolvimento que visava a atingir sua independência política através de uma liberação económica.⁹

A aula inaugural do antigo juiz do Tribunal Internacional de Justiça, o Senegalês Kéba Mbaye, proferida durante o Curso de Direitos Humanos do Instituto Internacional de Direitos do Homem de Estrasburgo de 1972, tornou-se um marco histórico no que diz respeito ao direito ao desenvolvimento.¹⁰ Nessa aula inaugural, Mbaye estabeleceu os contornos para uma defesa de desenvolvimento como

6 RN Anjos Filho *Direito ao desenvolvimento* (2013) 73.

7 Anjos Filho (n 6) 18.

8 Vide: R Adeola 'The right to development under the African Charter: is there an extraterritorial reach?' in CC Ngang *et al* (eds) *Perspectives on the right to development*; BA Pino 'Evolução histórica da cooperacao Sul-Sul (CSS)' in AM Souza (ed) 34 *Repensando a cooperação internacional para o desenvolvimento* IPEA 57-86.

9 MM Peixinho e AS Ferra 'Direito ao desenvolvimento como direito fundamental' disponível em http://www.publicadireito.com.br/conpedi/manaus/arquivos/anais/bh/manoel_messias_peixinho.pdf (consultado 14 agosto 2019).

10 K Mbaye 'Le droit au développement comme un droit de l'homme' (1972) *Revue des droits de l'homme* 505-34. No entanto, importa salientar, que apesar desta aula representar um marco histórico, existe uma divergência doutrinária quanto à origem do direito ao desenvolvimento enquanto direitos humanos. Assim, enquanto alguns apontam para inícios da década de 1970 e atribuem a Kéba Mbaye a formulação de desenvolvimento enquanto direitos humanos, neste sentido vide OO Oduwole 'Africa's contribution to the advancement of the right to development in international law' in CC Jalloh e O Elias (eds) *Shielding humanity: essays in international law in honour of Judge Abdul G. Koroma*, (BRILL, 2015), 566; S Marks 'The human right to development: between rhetoric and reality' (2004) 17 *Harvard Human Rights Journal* 138; VOO Nmehielle *The African human rights system: its laws, practice, and institutions* 149-150. Outros, no entanto, na senda de Ouguergouz, apontam para finais da década anterior como o momento de aparecimento das primeiras referências. Na verdade, Ouguergouz atribui a primeira referência ao então Ministro de Negócios Estrangeiros Senegalês Doudou Thiam em 1967 e uma segunda referência ao arcebispo de Argel, o Cardinal Duval, vide F Ouguergouz *The African Charter of Human and People's Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 298; e também no mesmo sentido: C Baldwin & C Morel Group rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: the system in practice 1986-2006* (2008) 270; F Viljoen *International human rights law in Africa* (2012) 226.

um direito humano, arguindo que este direito se justificava não apenas por razões político-jurídicas, mas também por imperativos morais. Na sua visão, o direito ao desenvolvimento era um direito de todos e defendia que cada um ‘tem o direito de viver e o direito de viver melhor’.¹¹ Mbaye defendeu a existência de uma correlação entre o desenvolvimento económico e o gozo e fruição de direitos humanos, arguindo que a existência de um implica necessariamente a existência do outro e concluiu realçando que ‘o direito ao desenvolvimento é um direito humano’.¹²

No entanto, nos anos imediatamente subsequentes à proposta de Mbaye, o direito ao desenvolvimento tornou-se objeto de um debate polarizado e acrimonioso no direito internacional dos direitos humanos.¹³ Como observa Mickelson:

o debate académico sobre a existência e o alcance de um direito ao desenvolvimento como direito humano continuou no final dos anos 70 e nos anos 80; durante esse período, foi frequentemente identificado como parte de uma ‘terceira geração’ de direitos humanos, denominada direitos coletivos ou solidários.¹⁴

No entanto, as discussões que polarizaram o debate sobre o direito ao desenvolvimento não se esgotaram apenas na sua definição extrapolando para sua legitimidade tanto passiva como ativa, que se descortina a seguir.

No que se refere à legitimidade ativa no direito ao desenvolvimento, a questão levantou-se em 1979, na conferência titulada ‘direito ao desenvolvimento no plano internacional’ que teve lugar em Haia. Nesta conferência, Kéba Mbaye voltou a salientar que o direito ao desenvolvimento é um direito coletivo uma vez que se ‘trata de mobilizar os recursos materiais e humanos, regionais, nacionais ou internacionais, para garantir a elevação do padrão de vida das populações num ambiente sociocultural satisfatório’.¹⁵ Tendo em conta estes elementos, defendeu que o desenvolvimento ‘é um direito coletivo, um direito dos povos’.¹⁶ Todavia, o mesmo autor ressaltou que a dimensão coletiva do direito ao desenvolvimento não significava que a componente individual desse direito não fosse relevante; pelo contrário, Mbaye salientou que para determinar o estado de desenvolvimento (coletivo), recorre-se necessariamente a critérios centrados no indivíduo, nomeadamente ‘a taxa de natalidade; taxa de

11 Mbaye (n 10) 515.

12 Mbaye (n 10) 529.

13 S Marks ‘Emerging human rights: a new generation for the 1980s’ (1981) 33 *Rutgers Law Review* (1981) 435–452; P Alston ‘A third generation of solidarity rights: progressive developments of obfuscation of international human rights law’ (1982) 29 3 *Netherlands International Law Review* 307–322; J Donnelley ‘In search of the unicorn. The jurisprudence and politics of the right to development’ (1985) 15 *California Western International Law Journal* 473–509.

14 K Mickelson, ‘Rhetoric and rage: third world voices in international legal discourse’ (1998) 16 2 *Wisconsin International Law Journal* 376.

15 K Mbaye ‘Le droit au développement’ in René-Jean Dupuy (ed) Workshop on the right to development at the international level: workshop the Hague 16-18 October 1979 (1979) 74. Esta tese já havia sido mencionada na sua aula inaugural vide supra nota de rodapé n 10.

16 Mbaye (n 15) 74.

mortalidade; a idade média da população.¹⁷ Por sua vez, Abi-Saab argumentou que o direito ao desenvolvimento na sua vertente de direito individual, tratava-se de um conjunto de direitos já reconhecidos em convenções internacionais, pelo que este direito só ganha uma nova dimensão enquanto direito coletivo.¹⁸

No que se refere à legitimidade passiva, ou seja, ao dever de providenciar pelo gozo e fruição do direito ao desenvolvimento, não restam dúvidas – tendo em conta o estipulado no n.º 2 do artigo 22 – que este recai sobre os Estados.¹⁹ Na verdade, o jurista Senegalês Mbaye defende que o direito ao desenvolvimento tem uma face doméstica e outra internacional, tratando-se, portanto de ‘um poder ou uma prerrogativa que os povos podem exigir aos seus Estados ou à comunidade internacional.’²⁰

2.2 O direito ao desenvolvimento na Carta Africana

Foi anteriormente explanado que a Carta Africana consagra o desenvolvimento como direito humano com caráter vinculativo – constituindo assim o expoente máximo deste novo paradigma que vinha sendo discutido desde finais das décadas de 60 e início de 70. A consagração do direito ao desenvolvimento na Carta Africana encontrou alicerce na construção africana do conceito desenvolvimento que já vinha sendo desenvolvido desde a formulação de Kéba Mbaye no início dos anos 70. Assim, tendo em conta a origem africana²¹ da formulação do direito ao desenvolvimento enquanto direito humano, não é, portanto, de estranhar a sua consagração na Carta Africana adotada no início dos anos 80. Desde logo, no preâmbulo da Carta Africana, o legislador frisa a necessidade de tomar em consideração o direito ao desenvolvimento, como um dos valores fundamentais e norteadores deste instrumento jurídico de cariz regional.²² Por sua vez,

17 Mbaye (n 15) 74–75.

18 G Abi-Saab ‘The legal formulation of a right to development: subjects and content’ in René-Jean Dupuy (ed) Workshop on the right to development at the international level: workshop the Hague 16-18 October 1979 (1979).

19 No entanto, segundo Ouguergouz, apesar de não existir um instrumento vinculativo que imponha o dever a todos os Estados, o n.º 2 do artigo 22.º diz respeito aos Estados em geral e não apenas aos que fazem parte da Carta Africana, consequentemente a responsabilidade de implementar o direito ao desenvolvimento recai sobre a comunidade internacional e não apenas sobre os Estados-Parte da Carta Africana. *Vide*, Ouguergouz (n 10) 308-9.

20 Mbaye (n 15) 77; Mbaye (n 3) 208.

21 Viljoen (n 10) 226.

22 O parágrafo 8.º do preâmbulo salienta o fato de que, para o futuro, é essencial dedicar uma particular atenção ao direito ao desenvolvimento; que os direitos civis e políticos são indissociáveis dos direitos económicos, sociais e culturais, tanto na sua conceção como na sua universalidade, e que a satisfação dos direitos económicos, sociais e culturais garante o gozo dos direitos civis e políticos.’ Através desta formulação, a Carta Africana procedeu a uma rutura com os paradigmas anteriores de Direito Internacional e reconheceu, *inter alia*, a indissociabilidade entre os Direitos Civis e Políticos e os Direitos, Económicos, Sociais e Culturais e simultaneamente estabeleceu o desenvolvimento como um direito humano.

o artigo 22.º consagra o direito ao desenvolvimento com a seguinte formulação:

1. Todos os povos têm direito ao seu desenvolvimento económico, social e cultural, no estrito respeito da sua liberdade e da sua identidade, e ao gozo igual do património comum da humanidade.
2. Os Estados têm o dever, separadamente ou em cooperação, de assegurar o exercício do direito ao desenvolvimento.

A Carta Africana foi o primeiro e continua a ser único instrumento supranacional de carácter vinculativo que consagra o direito ao desenvolvimento.²³ Este instrumento regional, impõe aos signatários, nos termos do n.º 2 do artigo supramencionado, o dever de adotar medidas para o gozo efetivo do direito em causa. Não obstante o reconhecimento do direito ao desenvolvimento como um direito humano, a sua tipificação é lacónica uma vez que a Carta Africana não define desenvolvimento.²⁴

Para Ngang, Kamga e Gumede, a inexistência de um conceito comum de desenvolvimento é um dos principais motivos de divergência doutrinária sobre o direito ao desenvolvimento. Ora, a doutrina questiona se verdadeiramente existe ou não este direito.²⁵ Os mesmos autores defendem que providenciar uma definição unânime de direito ao desenvolvimento, não é apenas impossível, como também não é necessário, antes pelo contrário que tal conceito deve ser compreendido tendo em conta o contexto específico.²⁶

Independentemente de não ser possível providenciar por uma definição unânime de direito ao desenvolvimento, importa salientar a Declaração sobre o Direito ao Desenvolvimento (DDD)²⁷ das Nações Unidas, uma vez que este é o único instrumento jurídico supranacional – ainda que sem carácter vinculativo – que logrou proceder à definição do direito ao desenvolvimento.²⁸ Assim, o artigo n.º 1 do artigo 1.º da DDD estipula que:

o direito ao desenvolvimento é um direito humano inalienável em virtude do qual todos os seres humanos e todos os povos têm o direito de participar, de contribuir e de gozar o desenvolvimento económico, social, cultural e político, no qual todos os direitos humanos e liberdades fundamentais se possam plenamente realizar.

Por sua vez, a Comissão Africana dos Direitos Humanos e dos Povos²⁹ reconheceu que esta declaração das Nações Unidas nesta matéria constitui o ‘reconhecimento político e legal mais avançado desse direito

23 Viljoen (n 10) 226; K Mbaye (n 3) 185.

24 Ouguergouz (n 10) 307.

25 CC Ngang *et al* ‘Introduction: the right to development in broad perspective’ in CC Ngang *et al* (eds) *Perspectives on the right to development* (2018) 2.

26 Ngang *et al* (n 25) 2-3.

27 A/RES/41/128, adotada pela resolução 41/128 da Assembleia das Nações Unidas, de 4 de dezembro de 1986. Pode-se encontrar uma tradução portuguesa no <http://gddc.ministeriopublico.pt/sites/default/files/decl-dtodesenvolvimento.pdf> (consultado no dia 31 julho 2019).

28 Como se verá mais adiante, a própria Comissão tem recorrido à DDD para esclarecer o conteúdo do direito ao desenvolvimento. Ademais, Ouguergouz também defende que se pode recorrer aos instrumentos das Nações Unidas para esclarecer o conteúdo deste direito. Vide Ouguergouz (n 10) 307.

29 Doravante a Comissão.

a nível internacional'.³⁰ A Comissão estipulou que o direito ao desenvolvimento tem de ser entendido 'como um direito inalienável, individual ou coletivo, de participar de todas as formas de desenvolvimento, através da plena realização de todos os direitos fundamentais e do gozo dos mesmos sem restrições injustificáveis'.³¹

Relativamente ao sentido de direito ao desenvolvimento consagrado na Carta Africana, Kéba Mbaye considerou 'precipitada' a conclusão que classifica este direito como coletivo, na medida em que defendeu o mesmo autor, este instrumento normativo consagra o direito ao desenvolvimento simultaneamente como um direito 'coletivo e individual'.³² No entanto, a maioria da doutrina tem entendido que na sua dimensão individual, este direito nada acresce, pois trata-se de 'direito síntese' englobando outros direitos.³³ Por conseguinte, é na sua perspetiva de direito coletivo que este direito traz uma nova dimensão ao debate dos direitos humanos.

Também parece ser este o sentido do direito ao desenvolvimento consagrado na Carta Africana, que se encontra consagrado estruturalmente na parte referente aos direitos coletivos, os designados direitos dos povos, mas também, pela opção do legislador africano de realçar expressamente o caráter coletivo deste como um direito através da utilização da expressão 'todos os povos'.³⁴ Por sua vez, a interpretação da própria Comissão nesta matéria tem evoluído e num sentido de maior clarificação do conteúdo normativo deste direito. Na verdade, nas comunicações *Sudan Human Rights Organisation e Outros v Sudão* considerou que o direito ao desenvolvimento previsto no artigo 22.º constitui um direito coletivo, cujo titular é o povo.³⁵ Mais recentemente, na comunicação *Open Society Justice Initiative v Costa de Marfim*, a Comissão veio salientar que não obstante a referência aos 'povos' no artigo 22.º, não se deve 'interpretar o direito ao desenvolvimento como sendo única e exclusivamente coletivo,' reconhecendo o papel do indivíduo na materialização deste direito.³⁶ Ainda assim, o que é certo é que a arguição do direito ao desenvolvimento nos termos da Carta Africana tem sido feita até ao momento num contexto de violações de direitos de grupos e não a título individual. Assim, pode-se arguir que nos termos da Carta Africana, a legitimidade ativa relativamente ao direito ao desenvolvimento pertence aos 'povos', que neste caso pode ser entendido como uma comunidade, a população de um país ou até os habitantes do próprio continente africano num todo.³⁷

30 *Society Justice Initiative v Côte d'Ivoire*, Comunicação n.º 318/06, Comissão Africana dos Direitos Humanos e dos Povos, 38.º Relatório de Atividades (2015), para. 181.

31 n 30, para 183.

32 Mbaye (n 3) 185.

33 Ougergouz (n 10)303-6; Viljoen (n 10) 226.

34 Artigo 22(1) da Carta Africana

35 *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 218.

36 n 30, para 183.

37 Viljoen (n 10) 226.

Entretanto, no contexto específico da Carta Africana, e tendo em conta que este é o único instrumento supranacional com carácter vinculativo nesta matéria, importa salientar que recai não apenas sobre os Estados-Parte da Carta Africana o dever vinculativo expresso de implementação do preceituado; ainda sobre eles recai a responsabilidade principal de assegurar o gozo do direito ao desenvolvimento aos povos africanos. Desse modo, tendo em conta o carácter vinculativo do direito ao desenvolvimento no sistema africano de direitos humanos, assiste aos nacionais dos Estados-Parte da Carta Africana a prerrogativa de recorrer tanto aos tribunais domésticos, como aos mecanismos regionais – Comissão e Tribunal – para fazer valer o seu direito ao desenvolvimento. Assim, uma das consequências da adesão à Carta Africana nos termos do n.º 2 do artigo 22.º é a obrigação imposta aos Estados Partes de criar um ambiente propício para ‘garantir o exercício do direito ao desenvolvimento’.³⁸ No entanto, de acordo com a interpretação da Comissão, esta obrigação é de implementação progressiva, pelo que cabe aos Estados-Parte:

uma obrigação mediata de cumprir os requisitos para o gozo desse direito e uma obrigação imediata de, pelo menos, criar oportunidades e ambiente propícios ao gozo dos referidos direitos.³⁹

Pode-se, portanto, concluir que o direito ao desenvolvimento tem uma natureza *sui generis*⁴⁰ na medida em que pode ser considerado como comportando vários outros direitos humanos, tanto os direitos civis e políticos, como os direitos económicos, sociais e culturais. Por conseguinte, o direito ao desenvolvimento pode ser compreendido como um direito em si mesmo, assim como traduzir-se em vários outros direitos humanos previstos na Carta Africana. Esta visão mais não é do que o reflexo de uma das características fundamentais da Carta Africana e que norteou todo o processo de elaboração da mesma: princípio da invisibilidade dos direitos humanos.⁴¹ Na verdade, interdependência e indivisibilidade são as premissas fundamentais para o direito ao desenvolvimento que coloca a pessoa humana como ‘sujeito central do desenvolvimento’ e simultaneamente como agente ativo e beneficiário deste direito.⁴²

Assim, a consagração de direito ao desenvolvimento na Carta Africana reflete aquilo que são as características essenciais e distintivas deste mecanismo regional de promoção e proteção de direitos humanos. O direito ao desenvolvimento na Carta Africana pode ser visto por um lado enquanto cômputo de um direito indivisível cuja consagração reverte não só como direito do indivíduo, mas sobretudo como um direito coletivo, um direito dos povos, realçando assim a

38 E Durojaye *et al* ‘Access to justice as a mechanism for the enforcement of the right to development in Africa’ in CC Ngang *et al* (eds) *Perspectives on the right to development* (2018) 65.

39 n 30, para 183.

40 Mbaye (n 3) 187.

41 A Baldé *O sistema Africano de direitos humanos e a experiência dos Países Africanos de Língua Oficial Portuguesa* (UCP: 2017) 75-76.

42 A/RES/41/128, Artigo 2(1) e também o artigo 9(1).

componente de solidariedade deste direito e enquadrando-o no grupo de terceira geração de direitos humanos.

A análise precedente sobre as disposições da Carta africana relativamente ao direito ao desenvolvimento – *máxime* o parágrafo 8º do preâmbulo e artigo 22.º – evidenciou uma consagração lacónica do direito ao desenvolvimento e a necessidade de contextualizar este exercício com exemplos concretos providenciados pela análise jurisprudencial, para assim se obter uma visão global do direito ao desenvolvimento no contexto africano. Procede-se de seguida à análise da jurisprudência da Comissão Africana e do Tribunal Africano dos Direitos Humanos e dos Povos que abrange a proteção do direito ora em causa.

2.3 Direito ao desenvolvimento na jurisprudência da Comissão e do Tribunal Africano dos Direitos Humanos e dos Povos

Existe alguma jurisprudência da Comissão e pouca do Tribunal Africano dos Direitos do Humanos e dos Povos que tratam da matéria do direito ao desenvolvimento e cuja análise se procede de seguida. No âmbito da comunicação n.º 227/99, *República Democrática do Congo v Burundi, Ruanda e Uganda*⁴³ a Comissão teve a oportunidade de se debruçar pela primeira vez sobre as questões de mérito relativo ao direito ao desenvolvimento, tendo concluído que houve violação desse direito por força de violação de um outro direito consagrado na Carta Africana: o direito à livre disposição da riqueza e dos recursos naturais, consagrado no artigo 21.º. O caso vertia sobre a alegada violação de direitos humanos – incluindo massacres, estupro, disseminação de doenças sexualmente transmissíveis – cometida pelas forças armadas dos três países na República Democrática do Congo. Entendeu a Comissão que:⁴⁴

A privação do direito do povo da República Democrática do Congo, neste caso, a dispor livremente da sua riqueza e recursos naturais deu azo a uma outra violação – do direito ao seu desenvolvimento económico, social e cultural e ao dever geral dos Estados de individual e coletivamente, assegurar o exercício do direito ao desenvolvimento, garantido segundo o artigo 22.º da Carta Africana.

Neste caso, portanto, a violação do direito ao desenvolvimento do Estado da República Democrática do Congo vem como consequência da própria violação do artigo 21.º imputando assim aos Estados demandados a exploração ilegal dos recursos naturais do demandante, através de *inter alia*, ‘confiscação, a extração e o monopólio forçado e a fixação de preços’.⁴⁵ Através desta decisão que condenou simultaneamente três países relativamente à violação do direito ao

43 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003). Para uma tradução da decisão para português *vide* <http://caselaw.ihrrda.org/pt/doc/227.99/view/pt/#merits> (consultado 7 agosto 2019).

44 Para 95.

45 Para 93.

desenvolvimento, a Comissão vem reforçar de certa forma, a interpretação anteriormente defendida relativamente à legitimidade passiva nesta questão. Assim, pode-se afirmar que através desta decisão confirmou-se a possibilidade de responsabilizar não apenas um Estado em particular, mas um conjunto de Estado.

Já, nas comunicações n.ºs 279/03 e 296/05,⁴⁶ *Sudan Human Rights Organisation e Outros v Sudão*, os queixosos alegaram que o governo do Sudão cometeu violações sistemáticas e maciças contra a população negra pertencentes a algumas das tribos em Darfur, tendo originado o desalojamento forçado daquela população. Os queixosos alegaram ainda que os ataques perpetrados pela milícia árabe levaram ao desalojamento forçado de populações negras do Darfur e consequentemente resultando na sonegação de oportunidades de desenvolvimento económico, social e cultural.⁴⁷ Arguiram que o desalojamento forçado e as subsequentes violações consubstanciam violação do direito à alimentação adequada e à água implicitamente garantidos nos artigos 4.º, 16.º e 22.º da Carta Africana.⁴⁸ Tendo sido chamada a apreciar o caso, a Comissão Africana entendeu ter havido violação do direito ao desenvolvimento por parte do Governo Sudanês salientando que os ataques e desalojamentos forçados por um lado levaram à impossibilidade destes se envolverem 'em atividades económicas, sociais e culturais' e por outro lado interferiram com o direito à educação das crianças.⁴⁹

Na comunicação n.º 273/03 *Centre for Minority Rights Development e Minority Rights Group (em nome do Endorois Welfare Council) v Quênia*,⁵⁰ os queixosos denunciaram as expulsões forçadas à comunidade indígena dos Endorois das suas terras ancestrais e através disso alegaram a violação de vários direitos da Carta Africana incluindo o direito ao desenvolvimento. Segundo os queixosos o Estado demandado procedeu à criação de uma zona de reserva de caça nas terras ancestrais do povo Endorois forçando-o a abandonar o seu território. Os queixosos alegam que a violação do artigo 22.º se deu não só devido à falta de participação dos Endorois no processo de desenvolvimento⁵¹ delineado pelo governo queniano, mas também

46 A Comissão consolidou as duas comunicações durante a 39.ª sessão ordinária; *vide* (n 47) para 33.

47 Para 224.

48 Para 124. Para mais detalhe sobre a arguição dos queixosos, *vide* a petição inicial, em particular parágrafos 69 e seguintes, apresentada à Comissão e disponível https://www.escri-net.org/sites/default/files/Sudan_Petition_%28Main%29.pdf (consultado 7/08/2019). Os queixosos arguiram que houve violação implícita destes direitos, por virtude de o Governo do Sudão, por um lado 'não ter respeitado o direito à alimentação adequada e o direito à água sendo cúmplice de saques e destruição de alimentos, plantações e gado, bem como envenenamento de poços' e por outro lado 'por não ter protegido os moradores dessas comunidades de pilhagem, destruição de alimentos, cultura e gado, bem como envenenamento de poços' (*in* para. 87 da petição inicial).

49 Para 224.

50 *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009). A versão portuguesa da mesma pode ser consultada na <http://caselaw.ihra.org/pt/doc/276.03/view/pt/> (consultado 7 agosto 2019)

51 Para 125.

tendo em conta o fato de terem sido excluídos dos benefícios desse mesmo desenvolvimento.⁵² Na sua análise a Comissão salientou que o direito ao desenvolvimento implica um duplo teste, isso é, a participação dos beneficiários no processo de desenvolvimento, bem como no usufruto dos resultados. Isto significa que a implementação deste direito tem necessariamente que ter em conta tanto os meios como o fim, pelo que o não cumprimento de quaisquer destes requisitos implica a violação do direito ao desenvolvimento.⁵³ A Comissão concluiu que houve violação do artigo 22.º uma vez que competia ao Estado queniano ‘assegurar que os Endorois não seriam excluídos do processo de desenvolvimento ou dos benefícios daí decorrentes.’⁵⁴

Na comunicação n.º 318/06 *Open Society Justice Initiative v Costa de Marfim*⁵⁵ o queixoso alegou uma discriminação sistemática e recorrente da população Dioula, consubstanciando entre outros, a violação do artigo 22.º da Carta Africana. Na verdade, segundo os queixosos, desde 1993 que o Governo Costa Marfinense vinha sedimentando a ideologia do ‘ivoirinité’ alimentando assim xenofobia com vista a justificar a discriminação contra a população Dioula e a sua recusa em conceder nacionalidade a estes.⁵⁶ Em virtude de tais políticas Estatais a população Dioula viu-se privada de fato e de direito da nacionalidade marfinense encontrando-se numa situação de apatridismo. O queixoso alegou que houve violação do aludido artigo 22.º da Carta na medida em que ‘a negação arbitrária da nacionalidade impediu que os Dioulas atingissem suas ambições e todo o seu potencial humano’.⁵⁷ Na sua decisão, a Comissão considerou que a negação do direito à nacionalidade impediu os Dioulas de gozar e fruir de uma série de vantagens, nomeadamente foi-lhes vedada a possibilidade de, *inter alia*, ‘aceder a empregos públicos, participar da vida pública e política, de votar e ser votado.’⁵⁸ Consequentemente, a Comissão concluiu que houve violação do direito ao desenvolvimento nos termos previsto no artigo 22.º.⁵⁹ Importa salientar que esta comunicação veio confirmar caráter de direito desenvolvimento como direito síntese, na medida em que considerou especificamente que houve violação deste direito devido à sonegação do uso e fruição dos direitos económicos, sociais e culturais; mas também dos direitos civis e políticos.

Na comunicação n.º 393⁶⁰ *Institute for Human Rights and Development in Africa e outros v República Democrática do Congo*, os

52 Para 135.

53 Para 277.

54 Para 298.

55 n 30.

56 Vide a submissão adicional da demandante disponível no <https://www.justiceinitiative.org/uploads/017155cd-1795-4a0a-81bf-b3558ca89509/admissibility-submission-20090514.pdf> (consultado 7 agosto 2019).

57 Para 76.

58 Para 185.

59 Para 186.

60 *Institute for Human Rights and Development in Africa and Others v Democratic Republic of Congo*, Comunicação n.º 393/10, Comissão Africana de Direitos Humanos e dos Povos, 41.º Relatório de Atividade (2016).

queixosos em representação do povo Kilwa alegaram a violação de vários direitos consagrados na Carta Africana, incluindo o direito ao desenvolvimento. O incidente teve a sua origem na sequência de uma insurreição de um pequeno grupo rebelde na localidade de Kilwa. Como resposta o exército congolês equipado por uma empresa australiana de mineração saqueou e bombardeou a localidade levando à morte de pelo menos 70 pessoas. Os queixosos alegaram que a pilhagem e a destruição de utensílios de trabalho levou os habitantes de Kilwa à precariedade e à pobreza consubstanciando assim uma violação do direito económico ao desenvolvimento.⁶¹ Outrossim, os queixosos alegaram que a sepultura dos mortos em valas comuns constituiu uma afronta aos valores e tradições africanas e como tal uma violação do direito ao desenvolvimento cultural do povo Kilwa.⁶² No seu relatório a Comissão confirmou a alegação dos queixosos estabelecendo que houve uma violação do artigo 22.º por duas vias. Por um lado, verificou-se a violação do direito ao desenvolvimento económico da população Kilwa em virtude da destruição de bens e propriedades; assim como a destruição de infraestruturas nomeadamente escolas e centros de saúde.⁶³ Por outro lado, considerou ainda a Comissão que houve a violação do direito ao desenvolvimento cultural por força do impedimento de enterrar os mortos de acordo com as práticas tradicionais da comunidade Kilwa.⁶⁴

O caso *Comissão Africana dos Direitos Humanos e dos Povos v Quênia*⁶⁵ é o único caso até ao momento em que houve uma condenação por violação do artigo 22.º pelo Tribunal Africano dos Direitos Humanos e dos Povos. A relevância desta condenação impõe-se desde logo pela distinta natureza jurídica das decisões proferidas pela Comissão e pelo Tribunal, sendo certo que as primeiras são meras recomendações, enquanto que as últimas têm um carácter vinculativo com força executória para as partes. O demandante alegou que houve violação do artigo 22.º por parte do Estado Queniano em virtude de expulsão forçada do povo Ogiek das suas terras ancestrais na Floresta Mau; assim como pelo fato de o Governo não ter consultado ou obtido consentimento prévio relativamente às políticas de desenvolvimento levadas a cabo nesse território.⁶⁶ O Tribunal condenou o Estado Queniano por violação do direito ao desenvolvimento, sublinhando que esta se verificou não só em virtude da expulsão forçada, mas também por conta da ausência de consulta à comunidade Ogiek na implementação de políticas de desenvolvimento nas suas terras ancestrais.⁶⁷

Finda a análise sobre o quadro jurídico e a jurisprudência do sistema africano relativo ao direito ao desenvolvimento, procedemos

61 Para 92.

62 Para 93.

63 Para 146.

64 Para 147.

65 *African Commission on Human and Peoples' Rights v Kenya* (2017) Application 6/2012.

66 Para 202.

67 Paras 207-210.

para um sumário do que a nosso ver releva nesta questão, tendo em conta sobretudo a visão da Comissão, uma vez que tem sido esta a principal responsável pelo esclarecimento do conteúdo e alcance do direito ao desenvolvimento no contexto africano. Assim, o pioneirismo na consagração do direito ao desenvolvimento conseguido pela Carta Africana, não logrou, contudo, proceder à definição do conteúdo deste direito. O trabalho de esclarecimento do conteúdo deste direito tem sido essencialmente feito pela Comissão, que para tal tem recorrido à doutrina, à visão das Nações Unidas e à jurisprudência do sistema interamericano de direitos humanos sobre esta matéria.

Outrossim, considera-se que o direito ao desenvolvimento tem simultaneamente uma natureza adjetiva e substantiva. Quanto ao direito adjetivo ou processual a Comissão salientou que o cumprimento do direito ao desenvolvimento implica proporcionar a participação da comunidade visada na tomada de decisões. Portanto, trata-se aqui de uma obrigação de meio, ou seja, uma obrigação processual.⁶⁸ Por sua vez, a vertente substantiva do direito ao desenvolvimento também foi objeto de análise, tendo a Comissão definido o que entende por direito ao desenvolvimento económico e o direito ao desenvolvimento cultural. A esse respeito, pode-se avançar de forma resumida que a Comissão entendeu que o direito ao desenvolvimento implica o direito de participar no processo e de beneficiar dos resultados de desenvolvimento, assim como o dever de respeitar práticas culturais, designadamente ritos funerários.⁶⁹

Finalmente, importa frisar que tendo em conta os casos apresentados perante a Comissão Africana, pode-se concluir que a violação do direito ao desenvolvimento tem implicado a violação de outros direitos, designadamente, a violação do direito à cultura, à terra, aos recursos naturais, à propriedade, à educação. Faz sentido que assim seja, uma vez que como se expôs anteriormente, o gozo e fruição do direito ao desenvolvimento acarreta também o gozo e fruição de outros direitos previstos na Carta Africana. A jurisprudência do Tribunal nesta matéria, se bem que insípida, confirma esta tese.

3 A PROTEÇÃO DO DIREITO AO DESENVOLVIMENTO NO CONTEXTO DOS PALOP

3.1 As Constituições dos PALOP e o direito ao desenvolvimento

As constituições dos PALOP⁷⁰ atualmente em vigor e aqui analisadas,

68 n 50, para 277.

69 n 60, para 146.

70 Para uma consulta de todas as constituições dos PALOP em vigor *vide* JB Gouveia *As Constituições dos Estados de Língua Portuguesa* (2014) 4.^ªed.

pertencem à chamada ‘segunda Era constitucional’⁷¹ que se iniciou nos anos 90, dando lugar à instalação de regimes democráticos e abertura ao multipartidarismo que pôs fim ao sistema de partido único que vigorava até então.⁷²

Na maioria dos países PALOP este processo, após vicissitudes várias, levaria à adoção de um texto constitucional novo. Segundo Luís Fonseca,

a evolução político-constitucional registada nos países da Comunidade de Língua Portuguesa nos últimos trinta anos espelha os avanços políticos fundamentais no que tange à conquista pelos seus povos de direitos políticos, sociais e económicos que, consagrados nas normas constitucionais avançadas, colocam os textos fundamentais vigentes nos Estados membros da nossa comunidade em linha com os mais altos padrões de prática política e social.⁷³

A Guiné-Bissau constitui uma exceção a este novo período constitucional que marcou o desenvolvimento político dos PALOP. A Lei Fundamental passou por revisões pontuais ao texto de 1984, com o objetivo de responder aos novos desafios impostos pela abertura democrática ⁷⁴ sem que, no entanto, de tal exercício tenha resultado na adoção de uma nova constituição.

Nos textos constitucionais dos PALOP em vigor e contrariamente ao que está previsto na Constituição Portuguesa,⁷⁵ não existe referência expressa ao direito ao desenvolvimento. Com exceção da Constituição da Guiné-Bissau,⁷⁶ as constituições dos PALOP reconhecem apenas a relevância de desenvolvimento enquanto um dos princípios e valores estruturantes das normas jurídicas nelas consagradas.

Nas constituições em alusão, a referência feita ao desenvolvimento consta do preâmbulo ou de normas integrantes do texto constitucional. A importância da menção de desenvolvimento no preâmbulo, assim como nos princípios estruturantes de uma constituição prende-se, desde logo com o fato de servir para espelhar aquilo que o legislador constitucional entende serem os valores essenciais e que devem nortear e servir de guia para a interpretação e aplicação da mesma.

71 Gouveia (n 70) 28ss.

72 Estas mudanças para regimes democráticos não é, contudo, um fenómeno exclusivo dos PALOP, tendo acontecido um pouco por toda a África na designada ‘terceira onda de democratização’ e resultaram no que Fombad designou de ‘uma fervorosa produção de constituições’ vide CM Fombad ‘The evolution of modern African constitutions: a retrospective perspective’ in CM Fombad (ed) *The separation of powers in African constitutionalism* (2016) 13.

73 L Fonseca ‘Apresentação’ in FAA Mourão *et al* (eds) *As Constituições dos Países de Língua Portuguesa Comentadas* Vol. 91 (Edições do Senado Federal: 2008) 11. Importa referenciar aqui que para além dos PALOP fazem parte desta comunidade de língua portuguesa Brasil, Portugal e Timor Leste.

74 Para uma contextualização breve do contexto político-social durante a adoção destas constituições vide JB Gouveia (n 70); JB Gouveia e FP Coutinho (coordenação) *O Direito Internacional Público nos Direitos de Língua Portuguesa* (2018)

75 O artigo 7(3) da Constituição Portuguesa dispõe: ‘Portugal reconhece o direito dos povos à autodeterminação e independência e ao desenvolvimento, bem como o direito à insurreição contra todas as formas de opressão.’

76 O texto constitucional foi revisto em 1993 e aprovado em 1996.

Por conseguinte, nos casos da Constituição da República de Angola (CRA)⁷⁷ e a Constituição da República de Cabo Verde (CRCV)⁷⁸ a referência à relevância do desenvolvimento, encontra-se desde logo salientada no preâmbulo, enquanto que esta mesma reflexão no caso da Constituição da República de Moçambique (CRM)⁷⁹ e da Constituição da República de São Tomé e Príncipe (CRSTP)⁸⁰ encontra-se prevista no texto constitucional.

Assim, a CRA no seu preâmbulo estabelece o compromisso do Estado angolano com ‘a reconciliação, a igualdade, a justiça e o desenvolvimento’, reiterando a necessidade de a constituição servir de alicerce ao ‘desenvolvimento’ e reconhecendo ainda a necessidade de assegurar ‘os mais altos anseios do povo angolano de estabilidade, dignidade, liberdade, desenvolvimento e edificação de um país moderno, próspero, inclusivo, democrático e socialmente justo.’⁸¹

Por sua vez, o preâmbulo da CRCV frisa que a revisão constitucional almejou justamente criar condições para o ‘exercício do poder e da cidadania num clima de liberdade, paz e justiça, fundamento de todo o desenvolvimento económico, social e cultural de Cabo Verde’, estipulando que a Administração deverá estar ‘ao serviço dos cidadãos e concebida como instrumento de desenvolvimento.’ Além do mais, segundo o artigo 1.º CRCV, o legislador cabo-verdiano comprometeu-se:

à remoção de todos os obstáculos que possam impedir o pleno desenvolvimento da pessoa humana e limitar a igualdade dos cidadãos e a efetiva participação destes na organização política, social, económica, social e cultural do Estado e da sociedade cabo-verdiana.⁸²

O preâmbulo da CRSTP reconhece como uma das razões para a revisão constitucional o dever ‘de promover um desenvolvimento equilibrado e harmonioso de São Tomé e Príncipe’. Por sua vez o n.º 1 do artigo 9.º reconhece que a organização económica do país tem como objetivo ‘a independência nacional, o desenvolvimento e a justiça social.’

Apesar do preâmbulo da CRM não fazer referência ao desenvolvimento, o artigo 11.º do texto constitucional prevê como um dos objetivos do Estado moçambicano a ‘promoção do desenvolvimento equilibrado, económico, social e regional do país;’⁸³ assim como ‘o desenvolvimento da economia e o progresso da ciência e

77 Aprovada em fevereiro de 2010.

78 Aprovada em setembro de 1992 (com as alterações introduzidas pela Lei Constitucional n.º 1/VII//2010, Boletim Oficial da República de Cabo verde, I Série, n.º 17, de 3 de maio de 2010).

79 Aprovada em novembro de 2004.

80 Aprovada em 1990.

81 Para uma análise detalhada do direito ao desenvolvimento no contexto angolano vide JA Francisco ‘O desenvolvimento sustentável: um desafio na era global’ (2017) *LUCERE Revista Académica da Universidade Católica de Angola*, disponível <https://ilpi.org/wp-content/uploads/2017/05/Summary.-Francisco-08.03.017.pdf> (consultado 10/8/2019) e JA Francisco ‘El derecho al desarrollo y desarrollo humano sostenible: un análisis de la realidad em Angola’, manuscrito inédito de mestrado, Universidade de Valência, 2016.

82 Artigo 1(4).

83 Artigo 11(d).

da técnica.⁸⁴ Por sua vez a alínea e) do artigo 11.º dispõe que um dos objetivos do Estado é ‘a defesa e a promoção dos direitos humanos e da igualdade dos cidadãos perante a lei.’

No caso da Constituição da Guiné-Bissau, apesar da ausência do reconhecimento do desenvolvimento, o artigo 58.º prevê, curiosamente, a realização progressiva dos direitos económicos e sociais, mas condicionando-a ao desenvolvimento do país.⁸⁵ Por sua vez, o legislador guineense estipulou que a autorização ao investimento estrangeiro no país está sujeita à sua utilidade para o ‘desenvolvimento económico e social do país.’⁸⁶

Neste sentido, à exceção da CRGB, e resultado da leitura dos preceitos constitucionais anteriormente mencionados, pode-se concluir pelo reconhecimento do desenvolvimento como um dos pilares do Estado democrático e multipartidário nos PALOP. O desenvolvimento é previsto nestas constituições – não na ótica de um *direito* ao desenvolvimento – mas antes como um instrumento e elemento que deverá nortear as políticas públicas destes Estados. O legislador constitucional pretendeu estabelecer o dever dos Estados de promover e proteger os direitos humanos em geral, incluindo o dever de assegurar o desenvolvimento destes países.

Outrossim, a doutrina salienta que de um modo geral as constituições dos PALOP consagraram no seu catálogo, para além dos direitos civis e políticos, também os direitos económicos, sociais e culturais. Aliás como salienta Bacelar Gouveia:

do ponto de vista de proteção dos direitos fundamentais, cumpre também observar que o caminho percorrido pelos Direitos Constitucionais de Língua Portuguesa revela uma generalizada aceitação de altos padrões de proteção desses mesmos direitos, o que se pode comprovar através da observação dos catálogos, mais ou menos generosos, da sua consagração.⁸⁷

Assim, não obstante o fato de o direito ao desenvolvimento não estar expressamente reconhecido nas constituições dos PALOP, entendemos que as constituições dos PALOP estipulam a proteção deste direito por duas vias. Por um lado, as constituições em análise protegem o direito ao desenvolvimento como um direito fundamental implícito e por outro lado, através da proteção oferecida pela Carta Africana. Procede-se de seguida a uma análise detalhada dos argumentos aqui enunciados.

84 Artigo 11(h).

85 De acordo com apesar do legislador constitucional guineense consagrar os direitos económicos, sociais e culturais ‘realisticamente, o art. 58 impõe ao Estado a tarefa de criação das condições necessárias à sua realização conforme as condições ‘de desenvolvimento do país’ A Duarte Silva ‘O Constitucionalismo da Guiné-Bissau’ in FAA Mourão *et al* (eds) *As Constituições dos Países de Língua Portuguesa Comentadas* Vol. 91 (2008) 485.

86 Como salienta João Espírito Santo ‘... o investimento estrangeiro não está garantido em termos absolutos, estando sujeito à limitação da sua relevância para o desenvolvimento económico e social do país...’ João Espírito Santo ‘Artigo 13.’ in C Monteiro *et al* *Constituição da República da Guiné-Bissau Anotada* (Centro de Estudos e Apoio às Reformas Legislativas da Faculdade de Direito de Bissau: 2019) 42.

87 Gouveia (n 70) 49

3.2 O direito ao desenvolvimento como um direito fundamental implícito

Vimos que o conceito de desenvolvimento é considerado como um dos pilares basilares das constituições dos PALOP e enquanto tal, deverá nortear as políticas públicas dos Estados em causa. Importa analisar se existe ou não consagração constitucional de um direito fundamental ao desenvolvimento nestas constituições.

A este propósito, vamos começar por esclarecer o significado do conceito de direitos fundamentais, entendendo-se serem estes os direitos concedidos às pessoas face ao poder estatal e consagradas constitucionalmente e como tal dotadas de força vinculatória plena.⁸⁸ Desta definição resulta que uma das características essenciais dos direitos fundamentais é a sua consagração na constituição. Assim, segundo Alexandrino ‘os direitos fundamentais são *direitos previstos* na Constituição.’⁸⁹ Decorre deste argumento, tendo em conta a análise anterior, que direito ao desenvolvimento não estando expressamente previsto nas constituições dos PALOP, pressuporia *a priori*, que tal direito não seria um direito fundamental e consequentemente não teria dignidade constitucional.

No entanto, se por um lado na visão clássica os direitos fundamentais são os que estão expressamente previstos, isto é, positivados na constituição, a doutrina tem sublinhado a relevância dos direitos fundamentais em sentido material.⁹⁰ Neste sentido, Jorge Miranda defende que os direitos fundamentais decorrentes da lei e das regras de direito internacional⁹¹ são fundamentais em sentido material e não em sentido formal, uma vez que no conjunto do ordenamento jurídico desempenham uma função substantiva idêntica mas não beneficiam das garantias inerentes às normas constitucionais, *maxime* a rigidez ligada à revisão constitucional e à fiscalização da constitucionalidade.⁹²

Por conseguinte, a constituição em sentido material, remete para princípio da não taxatividade dos direitos fundamentais. Na verdade, a ideia dos direitos constitucionais em sentido material põe em evidência o princípio da cláusula aberta da constituição. Este princípio, tem como pressuposto a ideia de que poderão existir outros direitos fundamentais para além dos que estão expressamente i.e. formalmente - previstos e positivados na lei constitucional, através de uma enumeração aberta

88 Sobre a definição de direitos fundamentais *vide*, entre outros, JM Alexandrino *Direitos Fundamentais: introdução Geral* (Principia: 2007) 16; J Miranda *Direitos Fundamentais* 2.^a edição (Almedina: 2018) 11e ss.; JB Gouveia *Direito Constitucional de Moçambique* (2015) 297 e ss. e JEM Machado *et al* *Direito Constitucional Angolano* 4.^a edição (2017) 138-9.

89 JM Alexandrino (n 88) 35 (sublinhado do autor).

90 J Miranda (n 88) 14.

91 Incluindo por exemplo o direito ao desenvolvimento com consagração expressa e vinculativa através da Carta Africana de que os PALOP são signatários.

92 J Miranda *Curso de direito constitucional: estado e constitucionalismo, constituição, direitos fundamentais* (2016) 260.

com a possibilidade de adição de novos direitos.⁹³ No contexto específico dos PALOP, Bacelar Gouveia vem confirmar esta ideia ao salientar que ‘o sistema constitucional de direitos fundamentais nem sequer se pode considerar um sistema fechado, mas antes aberto,’⁹⁴ argumento que secundamos atendendo a que as constituições dos PALOP, numa fórmula quase idêntica, consagram o princípio da cláusula aberta.⁹⁵ Ao reconhecer o carácter não exaustivo dos direitos consagrados na constituição, os legisladores constitucionalistas dos PALOP estabeleceram um regime de direitos fundamentais implícito e com isso criaram um mecanismo para o aparecimento de direitos novos – incluindo o caso *sub júdice* de direito ao desenvolvimento – que gozarão da mesma dignidade constitucional daqueles que estão expressamente previstos nas constituições.⁹⁶

Reveste-se, pois, de suma importância, a existência de cláusulas abertas nas constituições, incluindo nas constituições dos PALOP na medida em que tais cláusulas favorecem a flexibilidade na incorporação de normas jurídicas internacionais essenciais para o ordenamento jurídico interno e a atribuição às mesmas de uma dignidade constitucional, sem necessariamente ter de passar por um processo moroso e por vezes rígido de revisão constitucional.

93 Alexandrino (n 88) 181.

94 Gouveia (n 88) 49.

95 O n.º 1 do artigo 26.º da CRA estipula ‘os direitos fundamentais estabelecidos na presente Constituição não excluem quaisquer outros constantes das leis e regras aplicáveis de direito internacional.’ O artigo 17.º da CRCV dispõe que ‘as leis ou convenções internacionais poderão consagrar direitos, liberdades e garantias não previstos na Constituição.’ O n.º do artigo 29.º da CRGB dispõe que ‘os direitos fundamentais consagrados na Constituição não excluem quaisquer outros constantes das demais leis da República e das regras aplicáveis de direito internacional.’ A magna carta moçambicana que segundo Bacelar Gouveia é pioneira na consagração de direitos fundamentais sob uma perspectiva internacionalista – estipula no seu 41.º da CRM estipula que ‘os direitos fundamentais consagrados na Constituição não excluem quaisquer outros constantes das leis.’ (vide JB Gouveia (*supra* n.º109) 315). Finalmente, o n.º do artigo 18.º da CRSTP que ‘os direitos consagrados nesta Constituição não excluem quaisquer que sejam previstos nas leis ou em regras de direitos internacionais’.

96 Sobre os direitos fundamentais em sentido material no contexto dos PALOP, *vide, inter alia*, MJ Carapêto ‘Direito internacional público na ordem jurídica de Angola’ in JB Gouveia e FP Coutinho (coordenação) *O Direito Internacional Público nos Direitos de Língua Portuguesa* (CEDIS: 2018) 30; JEM Machado *et al* (n 88) 155-6; JB Gouveia (n 70) 314-5; J Francisco (n 81) 121 e ss.; JP Delgado ‘O direito internacional público no direito Cabo-Verdiano’ JB Gouveia e FP Coutinho (coordenação) *O Direito Internacional Público nos Direitos de Língua Portuguesa* (CEDIS: 2018) 121, nota de rodapé 129. Importa ainda salientar que de acordo com Pina Delgado o Tribunal Constitucional Cabo-verdiano teve a oportunidade de se pronunciar sobre esta matéria e concluiu pela aplicação de quatro requisitos para a aplicação do art.º17.º da CRCV, designadamente ‘a) ausência de previsão na Constituição; b) natureza do direito, liberdade ou de garantia; c) previsão de um tratado do qual Cabo Verde seja parte ou alternativamente em lei; d) materialidade constitucional’.

3.3 A proteção do direito ao desenvolvimento através da aplicação da Carta Africana aos PALOP

Acresce a esta ideia da fundamentalidade implícita do direito ao desenvolvimento nos PALOP;⁹⁷ a da proteção deste direito por virtude da adesão destes países à Carta Africana e a consequente aplicação desta no ordenamento jurídico destes países. Como já referimos na primeira parte a Carta Africana é o único instrumento jurídico supranacional que estabelece o carácter vinculativo deste direito e consequentemente através do n.º2 do seu articulado 22.º impõe deveres aos Estados-Parte. Como consequência desse dever, Ouguergouz esclarece que ‘é nos Estados-Parte que recai a responsabilidade principal sobre o gozo dos povos do direito ao desenvolvimento.’⁹⁸ Assim, importa ter em consideração, não só o regime de aplicação de direito internacional nos ordenamentos jurídicos internos dos PALOP, mas também salientar a relevância de direitos humanos de fonte supranacional nestes mesmos ordenamentos jurídicos.

A existência de um direito ao desenvolvimento no contexto dos PALOP pode ser defendida por virtude de incorporação da Carta Africana nos ordenamentos jurídicos internos dos países em causa. O modelo de receção estipula a integração do direito internacional na ordem jurídica interna, enquanto tal e sem necessidade de transformação.⁹⁹ Na verdade, à exceção da Constituição de Guiné-Bissau,¹⁰⁰ todos PALOP regulam expressamente a incorporação de direito internacional público na ordem jurídica interna, através do modelo de receção numa formulação mais ou menos idêntica.¹⁰¹ Daí que Bacelar Gouveia tenha salientado que:

da leitura dos textos constitucionais [incluindo as constituições dos PALOP] permite chegar à conclusão de que em todos eles, direta ou indiretamente, os

97 Defendida na subsecção precedente.

98 Ouguergouz (n 10) 319

99 Gouveia, *Manual de Direito Internacional Público* (2013), 3.ª ed., 442; J Miranda *Curso de Direito Internacional Público* (2016), 6ª ed., 147.

100 FF Oliveira ‘A aplicação do direito internacional público na Guiné-Bissau’ in JB Gouveia e FP Coutinho (coordenação) *O Direito Internacional Público nos Direitos de Língua Portuguesa* (2018) 177; P Rosa Có, *A Carta Africana dos Direitos Humanos e dos Povos: entre a Tradição e a Modernidade*. Lisboa: policopiado, 2007, tese de mestrado apresentada na Faculdade de Direito de Lisboa.

101 O artigo 26.º, n.º da CRA dispõe ‘o Direito Internacional geral ou comum, recebido nos termos da presente Constituição, faz parte integrante da ordem jurídica angolana.’ O artigo 12.º, n.º da CRCV prevê ‘O Direito Internacional geral ou comum faz parte integrante da ordem jurídica cabo-verdiana.’ O artigo 18.º, n.º 1 da CRM estipula ‘Os tratados e acordos internacionais, validamente aprovados e ratificados, vigoram na ordem jurídica moçambicana, após a sua publicação oficial e enquanto vincularem internacionalmente o Estado de

direitos do homem, consagrados pelas ‘... regras aplicáveis do Direito Internacional...’, são assumidos como fonte interna dos direitos fundamentais.¹⁰²

Mais concretamente no que diz respeito à interpretação e integração de matéria de direitos humanos provenientes de fontes internacionais nos PALOP, existem dois regimes. Por um lado, as das constituições angolana e moçambicana que fazem referência expressa à Carta Africana e por outro lado, as demais constituições cujas previsões se limitam à Declaração Universal dos Direitos Humanos.

As constituições angolanas e moçambicanas remetem especificamente para a Carta Africana. Desde logo, a constituição angolana é considerada como um dos exemplos mais significativos de incorporação direta dos instrumentos internacionais de direitos humanos.¹⁰³ O legislador angolano, através do regime consagrado 26.º da constituição, estabelece de forma explícita e inequívoca o primado do direito internacional face ao ordenamento jurídico interno, escolhendo os ‘textos internacionais enquanto padrão de conformação,’¹⁰⁴ e impõe aos tribunais nacionais a aplicação de instrumentos jurídicos internacionais ainda que não tenham sido invocados pelas partes. Por sua vez a constituição moçambicana prevê no seu artigo 43.º que ‘os preceitos constitucionais relativos aos direitos fundamentais são interpretados e integrados de harmonia com a Declaração Universal dos Direitos do Homem e a Carta Africana dos Direitos do Homem e dos Povos.’ Naturalmente, o estipulado neste artigo impõe a conformação dos preceitos constitucionais com as normas de direitos humanos oriundas de fonte supranacional, designadamente a Carta Africana.¹⁰⁵

As constituições de Cabo Verde, Guiné-Bissau e São Tomé e Príncipe remetem apenas para a Declaração Universal dos Direitos Humanos.¹⁰⁶ Ainda que não haja um acolhimento expresso da Carta Africana nas constituições destes Estados, consideramos que a mesma

Moçambique.’ O artigo 13.º n.º 1 da CRSTP estipula ‘as normas e os princípios de Direito Internacional geral ou comum fazem parte integrante do Direito são-tomense.’ No entanto, apesar de a Constituição da Guiné-Bissau de acordo com o Pereira Coutinho primar pelo ‘mutismo,’ o Oliveira defende que ‘na falta de preceito de sentido oposto, é de concluir que o legislador aceita a receção automática do Direito Internacional Público comum ou geral.’ (vide: FP Coutinho ‘Relatório síntese: o direito internacional público nos direitos de língua Portuguesa’ in JB Gouveia e FP Coutinho (coordenação) *O direito internacional público nos direitos de língua Portuguesa* (2018) 17 e Oliveira (n 100) 177)

102 Gouveia (n 99) 448 (parênteses nosso).

103 Fombad (n 72) 42; Gouveia (n 99) 449.

104 Carapêto (n 96) 30.

105 FP Coutinho ‘O Direito Internacional na Ordem Jurídica Moçambicana’ in JB Gouveia e FP Coutinho (coordenação) *O direito internacional público nos direitos de língua Portuguesa* (2018) 239.

106 Assim, o n.º 3 do artigo 17.º da CRCV estabelece que ‘as normas constitucionais e legais relativas aos direitos fundamentais devem ser interpretadas e integradas de harmonia com a Declaração Universal dos Direitos do Homem.’ O artigo 29.º n.º 2 da CRGB estipula que ‘os preceitos constitucionais e legais relativos aos direitos fundamentais devem ser interpretados de harmonia com a Declaração Universal dos Direitos do Homem.’ O n.º 2 do artigo 18.º da CSTP dispõe que ‘os preceitos relativos a direitos fundamentais são interpretados e integrados de harmonia com a Declaração Universal dos Direitos do Homem.’

se aplica. Esta doutrina é defensável tendo em conta não só o fato destes países terem aderido à Carta Africana e como tal estando a ela vinculados, mas também porque nas respetivas constituições, a proteção de Direito Internacional dos Direitos Humanos assume especial relevância nos termos já descritos e tendo como consequência a exigência de conformação das normas constitucionais internas com o regime internacional nestas matérias.

Assim, a adesão dos PALOP à Carta Africana traduz-se na obrigatoriedade¹⁰⁷ de promover e proteger os direitos nele consagrados e conseqüentemente, a aplicação direta deste normativo legal nos ordenamentos jurídicos internos destes países, assistindo aos cidadãos dos PALOP um direito inalienável ao desenvolvimento.

4 CONCLUSÃO

A presente comunicação procurou explorar a questão do direito ao desenvolvimento com enfoque nos mecanismos da União Africana e na ordem jurídica interna dos países africanos de língua oficial portuguesa. Procurou-se refletir sobre a origem do direito ao desenvolvimento, salientando suas características essenciais. De seguida, fizemos uma análise da jurisprudência do sistema africano de direitos humanos e o posicionamento da Comissão e do Tribunal nesta matéria.

Apresentamos a perspetiva da África lusófona sobre a proteção constitucional do direito ao desenvolvimento partindo do princípio que 'as constituições são as bases essenciais para estabelecer uma agenda abrangente para a modernização e reconstrução política dos países em particular e do continente africano no geral'¹⁰⁸ e que são instrumentos normativos que desempenham um papel cada vez mais fundamental no dia a dia dos africanos. Relativamente às constituições dos PALOP, estas resultaram de demorado processo político que se iniciou com o fim do colonialismo, seguindo-se a instalação de um sistema de partido único e nalguns deles com instabilidade interna provocada por anos de guerras civis e culminando com a abertura democrática que se deu no início dos anos 90. Conseqüentemente, o processo de adoção da constituição na fase pós-1990 de abertura democrática, através de processos mais ou menos completos de revisão constitucional serve de fundamento e explicação para um maior ou menor destaque conferido ao Direito Internacional em geral e direitos humanos em particular.

Da apreciação crítica das constituições dos PALOP, resultou que, não obstante a inexistência de uma consagração expressa do direito ao desenvolvimento, pode-se ainda assim arguir pela proteção constitucional deste direito se conjugarmos a noção de direitos fundamentais implícitos com a imposição que emana da Carta Africana de observância dos direitos aí consagrados pelos Estados-Parte, assim

107 Sobre os deveres aos Estados-Parte que emanam da Carta Africana, *vide*, Balde (n 41) 144 e ss.

108 Fombad (n 72) 13.

como pela via do reconhecimento do direito internacional. Desta análise conclui-se pela existência de um direito inalienável ao desenvolvimento para os cidadãos dos PALOP, que impõe uma responsabilidade aos Estados de implementar políticas para a efetivação deste direito. Assim, se ao nível normativo a existência deste direito é inquestionável, o mesmo poderá não ser o caso na sua implementação prática.

Le temps du procès et la sécurité juridique des requérants dans la procédure devant la Cour africaine des droits de l'homme et des peuples

*Serges Frédéric Mboumagne Dzesseu**

RÉSUMÉ: La sécurité juridique des requérants, en matière contentieuse ou non, impose une certaine clarté, une précision des délais raisonnables afin de parer à l'instabilité des situations juridiques. La Cour africaine des droits de l'homme et des peuples pour aborder la question des délais, fait usage des dispositions du Protocole qui l'a créée ainsi que son Règlement intérieur, sans ignorer la jurisprudence en la matière. Le présent article propose une réflexion sur les délais dans la procédure devant la Cour africaine des droits de l'homme et des peuples afin d'apprécier leur raisonnable ou non et leurs impacts sur les droits des requérants à la justice. Par ce biais, il envisage ultimement de présenter des pistes de réformes au sujet du délai raisonnable dans la pratique de la Cour africaine autant en matière contentieuse que consultative. La conjugaison de la méthode juridique dans sa double dimension dogmatique et casuistique a permis de noter que la Cour détermine une des conditions de recevabilité des requêtes devant elle à partir de l'épuisement des voies de recours internes. Certes, mais c'est sa jurisprudence qui détermine le point de départ de la computation des délais en cette matière. Par ailleurs, l'on note une mise en œuvre de la souveraineté de la Cour à propos de la définition du point de départ de sa saisine. Cette situation concourt à former l'impression d'une tergiversation contraire à la recherche de la sécurité juridique et de la stabilité des situations juridiques des requérants. Or, la juridiction elle-même sanctionne, à travers ses œuvres prétoriques, les violations du droit à un délai raisonnable, composante du procès équitable. Pour rechercher le juste milieu de ces paradigmes, il faut tout de même reconnaître qu'ils sont mus par cette tendance qu'a le juge continental de se positionner en faveur des victimes des violations des droits de l'homme.

TITLE AND ABSTRACT IN ENGLISH:

The length of trial and the legal security of applicants in proceedings before the African Court on Human and Peoples' Rights

ABSTRACT: Legal certainty for the applicants in contentious or non-contentious matters requires a certain clarity, a precision of reasonable deadlines in order to avoid the instability of legal situations. The African Court on Human and Peoples' Rights, in addressing the issue of time, relies on the provisions of its Protocol and Rules of Procedure as well as relevant case law. The purpose of this article is to discuss timeframes in proceedings before the Court in order to assess whether they are

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reasonable or not and their impact on the applicants' right to justice. In this way, it ultimately intends to present proposals for reforms on reasonable time in the practice of the Court in contentious and advisory matters. The combination of the legal method in its dual dogmatic and casuistic dimension made it possible to note that the Court determines one of its admissibility conditions of application on the basis of the exhaustion of domestic remedies. However, its case law determines the starting point for the calculation of time in this respect. Besides, it appears that the Court exercises discretion in determining the date on which it should be seized. Such situation leads to the impression of uncertainty which is contrary to the need for legal certainty and the stability of the applicants' legal situation. The issue is that the Court, in its own judgments, sanctions violations of the right to be tried within a reasonable time, as a component of the right to a fair trial. In order to strike the correct balance in these paradigms, it must be acknowledged that they are justified by the Court's approach in favour of victims of human rights violations.

MOTS CLÉS: Cour africaine des droits de l'homme et des peuples, délai raisonnable, sécurité juridique, stabilité des situations juridiques, recevabilité, date retenue par la Cour africaine

SOMMAIRE:

1	Introduction	73
2	La souveraineté de la Cour africaine dans la détermination du délai raisonnable en matière de recevabilité, source d'insécurité juridique des requérants.....	75
2.1	La flexibilité dans la détermination du délai raisonnable de l'épuisement des voies de recours interne à la saisine de la Cour : la règle de l'examen au cas par cas	76
2.2	L'imbroglio créé par la notion de « date retenue par la Cour »	80
3	L'attitude de « Janus » de la Cour africaine de la phase d'instruction au prononcé de l'arrêt sur les réparations, une atteinte à la stabilité des situations juridiques des requérants	84
3.1	Un temps non maîtrisé	84
3.2	La sanction du non-respect du délai raisonnable par les parties	89
4	Conclusion: pistes pour la clarté et la précision des délais devant la Cour africaine des droits de l'homme.....	91

1 INTRODUCTION

L'œuvre de justice s'insère inéluctablement dans le temps.¹ Dans la perspective du justiciable, une justice crédible, efficace et effective se traduit nécessairement par l'obtention et l'exécution d'une décision sur le fond dans un temps qui satisfait à ses impératifs économiques, sociaux et personnels.² C'est le principe de sécurité juridique qui y est donc inévitablement la boussole. Pour ce qu'il en est, le temps est consubstantiel au procès. Le temps du procès se déroule comme une succession de délais qui naissent dès la saisine de la juridiction et se prolongent après la décision de justice si elle est susceptible de recours. Le procès lui-même est un mécanisme visant à établir ou à rétablir la paix sociale par l'intervention d'un tiers légitime chargé de régler un litige né, latent ou virtuel, selon une procédure respectant les garanties fondamentales du procès équitable.³ S'agissant de la sécurité juridique, il convient de dire que c'est un principe qui exige un respect de la norme

1 L. Cadet (dir) *Dictionnaire de la justice* (2004) 313.

2 *Ibid.*

3 Cadet (n 1) 1088.

juridique ainsi qu'une stabilité de celle-ci, une détermination claire et précise des délais de recours ou de mise en œuvre de prescriptions ou de forclusions répondant à l'exigence de la stabilité des situations juridiques.⁴ De plus, le mot « procédure » évoque la progression vers un but déterminé, le processus selon lequel certaines décisions doivent être prises, certaines opérations conduites. Au sens matériel, c'est l'enchaînement ou l'ensemble des actes et des formalités qui conduisent à la prise d'une décision.⁵ Le requérant est l'auteur de la requête, le justiciable demandeur dans l'intérêt duquel la requête est présentée au juge.⁶ Il en ressort que le délai est au cœur de la trilogie: temps, procès et sécurité juridique.

La procédure devant la Cour africaine exige, entre autres, le respect des délais. Le délai raisonnable, qui y fait régulièrement objet de débat, est une notion à géométrie variable du fait d'une absence de définition précise et d'une variété d'approches tant en doctrine que dans la jurisprudence.

Primo, il suppose le maintien d'un équilibre entre les intérêts du requérant et les exigences d'une bonne administration de la justice ou de la sécurité publique.⁷ *Secundo*, la jurisprudence internationale des droits de l'homme appréhende cette notion à travers plusieurs critères. Ainsi, elle met en exergue: la complexité de l'affaire,⁸ le comportement du requérant,⁹ le comportement des autorités nationales,¹⁰ et l'enjeu du litige pour le requérant.¹¹

Le délai raisonnable est donc une donnée fondamentale en droit processuel et se pose avec acuité devant les juridictions internationales qui connaissent spécifiquement du contentieux des droits de l'homme. Bien que l'article 56(6) de la Charte africaine, repris par l'article 40(6) du Règlement intérieur de la Cour d'Arusha, fixe le droit applicable en matière de délai raisonnable, l'application de ses normes soulève la question suivante: l'appréhension du délai raisonnable par la Cour africaine concourt-elle à l'affermissement d'un régime juridique garant de la sécurité juridique des requérants?

A la lecture de l'arsenal juridique et de la jurisprudence de la Cour africaine, il convient de noter que celle-ci oscille entre deux « supposés » raisonnable et un déraisonnable. La Cour, suivant la logique de son cadre juridique,¹² détermine une de ses conditions de recevabilité à partir de l'épuisement des voies de recours internes. Certes, mais c'est sa jurisprudence qui détermine le point de départ de la computation des délais en cette matière. Par ailleurs, l'on note une mise en œuvre de la souveraineté de la Cour quant à la définition du

4 *Allemagne c. Commission CJCE* (26 mai 1982) 44/81.

5 Cadiet (n 1) 1053. Voir aussi G Cornu *Vocabulaire juridique* (2016) 811.

6 Cornu (n 5) 909.

7 O Corten *L'utilisation du 'raisonnable' par le juge international* (1997) 440.

8 *Boddaert c. Belgique CEDH* (12 octobre 1992) Ser A 235.

9 *Deumeland c. Allemagne CEDH* (20 mai 1986) Ser A 100.

10 *Martins Moreira c. Portugal CEDH* (26 octobre 1988), Ser A 143.

11 *O c. Royaume-Uni CEDH* (8 juillet 1987) Ser A 120.

12 Voir article 40 al 6 du règlement intérieur de la Cour.

point de départ de sa saisine. Ce qui concourt à une tergiversation contraire à la recherche de la sécurité juridique et la stabilité des situations juridiques des requérants. Or, elle sanctionne, à travers ses œuvres prétoriennes, les violations du droit à un délai raisonnable, composante du procès équitable.

Cette contribution revêt un intérêt certain dans la mesure où elle envisage des pistes de réformes en matière de délai raisonnable dans la pratique de la Cour africaine en matière contentieuse et consultative. Son analyse nécessite la conjugaison de la méthode juridique dans sa double dimension dogmatique et casuistique. Elle permet d'explorer le cadre juridique qui balise les délais dans le contentieux international des droits de l'homme en Afrique et d'apprécier son application dans la jurisprudence de la Cour africaine. Une telle investigation peut bénéficier utilement d'une approche comparée à la lumière des pratiques des autres juridictions régionales des droits de l'homme qui ont forgé des pratiques plus éprouvées en matière de gestion du temps procédural.

Il ressort à l'observation que la souveraineté de la Cour dans la détermination du délai raisonnable en matière de recevabilité est source d'insécurité juridique (2). De même, l'attitude, tel un « Janus », de la Cour, observée de la phase d'instruction au prononcé de l'arrêt sur les réparations, participe à l'instabilité des situations juridiques des requérants (3).

2 LA SOUVERAINÉTÉ DE LA COUR AFRICAINE DANS LA DÉTERMINATION DU DÉLAI RAISONNABLE, SOURCE D'INSÉCURITÉ JURIDIQUE DES REQUÉRANTS

Le caractère raisonnable de la durée d'une procédure s'apprécie en fonction des circonstances particulières de la cause, *in concreto*.¹³ L'article 40(6) du Règlement intérieur de la Cour africaine dispose, en ce qui concerne les conditions de recevabilité des requêtes qu'elles doivent, entre autres « être introduites dans un délai raisonnable courant depuis l'épuisement des recours internes ou depuis la date retenue par la Cour comme faisant commencer à courir le délai de sa propre saisine ». Il ressort de cette disposition l'existence d'une option: faire courir le délai à partir de la date à laquelle a été rendue la décision définitive dans l'ordre juridique interne de l'Etat mis en cause; et dans le cas contraire, fixer la date faisant courir ledit délai.¹⁴ L'interprétation de cette disposition montre qu'elle est empreinte d'une grande

13 *Obermeier c. Autriche* (28 juin 1990) CEDH Ser A 179.

14 F Ouguerouz 'Conditions de recevabilité des "autres communications" 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) 1043.

souplesse¹⁵ telle qu'il ressort d'ailleurs de la jurisprudence de la Cour en la matière.

Cette attitude de la Cour, contraire au principe de sécurité juridique, qui exige des requérants de connaître avec exactitude et de façon dépourvue d'ambiguïté leurs droits et obligations,¹⁶ justifie la flexibilité dans la détermination du délai raisonnable de l'épuisement des voies de recours internes à la saisine de la Cour d'une part et, d'autre part, du recours à la notion imprécise de « date retenue par la Cour ».

2.1 La flexibilité dans la détermination du délai raisonnable de l'épuisement des voies de recours interne à la saisine de la Cour: la règle de l'examen au cas par cas

La règle de l'épuisement des voies de recours internes a connu des développements importants en doctrine. Selon Wiebringhaus, elle joue un rôle important dans le domaine de la justice internationale. Elle a été par la suite consacrée en droit international.¹⁷ Elle figure ainsi à l'article 41 du Pacte relatif aux droits civils et politiques, aux articles 2 et 5 du Protocole facultatif se rapportant au Pacte relatif aux droits civils et politiques, aux articles 11(3) et 14 de la convention sur l'élimination de toute forme de discrimination raciale. L'article 26 de la Convention européenne des droits de l'homme est consacré à la même règle. On la retrouve aussi aux articles 56(6) de la Charte africaine et 40(6) du Protocole à la Charte africaine portant création de la Cour africaine. Tel que confirmé par la doctrine et la jurisprudence, le bien-fondé de la règle est de donner à l'Etat mis en cause la possibilité de réparer le dommage qu'on lui impute par les moyens de ses mécanismes internes compétents.¹⁸ Les organes qualifiés de l'Etat qui sont concernés doivent pouvoir statuer préalablement sur la réclamation. Ils doivent être à même de préciser le contenu du litige et d'en mesurer la portée.¹⁹ Ce n'est qu'après avoir donné cette faculté à l'Etat défendeur que le différend pourra être porté sur le plan international. Elle vise donc la protection de la souveraineté des États en leur accordant la marge de

15 CV Nouazi Kemkeng 'Le recours individuel dans les systèmes régionaux de protection des droits de l'homme. Etude comparative des systèmes africain, européen et interaméricain' PhD thèse, Université de Yaoundé II 2016 205.

16 *Gondrand* (9 juillet 1981) CJUE 169/80.

17 H Wiebringhaus 'La règle de l'épuisement préalable des voies de recours internes dans la jurisprudence de la Commission européenne des droits de l'homme' (1959) 5 *Annuaire français de droit international* 685.

18 *Guzzardi c. Italie* (10 mars 1977) CEDH Ser A 76; *Selmouni c. France* (28 juillet 1999) CEDH Ser A 74; *Kudla c. Pologne* (26 octobre 2000) CEDH Ser A 152.

19 R Pinto *La sentence Ambatielos* (1957) Clunet 598.

priorité nécessaire à la réparation des violations alléguées avant qu'une instance internationale n'examine le litige.²⁰

Aux termes de l'article 40 du Règlement intérieur de la Cour africaine, qui fixe les conditions de recevabilité des requêtes, il ressort que ces dernières doivent remplir, entre autres, les conditions ci-après: « (...) être introduites dans un délai raisonnable courant depuis l'épuisement des recours internes (...) ». ²¹ L'épuisement des recours internes est une règle qui impose à celui qui saisit une juridiction internationale d'avoir au préalable exercé toutes les voies de recours accessibles dans l'ordre interne ²² alors que le délai raisonnable est une notion à géométrie variable qui s'apprécie suivant plusieurs critères, à savoir : la complexité de l'affaire, le comportement du requérant, le comportement des autorités nationales, l'enjeu du litige pour le requérant. ²³ Si le délai est le laps de temps fixé par la loi, le juge ou la convention soit pour interdire, soit pour imposer d'agir avant l'expiration de ce temps, ²⁴ le raisonnable, d'après Salmon constituerait un moyen d'apprécier l'adéquation des moyens aux fins, d'apprécier l'adéquation d'un comportement aux circonstances, de tracer une limite entre ce qui est discrétionnaire et arbitraire, d'éviter l'absurde ou le ridicule et d'établir un équilibre entre des intérêts divergents. ²⁵

Cette notion imprécise et par conséquent controversée, ²⁶ au même titre que l'épuisement des voies de recours eu égard à son appréciation, sont à l'origine de l'attitude de la Cour africaine, lorsqu'elle examine la recevabilité d'une requête. Elle le fait 'au cas par cas' comme dans la requête *Norbert Zongo c. Burkina Faso*, ²⁷ et ce, en ces termes: « la Cour a établi le principe selon lequel le caractère raisonnable d'un délai de sa saisine dépend des circonstances particulières de chaque affaire, et doit être apprécié au cas par cas ». Il s'agit d'apporter une appréciation du délai raisonnable ou de l'épuisement des voies de recours internes en fonction de la spécificité de chaque requête. Les éléments ci-après sont pris en compte: la situation personnelle du requérant ²⁸ ainsi que les éléments objectifs susceptibles d'allonger les délais de saisine. ²⁹ A titre d'illustration, la Cour africaine se prononce de la manière suivante dans l'espèce *Mohamed Abubakari c. Tanzanie*: ³⁰

20 T Larroutourou 'La QPC est-elle une voie de recours à épuiser avant de saisir la cour européenne des droits de l'homme?' (2015) 1 *Revue du droit public et de la science politique en France et à l'étranger* 111.

21 Article 40 alinéa 6 du Règlement intérieur (2010) 33.

22 Cornu (n 2) 411.

23 O Corten *L'utilisation du 'raisonnable' par le juge international* (1997) 557-559.

24 Cornu (n 2) 315.

25 Corten (n 7) 163.

26 JF Renucci *Droit européen des droits de l'homme* (2017) 389.

27 *Ayants droit de feu Norbert Zongo, Abdoulaye Nikiema dit Ablassé, Ernest Zongo et Blaise Ilboudo & Mouvement Burkinabé des droits de l'homme et des Peuples c. Burkina Faso* (21 juin 2013, exceptions préliminaires).

28 On peut citer le degré d'alphabétisation, indigence, détention ou non, etc.

29 C'est le cas de l'entrée en fonction de la juridiction.

30 *Mohamed Abubakari Tanzanie*, CAfDH (3 juin 2016, fond) para 92.

Dans la présente affaire, le fait que le requérant soit incarcéré; le fait qu'il soit un indigent qui n'ait pas été capable de se payer un avocat; le fait qu'il n'ait pas eu l'assistance gratuite d'un avocat depuis juillet 1997; le fait qu'il soit illettré; le fait qu'il a pu ignorer jusqu'à l'existence de la présente Cour en raison de sa mise en place relativement récente; toutes ces circonstances justifient une certaine souplesse dans l'évaluation du caractère raisonnable du délai de saisine.

De plus, dans l'affaire *Alex Thomas*, elle argumente sa position de la manière suivante:³¹

74. Compte tenu de la situation du requérant, qui est une personne ordinaire, indigent et incarcérée et considérant le temps qu'il a fallu pour obtenir une copie du dossier de procédure et le fait qu'il a tenté d'utiliser des recours extraordinaires comme la procédure de requête en révision, la Cour conclut que tous ces facteurs constituent des éléments suffisants pour expliquer pourquoi il n'a introduit la requête devant la Cour que le 2 août 2013, soit trois ans et cinq mois après le dépôt de la déclaration prévue à l'article 34(6). Pour ces motifs, la Cour conclut que la requête a été déposée dans un délai raisonnable après épuisement des voies de recours internes, conformément à l'article 56(5) de la Charte.

Ont ainsi été jugés raisonnables des délais de 360 jours, en ces termes:³²

La Cour accepte l'argument des requérants selon lequel il n'y a pas eu de retard excessif dans la soumission des requêtes car après l'arrêt de la Cour d'appel, les requérants étaient en droit d'attendre la réaction du Parlement. Compte tenu de ces circonstances, la période de près de 360 jours (soit environ un an) qui s'est écoulée entre le jugement et le dépôt des requêtes n'a pas été prolongée de manière non raisonnable.

On y retrouve une introduction de la requête après trois ans et cinq mois depuis l'épuisement des voies de recours interne. En l'espèce,³³

La Cour d'appel a estimé que la question était de nature politique et qu'elle devait donc être résolue par le Parlement. Celui-ci a alors entamé un processus constitutionnel en vue de résoudre la question. Il s'agit d'un processus de consultation visant à recueillir l'opinion des citoyens tanzaniens sur une éventuelle modification de la Constitution. Durant l'audience publique, il a été confirmé devant la Cour que la procédure était toujours en cours

et trois ans et six mois après le dépôt par l'Etat défendeur de la déclaration. En ce sens, « la Cour conclut en conséquence que le délai entre la date de sa saisine en la présente affaire, le 8 octobre 2013, et la date du dépôt par l'Etat défendeur de la déclaration de reconnaissance de la compétence de la Cour pour connaître des requêtes individuelles, le 29 mars 2010, est un délai raisonnable au sens de l'article 56(6) de la Charte ».³⁴

31 *Alex Thomas c. Tanzanie*, CAFDH (20 novembre 2015, fond) 1 RJCA 482 para 74. Dans la même logique, voir *Kijiji c. Tanzanie* CAFDHP (21 mars 2018, Compétence et recevabilité), délai raisonnable: deux ans et onze mois, le requérant était profane en matière de droit, indigent et incarcéré et sans assistance judiciaire et en plus, ignorait l'existence de la Cour et comment la saisir; *Nguza Viking c. Tanzanie* CAFDHP (23 mars 2018, Compétence et recevabilité), délai raisonnable: un (1) an et vingt-et-jours (21), le requérant était profane en matière de droit, indigent, incarcéré et sans assistance judiciaire et a tenté d'exercer un recours en révision; *Amiri Ramadhani c. Tanzanie* CAFDHP (11 mai 2018, recevabilité), délai raisonnable: cinq ans (5) et un mois (1) treize jours (13), le requérant était profane en matière de droit, indigent, incarcéré, sans liberté de mouvement, accès limité à l'information et sans assistance judiciaire.

32 Tanganyika Law Society, The Legal and Human Rights Centre, *Révérend Christopher R. Mtikila c. République de Tanzanie, requêtes n 9/2011 et n 11/2011*, CAFDHP (14 juin 2013, fond) para 83.

33 *Tanganyika Law Society* (n 2) para 74.

Ce tâtonnement de la Cour africaine au sujet du délai raisonnable de recevabilité, du fait de l'absence de prévisibilité, de clarté et de précision, d'inconstance jurisprudentielle, peut influencer négativement sur l'observance de la sécurité juridique des requérants. La Convention européenne des droits de l'homme est assez claire et précise sur le délai de recevabilité de la requête. L'article 35(1) dudit texte dispose que: « La Cour ne peut être saisie [que] dans un délai de six mois à partir de la date de la décision interne définitive ». Cette prévisibilité n'existe pas dans le cadre juridique procédural applicable par la Cour africaine, qui sur la base de ses textes fait une application au cas par cas et parfois, cumule les options jurisprudentielles. Le principe de sécurité juridique concerne en premier lieu l'agencement, le contenu et la précision des dispositions d'un ordre juridique. Il est donc avant tout un problème normatif;³⁵ de même, il vise à garantir la prévisibilité des relations juridiques relevant du droit. Dans son arrêt *Marckx*, la Cour européenne des droits de l'homme reconnaît implicitement sa dette à l'égard de la Cour de justice, qualifiant le principe de la sécurité juridique de « principe nécessairement inhérent au droit de la Convention comme au droit communautaire ».³⁶ De ce fait, l'admissibilité des recours doit être jugée au regard des besoins de la sécurité juridique.

Cette position de la Cour européenne est issue de la Convention qu'elle supervise et qui fixe une limitation temporelle de six mois³⁷ depuis l'épuisement des voies de recours pour saisir la Cour. La finalité première de la règle des six mois est de servir la sécurité juridique et de veiller à ce que les affaires soulevant des questions au regard de la Convention soient examinées dans un délai raisonnable, tout en évitant aux autorités et autres personnes concernées d'être pendant longtemps dans l'incertitude.³⁸ En outre, cette règle fournit au requérant potentiel un délai de réflexion suffisant pour lui permettre d'apprécier l'opportunité d'introduire une requête et, le cas échéant, de déterminer les griefs et arguments précis à présenter, et elle facilite l'établissement des faits dans une affaire car, avec le temps, il devient problématique d'examiner de manière équitable les questions soulevées.³⁹ La Cour africaine semble avoir intégrée cette logique de la limitation temporelle par un revirement jurisprudentiel dans l'affaire *Wilfred Onyango Nganyi et 9 autres c. Tanzanie*. Elle se repositionne de la manière suivante : « 101(...) la Cour a déduit des pièces de procédures que la dernière décision de la Cour d'appel dans cette affaire a été rendue le 20 mars 2013 et que la requête en l'espèce a été introduite devant la Cour africaine le 23 juillet 2013. On peut retenir que contrairement à la Cour

34 *Mohamed Abubakari* (n 2) para 93.

35 R Kolb 'La sécurité juridique en droit international: aspects théoriques' (2002) 10 *African Yearbook of International Law* 118.

36 *Marckx c. Belgique* 1979 CEDH 58.

37 Article 35 para 1 de la Convention européenne des droits de l'homme – Conditions de recevabilité '1. La Cour ne peut être saisie [que] dans un délai de six mois à partir de la date de la décision interne définitive'.

38 *Mocanu et autres c. Roumanie* 2006 CEDH 258; *Lopes de Sousa Fernandes c. Portugal* 2017 CEDH 129

39 *Sabri Güneş c. Turquie* 2012 CEDH 39 99.

européenne qui peut s'appuyer sur un délai fixe de six mois conformément à la norme écrite avec des applications au cas par cas dans sa jurisprudence, la Cour africaine en l'absence d'une telle précision textuelle, ne peut qu'adopter une approche souple. Ainsi, un mois pourrait être tout aussi raisonnable que quatre ans en fonction des cas. À tous les égards, une période de quatre mois est un délai raisonnable selon l'instance. 102. La Cour considère en conséquence que la requête a été effectivement introduite dans un délai raisonnable». ⁴⁰

Cette voie a été également suivie par son homologue de la Commission africaine qui, a fait de la règle de la limitation temporelle, une règle de fait. La Commission fait usage d'une limitation dans le temps à certains égards. Dans *l'affaire Michael Majuru c. Zimbabwe*, même si la Commission accepte que le plaignant a fui le pays et qu'il a eu besoin de temps pour s'installer ou qu'il était préoccupé par la sécurité des membres de sa famille, 22 mois après sa fuite du pays vont au-delà d'un délai raisonnable. La Commission africaine considère donc que la soumission de la communication a été indûment retardée et n'est donc pas compatible avec les exigences de l'article 56(6) de la Charte. ⁴¹ On doit noter que le facteur central en l'espèce était que l'on n'aurait pas pu espérer du requérant qui avait fait l'objet de traitements constitutifs de torture et menacé de mort devait retourner sur le territoire de l'Etat violateur pour épuiser les recours internes. Des différentes analyses faites, il ressort que la Cour africaine fait preuve d'une extrême largesse dans l'appréciation du délai raisonnable.

L'indécision que nous postulons est également relevée lorsqu'elle se prononce sur le point de départ de l'épuisement des voies de recours internes.

2.2 L'imbroglie créé par la notion de « date retenue par la Cour »

L'article 56(6) de la Charte africaine des droits de l'homme et des peuples repris par le Règlement intérieur de la Cour africaine dispose que les requêtes doivent « être introduites dans un délai raisonnable courant depuis l'épuisement des recours internes ou depuis la date retenue par la [Cour] comme faisant commencer à courir le délai de sa propre saisine ». ⁴² Il convient de relever que cette disposition applicable par la Cour africaine montre qu'il y a bien de l'abstrait dans la détermination du point de départ de la computation du délai

40 *Wilfred Onyango Nganyi et 9 autres c. Tanzanie* CAFDHP (18 mars 2016, fond) 1 RJCA 526. Voir aussi *Anudo Ochieng c. Tanzanie* CAFDHP (22 mars 2018, fond) dans laquelle la Cour a considéré cinq (5) mois et vingt-et-un jour (21) comme étant un délai raisonnable motif pris de ce que le requérant se trouvait en dehors du pays.

41 *Michael Majuru c. Zimbabwe*, Communication 308/05 para 109, Commission Africaine des droits de l'homme et des peuples, Rapport de la 44e session ordinaire (10-24 novembre 2008).

42 Article 40(6) du règlement intérieur (n 2) 33.

d'épuisement des voies de recours interne. Au fil de sa jurisprudence sur la question, elle apporte des clarifications sur la notion bien qu'elle soit variable. La distinction s'opère selon qu'il s'agit d'un fonctionnement normal ou anormal des voies de recours internes.

Dans le premier cas, le principe est clair: le délai de saisine commence à s'écouler à compter du premier jour franc suivant l'épuisement des recours internes (soit, en pratique, la date de la dernière décision insusceptible de recours rendue par le juge national).⁴³ A ce principe, une exception a été relevée par la Cour africaine dans l'affaire *Ayants droits de feu Norbert Zongo et autres c. Burkina-Faso*. Les juges estimèrent qu'une interprétation raisonnable et de bonne foi devait conduire à apprécier la question du délai raisonnable à partir de l'adoption de son Règlement intérieur intérimaire en date du 20 juin 2008 au lieu du 22 août 2006 (date correspondant au premier jour franc à compter de l'épuisement des recours internes). Cet argument de l'auguste juridiction se base sur le fait qu'elle n'était pas encore opérationnelle. Et c'est seulement à partir d'elle que tous les requérants potentiels ont pu être en mesure de prendre connaissance du contenu de son Règlement intérieur, et de songer à saisir la Cour.⁴⁴ De même, si la déclaration a été déposée après que le requérant ait épuisé les recours internes pertinents, le délai de saisine commencera à courir à compter de la date du dépôt de la déclaration, et non à compter de celle de la dernière décision judiciaire rendue.⁴⁵ Ainsi, dans l'affaire *Alex Thomas c. Tanzanie*, la dernière décision rendue par le juge interne datait du 29 mai 2009. L'Etat défendeur n'ayant fait la déclaration susvisée qu'un an plus tard, le 29 mars 2010, la Cour décida de prendre cette dernière date comme point de départ.⁴⁶

Dans le second cas, en cas de fonctionnement anormal des recours internes, il se pose le problème de la computation du point de départ des délais. L'affaire *Onyango Nganyi et autres c. Tanzanie* est assez édifiante à ce sujet, en ce sens qu'une clarification de l'anormalité y est donnée de même que la position de la Cour lorsque les recours internes se prolongent de façon anormale. Ainsi, selon le *Black's Law Dictionary*, (Dictionnaire juridique de Black), «de façon anormale» signifie «de manière excessive» ou «sans justification».⁴⁷ S'appuyant sur la jurisprudence de la Commission Africaine des Droits de l'Homme, la Cour note que dans la *Communication 293/04: Zimbabwe Lawyers for Human Rights et Institute for Human Rights and Development in Africa c. Zimbabwe*, la Commission africaine a fait observer que même si elle n'a pas formulé de définition standard de «prolongé de façon anormale», elle peut être guidée par les

43 W Hoeffner *L'accès de l'individu à la Cour africaine des droits de l'homme et des peuples* (2016). Curitiba 876.

44 *Zongo et autres c. Burkina Faso* CAFDHP (21 juin 2013, exceptions préliminaires) 1 RJCA 2019.

45 *Hoeffner* (n 43) 877.

46 *Alex Thomas c. Tanzanie*, CAFDHP (20 novembre 2015, fond) para 73.

47 *Wilfred Onyango Nganyi et 9 autres c. Tanzanie*, CAFDHP (18 mars 2016, fond) para 91.

circonstances et le contexte de chaque affaire et par la doctrine de la Common Law du « test de l'homme raisonnable ». Sous ce critère, la Commission cherche à savoir, compte tenu de la nature et des circonstances particulières d'une affaire, quelle aurait été la décision d'un homme raisonnable.⁴⁸ Dans cette affaire illustrative, la Cour relève que : « depuis 2006, près de dix ans après l'arrestation et la mise en accusation, des requérants jusqu'à ce qu'ils saisissent la Cour en 2013, les juridictions de l'État défendeur n'ont pas mené cette affaire à son terme. Les arguments avancés par le défendeur selon lesquels les retards sont dus aux requêtes en suspension des procédures introduites par les requérants ne sauraient prospérer, car il revient aux juridictions de l'État défendeur de traiter les affaires jusqu'à leurs conclusions. Comme nous avons démontré plus loin, l'imbroglie se justifie par le fait que la Cour procède par une extension des critères d'appréciation du délai raisonnable. Dans l'arrêt *Woyomé* par exemple, la Cour va au-delà de ses critères originels d'appréciation du point de départ du délai raisonnable et prend également en compte le critère lié aux faits de l'espèce.

Par ailleurs, rien n'indique que les juridictions de l'État défendeur ont fait droit à l'une quelconque de ces demandes de suspension dans les affaires concernées (...). Compte tenu de la situation dans laquelle se trouvent les requérants, qui est aggravée par le retard mis à leur fournir les comptes rendus d'audience, et l'absence de conseil au stade ultérieur de la procédure, la Cour considère que l'exception du défendeur tirée du non-épuisement des voies de recours internes est dénuée de tout fondement et la rejette en conséquence.⁴⁹ Il convient donc de dire que le recours interne s'est prolongé de manière excessive ; par conséquent, le requérant était fondé à saisir la Cour africaine. Dans un autre cas, la date qui doit être retenue est alors celle de l'expiration du délai de recours non exercé selon le droit national.⁵⁰ Néanmoins, dans certains cas, la Cour africaine semble appliquer une méthode en déphasage avec son Règlement intérieur. Elle fait conjointement usage de la date retenue par elle comme faisant commencer à courir le délai de sa saisine et se réfère aussi à certains faits pour déterminer sa saisine. L'article 40(6) du Règlement intérieur de la Cour dispose : « Être introduites dans un délai raisonnable courant depuis l'épuisement des recours internes ou depuis la date retenue par la Cour comme faisant commencer à courir le délai de sa propre saisine ». On peut se rendre compte que deux options sont prévues. Or la Cour va au-delà et se réfère à certains faits pour déterminer sa saisine.

Cette inconstance dans sa jurisprudence a été relevée dans l'affaire *Alfred Agbesi Woyomé c. Ghana* en ces termes:⁵¹

48 *Wilfried Onyango Ngani* (n 2) para 92.

49 n 2, paras 94 et 96.

50 *Ayants droits de feu 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*, CAFDHP (21 juin 2013, exceptions préliminaires) para 116.

51 *Alfred Agbesi Woyomé c. République du Ghana* CAFDHP (28 juin 2019, compétence et recevabilité).

85. La Cour note que les recours internes avaient été épuisés le 29 juillet 2014 devant la Cour suprême, certes, mais que le requérant pouvait raisonnablement escompter que la procédure pénale engagée contre lui et la procédure de la Commission d'enquête aboutissent à une décision en sa faveur. 86. La Cour note en outre que le temps que le requérant a passé d'attendre la décision des procédures pénales engagées contre lui ainsi que celle de l'affaire devant la Cour d'appel contestant les conclusions de la Commission d'enquête justifie à suffisance le dépôt de la requête deux ans, cinq mois et dix-sept jours après l'épuisement des recours internes ».

Cette pratique, à en croire une certaine opinion, que nous partageons d'ailleurs, est erronée et ne répond pas à l'esprit du texte car les articles de la Charte et Règlement stipulent clairement la date retenue par la Cour et non des faits retenus pour fixer le délai de saisine.⁵² La Cour en retenant la date de l'arrêt de la chambre en révision (2014) et la date du dépôt de la requête (2017) et en tenant compte des faits survenus après la date de l'arrêt de la chambre en révision est sortie du sens même de l'article car par cette façon de faire, elle n'a déterminé aucune date comme faisant commencer à courir le délai de sa propre saisine et a par contre mélangé les deux choix que lui octroient les articles sus visés.⁵³ De même, il convient de relever le raisonnement à double vitesse de la Cour consistant à rejeter les recours extraordinaires dans l'application de l'article 56(5) mais en les prenant tout de même en compte au moment d'évaluer le caractère raisonnable du délai de saisine après l'épuisement des recours. A titre illustratif, dans le même arrêt, faisant fi du recours en révision, la Cour constate que des recours internes étaient certes disponibles, mais n'auraient pas été efficaces pour répondre aux griefs du requérant.⁵⁴ Or, pour déterminer si cette requête a été déposée dans un délai raisonnable, la Cour considère que les recours judiciaires ordinaires liés à la présente affaire ont été épuisés lorsque la Chambre de révision de la Cour suprême a rendu son arrêt le 29 juillet 2014.⁵⁵ Il se dégage donc l'impression d'une trop grande largesse dans les critères ou circonstances prises en compte. On relève par conséquent une impression d'une certaine inconstance dans les délais et l'absence de différenciation selon les situations et la durée des délais. Par exemple, la question pertinente serait de savoir pourquoi un délai de cinq ans serait tout aussi raisonnable qu'un délai de deux ans dans les mêmes circonstances d'indigence du requérant.

En fin de compte, l'imbroglio est imposé par la Cour africaine elle-même, eu égard au non-respect de ses propres textes en matière de recevabilité de la requête. Ce qui semble également s'observer à d'autres stades de procédures.

52 Voir l'opinion individuelle du juge Bensaoula, jointe à l'affaire *Alfred Agbesi Woyomé c. Ghana* CAFDHP (28 juin 2019, compétence et recevabilité).

53 Voir opinion individuelle du Juge Bensaoula.

54 *Alfred Agbesi Woyomé* (n 51) para 68.

55 n 51, 81.

3 L'ATTITUDE DE « JANUS » DE LA COUR AFRICAINE DE LA PHASE D'INSTRUCTION AU PRONONCÉ DE L'ARRÊT SUR LES RÉPARATIONS, UNE ATTEINTE À LA STABILITÉ DES SITUATIONS JURIDIQUES DES REQUÉRANTS

Le terme « Janus » renvoi à un nom d'une grande divinité romaine dont le temple était ouvert en temps de guerre, et fermé en temps de paix, et qui était représentée avec deux faces regardant l'une en avant l'autre en arrière.⁵⁶ Dans le cadre de cette contribution, c'est cette physionomie de deux faces qui est mise en exergue. La Cour africaine, sanctionne le non-respect du délai raisonnable par les défenseurs alors qu'elle balbutie elle-même dans l'appréciation du temps des procédures.

3.1 Un temps non maîtrisé

Une juridiction qui peut condamner les Etats pour le non-respect des délais pourrait voir sa crédibilité mise à mal lorsqu'elle-même ne respecte pas lesdits délais; les normes qu'elle a fixées.⁵⁷

3.1.1 Une variation du temps du prononcé des avis, ordonnances et arrêts

Le rôle de la jurisprudence dans les systèmes juridiques n'est plus à démontrer. Elle participe à l'éclairage des concepts, via la précision et la création des concepts.⁵⁸ De même, elle est le reflet de l'application des dispositions légales à travers des canaux de production bien déterminés.⁵⁹ Parmi ces canaux, on retrouve, les avis consultatifs, l'arbitrage, et l'ensemble du contentieux (fond et réparations). Les canaux de production de la Cour africaine sont prévus par le protocole portant création de la Cour et plus explicite dans son Règlement intérieur. Elle a compétence, a) pour connaître de toutes les affaires et de tous les différends dont elle est saisie concernant l'interprétation et l'application de la Charte, du Protocole et de tout instrument pertinent relatif aux droits de l'homme et ratifié par les Etats concernés ; b) pour donner un avis consultatif 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

56 *Dictionnaire le littré* (1880).

57 S Hanffou Nana *La Cour africaine des droits de l'homme et des peuples: etude à la lumière de l'expérience européenne* (2016) 332.

58 J Gatsi 'La jurisprudence, source du droit OHADA' (2012) 64 *Revue internationale de droit comparé* 479.

59 Gatsi (n 58) 488.

requête pendante devant la Commission; c) pour tenter de régler à l'amiable les affaires qui lui sont soumises conformément aux dispositions de la Charte; d) pour interpréter un arrêt qu'elle a rendu; e) pour réviser son arrêt à la lumière de nouvelles preuves en conformité avec l'article 67 du règlement.⁶⁰

Une lecture minutieuse de quelques éléments de gestion des affaires permet d'analyser et d'apprécier le temps raisonnable du prononcé des arrêts ou décisions par la Cour africaine et ses avantages ou inconvénients à l'égard des requérants. Une demande d'avis consultatif introduite par *Socio-Economic Rights and Accountability Project* en date du 14 mars 2013 a été rendue le 26 mai 2017, soit cinq ans deux mois depuis son introduction.⁶¹ Une analyse du dossier révèle que le 29 juin 2016 est la date de clôture des échanges dans le cadre de ce dossier. Pour un avis consultatif qui est une procédure sans contradiction, la Cour n'aurait pas attendu presque 1 an avant de vider sa saisine. Entre le 14 mars 2013, date d'introduction de la demande et le 26 juin 2016, se sont produits des échanges entre les parties et les tiers. Si l'on s'en tient au nombre de sessions annuelles de la Cour, pendant un an, elle tient quatre sessions. Elle aurait dû vider sa saisine au plus sur deux sessions.

Une ordonnance de mesures provisoires a été demandée par *Ingabire Victoire Umuhoza c. Rwanda*, en date du 3 octobre 2014; l'ordonnance a été rendue en date du 18 mars 2016, soit environ un an et cinq mois.⁶² Dans l'affaire *Joseph Chacha c. Tanzanie*, le requérant a introduit une requête en date du 30 septembre 2011 et la Cour a vidé sa saisine par un arrêt rendu le 28 mars 2014; soit une durée de trois ans six mois.⁶³ De manière statistique, on peut se rendre compte que le délai pendant lequel la Cour se prononce soit sur un avis consultatif, soit sur une demande en révision, interprétation, sur le fond ou sur les réparations, est relativement excessif. Le rythme de productivité judiciaire par session, la lenteur dans la finalisation des affaires ainsi que la nature non permanente du fonctionnement de la majorité des juges de la Cour africaine, sont, entre autres, les causes de retard.

AGES	< 1	[1-2]	[2-3]	[2-3]	[3-5]	>5
Nature des décisions						
Mesures conservatoires	11	3				
Fond	1	10		18	6	
Fond et réparation partielle			2			

60 Article 26 du Règlement intérieur de la Cour africaine.

61 *SERAP* CAfDHP (26 mai 2017, avis consultatif).

62 *Ingabire Victoire Umuhoza c. Rwanda* CAfDHP (18 mars 2016, mesures provisoires).

63 *Joseph Chacha c. Tanzanie* CAfDHP (28 mars 2014, fond).

Fond et réparation	1	1				
Avis consultatifs		2				1

Statistique de la Cour africaine des droits de l'homme et des peuples de 2006 à 2018

D'ailleurs, la lecture faite à partir du tableau ci-dessus a plusieurs implications: la longueur du traitement de certaines affaires donne au requérant la conviction à un dénouement heureux, la confiance légitime; ce qui n'est pas le cas lorsque sa requête est déclarée après plusieurs années d'attentes irrecevables. De même, l'on note la perte de confiance envers la Cour, l'engorgement du rôle de la Cour du fait des affaires non encore vidées et de nouvelles affaires inscrites au rôle et l'incertitude des requérants quant à la réalisation de la jouissance de leurs droits du fait de la mise en péril de la stabilité de leur situation juridique.

3.1.2 Une différence d'appréciation du temps de la réparation

Le droit à réparation prend sa source dans la nécessité de civiliser la solution à la violation d'une obligation en substituant la réparation à la vengeance jadis acceptée comme la norme.⁶⁴ Dans la même logique, la réparation est envisagée comme ayant un caractère exclusivement compensatoire et, donc, étranger à toute visée répressive.⁶⁵ Aussi, c'est la « prestation fournie ou à fournir à un État ou à une organisation internationale en compensation d'un dommage subi et consistant dans le rétablissement de la situation antérieure à l'acte dommageable ou dans le versement d'une indemnité pécuniaire.⁶⁶ » A l'instar de nombreux autres principes juridiques, la réparation s'est importée dans le droit international avant de devenir partie intégrante du contentieux international des droits de l'homme.⁶⁷ Dans le système africain des droits de l'homme, la Cour africaine s'illustre comme le modèle le plus avancé dans la galaxie des recours consacrant la réparation dans sa double acception d'obligation et de droit.⁶⁸ Ce modèle est consacré sous le double angle normatif et jurisprudentiel. Eu égard à ce que le Protocole portant création de la Cour se limite à disposer quant au pouvoir de la juridiction à ordonner des réparations, c'est au Règlement intérieur qu'il faut se tourner pour être fixé sur les

64 G Tomeba Mabou 'La réparation devant les juridictions judiciaires internationales' PhD Thèse, Université de Strasbourg, 24 janvier 2017 11.

65 G Tomeba Mabou (n 64) 11.

66 J Basdevant (dir) *Dictionnaire de la terminologie de droit internationale public* (1960) 528.

67 S Oré 'La systématisation de la réparation devant la Cour africaine des droits de l'homme et des peuples' (2019) 1.

68 Aucune des conventions portant création des autres institutions juridictionnelles régionales n'inclut une disposition similaire à celle du Protocole portant création de la Cour africaine relativement aux mesures de réparations pouvant être ordonnées en cas de violation des droits humains.

options procédurales y afférentes. On note ainsi qu'alors que l'article 27 du Protocole pose le principe de la réparation et donne le pouvoir à la Cour pour les liquider, le Règlement laisse à la juridiction un choix entre l'examen de la cause sur le fond conjointement avec les demandes sur les réparations et l'examen des réparations dans un arrêt séparé.⁶⁹

Les affaires *Mtikila c. Tanzanie*⁷⁰ et *Armand Guéhi c. Tanzanie*,⁷¹ constituent les temps fort de l'approche adoptée par la Cour africaine en matière de réparation. Dans le premier cas, la réparation est intervenue après la décision rendue sur le fond, alors que dans le second, elle a été prononcée simultanément sur le fond et les réparations. Au-delà du respect de l'alternative prévue par son Règlement intérieur, la Cour africaine procède à la mise en œuvre de sa décision prise depuis sa 49e session d'examiner à l'avenir les requêtes autant sur le fond que sur les réparations.⁷² Malgré ce revirement, néanmoins conforme à son cadre juridique, l'option de séparation perdurera du fait du nombre important des affaires dans lesquelles la Cour africaine a décidé d'examiner les questions de réparations dans un arrêt séparé. Dans l'affaire *Alex Thomas c. Tanzanie*,⁷³ « La Cour, à l'unanimité, ordonne au défendeur de prendre toutes les mesures nécessaires dans un délai raisonnable pour réparer les violations constatées aux articles 7(1)(a), (c) et (d) de la Charte et 14(3)(d) du Pacte international relatif aux droits civils et politiques, en particulier, pour avoir privé le requérant de la possibilité de reprendre la présentation des moyens de la défense et de rouvrir le procès, et d'informer la Cour des mesures prises, dans un délai de six mois, à compter de la date du présent arrêt ».

Dans le même ordre d'idée, dans l'affaire *Ayants droit de feu Norbert Zongo et autres c. Burkina Faso*,⁷⁴ la Cour a ordonné :

à l'unanimité, i. à l'Etat défendeur de payer 25 millions FCFA à chacun des conjoints, 15 millions FCFA à chacun des fils et filles et 10 millions FCFA à chacun des pères et mères des personnes décédées. Ces paiements devraient se faire sur présentation des documents établissant les liens de parenté, tels qu'indiqués dans l'arrêt, notamment un acte de mariage, un acte de naissance et une attestation de parenté. ii. l'arrêt du 28 mars 2014 en la présente affaire constitue une forme de réparation du préjudice moral subi par le *Mouvement Burkinabé des droits de l'homme et des peuples* (MBDHP) ordonne, pour le surplus, à l'Etat défendeur de payer un franc CFA symbolique au MBDHP, à titre de réparation dudit préjudice. iii. A l'Etat défendeur de payer aux requérants la somme de quarante (40) millions de FCFA au titre des frais et honoraires qu'ils doivent à leurs avocats conseils, (...)

De manière globale, ces arrêts illustrent la pratique de l'examen disjoint du fond et de la réparation. Dans l'affaire *Konaté*, l'arrêt sur le fond a été rendu le 5 décembre 2014 alors que celui portant sur les réparations a été rendu le 3 juin 2015. Dans l'arrêt rendu sur le fond, il est décidé

69 Oré (n 67) 2.

70 W Monzala 'Le contentieux de la réparation devant la Cour africaine des droits de l'homme et des peuples: A propos de l'arrêt *Révérend Christopher R. Mtikila c. République Unie de Tanzanie*' (2015) 53 *Petites affiches* 6.

71 *Armand Guehi c. Tanzanie* CAfDHP (7 décembre 2018, fond et réparations).

72 Oré (n 67) 3.

73 *Alex Thomas c. Tanzanie* CAfDHP (2013).

74 *Ayants droit de feu Norbert Zongo et autres c. Burkina Faso*.

comme suit: « La Cour ayant statué sur l'ensemble des allégations formulées par les parties, elle se prononcera sur la demande en réparation dans un autre arrêt (...)». ⁷⁵ Pareillement, dans l'affaire *Zongo*, à l'unanimité, la Cour réserve la question des demandes en réparation et ordonne aux requérants de soumettre à la Cour leur mémoire sur les réparations dans les trente jours qui suivent la date de l'arrêt sur le fond. ⁷⁶ En ce qui concerne particulièrement la procédure sur les réparations, le temps y demeure un facteur important. Un arrêt rendu dans un délai raisonnable contribuera au rétablissement rapide de la situation de la victime. Or, la célérité n'est pas de mise à la lumière du temps mis par la Cour africaine pour vider sa saisine en matière de réparation. Dans ses arrêts disjoints, l'on note depuis l'introduction de la demande de réparation jusqu'au prononcé de l'arrêt par la Cour, une variété de temps relativement long. Ce temps diffère selon les cas. L'on note à titre illustratif une durée de trois ans et huit mois dans l'affaire *Alex Thomas c. Tanzanie*, ⁷⁷ une durée de trois ans et deux mois dans l'affaire *Wilfried Onyango*, ⁷⁸ une durée de onze mois dans l'affaire *Révérénd Mtikila*, dix-huit mois dans l'affaire *Lohé Issa Konaté*, douze mois dans l'affaire *Norbert Zongo* et trois ans et un mois dans l'affaire *Mohamed Abubakari*. ⁷⁹

Ce rallongement de temps qui ne prend pas en compte la durée observée de la saisine de la Cour jusqu'à l'obtention de sa décision sur le fond, produit comme conséquence une perte. Cette perte que peut causer aux parties la longueur induite par la procédure en deux temps est bien le coût psychologique et économique. ⁸⁰ Le premier peut causer un préjudice fondamental en ce que c'est d'abord le besoin de justice que vient chercher un requérant devant la Cour africaine. Il suffira de noter que justice retardée est déni de justice. S'agissant du coût économique et même financier, à moins que la Cour n'ait ordonné des mesures provisoires, il va sans dire que plus longue est la procédure notamment vers les réparations, plus élevé est le risque de manque à gagner, de perte économique et financière, de voir la décision de la Cour intervenir à un moment où le requérant a déjà subi davantage de préjudice qu'il n'avait existé à l'introduction de la requête. ⁸¹

75 *Ayants droit de feu Norbert Zongo* para 174.

76 *Ayants droit de feu Norbert Zongo* paras 203, 6 et 7.

77 Le requérant a introduit sa demande en réparation le 27 novembre 2015 et l'arrêt sur les réparations a été rendu le 04 juillet 2019. Voir *Alex Thomas c. Tanzanie* CAfDHP (4 juillet 2019, réparations).

78 Voir *Wilfried Onyango Ngany et 9 autres c. Tanzanie* CAfDHP (4 juillet 2019, réparations). Le requérant a introduit sa demande en réparation en avril 2016, la procédure a été close en date du 28 janvier 2019 et l'arrêt sur les réparations prononcé le 4 juillet 2019.

79 Voir *Mohamed Abubakari c. Tanzanie* CAfDHP (4 juillet 2019, réparations). Le requérant a introduit sa demande en réparation courant juin 2016, la clôture de la procédure est intervenue le 28 septembre 2018 et l'arrêt sur les réparations prononcé le 4 juillet 2019.

80 Oré (n 67) 13.

81 Oré (n 67) 13.

3.2 La sanction du non-respect du délai raisonnable par les parties

Il s'agit d'une part de la radiation des affaires du rôle et d'autre part la mise en œuvre de la responsabilité de l'Etat.

3.2.1 La radiation des affaires du rôle pour non-respect du délai de réponse

La radiation est une sanction du défaut de diligence des parties ou de leurs représentants, résultant d'une décision d'administration judiciaire qui entraîne retrait du rang des affaires en cours et suspension de l'instance, sans cependant faire obstacle à la poursuite de celle-ci après rétablissement de l'affaire.⁸² Dans l'affaire *Commission africaine des droits de l'homme et des peuples c. Lybie*, la Cour africaine a procédé à la radiation de l'affaire inscrite à son rôle en ces termes:⁸³

26. Jusqu'au 25 mars 2013, le Requérant n'avait toujours pas répondu à la demande du défendeur et ni le défendeur ni PALU n'avaient répondu à la lettre que leur avait adressée le Greffe ; Au vu de ce qui précède, a) la Cour constate que le requérant n'a pas déposé sa réplique malgré la prorogation au 31 août 2012 du délai requis, et qu'il a plutôt tenté de contourner cette exigence en demandant un ajournement sine die de l'instance, par sa lettre du 28 août 2012; b) En conséquence, la Cour estime que le requérant n'a pas cherché à faire aboutir la requête déposée le 31 mars en l'espèce; c) la Cour constate également que le requérant n'a pas répondu à la demande d'abandon de l'affaire formulée par le défendeur bien que cette demande ait été dûment notifiée au requérant.

3.2.2 La mise en œuvre de la responsabilité de l'Etat défendeur pour violation du droit à un délai raisonnable

D'emblée, il convient de dire que tous les justiciables ont droit à une bonne justice et, même si la justice des hommes est par essence relative, tout doit être fait pour que celle-ci soit rendue de la manière la plus satisfaisante possible. Il s'agit d'un droit fondamental qui passe par le respect du droit au juge et, plus largement, par celui du droit à un procès équitable.⁸⁴ Ce dernier suppose pour sa mise en œuvre l'accomplissement de plusieurs exigences. Notamment: le droit à un tribunal établi par la loi, indépendant, impartial ; le droit à ce que sa cause soit entendue publiquement et équitablement et le droit d'être jugé dans un délai raisonnable, entre autres. La durée raisonnable de la procédure préserve la crédibilité de la justice et son efficacité.⁸⁵ Une justice de qualité répond à un critère fondamental qui est celui de la

82 Cornu (n 5) 846.

83 *Commission africaine c. Lybie* CAFDHP (15 mars 2013, fond).

84 Renucci (n 26) 399.

85 F Sudre *Droit international et européen des droits de l'homme* (1999) 237.

célérité des procédures.⁸⁶ En matière de délai raisonnable, il est essentiel de distinguer entre célérité et précipitation.

D'après la doctrine, l'on ne saurait trop se presser au risque de négliger des éléments probants capitaux à la manifestation de la vérité ; mais aussi, l'on ne doit pas trop prendre son temps, au risque de laisser dépérir les éléments de preuve essentiels à la manifestation de la vérité.⁸⁷ Par ailleurs, il est aussi question d'éviter « que l'écoulement du temps ne préjudicie les droits et les intérêts des requérants ».⁸⁸ Les lenteurs de la justice valent aux Etats des condamnations sur le plan africain. L'illustration en est faite à travers la jurisprudence de la Cour africaine relative à la sanction de la violation du non-respect du délai raisonnable.

Dans l'affaire *Wilfried Onyango Ngani et autres c. Tanzanie*, plusieurs critères ont permis à l'auguste juridiction continentale, d'engager la responsabilité du défendeur pour violation des dispositions de la Charte africaine des droits de l'homme et des peuples relatives à l'exigence du droit à un délai raisonnable, et libellé en ces termes: « 1. Toute personne a droit à ce que sa cause soit entendue. Ce droit comprend: (d) le droit d'être jugé dans un délai raisonnable par une juridiction impartiale.⁸⁹ » Le défendeur, après six années de détention du requérant, n'avait pas vider sa saisine. L'argument de la complexité de l'affaire, le comportement du requérant, le comportement des autorités judiciaires nationales ont été analysé par la Cour pour motiver sa décision. D'après elle, pour apprécier la complexité d'une affaire, tous les aspects doivent être pris en considération, étant donné que la complexité peut porter à la fois sur des questions de fait et de droit.⁹⁰ Dans la jurisprudence de la Cour européenne des droits de l'homme, la complexité peut être, entre autres facteurs, due à: la nature des faits qui sont à établir, le nombre d'accusés et de témoins, les éléments internationaux, la jonction de l'affaire à d'autres affaires, l'intervention des autres personnes dans la procédure.⁹¹

En conséquence, plus une affaire est complexe, plus longue en est la procédure. Cependant, même dans des affaires très complexes, les retards déraisonnables peuvent encore se produire.⁹² S'agissant du comportement du requérant, il y a lieu de dire que dans l'affaire *Union Alimentaria Sanders SA c. Espagne*, la Cour européenne des droits de l'homme a conclu que le requérant est seulement tenu de « faire preuve

86 F Foka *Le contentieux africain des droits de l'homme et des peuples* (2008) 3 73.

87 Foka (n 86) 74.

88 B-RG Dongmo 'Pratique du contentieux des droits de l'homme et procédures d'urgence' in JD Boukongou (dir) *Protection des droits de l'homme en Afrique* (2007) 185-195.

89 Article 7(1)(d) de la Charte Africaine des Droits de l'Homme et des Peuples.

90 *Wilfried Onyango Ngani* (n 2) para 138.

91 *Boddaert c. Belgique* (1987) CEDH 129 19.

92 *Boddaert c. Belgique* (1987) CEDH 87 dans laquelle une période de six ans et trois mois n'a pas été considérée comme non raisonnable par la Cour, du fait qu'elle concernait une enquête difficile sur un meurtre et l'évolution parallèle de deux affaires.

de diligence dans l'exécution des étapes procédurales pertinentes pour lui, de s'abstenir de recourir aux tactiques dilatoires et de se prévaloir des possibilités offertes par les lois internes pour abrégier la procédure». ⁹³ Enfin, s'agissant du comportement des autorités judiciaires nationales, l'on peut retenir que les juges ont également le droit, aussi bien que le devoir, de s'assurer activement que les procédures judiciaires devant eux respectent l'exigence du délai raisonnable. D'ailleurs, dans l'affaire *Cuscani c. Royaume-Uni*, la Cour européenne a par exemple estimé que « le juge de première instance est l'ultime gardien de l'équité », ⁹⁴ qu'elle attend du juge de première instance une attitude plus proactive. ⁹⁵ Ainsi, dans la jurisprudence de la Cour européenne, les retards qui ont été imputés à l'État dans les affaires pénales sont dus au transfert des dossiers d'une juridiction à une autre, à l'audition d'affaires impliquant soit deux, soit plus de deux accusés ensemble, à la communication du jugement à l'accusé et à la préparation et à l'audition des appels.

En outre, dans l'affaire *Lucien Ikili Rashidi c. Tanzanie*, pour engager la responsabilité de l'État défendeur pour violation du droit d'être jugé dans un délai raisonnable, prévu par l'article 7(1) d de la Charte africaine des droits de l'homme et des peuples, « (...) la Cour fait observer que l'État défendeur avait déjà arrêté et incarcéré le Requérant en 2006 pour séjour illégal, soit sept ans avant le jugement de la Haute Cour de 2014 qui a conduit à son expulsion. L'État défendeur avait donc amplement connaissance du statut du Requérant. Par ailleurs, tel qu'il ressort du dossier, eu égard aux actes posés en juin 2006, il n'a fallu que quelques jours à l'État défendeur pour établir que le Requérant était en situation irrégulière et expulser sa famille. Dans ces circonstances, la Cour estime excessif le délai de six ans et quatre mois mis pour déterminer si une personne est en situation irrégulière par rapport à la loi de l'État défendeur sur l'immigration ». ⁹⁶ Après avoir passé en revue les différents éléments permettant d'apprécier le délai raisonnable, la Cour retient que cela n'a pas été respecté en raison du manque de diligence de la part des autorités judiciaires nationales. ⁹⁷

4 CONCLUSION: PISTES POUR LA CLARTÉ ET LA PRÉCISION DES DÉLAIS DEVANT LA COUR

La question des délais devant la Cour africaine est épineuse, eu égard aux nombreuses interprétations, et options prévues par les textes organisant la procédure contentieuse. Ce qui justifie de nombreuses conséquences à l'égard des requérants. Les pistes d'améliorations sont

93 *Union Alimentaria Sanders SA c. Espagne* (1989) 011 681 CEDH para 35.

94 *Cuscani c. Royaume-Uni* (24 septembre 2002) CEDH 32771196.

95 *Cuscani* (n 94).

96 *Lucien Ikili Rashid c. Tanzanie*, CAFDHP (28 mars 2019, fond et réparations) para 108.

97 *Wilfried Onyango Ngani* (n 40) para 155.

les suivantes: l'examen conjoint sur le fond et les réparations déjà expérimenté par la Cour africaine depuis ses quarante neuvièmes sessions. La pérennisation de cette option permettra de purger le rôle des audiences de la Cour qui regorge une centaine d'affaires pendantes.⁹⁸ Il est aussi vrai que le problème de la longueur de la procédure conjointe va demeurer une équation irrésolue en ce que la Tanzanie, première pourvoyeuse du contentieux devant la Cour Africaine, a obtenu des délais supplémentaires allant jusqu'à quatre mois dans les requêtes les plus récentes notamment celles introduites à partir de 2017.⁹⁹ Par ailleurs, le traitement des affaires en lignes peut-être une issue favorable, en ce sens que les requérants et même la Cour africaine, par le biais des outils numériques notamment l'internet pourront de manière virtuelle, relever le défi de la célérité et la dématérialisation des actes de procédures donc la paperasse alourdie les procédures. De même, l'on ne peut oublier le rythme de productivité judiciaire dont il faut revoir, notamment la réorganisation du travail en interne malgré la non-permanence de dix des juges de la Cour africaine. L'exigence de célérité dans les échanges entre juristes et juges rapporteurs, entre la division juridique et l'unité des langues dans la traduction et révision des projets d'arrêt, sont autant de pistes à explorer. Aussi, il urge de réformer le Règlement intérieur afin d'assurer la sécurité juridique et la stabilité des situations des requérants.

98 Précisément 155 au 30 juin 2019 selon les statistiques du Greffe de la Cour disponible sur <http://www.african-court.org> (consulté le 30 juin 2019).

99 Oré (n 2) 13.

Patterns of discrimination based on sexual orientation in Africa: is there a Lusophone exception?

Rui Garrido*

ABSTRACT: This article analyses the legal developments in African Lusophone countries regarding sexual orientation and the legal-political choices made by these states about the regulation of consensual same-sex acts between adults. Under colonial rule, all Portuguese territories in Africa had sodomy laws in place. After independence, in 1975, the new countries reformed their penal codes and repealed sodomy laws, most of them shifting from criminalisation to protection of sexual orientation. Compared to the situation in other parts of the African continent, where violence against homosexuals is generalised, colonial criminalisation of consensual same-sex acts is still in force or where new laws that further criminalise sexual orientation have been adopted or are under consideration, Lusophone Africans demonstrate higher levels of acceptance of the homosexuality of their fellow citizens, and there is less hostility from the state. Starting with an analysis on international developments in human rights law and jurisprudence regarding prohibition of discrimination based on sexual orientation, this article focusses on the five African Lusophone countries, analysing the legal reforms adopted, the role played by legislative initiatives and the dialogue of states with supranational human rights mechanisms to better protect their citizens from discrimination of any kind. African Lusophone countries took a distinctive legal-political approach, not only by repealing sodomy laws but also by granting other forms of protection based on sexual orientation. They also provide a distinctive narrative regarding homosexuality in Africa, against its usual portrayal as a Western and un-African phenomenon, demonstrating a continent deeply divided on this particular human rights issue.

TITULO E RESUMO EM PORTUGUÊS:

Padrões de discriminação baseada na orientação sexual em África: existe uma exceção Lusófona?

RESUMO: Este artigo analisa os desenvolvimentos legislativos nos países Africanos Lusófonos em relação à orientação sexual e às opções jurídico-políticas efetuadas por estes, relativas à regulamentação dos atos sexuais consentidos entre adultos do mesmo sexo. Sob domínio colonial, todos os territórios portugueses em África tinham

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legislação da sodomia em vigor. Após a independência, em 1975, os novos estados reviram os seus códigos penais e revogaram as leis da sodomia, passando maioritariamente da criminalização para a proteção da orientação sexual. Comparado com a situação em outras partes do continente Africano, onde a violência contra homossexuais é generalizada, onde vigora a criminalização colonial dos atos sexuais consentidos entre adultos do mesmo sexo, ou onde tem sido proposta nova legislação que procura uma maior criminalização da orientação sexual, os cidadãos Africanos Lusófonos demonstram níveis mais elevados de aceitação da homossexualidade dos seus concidadãos e verifica-se ainda uma menor hostilidade por parte do estado. Começando por uma análise dos desenvolvimentos no direito internacional dos direitos humanos e da jurisprudência internacional, em matéria relativa à proibição da discriminação com base na orientação sexual, este artigo tem como foco os cinco países Africanos lusófonos, analisando as reformas legislativas que foram adotadas, o papel desempenhado pelas iniciativas legislativas e o diálogo dos Estados com os mecanismos supranacionais de direitos humanos para melhor proteger os seus cidadãos de qualquer discriminação. Os países Africanos Lusófonos adotaram uma distinta abordagem jurídico-política, não apenas revogando as leis da sodomia, mas também garantindo outras formas de proteção com base na orientação sexual. Estes estados fornecem uma narrativa distinta relativa à homossexualidade no continente Africano, habitualmente conotada como um fenómeno ocidental e não Africano, demonstrando um continente profundamente dividido nesta questão específica de direitos humanos.

TITRE ET RÉSUMÉ EN FRANCAIS:

Tendances de discrimination basée sur l'orientation sexuelle en afrique: existe-t-il une exception lusophone?

RÉSUMÉ: Cette contribution analyse l'évolution juridique dans les pays lusophones d'Afrique en matière d'orientation sexuelle et les options juridico-politiques proposées par ces États en matière de réglementation des actes homosexuels consentis entre adultes. Pendant la colonisation, les colonies portugaises en Afrique disposaient de lois anti-sodomies. Après l'indépendance, en 1975, les nouveaux États ont réformé leurs codes pénaux et abrogé les lois sur la sodomie, la plupart d'entre eux passant de la criminalisation à la protection de l'orientation sexuelle. Par rapport à la situation dans d'autres régions du continent africain, où la violence contre les homosexuels est généralisée, la criminalisation d'actes homosexuels consensuels héritée de la colonisation est toujours en vigueur ou alors lorsque des nouvelles lois ont été adoptées ou sont en cours d'adoption, les pays africains lusophones font montre d'une plus grande tolérance à l'égard de l'homosexualité de leurs concitoyens, et l'hostilité de l'État est moindre. En commençant par une analyse des développements du droit et de la jurisprudence au plan international relativement à l'interdiction de la discrimination fondée sur l'orientation sexuelle, cette contribution se focalise sur les cinq pays lusophones d'Afrique. Elle procède à une analyse des réformes juridiques adoptées, le rôle joué par les initiatives parlementaires et le dialogue entre les États et les mécanismes supranationaux de défense des droits de l'homme en vue de mieux protéger leurs citoyens contre toute forme de discrimination. Les pays africains lusophones ont adopté une approche juridico-politique distincte, non seulement en abrogeant les lois sur la sodomie, mais également en accordant d'autres formes de protection fondées sur l'orientation sexuelle. Ces pays déclinent également un récit distinctif sur l'homosexualité en Afrique contrairement à l'image largement répandue qu'elle est un phénomène occidental et non africain, démontrant ainsi un continent profondément divisé sur cette question particulière des droits de l'homme.

KEY WORDS: African Lusophone countries, Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe, domestic legislation, sexual orientation, decriminalisation, Universal Periodic Review

CONTENT:

1	Introduction.....	95
2	Sexual orientation in international human rights law.....	96
3	Sexual orientation in African Union law.....	101
4	Sexual orientation law in domestic law of African Portuguese speaking	

	countries.....	105
4.1	Angola.....	107
4.2	Cape Verde.....	111
4.3	Guinea-Bissau.....	113
4.4	Mozambique.....	114
4.5	São Tomé and Príncipe.....	115
5	Conclusion.....	117

1 INTRODUCTION

In several parts of the African continent, lesbian, gay, bisexual, transgender and intersex (LGBTI) people face a daily fight for a dignified life. They are subjected to violence, blackmail, extortion, rejection or even murder, just because they identify themselves as homosexuals or are perceived as such. This social hostility is often fuelled by laws criminalising consensual same-sex activity (sodomy laws) that are still in place in many African countries, despite being a legacy of European colonialism. This legal landscape changed dramatically when Uganda proposed, in 2009, the adoption of an anti-gay law going beyond criminalising same-sex acts. In the following years, Nigeria followed suit by proposing – and approving – a comprehensive anti-gay law, and other countries discussed similar legal initiatives (for example, Kenya in 2011).

Against this background, several voices within the African continent called for the decriminalisation of same-sex consensual activity and the respect for equality of all Africans irrespective of their sexual orientation. In 2011, Festus Mogae, former President of Botswana, strongly supported that the country should decriminalise homosexuality.¹ In the same way, former Mozambican President Joaquim Chissano wrote an open letter to African leaders calling for non-discrimination based on sexual orientation as a way to ‘unleash the full potential of everyone’.² And even former President of Nigeria, Goodluck Jonathan, who signed the Same Sex Marriage (Prohibition) Act into law in 2013, later stated that the country should revisit such law ‘in the light of deepening debates for all Nigerians and other citizens of the world to be treated equally and without discrimination and with the clear knowledge that the issue of sexual orientation is still evolving’.³

In global and regional fora there has been a growing consensus about the need to protect LGBTI people from discrimination and violence. There is an increasing awareness in some parts of the world that public expressions of what may be perceived as non-

1 ‘Botswana should decriminalise homosexuality, says former president’ *The Telegraph* 20 October 2011, <https://www.telegraph.co.uk/news/worldnews/africaandindianocean/botswana/8839131/Botswana-should-decriminalise-homosexuality-says-former-president.html> (accessed 21 October 2019).

2 ‘An Open Letter to Africa’s Leaders – Joaquim Chissano, former President of Mozambique’ *The Africa Report* 14 January 2014 <https://www.theafricareport.com/4886/an-open-letter-to-africas-leaders-joaquim-chissano-former-president-of-mozambique/> (accessed 21 October 2019).

3 ‘Nigeria may revisit law on gay marriage – Goodluck Jonathan’ *Daily Post* 6 June 2016 <https://dailypost.ng/2016/06/06/nigeria-may-revisit-law-on-gay-marriage-goodluck-jonathan/> (accessed 21 October 2019).

heteronormative sexuality and, consequently, a different sexual orientation than heterosexual, constitute a risk to integrity and life.

In contrast to some general continental trends on laws regulating consensual same-sex acts, African Lusophone countries seem to have a different approach regarding sexual orientation. In these countries, sodomy laws inherited from the Portuguese Criminal Code (1886) have been repealed, and in some cases legal protection against discrimination based on sexual orientation has been added. This article therefore focuses on legal changes in African Lusophone countries regarding sexual orientation, as well as their trajectory from criminalisation to protection. It first explores the legal development in international human rights law regarding the recognition of sexual orientation, and then delves into the African human rights system. Finally, it analyses developments in domestic legislation in Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe, with the aim of identifying the distinctive and disruptive features of the legal-political position regarding sexual orientation adopted by these states.

2 SEXUAL ORIENTATION IN INTERNATIONAL HUMAN RIGHTS LAW

Sexual orientation may manifest itself as homosexuality, heterosexuality and bisexuality. In international and European case law, 'sexual orientation' is often invoked with reference to homosexual behaviour and same-sex relationships.⁴ For Heize, sexual orientation is related to 'real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant heterosexual-normative paradigm'.⁵ Makau Mutua defines sexual orientation as 'the state and practice of emotional, sexual and romantic attraction to men, women, both genders or no gender. Sexual orientation is a human condition and is a matter of personal and social identity'.⁶ In the 2006 Principles on the application of international human rights law in relation to sexual orientation and gender identity (Yogyakarta Principles) sexual orientation is understood to refer to 'each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender'.⁷

The Universal Declaration on Human Rights (Universal Declaration), adopted on 10 December of 1948 by the UN General

4 K Waaldijk 'The right to relate: a lecture on the importance on "orientation" in comparative sexual orientation law' (2013) 24 *Duke Journal of Comparative and International Law* 163-164.

5 E Heize *Sexual orientation: a human right. An essay on international human rights law* (1995) 60.

6 M Mutua 'Sexual orientation and human rights: putting homophobia on trial' in S Tamale (ed) *African sexualities. A reader* (2011) 457.

7 The Yogyakarta Principles (2006) para 1.

Assembly, contains the principle of non-discrimination, which had already been affirmed in the Preamble of the UN Charter as a fundamental principle of humankind. The Universal Declaration represents the passage of fundamental rights to the international arena to become the object of international scrutiny. Although the Universal Declaration is soft law, and does not have binding force, it has become accepted as a reference for many subsequent human rights developments. The prohibition of discrimination is found in article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

This formulation – which makes no reference to sexual orientation – was followed in the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966. These – and other – international human rights treaties do not explicitly contemplate sexual orientation, or gender identity,⁸ as prohibited grounds of discrimination.⁹ The main question that therefore arises in respect of those fundamental human rights treaties is to know if sexual orientation falls within the concept of ‘other status’. The prohibition of discrimination was the subject of analysis by the Human Rights Committee in its 1989 General Comment to article 2 of ICCPR:¹⁰

[N]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitute a basic and general principle relating to the protection of human rights.¹¹

This position is in accordance with articles 1 and 2 of the Universal Declaration, and subsequent human rights treaties. While the Human Rights Committee fails to explicitly recognise in this Comment that sexual orientation is a prohibited ground of discrimination, paragraph 7 may be interpreted as giving some further protection to characteristics that are not in the text of the ICCPR:¹²

While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

The position of the Human Rights Committee is clear. Any ‘distinction, exclusion, restriction or preference’ that is based on any ground falls within the understanding of discrimination. This position opens a window of opportunity for a more progressive interpretation of the norm.

8 Although the sexual orientation and gender identity are treated as interrelated, our analysis concerns only to the situation of sexual orientation.

9 R Murray & F Viljoen ‘Towards non-discrimination on the basis of sexual orientation: the normative basis and procedural possibilities before the African Commission on Human and Peoples’ Rights and the African Union’ (2007) 29 *Human Rights Quarterly* 87.

10 Art 2 of ICCPR.

11 ICCPR ‘General Comment 18: Non-discrimination’ para 1.

12 ICCPR (n 11) para 7.

The Committee for Economic, Social and Cultural Rights, in its General Comment to article 12 of ICESCR asserts that 'by virtue of article 2(2) and article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), *sexual orientation* and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.'¹³ According to this Committee, the enjoyment of the higher standard of physical and mental health cannot be put at risk based on the sexual orientation of the individual. Regarding the necessary efforts taken by the states for the fulfilment of the right to health, the ICESCR affirms that all measures must be done for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases'.

Some scholars are of the opinion that the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) may be interpreted in a way that covers the human rights of LGBTI people. According to Holtmaat and Post, for example, the protection of CEDAW is asymmetrical, in that it essentialises women and ignores men as potential victims of gender-based violence.¹⁴ The authors support the vision of a gender-neutral interpretation for CEDAW, which would allow the central point of discussion to change from women to all gender expressions – including transgender and intersex, for example.¹⁵

The Yogyakarta Principles affirm the obligations of states to protect the human rights of LGBTI people, taking as baseline the rights enshrined in the Universal Declaration. In 2017 a new document was adopted – Principles of Yogyakarta+10 – updating and expanding the protection of the 2007 Principles but adopting nine new principles.¹⁶ The 2017 Principles also grant protection not only to sexual orientation and gender identity, but also to gender expression and sex characteristics.

13 ICESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art 12), para 18 (emphasis added). See also the paragraph 13 of the ICESCR General Comment 15: The Right to Water (arts 11 and 12 of the Covenant).

14 R Holtmaat & P Post 'Enhancing LGBT rights by changing the interpretation of the Convention on the Elimination of All Forms of Discrimination Against Women?' (2015) 33 *Nordic Journal of Human Rights* 322.

15 Holtmaat & Post (n 14) 323.

16 Namely, the Right to State Protection (Principle 30), Right to Legal Recognition (Principle 31), Right to Bodily and Mental Integrity (Principle 32), Right to Freedom from Criminalisation and Sanction on the Basis on Sexual Orientation, Gender Identity, Gender Expression or Sex Characteristics (Principle 33), Right to Protection from Poverty (Principle 34), Right to Sanitation (Principle 35), Right to the Enjoyment of Human Rights in Relation to Information and Communication Technologies (Principle 36), Right to Truth (Principle 37) and Right to Practice, Protect, Preserve and Revive Cultural Diversity (Principle 39).

The Human Rights Council in 2016 adopted a landmark resolution, which established an international expert on the protection against violence and discrimination based on sexual orientation and gender identity.¹⁷ This expert has an important mandate of monitoring states' implementation of legislative measures to protect people from violence and discrimination based on their real or perceived sexual orientation and gender identity. The resolution was adopted within an environment of contestation and opposition by several states. The African Group was against this resolution, arguing that the issue of sexual orientation is not a human rights issue:¹⁸

The African Group is strongly concerned by the attempts to introduce and impose new notions and concepts that are not internationally agreed upon, particularly in areas where there is no legal foundation in any international human rights instrument. We are even more disturbed at the attempt to focus on certain persons on the grounds of their sexual interests and behaviours, while ignoring that intolerance and discrimination regrettably exist in various parts of the worlds, be it on the basis of colour, race, sex or religion, to mention only a few. These attempts undermine not only the intent of the drafters and signatories to various human rights instruments, but also seriously jeopardize the entire international human rights framework as they create divisions.

The African Group's position illustrates the resistance by states to recognise sexual orientation as a prohibited ground of discrimination. Such resistance is also in force inside the African human rights system, as will become clearer below.

As Dominic McGoldrick notes, the progress in the UN human rights system was always much more contested than in the European and Inter-American regional systems.¹⁹ In these regional human rights systems, the trajectory of the inclusion of sexual orientation as a prohibited ground of discrimination has specific traces reflecting the different regional contexts.

In Europe, the European Convention on Human Rights (ECHR) of 1950 does not grant explicit protection based on sexual orientation. The European system was put under pressure to deal with the issue at an early stage, and the Council of Europe (CoE) made its first recommendation in 1981. In this document, the CoE asked member states who still had laws criminalising consensual same-sex activity to repeal those laws in order to avoid discrimination against homosexual individuals.²⁰ In 2000, the CoE called for all member states to include sexual orientation as a prohibited ground of discrimination in national legislation, and to repeal any laws targeting consensual homosexual activity.²¹ Concerning the European Court on Human Rights, there is a vast case-law regarding sexual orientation as prohibited ground of

17 HRC Resolution 32/2 (2016).

18 Statement of the African group on the presentation of the annual report of the United Nation human rights council 71 session of the United Nations general assembly, 4 November 2016, para 9.

19 D McGoldrick 'The development and status of sexual orientation discrimination under international human rights law' (2016) 16 *Human Rights Law Review* 617.

20 CoE, Recommendation 924 (1984), Discrimination against homosexuals.

21 CoE, Recommendation 1474 (2000), Situation of lesbians and gays in Council of Europe Member States.

discrimination. Oddný Arnardóttir concludes that the legal developments in the European Human Rights Court jurisprudence framed LGBTI persons as being located inside the concept of vulnerable groups under article 14.²² In the Charter of Fundamental Rights of the European Union (EU Charter), which entered into force with the Lisbon Treaty in 2009, sexual orientation is a prohibited ground of discrimination under the scope of article 21:

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 21(1) of the EU Charter is the only European treaty provision that explicitly grants equal protection based on sexual orientation but fails by omitting other factors such as gender identity. Article 21 of EU Charter also lacks an open-ended clause such as 'other status' or 'other situation'.

In the Inter-American human rights system, sexual orientation has over the last decade gained increasing attention from political leaders. Although the American Convention on Human Rights, similarly to other international human rights treaties, does not grant specific protection based on sexual orientation, the Organization of American States (OAS) has adopted resolutions and additional treaties addressing the subject. In 2008, the OAS Assembly adopted a resolution about violence perpetrated against individuals based on their sexual orientation and gender identity.²³ In 2013, it adopted the Inter-American Convention Against All Forms of Discrimination and Intolerance,²⁴ which provides that 'discrimination may be based on nationality; age; sex; sexual orientation; gender identity and expression'.²⁵ The Inter-American Court on Human Rights delivered, in 2012, its first judgment on this issue. In this case, *Atala Riffo and daughters v Chile*, the Court said that

it is always necessary to choose the alternative that is most favourable to the protection of the rights enshrined in said treaty, based on the principle of the most favourable to the human being.²⁶

The Court understands the American Convention as a 'living instrument'.²⁷ It states also that the article is not an exhaustive regarding prohibited grounds of discrimination, and finds that 'any

22 O Arnardóttir 'Vulnerability under article 14 of the European Convention on Human Rights. Innovation or business as usual?' (2017) 4 *Oslo Law Review* 163.

23 AG/Res.2435 (XXXVIII-O/08), *Derechos Humanos, Orientación Sexual e Identidad de Género*, available online at https://www.oas.org/dil/esp/AG-RES_2435_XXXVIII-O-08.pdf (accessed 10 October 2019).

24 This treaty is not yet in force: It has 12 signatures, but only Uruguay has ratified it, as of 2018. See http://www.oas.org/en/sla/dil/inter_american_treaties_A-69_discrimination_intolerance_signatories.asp#Uruguay (accessed 10 October 2019).

25 See art 1(1), Inter-American Convention Against All Forms of Discrimination and Intolerance (2013).

26 *Atala Riffo and Daughters v Chile* IACHR (24 February 2012) para 84.

27 A Paúl 'Examining *Atala-Riffo and Daughters v Chile*, the first Inter-American case on sexual orientation, and some of its implications' (2014) 7 *Inter-American and European Human Rights Journal* 58.

other social condition' is broad enough to include sexual orientation and that any 'right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation'.²⁸

These developments reflect the well-established protection of LGBTI persons within the European system, and a growing incorporation of sexual orientation as a prohibited ground of discrimination in the Inter-American human rights system. However, the African human rights system, the youngest of the three well-established regional human rights system, is quite different from the developments in the UN, European and American contexts.

3 SEXUAL ORIENTATION IN AFRICAN UNION LAW

In the African continent, issues pertaining to minority sexual orientation are very sensitive and complex. The cultural arguments of the alleged unAfrican, unnatural and unbiblical nature of homosexuality pose difficulties in debating the human rights of LGBTI person in Africa. As Sylvia Tamale points out, this political and religious discourse is based on several fallacies. Firstly, Africa is presented as a culturally homogenous unit, without any cultural diversity.²⁹ Moreover, Africa is presented as heterosexual and rejecting other expressions of sexuality. This argument portrays Africa wrongly as culturally homophobic.³⁰ In several African societies, the issue of homosexuality is also perceived as part of behaviour or conduct and not as part of an inborn identity. As Susan Haskins states, '[t]he idea of homosexuality as an inborn, life-long orientation is very much a product of the West'.³¹ Haskins reinforces the idea stating that a 'homosexual is therefore a person who commits same-sex acts, not a person with an orientation'.³² Several African states criminalise 'unnatural' offences or 'vices against nature'; and these laws are used to punish consensual same-sex acts. But, viewed historically, the criminalisation of homosexual practices is a product of the European colonialism. John McAllister states that '[t]he roots of contemporary

28 *Atala Riffo and Daughters v Chile* IACHR (24 February 2012) para 93.

29 'Homosexuality in not un-African' *Al Jazeera* 26 April 2014, available online at <http://america.aljazeera.com/opinions/2014/4/homosexuality-africamuseveniugandanigeriaethiopia.html> (last visited 11 July 2019). E Chitando & P Mateveke 'Africanizing the discourse on homosexuality: challenges and prospects' (2017) 9 *Critical African Studies* 127.

30 A Ibrahim 'LGBT rights in Africa and the discursive role of international human rights law' (2015) 15 *African Human Rights Law Journal* 267.

31 S Haskins 'The influence on Roman laws regarding same-sex acts on homophobia in Africa' (2014) 14 *African Human Rights Law Journal* 397.

32 Haskins (n 31) 398.

African homophobia are nineteenth-century European prudery and racist fantasies of ‘primitive’ black sexuality [...]’.³³ According to the 2019 annual report of ILGA, 32 African countries have provisions in their penal codes criminalising consensual same-sex sexual acts between adults.³⁴ The maintenance of such laws in place constitutes a challenging situation for the African human rights system.

African Union law, as the ‘the body of treaties, resolutions and decisions that have direct and indirect application to the member states of the African Union’,³⁵ gives little space to the debate of the prohibition of discrimination based on sexual orientation. It is not clear whether such debate has occurred during the drafting of the African Charter on Human and Peoples’ Rights (African Charter) but it seems rather unlikely. Adopted in 1981 under the aegis of the Organization of African Unity, the African Charter is the most relevant African human rights treaty and aims to provide an African imprint of international human rights law. The prohibition of discrimination is enshrined in article 2 of the African Charter in the following terms:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or any status.

The African Charter adopts a form of formulation that seems open to a progressive interpretation, when it prescribes that rights under the African Charter shall be entitled without discrimination ‘of any kind’. The formulation suggests a non-exhaustive list, whereby other unenumerated personal characteristic may be the subject of protection under the African Charter, assuming an interpretation close to the *Atala Riffo* case. This understanding is shared by Rachel Murray and Frans Viljoen, who argue that sexual orientation must be regarded as a prohibited ground of discrimination, as it falls under ‘any status’ of article 2.³⁶ The authors recall that the UN Human Rights Committee in *Toonen v Australia* highlighted the fact that ‘sex’ in article 2 of the ICCPR was broad enough to accommodate sexual orientation as a prohibited ground of discrimination. This is another possibility for a more expansive interpretation of the African Charter and respecting the principle of the most favourable treatment of the human being.

The African Charter does not grant a ‘right to privacy’, a fundamental human right that was central for the development and consolidation of human rights of LGBTI people in the European human rights system.³⁷ The African treaty brings some innovations to

33 J McAllister ‘LGBT activism and “traditional values”: promoting dialogue through indigenous cultural values in Botswana’ in T Stanford, F Simenel, K Mwachiro & V Reddy (eds) *Boldly queer: African perspectives on same-sex sexuality and gender diversity* (2014) 43.

34 L Mendos ‘State Sponsored Homophobia 2019’, ILGA Report, 197.

35 O Amao *The African Union law: the emergence of a sui generis legal order* (2018) 21.

36 Murray & Viljoen (n 9) 91.

37 P Johnson ‘Homosexuality and the African Charter on Human and Peoples’ Rights: What can be learned from the history of the European Convention on Human Rights?’ (2013) 40 *Journal of Law and Society* 263.

international law, in particular the rights of peoples' and individual duties. It is under the chapter on individual duties that another potential ground for non-discrimination, as set out in article 28 states, emerges:

Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed to promoting, safeguarding and reinforcing mutual respect and tolerance.

Article 28 imposes a positive obligation on individuals to mutually respect and tolerate difference in order to promote good relations with other citizens. This perspective is in line with traditional African philosophies, like Ubuntu, or Umunthu, but this provision lacks legal enforcement.

The African Commission on Human and Peoples' Rights (African Commission) has made slow but steady progress towards the protection of sexual and gender minorities on the continent. Mandated to promote, protect and interpret the human and peoples' rights enshrined in the African Charter,³⁸ the Commission has taken some steps towards the protection of sexual and gender minorities in Africa. Despite that, as we will see, its work on this sensitive issue had come at a very high price to this human rights body.

In 2011 the African Commission adopted the Guidelines and Principles on Economic, Cultural and Social Rights under the African Charter in Human and Peoples' Rights. These Guidelines aim to clarify the scope of protection and obligations of states under their international commitments for socio-economic rights. These Guidelines in their introduction give an understanding that prohibited grounds of discrimination

(...) include but are not limited to race, ethnic groups, colour, sex, gender, sexual orientation, language, religion, political or any other opinion, national and social origin, economic status, birth, disability or other status.

The understanding of the Commission is that sexual orientation is *de facto* a prohibited ground of discrimination under the African Charter. As we pointed out before, there is no reference to gender identity, although 'gender' itself is a prohibited ground. Taking in consideration that civil and political, and socio-economic rights in the African Charter have the same legal protection, it is possible to affirm with certainty that sexual orientation is a prohibited ground of discrimination in respect of all human rights enshrined in the African Charter. The Commission goes even further in the Guidelines, by recognising LGBTI people as vulnerable and disadvantaged groups under the African Charter:

Vulnerable and disadvantaged groups are people who have faced and/or continue to face significant impediments to their enjoyment of economic, social and cultural rights. Vulnerable and disadvantaged groups include but are not limited to (...) lesbian, gay, bisexual, transgendered and intersex people (...).

This was the most relevant recognition by the African human rights system of sexual orientation as a prohibited ground of discrimination, as well as the existence of a less favourable treatment to LGBTI people.

38 Art 45, African Charter.

In 2014 the Commission adopted Resolution 275, the only resolution so far entirely devoted to the protection of sexual and gender minorities in Africa. Resolution 275 recalls the prohibition of discrimination enshrined in article 2 of the African Charter and shows concern for the human rights violations based on 'actual and imputed sexual orientation or gender identity'.³⁹ In 2016, the Commission engaged in a joint dialogue with the Inter-American Commission on Human Rights in which the two bodies agreed to collaborate on the thematic issue of sexual orientation and gender identity.⁴⁰

The Commission received its first complaint concerning sexual orientation discrimination (*William A Courson v Zimbabwe*) in 1994. In it, the complainant alleged that the criminalisation of sexual acts between consenting adults in private, which was in force in domestic legislation of Zimbabwe, constituted a violation of fundamental human rights enshrined in the African Charter. The complainant took as reference the Human Rights Committee case *Toonen v Australia* to point out that the criminalisation of same-sex activity was an unreasonable interference with the right to privacy. Unfortunately, the case was discontinued by the applicant and the Commission did not proceed with it.⁴¹

In 2002, in the communication *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the Commission stated, in an *obiter dictum*, that the sexual orientation is a prohibited ground of discrimination under article 2 of the African Charter:

Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under Article 2 of the Charter provides the foundation for the enjoyment of all human rights. (...) The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.⁴²

Although the decision does not bind states, it formally recognises sexual orientation as a ground on which people may suffer discrimination and disadvantaged treatment from the law.

The African Commission in 2015 granted observer status to a South African based NGO named Coalition of African Lesbians (CAL). When it in June 2015 had the opportunity to consider the Commission's activity report containing this decision, the AU Executive Council requested the Commission to 'take into account fundamental African values, identity and good traditions and to withdraw the Observer Status granted to NGOs which may attempt to impose values contrary

39 Resolution 275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or gender identity.

40 'Ending violence and other human rights violations based on sexual orientation and gender identity. A joint dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and the United Nations' (2016) 23.

41 Communication 136/94, *William A. Courson v Zimbabwe*.

42 Communication 245/02, *Zimbabwe Human Rights NGO Forum v Zimbabwe*.

to African values'.⁴³ A request to the African Court on Human and Peoples' Rights to deliver an advisory opinion on the meaning of the term 'considered' in article 59(3) of the African Charter should be interpreted,⁴⁴ stalled the process. However, after the Court had dismissed the case for lack of standing, the Executive Council reiterated its demand, and eventually the Commission complied.⁴⁵ This sequence of events, and the Commission's reversal of its decision to grant observer status to CAL, has caused grave concerns to be raised about the ability of the Commission to continue performing its mandate as autonomous and independent human rights body.

4 SEXUAL ORIENTATION LAW IN DOMESTIC LAW OF AFRICAN PORTUGUESE SPEAKING COUNTRIES

The African Portuguese Speaking Countries (PALOP)⁴⁶ – Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe – have a distinguished legal approach concerning sexual orientation. Having all been under Portuguese colonial rule for more than four centuries, these countries share a common colonial past. The first criminalisation of homosexuality in Portugal was introduced in the Criminal Code of 1852, in the form of 'indecent assault' (article 931). António Cascais states that the law was not designed for targeting homosexuals, but that it was used to prosecute them in the public sphere, as the archives of the Judiciary Police, in Lisbon, reveal.⁴⁷

The subsequent Portuguese Penal Code of 16 September 1886 (PPC), which was adopted without any substantive adjustment in the five countries, introduced an 'sodomy' offence for those engaging in 'vices against nature'.⁴⁸ Article 70 of the PPC, as reformed in 1954,

43 Ex.CL/887(XXVII) *Decision on the thirty-eighth activity report of the African commission on human and peoples' rights* (2015) para 7.

44 *Request for an Advisory Opinion by the Centre for Human Rights of the University of Pretoria and the Coalition of African Lesbians* (Advisory Opinion 2/2015).

45 Ex.CL/1015(XXXIII) *Decision on the report on the joint retreat of the permanent representatives' committee and the African commission on human and peoples' rights* (2018).

46 The PALOP is a Portuguese acronym to designate the African Portuguese-speaking countries and does not constitute any formal organisation. See generally F Arenas *Lusophone Africa: beyond independence* (2011) and P Chabal 'The post-colonial state in Portuguese-speaking Africa' (1992) *Portuguese studies* 189-202. The PALOP are part of the Community of Portuguese-speaking countries – CPLP – and organisation created in 1998, which include also Brazil, Portugal, Timor-Leste and more recently, Equatorial-Guinea. Although CPLP is not a human rights organisation, the respect for international human rights standards is a prerequisite for it membership. About CPLP, see E Sanches *The community of Portuguese language speaking countries: the role of the language in a globalizing world* (2014).

47 A Cascais 'A homossexualidade nas malhas da lei no Portugal dos séculos XIX e XX' (2016) 26 *International Journal of Iberian Studies* 96.

48 Art 71(4), Portuguese Penal Code 1886, amended in 1954.

defined a set of measures – compulsory internment in an asylum, forced agricultural labour, limited freedom, or even ban on the exercise of professions – for a vast group of people who represented a threat to the society, namely ‘vagrants’, ‘mendicants’, ‘prostitutes’, ‘ruffians’, and homosexuals. In respect of homosexuality, the PPC adopted restrictive wording in respect of those who usually engage in vices against nature. Before the reform of 1954, a Law Decree no. 35:042 (October 1945), inserted in article 256 (vagrants) the duty of the criminal police to scrutinise homosexuals.⁴⁹ This surveillance was of a proactive nature, as the police was obliged to control suspicious places.⁵⁰

Within the broader African landscape, the PALOP countries present a disruptive picture, as all of them no longer criminalise ‘vices against nature’. These countries reformed domestic legislation that progressed from decriminalisation of consensual same-sex acts to protection or sexual orientation, in line not only with the recent recommendations of the African human rights system, but also with United Nations human rights commitments and standards. The PALOP countries achieved independences in 1975,⁵¹ by virtue of the 1974 revolution in Portugal that ended the dictatorship and started the third wave of democratisation in the world.⁵² Legal reform in the PALOP countries was a slow process. The PALOP countries inherited the Portuguese civil law legal system; they kept several inherited laws from the colonial period; and Portuguese law was preserved in transitional constitutional provisions. Despite several legal reforms taking place after independence, the legal systems of these countries have always been closely influenced by contemporary Portuguese law.⁵³

In 1993 Guinea-Bissau became the first PALOP country to adopt a new, autochthonous penal code, followed by Cape Verde (2004), São Tomé and Príncipe (2012), Mozambique (2015), and more recently, by Angola (2019). The dialogue with international human rights forums was decisive for the legal reforms that took place in the PALOP countries in recent years, with the Universal Period Review (UPR) of the Human Rights Council exerting an important but unequal influence. Regarding the African human rights system, Lusophone African states have in general had poor engagement with the regional mechanisms of supervision.⁵⁴ The possible influence of the developments in the African system only benefitted legal reform in Angola, as will appear from the discussion below, where an alphabetically ordered analysis of these countries is provided.

49 V Faveiro *Código penal português anotado* (1952) 438.

50 A Cascais (n 47) 107.

51 P Oliveira ‘Decolonization in Portuguese Africa’ in *Oxford Research Encyclopedia of African History* (2017).

52 About the third wave of democratisation, see generally S Huntington *Third wave. Democratization in the late twentieth century* (1993), and S Haggard & R Kaufman ‘Democratization during the third wave’ (2016) 19 *Annual Review of Political Science* 125-144.

53 D Vicente ‘O lugar dos sistemas jurídicos lusófonos entre as famílias jurídicas’ (2009) 36 *Revista brasileira de direito comparado* 87.

54 A Baldé ‘O Sistema Africano de Direitos humanos e a experiência dos Países Africanos de Língua Oficial Portuguesa’ (2017) 200.

4.1 Angola

In so far as human rights matters are concerned, Angola is a country of contrasts. After gaining independence from Portugal in 1975, the country was until 2002 devastated by a civil war and political instability.⁵⁵ Despite an authoritarian regime being installed, the country ratified several international human rights treaties.⁵⁶ In 2019, Freedom House qualified Angola as ‘not free’ regarding civil liberties and political rights.⁵⁷ The United Nations Development Programme places the country in position 147 out of 189 in the 2018 Human Development Index (HDI).⁵⁸ The country has an estimated population of around 30 million inhabitants.⁵⁹

The Angolan Constitution, as reformed in 2010, grant generously protect the fundamental rights of citizens, and prohibits discriminatory treatment and practices.⁶⁰ This general principle was transposed onto the country’s Penal Code, when the legislature rejected criminalisation of consensual same-sex activity in favour of protection of sexual orientation. The Angolan legislature repealed the Penal Code inherited from Portuguese colonisers that was obsolete and inadequate to the present demands of the Angolan society. On 23 January 2019, the Parliament of Angola approved a new Penal Code,⁶¹ as the culmination of a process that started in 2004 when it installed a Commission for the Reform of Justice and Law, created under the Presidential Order N. 124/12, 27 November 2004, with the mandate to draft a new Penal Code. The text of the Penal Code approved in 2019 is surprisingly progressive regarding protection based on sexual orientation. In the new Angolan Penal Code (APP), sexual orientation is recognised as an aggravating circumstance in respect of several types of crimes, namely: article 71 (determination of penalty measure); article 172 (threat); article 214 (discrimination);⁶² article 215 (insult); article 216 (defamation); article 225 (aggravation), related to crimes against the respect due the deceased;⁶³ article 382 (incitement to

55 See P Jerónimo *Report on citizenship law: Angola* (2019) 4.

56 Eg CCPR and CESCR in 1992, and the African Charter on Human and Peoples’ Rights in 1990.

57 See <https://freedomhouse.org/report/freedom-world/2019/angola> (accessed 30 July 2019).

58 See <http://hdr.undp.org/en/countries/profiles/AGO> (accessed 30 July 2019).

59 See <https://data.worldbank.org/country/angola> (accessed 28 July 2019).

60 P Jerónimo ‘Os direitos humanos em Angola’ in P Jerónimo (ed) *Os Direitos Humanos no Mundo Lusófono. O Estado da Arte* (2015) 18 - 19.

61 R Garrido ‘Recent SOGI developments in Angola and an overview on other African Lusophone countries’ in Mendos (n 34) 97.

62 The article 214 introduces a legal protection against discrimination in the access to a job or protection of the employee from being discriminated based on his/her sexual orientation, article 214(1) and (2).

63 Article 223 (attempt on the integrity of mortal remains) and article 224 (profanation of funeral location).

discrimination);⁶⁴ and article 284 (crimes against humanity).

Article 71 of the APP, which relates to the factors that determine the penalty, states as follows (emphasis added):

1. Without prejudice to the provisions of paragraph 3 of the preceding article, the only aggravating circumstances are that the perpetrator has committed the crime:
(...)
- c) on grounds of race, color, ethnicity, place of birth, sex, sexual orientation, physical or mental illness or disability, belief or religion, political or ideological beliefs, social condition or origin or *any other forms of discrimination*.

Under article 71(1)(c) of the APP, sexual orientation has the same legal force as other factors, the majority of which have already been consecrated in the Angolan 2010 Constitution and in international human rights treaties. One can thus conclude that the Angolan legislature had in mind a broadening of existing protection against discrimination, not only because it included new factors that had not been the subject of legal codification prior to the APP, but also because the clause ‘any other forms of discrimination’ denotes a progressively expanding view on the part of the legislature.

Chapter III of the APP is dedicated to crimes against the freedoms of people, article 172 – the crime of threat – defines a penalty of imprisonment of up to one year for those who make a threat against the ‘physical integrity, freedom and sexual auto determination’ of another person. Article 127(3) states that if such threat was based on – among other factors – sexual orientation, the penalty is aggravated. Under article 127(4), the same principle applies if the threat targets a group of persons. The report of the preliminary draft of the Penal Code states that the criminal proceeding depends on the complaint of the offender.⁶⁵

The crime of discrimination is mostly related to the protection of the rights of workers and access to good or services. Article 214 of the APP states:

1. A penalty of up to 2 years imprisonment or a fine of up to 240 days may be imposed on those who, because of race, colour, ethnicity, place of birth, sex, sexual orientation, illness or physical or mental disability, or impediment, belief or religion, political or ideological beliefs, condition or social origin or any other forms of discrimination:
 - a) refuse a contract or employment;
 - b) refuse or condition the supply of goods or services;
 - c) prevent or condition the exercise of another person’s economic activity;
 - d) punish or fire a worker.

The same penalty is applied to discrimination targeting a collective person, such as associations. According with the report of the preliminary draft of the Penal Code, the crime of discrimination has been inspired by article 161 in the Cape Verde Penal Code (2004). The

64 The incitement to hate, acts of violence, or the foundation of organisation that incite discrimination against a person or a group or persons based, among other, on sexual orientation (art 382(1), (2) and (4), respectively).

65 Angola ‘Report preliminary draft Angolan Penal Code’ 50.

report states that the crime of discrimination ‘has as its paradigm article 161 of the Cape Verde Penal Code, but it was understood to include in the Preliminary draft “sexual orientation” as a factor of discrimination. Factor that is not invented. Exists and is producer of unjust damage’.⁶⁶

Article 215 (insult) of the APP foresees a penalty of up to six months imprisonment or a fine to those who ‘by any means of expression or communication, and with the intent to offend another person, offend in your honour, good name or consideration’. If the insult is based on the sexual orientation of the person, the penalty doubles, both in respect of imprisonment and fine. A similar approach is adopted in article 216 (defamation).

In the section dedicated to the crimes against the respect due to the dead, article 225 aggravates the penalty in articles 223 (attack on the integrity of remains) and article 224 (desecration of funeral place), in the following terms:

If the perpetrator commits the crimes set forth in the preceding articles [223 and 224] on the grounds of the belonging or non-belonging, true or alleged, of the deceased person to (...) sexual orientation, (...) the penalty is aggravated by one third in its minimum and maximum limits.

Incitement to discrimination is also an aggravated offence if based on the sexual orientation of the person or group. Article 382(1) provides that those who

in a meeting, public place or by any means of publicizing or communicating with the public, incites hatred against a person or group of people because of its (...) sexual orientation, (...) for the purpose of discriminating against them, is punished with imprisonment from 6 months to 6 years.

Article 382(2) foresees the same punishment for those who incite violence against a person or group of people based on sexual orientation. Article 382(4) states that those who create an organisation, or takes part in an organisation, for the purpose of inciting discrimination, hate or violence against a person or group based, among other factors, on the sexual orientation of the person or persons, is subject to a penalty of imprisonment from 2 to 8 years.

Finally, article 384 – crimes against humanity – takes in consideration the seriousness of the crime. It states:

A penalty of imprisonment of 3 to 20 years may be imposed if a more serious penalty is not imposed by virtue of another legal provision, on a person who, in the context of a widespread or systematic attack on a determined population or in the context of an armed, international or internal conflict, or during the military occupation of a state, territory or part of territory, commits the following acts against protected persons:

...

- g) persecution on the grounds of political, ideological, racial, ethnic, social, cultural or nationality, gender, religion, disease or physical or mental disability or sexual orientation.

In other words, the APP understands sexual orientation as a reason for persecution, both as part of a systematic attack and in the context of armed conflict. In this unique recognition of the sensitivity of the issue,

the APP goes far beyond of the protection granted by the Rome Statute of the International Criminal Court (1998), which Angola has signed, but not ratified.

The APP is, therefore, ground-breaking regarding the protection of the inequalities and vulnerabilities resulting from the sexual orientation of Angolan citizens. This position of the Angolan legislature is in line with the state's international commitments to the United Nations and the African Union.

The UPR is a mechanism of dialogue between states within the ambit of the United Nations Human Rights Council regarding their human rights commitments, and it is a forum in which some states seems to have an openness to deal with controversial issues. As Cowell and Milon state, '[b]y promoting a dialogic approach, the UPR process offers an alternative to what could potentially be a confrontational and antagonistic process of attempting to enforce politically controversial human rights norms'.⁶⁷ In the first UPR cycle, the national report of Angola (2010) had no provisions about the protection on the basis of sexual orientation. As part of this review, Belgium asked that Angola repeal the 'sodomy' law and enshrine respect for non-discrimination.⁶⁸ France recommended that Angola should 'ensure that articles 70 and 71 of the Penal Code are not construed and applied so as to criminalise homosexuality'.⁶⁹ Those recommendations were made when the 'sodomy' law was still in force. In 2014, during the second UPR cycle, the approach of Angola was different. Its national state report stated that the Angolan Constitution (in article 23(2)) protects the right to privacy of individuals, and affirmed that no legal discrimination based on sexual orientation exists in the country, in the following terms: 'Intimacy between adults is a matter of individual freedom and Government is *not are unaware* of any cases of legal prohibition or discrimination on the basis of sexual orientation'.⁷⁰ On that occasion, only the Netherlands asked Angola for the measures adopted to end violence based on sexual orientation and gender identity. The Angolan experience highlights that the UPR can be an important tool for the decriminalisation of consensual same-sex acts,⁷¹ even if the recommendations made during the review are of a non-binding nature.⁷²

67 F Cowell & A Milon 'Decriminalisation of sexual orientation through the Universal Periodic Review' (2012) 12 *Human Rights Law Review* 346.

68 See https://lib.ohchr.org/HRBodies/UPR/Documents/Session7/AO/ADVANCE QUESTIONSANGOLA_ADD.2.pdf (accessed 30 July 2019).

69 A/HRC/14/11, 18.

70 A/HRC/WG.6/20/AGO/1, para 143 (emphasis added); while the English version is ambiguous, and clearly incorrect, the French ('n'a connaissance d'aucune' and Spanish versions ('no tiene conocimiento') convey the government's intent clearly, namely, that it was not aware of any legal prohibition based on sexual orientation.

71 Cowell & Milon (n 67).

72 For a general discussion on the effectiveness of the UPR in domestic legal reforms, see the works of F Cowell 'Understanding the legal status of universal periodic review recommendations' (2018) 7 *Cambridge International Law Journal*; D Etone 'Theoretical challenges to understanding the potential impact of the

The year 2014 seems to have been a turning point in Angola's position towards sexual orientation. In May 2014, the African Commission adopted, in Luanda, Resolution 275 concerning violence and other human rights violations based on real and imputed sexual orientation and gender identity. The approach of Angola towards the African human rights system also changed. Under the African Charter, states are obliged to submit a national report about the implementation of human and peoples' rights under the African Charter. The sixth Angola's report, covering the period of 2011 to 2016, for the first time gave some attention to the issue of human rights and sexual orientation in the country. The national report states that '[t]here are no codes in Angola, which punish the consensual same-sex relations between adults. There is no record of conviction of people for being LGBTI. The draft Law that approves the Criminal Code contains rules dealing with discrimination on the ground of sexual orientation'.⁷³ Although the report places such analysis under article 3 of the Protocol on the Rights of Women in Africa, which denotes some misunderstanding of the issue of sexual orientation – as the due place for its analysis is under article 2 (non-discrimination) of the African Charter – it is important, in any case, to highlight the initiative of Angola to affirm the non-discrimination of sexual orientation in its national legal framework. In June 2018 the Angola association, Iris, the only Angola NGO working on human rights of LGBTI people in the country, was legally registered by the government.⁷⁴ This is an important step taken by Angolan authorities, taking into consideration that several African countries refuse the register of organisations of this nature, and in some cases litigation is the only option for such NGOs.⁷⁵

4.2 Cape Verde

Cape Verde is a small archipelago located in West Africa. The country is often held up as an example of democracy and rule of law on the continent. For example, Freedom House ranks the country quite highly as far as political rights and civil liberties are concerned.⁷⁶ In 2018, the HDI placed the country at 125 out of 189 countries – the highest of all African states.⁷⁷ The country has a good index of social tolerance and acceptance towards homosexuality, as evidenced by an Afrobarometer

universal periodic review mechanism: revisiting theoretical approaches to state human rights compliance' (2019) 18 *Journal of Human Rights*; N Scensson 'The Universal Periodic Review: a study on the effectiveness of the United Nations human rights council's monitoring mechanism' (2015) 8 *Vienna Journal on International Constitutional Law*.

73 Angola 'Sixth and seventh report on the implementation of the African Charter on Human and Peoples' Rights and Initial Report on the Protocol on the Rights of Women in Africa' (2017) 47.

74 See <https://www.mambaonline.com/2018/06/21/angola-registers-its-first-lgbt-affirming-civil-rights-group/> (accessed 11 October 2019).

75 As in Kenya and Botswana.

76 See <https://freedomhouse.org/report/freedom-world/2018/cape-verde> (accessed 26 July 2019).

77 See <http://hdr.undp.org/en/countries/profiles/CPV> (accessed 28 July 2019).

survey which identified the country as the most tolerant African country in this respect.⁷⁸

Regarding the legal framework and sexual orientation, the country adopted a new Penal Code in 2004 and repealed the criminalisation of the offence of ‘vices against nature’. It was the second PALOP country to do so, after Guinea-Bissau (1993). Meanwhile, no mention was made of the necessity of protecting sexual orientation in the Penal Code of 2004. The draft code was made by Jorge Carlos Fonseca,⁷⁹ a prominent Cape Verdean jurist who graduated from the Law Faculty of the University of Lisbon (Portugal), and who later became the President of Cape Verde.

In 2015 another reform of the Penal Code (in the form of Law-Decree 04/2015) introduced significant amendments to the law. In the Preamble of Law-Decree 04/2015, the Cape Verdean legislature expanded the definition of aggravated homicide to include circumstances related to sexual orientation and gender identity, in the following terms:⁸⁰

The penalty will be imprisonment of 15 to 30 years, when the circumstances of the case reveal a marked degree of illegality of the fact or guilty of the agent, and the murder is committed:

(...)

- e) For racial, religious or political hatred or *due to sexual orientation and gender identity* of the victim.

The Cape Verdean legislature demonstrates concern for the vulnerability of people based on their sexual orientation and gender identity. It is the only PALOP country that grants some protection to gender identity, specifically. The amendments introduced by Cape Verde are in line with the international human rights commitments of the country, as it has ratified the ICCPR and ICESCR in August 1993. Regionally, Cape Verde ratified the African Charter on Human and Peoples’ Rights in June 1987. The engagement of Cape Verde with the African human rights system is very limited, as the state only submitted one national report to the African Commission since 1987.

Under the UPR, Cape Verde adopted a minimalist approach to sexual orientation. In the first (2008) and second (2013) cycles, the national report of Cape Verde was silent regarding sexual orientation. Only in 2018, in its third cycle, did the national report mention the need for the media to abstain from discrimination based on sexual orientation.⁸¹ No questions were addressed to Cape Verde regarding the need to take political measures to prohibit discrimination based on sexual orientation. The state affirmed the efforts made to prevent discrimination based on sexual orientation and gender identity,⁸² although such measures are not clearly stated in the document of the

78 Afrobarometer ‘Good neighbours? African express high levels of tolerance for many, but not for all’ (2016) 12.

79 J Fonseca *Elementos para o estudo do código penal de Cabo Verde* (2004).

80 Art 123 (emphasis added).

81 See A/HRC/WG.6/30/CPV/1 (2018) 8.

82 See A/HRC/39/5/Add.1 (2018) 3.

national plan.⁸³ Despite the importance of the UPR as a forum of dialogue in which Cape Verde is engaged, it seems not to have had a strong influence in the country's political choices regarding sexual orientation.

4.3 Guinea-Bissau

Guinea-Bissau, located in West Africa, achieved independence in November 1974, after a ten year's liberation war against Portugal.⁸⁴ The country experienced several *coup d'états* since the 1980's. Despite this political instability, the country soon started a process of legal reforms to repeal all colonial legislation. In 1993, the country adopted new criminal legislation.

The Penal Code of Guinea-Bissau repealed the colonial sodomy law and no other criminalisation of consensual same-sex activity between adults was adopted. The country shifted, then, from criminalisation to decriminalisation. Although it is possible to affirm that some legal transplant⁸⁵ has occurred from the Portuguese Criminal Code of 1982 (adopted after the 1974 revolution) – for example, the wording of the crime of rape is identical in both Codes – the truth is that the Portuguese law criminalised, at the time, 'homosexual act with minors'⁸⁶ and that was not adopted by the Guinean legislature. Despite that, in 2005 the country adopted legislation granting health care for people suffering from HIV with no discrimination based on any ground.⁸⁷

In international human rights fora, Guinea-Bissau was questioned during the second cycle of the UPR (2015) about legislative developments regarding the equality and protection from discrimination based on sexual orientation.⁸⁸ To these questions, Guinea-Bissau replied that the issue was not the subject of public debate and, therefore, it is not a priority for the government. Despite this argument, the state recognised discrimination based on sexual orientation and gender identity as 'a matter of concern for the country',⁸⁹ and reaffirmed that the Constitution guarantees the equality of all citizens and no legal criminalisation was in place.

83 See <https://www.icieg.cv/images/phocadownload/PNIG-Final-completo.pdf> (accessed 12 October 2019).

84 C Kohl 'National integration in Guinea-Bissau since independence' (2010) 20 *Cadernos de Estudos Africanos* 87.

85 There are other legal areas in which the dialogue between Portugal and former colonies, although the African states took its own path, in particular of a socialist inspiration. See F Simões 'Portuguese-speaking Africa and the lusophone legal system: all in the family?' (2017) 76 *African Studies* 91.

86 Article 207 of the Portuguese Penal Code (1982).

87 F Dramé *et al* 'Gay men and other men who have sex with men in West Africa: evidence from the field' (2013) 15 *Culture, Health & Sexuality* 11.

88 Questions made by Slovenia and Spain, although the Spanish delegation questioned about legislative measures for decriminalisation of 'homosexual relations'.

89 See A/HRC/29/12 para 12.

4.4 Mozambique

After the independence from Portugal, a devastating civil war engulfed Mozambique. That event dramatically shaped the legal and political landscape in the country,⁹⁰ and the political and juridical choices of the state, regarding sexual orientation are of a complex nature. The country has a poor record in terms of development-related ranking as captured in the HDI, achieving position 180 out of 189 in 2018.⁹¹ Concerning freedoms, the country is ranked as ‘partially free’.⁹² The Afrobarometer survey found out that Mozambicans are mostly tolerant towards sexual diversity.⁹³

As Emerson Lopes points out, one of the main particularities of the country is the ‘lack of uniformity in the Mozambican legal system with respect to the rights of sexual minorities’.⁹⁴ Despite this scenario, the Mozambican legislature in 2007 adopted progressive labour legislation in the form of granting the protection of the rights of workers in article 4(1) of Law 23/2007, as follows:

The interpretation and application of the rules of this law obey, among others, the principle of the right to stability in employment and the workplace, changing circumstances and non-compliance with discrimination on grounds of sexual orientation, race or HIV/AIDS.

The Labour Law was adopted while the colonial law criminalising ‘vices against nature’ was still in force. The repeal of the colonial Penal Law criminalising consensual same-sex activity was one of the recommendations made during the first cycle of the UPR, in 2011.⁹⁵ In 2015, Mozambique adopted a new criminal code, and as part of this process the ‘sodomy’ law was repealed. However, the legislature missed the opportunity to go beyond mere decriminalisation, towards anti-discrimination. The new legislation failed to grant protection against discrimination based on sexual orientation, as the Mozambican legislature followed neither the path previously adopted in the Labour Law, nor the UPR recommendations received in 2011. To those, the Mozambican state added that ‘its Constitution makes no reference to sexual orientation [and] the country is confronted with profoundly entrenched cultural and religious habits’.⁹⁶ Culture is, therefore, mobilised to the arena of human rights to legitimise the lack of an affirmative action to the state on the sensitive issue of homosexuality. It is also added that ‘homosexuality is not criminalised’ in the country,

90 See P Jerónimo *Report on citizenship law: Mozambique* (2019).

91 See <http://hdr.undp.org/en/countries/profiles/MOZ> (accessed 28 July 2019).

92 See <https://freedomhouse.org/report/freedom-world/2018/mozambique> (accessed 28 July 2019).

93 Afrobarometer (n 78) 12.

94 E Lopes ‘The legal status of sexual minorities in Mozambique’ in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 185.

95 Made by France, Spain and the Netherlands.

96 ‘Report of the Working Group on the Universal Periodic Review: Mozambique’ A/HRC/17/16 (2011) 12.

pointing that the criminalisation of ‘vices against nature’ is not a law that discriminates based on sexual orientation.

The lost opportunity in the new penal code of 2015 was underlined by some states under the second cycle of the UPR (2016) that noted that Mozambique failed to protect people from discrimination based on the sexual orientation or gender identity.⁹⁷ Mozambique took note, but did not accept the recommendations calling for legal and political measures to protect LGBTI people. To those, Mozambique affirmed, once again, that no discrimination based on sexual orientation is in force in the country.⁹⁸

The case of registering an NGO that works directly with human rights of LGBTI people – LAMBDA Mozambique – was another subject of discussed in 2016, as the state has failed to register this organisation since 2008.⁹⁹ The case was also the subject of several recommendations under the UPR, and to those the Mozambican state replied that ‘there is no discrimination in Mozambique for the recognition of civil society organisations. In the case of the recognition of LAMBDA and other similar associations, the position of Mozambique is that non registration of these associations does not imply a discriminatory practice. Internal consultations with the relevant administrative services and other mechanisms are underway’.¹⁰⁰ Despite this refusal of registration, the activity of LAMBDA is not constrained by government authorities. As Zenaida Machado states, this NGO works ‘freely, but not legally’.¹⁰¹

In 2017, the Constitutional Council – a court-like body – pronounced the unconstitutionality of the law of associations, on which the state based its rejection to register LAMBDA.¹⁰²

4.5 São Tomé and Príncipe

The small archipelago of São Tomé and Príncipe, located in the Gulf of Guinea, has a population of around 200,000 inhabitants. Freedom House ranks the country as having a good records pertaining to political rights and civil liberties.¹⁰³ It is a small economy, with a poor HDI ranking, at around position 143 out of 189 countries.¹⁰⁴ With Cape

97 ‘Report of the Working Group on the Universal Periodic Review: Mozambique’ A/HRC/32/6 (2016).

98 ‘Matrice of recommendations’ (2016) 8.

99 See <http://rajatorrent.com.lambdamoz.org/index.php/recursos/brochuras/8-registe-lambda/file> (accessed 1 August 2019).

100 ‘Matrice of recommendations’ (2016) 8.

101 ‘Dispatches: Mozambique’s double speak on LGBTI rights’ 25 January 2016 <https://www.hrw.org/news/2016/01/25/dispatches-mozambiques-double-speak-lgbt-rights> (accessed 21 October 2019).

102 See <https://www.hrc.org/blog/mozambiques-recent-ruling-moves-lgbtq-organization-closer-to-legal-recognition> (accessed 2 August 2019).

103 See <https://freedomhouse.org/report/freedom-world/2015/s-o-tom-and-principe> (accessed 2 August 2019).

104 See <http://hdr.undp.org/en/countries/profiles/STP> (accessed 2 August 2019).

Verde, it shares a high level of social tolerance and acceptance towards homosexuality, as the Afrobarometer survey found that people of São Tomé expresses a level of tolerance that is above the average of the countries studied.¹⁰⁵ The archipelago is the third African Lusophone country that appeared above the average (21%) of those studied by Afrobarometer, with near half of the respondents (46%) demonstrating a good tolerance towards homosexuality.¹⁰⁶

The legal recognition of sexual orientation in São Tomé took place in 2008, when it adopted the first ordinary law criminalising domestic and familiar violence. Article 2 of Law 11/2008 states:

Every woman, man, child, regardless of class, ethnicity, sexual orientation, profession, culture, educational level, age and religion, enjoys the fundamental rights inherent to the human person, being assured the opportunities and facilities to live without violence, to preserve their physical and mental health and their moral, intellectual and social integrity.

The country adopted a new penal code in 2012, repealing the law criminalising consensual same-sex activity. That was a recommendation made to the country in 2011, during the first UPR cycle.¹⁰⁷ The new legislation aggravates the penalty of the qualified homicide when motivated by hatred against the sexual orientation of the victim. Article 130 of the Penal Code states:

1. If the death is caused in a circumstance that reveals a special objection or perversity of the agent, the penalty is the imprisonment of 14 to 20 years.
2. The particular objectionability or perversity referred to in the preceding paragraph may reveal, inter alia, the fact that the staff member:

(...)

(d) be determined by racial, religious or political hatred, or generated by the color, ethnic or national origin, sex or sexual orientation of the victim.

São Tomé and Príncipe moved from criminalisation to protection in its new Penal Code. The state engaged in active dialogue during the first cycle of UPR, accepting the recommendations made to repeal the criminalisation of same-sex activity.¹⁰⁸

The same law criminalises, in article 178, 'homosexual acts with adolescents'. This provision was a legal transplant from former article 175 of the Portuguese Penal Code (1995).¹⁰⁹ Such disposition of homosexual acts with adolescents constitutes a form of discrimination based on sexual orientation, as article 177 of the Penal Code criminalises the sexual acts with adolescents, when 'copulation, anal or oral intercourse' took place, irrespectively the gender of the minor, and punishable with imprisonment up to 3 years or fine up to 300 days. In article 178, the legislature does not define 'homosexual acts of relevance' with minors but gave a less severe punishment of imprisonment up to 2 years or fine up to 200 days.

105 Afrobarometer (n 78) 12.

106 Afrobarometer (n 78) 12.

107 Recommendations made by Norway and France. See 'Report of the Working Group on the Universal periodic Review - São Tomé and Príncipe' A/HRC/17/13 (2011) 13-14.

108 Cowell & Milon (n 67) 347.

109 Repealed in 2007.

As articles 177 and 178 seem to cover the same legal good, which is the minor's sexual freedom and self-determination, the São Toméan legislature defines a less severe penalty and fine for the crime of homosexual acts with adolescents. Article 178 also stipulates that a person who acts in a way of aiding or abetting the commitment of the homosexual acts by the minor is also punishable under the law. São Tomé and Príncipe should repeal article 178 of the Penal Code as it constitutes discrimination based on sexual orientation, and article 177 gives an enough scope to accommodate all crimes committed against the sexual determination of minor with a more adequate penalty and fine.

5 CONCLUSION

This article analyses the legal developments of African Union law and domestic criminal law of the African Lusophone countries regarding the prohibition of discrimination based on sexual orientation. Remaining as a complex human rights issue and despite developments in international human rights law, there is strong reluctance to deal with the topic, due its political, cultural and religious dimensions. The article sheds some light on the legal developments under United Nations and African Union law, but also presents an in-depth analysis of African Lusophone countries' domestic legislation regarding sexual orientation and human rights standards. The article further presents a distinctive narrative contradicting the rhetoric of homosexuality as being unAfrican or a western imposition, as the African Lusophone countries, as well as South African and recently Botswana, are examples of states that prohibits discrimination of its citizens regardless of their sexual orientation, as such ground constitutes a negative condition that puts this citizens at risk of vulnerably and several human rights violations.

The first conclusion to be drawn from this discussion is that African states individually and collectively have displayed strong resistance against affirming the prohibition of discrimination based on sexual orientation. Despite the efforts by the African Commission to recognise sexual orientation as a human rights issue, and the broad protection granted by the African Charter in its articles 2 and 28, the Commission has faced resistance from other AU bodies. The experience of African Lusophone countries shows that, despite the cultural sensibility of the issue of sexual orientation, at least some African states are willing to fulfill their international human rights obligations by protecting the rights of sexual minorities. These countries may play an important role in the AU human rights system by reaffirming the independence of the African Commission on human and peoples' rights and pushing for the development of African human rights law to protect all African citizens from discrimination on any grounds. The African Commission should also adopt an approach to invite African states to repeal sodomy laws from their penal codes and ensure that no discrimination, including discrimination based on sexual orientation, is tolerated under the African Charter.

The second conclusion is that domestic legislation related to sexual orientation in African Lusophone countries goes far beyond the protection under the regional human rights system. These countries underwent legal reforms after their independence from Portugal and repealed colonial sodomy laws. The crime of ‘vices against nature’ was repealed, but other criminalisation was adopted to replace it. That was the legal-political choice of these independent African countries. Despite the cultural sensibility of the subject, Angola, Cape Verde, and São Tomé and Príncipe provided for aggravated sentence for the crime of murder if motivated by the sexual orientation of the victim, in formal recognition by the legislature of the negative treatment that LGBTI people are subject to. The Angolan legislature adopted the most protective approach of the PALOP states. As those countries inherited a legal system from Portuguese colonisation based on civil law, and legal transplants from Portuguese law occurred since their independence, the legal developments in Portugal – decriminalisation of same-sex consensual acts and the prohibition of discrimination based on sexual orientation in the Portuguese Constitution (2004) – may have played a crucial role in the initiatives of African Lusophone legislatures. Despite that, these states exercised their discretion to accommodate these developments, which reveal a sensitivity of PALOP legislatures to the need for protecting citizens from all forms of discrimination.

Finally, a third conclusion is that the dialogue within global and regional African human rights fora is beneficial for a more protective approach by the states to sexual orientation. The UPR was of central importance for legal reforms in São Tomé and Príncipe. Other states also engaged in positive dialogue with peers, such as Guinea-Bissau, which recognised that sexual orientation was a human rights issue, although it still was not ready for legal reform in the area. For Mozambique, the dialogue was not useful, as the state refused to act on all sexual orientation-related recommendations. The state used cultural arguments to avoid a more protective approach in its legislation. Domestically, Mozambican authorities persist in disallowing the registration of an NGO that advocates for the human rights of sexual minorities. This case reveals the tension between international law and domestic sensitivities to dealing with this controversial human rights topic.

Children's right to sustainable development under the African human rights framework

Elsabé Boshoff and Samrawit Getaneh Damteu***

ABSTRACT: The aim of this article is to explore the existence of an implied right to sustainable development for children under the African human rights system, and the main elements of such a right. It avers that under the African human rights system, the existing rights such as the right to health and the right to development, if viewed from the perspective of the indivisibility of rights, provides for an implied right of children to sustainable development. It submits that such a right would include elements such as the right to a clean and healthy environment, to safe drinking water, education, and a right to participate in decisions affecting them. The article makes recommendations on how states, individually and collectively, as well as regional human rights bodies, can ensure the realisation and protection of this right. It further contends that there is a need for an explicit recognition of the right to sustainable development of African children, on the basis that it is a separate right and that there are benefits from recognition of it as a stand-alone right. The article adopts a doctrinal methodology and utilises theoretical approaches to the law as an analytical framework, thereby seeking to establish a human rights framework for addressing the challenges faced by children in the context of (sustainable) development in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le droit des enfants au développement durable dans le système africain des droits de l'homme

RÉSUMÉ: Cet article vise à explorer l'existence d'un droit implicite des enfants au développement durable dans le système africain des droits de l'homme et ses principaux éléments. L'article trouve que, dans le système africain des droits de l'homme, les droits existants tels que le droit à la santé, le droit au développement, appréhendés du point de vue de l'indivisibilité des droits, contiennent un droit implicite des enfants au développement durable. Ce droit inclurait notamment le droit à un environnement propre et sain, à l'eau potable, à l'éducation et le droit de participer aux décisions qui les concernent. Cet article formule des recommandations sur la manière dont les États, individuellement et collectivement, ainsi que les mécanismes régionaux des droits de l'homme peuvent assurer la réalisation et la protection de ce droit. Il affirme en outre qu'il est nécessaire de reconnaître explicitement le droit des enfants africains au développement durable, au motif qu'il s'agit d'un droit distinct et qu'il serait avantageux de le reconnaître comme un droit

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autonome. L'article utilise une approche doctrinale et théorique du droit comme cadre d'analyse, cherchant ainsi à développer un cadre normatif en droits de l'homme pour relever les défis auxquels les enfants sont confrontés en matière de développement (durable) en Afrique.

KEY WORDS: sustainable development, right to development, children's rights, African Charter on the Rights and Welfare of the Child, climate change

CONTENT:

1	Introduction.....	120
2	Sustainable development and climate change.....	122
3	The right to sustainable development in Africa.....	124
4	The right of children to sustainable development	129
4.1	The question of inter-generational justice.....	129
4.2	Applicable legal instruments and principles.....	130
4.3	Developments towards the protection of the right to sustainable development of children	134
5	The need for explicit recognition	136
6	Conclusion and recommendations.....	139

1 INTRODUCTION

Since the middle of the 20th century there has been a growing awareness that the actions of humans have the ability to impact and irrevocably change the environment – through loss of biodiversity, environmental pollution, deforestation and desertification – and even impact the earth's climate.¹ The current geological age is sometimes referred to as the 'anthropocene', the age of humankind, where no aspect of the environment remains untouched by human actions.² The awareness of the power that we wield over the survival of a world that is habitable for humans has increasingly led to a call for a fundamental change in how we view our place in the world. Some of the earliest works published in this regard include *A sand county almanac*, 1949,³ and *Silent spring*, 1962,⁴ which deal with the adverse impacts of human activity on the environment and the possibility of a responsible relationship between people and the land they inhabit.

The first major action that was taken at the global level to address the challenges of the anthropocene head-on, was the adoption of the Brundtland Commission's Report of 1987, which for the first time articulated the concept of sustainable development, as meeting 'the needs of the present without compromising the ability of future generations to meet their needs',⁵ and which also placed sustainable development on the agenda of the United Nations (UN).⁶ Since then,

1 IPCC 'Climate Change 2014: Synthesis Report' (2014) Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change.

2 OC Ruppel 'Intersections of law and cooperative global climate governance challenges in the Anthropocene', Inaugural Address at University of Stellenbosch (2013) <https://scholar.sun.ac.za/handle/10019.1/5667> (accessed 20 August 2019); SL Lewis & AM Maslin 'Defining the anthropocene' (2015) 519 *Nature*.

3 A Leopold *A sand county almanac* (1949).

4 R Carson *Silent spring* (1962).

the use of the concept of sustainable development has become common-place to describe economic development, which takes account of the environmental and social impacts and tries to balance the economic, environmental and social aspects. The Millennium Development Goals and its successor, the Sustainable Development Goals (SDGs) were adopted by the UN in the 21st century to give effect to sustainable development at both the international and local levels.

While sustainable development has become a commonly recognised concept it remains relatively vague.⁷ This indeterminateness raises some concerns from a legal perspective, as definitional uncertainties make it harder to apply and ultimately enforce a right to sustainable development.⁸ This article is aimed at providing some clarity on the legal basis for a children's right to sustainable development in the African context.

This article elaborates on the need for recognition of the right to sustainable development of the child in the context of Africa. It argues that the African human rights system implicitly recognises the right to sustainable development of the child and attempts an initial analysis of what this right would entail, given the specific needs and vulnerabilities of children in Africa, particularly in the face of climate change. It further argues that an explicit acknowledgement of the right to sustainable development for children in Africa is necessary to effectively protect and promote it.

- 5 GH Brundtland 'Report of the World Commission on Environment and Development: Our Common Future' (1987) United Nations General Assembly document A/42/427, 16.
- 6 J McCormick 'The origins of the world conservation strategy' (1986) 10 *Environmental Review* 177 at 178.
- 7 V Barral 'Sustainable development in international law: nature and operation of an evolutive norm' (2012) 23 *European Journal of International Law* 377, 383; HE Daly 'Toward some operational principles of sustainable development' (1990) 2 *Ecological Economics* 1; B Hopwood, M Mellor & G O'Brien 'Sustainable development: mapping different approaches' (2005) 13 *Sustainable Development* 41; M Redclift 'Sustainable development (1987–2005): an oxymoron comes of age' (2005) 13 *Sustainable Development* 216.
- 8 EE Ekon 'The legal status of sustainable development in Nigerian environmental law' (2016) 7 *Journal of Sustainable Development Law and Policy* 104 at 107. While there are no universally binding instruments which provide for a right to sustainable development, the Protocol to the African Charter on the Rights of Women in Africa provides explicitly for the right of all women to sustainable development (article 19) and it has been argued that this right could not only apply to women. Nsibirwa argues that '[t]he [...] Protocol ought not to be viewed as merely advancing the rights of women, but rather as advancing the interests of society in general. This is because the whole society gains if a healthy and sustainable environment is attained.' (MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 49.) The authors believe that the African human rights system does acknowledge the right to sustainable development.

2 SUSTAINABLE DEVELOPMENT AND CLIMATE CHANGE

One of the biggest threats to the attainment of sustainable development across the world is climate change.⁹ Human induced climate change is the result of increased greenhouse gasses (carbon dioxide, methane, nitrous oxide and ozone) being released through human activities, including the burning of fossil fuels, deforestation, and certain agricultural practices such as domestic livestock farming, which result in more heat being trapped into the atmosphere.¹⁰ The consequences include increased and more erratic flooding and drought as rainfall patterns shift and become less predictable, a rise in sea levels as a result of melting ice in the polar regions as well as increased natural disasters, biodiversity destruction and spread of disease resulting from warming temperatures on land and sea.

While no nation can escape the adverse consequences of climate change, developed countries are better prepared to deal with the adverse consequences, because of better infrastructure, financial safety nets and technological advancements, which together increase their resilience.¹¹ However, in developing countries, the consequences of climate change are much more dire, because of a lack of the infrastructure and technology which would enable them to 'bounce back' after suffering from drought, for example, as well as the relatively low investment in adaptation as opposed to mitigation and low global investment in adaptation of the African continent.¹²

- 9 JC Dernbach & F Cheever 'Sustainable development and its discontents' (2015) 4 *Transnational Environmental Law* 247, 252; J Pinkse & A Kolk 'Addressing the climate change-sustainable development nexus: addressing the role of multistakeholder partnerships' (2012) 5 *Business & Society* 176 at 177; M Munasinghe *Analysing the nexus of sustainable development and climate change: an overview* <http://www.oecd.org/env/cc/2510070.pdf> (accessed 25 October 2018), 15.
- 10 The Inter-governmental Panel on Climate Change, the most authoritative body on climate science in its Fifth Assessment Report found that it is beyond reasonable doubt that climate change is taking place and that there is a 95% chance that it is as a result of human activities. IPCC 'Climate Change 2014: Synthesis Report' (2014) *Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*.
- 11 The World Bank 'Building resilience – integrating climate and disaster risk into development: the World Bank Group experience' (2013) 35. https://www.worldbank.org/content/dam/Worldbank/document/SDN/Full_Report_Building_Resilience_Integrating_Climate_Disaster_Risk_Development.pdf (accessed 11 November 2019).
- 12 J Reinl 'Investments to Cushion African Countries against Climate Shocks Not Enough' 27 September 2019 *Inter Press Service*, <http://www.ipsnews.net/2019/09/investments-cushion-african-countries-climate-shocks-not-enough/> (accessed 11 November 2019); see also UNEP, AMCEN and Climate Analytics, 'Africa's Adaptation Gap: Climate-change impacts, adaptation challenges and costs for Africa' (2013) https://climateanalytics.org/media/schaeffer_et_al_2013_africao_s_a_daptation_gap_technical_report.pdf (accessed 11 November 2019).

In Africa, 33 of the 55 countries are classified as 'least developed' by the UN¹³ and the remaining African countries as developing countries. It is thus ironic that the countries which are the most in need of development, are the same countries which will in future bear the brunt, and are already starting to suffer from the consequences of climate change. Climate change not only impact on the ability of countries to develop,¹⁴ it also results in losses of gains which had been made in sustainable development.¹⁵ This is because the consequences of climate change set out above impacts negatively on the availability of water, access to food, prevalence of life-threatening diseases and results in human migration, which further have the potential to lead to increased conflict — all consequences which pose serious threats to human life and development.

Children often suffer the most from the adverse effects of climate change. In fact, children are the most vulnerable group to environmental harm.¹⁶ It is estimated that more than 1.5 million annual deaths of children under the age of 5 can be prevented by reduction of environmental risks.¹⁷ In African countries children make up almost half of the population. Children are the most vulnerable to negative impacts of climate change such as more wide-spread diseases, climate induced migration, and lack of access to water and food, since these directly threaten their survival and development. According to the World Health Organisation (WHO), '88 per cent of the existing burden of disease as a result of climate change occurs in children under 5 years of age'.¹⁸ In Africa, 84 million children live in 'areas of high or extremely high water scarcity',¹⁹ and if global temperatures increase by an average of 3 degrees Celsius, the decrease in crop yields can result in '550 million people, more than half of whom live in Africa' facing food shortages.²⁰ Children have 'growing bodies and developing minds' which are 'extremely sensitive to the effects of malnutrition'.²¹

13 <https://unctad.org/en/Pages/ALDC/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx> (accessed 12 November 2019).

14 African Union (AU) 'Draft African Union Strategy On Climate Change' (2014) 1, 8.

15 Dernbach and Cheever (n 9) 252.

16 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) para 15.

17 As above.

18 UNICEF 'Strategic Framework on Environmental Sustainability for Children 2016-2017' (2015) 6.

19 UNICEF 'Unless we act now: The impact of climate change on children' (2015) 66.

20 R Perrot 'South Africa's consideration of ethics and justice issues in formulating climate change policies' in DA Brown & P Taylor (2014) 'Ethics and climate change: A study of national commitments' IUCN (World Commission on Environmental Law) Environmental Policy and Law Paper 86 130.

21 JJ Romm 'Present and future climate realities for children' in UNICEF (ed) *The challenge of climate change: Children on the front line* (2014) 6

Despite the challenges posed by climate change to sustainable development, sustainable development has also been embraced as a solution to environmental problems, including climate change.²² The UN Framework Convention on Climate Change (UNFCCC) in article 3(4) provides:

The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change.

Through adopting measures in line with sustainable development principles, states would on the one hand decrease the negative impacts on the environment, thereby curbing the negative implications for humans, including children, and on the other hand increase the resilience of all people to the negative environmental consequences which do arise.

3 THE RIGHT TO SUSTAINABLE DEVELOPMENT IN AFRICA

As noted above, the concept of sustainable development was first elaborated in the Brundtland report of 1987. Holden *et al* suggest that core to the concept of sustainable development is 'safeguarding long-term ecological sustainability, satisfying basic human needs, and promoting intragenerational and intergenerational equity'.²³ Sustainable development is thus generally described as aimed at meeting the 'triple bottom line' of environmental, economic and social components.²⁴

The UN Declaration on the Right to Development of 1986 declared the *right* to development to be an inalienable human right. Through reading together provisions of international instruments, such as the Universal Declaration of Human Rights (UDHR), International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and Convention on the Rights of the Child (CRC), a clear picture emerges of the right of all persons to a standard of living adequate for health and well-being, in an environment that is not

22 J Robinson *et al* 'Climate change and sustainable development: realising the opportunity' (2006) 35 *Ambio* 2, 3. See also the references to climate change in the Sustainable Development Goals.

23 E Holden, K Linnerud & D Banister 'Sustainable development: our Common future revisited' (2014) 26 *Global Environmental Change* 130 at 131.

24 The term was first coined by John Elkington and popularised in particular through his book *Cannibals with forks: the triple bottom line of 21st century business* (1999).

detrimental to their wellbeing – a right to sustainable development.²⁵ The UN Agenda 2030 which establishes the SDGs further expressed the commitment of signatories ‘to respecting all human rights, including the right to development’.²⁶

A much clearer framework exists for the right to sustainable development at the level of the African continent. The African Charter on Human and Peoples’ Rights (African Charter) provides for the right of all peoples to development,²⁷ as well as a right to a satisfactory environment²⁸ which together with other socio-economic rights could be interpreted to provide for a right to sustainable development.²⁹ In addition, while adopted before the concept of sustainable development became mainstream, the right to development in the African Charter provides that

all peoples shall have the right to their economic, social and cultural development, with due regard to their freedom and identity in *the equal enjoyment of the common heritage of mankind* (emphasis added).

This phrase ‘common heritage of mankind’ has been interpreted as

a principle of international law that holds that elements of humanity’s common heritage (cultural and natural) should be held in trust for future generations and be protected from exploitation by individual nation states or corporations.³⁰

This could thus be interpreted to provide for a right to sustainable development.

Amechi further notes that apart from providing for a right to a generally satisfactory environment, article 24 of the African Charter also links the right to environment to [sustainable] development.³¹ He submits that this envisages

that African citizens should not only be able to live in an undegraded and pollution-free environment, but also, be able to access the resources provided by their environment in order to develop to their full potential.³²

This link is also reiterated by the African Commission’s State Reporting Guidelines and Principles on articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment adopted at the 61st Ordinary Session of the Commission in April 2018, when it provides that in relation to article 24:

25 See for example UDHR articles 2, 22, 25, 26; ICESCR articles 2, 3, 11, 12, 13, 15 and CRC articles 2, 24, 27, 28, 29, as elaborated in ‘The Human Right to Sustainable Development’ <https://www.pdhre.org/rights/sustainable-development.html> (accessed 19 August 2019).

26 Transforming our world: the 2030 Agenda for Sustainable Development A/RES/70/1, para 35.

27 Art 22 of the African Charter on Human and Peoples’ Rights (African Charter).

28 Art 24 African Charter.

29 J Oloka-Onyango ‘Human rights and sustainable development in contemporary Africa: A new dawn, or retreating horizons?’ (2000) Human Development Report 2000 Background Paper 6.

30 https://en.wikipedia.org/wiki/Common_heritage_of_mankind; Edwin Egede ‘Common heritage of mankind’ in Oxford Bibliographies, <https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0109.xml> (accessed 21 August 2019).

31 Amechi (2010) 123.

32 As above.

[t]he requirement of being favourable to their development, [...] entails that the environment should be used in a sustainable manner, which fulfills the needs of the present generation, without compromising the ability of future generations to meet their own needs.³³

The jurisprudence of the African Commission also supports this interpretation of a rights-based approach to sustainable development. The first case in which the African Commission dealt with the question of a violation of the right to development under article 22 was in *Kevin Mgwanga Gumne, et al v Cameroon*. In this case the complainants

alleged economic marginalization by the Government of Cameroon as well as denial of economic infrastructure. They contended that their lack of infrastructure, and in particular the relocation of an important sea port from their region, constituted a violation of their right to development under article 22 of the African Charter.³⁴

The Commission found that while states have a responsibility to 'invest its resources in the best way possible to attain the progressive realisation of the right to development', in the present case the complainants had not provided enough evidence to show that there was a basis for a finding of a violation of this right.³⁵ The Commission in this case lost a valuable opportunity to elaborate on the substance and content of the right to development. It did not clarify the elements of the right which complainants would have to fulfill in order to succeed with a claim alleging violation of the right to development. Subsequent cases provided more legal and conceptual clarification of the right to development. However, there is still a lack of comprehensive framework outlining the elements of the right and what constitutes its violation.

In a Communication dealing with the conflict in the Darfur region of Sudan, the Commission in finding a violation of the right to development, argued as follows:

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 pursuit of other activities. Instead of deploying its resources to address the marginalisation in the Darfur, [...] the Respondent State instead unleashed a punitive military campaign which constituted a massive violation of not only the economic, social and cultural rights, but other individual rights of the Darfurian people. [...] the Commission finds that the Respondent State is in violation of Article 22 of the Africa Charter.³⁶

In its only inter-state communication to date, the Commission also found a violation of article 22. It found that

[t]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also

33 African Commission on Human and Peoples' Rights, State Reporting Guidelines and Principles on articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and The Environment (2018) 28.

34 OC Okafor 'A regional perspective: article 22 of the African Charter on Human and Peoples' Rights' (2013) in Office of the High Commissioner for Human Rights, *Realizing the right to development: essays in commemoration of 25 years of the United Nations Declaration on the Right to Development*, United Nations, New York and Geneva, 373-384.

35 Communication 260/2002, *Bakweri Land Claims Committee v Cameroon*, para 206.

36 Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 224.

occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter.³⁷

This decision of the Commission highlighted the clear link between articles 21 (right to freely dispose of wealth and natural resources) and 22 of the African Charter, and also emphasised that the actions of other states can violate human rights in the affected state.

The Communication which has probably contributed the most to developing the content of the right to development under the Charter is *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of the Endorois Welfare Council v Kenya* (Endorois case). In this case the Commission highlighted the holistic character of the right to development which encompasses elements of non-discrimination, participation, accountability and transparency, equity and choices as well as capabilities.³⁸ The Commission further ‘placed the burden of “creating conditions favourable to a people’s development” on the Government’.³⁹ The African Court on Human and Peoples’ Rights, in the case of *the African Commission on Human and Peoples’ Rights v Kenya* (Ogiek case), followed the logic of the *Endorois case*, in emphasising both the need for effective consultation, as a crucial part of the right to development and also placing the burden of development squarely on the state.⁴⁰

The following elements of the right to development under the Charter can thus be extracted from the jurisprudence of the Commission and the Court: 1) an element of progressive realisation; 2) a link to the right to freely dispose of their wealth and natural resources; 3) a duty on states not only to refrain from violating the right to development but also to deploy its resources to address marginalisation; 4) a requirement of meaningful participation by affected persons; 5) a responsibility to ensure that the obligations arising from the right to development are to be fulfilled by states individually and collectively. Read together, this jurisprudence supports the idea of the right under article 22 being a right to sustainable development. For example, it is concerned with safeguarding long-term ecological sustainability by ensuring that people are able to control their natural resources, is aimed at satisfying basic human needs including the realisation of socio-economic rights, and attempts to ensure that economic development is in the interest of the people concerned.

The Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) expels any further doubts about the existence of a right to sustainable development at the African regional level, by

37 Communication 227/99, *Democratic Republic of Congo v Burundi, Rwanda, Uganda*, para 95.

38 S Kamba ‘The right to development in the African human rights system: the Endorois case’ (2011) 44 *De Jure* 390.

39 Okafor (n 34) 376.

40 Application 6/2012, *African Commission on Human and Peoples’ Rights v Kenya*, paras 207-209.

providing explicitly for the right of women to sustainable development,⁴¹ as well as the right to a healthy and sustainable environment, including to the extent that it relates to environmental and water management and the protection of women's indigenous knowledge.⁴² The Protocol places duties on state parties to 'take all appropriate measures' to introduce the gender perspective in the national development planning procedures, ensure participation of women, promote women's access to credit, training, skills development and to take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes. In one of the few academic assessments of the Maputo Protocol, Nsibirwa argues that

[t]he [...] Protocol ought not to be viewed as merely advancing the rights of women, but rather as advancing the interests of society in general. This is because the whole society gains if a healthy and sustainable environment is attained.⁴³

Contrary to these two instruments, the African Charter on the Rights and Welfare of the Child (African Children's Charter) has no provision which deals with the right of children to sustainable development. The Charter deals with the right to development of the child as an individual right, in the context of the right to life, survival and development.⁴⁴ However, it is our contention that a holistic reading of the Children's Charter does envision sustainable development as being in the best interest of children. This is elaborated further in the next section that deals particularly with the rights of children to sustainable development.

Apart from the human rights instruments themselves, there are other frameworks that outline some aspects of the right to sustainable development in the African context. Regional environmental law, in particular the Revised African Convention on the Conservation of Nature and Natural Resources (Convention on Nature) adopted in 2003, concerns itself with sustainable development and human rights.⁴⁵ The objectives of the Convention on Nature are aligned with the classical conception of sustainable development, and it was adopted 'with a view to achieving ecologically rational, economically sound and socially acceptable development policies and programmes.'⁴⁶ The revision was done with the specific aim of 'expanding elements related to sustainable development.'⁴⁷ The principles that should guide states in implementing the Convention rely on the right of all peoples to a

41 Art 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

42 Art 18 Maputo Protocol.

43 MS Nsibirwa 'A brief analysis of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women' (2001) 1 *African Human Rights Law Journal* 49.

44 Art 5 of the African Charter on the Rights and Welfare of the Child (African Children's Charter).

45 W Scholtz 'Human rights and the environment in the African context' in W Scholtz & J Verschuuren (eds) *Regional environmental law: transregional comparative lessons in pursuit of sustainable development* (2015) 102, 103.

46 Convention on Nature, article II.

47 The revised Convention on Nature replaced the 1968 version.

satisfactory environment favourable to their development; the duty of states, individually and collectively to ensure the enjoyment of the right to development; and the duty of states to ensure that developmental and environmental needs are met in a sustainable, fair and equitable manner – clearly illustrating the human rights norms underlying the Convention.⁴⁸ Interestingly, and particularly concerning, is the complete absence of provisions on climate change, apart from a vague reference in the preamble that affirms ‘that the conservation of the global environment is a common concern of human kind as a whole’.

Finally, considerations of sustainable development were included in the AU’s Agenda 2063 – the Africa we want – which was adopted as a ‘plan for structural transformation and a shared strategic framework for inclusive growth and sustainable development.’⁴⁹ The first important aspect in this regard is that it is a long term plan⁵⁰ – fifty years – for Africa’s development, and is thus crucially concerned with future generations.⁵¹ Sustainable development is also the first aspiration of Agenda 2063, formulated as follows: ‘a prosperous Africa based on inclusive growth and sustainable development’. This aspiration includes measures for climate change adaptation and mitigation, and explicitly makes the link between the challenges posed by climate change to sustainable development.⁵²

4 THE RIGHT OF CHILDREN TO SUSTAINABLE DEVELOPMENT

This section is limited to the level of current normative recognition of the right of the child to sustainable development. In doing so it draws particularly on the rights in the CRC, the African Children’s Charter, the principle of the best interest of the child, and the frameworks discussed in the previous section, The African Charter, Maputo Protocol, Convention on Nature and Agenda 2063, in interpreting the child’s right to sustainable development in Africa.

4.1 The question of inter-generational justice

There is a risk that the consequences of present unsustainable development, including climate change, can simply be ignored and consigned to future generations to deal with, as the main impacts will only be felt after the damage has been done. This approach of consigning the finding of solutions to future generations is also supported by a narrative that technological advancement will have sufficiently developed to deal with these consequences in the future,

48 See article III of the Convention on Nature.

49 Agenda 2063, iii.

50 For purposes of implementation the Agenda 2063 was divided into ten year implementation plans.

51 Agenda 2063, para 5.

52 Agenda 2063, para 16 & 17.

and that there is no need for present generations to alter their way of life. However, this may be seen as not only unethical, but also unjust, as the consequences were firstly not of their making and secondly there is no knowing what the state of technology in future will be. Sustainable development, especially in the context of environmental sustainability, thus gives a place of prominence to the needs of generations to come.⁵³

Sustainability thus presupposes a long-term timeframe, in which present actions are *consciously* aimed at minimising the impact on future generations and not jeopardising the ability of future generations to meet their needs. Some scholars have argued that this concern with future generations means that issues of the environment and sustainability cannot be dealt with within a human rights framework, as they concern generations who are not yet alive, and thus have no entitlement to human rights (yet).⁵⁴ One way in which this concern has been addressed, is by noting that while some of the future generations which may be affected are not yet born, the environmental degradation and climate change will already severely affect the current generation of children. Thus considerations of inter-generational justice can be applied in the present human rights context, as young children run the risk of inheriting an irreversibly degraded living environment.⁵⁵ Therefore, because these young generations face great risks to their life and survival owing to unsustainable practices, legal protection in the form of the right to sustainable development is warranted. Unfortunately, the legal instruments dedicated to children's rights fall short of explicit recognition of a standalone right to sustainable development, however, some protection is provided, particularly in relation to environmental degradation.

4.2 Applicable legal instruments and principles

The CRC recognises the duty of state parties to take into account the dangers and risks of environmental pollution in respect of protecting the right to health of the child.⁵⁶ The Committee on the Rights of the Child has also acknowledged the significance of various components of the right to sustainable development through its mandate of interpreting the CRC. In its General Comment regarding the rights of indigenous children the Committee urged state parties to consider quality of natural environment while ensuring the realisation of children's right to life, survival and development to the highest extend possible.⁵⁷

53 D McGoldrick 'Sustainable development and human rights: an integrated conception' (1996) 45 *The International and Comparative Law Quarterly* 796 at 812.

54 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) para 67.

55 Report of the Special Rapporteur (n 54) para 68.

56 Art 24 of the CRC.

57 UNCRC General Comment 11 (2009) Indigenous children and their rights under the Convention para 35.

Moreover, as seen above, the Maputo Protocol contains an explicit and broad incorporation of the right to sustainable development.⁵⁸ Even though the Protocol is not a child rights instrument, the recognition is significant as it applies (at least) to girls, but also holds benefits for all children, as all people benefit when women actively participate in concerns related to sustainable development, and if they have access to credit and land rights. The Maputo Protocol further recognises all the three elements of sustainable development, that is, environmental, social, and economic, as a human right of women and girls in Africa.⁵⁹ The Protocol provides for this right in broad terms in two provisions: article 18 the right to a healthy and sustainable environment and article 19 the right to sustainable development. While the former deals only with environmental sustainability, the latter focuses mainly on social and economic sustainability.

On the other hand, the African Children's Charter has no provision which deals with the right of children to development, except as an individual right in the context of the right to life, survival and development.⁶⁰ The right to development of the child is interpreted broadly to include the child's physical, mental, spiritual, moral, psychological and social development, in the context of the development of children from childhood to adulthood.⁶¹ Moreover, the Charter does not contain right to a satisfactory environment. However, if rights which are indeed protected in the Children's Charter, such as the right to life, right to education⁶² and the right to health⁶³ are read together with the right/principle of the best interest of the child,⁶⁴ a case can be made for the right of African children to sustainable development. This link between sustainable development and children's right to education was already made by the African Commission in the *Darfur* case,⁶⁵ as well as in the Agenda 2063's first 'Aspiration', both discussed above.⁶⁶

Because of their specific vulnerability, children enjoy rights that are not bestowed upon adults.⁶⁷ One such right is the right to life, survival and development, protected in article 5 of the Children's Charter. While all individuals are entitled to the right to life, in relation to children there is an absolute prohibition on state parties' interference with this

58 Art 18 and 19 Maputo Protocol.

59 As above.

60 Art 5 of the African Charter on the Rights and Welfare of the Child (African Children's Charter).

61 General Comment 5 of the African Committee of Experts on the Rights and Welfare of the Child on 'State Party Obligations under the African Charter on the Rights and Welfare of the Child (article 1) and systems strengthening for child protection' (2018) P12.AUTHORS – para 12.

62 Art 11 African Children's Charter.

63 Art 14 African Children's Charter.

64 Art 4 African Children's Charter.

65 Communication 279/03-296/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, para 224.

66 Agenda 2063, para 10.

67 S Sanz-Caballero 'Children's rights in a changing climate: a perspective from the United Nations Convention on the Rights of the Child' (2013) 13 *Ethics in Science and Environmental Politics* 1 at 3.

right (negative obligation) and states have an obligation to realise it to the highest extent possible (positive obligation).⁶⁸ The right to sustainable development can thus also find expression through this cardinal provision of the Children's Charter, in that the state would be responsible for ensuring that economic, social and environmental conditions in the country are such that they support and enhance the child's right to life and development. In a context of climate change, states need to put in place all the necessary measures to adapt and mitigate the consequences of climate changes, to protect children from the life threatening impacts of climate change.

Among the rights that are closely interlinked with the environmental aspect of sustainable development is the right to health. The UN Committee expounded upon the obligations of state parties in relation to the environment/health context, which include: taking measures to address the risks of environmental pollution, ensuring housing facilities are free from dangerous smokes, regulating the environmental impact of business activities that can compromise children's health, access to safe drinking water and sanitation.⁶⁹ In relation to the highest attainable standard of health the UN Committee on the Rights of the Child also explicitly stated that state obligations extend beyond combating environmental pollution, to include ensuring the existence of a sustainable environment through addressing climate change and putting children's rights at the centre of climate change adaptation and mitigation.⁷⁰

Another important right and cardinal principle in the African Children's Charter is the right to participation.⁷¹ Children have a right to be heard in matters that affect them. The participation right of children has two key elements, the right to express their views and the right to have their views given due weight.⁷² Protection of children's right to sustainable development entails ensuring that they take part in decisions that will affect their future. Hence participation is intrinsic in the realisation of sustainable development.

The jurisprudence of the African Commission in the *Endorois* case, discussed above, demonstrated that meaningful participation of affected group is one of the elements of peoples' rights to development.⁷³ When it comes to the African Children's Charter, the fact that it gives children the right to meaningful participation in matters that affect them entitles them to take part in decisions pertaining to sustainable development. It is paramount that children

68 EA Sutherland 'The child's right to life, survival and development: evolution and progress' (2015) 26 *Stellenbosch Law Review* 272 at 280.

69 Committee on the Rights of the Child General Comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24).

70 Committee on the Rights of the Child General comment 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art 24).

71 African Children's Charter art 7 & art 4(2).

72 Defining Child Participation; Unpacking Gender Equality Approach to Children and Young People's Participation' <https://www.wvi.org/sites/default/files/Defining%20Child%20Participation.pdf> (accessed 21 November 2019).

73 Okafor (2013) 376.

influence the shaping of the world, which they will be inheriting. Hence the right to participation of the child under the African Children's Charter is an important consideration in sustainable development.

Core to the child rights instruments is the principle of the best interest of the child, which ought to be the primary consideration in all decisions and actions concerning the child.⁷⁴ This implies that states have a duty to take all measures to ensure that the interest of children have pride of place in all legislation, policies and budget allocations that are done in giving effect to the right to development and sustainable development in particular, as well as in addressing the challenges of climate change. This is also in line with the principle of development as identified from the African Commission's jurisprudence above that states have a duty to deploy its resources for ensuring development and addressing marginalisation of certain groups.

According to General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration, the best interest of the child must be understood as a substantive right of all children, as an interpretive principle when read together with other rights, and as a rule of procedure. The consequence of the best interest being a substantive right is that a child can rely on this right to claim fulfilment of its obligations from the state. Freeman and Tobin both take the view that the best interest of the child 'must be seen both as informed by and constrained by the rights, and the other principles, provided for by the Convention'.⁷⁵ In terms of best interest being an interpretive principle, this means that, if more than one interpretation of a right is possible, the one that best serves the best interest of the child should be followed.⁷⁶ As a rule of procedure, an action must be assessed for the potential impact on children and the end decision must be justifiable in terms of the best interest of the child.⁷⁷ There must also be procedures in place to ensure that the implementation of the best interest of the child is guaranteed. Vital to the process of determining the best interest of the child is that the child must be given an opportunity to express his or her views and to have such views taken into account.

As clearly demonstrated in the introduction, unsustainable practices including those that result in climate change and environmental degradation, are contrary to the best interest of the child in many aspects, as it affects the survival, health, physical wellbeing and development of the child. Hence the best interest principle demands

74 Art 4 African Children's Charter.

75 M Freeman 'Article 3, the best interest of the child' in A Alen *et al* (2007) *A commentary on the United Nations Convention on the Rights of the Child 1-2*; J Tobin 'Beyond the supermarket shelf: using a rights based approach to address children's health needs' (2006) 14 *International Journal of Children's Rights* 275 at 287.

76 General Comment 14, para 6(b).

77 In this regard, states parties 'shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations', General Comment 14, para 6(c).

that states take the necessary measures to ensure the protection of children from climate change, unsustainable practices and environmental degradation.⁷⁸ It is crucial to note that in the African Children's Charter the principle of the best interest of the child is 'the' primary consideration and not 'a' primary consideration.⁷⁹ Hence, despite considerations such as economic growth, interest of private sector or any other factor that aims to justify environmental degradation and policy decisions on development, the best interest of the child trumps all. In addition, while the elements noted above which constitute the right to development under the African human rights system make provision for progressive realisation, in considering the best interest of the child, there is also a need to take account of the time perception of children, as well as the prolonged exposure of children to the negative environmental impacts of unsustainable development, which would militate against unnecessary delays. Thus as far as possible, there is a need for measures to be expedited and realised immediately.

4.3 Developments towards the protection of the right to sustainable development of children

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee or Committee), which is the organ established by the African Children's Charter to monitor its implementation, has limited case law jurisprudence. Moreover the issue of sustainable development and its impact on children's rights has not featured in any of the communications considered by the African Children's Committee. The Committee has, thus far, not found implied rights in the normative framework of the African Children's Charter. Unlike the African Commission, which uses the doctrine of implied rights and found rights that are not explicitly recognised in the African Charter, such as the right to food, through its jurisprudence,⁸⁰ the African Children's Committee is yet to add implicit rights to the list of children's rights in Africa.

In addition to its quasi-judicial mandate of determining communications, the Committee is also mandated to consider periodic state party reports as a means to explicate and expound upon rights recognised in the Children's Charter. The State Reporting Guidelines of the Committee outline clusters of rights and provide a breakdown of the type of information that should be provided by state parties in their report. The reporting procedure therefore provides a platform to apply the rights in the Charter to challenges on the ground, and the concluding observations and recommendations adopted after review of

78 Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) para 56-58.

79 As above.

80 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR (ACHPR 2001) paras 65 & 66.

state reports also provide guidance on the content and application of rights.

In its recent Concluding Observation and Recommendation on the Kingdom of Eswatini, the Committee noted with concern the impact of drought on the survival and development of children and urged the state party to take the necessary measures to address this concern.⁸¹ In another Concluding Observation and Recommendation to Lesotho, the Committee raises the need to ensure the supply of clean drinking water to all children, under the right to survival and development.⁸² In various Concluding Observations and Recommendations the African Committee has also raised the issue of provision of clean drinking water under the right to health.⁸³ Not only does providing clean drinking water require a balanced ecosystem and sustainable environment,⁸⁴ climate change which by 2025 will result in half of the world population living in water distressed areas, also impacts on this right.⁸⁵ Clearly the state party reporting procedure could be used to address contemporary child protection challenges related to environmental degradation and climate change, within the context of existing rights.

Beyond the normative framework of the African Children's Charter, the Committee has developed a policy document entitled *Agenda 2040: Fostering an Africa fit for children*.⁸⁶ The document aims to address current child rights concerns in Africa by outlining ten priorities as aspirations to be achieved by 2040 along with action steps to be taken by state parties and other stakeholders.⁸⁷ Aspiration 9 of *Agenda 2040* provides that 'Every child is free from the impact of armed conflicts and other disasters or emergency situations'.⁸⁸ While in the explanation of Aspiration 9, it is alluded that disasters and emergency situations such as climate change have a disproportionate and negative impact on children, the action steps are primarily focused on armed conflict. Only one action step could be interpreted to extend to natural disasters, by requiring that children be equipped to be resilient in the face of disasters and other emergency situations.⁸⁹

81 African Children's Committee Concluding Observation and Recommendations, Eswatini (2019) 7.

82 African Children's Committee Concluding Observation and Recommendations, Lesotho (2016) 7.

83 African Children's Committee Concluding Observation and Recommendation Sierra Leone (2018) 11; African Children's Committee Concluding Observation and Recommendation Liberia 8.

84 World Health Organization 'drinking water' <https://www.who.int/news-room/fact-sheets/detail/drinking-water> (accessed 9 August 2019).

85 As above.

86 *Agenda 2040: Fostering an Africa fit for children* is a policy document developed by the African Children's Committee and adopted by the African Union Executive Council through decision no EX.CL/December.997(XXXI) of the African Union, as a document of the Union. It elaborates on Paragraph 53 of AU-Agenda 2063 and presents measurable goals and priority areas to which the African Union and its Member States commit themselves for the 25 years starting 2015.

87 *Africa's Agenda for Children 2040: fostering an Africa fit for children* (2016) 10.

88 *Africa's Agenda for Children 2040* (n 87) 18.

89 *Africa's Agenda for Children 2040* (n 87) 19.

Rather than focusing on the responsibility on state parties to address and prevent environmental degradation, the Agenda thus only addresses the need to prepare children to withstand and live with harsh climatic conditions. Even though Agenda 2040 is not a normative document, it is a missed opportunity in terms of making a clear link between children's rights and sustainable development, especially as the Agenda claims to be informed by the African Children's Charter and other documents such as the UN Sustainable Development Goals.⁹⁰

An examination of the various applications of the right to health, the right to survival and development, education and the principle/right of the best interest of the child and the right to participation, if viewed from the perspective of the indivisibility of rights, leads to the conclusion that the right to sustainable development of the child is implied under the African human rights system. Such a right to sustainable development would include elements such as the right to a clean and healthy environment, to safe drinking water, education, and a right to participate in decisions affecting them. A right to sustainable development cuts across the various rights that are explicitly included in these instruments. However, it is our contention that there is still need for an explicit recognition of the right to sustainable development of African children, on the basis of a separate right and while some elements can be derived from other rights, there are benefits from its recognition as a stand-alone right.

Both the right to development and the right to satisfactory environment under the African Charter on Human and Peoples' Rights are clearly defined as peoples' rights, or collective rights,⁹¹ and the Maputo protocol bestows the right to sustainable development to women collectively.⁹² It has been argued that the incorporation of peoples' collective rights in the African Human Rights system enhances enforcement.⁹³ While it is not trite that the right to sustainable development can only be exercised collectively, under the African human rights system it has thus far been exercised only as a collective right. Hence the implied or explicit recognition of the right in the African Children's Charter should take cognisance of the nature of the right and its applicability to render it a collective right of children.⁹⁴ However, there is a need for a much more focused study in future to address this fully.

5 THE NEED FOR EXPLICIT RECOGNITION

Explicit recognition of the right to sustainable development, especially as it relates to the right to environment may seem to be untenable for

90 Africa's Agenda for Children 2040 (n 87) 10.

91 Art 2 African Charter.

92 Art 18 Maputo Protocol.

93 M Talbot 'Collective rights in the Inter-American and African human rights systems' (2018) *Georgetown Journal of International Law* 185.

94 The African human rights system is praised for its inclusion of the concept of peoples' rights, however this concept is missing in the African Children's Charter.

various reasons. As highlighted above, the argument is sometimes made that since environmental rights are linked with future generations, they cannot fall in the human rights regime, which requires present victims.⁹⁵ Furthermore, there are arguments that environmental rights aim to prevent environmental damage, and human rights law remedies past violations not future scenarios.⁹⁶ However, these arguments overlook the broad nature and various elements of the right to sustainable development, as well as the already manifesting impacts of environmental degradation on human rights. As argued in this paper, environmental protection is no longer only for the sake of future generations but also equally for the sake of the current generations and especially for children who will bear the brunt of degradation of the environment and the consequences of climatic change. In addition, legislation and policy decisions which will result in negative consequences have to be repealed even if the negative consequences have not yet manifested, if it is clear that they will be detrimental and in contravention of established legal and human rights principles. Similarly, the harmful activities of industries and corporations should be regulated and limited in law, to prevent harm to children. This is in line with the principle of the best interest of the child and that business interests cannot trump the realisation of their rights and interests.

A further reason why there is a need for explicit recognition relates to the mode of monitoring the implementation of the right and remedying violations of the right. Human right monitoring has a preventive element in addition to a remedial one. In fact one of the most utilised mechanism of monitoring, also under the African human rights system, the state reporting procedure, serves exactly this purpose. The state reporting mechanism allows state parties to identify risks and put in place measures to prevent violations in accordance with concluding observations and recommendations of treaty bodies.⁹⁷ However, for this objective to be realised, the right needs to be recognised and the state concerned has to report on measures it is taking to ensure its realisation. If a certain right is not explicitly recognised, state parties will not be inclined to report on any elements of such right, even if it can be inferred from other rights.

For a right to be invoked before courts and international treaty bodies, it is essential that it be explicitly provided in the relevant instrument. While a right may be recognised through creative interpretation of human rights instruments, as has been done with the right to food by the African Commission, this would leave the duty to recognise the right with international treaty bodies, which are often not willing to interpret rights too broadly. In addition, the UN Committee on the Rights of the Child noted the importance of incorporation of

95 McGoldrick (n 53) 812.

96 McGoldrick (n 53) 813.

97 International supervisory mechanisms for human rights <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/international-supervisory-mechanisms-for-human-rights> (accessed on 9 August 2019).

rights recognised in the CRC in domestic legislation in order to invoke it in national courts and thereby ensure its implementation.⁹⁸ Establishing access to justice for children in the context of sustainable development is a key means of ensuring that states and private actors are held accountable for obligations.

Related to this is the general rule of law that where there is a right there is a remedy. Conversely, where there is no right, there is no need for any steps to be taken to remedy the situation. So the explicit recognition of the right to sustainable development for children would lead to further elaboration of what the duties of states and other stakeholders and even the international community are in respecting, protecting and fulfilling this right for children. Under article 1 of the African Charter states assume the obligation to 'adopt legislative or other measures to give effect' to the rights protected under that treaty. A similar provision is provided under article 1 of the African Children's Charter. Thus an explicit recognition would make sustainable development not only an Aspiration to be achieved, as under the Agenda 2063, but impose obligations which can be enforced by rights holders.

Another important reason for explicit recognition of the right to sustainable development in international instruments is the extraterritorial impact of environmental degradation.⁹⁹ Various national laws may recognise the right to environment and may criminalise certain acts that amount to environmental degradation. However, international recognition of the right is needed to ensure protection across territories.

There is furthermore a moral obligation on the present generations and in particular the policy makers for the explicit recognition of children and future generations to a liveable future. An explicit recognition of a right to sustainable development for children would thus be an indication of a commitment of leaders on this continent to ensure that development does not only take place, but that in developing economically, the social and environmental considerations and the obligations towards future generations is given full recognition.

Explicit recognition of rights is furthermore crucial to ensure political will and commitment from states and galvanise the necessary support and resources from stakeholders to realise the right.¹⁰⁰ One of the strengths of the Sustainable Development Goals as opposed to the Millennium Development Goals is said to be the fact that the SDGs are anchored on human rights norms.¹⁰¹ This has given them political weight and increased commitment. However not all the elements of the

98 UNCRC General Comment 5 General measures of implementation of the Convention on the Rights of the Child (arts 4, 42 and 44, para 6) (2003) para 20.

99 A Boyle 'Human rights and the environment: where next?' (2012) 23 *European Journal of International Law* 613 at 634.

100 <https://canadians.org/blog/blue-planet-project-calls-explicit-recognition-right-water-un-development-agenda> (accessed 22 August 2019).

101 I Winkler 'The sustainable development goals and human rights: a critical early review' <https://www.tandfonline.com/doi/full/10.1080/13642987.2017.1348695> (accessed 22 August 2019).

SDGs are explicitly recognised in human rights norms, the right to sustainable development of the child is an example. Hence it is curial to explicitly recognise the right in order to benefit from the accountability mechanisms of human rights systems that inspire political commitment.

Finally, in the Preamble of the African Children's Charter, states noted

with concern that the situation of most African children remains critical due to the unique factors of their socio-economic, [...] and developmental circumstances, natural disasters [...] and on account of the child's physical and mental immaturity he or she needs special safeguards and care

Through this, the additional protection, which should be bestowed upon children, was acknowledged. Given the intergenerational nature of climate change and sustainable development, and the specific needs and vulnerabilities that children have in this regard, it is therefore paramount and in the best interest of the child that the specific factors that impact on children in this regard be fully developed and that it is acknowledged as a right.

6 CONCLUSION AND RECOMMENDATIONS

News reports released in June 2019 indicate that the permafrost in the Canadian Arctic, which scientists expected to remain frozen for at least another 70 years, had begun thawing.¹⁰² This is just one of the many consequences of human induced climate change which was not expected to take place in our lifetime, and which will have far-reaching consequences for today's children and future generations. There is a need for a realisation on the side of the present generation, and leaders in particular, that the consequences of the development decisions that we take today will have repercussions which we may not experience ourselves. As noted by Viljoen, the various human rights instruments discussed in this paper together create 'overlapping and connecting [...] layers of protection.'¹⁰³ Together these instruments offer protection for the right to sustainable development.

However, as we argue above, there is, in addition, a need for an explicit recognition of the future challenges that we create for children through our present mode of development which had been followed since the industrial revolution and which has become untenable, unsustainable and unfit for our limited world. There is thus a need for a recognition of the best interest of the child, and for providing children

102 Matthew Green 'Scientists amazed as Canadian permafrost thaws 70 years early' 18 June 2019 *Reuters* <https://www.reuters.com/article/us-climate-change-permafrost/scientists-amazed-as-canadian-permafrost-thaws-70-years-early-id-USKCN1TJ1XN> (accessed on 21 August 2019); Grant Currin 'Arctic Permafrost Is Going Through a Rapid Meltdown — 70 Years Early' 13 June 2019 <https://www.livescience.com/65709-arctic-permafrost-melts-decades-early.html> (accessed 21 August 2019).

103 F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 11 *Washington & Lee Journal of Civil Rights & Social Justice* 29.

with opportunities to participate, in order to share a world which will continue to be habitable. While it would be best if this could be done through the amendment of existing instruments, it is not likely that these instruments will be opened up for review in the foreseeable future, and there is thus a need for its incorporation through other means, including interpretation.

Based on the arguments and conclusions made in this paper we make the following recommendations:

The African Children's Committee should use its case law jurisprudence to find an implied right to sustainable development, if presented with a communication that relates to any of the elements of the right. The Committee should improve the analysis of the right to life, survival and development and the right to health including access to safe drinking water, to include various elements of sustainable development such as: the right to a satisfactory environment, protection from environmental pollution and degradation, access to resources provided by the environment, the right to economic, social and cultural development, the principle of non-discrimination and participation in sustainable development. The Committee can do this in its concluding observations and recommendations, and through a General Comment on the right to survival and development.

The Committee may amend its state reporting guidelines to incorporate elements of sustainable development. The Committee could specifically request the following information from state parties through its reporting guidelines; disaggregated information on the effects of pollution and climate change on the health and wellbeing of children, precautionary measures to protect children against environmental harm, participation of children in environmental decision-making and availability of remedies for environmental harm caused to children.

The Committee may specifically urge state parties to put the best interest of children at the centre of climate adaptation strategies, put in place preventive measures with regards to environmental degradation, and mitigate current impact of climate change and environmental degradation on children. The Committee could urge states parties to put in place environmental standards that are based on the best available scientific research and recommendations. The Committee may further push for the incorporation of children's rights in environmental impact assessments conducted prior to public or private projects.

The Committee could further pay special attention to countries most affected by climate change and environmental degradation and utilise its multi-faceted mandate to respond accordingly. In addition to state party reporting mechanism and communication mandate, the Committee could undertake onsite investigation in these countries with a view to analyse the impact of environmental degradation and climate change on children's rights and welfare and recommend the necessary measures.

The African Commission may make use of its norm-setting functions to elaborate the meaning of the right to development under

the African Charter, and to ensure that this is in line with the principles of sustainable development, as well as to elaborate on the content of the right to sustainable development under the Maputo Protocol. The African Commission and the African Court could use the opportunity of cases brought before it that relate to article 22 of the African Charter to develop its jurisprudence in this regard and particularly to elaborate on the duties and expectations in relation to states in respecting, protecting and fulfilling this right.

Civil society organisations could ensure the inclusion of aspects of sustainable development in their complementary reports to the Committee and the Commission and further bring communications against state parties who are failing to protect children from environmental degradation. Civil society organisations should advocate for the inclusion of the right of children to sustainable development, preferably within the existing instrument protecting the rights of children on the continent.

State parties should comply with their obligations under the African Charter, the Maputo Protocol and the African Children's Charter, to respect, protect and fulfill the rights of all people to development, within an environment that is not detrimental to their health and wellbeing, and in a manner which allows future generations to do the same. State parties should also cooperate for the purposes of development, to ensure that economic development is delivered, within the social and environmental boundaries, and without detrimental effects resulting for another state as a result of their development efforts.

Journalism and human rights standards in Africa: reportage of violence against persons with albinism in Malawian newspapers

Joe Mlenga*

ABSTRACT: Malawi has experienced a boom in radio and television stations, newspapers, online media, and a democratic dispensation has been put in place, but reporting of human rights abuses in the country is unsatisfactory. One of the most pressing issues at the moment in the country is the killing, maiming, abduction and disappearance of persons with albinism. Persons with albinism face discrimination and stigma based on false beliefs. A content analysis of Malawian newspaper articles on the attacks on persons with albinism suggests that reporting is largely specific, reactive and superficial. The articles from the Times Media Group and Nation Publications Limited published between 2016 and 2018, seem not to aim at demystifying the issue of albinism as a mere disability, and the press portray persons with albinism as helpless victims of voodoo. There is hardly any framing of articles to show positive contributions or normalcy of persons with albinism. The Malawian newspapers should highlight their achievements and portray them as more than mere victims. Additionally, there is a role for investigative journalism to help in tracking buyers of body parts of persons with albinism. Better reporting of violations would ultimately help raise human rights standards in Malawi and Africa as a whole.

TITRE ET RÉSUMÉ EN FRANCAIS:

Journalisme et normes des droits de l'homme en Afrique: le reportage sur les violences à l'égard des albinos dans les journaux au Malawi

RÉSUMÉ: Au Malawi, les stations de radio et de télévision, les journaux et les médias en ligne connaissent un essor considérable dans un environnement de libéralisation mais le reportage sur les violations des droits de l'homme dans le pays n'est pas satisfaisant. L'assassinat, la mutilation, l'enlèvement et la disparition de personnes atteintes d'albinisme sont l'un des problèmes les plus urgents dans le pays. Les personnes atteintes d'albinisme font face à la discrimination et à la stigmatisation fondées sur de fausses croyances. Une analyse du contenu d'articles de journaux au Malawi sur les attaques contre des personnes atteintes d'albinisme suggère que le reportage est en grande partie spécifique, réactif et superficiel. Les articles du *Daily Times* and the *Nation* publiés entre 2016 et 2018 ne semblent pas viser à démystifier le problème de l'albinisme en tant que simple handicap, et la presse dépeint les personnes atteintes d'albinisme comme des victimes impuissantes de la superstition. Il n'existe guère un effort dans la rédaction d'articles montrant des contributions positives ou la normalité des personnes atteintes d'albinisme. Les journaux au Malawi devraient mettre l'accès sur leurs réalisations et les décrire davantage comme de simples victimes. En outre, le journalisme d'investigation a un rôle à jouer dans le suivi des acheteurs de parties du corps de personnes atteintes d'albinisme. Un meilleur reportage des violations aiderait en fin de compte à relever les normes des droits de l'homme au Malawi et en Afrique en général.

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KEY WORDS: albinism, killings, journalism, content analysis, Malawi, superstition

CONTENT:

1	Background: the media in Malawi.....	143
2	Attacks on persons with albinism.....	144
3	The national action plan on persons with albinism	146
4	Human rights and journalism	147
5	Methodology	148
6	Reporting of attacks on persons with albinism in the Times Media Group	149
7	Reporting of attacks on persons with albinism in the Nation Publications Limited.....	150
8	Discussion	152
9	Recommendations and way forward.....	153
10	Conclusion.....	155

1 BACKGROUND: THE MEDIA IN MALAWI

The media in Malawi have boomed in the 25 years of multi-party democracy following the fall of founding father Kamuzu Banda. In 1994, Banda, whose 30 year reign was marked by abuse of human rights and lack of rule of law, lost a watershed election to opposition opponent Bakili Muluzi.¹ Under Kamuzu Banda's rule there was a single daily newspaper, *The Daily Times*, a solitary weekly called *Malawi News* and a lone radio station, the Malawi Broadcasting Corporation.² There was no television station.³ The existing media houses were propaganda tools that helped maintain the status quo.⁴

With newly found freedoms and rights entrenched in the 1994 Constitution designed to reflect the democratic dispensation, alternative newspapers and radio stations flourished. Television stations however started operating in Malawi only a few years later in 1999.⁵ As of 2019 there are two established print media houses, namely the Times Media Group and the Nation Publications Limited. The Times Media Group publishes *The Daily Times*, *Malawi News* and *Sunday Times*. It also operates Times Television and Times Radio, and an online news site. The Nation Publications Limited publishes *The Nation*, a daily; the *Weekend Nation* which appears on Saturdays, and *Nation on Sunday*. The firm also has an online news site. Furthermore there are 27 licensed local television stations and 60 licensed FM radio stations in Malawi.⁶

- 1 JK van Donge 'Kamuzu's legacy: the democratization of Malawi: or searching for the rules of the game in African politics' (1995) 94 *African Affairs* 239.
- 2 J Lwanda 'Paper tigers: the rise and fall of independent media in Malawi: 1961-2001' (2002) 55 *The Society of Malawi Journal* 5.
- 3 Lwanda (n 2) 7.
- 4 Lwanda (n 2) 5-6.
- 5 Lwanda (n 2) 17.
- 6 Malawi Communications Regulatory Authority (2019) 'List of broadcasting licences and validity period of their licences'.

The media houses carry largely local content and some of their reportage concerns human rights or democracy issues. Radio stations' phone-in programmes are popular with listeners on these topics. Newspapers have reserved spaces for readers who contribute content in terms of photographs and stories on a wide range of issues including human rights. The allotted spaces go under the banner citizen journalism.

Concerning ownership and bias, both the Nation Publications Limited and Times Media Group are privately ran and are deemed to be independent in their reportage. As such they are supposed to play a critical role in promoting human rights, democracy and the rule of law. Indeed, the media houses have occasionally fallen foul of the authorities following critical stories. The Times Media Group was shut down in 2018 for allegedly failing to square its tax bill.⁷ The publisher claimed that the shut-down was a witch hunting following negative reporting about the government.⁸ The Nation Publications Limited was at one point barred from carrying government adverts and civil servants were told not to buy or read the company's papers after an outburst against it by former president Bingu wa Mutharika.⁹ Radio and television stations are mainly privately operated. The exception is the Malawi Broadcasting Corporation whose radio and television stations are seen as biased in favour of whichever party is in government.¹⁰

2 ATTACKS ON PERSONS WITH ALBINISM

Although persons with albinism in Malawi have suffered various abuses for years, violence against them became more pronounced five years ago.¹¹ In 2014, people with albinism in Malawi started to experience greater abuses of their rights.¹² Children and adults were targeted in abductions, killings, maimings and disappearances. Previously such atrocities were recorded in Mozambique and Tanzania.¹³ In Malawi some sections of the society wrongly believe that persons with albinism have special powers that enable them to defy death.¹⁴ In Tanzania the

7 P Kumbani 'MRA seals Times Media Group' 1 June 2018 <https://mwncation.com/mra-seals-times-media-group/> (accessed 27 July 2019).

8 L Mughogho 'MRA trashes political interference claims in their action against Times' 2 June 2018 <https://malawi24.com/2018/06/02/mra-trashes-political-interference-claims-in-their-action-against-times/> (accessed 25 September 2019).

9 Nyasa Times 'Don't read the Nation, DPP warns civil servants' 12 March 2012 <https://www.nyasatimes.com/dont-read-the-nation-dpp-warns-civil-servants/> (accessed 27 July 2019).

10 L Chitsulo 'Report faults MBC on bias' 7 June 2019 <https://mwncation.com/report-faults-mbc-on-bias/> (accessed 27 July 2019).

11 Malawi Government *National action plan for persons with albinism in Malawi 2018-2022* (2018) 12.

12 'UN condemns attacks on albinos' *The Daily Times* 5 April 2018 3.

13 J Chavula 'The muted side of albino killings' 5 January 2016 <http://mwncation.com/the-muted-side-of-albino-killings/> (accessed 26 September 2019).

superstition is similar and persons with albinism are viewed as 'ghosts' and it is believed in some quarters that they do not die.¹⁵ Such false beliefs have spurred attacks on persons with albinism.

Some criminals who attack people with albinism on the African continent hold the belief that their body parts have special powers,¹⁶ and that they bring wealth or good luck when mixed with other charms in voodoo rituals. As a result, people with albinism are being hunted like animals for their body parts in many African countries.

In Tanzania, where the attacks started earlier, over 80 people have been killed.¹⁷ In the same country, the British Broadcasting Corporation (BBC) reported that body parts are coveted by witchdoctors and can fetch up to \$75, 000.¹⁸ Overall, the United Nations estimates that since 2006, 600 attacks have taken place in 28 African countries.¹⁹ Tanzania has the highest recorded number of attacks.

In Malawi, about 25 people with albinism including young children have been killed since 2014.²⁰ Many more have been maimed, disappeared or forced into hiding. The population of persons with albinism in Malawi is said to be around 135, 000, according to the 2018 National Population and Housing Census.²¹ The number is a significant rise from a previous estimate which put it at 17, 000.²² In Malawi 72 per cent of the victims are children and 28 per cent adults.²³ The attacks also include desecration of graves to loot bones of the deceased.

Some of the perpetrators of the attacks on children are people close to the youngsters such as uncles, aunts and even parents.²⁴ In Malawi, an attack on a young boy in 2018 was carried out by his step father; the

14 Ministry of Justice and Constitutional Affairs *Handbook for investigators, prosecutors and magistrates concerning offences against persons with albinism* (2016).

15 Under the Same Sun <http://www.underthesamesun.com> (accessed 15 September 2018).

16 G Gondwe 'Amnesty International faults government on albino killings' 7 June 2016 <http://mwntation.com/amnesty-intl-faults-government-on-albino-killings/> (accessed 26 September 2019).

17 R Velton 'The silent killer of Africa's albinos' 25 April 2017 <http://www.bbc.com/future/story/20170425-the-silent-killer-of-africas-albinos> (accessed 20 September 2018).

18 Velton (n 17).

19 Office of the United Nations High Commissioner for Human Rights *Regional action plan on albinism in Africa -2017 to 2021* (2017) 2.

20 'Albino case: 3 pathologists to craft autopsy report' Weekend Nation 23 February 2019 3.

21 M Masuku 'Persons with albinism count' 19 June 2019 <https://mwntation.com/persons-with-albinism-count/> (accessed 26 September 2019).

22 Masuku (n 21).

23 Malawi Government (n 11).

24 R Mpaso 'Parents, guardians of missing albinos risk arrest' 9 May 2016' <https://www.times.mw/parents-guardians-of-missing-albinos-risk-arrest/> (accessed 26 September 2019).

boy was given a poisonous substance to assist in his killing.²⁵ Some duty bearers in Malawi are believed to be behind the attacks.²⁶ Some implicated in the violence include a Roman Catholic cleric, a police officer and a medical worker.²⁷ The arrest of the three seemed to fuel speculations that some people in influential positions are involved in the abuses. At least one official of the ruling Democratic Progressive Party (DPP) was arrested in 2018 in connection with attacks on persons with albinism.²⁸

In 2017 a ruling party legislator, Bon Kalindo, led a protest in the capital Lilongwe over the apparent inaction by government over the killings. The protest was unusual as at that time Kalindo belonged to the governing DPP. It is rare in a neo-patrimonial Malawi with a predominant subject-parochial political culture,²⁹ for parliamentarians to demonstrate against the policies of their own party. Politics in the country is dominated by party leaders who are often rich individuals and wield considerable power and influence over followers who are largely passive and obedient. Rather, party members or parliamentarians are more likely to toe the line of those at the top of the political hierarchy. Kalindo therefore showed unprecedented courage to protest against his own party, which was also in government at the time.

In some instances files for cases on suspects have disappeared from police stations.³⁰ The result has been suspicion of corruption and sweeping under the carpet possible revelations of influential people being connected to the abuses. The Malawian authorities have on their part been insisting that they are working hard to stop the violence against persons with albinism.

3 THE NATIONAL ACTION PLAN ON PERSONS WITH ALBINISM

In 2018, the Malawi government launched its National Action Plan on Persons with Albinism to run up to 2022.³¹ The Plan is wide-reaching and covers six thematic areas namely: education, awareness raising and training; internal security; investigative research, human rights monitoring and reporting, administration of justice and victim

25 O Khamula 'Police arrest mother, 4 others over the missing of albino boy' 11 July 2018 <http://www.nyasatimes.com/police-arrest-mother-4-others-over-the-missing-of-albino-boy/> (accessed 20 September 2018).

26 L Mkandawire 'NGOs want albino inquiry' 4 January 2019 <https://mw-nation.com/ngos-want-albino-inquiry/> (accessed 26 September 2019).

27 'Priest arrested over albino killing' *The Nation* 17 April 2018 1.

28 Nyasa Times 'DPP governor, two others arrested over missing albino in Phalombe' 17 July 2018 <http://www.nyasatimes.com/dpp-governor-two-others-arrested-over-missing-albino-in-phalombe/> (accessed 19 September 2018).

29 A Tostensen *Malawi: a political economic analysis* (2017) 19.

30 'Albino case files are missing-MP' *The Daily Times* 11 May 2018 5.

31 Malawi Government (n 11).

assistance, legislation, and empowerment of persons with albinism through the Association of Persons with Albinism in Malawi.

This article focuses on the role of media which is part of the aspect of awareness raising. The National Action Plan suggests positive media reporting, civic education and empowerment through knowledge for parents and guardians of children with albinism.³² This is for the purpose of attitudinal and behavioural change. Therefore, the paper will focus on how the Times Media Group and Nation Publications Limited have reported on issues involving persons with albinism. The Times Media Group and Nation Publications Limited are the biggest and only established print media houses in Malawi. Smaller newspapers emerge during election times and disappear soon after the polls, as they seem to be established specifically for political purposes. Hence it was practical to only target the two media houses. The article discusses the role of investigative reporting especially in so far as it could contribute to promoting and protecting the rights of persons with albinism.

4 HUMAN RIGHTS AND JOURNALISM

It is widely postulated that human rights is not a stand-alone field, but is impacted upon by other sectors of society such as politics, law, sociology and even journalism.³³ The media have a role to play in the protection and promotion of human rights by exposing abuses and holding to account duty bearers.

Media organisations find human rights a news worthy topic because of the emergence of crises, ratification of international treaties as well as democratisation processes across the globe.³⁴ Nevertheless, the media do not ultimately cover all human rights issues as they select which stories to prioritise.³⁵ That selection process is influenced by various stakeholders such as politicians, non-governmental organisations and other media entities.³⁶ The media decide to highlight a particular issue and also are in a position to call for action to be taken.³⁷

However, the reasons why the media do not cover all human rights stories go beyond lack of space, for example in newspapers.³⁸ Journalists may also fail to investigate human rights abuses because of the threat of lawsuits from targeted individuals or organisations.³⁹

32 Malawi Government (n 11) 18.

33 E Daly 'Why we need journalism' 2 May 2014 <https://www.hrw.org/news/2014/05/02/why-we-need-journalism> (accessed 27 September 2019).

34 International Council on Human Rights Policy *Journalism, media and the challenge of human rights reporting (2002)* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551305 (accessed 11 July 2019) 16.

35 International Council on Human Rights Policy (n 34) 17.

36 International Council on Human Rights Policy (n 34) 15.

37 International Council on Human Rights Policy (n 34) 15.

38 International Council on Human Rights Policy (n 34) 116.

39 D Forbes *A watchdogs guide to investigative journalism* (2005) 52.

Other reasons could be existing links between media houses and the corporate world, which may threaten to withdraw advertisements or sponsorship.⁴⁰ Journalists miss certain angles of a human rights story because in some countries there is an overemphasis of civil and political rights at the expense of social and cultural rights.⁴¹

The way forward could be practising human rights journalism which exposes abuses by nature.⁴² That genre of journalism is

a diagnostic style of reporting which offers a critical reflection of the experiences and needs of the victims and perpetrators of (physical, cultural and structural) human rights violations. It attempts to understand the reasons for these violations in order to prevent further violations and to solve current ones in ways that would not produce more violence. Moreover, it is a journalism that challenges, rather than reinforces, the status quo of the dominant voices of global and national societies.⁴³

Human rights journalism favours the vulnerable, truth, non-selective reporting and is proactive.⁴⁴

The importance of journalism to human rights can therefore not be overemphasised. It is imperative for journalists to be mindful of the challenges that may induce them to practice selective reporting. Journalists therefore have to prioritise victims of abuses in the news agenda. In doing so reporters need to put truth and the vulnerable as priority areas in writing stories.

5 METHODOLOGY

This article reports on a content analysis analysing 124 newspaper articles published between January 2016 and June 2018 in Malawi. The newspapers targeted are those published by the two major media houses, the Nation Publications Limited and Times Media Group. This time frame was selected as it coincided with a resurgence of attacks on persons with albinism, and it was assumed that journalists would extensively write on the incidents. Furthermore, the stories were seen as a representative sample of how the Times Media Group and Nation Publications Limited cover stories on persons with albinism. Fifty-five of the articles were from the Nation Publication Limited and 69 were from the Times Media Group. The articles were purposively selected for the study in that they carried news concerning attacks on persons with albinism. Specific codes were devised to help analyse the newspapers. The coding sheet had predetermined variables that were presented in the articles.

The analysis involved finding out what the stories were about, how persons with albinism were represented in the stories, if the persons with albinism were quoted as primary sources or not, and the use of the

40 Konrad Adenauer Stiftung *Handbook to investigative journalism* (undated) 8-15.

41 International Council on Human Rights Policy (n 34) 19.

42 IS Shaw *Human rights journalism: advances in reporting distant humanitarian interventions* (2012) 109.

43 Shaw (n 42) 107.

44 Shaw (n 42) 109.

word 'albino' in the headlines of the story as that term is not considered respectful or humanising.⁴⁵

The framing theory underpinned the study to look at how stories on persons with albinism were presented by journalists. The framing theory suggests that the way a text is presented to the audience influences the choices people make on ways to process that information.⁴⁶ Frames are abstractions that work to organise, or structure message and it is indicated that they influence the way audiences perceive news items.⁴⁷ Framing involves selecting some aspects of reality and giving them prominence over others.⁴⁸ A frame is an indication to what the source thinks is important in information being relayed to audiences.⁴⁹ Therefore, the theory helps make conclusions on how journalists at the Nation Publications Limited and Times Media Group saw as important as they wrote articles on issues concerning abuses against persons with albinism. Furthermore, the theory helps in finding out how the journalists were trying to influence the readers of the papers that their media houses publish.

6 REPORTING OF ATTACKS ON PERSONS WITH ALBINISM IN THE TIMES MEDIA GROUP

In the Times Media Group, the articles were predominantly hard news in that they reported events in a brief manner that was not deeply analytical or critical. In other words, it was presenting facts on what had happened. While 84 per cent of the articles were hard news, 12 per cent displayed an in-depth look at issues surrounding persons with albinism. Four per cent of the articles were opinion pieces or editorials representing the personal views of the editor.

Looking at the headlines of the stories, the majority of them (94 per cent) used the term 'albino', while 6 per cent did not.⁵⁰ These few headlines had wording that did not have to refer to persons with albinism such as; 'Government irks rights activists' or 'Bishops speak on priest's arrest'. Within the article the usage of the word 'albino' had a different frequency. While 68 per cent of the stories did not use the term, only 32 per cent of them used it.

45 Under the Same Sun 'Albino versus person with albinism' <https://www.underthesamesun.com/sites/default/files/WHY%20WE%20PREFER%20THE%20TERM%20PERSON%20WITH%20ALBINISM.pdf> (accessed 30 July 2019).

46 Masscommtheory.com 'Framing theory' <https://masscommtheory.com/theory-overviews/framing-theory/> (accessed 18 June 2019).

47 A Ardèvol-Abreu 'Framing theory in communication research in Spain. Origins, development and current situation' (2015) 70 *Revista Latina de Comunicación Social* 424.

48 Ardèvol-Abreu (n 47) 424.

49 D Chong & JN Druckman 'A theory of framing and opinion formation in competitive elite environments' (2007) 57 *Journal of Communication* 100.

50 Under the Same Sun (n 45).

On the use of persons with albinism as sources of news, 16 per cent of the articles used them as primary and prominent sources. While 19 per cent of the articles used persons with albinism as secondary and non-prominent sources. The majority of the stories (65 per cent) quoted other sources and not persons with albinism.

As far as topics or themes in the stories are concerned, the analysis indicated that the Times Media Group reported most general issues or events concerning persons with albinism, with a percentage of 17. These included general public declarations or marches to highlight abuses. The second most reported issue (14 per cent) was condemnation of violence against persons with albinism. The least reported topics were on the arts as a form of fighting against abuses, appeals for assistance, achievements or rights issues, each with a percentage of less than one.

Regarding whether the stories cited various rights, freedoms or human rights instruments, only 17 per cent of the articles did that, and 83 per cent failed to do so. Mostly the articles mentioned the right to life and right to education. The documents mentioned were largely local in nature, referring to the Malawi Constitution and hardly any international treaties. Only two stories were framed in a manner that was seen as tackling stigma surrounding persons with albinism and helping in overcoming such a vice. That represented a meagre 3 per cent, with 97 per cent of the stories being written in a manner that did not fight against stigma.

Another variable concerned how the newspapers portrayed persons with albinism as either helpless victims needing 'salvation' from the society, or victors over circumstances and being achievers. The Times Media Group stories mainly portrayed persons with albinism as helpless victims (60 per cent), and only 1 per cent of the stories portrayed them in a positive manner. The remaining 39 per cent of the articles were neutral in nature.

7 REPORTING OF ATTACKS ON PERSONS WITH ALBINISM IN THE NATION PUBLICATIONS LIMITED

The findings concerning reporting in the Nation Publications Limited reflect that there are some similarities between the two media houses in the trends concerning all the variables. For example, in the Nation Publications Limited the articles were predominantly hard news (93 per cent) with a few features (7 per cent) and no editorial column. The headlines of all the stories used the term 'albino', despite this term being unacceptable to rights groups. The term was used inside 36 per cent of the stories, but 64 per cent did not contain the word.

When it comes to using persons with albinism as sources, 16 per cent of the stories used them as primary and prominent sources, while 13 per cent of the stories used persons with albinism as secondary and non-prominent sources. In other words, 71 per cent of the stories used other individuals as sources, meaning that persons with albinism were not quoted.

On the topics or themes of the stories published by the Nation Publications Limited, the analysis indicates that the most were written on the protection of persons with albinism (16 per cent) followed by condemnation on attacks (13 per cent). The least written about topics were on murder, appeal for help, fashion shows as a means of fighting abuses and indirect attacks on persons with albinism, with a percentage of less than one.

Looking at stories citing rights, freedom or human rights instruments, 27 per cent of the articles contain such reference and 73 per cent of them did not. Similar to the Times Media Group, the instruments cited were local, and the right to life and right to education were the dominant rights mentioned in the stories.

Concerning reportage to fight against stigma of persons with albinism, 98 per cent of the stories did not report in such a manner. A mere 2 per cent of the articles were written in a manner that took some position against stigmatisation of persons with albinism. The findings in this variable are very similar to those in the Times Media Group, with corresponding figures of 97 per cent and 3 per cent respectively.

With regard to portraying persons with albinism as helpless and needing a sort of salvation, or portraying them as victors over situation, the Nation Publications Limited did not have any article that was positive and showing progress in issues of persons with albinism. Forty-five per cent of the stories portrayed them as helpless victims, hence negative, while 55 per cent of the articles were neutral in nature. The analysis on the Nation Publications Limited and Times Media Group are given in table form below:

Table 1: Tabular depiction of reportage on persons with albinism (PWA) in Malawi's print media

	Nation Publications Limited (55 articles)	Times Media Group (69 articles)
Type of story	Hard news: 93% Features: 7%	Hard news: 84% Features: 12% Opinion: 4%
Topic or theme	Protection of PWA: 16% Condemnation: 13%	General issues: 17% Condemnation: 14%
'Albino' in headlines	100%	94%
'Albino' in story	36%	32%
Citing human rights	27%	17%
PWA used as sources	Primary sources: 16% Secondary sources: 13%	Primary sources: 16% Secondary sources: 17%
Portrayal of PWA	Negative (Victim): 45% Positive (Victor): 0%	Negative (Victim): 60% Positive (Victor): 1%
Framing to fight stigma	Yes: 2% No: 98%	Yes: 3% No: 97%

8 DISCUSSION

The International Council on Human Rights Policy claims that journalists confuse issues due to their inadequate understanding of the human rights stories they are covering.⁵¹ The organisation states further that human rights stories are reported more, than being covered.⁵² The Times Media Group and Nation Publications Limited both seem to frame their reportage of the attacks on persons with albinism as general events and not as serious human rights violations. This is seen in the low percentages of stories citing human rights violations. This could be termed as superficial reporting without deep analysis of the issues at hand or connecting them to human rights instruments.

The contributing factor to the shallow reportage or superficial integration of human rights in the stories of the two media houses could be due to the fact that the majority of stories in the two media houses are hard news, and not editorials or features. However, the journalists could in the background information have attempted to cite the rights and freedoms involved or conventions being contravened. That would have helped in not just reporting the story, but covering it in a more in-depth manner.

The superficial integration of human rights in the reportage of attacks on persons with albinism could be a factor in why there is little or no framing of the articles to fight stigma surrounding persons with albinism. Framing stories in such a way is a deliberate task and requires an effort to research information that would achieve that goal. The scanty connection to human rights could also be a factor behind the portrayal of persons with albinism largely as helpless victims and not in a positive manner as persevering despite difficult circumstances. The journalists do not write stories focusing on normalcy and achievements in society of persons with albinism. Publishing such articles might help reduce stigmatisation and the spread of myths against persons with albinism. Establishing the link between shallow reporting of the stories and portrayal or framing of the stories is beyond the scope of this article, and so needs further investigation.

It is worth noting that both media houses overwhelmingly used the term 'albino' in the headlines of their stories. Within their articles there is also extensive use as over a third of the stories used the term which is offensive to persons with albinism. Reporters and perhaps editors at the Nation Publications Limited and Times Media Group seem unaware that the word 'albino' is unacceptable by advocacy groups, by using it within the headlines. However, with the published stories the use drops sharply indicating possible knowledge that it should be avoided. This is shown by the fact that the Nation Publications Limited had 100 per cent use of the offensive term 'albino' in their headlines while the Times Media Group used it 94 per cent of the times. However,

51 International Council on Human Rights Policy (n 34) 19.

52 International Council on Human Rights Policy (n 34) 116.

within the articles, the Nation Publications Limited usage of the word declined to 36 per cent while that of the Times Media Group fell to 32 per cent, The media houses could do well to find ways of entirely abstaining from using the term in their headlines and articles.

The scanty portrayal of persons with albinism in a positive manner as triumphant over circumstances or achievers is reflected in the little use of them as sources of news in the articles. About 60 per cent of the stories do not use persons with albinism at all as sources. This is a disservice to any effort to promote the status of the individuals as normal, achievers or productive members of the society. This is not to deny the threat persons with albinism face daily in Malawi and in other parts of sub-Saharan Africa. But there seems to be an overemphasis on portraying them as helpless and hapless victims who cannot or do not contribute to national development. Using persons with albinism more as sources of news could help in efforts demystifying them as 'ghosts' or supernatural beings that do not suffer death.

By putting the spotlight more on the achievements and progress of people with albinism, the kind of topics or themes covered in the two media houses could probably change from the current scenario which is largely condemnation of attacks or protection measures. While it is imperative to report, expose and condemn the abuses, there is need for more balance. After the naming and shaming, there is need to help break the cycle of stigmatisation and what this article would term as 'mythisation' of persons with albinism. That could be achieved by journalists putting more focus on articles that are analytical, critical and challenging the status quo surrounding persons with albinism. Failure to do so helps perpetuate abuses.

Connecting the framing theory to findings of the study, it appears that the two media houses did not see destigmatisation as important nor did they try to influence a change of attitude among readers. The results indicate that what they saw as important was protecting persons with albinism and condemning the attacks.

The reportage in both the Times Media Group and Nation Publications Limited does not help in promoting the National Plan on Persons with Albinism in Malawi which runs from 2018 to 2022. As already discussed above, one of the thematic areas of the Plan concerns awareness and requires the media to write positive reports to help in attitude change among people regarding persons with albinism. The reportage in the two media houses largely focuses on negative elements and not on helping in eradicating stigmatisation. Journalists need to realign themselves and help in the implementation of the Plan.

9 RECOMMENDATIONS AND WAY FORWARD

Could the solution to the conundrum be 'human rights journalism' that favours victims of abuses and challenges the status quo?⁵³ It could be

quite a task for Malawian journalists to adopt the concept in a wholesale manner, either due to lack of capacity or adequate knowledge of human rights. A more thorough study has to be conducted to confirm knowledge levels of human rights instruments among journalists in Malawi. However, it could be a step forward to look at some aspects of human rights journalism such as its holistic problem-solving approach or its bias towards the vulnerable.

Moving forward, journalists in Malawi could write more in-depth and better stories concerning persons with albinism by having editors insist that every article should reflect the requisite rights, freedoms, local or international instruments. That would also help in giving visibility to the story as a rights issue. What that requires is easing access to human rights instruments in newsrooms. Again, this is another area of possible study as knowledge is not readily available on how easy it is to access human rights documents whether in hard copy or online in media houses in Malawi.

Furthermore, through proper training on reporting human rights related stories, journalists' capacity could be enhanced. One tertiary institution, the Malawi Institute of Journalism, has a human rights module. But its focus is largely providing knowledge on the development and current status of human rights in Malawi and beyond. It does not zero in on how to write or effectively produce a human rights piece. There is therefore a need for journalism training institutions to shift attention to giving students or practicing journalists skills to that end.

Linked to the point of training is promotion of niche reporting. In the current set up of tertiary institutions offering journalism programmes in Malawi, there is little emphasis on specialised reporting courses. Initiatives to promote niche reporting could help in focusing on human rights and how to report the field. The challenge for such growth in portfolios of institutions is funding. To have such specialised modules, colleges and universities would need experts in the field to deliver lessons and other resources to facilitate the learning process. With countries such as Malawi perennially struggling economically, possible solutions could be networking with international funding organisations or institutions.

Investigative journalism has a role to play in fighting the abuses against persons with albinism. There are two issues that seem to complicate efforts in tackling the violence. The first is reported missing of case files of suspects, a fact that was disclosed in Parliament in 2018.⁵⁴ The other is failure to track down and bring to justice buyers of body parts.⁵⁵ Those arrested in connection with killings or maimings of persons with albinism in Malawi claim that the market is in Mozambique. But suspects in Mozambique claim the market is in Malawi. Investigative journalism should dig deeper, and try to expose secrets and issues that are of public interest.⁵⁶ Hence journalists could

54 *The Daily Times* (n 30) 5.

55 'The mysterious market of albino bones' *The Daily Times* 12 January 2017 33.

56 *Forbes* (n 39) 6.

probe and try to lay bare how case files can disappear, why and for whose benefit. Similarly, investigative reporting can be useful in helping track down the market for body parts.

The Malawian authorities seem to play down the existence of such markets. Police officials have in the past alleged that there are no buyers of body parts for persons with albinism.⁵⁷ Therefore there is an urgent need to establish the facts. A suspect who alleged to know who was behind the killings of persons with albinism in Malawi and the buyers died in police custody.⁵⁸ A post mortem report indicated that the suspect, Buleya Lule, had succumbed to torture in a police cell.⁵⁹

Considering that the media has an important role to play in advancing certain agenda by framing stories in a particular manner, it is envisaged that human rights standards would improve in Malawi if the two publishers improve their coverage of pertinent issues. Promoting human rights standards at a national level could contribute to lifting these levels on a continental stage.

10 CONCLUSION

The main print media houses in Malawi, the Times Media Group and Nation Publications Limited, do not have in-depth reporting of issues to do with persons with albinism. The firms mainly do event-based reporting (hard news) and very few features that are critical and analytical. The published articles are not framed in a way that helps fight stigma and myths surrounding persons with albinism.

The majority of stories published by the Nation Publications Limited and Times Media Group do not use persons with albinism as sources. Furthermore, the portrayal of such individuals is negative and as helpless victims. The media houses extensively use the term 'albino', which is unacceptable to advocacy groups, and the majority of stories do not cite relevant rights, freedoms or human rights instruments. The reportage is contrary to the aspirations of the Malawian National Action Plan on Persons with Albinism which calls for positive portrayal to help in attitude change in communities.

The way forward could be the training of journalists to cover stories in an in-depth manner and not just report human rights issues superficially. Editors have a role to stress the reference of rights in human rights stories and providing easy access to human rights instruments. Training institutions need to have specialised modules on coverage of human rights. Linkages with international funding agencies could help make available resources for training institutions to have specialised courses on human rights.

57 'Puzzle in albino body tissue market' *The Daily Times* 10 January 2018 33.

58 S Chitete 'Police to probe Lule's death' 28 April 2019 <https://mwnation.com/police-to-probe-lules-death/> (accessed 8 August 2019).

59 G Muheya 'Autopsy confirms Buleya Lule was killed: tortured in a Malawi police 17 April 2019' <https://www.nyasatimes.com/autopsy-confirms-buleya-lule-was-killed-tortured-in-malawi-police-cell/> (accessed 8 August 2019).

Also, investigative journalism could help in finding out why case files of suspects of the abuses go missing in Malawi, and help establish the currently mysterious market for body parts. Better coverage of human rights issues is crucial to promoting rights in Malawi and across Africa.

Droits de l'homme et justice climatique en Afrique

*Daniel Owona**

RÉSUMÉ : La justice climatique, dans son acception judiciaire, se développe progressivement dans le monde en touchant à plusieurs problématiques dont celle des droits de l'homme. Fort de ce constat, la présente contribution analyse la place accordée aux droits de l'homme dans les contentieux climatiques recensés en Afrique. En se fondant sur une approche sociojuridique et une analyse praxéologique des décisions de justice sélectionnées sur le continent, l'article constate le caractère subsidiaire des droits de l'homme dans lesdits contentieux. D'une part, des droits de l'homme spécifiques y sont invoqués comme moyens par les plaideurs et comme outils d'analyse par les juges. Il s'agit du triptyque droit à la vie, droit à la dignité humaine et droit à un environnement propre et sain, sans poison ni pollution et du droit à un environnement sain. D'autre part, le contentieux africain des droits de l'homme en matière climatique est relativement représenté sur le continent du fait de son caractère embryonnaire au niveau national et inexistant au niveau régional. Enfin, malgré l'inexistence du contentieux régional, le système africain des droits de l'homme et le régime communautaire de la Communauté économique des Etats de l'Afrique de l'Ouest (CEDEAO) offrent des possibilités de développement au regard des interprétations juridictionnelles de droits de l'homme menacés par les changements climatiques. La recherche caractérise les droits humains dans la justice climatique en Afrique tout en proposant des pistes de multiplication.

TITLE AND ABSTRACT IN ENGLISH:

Human rights and the climate justice in Africa

ABSTRACT: Climate change, in its judicial understanding, is increasingly developing worldwide by touching on various issues including human rights. Against that background, this article undertakes an analysis on the place afforded to human rights in the adjudication of climate related issues in Africa. Using a socio-legal approach and praxiological analysis of judicial decisions selected across the continent, the article establishes the subsidiary nature of human rights in such adjudication. On the one hand, specific human rights are invoked therein as submissions by the litigants and as tools of reasoning by judges, especially the trio of the right to life, the right to dignity and the right to a clean, healthy and safe environment, without poison or pollution. On the other hand, climate related human rights litigation in Africa is relatively represented in the continent due to its burgeoning nature at the national level and non-existent at the regional level. Finally, despite the necessity of regional

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litigation, the African human rights system and the regime operated by ECOWAS offer opportunities to consider human rights when climate justice issues are being adjudicated. This article therefore locates human rights in climate justice in Africa while proposing ways of developing related litigation.

MOTS CLÉS: droits de l'homme, justice climatique, contentieux climatique, contentieux africain des droits de l'homme en matière climatique

SOMMAIRE:

1	Introduction.....	158
2	L'invocation de droits de l'homme spécifiques	165
2.1	Le triptyque droit à la vie, droit à la dignité humaine et droit à un environnement propre et sain, sans poison ni pollution comme moyen.....	165
2.2	Le droit à un environnement sain comme outil d'analyse	168
3	La représentativité du contentieux africain des droits de l'homme en matière climatique.....	171
3.1	Un contentieux national embryonnaire	171
3.2	Un contentieux régional inexistant	175
4	Conclusion	177

1 INTRODUCTION

« De la justice environnementale, qui s'est jusqu'à présent focalisée sur les écosystèmes et la biodiversité, nous sommes passés à la justice climatique ». ¹ Cette assertion du juge pakistanais de la Lahore High Court dans l'affaire *Leghari*² met en lumière l'importance accordée aujourd'hui à la justice climatique suite au constat des conséquences néfastes des changements climatiques.³ En effet, ces derniers représentent un enjeu majeur non seulement pour la protection de l'humanité, mais aussi pour celle des systèmes naturels.⁴ Pour preuve, le Groupe d'experts intergouvernemental sur l'évolution du climat (GIEC) affirme que les changements climatiques conduiront par exemple à un appauvrissement des ressources renouvelables en eau de surface et en eau souterraine dans la plupart des régions subtropicales arides, ce qui exacerbera la concurrence intersectorielle autour des

1 Lahore High Court *Asghar Leghari v Pakistan* Affaire n° WP N° 25501/2015 (jugement du 25 janvier 2018) 22.

2 Asghar Leghari, agriculteur pakistanais avait été en justice contre la Fédération du Pakistan devant la Lahore High Court pour non application de la politique nationale sur le changement climatique de 2012 et le cadre de mise en œuvre de cette politique. Dans cette espèce, la cour a relevé que le droit à la vie, le droit à la dignité humaine, le droit à la propriété et le droit à l'information consacrés dans les articles 9, 14, 23 et 19A de la constitution fournit les outils juridiques nécessaires pour résoudre et suivre les actions du gouvernement contre les changements climatiques. Voir Lahore High Court (n 1).

3 Les changements climatiques sont définis à l'article premier (2) de la Convention cadre des Nations Unies sur les changements climatiques comme des changements de climat qui sont attribués directement ou indirectement à une activité humaine altérant la composition de l'atmosphère mondiale et qui viennent s'ajouter à la variabilité naturelle du climat observée au cours de périodes comparables.

4 GIEC 'Changement climatique 2014: Incidence, adaptation et vulnérabilité. Résumés, foire aux questions et encarts thématiques' (2014) *Contribution du Groupe de travail II au cinquième Rapport d'évaluation du Groupe d'experts intergouvernemental sur l'évolution du climat* 3.

ressources hydriques.⁵ Bien plus, en raison des changements climatiques, d'ici le milieu du 21^e siècle et au-delà, la redistribution des espèces marines à l'échelle mondiale et la réduction de la biodiversité marine dans les régions sensibles auront une incidence sur la pérennité de la productivité de la pêche et d'autres services éco systémiques.⁶ Dès lors, des actions en faveur de la justice climatique concourront à la justice environnementale par la protection incidente des écosystèmes et de la biodiversité. Mais encore faut-il savoir ce que l'on entend concrètement par justice climatique.

Née des revendications de différents courants de la société civile qui lui associaient une compréhension particulière en fonction des intérêts défendus,⁷ la justice climatique apparaît comme un concept fondamentalement éthique mettant en exergue des questions relatives à l'équité, à l'égalité, à la responsabilité ou encore à la protection de droits subjectifs soulevés par les changements climatiques. Et, en fonction de la compréhension de ces questions, deux principaux types de justice climatique se démarquent en l'occurrence la justice corrective prônée par les pays du Sud, et la justice distributive à laquelle se réfèrent les économistes et philosophes des pays du Nord.⁸ La justice corrective vise à « corriger » les inégalités causées par les changements climatiques et subies le plus gravement et directement par les populations extrêmement pauvres et vulnérables.⁹ Parmi ces populations, l'on retrouve celles vivant sur le continent africain du fait de sa grande exposition aux changements climatiques et de sa faible capacité d'adaptation.¹⁰ Cette justice se fonde sur trois idées essentielles notamment la responsabilité historique des pays occidentaux dans les changements climatiques, leur dette écologique ou climatique envers les pays en développement et celle des « global commons » ou biens communs que fournit la terre.¹¹ Elle représente

5 GIEC 'Changements climatiques 2014. Rapport de synthèse' (2014) 13.

6 *Ibid.*

7 Tandis que pour les organisations non gouvernementales ce concept faisait, entre autres, référence à une plus grande représentation des communautés et peuples autochtones dans les instances de négociation sur les changements climatiques, pour les syndicats, il s'agissait plutôt de protéger les emplois des salariés travaillant dans les secteurs d'activité qui feront l'objet de transformations majeures. Des revendications ont également été émises par des courants religieux notamment sur le lien entre l'Homme et la terre ainsi que la nécessité de la protéger. A ce propos, le Pape François rappelle que le climat est un bien commun de tous et pour tous en relation avec beaucoup de conditions essentielles pour la vie humaine. Cf A Michelot 'Définition(s) et perspectives de justice climatique' in A Michelot (dir) *Justice climatique/Climate justice: enjeux et perspectives/Challenges and perspectives* (2016) 21-23; SP François Laudato Si' sur la sauvegarde de la maison commune 20.

8 C Larrère 'Qu'est-ce que la justice climatique?' in A Michelot (dir) *Justice climatique/Climate justice: enjeux et perspectives/Challenges and perspectives* (2016) 6.

9 Larrère (n 8) 7.

10 O C Ruppel 'International climate change law and policy from an african perspective' in OC Ruppel & E Kam Yogo (dirs) *Droit et politique de l'environnement au Cameroun. Afin de faire de l'Afrique l'arbre de vie/ Environmental Law and policy in Cameroon. Towards making Africa the tree of life* (2018) 493.

alors un argument dans les négociations sur le climat pour permettre aux pays du Sud d'obtenir des aides dans la mise en œuvre des politiques de lutte contre les changements climatiques.¹²

La justice distributive quant à elle entend répartir les responsabilités des changements climatiques proportionnellement au niveau d'émission de gaz à effet de serre (GES) étant donné que celui-ci ne devient problématique qu'à partir du dépassement d'un seuil minimum.¹³ Cette justice est matérialisée par le principe des responsabilités communes mais différenciées énoncé expressément dans la Déclaration de Rio sur l'environnement et le développement¹⁴ et réaffirmé dans la Convention cadre des Nations Unies sur les changements climatiques (Convention cadre sur le climat) de 1992.¹⁵ Ainsi, contrairement à la justice corrective, la justice distributive repose sur l'idée d'un partage de responsabilités entre tous les Etats dans la survenance des changements climatiques. Elle ne saurait donc être le fait d'un seul groupe.

Ces deux types de justice sont critiqués par certains parce qu'ils ne sont pas centrés sur la nature. D'une part, la justice distributive envisage la nature comme une ressource ou un ensemble de biens que l'on s'approprie ou que l'on se partage, d'autre part la justice corrective ne fait pas de place à la nature mais plutôt aux affrontements entre les Etats du Nord et du Sud.¹⁶ Pour remédier à cela il est alors proposé un concept de justice climatique qui lierait le social à l'environnemental en tenant compte de la diversité des cultures.¹⁷

Au-delà de ce volet éthique, le concept de justice climatique fait également référence au phénomène de « judiciarisation »¹⁸ du changement climatique sur lequel s'appesantit la présente recherche. En effet, des litiges administratifs ou judiciaires soulevant directement et expressément une question de fait ou de droit concernant les causes et effets du changement climatique¹⁹ se sont développés de manière significative dans divers Etats. En mars 2017, l'on dénombrait 654 contentieux « climatiques »²⁰ aux Etats-Unis et 230 dans l'ensemble

11 Larrère (n 8) 7-8.

12 Larrère (n 8) 9.

13 *Ibid.*

14 Principe 7, Déclaration de Rio sur l'environnement et le développement de 1992

15 Article 3, Convention cadre des Nations Unies sur les changements climatiques adoptée le 9 mai 1992 et entrée en vigueur le 21 mars 1994.

16 Larrère (n 8) 16.

17 Larrère (n 8) 18.

18 C Cournil & L Varison 'Introduction' C Cournil & L Varison (dirs) *Les procès climatiques. Entre le national et l'international* (2018) 19.

19 *Ibid.*

20 Encore appelés litige climatique ou procès climatique, le contentieux climatique n'est pas un nouveau type de contentieux au regard des catégories classiques existantes notamment judiciaires ou administratives puisqu'ils relèvent de ces différentes catégories. Il a été nommé comme tel par la doctrine du fait de son objet en l'occurrence les changements climatiques qui peuvent avoir une place centrale ou non dans la procédure. Voir dans ce sens M Hautereau-Boutonnet 'Les procès climatiques par la "doctrine du procès climatique"' in C Cournil & L Varison (dirs) *Les procès climatiques. Entre le national et l'international* (2018) 33.

des autres Etats (Nigéria, Afrique du Sud, Nouvelle Zélande,...).²¹ Avec pour objectif d'établir la responsabilité des activités humaines sur le climat,²² ce mouvement est né du désir des organisations non gouvernementales de disposer d'un moyen de décision ou de contrôle des engagements climatiques des Etats²³ en l'absence de mécanisme de contrôle et de sanction de la Convention-cadre sur le climat et de l'Accord de Paris.²⁴ Mais le contentieux climatique ne se limite pas à l'engagement de la responsabilité de l'Etat ou de ses entités infra-étatiques du fait de leurs actions ou omissions dans la mise en œuvre des politiques climatiques.²⁵ Il vise également les entreprises qui étaient d'ailleurs les premières cibles de ce contentieux dès les années 2000 aux Etats Unis.²⁶

Ainsi, diversifiés par leur nombre, les contentieux climatiques le sont également par leur objet, les personnes dont l'engagement de la responsabilité est demandé ou encore la nature des recours. C'est ce qui a fait dire à Cournil et Varison que le contentieux climatique a une nature polymorphe²⁷ du fait du dynamisme des requérants²⁸ qui recherchent en permanence de nouvelles stratégies contentieuses pour obtenir gain de cause. C'est dans cette perspective des contentieux climatiques fondés sur les droits de l'homme a vu le jour dans le monde tant à l'échelle nationale qu'au niveau régional.²⁹ Sur le continent américain par exemple, la Commission interaméricaine des droits de l'Homme (Commission interaméricaine) a été saisie par des peuples autochtones à la suite d'une modification de leur approche contentieuse. Initialement fondée sur la conception des changements climatiques comme une question de protection de la nature relevant alors du droit civil ou du droit de l'environnement, la stratégie des Inuit et des peuples Athabaskan des Etats-Unis et du Canada a été revue pour s'investir davantage sur les droits humains plus adaptés à leurs revendications.³⁰ En effet, suite à l'échec de leur tentative de condamnation d'un groupe d'entreprises pétrolières et de l'énergie

21 Programme des Nations Unies pour l'Environnement & Sabin Center for Climate Change Law, 'L'état du contentieux climatique: revue mondiale' (2017) 12.

22 Cournil & Varison (n 18) 19.

23 Cournil & Varison (n 18) 22.

24 L Canali 'Les contentieux climatiques contre les entreprises: Bilan et perspectives' in C Cournil & L Varison (dirs) *Les procès climatiques: Entre le national et l'international* (2018) 67.

25 Cournil & Varison (n 18) 21-22.

26 Canali (n 24) 68.

27 Cournil & Varison (n 18) 21.

28 Personnes physiques, organisations non gouvernementales, peuples autochtones, entreprises, entités infra-étatiques.

29 Le Sabin Center for Climate Change Law est une organisation qui tient à jour une base de données du contentieux climatique dans le monde. Elle a regroupé à ce jour vingt-cinq contentieux climatiques dans la catégorie 'Human rights'. <http://climatecasechart.com/non-us-climate-change-litigation/> (consulté le 23 septembre 2019).

30 C Perruso & L Varison 'La saisine du système interaméricain de protection des droits de l'homme en matière climatique: l'analyse des pétitions autochtones' in C Cournil & L Varison (dirs) *Les procès climatiques. Entre le national et l'international* (2018) 180-181.

pour des dommages subis à cause des inondations en se fondant sur la théorie de la nuisance, les Inuit ont saisi la Commission interaméricaine en demandant réparation pour la violation de leurs droits humains par les Etats Unis du fait de leurs émissions de GES.³¹ Les requérants arguaient que les actes et les omissions des Etats Unis en matière climatique violaient différents droits humains à l'instar des droits aux bienfaits de la culture, à la propriété, à la santé ou encore à la vie.³²

L'établissement progressif des liens entre les droits de l'homme et les changements climatiques tient au constat des impacts négatifs de ces derniers sur les conditions de vie humaines. A ce propos, le GIEC affirme par exemple que la modification du régime de précipitation ou de la fonte des neiges et des glaces perturbe les systèmes hydrologiques et influe sur la quantité et la qualité des ressources hydriques.³³ Or, selon le Comité des droits économiques, sociaux et culturels, le droit à l'eau consiste en un approvisionnement suffisant, physiquement accessible et à un coût abordable, d'une eau salubre et de qualité acceptable pour les usages personnels et domestiques de chacun.³⁴ Par ailleurs, une quantité adéquate d'eau salubre est nécessaire pour prévenir la mortalité due à la déshydratation et pour réduire le risque de transmission de maladies d'origine hydrique ainsi que pour la consommation, la cuisine et l'hygiène personnelle.³⁵ Fort de cela, le Comité des droits économiques, sociaux et culturels relève que les Etats parties au Pacte international relatif aux droits économiques, sociaux et culturels doivent établir des mécanismes pour³⁶

évaluer les impacts des actions qui pourraient empiéter sur la disponibilité de l'eau et des écosystèmes naturels des bassins hydrographiques, tels que *les changements climatiques*, la désertification et l'augmentation de la salinité du sol, la déforestation et la perte de la biodiversité. (nous soulignons)

C'est dire que le changement climatique menace la jouissance du droit à l'eau en ce qu'il limitera la quantité et la qualité de l'eau salubre disponible pour les populations. En outre, les Etats ont des obligations positives pour assurer la jouissance de cette prérogative dans le contexte de changement climatique actuel.

La Commission africaine des droits de l'homme et des peuples (Commission africaine) a également reconnu que les droits de l'homme sont menacés par les changements climatiques. En effet, dans sa résolution 153 sur le changement climatique et les droits de l'homme et la nécessité d'une étude sur son impact en Afrique, elle se dit préoccupée que l'absence de sauvegarde des droits de l'homme dans

31 Perruso & Varison (n 30) 182-183.

32 Perruso & Varison (n 30) 183.

33 GIEC (n 5) 4.

34 CEDESC *Observation générale n° 15. Le droit à l'eau (art. 11 et 12 du Pacte international relatif aux droits économiques, sociaux et culturels)* (2002) 2.

35 *Ibid.*

36 Traduction libre. Cf. The Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment 'Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment. Focus report on human rights and climate change' (2014) 4 <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/MappingReport.aspx> (consulté le 21 octobre 2019).

divers projets de texte ou de convention sur les changements climatiques en cours de négociation ne mette en péril la vie, l'intégrité physique et les moyens de subsistance des membres les plus vulnérables, en particulier les communautés autochtones et locales isolées, les femmes et les autres groupes sociaux vulnérables.³⁷ C'est la raison pour laquelle elle³⁸

APPELLE la Conférence des chefs d'Etat et de Gouvernement de l'Union africaine à s'assurer que les normes et mesures de protection des droits de l'homme, telles que le principe du consentement préalable, libre et informé, soient incluses dans le texte juridique adopté sur le changement climatique devant servir de mesure préventive des réinstallations forcées, de la dépossession des biens, de la perte des moyens de subsistance de violations de droits similaires.

Malgré le constat d'un large consensus sur le fait que les changements climatiques ont généralement des impacts négatifs sur la réalisation des droits humains, le Haut-Commissariat des Nations Unies aux droits de l'homme relève toutefois qu'il est moins évident de déterminer si, et jusqu'à quel niveau, ces effets peuvent être qualifiés de violations des droits de l'homme au sens strictement légal.³⁹ En effet, la justiciabilité des changements climatiques met en lumière diverses problématiques telles que la preuve des dommages ou encore le lien de causalité⁴⁰ nécessaires pour l'établissement d'un lien strict avec un droit de l'homme. C'est pourquoi Cournil et Varison argumentent que les contentieux climatiques représentent un laboratoire des grands défis juridiques.⁴¹ Les différents contentieux climatiques observables et notamment relatifs aux droits de l'homme dans le cadre de la présente recherche, constituent donc des tentatives d'approfondissement de ces liens afin de faire reconnaître la violation de droits humains.

Le continent africain n'est pas en reste dans la dynamique de judiciarisation du climat. En effet, le Sabin Center for Climate Change Law recense six contentieux se déroulant sur le continent uniquement dans les pays anglo-saxons notamment le Nigéria, l'Afrique du Sud, l'Ouganda et le Kenya.⁴² A ce jour, ni la base de données du Sabin Center for Climate Change Law, ni celle du Grantham Research Institute on Climate Change and the Environment n'ont recensé un contentieux climatique dans un pays autre que ces quatre.⁴³ La présente contribution analyse la place accordée aux droits de l'homme

37 Résolution sur le Changement Climatique et les Droits de l'Homme et la Nécessité d'une Etude sur son impact en Afrique-CADHP/Res.153 (XLVI) 09 https://www.achpr.org/fr_sessions/resolutions?id=291 (consulté le 21 octobre 2019).

38 *Ibid.*

39 Programme des Nations Unies pour l'Environnement 'Climate Change and Human Rights' (2015) 13.

40 Cournil & Varison (n 18) 25.

41 Cournil & Varison (n 18) 24.

42 <http://climatecasechart.com/non-us-jurisdiction/> (consulté le 13 août 2019).

43 <http://climatecasechart.com/non-us-jurisdiction/>; http://www.lse.ac.uk/Grant%20Institute/climate-change-laws-of-the-world/?fromyear=all&toyear=all&country=BFA&side_a=all&side_b=all&side_c=all&classification=all&climate_area=all&status=all&type=litigation (consultés le 23 septembre 2019).

dans les contentieux climatiques identifiés à ce jour en Afrique⁴⁴ à la lumière des décisions de justice rendues en la matière à l'échelle nationale. Trois des six contentieux climatiques africains recensés ont été sélectionnés compte tenu du fait qu'ils sont les seuls à avoir été jugés au cours de la période de recherche. Il s'agit notamment des affaires *Jonah Gbemre*⁴⁵ du Nigéria, *Thabametsi*⁴⁶ d'Afrique du Sud et *Save Lamu*⁴⁷ du Kenya. Ainsi, il sera possible de présenter de manière incidente les tendances du contentieux climatique sur le continent car⁴⁸

Les questions posées au juge lors de procédures permettent, comme un baromètre, de relever les tendances, les pratiques communes ou singulières et les pistes juridiques qui s'ouvrent sur le plan procédural et substantiel en matière climatique.

En dehors de ces contentieux, des affaires portant sur les droits de l'homme et relevant des questions d'ordre environnemental au niveau régional ont été sélectionnées dans l'optique d'envisager les possibilités de multiplication d'un contentieux africain des droits de l'homme en matière climatique. Ce dernier renvoie, dans le cadre de la présente recherche, à l'ensemble des litiges africains à l'échelle nationale ou régionale soulevant des questions de fait ou de droit sur les causes et effets du changement climatique en se fondant principalement sur les droits de l'homme. Parmi ces affaires, l'on retrouve les affaires *SERAC*⁴⁹ et *Endorois*⁵⁰ devant la Commission africaine, *Ogiek*⁵¹ devant la Cour africaine des droits de l'homme et des peuples (Cour africaine), *Le Centre pour les droits de l'homme*⁵² devant le Comité africain

- 44 Différentes études ont été menées sur la question des droits de l'homme dans le contentieux climatique, certaines soulignant d'ailleurs des affaires en Afrique sans toutefois aborder la question de leur place au niveau africain. Voir sans prétention à l'exhaustivité, C' Cournil 'Etude comparée sur l'invocation des droits constitutionnels dans les contentieux climatiques nationaux' in C Cournil & L Varison (dirs) *Les procès climatiques. Entre le national et l'international* (2018); C Cournil & C Perruso 'Réflexions sur "l'humanisation" des changements climatiques et la "climatisation" des droits de l'homme. Emergence et pertinence' (2018) 14 *La Revue des droits de l'homme*; C Huglo *Le contentieux climatique: une révolution judiciaire mondiale* (2018); M Dutu 'Climate change and human rights: emergence of a new fundamental right to proper climate' in Michelot (n 7).
- 45 Federal High Court of Nigeria *Jonah Gbemre v Shell Petroleum Development Company Nigeria LTD & Others* Affaire n° FHC/B/CS/53/05 (jugement du 14 novembre 2005).
- 46 High Court of South Africa *Earthlife Africa Johannesburg v The Minister of Environmental Affairs & Others* Affaire n° 65662/16 (jugement du 8 mars 2017) (*Thabametsi*).
- 47 National Environmental Tribunal *Save Lamu & Others v National Environmental Authority & Other* Affaire n° NET 196 de 2016 (jugement du 26 juin 2019).
- 48 Cournil & Varison (n 18) 24.
- 49 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).
- 50 *Centre for Minority Rights Development & Others c. Kenya* (2009) AHRLR 75 (ACHPR 2009).
- 51 *Commission africaine des droits de l'homme et des peuples c. Kenya* (mesures provisoires) (2013) 1 RJCA 200.
- 52 *Le Centre pour les droits de l'homme (Université de Pretoria) et la rencontre africaine pour la défense des droits de l'homme (Sénégal) c. Sénégal* Décision 3/Com/001/2012 du 15 avril 2014 lors de la 23^e session ordinaire du Comité africain d'experts sur les droits et le bien-être de l'enfant.

d'experts sur les droits et le bien-être de l'enfant (Comité sur les droits de l'enfant) et *SERAP*⁵³ devant la Cour de justice de la Communauté économique des Etats de l'Afrique de l'Ouest (Cour de la CEDEAO).

Pour ce faire, la sociologie juridique a été choisie comme cadre conceptuel car elle permet de s'intéresser aux phénomènes juridiques primaires tels que les jugements tout en s'appesantissant sur des phénomènes juridiques secondaires à l'instar des justifications sociologiques voire politiques de la place du contentieux climatique en Afrique.⁵⁴ Sur cette base, une analyse praxéologique⁵⁵ des décisions sélectionnées sera effectuée.

Il apparait que les droits de l'homme ont une place subsidiaire dans le contentieux climatique en Afrique. Bien que certains soient invoqués dans les différents contentieux (2), le contentieux africain des droits de l'homme en matière climatique reste faiblement représenté sur le continent (3).

2 L'INVOCATION DE DROITS DE L'HOMME SPECIFIQUES

Les affaires *Jonah Gbemre*, *Thabametsi* et *Save Lamu* réaffirment les liens entre les droits de l'homme et les changements climatiques par leur invocation. D'une part, dans l'affaire *Jonah Gbemre*, le triptyque droit à la vie, droit à la dignité humaine et droit à un environnement propre et sain, sans poison ni pollution est invoqué comme un moyen (2.1.), d'autre part le droit à un environnement sain en particulier est utilisé comme un outil d'analyse par le juge (2.2.).

2.1 Le triptyque droit à la vie, droit à la dignité humaine et droit à un environnement propre et sain, sans poison ni pollution comme moyen

Le moyen est le fondement invoqué par un plaideur pour justifier ou critiquer une prétention.⁵⁶ Il s'agit du fondement *de droit* ou *de fait* invoqué par une partie au soutien de ses prétentions.⁵⁷ Lorsqu'il est désigné comme étant *de droit*, le moyen fait référence au fondement juridique, à la raison tirée d'une règle de droit propre à justifier ou

53 *SERAP c. Federal Republic of Nigeria* (14 décembre 2012) Arrêt n° ECW/CCJ/JUD/18/12.

54 JL Bergel *Théorie générale du droit* (2012) 194-196.

55 Elle renvoie à une analyse du droit par les pratiques. Voir J Colemans & B Dupret (dirs) *Ethnographies du raisonnement juridique* (2018).

56 S Guinchard & T Debard (dirs) *Lexique des termes juridiques 2017-2018* (2017) 1240.

57 B Metou 'Le moyen de droit international devant les juridictions internes en Afrique: quelques exemples d'Afrique noire francophone' (2009) 22 *Revue québécoise de droit international* 129.

critiquer une demande ou une décision.⁵⁸ Par contre, lorsqu'il est désigné comme étant *de fait*, il renvoie à des éléments de fait spécialement allégués par un plaideur pour justifier ou critiquer une prétention.⁵⁹

Dans l'affaire *Jonah Gbemre*, le lien entre le droit à la vie, le droit à la dignité humaine et le droit à un environnement propre et sain, sans poison ni pollution constitue le fondement juridique de la demande du requérant relative à l'arrêt de la pratique de torchage de gaz pratiquée par les entreprises pétrolières Shell Petroleum Development Company Nigeria LTD et Nigerian National Petroleum Corporation. Le droit à un environnement propre et sain, sans poison ni pollution n'étant pas consacré parmi les droits fondamentaux dans la Constitution nigériane,⁶⁰ c'est par le truchement du droit à la vie et à la dignité humaine consacrés aux sections 33(1) et 34(1) de la Constitution de la République fédérale du Nigéria de 1999 et renforcés par les articles 4, 16 et 24 de l'*African Charter on Human Procedure Rules (Procedure and Enforcement) Act*⁶¹ ainsi que les lois de la Fédération du Nigéria de 2004 que le requérant a pu mettre en exergue son caractère fondamental.⁶² En l'espèce, Jonah Gbemre alléguait, pour lui-même et pour la communauté Iwherekkan de l'Etat du Delta, que la pratique du torchage de gaz⁶³ effectuée par les entreprises pétrolières Shell Petroleum Development Company Nigeria LTD et Nigerian National Petroleum Corporation dans leur communauté violait leurs droits fondamentaux à la vie et à la dignité humaine y compris à un environnement sain.⁶⁴ Il a, par l'entremise de son avocat, fondé sa démonstration sur le fait que la signification du droit à la vie et à la dignité humaine incluent inévitablement le droit à un environnement propre et sain, sans poison ni pollution.⁶⁵

Concernant le droit à la vie, il relève que selon la sixième édition du *Blacks Law Dictionary*, le droit à la vie ne signifie pas uniquement ne pas se voir couper la tête ou guillotiné mais inclut également le droit d'avoir des organes qui fonctionnent normalement et de jouir de toutes ses facultés.⁶⁶ Par ailleurs, il souligne que le droit à la vie ne peut avoir pleinement son sens que si l'on retire les choses qui le mettent en danger ou le diminuent.⁶⁷ Sur cette base, il affirme que le torchage de

58 Guinchard & Debard (n 56) 1241.

59 *Ibid.*

60 Huglo (n 44) 105.

61 La loi sur les règles de procédure relatives aux droits de l'homme consacrés par la Charte africaine des droits de l'homme (traduction libre).

62 Federal High Court of Nigeria (n 45) 2.

63 Cette pratique consiste à brûler les rejets de gaz à différentes étapes de l'extraction de pétrole et qui est responsable du rejet dans l'atmosphère de plus de 350 millions de tonnes de dioxyde de carbone chaque année. Ces rejets sont particulièrement nocifs. Cf <https://www.banquemondiale.org/fr/news/press-release/2018/07/17/new-satellite-data-reveals-progress-global-gas-flaring-declined-in-2017> (consulté le 21 octobre 2019).

64 Federal High Court of Nigeria (n 45) 2.

65 Federal High Court of Nigeria (n 45).

66 Federal High Court of Nigeria (n 45) 19.

67 Federal High Court of Nigeria (n 45).

gaz met en danger et diminue la vie des membres de la communauté Iwherekan qui ne peuvent pleinement en jouir.⁶⁸ Cette pratique concourt également à la pollution de l'environnement par l'émission du dioxyde de carbone, principal GES contribuant aux effets négatifs des changements climatiques, expose sa communauté à un risque élevé de mort prématurée, de maladies respiratoires et de cancer.⁶⁹ En outre, cela pollue leurs aliments et leur eau.⁷⁰ Le plaignant estime alors que la communauté Iwherekan ne peut valablement jouir du droit à la vie dans un environnement pollué par le torchage de gaz.

Relativement au droit à la dignité humaine, il relève, en citant une affaire,⁷¹ qu'il comprend le droit de ne pas se voir infliger un traitement inhumain ou dégradant.⁷² Cela implique également de ne pas se faire infliger des préjudices physiques ainsi que des angoisses et des souffrances.⁷³ Or, le torchage de gaz des entreprises est susceptible d'infliger de graves préjudices physiques aux membres de la communauté Iwherekan avec la diminution de la fonction du poumon ou la mort.⁷⁴ De ce fait, vivre dans un environnement pollué qui n'est ni propre, ni sain du fait du torchage de gaz par les entreprises pétrolières est susceptible de nuire à la jouissance du droit à la dignité humaine des populations.⁷⁵ Le juge a fait sien l'argumentaire du requérant en le disant fondé et ordonna aux entreprises en cause de restreindre la pratique du torchage de gaz.⁷⁶

Ainsi, le lien qu'établit le requérant entre le triptyque droit à la vie, à la dignité humaine et droit à un environnement propre et sain, sans poison ni pollution est un moyen de *droit* en ce qu'il est tiré de règles de droit notamment des textes juridiques. Il représente le moyen principal de la demande de Jonah Gbemre. C'est la raison pour laquelle cette affaire est catégorisée par le Sabin Center for Climate Change Law parmi les contentieux climatiques fondés sur les droits de l'homme.⁷⁷

La construction juridique autour du droit à un environnement propre et sain, sans poison ni pollution pourrait constituer le fondement de requêtes de membres de communautés affectées par l'exploitation de ressources extractives dans leur milieu de vie. Sur cette base, les communautés pourraient saisir les juridictions nationales ou des institutions régionales de protection des droits de l'homme suivant les règles de procédure applicables. Toutefois, il y a lieu de relever que le moyen constitué du triptyque droit à la vie, droit à la dignité humaine et droit à un environnement propre et sain, sans poison ni pollution n'a

68 Federal High Court of Nigeria (n 45) 20.

69 Federal High Court of Nigeria (n 45) 4.

70 Federal High Court of Nigeria (n 45) 5.

71 *Uzoukwo c. Ezeonu* (1991) 6 NWI.

72 Federal High Court of Nigeria (n 45) 22.

73 n 72.

74 Federal High Court of Nigeria (n 45) 5.

75 Federal High Court of Nigeria (n 45) 22.

76 Federal High Court of Nigeria (n 45) 29-31.

77 <http://climatecasechart.com/non-us-case-category/human-rights/page/2/> (consulté le 30 septembre 2019).

pas tenu compte de la communication de la Commission africaine dans l'affaire *SERAC*. Pourtant, la Commission africaine y a affirmé que la dégradation et la pollution de l'environnement à un niveau humainement inacceptable affecte la vie des populations et par conséquent viole leur droit à la vie.⁷⁸ La décision de la Commission africaine aurait ainsi pu constituer un argument supplémentaire d'autant plus qu'elle concernait le Nigéria.

2.2 Le droit à un environnement sain comme outil d'analyse

Généralement classé parmi les droits de la troisième génération,⁷⁹ le droit à un environnement sain a été consacré par la Charte africaine des droits de l'homme et des peuples (Charte africaine)⁸⁰ en son article 24. Il dispose en effet que tous les peuples ont droit à un environnement satisfaisant et global, propice à leur développement.

Relevé dans divers autres instruments régionaux des droits de l'homme⁸¹, le droit à un environnement sain a été interprété dans certains contentieux initiés devant des organes quasi-judiciaires du système de l'Union africaine. Dans l'affaire *SERAC*, la Commission africaine relève par exemple que le droit à un environnement sain requiert que l'Etat prenne des mesures raisonnables et d'autres mesures pour prévenir la pollution et la dégradation écologique, favoriser la protection de l'environnement et garantir un développement écologiquement et l'utilisation des ressources naturelles.⁸²

Par ailleurs, le droit à un environnement sain est reconnu par le Comité africain d'experts sur les droits et le bien-être de l'enfant comme faisant partie intégrante des obligations d'un Etat partie à la Charte africaine des droits et du bien-être de l'enfant en vertu du principe général de survie et de développement. En effet, il relève que⁸³

Puisque la survie et le développement englobent le droit à la vie et impose aux Etats l'obligation d'assurer un niveau de vie suffisant pour les enfants, y compris le droit à la vie et à leur développement physique, mental, spirituel, moral, psychologique et social, les obligations de l'Etat partie en vertu de ce principe comprennent

78 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (n 49) 73.

79 Huglo (n 44) 102.

80 Adoptée le 27 juin 1981 et entrée en vigueur le 21 octobre 1986.

81 L'article 18(1) du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes adopté le 11 juillet 2003 et entré en vigueur le 25 novembre 2005 dispose que les femmes ont le droit de vivre dans un environnement sain et viable. En outre, le droit à un environnement sain transparaît de l'article 11(2)(g) de la Charte africaine des droits et du bien-être de l'enfant adoptée le 1 juillet 1990 et entrée en vigueur le 29 novembre 1999 qui relève que l'éducation de l'enfant vise à susciter le respect de l'environnement et des ressources naturelles.

82 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (n 49) 68.

83 *Le Centre pour les droits de l'homme (Université de Pretoria) et la rencontre africaine pour la défense des droits de l'homme (Sénégal) c. Sénégal* (n 52) 13.

également la protection des droits des enfants à accéder [...] au droit de vivre dans un environnement sûr et propre.

Dans l'affaire *Thabametsi* en Afrique du Sud, le juge fait référence au droit à un environnement sain dans l'optique d'interpréter le *National Environmental Management Act*⁸⁴ (NEMA) qui conditionne, en sa section 24, la réalisation de certaines activités par l'obtention d'une autorisation de l'administration en charge de la protection de l'environnement à la suite d'une étude de ses impacts environnementaux.⁸⁵ En l'espèce, l'organisation non gouvernementale Earthlife Africa Johannesburg conteste la décision du Ministère sud-africain de l'environnement d'accorder l'autorisation environnementale de réaliser un projet de centrale thermique à charbon devant la North Gauteng High Court.⁸⁶ Elle décriait le défaut de considération des incidences climatiques de ce projet.⁸⁷ Dans sa décision, le juge a dégagé une obligation d'évaluation des impacts climatiques dudit projet. Elle n'est pas expressément formulée dans le NEMA mais considérée comme un des facteurs pertinents devant justifier l'octroi ou le rejet d'une autorisation environnementale.⁸⁸ Pour formuler l'obligation d'évaluation climatique, le juge s'attèle à interpréter le NEMA à la lumière de dispositions pertinentes parmi lesquelles la section 24 de la Constitution. Elle dispose que⁸⁹

Toute personne a le droit

- (a) À un environnement qui ne soit pas nocif pour sa santé ou son bien-être; et
- (b) D'avoir un environnement protégé pour le bénéfice des générations présentes et futures à travers des mesures législatives appropriées et d'autres mesures qui-
 - (i) Préviennent la pollution et la dégradation écologique;
 - (ii) Promeuvent la conservation; et
 - (iii) Sécurisent le développement écologiquement durable et l'utilisation des ressources naturelles tout en promouvant le développement écologique et social légitime.

Fort de cette disposition et plus particulièrement de son point (iii), le juge souligne que les changements climatiques posent un risque substantiel au développement durable de l'Afrique du Sud au regard de ses conséquences telles que l'augmentation des températures, la raréfaction de l'eau et l'augmentation de la fréquence des catastrophes naturelles.⁹⁰ Ce développement ne peut donc se faire sans la prise en compte des changements climatiques qui doivent être évalués en fonction des conséquences à long terme.⁹¹ Sur cette base, les études d'impact environnemental devraient donc prendre en compte les évaluations des incidences climatiques. Le juge a ainsi recours au droit à un environnement sain pour justifier la nécessité de tenir compte des

84 La loi sur gestion de l'environnement (traduction libre).

85 High Court of South Africa (n 46).

86 n 85.

87 Cournil & Varisan (n 18) 98.

88 High Court of South Africa (n 46) 3.

89 Traduction libre. Voir à ce sujet, High Court of South Africa (n 48) 33.

90 n 89.

91 n 89.

incidences climatiques de projets dans l'optique d'un développement écologiquement durable.

Dans cette affaire, le juge fait un pas significatif dans le contrôle de « projets climaticides » ou climatiquement non compatibles soumis à l'autorisation préalable des pouvoirs publics, et émet un signal fort aux futurs gestionnaires de projets basés sur l'exploitation de charbon ou d'autres énergies émettrices de GES.⁹²

Enfin, pour ce qui est de l'affaire *Save Lamu*, les requérants contestent la validation de l'étude d'impact environnemental d'une centrale thermique à charbon par l'autorité nationale de gestion de l'environnement.⁹³ Ils demandent au Tribunal national de l'environnement⁹⁴ d'écarter la licence délivrée par cette autorité sur la base de cette étude d'impact et qu'une nouvelle soit effectuée avec la participation de toutes les parties prenantes.⁹⁵ En outre, ils relèvent au soutien de leurs prétentions qu'il y a eu une mauvaise analyse des alternatives à ce projet ainsi qu'un échec dans la prise en compte des questions économiques qu'il soulève.⁹⁶ Les requérants allèguent également que le projet de centrale thermique à charbon contribue au changement climatique et n'est ainsi pas cohérent avec les engagements de faible émission de carbone du Kenya.⁹⁷ Dans cette affaire, le droit à un environnement sain est invoqué par le juge dans l'analyse de la participation publique aux études d'impact environnemental. Pour soutenir son idée de la place essentielle de la participation du public dans ces études, le juge cite l'affaire *Ken Kasinga* dans laquelle il est relevé que⁹⁸

Lorsqu'une procédure de protection de l'environnement établie par la loi n'est pas respectée, il est possible de présumer que le projet en question viole le droit à un environnement sain ou à tout le moins est susceptible de nuire à l'environnement.

Or la participation publique étant une procédure de protection de l'environnement par son insertion dans les études d'impact environnemental, son absence est susceptible de violer le droit à un environnement sain des populations. Dans le cas d'espèce, le juge a demandé à l'entreprise Amu Power Company Limited en charge de la mise en place de la centrale thermique à charbon, au cas elle voudrait poursuivre ce projet, de faire une nouvelle étude d'impact environnemental respectant chaque étape requise par les normes en la matière au Kenya ainsi que les considérations de la loi sur les changements climatiques, de la loi sur l'énergie et de celle sur les ressources naturelles.⁹⁹ Cette décision, dans le même sens que celle de l'affaire *Earthlife* peut inspirer des juges et requérants sur le continent.

92 Cournil (n 44) 98.

93 Traduction libre. Cf. National Environmental Tribunal (n 47) 2.

94 Traduction libre.

95 National Environmental Tribunal (n 49) 2.

96 n 95.

97 n 95.

98 Traduction libre. Cf. National Environmental Tribunal (n 47) 28.

99 Traduction libre. Cf. National Environmental Tribunal (n 47) 49.

Dans chacune de ces affaires, les juges citent des dispositions ou décisions de justice relatives au droit à un environnement sain pour guider leur raisonnement. Les prétentions des parties ne relèvent pas forcément le droit à un environnement sain mais ce dernier est utilisé par les juges comme une base de construction de sa décision.

Du triptyque droit à la vie, droit à la dignité humaine, droit à un environnement propre et sain, sans poison ni pollution comme moyen par les plaideurs au droit à un environnement sain comme un outil d'analyse de problèmes juridiques par le juge, il apparaît que certains droits de l'homme sont invoqués dans les contentieux climatiques recensés sur le continent africain. Par conséquent, les droits de l'homme sont donc pris en compte dans ce contentieux naissant. Toutefois, considérer ce constat comme la matérialisation d'une place prépondérante des droits de l'homme dans ce type de contentieux sur le continent serait étendre un voile sur une réalité somme toute différente, celle de la représentativité relative du contentieux africain des droits de l'homme.

3 LA REPRESENTATIVITE RELATIVE DU CONTENTIEUX AFRICAIN DES DROITS DE L'HOMME EN MATIERE CLIMATIQUE

Malgré l'invocation de certains droits de l'homme dans les décisions de justice en matière climatique recensées sur le continent africain, force est de constater que les contentieux climatiques ne portent pas tous sur les droits de l'homme à titre principal. En effet, le contentieux africain des droits de l'homme en matière climatique est encore embryonnaire à l'échelle nationale (3.1) tandis qu'à l'échelon régional, ce contentieux est encore inexistant (3.2).

3.1 Un contentieux national embryonnaire

A ce jour, seule l'affaire *Jonah Gbemre* au Nigéria est considérée comme un contentieux des droits de l'homme en matière climatique. En effet, elle représente la seule affaire dans laquelle les revendications sur les effets néfastes des changements climatiques sont principalement fondées sur des droits de l'homme notamment le droit à la vie, à la dignité humaine et à un environnement propre et sain, sans poison ni pollution. Les affaires *Thabametsi* en Afrique du Sud et *Save Lamu* au Kenya portent quant à elles sur des contestations d'autorisations environnementales de projets de construction de centrales thermiques à charbon délivrées par des administrations publiques compétentes sans prise en compte de leurs incidences climatiques. C'est dire que le contentieux des droits de l'homme est moins représenté à l'heure actuelle et que les stratégies contentieuses sur le continent en matière climatique ne se focalisent pas encore sur la question des droits de l'homme à titre principal. Afin de comprendre les raisons de cette situation, il sied d'analyser le cas de chaque Etat dans

lequel s'est déroulé un contentieux climatique recensé dans le cadre de la présente recherche.

Pour le cas de l'Afrique du Sud, le succès de l'affaire *Thabametsi* a influencé le développement actuel du contentieux climatique. Il a conduit d'autres requérants à se focaliser sur le même fondement notamment l'obligation d'évaluation climatique de certains projets de centrales thermiques à charbon. A la suite de cette affaire deux autres requêtes ont été introduites devant les tribunaux. Il s'agit des affaires *Kipower*¹⁰⁰ et *Acwa Power*.¹⁰¹ Dans l'affaire *Kipower*, le requérant relève que l'autorisation environnementale délivrée par le Directeur en chef compétent en la matière et la décision de confirmation de cette autorisation par le Ministère des affaires environnementales sont erronées en l'absence d'évaluation des impacts climatiques du projet de centrale près de la région de Delmas à Mpumalanga.¹⁰² Il rappelle pour cela que la North Gauteng High Court a établi, dans sa décision relative à l'affaire *Thabametsi* que¹⁰³

- (a) Les impacts climatiques d'une centrale thermique à charbon en prévision doivent être examinés et entièrement considérés comme faisant partie d'une étude d'impact environnemental conformément aux dispositions du NEMA avant qu'une décision ne soit prise sur la délivrance d'une autorisation environnementale; et
- (b) En plus de l'obligation établie par le NEMA en sa section 240(1)(b) d'identifier les impacts pertinents ainsi que des mesures d'atténuation et de tenir compte des politiques et informations pertinentes pour décider de délivrer ou pas une autorisation environnementale, de même que les engagements politiques internationaux et nationaux de l'Afrique du Sud de résoudre le changement climatique, une évaluation climatique était nécessaire pour effectuer un examen exhaustif de l'impact environnemental du projet de centrale thermique à charbon préalablement à sa délivrance.

Le requérant relève, alors, que la décision de confirmation de l'autorisation environnementale délivrée par le Ministère des affaires environnementales va à l'encontre de l'obligation d'évaluation climatique établie par le juge.¹⁰⁴ En effet, elle affirme qu'il n'existe actuellement aucune base légale dans le cadre juridique applicable aux études d'impact environnemental pour réaliser une évaluation des incidences climatiques.¹⁰⁵

Pour ce qui est de l'affaire *Acwa Power*, le requérant relève que sa demande se fonde sur le jugement de la North Gauteng High Court dans l'affaire *Thabametsi*.¹⁰⁶ A cet effet, il souligne que ce jugement a clairement établi pour la première fois dans le droit sud-africain que les impacts climatiques d'un projet de centrale thermique à charbon

100 High Court of South Africa *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs & Others* Affaire n° 54087 (4 août 2017).

101 High Court of South Africa *Trustees for the Time Being of the Groundwork Trust v Minister of Environmental Affairs & Others* Requête n° 61561 (5 septembre 2017).

102 High Court of South Africa (n 100) 14.

103 *Thabametsi* (n 46), traduction libre.

104 High Court of South Africa (n 100) 15.

105 n 100.

106 High Court of South Africa (n 101) 12.

doivent être complètement évalués et considérés avant la délivrance d'une autorisation environnementale conformément au NEMA.¹⁰⁷

A l'observation, l'affaire *Thabametsi* a manifestement créé un effet domino sur l'évaluation climatique en Afrique du Sud. Cela se comprend d'autant plus lorsque l'on sait que cet Etat fait face à des problèmes d'eau et que les conséquences des changements climatiques du fait des centrales thermiques à charbon pourraient conduire à une raréfaction accrue de l'eau.¹⁰⁸ Bien que cette affaire n'entrave pas la possibilité d'une requête sur les violations de droits de l'homme en matière climatique en Afrique du sud, elle a tout de même ouvert la voie au développement actuel de contentieux fondés spécifiquement sur l'évaluation climatique des projets de centrales thermiques à charbon.

En ce qui concerne le Nigéria, le statut embryonnaire du contentieux national des droits de l'homme en matière climatique peut trouver sa justification dans l'impact mitigé de l'affaire *Jonah Gbemre*. En effet, bien que cette affaire ait construit un principe inédit en matière climatique, ses décisions n'ont pas pu être implémentées. Tout d'abord, l'entreprise Shell a refusé d'exécuter la décision de la Federal High Court en arguant qu'elle ne disposait pas d'assez de ressources pour liquéfier le gaz brûlé.¹⁰⁹ Par ailleurs, la Cour a échoué à implémenter le droit à un environnement propre et sain, sans poison ni pollution car malgré la condition qu'elle avait donné à Shell de réduire progressivement le torchage de gaz, ce dernier ne s'est pas exécuté.¹¹⁰ Entre avril 2006 et avril 2007, Shell n'avait pas réduit la quantité de gaz torchée¹¹¹ et continuait donc les activités qui ont donné lieu à ce contentieux.¹¹² Pourtant, cette affaire s'inscrivait dans la perspective d'utiliser les juridictions comme des forums de changements sociaux susceptibles de mettre fin à la pratique de torchage de gaz effectuée par les entreprises pétrolières au regard de l'incapacité du gouvernement nigérian à le faire.¹¹³

Pour preuve, Jonah Gbemre demandait au juge de déclarer également que les dispositions de l'Associated Gas Re-injection Act sur la base duquel le torchage de gaz pouvait être autorisé étaient contraires aux sections 33(1) et 34(1) de la Constitution de 1999.¹¹⁴ Malgré des promesses répétées de suspendre les activités de torchage de gaz, en janvier 2008 le gouvernement nigérian n'avait toujours pas sanctionné Shell.¹¹⁵ Il a fallu attendre le recours intenté par Kenule Saro-Wiwa Jr contre Shell aux Etats Unis sur la base de l'Alien Tort Claims Act pour

107 n 106.

108 High Court of South Africa (n 46) 11.

109 Ukala 'Gas flaring in Nigeria's Niger Delta: failed promises and reviving Community voices' (2012) 2 *Washington and Lee Journal of Energy, Climate and The Environment* 108.

110 Ukala (n 109) 109.

111 n 109.

112 KG Kingston 'Shell oil company in Nigeria: impediment or catalyst of socio-economic development?' (2011) *African Journal of Social Sciences* 1 10.

113 Ukala (n 109) 107.

114 Federal High Court of Nigeria (n 45) 2.

115 Ukala (n 109) 110.

obtenir une décision exécutée en la matière.¹¹⁶ Cette situation a fait dire à Ukala qu'au Nigéria les contentieux environnementaux notamment fondés sur les droits de l'homme ne peuvent avoir du succès que dans l'hypothèse d'une bonne gouvernance.¹¹⁷ La décision du juge dans l'affaire *Jonah Gbemre* aurait pu susciter des contentieux similaires au titre de stratégie de limitation de la capacité des entreprises transnationales à méconnaître les institutions et les lois des Etats de certaines régions,¹¹⁸ mais le contexte de gouvernance a sans doute influencé la multiplication de tels contentieux au Nigéria. Contrairement à l'Afrique du Sud où la décision dans l'affaire *Thabametsi* aurait suscité d'autres contentieux sur l'obligation d'évaluation climatique de projets, le Nigéria n'a toujours pas vu d'autres contentieux de droits de l'homme en matière climatique. Pourtant, le Nigéria était recensé comme un Etat susceptible de voir émerger plusieurs contentieux de droit de l'homme en matière climatique au regard de la forte présence de compagnies pétrolières sur son territoire.¹¹⁹

Enfin, en ce qui concerne le Kenya, bien que des contentieux climatiques fondés sur les droits de l'homme n'y soient pas encore recensés, il est également considéré comme l'un des Etats dans lesquels des personnes souffrant des impacts des changements climatiques peuvent introduire des recours sur la base des droits consacrés dans la Constitution de 2010 associés aux dispositions pertinentes de la loi sur la gestion et la coordination environnementales de 1999.¹²⁰ Au titre des droits constitutionnels l'on peut notamment relever le droit à un environnement sain consacré en son article 70. Cette opportunité est d'autant plus envisageable avec la création de la Cour de l'environnement et du foncier¹²¹ qui a pour compétence de recevoir des contentieux relatifs aux problématiques climatiques.¹²² De ce fait, il y a lieu d'espérer le développement de contentieux climatiques fondés sur les droits de l'homme dans cet Etat dans les prochaines années.

Ainsi, plusieurs raisons justifient le caractère embryonnaire du contentieux africain des droits de l'homme en matière climatique à ce jour. Mais l'on ne peut que se réjouir des prédispositions juridiques des Etats recensés à connaître ce type de contentieux dans un futur proche nonobstant l'influence des causes contextuelles extra juridiques susceptibles de nuire à son développement. Cet optimisme est également de mise à l'échelle régionale malgré l'inexistence d'un tel contentieux à ce jour.

116 n 115.

117 Ukala (n 109) 113.

118 Kingston (n 109) at 11.

119 Environmental Law Alliance Worldwide 'Holding corporations accountable for damaging the climate' (2014) 33 <https://www.elaw.org/system/files/elaw.climate.litigation.report.pdf> (consulté le 21 octobre 2019).

120 Traduction libre. Cf. Environmental Law Alliance Worldwide (n 119) 27.

121 Traduction libre de Environment and Land Court.

122 Environment and Land Court Act 2011 para 13(2)(a).

3.2 Un contentieux régional inexistant

A ce jour, aucun organe judiciaire ou quasi-judiciaire de protection des droits de l'homme au niveau africain n'a rendu une décision ou une communication en matière climatique. Il sied tout de même de rappeler qu'il existe plusieurs décisions en matière de droits humains touchant aux questions environnementales et rendues par des juridictions régionales africaines notamment celles que nous avons retenu pour le cadre de l'étude¹²³. De ce fait, l'on peut, de manière prospective entrevoir les possibilités de réalisation de ce contentieux à partir des droits de l'homme qui y sont relevés.

Dans l'affaire *SERAC* devant la Commission africaine, la communication des requérants alléguait que le gouvernement nigérian avait, entre autres, violé les droits à la santé et à un environnement sain du peuple Ogoni consacrés aux articles 16 et 24 de la Charte africaine en négligeant de fournir ou de permettre la conduite d'études sur les risques éventuels ou réels sur l'environnement et la santé causés par les activités pétrolières.¹²⁴ A ce propos, la Commission africaine relevait que le respect par le gouvernement de l'esprit de ces articles incluait également le fait d'exiger et de publier des études sur l'impact social et environnemental avant tout développement industriel majeur.¹²⁵ Cette explication de la Commission africaine peut être utilisée par des requérants pour introduire des communications relevant l'absence d'évaluation des impacts climatiques de projets tels que les centrales thermiques à charbon dans le cas de l'affaire *Thabametsi*. En effet, l'aspect environnemental de l'étude d'impact d'un projet industriel ne peut plus à ce jour éluder les changements climatiques au risque de ne pas prendre en considération des risques éventuels ou réels tant pour l'environnement que pour l'homme.

La Commission africaine relève également dans cette affaire que l'esprit des articles 16 et 24 de la Charte africaine implique pour le gouvernement d'¹²⁶

[i]nformer les communautés exposées aux activités et produits dangereux et d'offrir aux individus la possibilité d'être entendus et de participer aux décisions relatives au développement affectant leurs communautés.

Or, l'affaire *Save Lamu* du Kenya nous montre que la participation du public aux études d'impact environnemental de projets de centrales thermiques à charbon est susceptible d'être relevée dans les contentieux climatiques.¹²⁷ C'est dire qu'une communication alléguant la violation des articles 16 et 24 de la Charte africaine peut être adressée à la Commission africaine sur le fondement de l'absence de

123 Affaires *SERAC* et *Endorois* devant la Commission africaine, *Ogiek* devant la Cour africaine, *Le centre pour les droits de l'homme* devant le Comité sur les droits de l'enfant et *SERAP* devant la Cour de la CEDEAO.

124 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (n 49) 5.

125 *Social and Economic Rights Action Center (SERAC) and Another v Nigeria* (n 49) 6.

126 n 125.

127 *National Environmental Tribunal* (n 47) 49.

participation du public aux projets ayant des incidences climatiques tant pour l'environnement que pour les personnes.

Les affaires *Endorois* devant la Commission africaine et *Ogiek* devant la Cour africaine traitent, entre autres, du droit de propriété des peuples autochtones. Consacré à l'article 14 de la Charte africaine, il est généralement relevé comme ayant été violé dans plusieurs contentieux climatiques dans le monde à l'instar de la pétition des Inuits devant la Commission interaméricaine.¹²⁸ Selon la Commission africaine, il comprend non seulement le droit d'avoir accès à sa propriété et empêcher l'empiètement de ladite propriété, mais aussi le droit à une possession et une utilisation ainsi qu'un contrôle en toute tranquillité de cette propriété, tel que ses propriétaires le désirent.¹²⁹ La Commission africaine note également que la Cour européenne des droits de l'homme a reconnu que les droits de propriété pouvaient également comprendre les ressources économiques et les droits sur les terres communautaires des demandeurs.¹³⁰ En matière climatique, sa violation peut être envisagée dans la mesure où¹³¹

Les prévisions relatives à l'élévation du niveau de la mer et l'augmentation des sécheresses pourraient rendre une grande partie du continent africain inhabitable [...] conduisant ainsi à de grandes pertes en vie et à des dommages à la propriété parmi d'autres conséquences.

Les requêtes devront alors démontrer le lien entre les actions ou omissions des Etats en matière climatique et la violation du droit de propriété.

Pour ce qui est de l'affaire *Le Centre pour les droits de l'homme* devant le Comité sur les droits de l'enfant, elle relève qu'en vertu de l'obligation d'assurer un niveau de vie suffisant pour les enfants, les Etats doivent également protéger leur droit de vivre dans un environnement sûr et propre.¹³² Cette reconnaissance tirée de l'interprétation du droit à la vie consacré à l'article 5 de la Charte africaine des droits et du bien-être de l'enfant (Charte africaine sur les droits de l'enfant), constitue un premier pas dans la possibilité d'introduire des requêtes en matière climatique devant le Comité sur les droits de l'enfant. En effet, comme dans l'affaire *Jonah Gbemre*, il pourrait être possible de lier aux changements climatiques le droit de tout enfant à la vie. Une autre possibilité réside également dans le droit à la santé consacré à l'article 14 de la Charte africaine sur les droits de

128 Cette pétition alléguait que les actions et omissions des Etats Unis en matière climatique violaient leur droit fondamental à l'utilisation et à la jouissance de leur propriété. Elle relevait que la propriété n'est pas uniquement conçue comme les biens matériels que l'on peut posséder mais aussi du patrimoine personnel. Sur cette base, les plaignants affirment les changements climatiques diminuent la valeur de leur propriété personnelle, intangible. Cf. *Watt-Cloutier c. Etats Unis*, Commission Interaméricaine des droits de l'homme, CIADH (7 décembre 2005), P-1413-05.

129 *Centre for Minority Rights Development & Others c. Kenya* (n 50) 120.

130 *Ibid.*

131 M Addaney et al 'The climate change and human rights nexus in Africa' (2017) 9 *Amsterdam Law Forum* 6-7.

132 *Le Centre pour les droits de l'homme (Université de Pretoria) et la rencontre africaine pour la défense des droits de l'homme (Sénégal) c. Sénégal* (n 52) 13.

l'enfant au regard des commentaires du Comité des droits de l'enfant y relatifs. En effet, il relève que¹³³

La santé des enfants est affectée par une variété de facteurs dont la plupart a changé pendant les 20 dernières années et sont susceptibles de continuer à évoluer dans le futur. [...] Il y a également une compréhension grandissante de l'impact des changements climatiques et l'urbanisation rapide sur la santé des enfants.

C'est la raison pour laquelle il considère que les Etats doivent insérer les préoccupations relatives à la santé des enfants au centre dans leurs stratégies d'adaptation et d'atténuation des changements climatiques.¹³⁴

Enfin, dans l'affaire *SERAP*, la Cour de la CEDEAO relève que¹³⁵

l'adoption de lois en matière environnementale, quelle que soit leur modernité, ou la création d'agences inspirées des meilleurs modèles dans le monde, de même que l'allocation de ressources financières en quantité équitable, pourraient malgré tout ne pas être conformes avec les obligations internationales en matière de protection de l'environnement si ces mesures demeurent inappliquées et si elles ne sont pas accompagnées de mesures additionnelles et concrètes ayant pour objectif de prévenir la survenance de dommages ou assurer la responsabilité, avec la réparation effective des dommages environnementaux subis.

En matière climatique, les requêtes pourraient alors porter sur les omissions des Etats membres de la CEDEAO relativement à leurs politiques, lois ou encore stratégies.

Ainsi, comme le relevait déjà Boshoff pour le cas spécifique des droits de l'enfant,¹³⁶ le système africain des droits de l'homme et la Cour de la CEDEAO sont adéquats pour connaître des contentieux climatiques.

4 CONCLUSION

La présente étude avait pour objectif d'analyser la place des droits de l'homme dans la justice climatique en Afrique. Au terme de cette analyse, il ressort que la place des droits de l'homme dans ce phénomène naissant est subsidiaire. Cette subsidiarité s'explique tout d'abord par le constat d'un existant matérialisé par l'invocation de droits de l'homme spécifiques dans les contentieux climatiques recensés sur le continent. Le recours à ces droits a alors permis d'identifier un échantillon de droits humains sollicités dans les contentieux climatiques qui se sont avérés être utilisés comme des moyens par les plaideurs ou des outils d'analyse par les juges. Il s'agit du triptyque droit à la vie, droit à la dignité humaine et droit à un environnement propre et sain sans poison ni pollution relevé dans l'affaire *Jonah Gbemre* ainsi que du droit à un environnement sain invoqué dans les affaires *Thabametsi* et *Save Lamu*. Ces utilisations sont susceptibles d'inspirer de potentiels requérants dans la

133 The Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (n 36) 6.

134 *Ibid.*

135 Traduction libre. Cf. *SERAP c. Nigeria* (14 décembre 2012) (n 53) 26.

136 E. Boshoff 'Protecting the African child in a changing climate : are our existing safeguards adequate?' (2017) 1 *Annuaire africain des droits de l'homme* at 23.

préparation de recours devant des juridictions internes ou régionales en matière climatique. Par ailleurs, des juges pourraient analyser les raisonnements effectués dans les contentieux sélectionnés pour avoir, le cas échéant, une meilleure compréhension des liens entre les droits de l'homme et les changements climatiques.

Cependant, l'invocation des droits de l'homme ne saurait donner l'illusion d'une place prépondérante dans la justice climatique en Afrique. Force est de constater que le contentieux africain des droits de l'homme en matière climatique est relativement représenté sur le continent. Pour preuve, il est embryonnaire au niveau national et inexistant à l'échelle régionale. Concernant son caractère embryonnaire au niveau national, il peut s'expliquer en Afrique du sud par le succès de l'affaire *Thabametsi* et au Nigéria par l'impact mitigé de l'affaire *Jonah Gbemre*. Malgré cette situation, le droit positif des Etats dans lesquels se sont déroulés les contentieux climatiques actuels, le système africain des droits de l'homme et l'implication de juridiction communautaire dans la protection de l'environnement laissent entrevoir des lueurs d'espoir tel la jeune pousse d'un arbre qui sort de terre. Ainsi, l'on ne peut que souhaiter le développement d'une justice climatique en Afrique accordant progressivement une place plus importante aux droits de l'homme au regard de leur interdépendance avec le changement climatique. Bien plus, que les requérants et leurs conseils utilisent davantage la boîte à outils des droits de l'Homme pour faire progresser la protection de l'environnement et du système climatique tout en protégeant les victimes climatiques potentielles, que ce soit par le biais des instruments internationaux des droits de l'Homme ou des droits nationaux comme les droits fondamentaux ou constitutionnels.¹³⁷

Mental health and exploitation, violence and abuse: the domestication of articles 5 and 16 of the African Charter on Human and Peoples' Rights in Ghana and its implication for conventional and traditional mental healthcare

*Natalie Schuck**

ABSTRACT: This article assesses the critical situation of inhumane and degrading treatment in the mental healthcare practice through a review of the interaction between the right to health and the right to be free from exploitation, violence and abuse. The article reflects on the domestication of articles 5 and 16 of the African Charter on Human and Peoples' Rights and the status of exploitation, violence and abuse in conventional and traditional mental healthcare in Ghana. Since the enactment of the Ghanaian new and progressive mental health law in 2012, specific measures have been put in place to advance the protection of persons within the mental healthcare setting; mental healthcare workers, including traditional and faith-based practitioners, have been trained on human rights; guidelines have been published; and programmes such as the QualityRights initiative have been launched. A normative analysis, combined with literature review, interviews and field visits, help to uncover barriers impeding implementation of the law and reveal gaps that remain, which automatically leaves room for exploitation, violence and abuse. The paradigm shift from a rather paternalistic approach in mental healthcare to one that promotes and respects autonomy and dignity is slow. There is still much to be desired. This article argues that there is a need to reassess or further define domestic legal provisions allowing for involuntary treatment and restraints, establish a stronger human rights oversight body, strengthen cooperation between the formal and informal mental healthcare providers, and create a legal forum where persons whose rights have been infringed can seek redress. Ultimately, these advancements could ensure that the provided right, namely to be free from exploitation, violence and abuse in mental healthcare, translates into actual change.

TITRE ET RÉSUMÉ EN FRANCAIS:

Santé mentale et exploitation, violence et abus: l'incorporation en droit interne des articles 5 et 16 de la Charte africaine des droits de l'homme et des peuples et son incidence sur le système conventionnel et traditionnel des soins de santé mentale au Ghana

RÉSUMÉ: Cette contribution examine la question des traitements inhumains et dégradants dans la pratique des soins de santé mentale à travers une analyse de l'interaction entre le droit à la santé et le droit de ne pas être soumis à l'exploitation, à la violence et aux abus. L'article se penche sur l'incorporation en droit interne des articles 5 et 16 de la Charte africaine des droits de l'homme et des peuples et sur l'état

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des lieux de l'exploitation, de la violence et des abus dans les soins de santé mentale conventionnels et traditionnels au Ghana. Depuis que la loi sur la santé mentale au Ghana a été promulguée en 2012, des mesures spécifiques ont été mises en place pour renforcer la protection des personnes impliquées dans le système des soins de santé mentale: des agents de santé mentale, notamment les tradi-thérapeutes et guérisseurs religieux, ont suivi une formation sur les droits de l'homme; des directives ont été publiées; et des programmes tels que l'initiative « Quality Rights » ont été mis en œuvre. Cette contribution se fonde sur une analyse normative et doctrinale, d'entretiens et de visites de terrain pour appréhender les obstacles à la mise en œuvre de la loi et de révéler les lacunes qui subsistent. Ces dernières continuent à causer l'exploitation, la violence et les abus. Le changement de paradigme, c'est-à-dire d'une approche paternaliste en matière de santé mentale vers une approche qui favorise et respecte l'autonomie et la dignité, est plutôt lent. Il reste donc fort à faire. Cette contribution postule qu'il est nécessaire de réévaluer ou de définir les dispositions légales nationales permettant un traitement et des contraintes involontaires, de mettre en place un organe de protection des droits de l'homme plus efficace, de renforcer la coopération entre les prestataires formels et informels de soins de santé mentale et de créer un forum juridique où les victimes des violations des droits de l'homme peuvent demander réparation. À terme, ces progrès pourraient faire en sorte que le droit prévu, à savoir de ne pas être soumis à l'exploitation, à la violence et aux mauvais traitements en matière de santé mentale, se traduise en un changement réel.

KEY WORDS: mental health, right to health, freedom from exploitation, violence and abuse, freedom from inhumane treatment, Mental Health Act, Ghana

CONTENT:

1	Introduction.....	180
2	The protection of persons within the mental healthcare system against exploitation, violence and abuse under the African Charter	182
2.1	The right to health	182
2.2	The right to be free from inhumane and degrading treatment	185
3	Ghana's legal framework relating to the treatment of persons within the mental healthcare system.....	187
3.1	Constitutional protection.....	187
3.2	Protection under domestic legislation and policy.....	188
4	The practice of mental healthcare in Ghana	192
4.1	Situations amounting to ill-treatment	192
4.2	Legal and judicial challenge	195
5	Conclusions.....	197
5.1	Uncovering gaps and shortcomings	197
5.2	Recommendations.....	199

1 INTRODUCTION

The domestication and implementation of articles 5 and 16 of the 1981 African Charter on Human and Peoples' Rights (African Charter), dealing with the prohibition of cruel, inhuman and degrading treatment and the right to health, form an integral component of the emerging legal research about mental health and human rights. Within the last few years, many scholars have written about the human rights situation of persons with mental health conditions,¹ and the United Nations Human Rights Council has also supported the establishment of

1 Eg D Bhugra *et al* (eds) 'The right to mental health and parity' (2015) 57 *Indian Journal of Psychiatry* 117; E Flynn *et al* (eds) *Global perspectives on legal capacity reform: our voices, our stories* (2018); A Arstein-Kerslake *Restoring voice to people with cognitive disabilities: realizing the right to equal recognition before the law* (2017); and P Barlett & M Schulze 'Urgently awaiting

a human rights approach to mental health.² As the importance to protect persons with mental health conditions against violence and abuse grew in recognition, numerous countries developed new mental health laws and policies aimed at the protection of this vulnerable group, amongst them many African countries. Nevertheless, state compliance with regional but also domestic legislation remains a challenge, as is the case in Ghana. Accordingly, this article inquires about the status of the law and mental healthcare structures in Ghana. It sets out to determine the factors that impede the protection against ill-treatment in the mental healthcare service delivery, a system where power imbalances reinforce paternalism and patriarchal approaches.

This article takes a human rights approach to discuss the status of exploitation, violence and abuse in mental healthcare in Ghana in reference to articles 5 and 16 of the African Charter. Practically, this article is a reflection on the improvements made in domestic law, the challenges remaining and the prospects of advancing the human rights protection in the mental healthcare system. The term 'mental healthcare' or 'mental healthcare system' is used in the paper, to refer to the sum of all existing services, including conventional and traditional mental healthcare, as suggested by the World Health Organisation (WHO);³ traditional mental healthcare comprising the practice of traditional and faith-based healers. Without explicitly excluding outpatient facilities, this article refers to ill-treatment after admission to facilities, and hence, looks at human rights violations regarding inpatient mental health services. Therefore, the domestication and implementation of articles 5 and 16 of the African Charter for the purpose of this article has to be understood in a rather narrow scope. The article commences with a normative analysis of the respective articles of the African Charter and the applicable domestic framework. Following is an assessment of the actual status of exploitation, violence and abuse in mental healthcare in Ghana and thus the implementation of the law and the challenges that persist. The final part of the article concludes with an examination of gaps and shortcomings of the regional and domestic human rights protection, supplemented with policy and program recommendations for Ghana, where practicable leaned on best-practice examples from other African countries.

implementation: the right to be free from exploitation, violence and abuse in article 16 of the Convention on the Rights of Persons with Disabilities' (2017) 53 *International Journal of Law and Psychiatry* 2.

- 2 See eg United Nations General Assembly (UNGA) 'Report of the United Nations High Commissioner for Human Rights, Mental health and human rights' (31 January 2017) UN Doc A/HRC/34/32; and 'Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' (28 March 2017) UN Doc A/HRC/35/21.
- 3 World Health Organisation (WHO) 'Organization of services for mental health (Mental Health Policy and Service Guidance Package)' (2003).

2 THE PROTECTION OF PERSONS WITHIN THE MENTAL HEALTHCARE SYSTEM AGAINST EXPLOITATION, VIOLENCE AND ABUSE UNDER THE AFRICAN CHARTER

The African Charter establishes a system for the promotion and protection of human rights within the African region. It incorporates civil and political rights, like the right to be free from inhumane and degrading treatment, in the same document as economic, social and cultural rights, such as the right to health.

2.1 The right to health

Being part of the internationally recognised economic, social and cultural rights,⁴ the right to physical and mental health is also protected under the African human rights system. Article 16 of the African Charter provides for the right to enjoy the best attainable state of physical and mental health and obliges state parties to take all necessary means to (i) protect the health of the people and (ii) ensure that the sick receive medical attention.⁵ Although (i) is of no lesser importance in the discussion about the right to mental health, this article focuses on (ii) as it explores how persons who have already fallen mentally ill, receive mental healthcare. At first, article 16 was criticised for being too vague and for lacking specific measures that states have to take to implement the right.⁶ However, guidelines, resolutions and case-law of the African Commission on Human and Peoples' Rights (African Commission) have interpreted the right since the adoption of the African Charter and thus, resolved such criticisms.

Among those interpretive soft law instruments is the 2004 Pretoria Declaration on Economic, Social and Cultural Rights in Africa, in which the African Commission explains that article 16 entails the '[a]vailability of accessible and affordable health facilities, goods and services of reasonable quality for all', '[a]ccess to humane and dignified care for persons with mental and physical disabilities', and '[t]raining for health personnel including education on health and human rights'.⁷ The Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, adopted in 2010,

4 See eg UNGA, International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, art 12.

5 Organization of African Unity, African Charter on Human and Peoples' Rights (Banjul Charter) (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 271, art 16(1)(2).

6 M Ssenyonjo 'Analysing the economic, social and cultural rights jurisprudence of the African Commission: 30 years since the adoption of the African Charter' (2011) 29 *Netherlands Quarterly of Human Rights* 358 362-363.

7 African Commission, Pretoria Declaration on Economic, Social and Cultural Rights in Africa (adopted on 17 September 2004), para 5.

stipulate further components of the right to mental health: the right to healthcare, which is effective and integrated; the freedom to have control over one's own body and health; and the right to be free from unwarranted interferences, such as non-consensual medical treatment or inhumane and degrading treatment, among others.⁸ Defined as minimum core obligations, states must ensure the right to access health facilities, goods and services on a non-discriminatory basis for especially vulnerable groups, which includes early diagnosis and access to humane and dignified care and treatment specifically for persons with mental disorders.⁹ Both documents explicitly address the vulnerability of persons with mental disorders and the need to protect them against abuse within the mental healthcare system. Since traditional healthcare plays a special role in general but particularly for mental healthcare, it is important to note that the Principles and Guidelines furthermore urge states to recognise, accept, develop and integrate traditional healthcare into the public healthcare system, which includes drafting legislation on traditional medicine and creating an oversight authority, in order to protect individuals from abuse and misuse of traditional medicine and practice.¹⁰

As the African Charter states, its provisions can be supplemented by special protocols, if necessary.¹¹ For that reason, I would like to draw the attention to article 17 of the 2018 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on Disability Rights), which provides detailed regulations regarding the right to health of persons with mental disabilities. For instance, it states that persons with mental disabilities should have the same range, quality and standard of healthcare as provided to others, and that specific services designed to minimise or prevent further mental disability need to be offered, including the provision of medicine. The article highlights that healthcare has to be provided on the basis of free, prior and informed consent, that persons with mental disabilities should be supported in the decision making, if needed, and that all healthcare providers, including conventional and traditional services, do not violate any rights of persons with mental disabilities.¹²

The African Court of Human and Peoples' Rights (African Court) has to be seen as important institution with immense potential to enhance the standard of human rights protection in the African region.¹³ Nevertheless, there has not been any ruling on the right to

8 African Commission, Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (November 2010), paras 62, 64 & 65.

9 n 8 above, paras 1(e) & 67(a)(ee).

10 n 8 above, para 67(h)(w).

11 Banjul Charter (n 5) art 66.

12 African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (adopted 29 January 2018), art 17.

13 See eg D Juma 'Provisional measures under the African human rights system: the African Court's order against Libya' (2012) 30 *Wisconsin International Law Journal* 344 363.

health in which the Court discussed the substantive essence of the right,¹⁴ neither was the right to health interpreted any further in orders of provisional measures which address the right.¹⁵

The African Commission, on the other hand, has interpreted the human right to health as quasi-judicial body in several instances.¹⁶ In a landmark case for mental health, *Purohit & Another v The Gambia*, the claimants alleged that the Gambia is violating the human right to health of persons with mental disorders, as the Lunatic Detention Act (LDA) uses discriminatory labels for affected individuals and orders their detention in psychiatric jails which lack quality diagnosis and treatment. The African Commission considered that additionally to the right to access health facilities, goods and services (article 16), mental health patients should be accorded special treatment in line with article 18(4) African Charter, concerning the protection of vulnerable groups, and found that the scheme of the LDA falls short in terms of therapeutic objectives and the provision of treatment of mental health patients. Important in that case was the African Commission declaring that despite being an important right, the implementation of the right to health in African countries has to be seen in light of underlying problems, such as poverty, and that a state's obligation is therefore to take 'concrete and targeted steps' towards a progressive implementation of the right according to available resources. Hence, it might not be crucial whether the right to health is fully implemented; what has to be assessed is whether states have taken necessary steps towards the provision of the right to health in line with their available resources. This interpretation significantly weakens the obligation imposed on states under article 16(2) African Charter, as it sparks the question of whether it enables states to avoid their obligations under article 16, blaming insufficient protection on a lack of available resources. Unfortunately, the African Commission does not specify the details of such exception to the state's general obligation under article 16. Notwithstanding, claiming that the steps taken by the Gambia were not sufficient, including the improvements of the nature of care given to mental health patients and the developments of a mental health law reform, the African Commission found a violation of article 16 in

14 Before the African Court on Human and Peoples' Rights, health has been addressed as part of the discussion about other human rights violations, see eg Application 6/2012, *African Commission on Human and Peoples' Rights v Kenya*; and Application 46/2016, *APDF & IHRDA v Mali*. Cases with alleged right to health violations were held inadmissible, see eg Application 40/2016, *Mariam Kouma & Another v Mali* (2018); and Application 42/2016, *Collectif des Anciens Travailleurs du Laboratoire ALS v Mali* (2019). Still on-going is case Application 12/2017, *Mugesera v Rwanda*, claiming a lack of medical attention during detention.

15 See eg Application 4/2013, *Lohé Issa Konaté v Burkina Faso* (Order of Provisional Measures) (2013).

16 See case-law of the ACHPR, eg Communication 155/96, *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*, Thirtieth Ordinary Session, paras 50-54; or Communication 379/09, *Monim Elgak & Others v The Sudan*, Fifteenth Extra Ordinary Session, paras 134-135; *Egyptian Initiative for Personal Rights and Interights v Egypt I* (2011) AHRLR 42 (ACHPR 2011), para 261.

connection with article 18(4) of the African Charter.¹⁷ Amongst other human rights violations, the claimants further allege that the conditions within the psychiatric jails amounted to cruel, inhumane and degrading treatment. By accepting that persons with mental disorders have a right to dignity and a life as full and normal as possible, the African Commission ruled that the provisions of the LDA amount to a violation of article 5 of the African Charter, the right to be free from cruel, inhumane and degrading treatment.¹⁸

While mental health is by definition part of the right to the best attainable state of physical and mental health, the preceding analysis shows that for the protection of persons within the mental healthcare system, the enjoyment of the right to mental health is closely connected to and might even depend on the enjoyment of other human rights. Scholars have argued that article 5 of the African Charter indirectly protects the right to health, or in other words, that a violation of article 5 within healthcare settings infringes on the right to health.¹⁹ When seeking treatment, it is particularly mental health patients who are more vulnerable to various forms of exploitation, violence and abuse.²⁰ Therefore, the following section examines the right to be free from inhumane and degrading treatment in connection to the right to mental health, namely when seeking mental healthcare.

2.2 The right to be free from inhumane and degrading treatment

The African Commission calls attention to violations against the right to dignity and freedom from inhumane and degrading treatment of persons with mental disorders in Africa, as it addresses that mental healthcare patients throughout the African region are subject to forced treatment without prior, free and informed consent given, forced sterilisation, beatings, chaining, food deprivation and forced detention.²¹ Article 5 of the African Charter provides that

[e]very individual shall have the right to the respect of the dignity inherent in a human being [...] All forms of exploitation and degradation of man, particularly [...] inhuman or degrading punishment and treatment shall be prohibited.²²

17 African Commission, *Purohit & Another v The Gambia* (2003) AHRLR 98 (ACHPR 2003), paras 80-84 (*Purohit* case).

18 n 17, paras 59-61.

19 Unpublished: MC Van den Bossche 'Protection of the right to health through the human rights discourse in Africa' unpublished Master thesis, Ghent University, 2014 https://lib.ugent.be/fulltxt/RUG01/002/163/014/RUG01-002163014_2014_0001_AC.pdf (accessed 14 June 2019).

20 K Hughes *et al* 'Prevalence and risk of violence against adults with disabilities: a systematic review and meta-analysis of observational studies' (2012) 379 (9826) *The Lancet* 1621.

21 African Commission, Resolution 343 on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa (20 April 2016).

22 Banjul Charter (n 5) art 5.

While there is no soft-law document to interpret article 5 in light of the mental healthcare context,²³ the earlier examined Protocol on Disability Rights can again be referred to. The Protocol recalls the provisions of article 5 of the African Charter, but also adds in its article 10 that states need to take appropriate and effective measures to ensure that persons with mental disabilities are protected. Furthermore, it defines that freedom from inhumane or degrading treatment or punishment includes not being subject to medical intervention, experimentation, sterilisation or other invasive procedures without free, prior and informed consent, and being protected against any form of exploitation, violence and abuse inside one's home and elsewhere.²⁴ The Protocol on Disability Rights further provides that states need to take specific measures to protect persons with mental disorders against such forms of ill-treatment, prosecute perpetrators of abuses, and provide remedies for victims. As supplement to article 5 of the African Charter, the article of the Protocol on Disability Rights is a milestone for the protection of persons with mental disorders against inhumane and degrading treatment within the African region.

As previously outlined, the African Commission also found a violation of article 5 of the African Charter in *Purohit & Another v The Gambia*. In that Communication, the African Commission draws from two other cases to explain the violation of article 5. In *Media Rights Agenda & Others v Nigeria*, the African Commission held that cruel, inhuman or degrading treatment and punishment 'is to be interpreted so as to extend to the widest possible protection against abuses, whether physical or mental', and that no circumstance may be invoked as justification for cruel, inhuman or degrading treatment or punishment.²⁵ In *John K Modise v Botswana*, the African Commission further argues that 'personal suffering and indignity', which can take many forms, amounts to a violation of article 5 of the African Charter.²⁶ In its conclusion in *Purohit & Another v The Gambia*, the African Commission refers to the United Nations Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care, which requires that 'all persons with mental illness, or who are being treated as such, shall be treated with humanity and respect for the inherent dignity of the human person'.²⁷ In conclusion thereof, any circumstance that denies any form of dignity or that dehumanises is in contravention of article 5 of the African Charter.

23 The 2008 Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (adopted in 2002, revised in 2008) do not refer to the mental healthcare context.

24 African Union (n 12) art 10.

25 African Commission, Communication 224/98, *Media Rights Agenda & Others v Nigeria*, Twenty-Eight Ordinary Session, paras 70-71.

26 African Commission, Communication 97/93, *John K Modise v Botswana*, Twenty-Eight Ordinary Session, para 92.

27 See ACHPR (n 17) para 60; and United Nations Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (17 December 1991) UN Doc A/RES/46/119.

3 GHANA'S LEGAL FRAMEWORK RELATING TO THE TREATMENT OF PERSONS WITHIN THE MENTAL HEALTHCARE SYSTEM

The African Charter establishes a regional framework for the promotion and protection of human rights within the African Union states. So how does Ghana domesticate the regulations of articles 5 and 16 African Charter for them to become justiciable human rights?

3.1 Constitutional protection

After becoming state parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), many African states revised their constitutions.²⁸ Today, 33 percent of all national constitutions in Africa offer a comprehensive exposition of the right to health;²⁹ for instance the Constitutions of Kenya and South Africa, which provide the explicit right to the 'highest attainable standard of health, which includes the right to health care services',³⁰ or the right of everyone to have access to healthcare services,³¹ respectively. These constitutions guarantee the right as justiciable constitutional right vis-à-vis other constitutions that provide for the right to health as part of directive principles and objectives of state policy, thereby reducing its enforceability. The Constitution of Ghana is amongst those 15 percent of African constitutions,³² that lists 'the right to good healthcare' only as directive principle, not as fundamental human right.³³

However, the right to health is in some way justiciable in Ghana. The Supreme Court of Ghana determined in *Ghana Lotto Operators Association v Ghana Lottery Authority* that an article that falls under the directive principles is an enforceable right.³⁴ The Court held that in order to strengthen the legal status of economic, social and cultural rights, the justiciability of the directive principles has to be presumed. Under that observation, one could argue that the right to good healthcare is also justiciable. Furthermore, the Economic Community of West African States (ECOWAS) Community Court of Justice, a regional court with jurisdiction over human rights violations committed by an ECOWAS member state, found the following in

28 M Ssenyonjo 'The influence of the International Covenant on Economic, Social and Cultural Rights in Africa' (2017) 64 *Netherlands International Law Review* 259 at 269.

29 A le Roux-Kemp 'The recognition of health rights in constitutions on the African continent: a systematic review' (2016) 24 *African Journal of International and Comparative Law* 142 at 143.

30 The Constitution of Kenya, 2010, art 43.

31 The Constitution of the Republic of South Africa, 1996, sec 27(1)(a).

32 Le Roux-Kemp (n 29).

33 The Constitution of the Republic of Ghana, 1992, sec 34(2).

34 *Ghana Lotto Operators Association v National Lottery Authority* [2007-2008] SCGLR 1089.

SERAP v Nigeria: irrespective of a country's categorisation of rights as merely directive principles of state policy, rights protected in the African Charter are at least justiciable before the ECOWAS Court.³⁵ Lastly, while the right to health is not expressly guaranteed in the Constitution, it is worthwhile to refer to section 33(5), which indicates that courts should protect human rights that are considered to secure the dignity of a person, among others, even if not specifically mentioned under the fundamental human rights. This could be understood as obliging the state to protect the right to health, encompassing access to humane and dignified healthcare.

Since this article focuses on mental healthcare concomitant with exploitation, violence and abuse, and not purely on the right to health, it is important to examine the Constitution of Ghana in that regard. Indeed, the Constitution offers more protection as first anticipated. Section 15 sets forth that the dignity of every person is inviolable, and that no one should be subject to torture or other cruel, inhumane or degrading treatment or punishment, or other conditions that (are likely to) detract from the person's dignity and worth as a human being.³⁶ Moreover, the Constitution declares in section 29 that '[d]isabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature'.³⁷ Since it does not specify on physical disability only, it can be interpreted as to also be applicable for mental disability.

Consequently, the framework of the Constitution clearly protects persons with mental disorders and disabilities against exploitation, violence and abuse in the mental healthcare setting.

3.2 Protection under domestic legislation and policy

Legislation regarding mental healthcare delivery in Ghana has been in place for over 100 years. The first Act relating to mental health, the Lunatic Asylum Act 1888, marked the beginning of 'formal government mental health service delivery in Ghana'.³⁸ Under the Act, people who were suspected to suffer from mental disorders were confined in special institutions. With the passing of the Mental Health Decree of 1972 (NRCD 30), persons with mental disorders were not regarded anymore as special prisoners who need to be arrested, but as individuals who require treatment. Notwithstanding, Ghanaian chief psychiatrist Akwasi Osei announced that the Decree did not protect affected individuals against unnecessary abuse, as persons were still subjected to being locked away for decades and being seriously mistreated.³⁹

35 *SERAP v Nigeria*, Judgment, Court of Justice of the Economic Community of West African States (27 October 2009) ECW/CCJ/APP/o8o8, paras 14 & 19.

36 Constitution of the Republic of Ghana (n 33) sec 15.

37 n 33 above, sec 29(4).

38 S Adu-Gyamfi 'Mental health service in Ghana: a review of the case' (2017) 6 *International Journal of Public Health Science* 299.

39 A Osei *et al* 'The new Ghana Mental Health Bill' (2011) 8 *International Psychiatry* 8.

It was not until recently that domestic legislation explicitly started protecting persons with mental disorders against exploitation, violence and abuse. The Persons with Disability Act 715 of 2006 states that '[a] person shall not discriminate against, exploit or subject a person with disability to abusive or degrading treatment'.⁴⁰ Despite the reference to discrimination, scholars have criticised that provision and pointed out an omission of the Act that gives room to exploitation.⁴¹ They find that the Act should contain a general non-discrimination clause. While it is acknowledged that the Act provides for persons with disability to not be discriminated against or exploited on grounds of their disability, critics propose that the non-discrimination provision of the Act is not comprehensive enough to address all forms of discrimination, as it focused on direct discrimination only. In other words, the Act fails to address indirect discrimination, including attitudinal, institutional and environmental barriers, which ultimately affects the treatment of persons with mental health issues and whether or not they are subject to exploitation, violence and abuse within mental healthcare institutions.⁴²

Furthermore, the Executive Director of the National Council of Persons with Disabilities (NCPD) disclosed in an interview that since the enactment of the new Mental Health Act and the establishment of a Mental Health Authority as overseeing body, the NCPD does not find itself responsible anymore for programs and interventions for persons with mental health issues. The Executive Director agrees that the Disability Act protects persons with mental disabilities, but the Act only protects their general rights and for specific rights, one has to draw from the new mental health law.⁴³ Although that perception of responsibility does not amount to insufficient protection for persons with mental disabilities *per se*, since the mental health law grants protection, the reservation of the NCPD as main body governing disability rights in Ghana can nevertheless be seen critical for the human rights protection of affected individuals.

The passing of the Mental Health Act 846 of 2012 started a new era of protecting the human rights of persons with mental disorders and has to be seen as significant breakthrough in regard to addressing mental health as a public health issue.⁴⁴ The WHO calls the Act 'a very progressive mental health law',⁴⁵ which can 'serve as a model for other African countries wishing to develop progressive mental health laws

40 Republic of Ghana, Person with Disability Act 715 of 2006, art 3, sec 4(1).

41 See eg EA Gyamfi 'Country report on Ghana' (2013) 1 *African Disability Rights Yearbook* 221; and L Asante Abedi & A Sasu 'The Persons with Disability Act, 2006 (Act 715) of the Republic of Ghana: the law, omissions and recommendations' (2015) 36 *Journal of Law, Policy and Globalization* 62 at 64.

42 J Ocran 'Exposing the protected: Ghana's disability laws and the rights of disabled people' (2018) 34 *Disability & Society* 663 at 666.

43 Executive Director of the Ghana National Council of Persons with Disabilities, personal interview (21 May 2018).

44 Republic of Ghana, Mental Health Act 846 of 2012.

45 WHO 'Ghana: a very progressive mental health law' https://www.who.int/mental_health/policy/country/GhanaCountrySummary_Oct2007.pdf (accessed 16 January 2019).

that respect international human rights standards'.⁴⁶ The Act reflects international human rights and best practice standards, and considers local conditions, requirements and customs. The law takes into account the significant role of traditional and faith-based healers, and acknowledges and regulates informal mental health facilities in order to safeguard against inhumane and degrading practices. Section 57 of the Act defines the right to the highest attainable standard of mental healthcare for persons with mental disorders and states that they are

entitled to the same standard of care as a person with physical health problems and [treatment] on an equitable basis including quality of in-patient food, bedding, sanitation, buildings, levels and qualifications of staff, medical and related services and access to essential medicines.⁴⁷

Moreover, the section provides that service users in both conventional and traditional mental healthcare institutions should not be subject to cruelty, torture or any other form of inhumane treatment.⁴⁸ This regulation is supported by what is outlined as a basic human right in section 55, namely that persons with mental disorders are at any time entitled to humane and dignified treatment with respect to their personal dignity and privacy.

Notwithstanding these provisions, let us look at previously examined important elements of being free from ill-treatment within the mental healthcare provision, for instance respecting the choice over one's body, not being chained or forcefully detained, or informed consent. Section 58 allows for seclusion and restraint to some extent by outlining that involuntary seclusion or minimal mechanical restraints can be placed on a person 'when there is imminent danger to the patient or others and tranquilisation is not appropriate or not readily available'.⁴⁹ Although it is further written that 'seclusion or restraint [...] shall not be used as punishment or for the convenience of staff',⁵⁰ it undoubtedly opens the door for possible abuses justified by vague explanations, especially when argued that needed tranquilisation was not available or simply not appropriate to the level of risk posed by the situation. The Act also addresses informed consent in detail. For instance, a voluntary patient has to give consent before a treatment is given which comes with the right to refuse treatment.⁵¹ However, it also allows for temporary involuntary admission and treatment under recommendation if persons are believed to be risk to themselves or other people, or if there is a substantial risk of a serious deterioration of the mental disorder. In those instances, the environment has to be as least restrictive as compatible with the health and safety of the person and society.⁵² It specifically prohibits major medical procedures without informed consent; nevertheless, it allows that a personal

46 https://www.who.int/mental_health/policy/country/ghana/en/ (accessed 15 January 2019).

47 Mental Health Act (n 44) sec 57(2).

48 Mental Health Act (n 44) sec 57(3).

49 Mental Health Act (n 44) sec 58(1).

50 Mental Health Act (n 44) sec 58(4).

51 Mental Health Act (n 44) sec 40.

52 Mental Health Act (n 44) sec 42.

representative can give consent to that if the patient is incapable to do so.⁵³ Until now, many provisions of the Act remain unimplemented for reasons like a missing Legislative Instrument and important structures that are still not operational.

In 2018, the Ministry of Health published the Ten Year Mental Health Policy 2018-2027,⁵⁴ to guide the implementation of the Act and the establishment of the Mental Health Tribunal and Visiting Committees, two essential mechanisms under the Mental Health Authority for the human rights protection and promotion in line with the Act. At this point, the composition of these mechanisms is noteworthy: the Tribunal is composed of members with legal, psychiatry, psychology and social service backgrounds, as well as service users; and the Visiting Committees consist of regional representatives from health management teams, social services, and the council, as well as non-local mental health professionals and legal practitioners. Bringing together different backgrounds and regional as well as non-local members can be seen as strong joint effort to assist the effective implementation of the Act. However, it can simultaneously impede the implementation because of existing conflicts of interests between the members.

One of the guiding principles of the Policy is to uphold the dignity and autonomy of persons with mental disorders and to ensure freedom from any form of discrimination. Amongst the Policy objectives is the implementation of strategies to protect, promote and ensure the human rights of persons with mental health conditions. Stating that the greatest challenge of mental healthcare in Ghana is in the area of human rights abuses, the Policy aims at guaranteeing the rights of persons with mental health conditions, strengthening the Mental Health Tribunal and Visiting Committees for human rights protection, engaging traditional and faith-based healers to respect the rights of persons with mental health conditions under their care, and enforcing the ban of all human rights abuses, including chaining, shackling, caging, and forced fasting. The Policy states that collaboration between the ministries and agencies, NGOs, traditional rulers and civil society is needed for ensuring that persons with mental disorders are free from abuse. Despite referring to various stakeholders as responsible actors for the human rights protection, it lacks detailed specific roles of the stakeholders and declares that such details will be established in due course. Moreover, besides pointing out the importance of the Visiting Committee and the Mental Health Tribunal, the Policy does not set out to explain how these institutions have to be established and operated. While the Policy is portrait as a document that supports the implementation of the Act and foster the human rights protection of persons with mental disorders, it can be criticised for not offering precise regulations and strategies from which clear actions and responsibilities could be derived.

53 Mental Health Act (n 44) sec 71.

54 Ministry of Health, Ghana, Ten Year Mental Health Policy 2018-2027.

More regulations about protecting affected individuals against ill-treatment can be found in guidelines launched in 2018. The Guidelines for Traditional and Faith-Based Centres in Mental Health Care provide that such institutions should ensure the freedom from exploitation, and from cruel, inhumane and degrading treatment, including flogging, chaining, shackling, roping or caging. If there is a need to restrain an aggressive or violent person who has been involuntarily admitted because of an emergency situation, a soft cloth can be used to restrain, but the person then has to be transferred to a conventional mental health facility within forty-eight hours.⁵⁵ However, there is no guideline addressing and regulating human rights abuses in the conventional mental healthcare sector where, as demonstrated in the next chapter, ill-treatment takes place as well.

4 THE PRACTICE OF MENTAL HEALTHCARE IN GHANA

Since the inauguration of Ghana's Mental Health Authority (MHA) in 2013, measures have been taken to protect persons with mental disorders against exploitation, violence and abuse. The MHA has organised public education and advocacy campaigns to reduce stigma and discrimination. NGOs, but also the MHA together with the Ghana Federation of Traditional Medicine Practitioners Associations, have trained traditional and faith-based healers throughout the country to reduce human rights violations against persons with mental health conditions. Additionally, the MHA formally banned chaining and shackling of persons with mental illness in October 2017. The newly launched guidelines for the operation of traditional and faith-based healing centres, covering various aspects of human rights, also aim at protecting persons with mental disorders from ill-treatment.⁵⁶ In spite of this progress, challenges remain in the conventional and traditional service provision. Pascale notes that state practice of implementing the right to quality (mental) healthcare is inconsistent throughout the African region and argues that the reasons why states do not fully fulfil their obligations include the acute shortage of financial, institutional and human resources within the mental healthcare system.⁵⁷

4.1 Situations amounting to ill-treatment

The Committee for the Prevention of Torture in Africa reported that in Ghana, persons with mental disorders often continue to live against

55 Mental Health Authority, Ghana, Guidelines for Traditional and Faith-Based Centres in Mental Health Care, 2018, p 7.

56 As above.

57 G Pascale 'The human right to health under the African Charter on Human and Peoples' Rights: an evaluation of its effectiveness' (2016) 22 *Federalismi.it Journal* 2 11-12.

their will in psychiatric hospitals and traditional facilities, with little or no possibility to challenge their confinement.⁵⁸ Although the inhumane practices in traditional settings have been more in the spotlight, the ongoing ill-treatment in conventional mental healthcare institutions cannot be neglected. Juan Méndez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, found that Ghana's public psychiatric facilities lacked qualified staff and equipment, had poor sanitation, were overcrowded, applied electroshock therapy administered with the use of restraints, without adequate anesthesia and not as a last resort, and had a lack of psychoactive drugs which leads to inadequate treatment of persons.⁵⁹ The psychiatric hospitals were generally underfunded, causing a lack of essential medication provision, which requires persons to buy their own, usually very expensive, medicine, and there was a serious shortage of not just facilities where persons with mental health conditions could turn to, but also psychiatrists. Although Méndez reviewed hospital files documenting the consent of service users, he doubted that the consent is truly free and informed in practice.⁶⁰ The MHA 2017 Annual Report states that in a client satisfaction survey, persons in psychiatric hospitals were 'largely satisfied [with the quality of service], mindful of constraints facing the hospital',⁶¹ but the question is whether this reflects the opinion of all admitted persons. Further, the same report shows that the initiative of sending home persons who had been abandoned at the hospital and who were kept against their will was stalled due to lack of funds. In reality, many of the outlined challenges remain up to date.⁶² The MHA addresses this only briefly in its Annual Report by including in its Activity Plan the need to identify and train human rights officers for the psychiatric hospitals.⁶³

The implication of the law on conventional mental healthcare is clear, but how can it be converted into practice? Former executive director of one of the psychiatric hospitals disclosed in an interview that the Mental Health Act still receives too little attention in general. The former director sees the stigma that exists also among policy-makers and missing funding as main drivers for the delaying implementation of the Act, and thus for actual change. When examining the issue of involuntary admission and treatment, it was said that in practice, a person might not agree to be admitted and treated. There might not be

58 Committee for the Prevention of Torture in Africa 'Intersession Activity Report' <http://www.achpr.org/sessions/55th/intersession-activity-reports/cpta/> (accessed 15 July 2019).

59 This article refers to public psychiatric facilities and does not examine private psychiatric facilities and services, for example offered through the Christian Health Association of Ghana.

60 UNGA 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, Mission to Ghana' (5 March 2014) UN Doc A/HRC/25/60/Add.1, paras 68-71.

61 Mental Health Authority, Ghana, Annual Report of 2017, 47.

62 See Ministry of Health (n 54); or Human Rights Watch (HRW) 'Ghana should implement commitments on mental health issues' 15 March 2018 <https://www.hrw.org/news/2018/03/15/ghana-should-implement-commitments-mental-health-issues> (accessed 18 July 2019).

63 Mental Health Authority (n 61) 73.

enough visible reasons for the practitioner to allow for involuntary admission, but the family has observed the deterioration and danger the person poses. According to the new law, the family has to get two opinions of doctors and a court order that confirms involuntary admission. But still, persons end up in the psychiatric hospitals without such court order and practitioners have to make a decision on what to do. When having fifty or more persons waiting, there is too little time to do proper examination and diagnoses. Hence, very often, due to the lack of human resources, practitioners are forced to make a fast decision in regard to involuntary admission for observation, and then the question is whether treatment should be started. The interviewee agreed that the Mental Health Act is important and the regulations are ideal, but that the on-going practices in the psychiatric hospitals, which may be unlawful, are a product of missing resources, starting with financial resources, and thus practitioners cannot be blamed for what is being done.⁶⁴

In traditional mental healthcare facilities, ill-treatment has been recorded in different forms: being chained or shackled, starved in the name of fasting, deprived of water, flogged or used for forced labour, forced to take herbal concoctions against the person's will, or being sexually harassed or abused.⁶⁵ Mental health service users often do not receive adequate medical treatment and despite the ban of chaining and shackling, it is a procedure still carried out widely.⁶⁶ While some traditional or faith-based healers claim that they no longer shackle persons, some confessed that they have simply moved the persons shackled off the facility's premises so that officials could not find them.⁶⁷ The MHA's human rights activities to end inhumane and degrading treatment have mostly targeted the informal or traditional sector. Indeed, the traditional mental healthcare practices seem to pose many challenges for being free from ill-treatment. Most of these challenges are based on spiritual implications surrounding illness; for example that herbal drinks, which persons are forced to take, contain spiritual healing powers, or that forced fasting is a key component for curing mental disorders as it starves the evil spirits and 'allows the spirit of God to heal'.⁶⁸ Traditional practitioners have described such restrictions as necessary for a holistic and effective healing process.⁶⁹

When assessing ill-treatment in traditional mental healthcare facilities, it is possible that there is a need to look beyond the right to be

64 Former Director of Pantang Psychiatric Hospital, personal interview (4 May 2018).

65 See Ministry of Health (n 54); or Committee for the Prevention of Torture in Africa (n 58).

66 HRW 'Ghana: oversight needed to enforce shackling ban' 9 October 2018 <https://www.hrw.org/news/2018/10/09/ghana-oversight-needed-enforce-shackling-ban> (accessed 18 July 2019).

67 Investigated during visits to traditional mental health facilities together with a representative of the Ghana Association of Faith Healers throughout the Greater Accra, Central and Volta Region in Ghana in 2018.

68 UNGA (n 60) para 77.

69 LNA Kpobi *et al* 'Traditional herbalists' methods of treating mental disorders in Ghana' (2018) *Transcultural Psychiatry* 250 259.

free from degrading or inhumane treatment when receiving mental healthcare; could the right to religion or the right to assembly prevail? Especially if affected individuals freely choose to obtain traditional healthcare, do the inhumane or degrading treatment methods really amount to a violation of their right to be free from exploitation, violence and abuse? Or in other words: is it possible to give consent to what can be seen as ill-treatment? Instead of simply classifying some traditional mental healthcare methods as violating the human right of affected persons, it is important to keep in mind that some individuals choose or prefer traditional healthcare over conventional healthcare.

Despite that, the implications of the law, both regional and domestic, seem clear: when carried out in a non-abusive or non-degrading way according to legal standards, traditional mental healthcare is an accepted form of mental healthcare. The way forward could be, and this is supported by the MHA, to ensure that traditional practices, no matter if it includes herbal or spiritual methods, adhere to the law. Even if that means that certain practices have to be discontinued, such as forced fasting, and even if that sparks the question of infringing upon someone's right to freedom of religion or assembly. After all, freedom of religion and assembly are not absolute rights and thus, may be limited on grounds justified under human rights law.

In February 2019, the WHO and MHA launched the QualityRights initiative in Ghana, a programme that aims at training 50,000 people to ensure respect for human rights and to improve the quality of mental healthcare in conventional and traditional mental healthcare facilities.⁷⁰ Although this programme is a step forward, it should not overshadow the need to make active changes towards the implementation of the law. After all, the delay in the establishment of the Visiting Committee has made the monitoring of exploitation, violence and abuse in conventional and traditional mental healthcare facilities virtually impracticable. Moreover, besides the monitoring, legal aid to claim one's right also plays a critical role.

4.2 Legal and judicial challenge

Additional to legislation, a legal forum needs to be available where persons can go and seek redress for the breach of their human rights, and where professionals assist persons in their representation; otherwise the protection of human rights is at stake. Despite the wide knowledge of existing human rights abuses, no complaint has been brought before the domestic court yet, neither has a Ghanaian case in that regard been before a regional judicial instance. According to the Mental Health Act, the establishment of a Mental Health Tribunal under the MHA, quasi-judiciary in nature, would bring more attention and more justice to human rights violations of persons with mental

70 HRW 'Not everyone is celebrating on Independence Day in Ghana' 13 March 2019 <https://www.hrw.org/news/2019/03/13/not-everyone-celebrating-independence-day-ghana> (accessed 19 July 2019).

disorders. The functions of the Tribunal will be, *inter alia*, (i) reviewing and monitoring cases of involuntary admissions and treatment processes, and long-term stay voluntary admissions, (ii) providing guidance on minimising intrusive and irreversible treatments, seclusion or restraint, and (iii) hearing and investigating complaints in respect of persons detained in mental healthcare facilities.⁷¹ It can be understood that the Tribunal will not only investigate after complaints are filed, but that it will have a more active monitoring role. However, what can be criticised is that the functions look at protecting cases of which the Tribunal already knows of, for example through court orders, or whenever service users or their relatives or caregivers make an appeal to the Tribunal. Moreover, the Mental Health Act does not grant NGOs or other civil society organisations the right to make a complaint to the Tribunal.⁷² Hence, the problem remains with cases that will stay unmentioned to the court. While it is amongst the duty of the Visiting Committee to receive and enquire into complaints,⁷³ the law is not clear about whether complaints will be forwarded to a judiciary instance on behalf of the persons whose rights were infringed.

Some scholars argue that the Commission for Human Rights and Administrative Justice (CHRAJ) is the *de facto* Mental Health Review Tribunal.⁷⁴ CHRAJ has a mandate to protect and promote human rights, and its functions include (i) receiving and investigating complaints from and on behalf of persons suffering from mental ill-health concerning practices and actions by persons or institutions where those complaints allege violations of fundamental rights and freedoms, and (ii) taking appropriate action to call for remedy.⁷⁵ Moreover, CHRAJ is supposed to '[carry] out special investigations into human rights abuses that are systemic or cultural [and investigate] other human rights violations brought to the Commission's attention'.⁷⁶ It could be concluded that even if no complaint is filed, CHRAJ should carry out special investigations because the matter of ill-treatment in mental healthcare facilities is known. In 2009 and 2010, CHRAJ set out to monitor traditional mental healthcare facilities and published its concerns and recommendations in reports. Nevertheless, the Director of Human Rights at CHRAJ stated in an interview that unless affected individuals reach out to CHRAJ with a human rights complaint, the organisation does not take action towards remedy, and rather calls upon civil society to intervene and speak on behalf of the vulnerable group.⁷⁷ While it is the responsibility of the state to protect persons with mental disorders against human rights abuses, it can be

71 Mental Health Act (n 44) sees 26(1), (2) & (5).

72 With the exception of the right to appeal against a decision of continuous guardianship, see Mental Health Act (n 44) sec 70(2).

73 Mental Health Act (n 44) sees 36(1)(c) & (37).

74 See eg Adu-Gyamfi (n 38) 304.

75 The Republic of Ghana, Commission of Human Rights Act 456 of 1993, sec 7.

76 <https://chraj.gov.gh/human-rights/> (accessed 30 July 2018).

77 Director of Human Rights at Commission on Human Rights and Administrative Justice, personal interview (10 May 2018).

seen as fundamental role of civil society to promote their human rights protection, especially if a state does not fulfil its obligations.

5 CONCLUSIONS

The domestication of articles 5 and 16 of the African Charter has come a long way in Ghana's legal framework. Today, there is a comprehensive human rights framework that protects persons against exploitation, violence and abuse in the mental healthcare system in Ghana. To conclude this paper, the last chapter analyses gaps and shortcomings of the regional and domestic law, followed by recommendations for possible developments to overcome persisting hurdles.

5.1 Uncovering gaps and shortcomings

To complete the normative analysis, I draw attention to prevalent gaps between the regional and domestic legislation and consider whether the analysed legal frameworks, both regional and domestic, fall short in regard to protecting persons with mental disorders against exploitation, violence and abuse.

Firstly, I compare the two systems. From the regional human rights law, it can be summed up that persons with mental disorders have a right to access humane and dignified care to minimise or prevent further mental disability while having control over their body and health, being free from unwarranted interferences, and if necessary, while being supported in decision making. The African Commission even defines access to humane and dignified care and treatment as minimum core obligation of states under the right to health. Regarding the freedom from inhumane and degrading treatment within the African human rights framework, the interpretation of the right seems straight forward: the care or treatment in the mental healthcare service provision can under no circumstance deny any form of dignity, nor dehumanise the affected individual, and nothing justifies such act.

When turning to the domestic legal framework, it is noticeable that it lacks a sufficient right to health norm. Ghana's Constitution does not expressly provide an enforceable right to health, with due consideration of the import of section 33(5), and the Disability Act only urges for providing free general and specialist care.⁷⁸ However, the Mental Health Act lists under basic human rights specific rights relating to treatment, including that persons with mental disorders have the right to the highest attainable standard of mental healthcare, and that affected individuals are entitled to humane and dignified treatment. Furthermore, the Act regulates informed consent, a topic formerly defined under the regional right to health norm, in regard to lack of mental capacity. Yet, it needs to be noted that the Act does not provide for supported decision making but calls for substituted decision making

78 Disability Act (n 40) sec 31.

by a guardian, a regulation that is criticised for undermining the will of affected individuals. Despite regulating what can be labelled as ‘the quality of treatment’, the Act lacks the positive right of persons with mental disorders to available, accessible, and affordable mental health facilities, goods, and services,⁷⁹ as provided within the regional system. In regard to the freedom from exploitation, violence and abuse, all three examined domestic laws protect against abusive or degrading treatment of persons within mental healthcare facilities. However, which leads to the following critical analysis of limitations to the rights under discussion, the Mental Health Act, in contrast to the regional human rights law, explicitly allows for derogation in what could be said being the freedom from ill-treatment, namely giving way to involuntary seclusion and minimal mechanical restraints.

Secondly, I want to discuss the existing limitations, how they differ between the regional and domestic law, and how such limitations could be a threat to the protection of persons with mental disorders against exploitation, violence and abuse. The only valid limitation pointed out in this article within the regional human rights law is that the fulfilment of the state obligations under the right to health is dependent on the resources available. As critically outlined above, this could inhibit the enforcement of the right, especially because states could argue to be incapable to fulfil their obligation to provide access to humane and dignified care because of limited available resources. Despite resource constraints, the African Commission obliges states to take concrete and targeted steps to ensure the realisation of the right. However, details as to what steps must be taken are not specified, which can be seen as a shortcoming within the regional human rights framework.

Moreover, it is unmentioned whether and how the limitation affects the previously determined minimum core obligation. The domestic cases of *Minister of Health & Others v Treatment Action Campaign* or *Government of the Republic of South Africa & Others v Grootboom & Others* are examples that show that the Constitutional Court of an African country, namely South Africa, has argued that in light of the fact that the ICESCR framework stipulates that states are obliged to promote the right to health within the state’s available resources, not even a minimum core obligation to provide the right to health can be imposed on the state.⁸⁰ In effect, the scope of this limitation cannot really be estimated since the extent of what concrete and targeted steps need to be taken, and whether or which minimum core obligations remain, is unclear.

In the domestic legislation, the Mental Health Act justifies more limitations to the right to being free from exploitation, violence and abuse within the mental healthcare system. Plausible reasons could be that the domestic law needs to apply to real situations, for example it

79 Section 2(d) of the Mental Health Act (n 44) merely lists as one of the objectives of the MHA to ‘promote a culturally appropriate, affordable, accessible and equitably distributed, integrated and specialised mental health care’.

80 See *Minister of Health & Others v Treatment Action Campaign* 2002 10 BCLR 1033 (CC), paras 23-39; and *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 11 BCLR 1169 (CC), paras 27-33.

regulates what exactly can be done if persons with mental disorders become aggressive or create dangerous situations for themselves or others. However, notably, the Mental Health Act explains the application and scope of the limitations in detail. Here, a lack of resources does not justify the limitation of providing quality mental healthcare. Ghana's law is precise in when exceptional measures, such as restraint or involuntary admission and treatment, cannot be used, for example as punishment or for convenience reasons, and it further regulates under which circumstances the measures can be taken, for example applying restraint if there is a risk to the affected person or other persons, or allowing temporary involuntary admission and treatment only upon recommendation by specialists and through court order. By doing so, the law tries to minimise limitations of the human rights law, which can be viewed as positive. Nevertheless, I contend that any deviation from the right that needs to be protected, such as applying restraint or admitting and treating persons without granting them control over their body, even if justified by law, facilitates possibilities for ill-treatment. Naturally, real-life situations may demand such restrictions of the right, but it needs to be pointed out that with any restriction of a human right, the protection and enjoyment thereof may be weakened.

Lastly, although the Mental Health Act addresses ill-treatment in mental healthcare institutions and protects persons against exploitation, violence and abuse, I argue that the domestic framework falls short in suggesting alternative measures to restraint or involuntary treatment in order to eliminate exploitation, violence and abuse in the mental healthcare setting. While there is a guideline that specifically regulates restraint measures in traditional and faith-based institutions, a more comprehensive document that also applies to the conventional healthcare practice is missing.

5.2 Recommendations

The domestication of the regional human rights in Ghana's Constitution, the Disability Act and especially the Mental Health Act, has led to a new mental health policy and several guidelines, which are likely to contribute immensely to the protection against ill-treatment in the mental healthcare system. For that reason, it is not wrong to say that Ghana can be seen as a good example in that respect. Given the broad challenges that remain, however, I conclude this article with some recommendations.

First of all, there should be a dedicated institution that actively controls and supervises the mental healthcare practice in conventional and traditional institutions. Since this falls within the mandate of the MHA, the MHA could possibly appoint human rights institutions to carry out that task. Only with continuous and focused attention on inhumane and degrading practices can exploitation, violence and abuse be broadly limited and ultimately eliminated.

Second, seclusion and restraint, carried out only when there is a risk of harm to the person or others, has to be regulated better in a

policy in regard to time limits and measures used. Additionally, alternative methods should be suggested and how they can be applied, such as one-to-one verbal dialogue followed by pastoral care, or training staff on de-escalation and crisis management.⁸¹

Third, non-consensual treatment, such as forced medication or electroshock procedures in hospitals, has to be prohibited, and in severe situations where a person is incapable of providing consent, treatment decisions must be based on the best interpretation of the will and preferences of the person. Additionally, essential medicines need to be available for treating persons, even in traditional healthcare facilities.⁸² That demonstrates that collaboration between the conventional and traditional sector is important. Some traditional facilities in Ghana already cooperate with district hospitals, where community psychiatric nurses are called to administer sedatives and supply persons with medicine while they stay in traditional facilities. But in order to broadly tackle human rights abuses in the traditional sector, the collaboration between conventional and traditional mental healthcare providers needs to be strengthened further, something the WHO also calls for.⁸³ Informal mental healthcare similar to the Ghanaian example is carried out in many African countries,⁸⁴ and some countries have launched successful programmes to strengthen collaboration and improve the human rights protection. In Kenya, for example, projects in 2008-2009 and 2015-2016 showed that through task shifting between the formal and informal healthcare providers and community health volunteers, more persons received access to quality mental healthcare. The project activities included the training and capacity building of formal and informal health workers in (i) screening, identification and referral for traditional practitioners, and (ii) in detection and providing interventions of mental health disorders for formal general healthcare providers. That increased the number of referrals and the number of non-specialist health workers who are able to identify, diagnose and manage mental disorders.⁸⁵ A programme successfully carried out in Uganda firstly in 2012-2013, has shown that peer support groups also prove helpful to increase the

81 See eg BN Raveesh *et al* 'Alternatives to use of restraint: a path toward humanistic care' (2019) 61 *Indian Journal of Psychiatry* 693.

82 UNGA (n 60) paras 104(g), 105(a), (b), (c), (e) & (f).

83 WHO, Mental Health Action Plan 2013-2020; and WHO, Traditional Medicine Strategy 2014-2023.

84 See eg KG Mzimkulu & LC Simbayi 'Perspectives and practices of Xhosa-speaking African traditional healers when managing psychosis' (2006) 53 *International Journal of Disability, Development and Education* 417; A Gari *et al* 'Knowledge, attitude, practice and management of traditional medicine among people of Burka Jato Kebele, West Ethiopia' (2015) 7 *Journal of Pharmacy & Bio-allied Sciences* 136; or L Kajawu *et al* 'What do African traditional medical practitioners do in the treatment of mental disorders in Zimbabwe?' (2016) 9 *International Journal of Culture and Mental Health* 44.

85 Africa Mental Health Foundation 'Multi-sectoral Stakeholder TEAM Approach to Scale-Up Community Mental Health in Kenya' (December 2016); and VN Mutiso *et al* 'A step-wise community engagement and capacity building model prior to implementation of mhGAP-IG in a low- and middle-income country: a case study of Makueni County, Kenya' (2018) 12 *International Journal of Mental Health Systems* 1.

number of persons reaching out to mental health hospitals to receive adequate care.⁸⁶ Nevertheless, it should not be forgotten that ill-treatment does not only take place in the traditional mental healthcare system, but also the conventional. If more mental health professionals were recruited, for instance through educational scholarships, a higher level of care in conventional facilities could be delivered, and collaboration with and visits of qualified medical staff in traditional mental healthcare facilities could be scaled up.

Furthermore, training mental health workers on the rights of patients remains crucial for minimising human rights abuses. Although the newly launched QualityRights training aims at creating services free from exploitation, violence and abuse, the training is mostly internet-based and in English. Therefore, it is important that organisations, some of them having been active for years, keep on undertaking trainings in traditional and conventional settings, especially in rural areas where access to internet might be aggravated and where English may be an obstacle.

Ultimately, in order to support the promotion and protection of the respective human rights of persons in mental healthcare institutions, the government of Ghana has to actively provide access to legal aid, especially to persons who were admitted or treated involuntarily. Cases of alleged inhumane practices have to be thoroughly investigated and prosecuted under criminal law.

86 C Hall *et al* 'Brain gain in Uganda: a case study of peer working as an adjunct to statutory mental health care in a low-income country' in RG White *et al* (eds) *The Palgrave handbook of sociocultural perspectives on global mental health* (2017) 633.

The privacy awakening: the urgent need to harmonise the right to privacy in Africa

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ABSTRACT: This article argues that, although the African Charter on Human and Peoples' Rights does not expressly provide for a right to privacy, the African Commission on Human and Peoples' Rights can and should – of its own volition or when called upon to do so – read the right to privacy into the African Charter on Human and Peoples' Rights in order to harmonise the African human rights system and provide express recognition to privacy as a fundamental and enforceable human right in Africa. Drawing on the approach taken by the African Commission in *Social and Economic Rights Action Centre and Another v Nigeria* and comparative jurisprudence from the Supreme Court of India in *Justice KS Puttaswamy (Retd) and Another v Union of India and Others*, this article explores how the right to privacy can be read into the African Charter through the right to respect for life and the integrity of the person, the right to dignity, and the right to liberty and security of the person. This article submits that reading the right to privacy into the African Charter is the least imposing and swiftest measure available, and one that mitigates the need to amend the African Charter in terms of its articles 66 or 68. It concludes with arguments as to why it is necessary and important to read the right to privacy into the African Charter, and the broader impact that its enforceability can have on the meaningful realisation of the right to privacy and other associated rights in the region.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'essor du droit à la vie privée: de l'urgente nécessité d'une harmonisation du droit à la vie privée en Afrique

RÉSUMÉ: Cette contribution avance que, bien que la Charte africaine des droits de l'homme et des peuples ne garantit pas expressément le droit à la vie privée, la Commission africaine des droits de l'homme et des peuples peut et doit – de sa propre initiative ou lorsqu'elle est saisie – déduire l'existence du droit à la vie privée des dispositions de la Charte africaine afin d'harmoniser le système africain des droits de l'homme et de reconnaître expressément le droit à la vie privée en tant que droit fondamental et applicable en Afrique. S'appuyant sur l'approche adoptée par la Commission africaine dans l'affaire *Social and Economic Rights Action Centre et un*

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autre c. Nigéria et la jurisprudence de la Cour suprême d'Inde dans l'affaire *KS Puttaswamy (Retd) et un Autre c. Union of India et autres*, cet article explore la manière dont le droit à la vie privée peut être déduit des droits à la vie et à l'intégrité de la personne, du droit à la dignité ainsi que du droit à la liberté et à la sécurité de la personne. Cette contribution suggère que la déduction du droit à la vie privée d'autres droits garantis dans la Charte africaine est la voie la moins contraignante et la plus rapide qui soit. Elle atténue la nécessité de modifier la Charte africaine au regard de ses articles 66 ou 68. Enfin, cette contribution discute les raisons pour lesquelles il est nécessaire et important de déduire le droit à la vie privée d'autres droits garantis dans la Charte africaine et l'impact plus large que son caractère exécutoire peut avoir sur la réalisation significative du droit à la vie privée et des autres droits connexes en Afrique.

KEY WORDS: privacy, right to life, right to dignity, right to liberty, security of the person, African Charter on Human and Peoples' Rights, remedies

CONTENT:

1	Introduction.....	203
2	Recognition of the right to privacy in international human rights law and in the African human rights system	205
2.1	The right to privacy in international human rights law	205
2.2	The right to privacy in African regional human rights instruments	207
2.3	The right to privacy in African sub-regional frameworks and agreements	208
2.4	The right to privacy and the African Commission	210
3	Reading the right to privacy into the African Charter.....	211
3.1	Guidance from the African Commission: reading the rights to housing and food into the African Charter.....	211
3.2	Guidance from the Supreme Court of India: reading the right to privacy into the rights to life and liberty	213
3.3	Where to from here?	215
4	Importance of the right to privacy in the African human rights system	217
5	Conclusion.....	220

1 INTRODUCTION

Before the dawn of the digital age and the spectre of on- and offline privacy violations, the internationally recognised right to privacy played a peripheral role, if any, in African human rights law. This is evidenced by the notable omission of the right from the African Charter on Human and Peoples' Rights (African Charter).¹ However, despite this, and in line with international trends, the right to privacy currently finds reference in the Constitutions of 52 African states² and in recent

1 African Charter on Human and Peoples' Rights (1981).

2 The following 52 African constitutions, inclusive of amendments and recent reviews, include reference to the right to privacy: articles 46-7 of the Constitution of Algeria (1989); articles 32-4 of the Constitution of Angola (2010); articles 20-1 of the Constitution of Benin (1990); articles 3 and 9 of the Constitution of Botswana (1966); article 6 of the Constitution of Burkina Faso (1991); article 43 of the Constitution of Burundi (2005); Preamble to the Constitution of Cameroon (1972); articles 38, 41 and 42 of the Constitution of Cape Verde (1980); articles 16 and 19 of the Constitution of the Central African Republic (2016); Preamble to the Constitution of the Comoros (2001); articles 29 and 31 of the Constitution of the Democratic Republic of the Congo (2005); articles 20 and 26 of the Constitution of the Republic of the Congo (2015); article 8 of the Constitution of Côte d'Ivoire; articles 12-3 of the Constitution of Djibouti (2010); articles 57-8 of the Constitution of Egypt (2014); article 13 of the Constitution of Equatorial Guinea (1991); article 18 of the Constitution of Eritrea (1997); article 26 of the

African regional instruments³ and guidelines.⁴ This evinces a disjunct in legal protections available for violations of the right to privacy in domestic laws and those available within the African human rights system.

As the foundational human rights instrument within the African human rights system,⁵ the African Charter sets the benchmark for recognised and enforceable human rights in the region. Without adequate recognition of the right to privacy in the African Charter, both as a self-standing right and an enabling right, regional development and enforceability of the right to privacy is constrained, particularly as the founding instruments of the ‘building blocks’⁶ of the African Union — the regional economic communities (RECs) — make reference to the African Charter as the regional lodestar on human rights.⁷ In the midst of global technological advancements and a notable privacy awakening, there is an urgent need to remedy any constraints on the development and enforceability of the right to privacy in the region that may be occasioned by its omission from the African Charter.

This article argues that, despite the existence of regional instruments that make reference to the right to privacy, the African

Constitution of Ethiopia (1994); article(1)(5)-(6) of the Constitution of Gabon (1991); article 23 of the Constitution of The Gambia (1996); article 18 of the Constitution of Ghana (1992); article 12 of the Constitution of Guinea (2010); Articles 44 and 48 of the Constitution of Guinea-Bissau (1984); article 31 of the Constitution of Kenya (2010); article 4(f)-(g) of the Constitution of Lesotho (1993); article 16 of the Constitution of Liberia (1986); articles 11-3 of the Constitution of Libya (2011); article 13 of the Constitution of Madagascar (2010); article 21 of the Constitution of Malawi (1994); article 6 of the Constitution of Mali (1992); article 13 of the Constitution of Mauritania (1991); articles 3(c) and 9 of the Constitution of Mauritius (1968); article 24 of the Constitution of Morocco (2011); article 41 of the Constitution of Mozambique (2004); article 13 of the Constitution of Namibia (1990); articles 27 and 29 of the Constitution of Niger (2017); article 37 of the Constitution of Nigeria (1999); article 2 of the Constitution of Rwanda (2003); articles 24-25 of the Constitution of Sao Tome and Principe (1975); articles 13 and 16 of the Constitution of Senegal (2001); article 20 of the Constitution of the Seychelles (1993); article 15(c) of the Constitution of Sierra Leone (1991); article 19 of the Constitution of Somalia (2012); article 14 of the Constitution of South Africa (1996); article 22 of the Constitution of South Sudan (2011); article 14(1)(c) of the Constitution of Swaziland (2005); articles 16 and 18 of the Constitution of the United Republic of Tanzania (1977); article 28 of the Constitution of Togo (1992); article 24 of the Constitution of Tunisia (2014); article 27(1) of the Constitution of Uganda (1995); articles 11(d) and 17 of the Constitution of Zambia (1991); and article 57 of the Constitution of Zimbabwe (2013). See <https://www.constituteproject.org> (accessed 15 August 2019).

3 See, for example, the African Charter on the Rights and Welfare of the Child (1990) and the African Union Convention on Cyber Security and Personal Data Protection (2014).

4 Personal Data Protection Guidelines for Africa (2018).

5 The African Charter is referred to in the Constitutive Act of the African Union (2000) which provides in article 3(h) that ‘The objectives of the [African] Union shall be to promote and protect human and peoples’ rights in accordance with the African Charter ... and other relevant human rights instruments’.

6 African Union ‘Regional Economic Communities’, <https://au.int/en/organs/recs> (accessed 16 August 2019).

7 See, for example, article 6(d) of the Treaty for the Establishment of the East African Community (1999).

Commission on Human and Peoples' Rights (African Commission) can and should — of its own volition or when called upon to do so — read the right to privacy into the African Charter in order to harmonise the African human rights system and provide express recognition to privacy as a fundamental and enforceable human right in Africa. Drawing on the approach taken by the African Commission in *Social and Economic Rights Action Centre and Another v Nigeria*⁸ (SERAC) and comparative jurisprudence from the Supreme Court of India in *Justice K.S. Puttaswamy (Retd.) and Another v Union of India and Others*⁹ (*Puttaswamy*), this article explores how the right to privacy can be read into the African Charter through the right to respect for life and the integrity of the person,¹⁰ the right to dignity,¹¹ and the right to liberty and security of the person.¹² This article submits that reading the right to privacy into the African Charter is the least imposing and swiftest measure available, and one that mitigates the need to amend the African Charter in terms of its articles 66 or 68. Lastly, this article concludes with arguments as to why it is necessary and important to read the right to privacy into the African Charter, and the broader impact that its enforceability can have on the meaningful realisation of the right to privacy and other associated rights in the region.

2 RECOGNITION OF THE RIGHT TO PRIVACY IN INTERNATIONAL HUMAN RIGHTS LAW AND IN THE AFRICAN HUMAN RIGHTS SYSTEM

2.1 The right to privacy in international human rights law

The right to privacy finds its first direct international reference in article 5 of the 1948 American Declaration of the Rights and Duties of

8 (2001) AHRLR 60 (ACHPR 2001).

9 Writ Petition (Civil) No. 494 of 2012, https://sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_24-Aug-2017.pdf (accessed 10 August 2019).

10 Article 4 of the African Charter (n 1) provides that

‘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.’

11 Article 5 of the African Charter (n 1) provides as follows:

‘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.’

12 Article 6 of the African Charter (n 1) provides:

‘Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.’

Man¹³ (American Declaration). Article 5 of the American Declaration provides that '[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.' Shortly thereafter, the 1948 Universal Declaration of Human Rights¹⁴ (Universal Declaration) provides, in its article 12, that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.' The 1950 European Convention on Human Rights¹⁵ (European Convention), which established the European Court of Human Rights, was the first binding international instrument to recognise the right to privacy. It provides, in its article 8(1), that '[e]veryone has the right to respect for his private and family life, his home and his correspondence.' The European Convention further provides, in its article 8(2), as follows:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The European Convention was followed by the 1966 International Covenant on Civil and Political Rights¹⁶ (ICCPR), and its article 17, which largely mirrors article 12 of the Universal Declaration, save for the addition of the words 'or unlawful' following the word 'arbitrary'. Shortly thereafter, article 11(2) of the 1969 American Convention on Human Rights¹⁷ (American Convention) also refers to the right to privacy, stating that '[n]o one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.'

Following the adoption of the right to privacy by the international community between the 1940s and 1970s, the 1988 ICCPR General Comment 16: Article 17 (Right to Privacy)¹⁸ (General Comment 16) gives additional insight into the right to privacy in international law, including a statement that the 'gathering and holding or personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies, must be regulated by law'.¹⁹ A year later, the 1989 *Convention on the Rights of the Child* expressly recognises the right to privacy in respect of children through its article 16.²⁰ Following this, a decade later, the 2000 *Charter of Fundamental Rights of the European Union*²¹ (European Charter) goes on to provide in article 7 that '[e]veryone has the right to respect

13 American Declaration of the Rights and Duties of Man (1948).

14 Universal Declaration of Human Rights (1948).

15 European Convention on Human Rights (1950).

16 International Covenant on Civil and Political Rights (1966).

17 American Convention on Human Rights (1969).

18 UN Human Rights Committee *General Comment 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation* (1988).

19 General Comment 16 (n 18) para 11.

20 Convention on the Rights of the Child (1989).

21 Charter of Fundamental Rights of the European Union (2000).

for his or her private life, home and communications’, and in article 8 that ‘[e]veryone has the right to the protection of personal data concerning him or her.’

Most recently, the United Nations has started to consider the import of the right to privacy in the digital age, and the impact that this has on the exercise of other rights. In this regard, the United Nations General Assembly published in 2014 *The right to privacy in the digital age*,²² a report of the Office of the United Nations High Commissioner for Human Rights, and in 2015 appointed the first United Nations Special Rapporteur on the right to privacy in recognition of the ‘global and open nature of the Internet and the rapid advancement in information and communications technology’.²³

2.2 The right to privacy in African regional human rights instruments

From an African perspective, and despite international human rights law developments, the adoption of privacy as a fundamental right in the African Charter did not take place in 1981 when the treaty was adopted. However, the right to privacy finds application in two regional treaties and in the recent Personal Data Protection Guidelines for Africa (Data Protection Guidelines);²⁴ various sub-regional frameworks and agreements which are detailed below; and through the work of the African Commission, particularly through the work of its Special Rapporteur on Freedom of Expression and Access to Information and its NGO Forum.

The right to privacy first finds continental-wide application in the 1990 African Children’s Charter²⁵ which contains an express right to privacy in respect of children. Article 10 of the African Children’s Charter provides:

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or correspondence, or to the attacks upon his honour or reputation, provided that parents or legal guardians shall have the right to exercise reasonable supervision over the conduct of their children. The child has the right to the protection of the law against such interference or attacks.

In addition, the most recent direct expression to the right to privacy in treaty law is contained in the 2014 African Union Convention on Cyber Security and Personal Data Protection²⁶ (AU Data Protection Convention), which notes in its preamble the commitment of the

22 Office of the United Nations High Commissioner for Human Rights *The right to privacy in the digital age* (2014).

23 United Nations General Assembly *The right to privacy in the digital age*, A/HRC/RES/28/16 (1 April 2015) paras 2 and 4.

24 See the African Charter on the Rights and Welfare of the Child (1990) and the African Union Convention on Cyber Security and Personal Data Protection (2014); and the Personal Data Protection Guidelines for Africa (2018).

25 African Charter on the Rights and Welfare of the Child (1990).

26 African Union Convention on Cyber Security and Personal Data Protection (2014).

African Union to build the ‘Information Society’ and to protect ‘the privacy of its citizens in their daily or professional lives, while guaranteeing the free flow of information.’ The primary objective of the AU Data Protection Convention in relation to personal data protection is the commitment from each state party ‘to establishing a legal framework aimed at strengthening fundamental rights and public freedoms, particularly the protection of physical data, and [to] punish any violation of privacy without prejudice to the principle of [the] flow of personal data.’²⁷ Despite these ideals, the AU Data Protection Convention – which in terms of its article 36 requires ratification by fifteen member states to enter in force – has only received five ratifications.²⁸

Allied to the AU Data Protection Convention and in terms of its article 31, the 2018 Data Protection Guidelines have been published. The Data Protection Guidelines include 18 recommendations: including two foundational principles to create trust, privacy and responsible use of personal data; eight recommendations for action by states and policy makers, data protection authorities, and data controllers and processors; and eight recommendations on multi-stakeholder solutions, wellbeing of the digital citizen, and enabling and sustaining measures. While the Data Protection Guidelines are a welcome development, there is still no recognised and enforceable fundamental right to privacy in the African human rights system, with the exception of the African Children’s Charter which applies only to children.

2.3 The right to privacy in African sub-regional frameworks and agreements

As mentioned, the African Union system relies on RECs as its ‘building blocks’.²⁹ Despite privacy not being recognised as a fundamental right in the African Charter, RECs have developed a series of frameworks, directives and model laws relevant to the right to privacy. However, these instruments remain largely unenforceable and do not find continental wide application.

In 2008, the East African Community (EAC) prepared the Draft EAC legal framework for cyberlaws³⁰ (EAC Framework). The EAC Framework was prepared by the EAC Task Force on Cyberlaws, comprising representatives from the partner states and the EAC Secretariat, with the support of the United Nations Conference on Trade and Development. It covers various topics in addition to data

27 Article 8(1) of the AU Data Protection Convention.

28 African Union List of countries which have signed, ratified or acceded to the African Union Convention on Cyber Security and Personal Data Protection (2014), accessible at <https://au.int/sites/default/files/treaties/29560-sl-AFRICAN%20UNION%20CONVENTION%20ON%20CYBER%20SECURITY%20AND%20PERSONAL%20DATA%20PROTECTION.pdf> (accessed 16 August 2019).

29 AU (n 6).

30 Draft EAC legal framework for cyberlaws (2008).

protection, including electronic commerce, data security and consumer protection. The EAC Framework is not intended to be a model law, but instead provides guidance and recommendations to states to assist with informing their respective legal development. Data protection and privacy is dealt with briefly at paragraph 2.5 of the EAC Framework, and provides limited detail on the substantive conditions for the lawful processing of personal information. The EAC Legal Framework concludes on the topic of data protection stating as follows:³¹

The Task Force recognises the critical importance of data protection and privacy and recommends that further work needs to be carried out on this issue, to ensure that (a) the privacy of citizens is not eroded through the Internet; (b) that legislation providing for access to official information is appropriately taken into account; (c) the institutional implications of such reforms; and (d) to take into account fully international best practice in the area.

In 2010, the Economic Community of West African States (ECOWAS) enacted the Supplementary Act on Personal Data Protection within ECOWAS³² (ECOWAS Supplementary Act), together with the Supplementary Act on Electronic Transactions within ECOWAS.³³ In 2011, it published the Directive on Fighting Cyber Crime within ECOWAS.³⁴ These documents are key to the right to privacy within ECOWAS and together constitute a bouquet of privacy-related protections, including seven guiding principles³⁵ on the processing of personal data and provisions on the establishment and responsibilities of data protection authorities.³⁶ The ECOWAS Supplementary Act provides as its overarching aim:³⁷

Each Member State shall establish a legal framework or protection for privacy of data relating to the collection, processing, transmission, storage, and use of personal data without prejudice to the general interest of the State.

In 2013, in an effort to harmonise data protection laws in Southern Africa, the Southern African Development Community (SADC) published the SADC Model Law on Data Protection³⁸ (SADC Model Law). The SADC Model Law seeks to ensure the harmonisations of information and communications technologies (ICTs) policies, and recognises that developments in ICTs impact the right to privacy and protection of personal data, including in government and commercial activities. It seeks to strike a balance to ensure that the benefits of using ICTs do not result in the weakened protection of personal data and it provides, in its article 3(1), that independent administrative authorities

31 Draft EAC legal framework for cyberlaws (2008) para R.19.

32 Supplementary Act on Personal Data Protection within ECOWAS A/SA.1/01/10 (16 February 2010).

33 Supplementary Act on Electronic Transactions within ECOWAS A/SA.2/01/10 (16 February 2010).

34 Directive in Fighting Cyber Crime within ECOWAS C/DIR. 1/08/11 (August 2011).

35 Articles 23-9 of the ECOWAS Supplementary Act.

36 Articles 14 and 19 of the ECOWAS Supplementary Act.

37 Article 2 of the Supplementary Act on Personal Data Protection within ECOWAS A/SA.1/01/10 (16 February 2010).

38 Southern African Development Community (SADC) Model Law: Data Protection (2013).

should be established within member states with oversight over the 'respective rights of privacy' in national territories.

2.4 The right to privacy and the African Commission

Alongside the African Children's Charter and the AU Data Protection Convention, as well as the EAC Framework, the ECOWAS Supplementary Act and the SADC Model Law, efforts to promote the right to privacy have only occurred to a limited degree at the African Commission. Most recently, the Legal Resources Centre, supported by Privacy International and the International Network of Civil Liberties Organizations (INCLEO), introduced a draft resolution on the right to privacy,³⁹ which was adopted by the NGO Forum and forwarded to the African Commission for consideration. Although the draft resolution was not formally adopted by the African Commission, the text of the draft resolution is informative.

In particular, the draft resolution calls on the African Commission to resolve, among other things, that human dignity is a core right and value that underpins the need for the recognition of the right to privacy; that effective respect and promotion of the right to privacy is necessary for the enjoyment of a range of human rights, including freedom of expression, access to information, association and peaceful assembly; and that the mandate of the Special Rapporteur on Freedom of Expression and Access to Information should include privacy and digital rights concerns.⁴⁰

In addition, the African Commission has recently considered and adopted the revised 2002 Declaration of Principles on Freedom of Expression and Access to Information in Africa,⁴¹ which includes significant provisions on the right to privacy.⁴² Although a soft law instrument, its adoption is a landmark development in the recognition

39 Privacy International *Privacy International at the 62nd Session of the African Commission on Human and Peoples Rights (ACHPR)*, <https://privacyinternational.org/blog/2227/privacy-international-62nd-session-african-commission-human-and-peoples-rights-achpr> (accessed 16 August 2019).

40 Legal Resources Centre *Recommended Resolution to the NGO Forum (April 2018)*, <https://privacyinternational.org/sites/default/files/2018-08/LRC%20Recommended%20Resolution%20to%20the%20NGO%20Forum%20April%202018.pdf> (accessed 16 August 2019).

41 Declaration of Principles on Freedom of Expression and Access to Information in Africa (2002). The Commission at its 65th Ordinary Session in Banjul, The Gambia, 21 October - 10 November 2019, adopted the revised version of the Declaration (see the Final Communiqué of the Session, para 35(ix)).

42 See articles 97-100 of the Draft Declaration of Principles on Freedom of Expression and Access to Information in Africa issued by the Special Rapporteur on Freedom of Expression and Access to Information in Africa, for consultation with States and other Stakeholders, pursuant to Resolution 350 (ACHPR/Res.350 (EXT.OS/XX) 2016) of the African Commission on Human and Peoples' Rights (30 April 2019), https://www.achpr.org/public/Document/file/English/draft_declaration_of_principles_on_freedom_of_expression_in_africa_eng.pdf (accessed 20 October 2019).

of the right to privacy at the regional level, both as an independent right and as an enabler of the right to freedom of expression.

While key efforts to fully introduce the right to privacy in the region have taken place, full recognition of the right is yet to occur. The rapid advancements in, and use of, ICTs — domestically, regionally and globally — warrants an urgent and holistic response to the right to privacy in Africa. In the absence of the recognition of the right to privacy as a fundamental right in the African Charter, and its concomitant status as a lodestar for RECs, the current piecemeal and un-harmonised approach limits the ability of all people on the continent to realise their privacy rights or seek vindication for violations from regional bodies and courts. This must be urgently remedied.

3 READING THE RIGHT TO PRIVACY INTO THE AFRICAN CHARTER

In order to effectively and urgently harmonise the right to privacy in the African human rights system, the African Commission can and should — of its own volition or when called upon to do so — read the right into the African Charter through not only the right to dignity, as has been proposed by civil society at the African Commission, but also through the right to respect for life and the integrity of the person and the right to liberty and security of the person.⁴³ The approach of reading rights into the African Charter is not novel, as the African Commission has previously read the right to housing or shelter and the right to food into the African Charter, finding these rights to be implicitly reflected in the African Charter through a confluence of other rights. Additionally, this argument finds further comparative reference in the recent *Puttaswamy* judgment of the Supreme Court of India, which read the right to privacy into the Indian Constitution.

3.1 Guidance from the African Commission: reading the rights to housing and food into the African Charter

In *SERAC*,⁴⁴ it was alleged that the Government of Nigeria had been directly involved in oil production — through the state oil company, the Nigerian National Petroleum Company, the majority shareholder in a consortium with Shell Petroleum Development Corporation — and that these operations had caused environmental degradation and health problems resulting from the contamination of the environment among the Ogoni people. As set out in the communication, it was alleged that the oil consortium had exploited oil reserves in Ogoni land with no

43 Articles 4, 5 and 6 of the African Charter.

44 *SERAC* (n 8).

regard for the health or environment of the local communities, and the Government of Nigeria had condoned and facilitated these violations by placing the legal and military powers of the state at the disposal of the oil companies.⁴⁵ The communication alleged 'a concerted violation of a wide range of rights guaranteed under the [African Charter]'.⁴⁶ However, notwithstanding the communication relying directly on provisions contained in the African Charter, it further urged the African Commission to read rights into the African Charter, namely the right to housing or shelter, as well as the right to food.

With regard to the right to housing or shelter, the complainants argued that the government had 'massively and systematically' violated the right to adequate housing of members of the Ogoni community under the right to property,⁴⁷ and implicitly recognised by the rights to health⁴⁸ and family as the natural unit and basis of society,⁴⁹ as contained in the African Charter.⁵⁰ Importantly, in respect of the argument that the right to housing or shelter should be read into the African Charter, the African Commission held:⁵¹

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected. It is thus noted that the combined effect of articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian government has apparently violated.

In terms of the right to food, the communication argued that the right to food is also implicit in the African Charter through provisions such as the rights to life,⁵² health⁵³ and economic, social and cultural development.⁵⁴ As with the right to housing or shelter, the African Commission accepted that it could read rights into the African Charter on the basis of a confluence of other rights already expressly contained therein. As such, in respect to food, the African Commission stated that: '[b]y its violation of [the rights contained in articles 4, 16 and 22 of the African Charter], the Nigerian government disregarded not only the explicitly protected rights but also upon the right to food implicitly guaranteed.'⁵⁵

This innovative approach by the African Commission marked the first instance in which the African Commission found violations of

45 *SERAC* (n 8) paras 2-3.

46 *SERAC* (n 8) para 43. Specifically, the communication referred to articles 2, 4, 14, 16, 18(1), 21 and 24 of the African Charter.

47 Article 14 of the African Charter (n 1).

48 Article 16 of the African Charter (n 1).

49 Article 18(1) of the African Charter (n 1).

50 *SERAC* (n 8) para 59.

51 *SERAC* (n 8) para 60.

52 Article 4 of the African Charter (n 1).

53 Article 16 of the African Charter (n 1).

54 Article 2 of the African Charter (n 1).

55 *SERAC* (n 8) paras 64-65.

rights which are not expressly contained in the African Charter. However, it was not the first time that the African Commission adopted a purposive interpretation of the provisions of the African Charter: for instance, it previously followed a similar approach in respect of claw-back clauses, such as ‘subject to law’ and ‘in accordance with law’.⁵⁶ Here, the African Commission had interpreted these provisions in a manner that ensured that the limitations did not defeat the purposes of the African Charter.

In sum, the African Commission read the right to housing and the right to food into the African Charter, enunciated its views on the substantive content of these rights and consequently found the Government of Nigeria to be in violation of these rights. This, the African Commission did in fulfilment of its mandate to promote fundamental rights in the region. The Supreme Court of India has done the same but with regard to the right to privacy in terms of the Indian Constitution.

3.2 Guidance from the Supreme Court of India: reading the right to privacy into the rights to life and liberty

In August 2017, the Supreme Court of India handed down the landmark *Puttaswamy* judgment which dealt with the right to privacy.⁵⁷ The key question before the Supreme Court was whether the right is a domestic right under the Indian Constitution, despite it not finding explicit reference in the text. Although it appeared from the constitutional drafting history that there had been suggested clauses dealing with privacy, specifically the right to secrecy of correspondence and the protection against unreasonable searches and seizures, these clauses were ultimately not included in the final draft.⁵⁸ As a result, the Supreme Court was tasked with deciding whether the right to privacy should be implicitly read into article 21 of the Constitution, which provides that: ‘[n]o person shall be deprived of his life or personal liberty except according to procedure established by law.’⁵⁹

The Supreme Court noted the importance of the right to privacy as a ‘concomitant of the right of the individual to exercise control over his or her personality’⁶⁰ and characterised the right as among those that are ‘natural to or inherent in a human being’, and which are therefore ‘inalienable because they are inseparable from the human

56 D Chirwa ‘Towards revitalising economic, social and cultural rights in Africa’ (2002) 10 *Human Rights Brief* 14 at 17.

57 *Puttaswamy* (n 9).

58 *Puttaswamy* (n 9) para 148.

59 Constitution of India, 1949, https://www.constituteproject.org/constitution/India_2016.pdf?lang=en (accessed 10 August 2019).

60 *Puttaswamy* (n 9) para 40.

personality'.⁶¹ It went on to recognise the import of the right to privacy on the exercise of the rights to life and dignity, stating as follows:⁶²

Life is precious in itself. But life is worth living because of the freedoms which enable each individual to live life as it should be lived. The best decisions on how life should be lived are entrusted to the individual. They are continuously shaped by the social milieu in which individuals exist. The duty of the state is to safeguard the ability to take decisions – the autonomy of the individual – and not to dictate those decisions. 'Life' within the meaning of Article 21 is not confined to the integrity of the physical body. The right comprehends one's being in its fullest sense. That which facilitates the fulfilment of life is as much within the protection of the guarantee of life.

To live is to live with dignity. The draftsmen of the Constitution defined their vision of the society in which constitutional values would be attained by emphasising, among other freedoms, liberty and dignity. So fundamental is dignity that it permeates the core of the rights guaranteed to the individual by Part III. Dignity is the core which unites the fundamental rights because the fundamental rights seek to achieve for each individual the dignity of existence. Privacy with its attendant values assures dignity to the individual and it is only when life can be enjoyed with dignity can liberty be of true substance. Privacy ensures the fulfilment of dignity and is a core value which the protection of life and liberty is intended to achieve.

Regarding the argument that elements of the right to privacy had been considered during the drafting of the Indian Constitution but ultimately excluded, the Supreme Court noted that the provisions considered at the time focused on two narrow aspects of the right to privacy – namely, the right to secrecy of correspondence and the protection against unreasonable searches and seizures. From this, the Supreme Court held that '[i]t cannot be concluded that the Constituent Assembly had expressly resolved to reject the notion of the right to privacy as an integral election of the liberty and freedoms guaranteed by the fundamental rights'.⁶³ The Supreme Court also dispelled the misplaced notion that privacy is a privilege for the few or an elitist construct. In this regard, the Supreme Court emphasised that '[e]very individual in society irrespective of social class or economic status is entitled to the intimacy and autonomy which privacy protects'.⁶⁴

In addition, the Supreme Court rejected the argument that recognising the right to privacy would require a constitutional amendment, finding that this incorrectly assumed that the right to privacy stands independent of the liberties already guaranteed under the Indian Constitution. One of the key findings made by the Supreme Court was that the right to privacy is an element of human dignity, from which it followed that the recognition of the right to privacy as a constitutional entitlement was not tantamount to fashioning a new fundamental right.⁶⁵ The import of this finding bears emphasis: it is the ability of the right to privacy to enable the fundamental elements of the person, particularly the right to dignity, in which the inherent value of the right lies, and which renders it intrinsic to the overarching human rights framework as a whole.

61 *Puttaswamy* (n 9) para 40.

62 *Puttaswamy* (n 9) paras 106-107.

63 *Puttaswamy* (n 9) para 148.

64 *Puttaswamy* (n 9) para 157.

65 *Puttaswamy* (n 9) para 113.

The Supreme Court ultimately held that although privacy had not been couched as an independent fundamental right in the Indian Constitution, this did not detract from the protection afforded to it because privacy lay across the spectrum of protected freedoms.⁶⁶ Accordingly, the Supreme Court concluded that privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in article 21 of the Constitution, with elements of privacy also arising in varying contexts from the other facets of freedom and dignity which are constitutionally recognised and guaranteed.⁶⁷

The approach taken by the Supreme Court of India in reading in the right to privacy aligns with the approach taken by the African Commission in reading in the rights to housing or food into the African Charter. It follows that the African Commission is well-placed — and appropriately empowered, as is apparent from its own jurisprudence — to take guidance from the *Puttaswamy* judgment and read the right to privacy into the African Charter. In doing so, the African Charter is primed to provide the necessary and urgent harmonisation of the right to privacy needed in the African human rights system.

3.3 Where to from here?

It is apparent from the preceding discussion that the African Commission has been both willing and empowered to read rights into the African Charter where it is appropriate to do so. In line with the Supreme Court of India's reasoning in *Puttaswamy*, as well as the rapid technological advancements on the continent, it is likewise appropriate for the right to privacy to be read into the rights to life, dignity, liberty and security of the person.⁶⁸ In doing so, and as the African Commission did in *SERAC*, the right to privacy should be read to include the same substantive duties on states as the rights expressly contained in the African Charter. This includes the duty to respect, protect and fulfil the right;⁶⁹ a minimum standard of conduct expected

66 *Puttaswamy* (n 9) para 169. For a summary of principles espoused in the different concurring judgments in *Puttaswamy*, see Columbia Global Freedom of Expression *Puttaswamy v India* <https://globalfreedomofexpression.columbia.edu/cases/puttaswamy-v-india/> (accessed 14 August 2019).

67 *Puttaswamy* (n 9) para 3C. The Supreme Court stated further (para 3E): 'Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty'.

68 Articles 4, 5 and 6 of the African Charter.

69 *SERAC* (n 8) para 61. Human rights treaties and customary international law impose three obligations on states: the duty to respect; the duty to protect; and the duty to fulfil. The duty to respect means that states are obliged to refrain from interfering in the enjoyment of rights by individuals and groups, and prohibits state actions that may undermine the enjoyment of rights; the duty to protect requires states to protect individuals against abuses by non-state actors, foreign actors or state agents acting outside their official capacity, requiring both a preventative and remedial dimension; and the duty to fulfil requires states to take

by the state;⁷⁰ and a minimum core of the right that the state is required to meet.⁷¹

In terms of the content of the obligations under the African Charter, these obligations are both positive and negative. Accordingly, states are not only required not to infringe the right to privacy but also to take positive action to realise it. Allied to this, states must make remedies for violations of the right available, as the African Commission has made clear that there should be no right in the African Charter that cannot be made effective.⁷² Further, the African Commission did not treat the reading in of rights as an endeavour of last resort. For instance, in respect of the right to food read into the African Charter, the African Commission held that the Government of Nigeria had violated this right in addition to the rights to respect for life and integrity of the person, the best attainable state of physical and mental health and to economic, social and cultural development.⁷³ In other words, even though there were other rights that the African Commission found to have been violated — with these rights being expressly recognised in the African Charter — this did not inhibit the African Commission from going further in finding an additional violation of a right to food that had been implicitly read in.

Recognising that a right to privacy can be read into the African Charter is only the first step: the next is giving content to the right. In *SERAC*, in addition to reading the rights to housing and food into the African Charter, the African Commission went further to ascribe substantive content to these rights. In respect of the right to privacy, there are a number of international instruments that could be looked to for guidance on the content of the right, such as article 17 of the ICCPR⁷⁴ and General Comment 16.⁷⁵ However, it must necessarily be accepted that the right to privacy — as with all rights — is not static, but

positive action to ensure that human rights can be realised. See Office of the High Commissioner on Human Rights ‘Human rights: Handbook for parliamentarians’ 2016 31-33 <https://www.ohchr.org/Documents/Publications/HandbookParliamentarians.pdf> (accessed 13 August 2019).

70 *SERAC* (n 8) para 61.

71 *SERAC* (n 8) para 65.

72 *SERAC* (n 8) para 68.

73 *SERAC* (n 8) para 63.

74 Article 17 of the ICCPR provides as follows:

‘(1) No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to harmful attacks on his honour or reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.’

The right to privacy is also contained in regional human rights instruments, such as article 8 of the European Convention and article 11 of the American Convention. For a discussion of the content of the right to privacy under international law, see *Ismayilova v Azerbaijan* App. Nos 65286/13 and 57270/14 (10 January 2019) para 139.

75 This is consonant with the approach taken by the African Commission in *SERAC* (n 8 above) para 61, in which it looked to General Comment No. 4 (1991) and General Comment No 7 (1997) in respect of the right to adequate housing to give content to the right that it had read into the African Charter.

rather one that is constantly evolving as society and technological advancements progress. This requires lawmakers, judicial officers and other stakeholders to be flexible and resilient to changing norms that reflect the needs of society at the time. This is especially pertinent in relation to the right to privacy in an ever-changing digital age.

Importantly, particularly with technological advancements used for nefarious purposes which place individual autonomy at risk, the rights to dignity and liberty demand that the right to privacy be urgently recognised as an element of the African human rights system, if these rights are to be fully and meaningfully realised. By reading in the right to privacy into the African Charter — this being presumably the swiftest vindication of the right under increasingly urgent circumstances — an amendment to the treaty itself is unnecessary.⁷⁶

4 IMPORTANCE OF THE RIGHT TO PRIVACY IN THE AFRICAN HUMAN RIGHTS SYSTEM

The right to privacy is essential for every person to fully realise their own autonomy, identity and personality, on their own terms and for their own self-development. This does not negate the importance of a person's engagement with the broader community. As explained by the Constitutional Court of South Africa: '[t]he scope of privacy has been closely related to the concept of identity and it has been stated that "rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's own autonomous identity".⁷⁷ Indeed, one of the very reasons for which privacy is so valued is because it enables the person to choose how to live their life within the overall framework of a broader community.⁷⁸

The limited and disjointed recognition that the right to privacy currently receives in the African human rights system fails to provide adequate protection. What is required is a holistic recognition of this fundamental right in the African Charter in order for it to receive the elevated recognition that it deserves and, thereafter, for RECs instruments to harmonise with the African Charter. The harmonisation of the right to privacy is premised not only on the importance of the right itself, but also as a crucial enabling right. Beyond the rights to dignity and liberty, there is an array of other rights whose full realisation depend on an effective right to privacy:⁷⁹ the confidentiality

76 As explained in *Puttaswamy* (n 9) para 113:

'To recognise the value of privacy as a constitutional entitlement and interest is not to fashion a new fundamental right by a process of amendment through judicial fiat. Neither are the judges nor is the process of judicial review entrusted with the constitutional responsibility to amend the Constitution. But judicial review certainly has the task before it of determining the nature and extent of the freedoms available to each person under the fabric of those constitutional guarantees which are protected.'

77 *Bernstein v Bester* NO 1996 (2) SA 751 (CC) para 65.

78 *NM v Smith* 2007 (5) SA 250 (CC) para 131.

79 *NM v Smith* (n 78) para 131.

of medical records as an element of the right to healthcare; the sacrosanct requirement of legal privilege as fundamental to the right to a fair trial; the protection of whistleblowers and sources from the interception of communications as indispensable to the right to freedom of expression and press freedom; the legitimate expectation of not being under unlawful surveillance as quintessential to the rights to freedom of association and movement; and a world without privacy falls foul of the right to a general satisfactory environment favourable to development. As held in *Puttaswamy*:⁸⁰

Dignity cannot exist without privacy. Both reside within the inalienable values of life, liberty and freedom which the Constitution has recognised. Privacy is the ultimate expression of the sanctity of the individual. It is a constitutional value which straddles across the spectrum of fundamental rights and protects for the individual a zone of choice and self-determination.

Certain components of the right to privacy also warrant special attention. First, the need for informational privacy and data protection laws has gained global attention in the digital age, in a time when the generation of data through online technologies has rendered people vulnerable to their information being used against them if not properly secured and safeguarded. The right to privacy is fundamental to these safeguards, including by providing a basis to advocate for the development and implementation of robust laws to protect personal information.⁸¹ Such data protection regimes are essential to protecting the autonomy of the person, in addition to providing data subjects with other rights inherent to the data protection framework, such as the right to consent or to object to certain forms of processing of personal information.

Linked to this is the issue of the interception and surveillance of communications. The implications of mass surveillance on the fundamental rights of people is staggering, and yet in countries without effective privacy regimes, these surveillance practices continue with little to no legal framework, or oversight and accountability mechanisms. Throughout the region, the lack of effective privacy protections has resulted in rights violations without remedy as a result of unlawful surveillance. This has included the unlawful surveillance of human rights defenders, opposition leaders, critics and members of the media, whose struggles have been made all the more challenging by having to withstand unlawful and disproportionate surveillance. Where countries enable these violations and do not provide for the right to an effective remedy, regional human rights mechanisms — empowered by appropriate legal frameworks — must step in and vindicate rights.

While there are various aspects to which the right to privacy pertains, one that bears special mention is that of equality, particularly in the context of sexuality and sexual orientation. These aspects of every person's life are essential attributes of the right to privacy, with

80 *Puttaswamy* (n 9) para 169.

81 The *Puttaswamy* judgment, for instance, has formed part of a broader litigation strategy seeking to compel the state to enact a comprehensive data protection framework to meaningfully protect the right to privacy. See *Puttaswamy* (n 9) paras 177-178.

discrimination against an individual on the basis of sexuality or sexual orientation being deeply offensive to a person's dignity.⁸² As explained by the Constitutional Court of South Africa: '[p]rivacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community.'⁸³ The way in which we give expression to our sexuality is at the core of the right to privacy.

In addition to the substantive importance of the right to privacy being read into the African Charter, there are also practical applications that arise. As mentioned, the recognition of the right within the African Charter creates a basis for members of the public to lobby for privacy-related law reform — such as data protection laws — in their domestic jurisdictions. The binding nature of the African Charter and the primacy with which it is treated within the African human rights system makes this both a binding and persuasive advocacy tool. Reading privacy into the African Charter also finds application at the RECs level. This is because core RECs instruments, such as the Treaty for the Establishment of the East African Community (East African Treaty) and the Revised Treaty of the Economic Community of West African States (ECOWAS Treaty), make express reference to the rights contained in the African Charter being binding within RECs frameworks as well.⁸⁴ This elevated status that the African Charter holds highlights the need for the right to privacy to be appropriately recognised as an element of the African Charter, in order to ensure an appropriate level of protection and the meaningful realisation of the associated rights.

Lastly, privacy plays an important role in facilitating the work of the African Commission. It will allow for communications to be filed in order to vindicate the right where states have violated it, and it will allow for recommendations on effective remedies. This recognition will enable the African Commission to provide soft law guidance through the development of resolutions, declarations, principles and model laws that could provide guidance to states to realise the right in a meaningful and appropriate rights-based manner. Also, states would be required to report on their compliance and fulfilment of the right as part of the treaty-body reporting requirements. And it would enable the relevant country rapporteurs and mandate-holders of the African Commission to investigate the measures taken by states and other actors to respect, protect and fulfil the right the right to privacy in their jurisdictions.

As with all rights, the right to privacy is not absolute. However, a recognition of the right within the African Charter will ensure that any limitation of the right would have to comply with the three-part test for

82 *Puttaswamy* (n 9) para 126.

83 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 31.

84 Article 6(d) of the East African Treaty and article 4(g) of the ECOWAS Treaty both provide for 'the recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights as being a fundamental principle.

a justifiable limitation, namely that such limitation be provided for in law, serve a legitimate aim and be proportionate to that aim. The right to privacy is an important constraint on the state — making the right one that is worthy of protection, particularly in times where it is increasingly under threat from both state and private actors seeking to violate the inviolable personal sphere in order to gain unfettered, and oftentimes unlawful, access to private information.

5 CONCLUSION

Urgent harmonisation and recognition of the right to privacy within the African human rights system, through its foundational instrument, the African Charter, is needed. The African Commission is best placed to do this by reading the right to privacy into the existing provisions on the rights to life, dignity and liberty and security of the person. Such action by the African Commission will create the impetus for a range of consequent rights and protections, including informational privacy, data protection, and the prevention of unlawful surveillance, among others. Most importantly, it enables every person to live with the dignity, autonomy and self-determination that the African Charter demands, and to meaningfully self-actualise within their broader community.

The right to privacy is not a luxury, certainly not in the digital age in which data has become a currency. Every aspect of our person is at risk of being exploited if not appropriately protected through effective rights-based measures that take due account of the exigencies of the right to privacy. The starting point for this can and should be the recognition of the right to privacy in the African regional human rights system as an essential step in the protection and harmonisation of the broader scheme of rights fundamental to every person in the region. A privacy awakening in Africa is urgently needed and it should be led by the African Commission.

The settlement option: friend or foe to human rights protection in Africa?

*Ismene Nicole Zarifis**

ABSTRACT: The friendly settlement procedure has long existed in the Inter-American and the African human rights systems, yet over the past twenty years, it has become increasingly popular in the Inter-American system as a means to protect human rights and deliver remedies to victims. To date, over 150 settlements have been successfully negotiated at the level of the Inter-American Commission of Human Rights. The practice has differed, as has the impact of such settlements across the regions. Reports show that compliance with these agreements is generally better when compared to decisions on individual complaints. In contrast, the African system has rarely seen the amicable settlement option exercised successfully by the parties. This article outlines the advantages and disadvantages of the settlement option for the protection of human rights. The approach taken is an in-depth analysis of the procedure in both systems followed by a comparative analysis of the practice and its impact in the regions. In light of the practice in the Americas and Africa, the article interrogates and evaluates the overall utility of the settlement procedure and its potential for furthering human rights protection at the regional level, and in Africa specifically. This article finds that the settlement mechanism has numerous benefits for human rights protection if it is carried out according to established principles and clear criteria that seek to preserve the integrity of the procedure and the African human rights system more generally.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'option de règlement: ami ou ennemi de la protection des droits de l'homme en Afrique?

RÉSUMÉ: La procédure de règlement à l'amiable existe depuis longtemps dans les systèmes interaméricain et africain des droits de l'homme. Cependant, au cours des 20 dernières années, elle a de plus en plus été utilisée en tant que moyen de protection des droits de l'homme et des victimes dans le système interaméricain des droits de l'homme. À ce jour, plus de 150 règlements ont été négociés avec succès au niveau de la Commission interaméricaine des droits de l'homme. La pratique et l'impact de tels règlements à travers les régions diffèrent. Les rapports montrent que le respect de ces accords est généralement meilleur que celui des décisions relatives à des plaintes individuelles. En revanche, le système africain a rarement vu l'option de règlement à l'amiable être utilisée avec succès par les parties. Cet article décrit les avantages et les inconvénients de l'option de règlement pour la protection des droits de l'homme. L'approche adoptée consiste en une analyse approfondie de la procédure dans les deux

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systèmes, suivie d'une analyse comparative de la pratique et de son impact dans les systèmes régionaux. À la lumière de la pratique dans les Amériques et en Afrique, l'article examine et évalue l'utilité globale de la procédure de règlement et son potentiel pour renforcer la protection des droits de l'homme au niveau régional, et plus particulièrement en Afrique. L'article conclut que le mécanisme de règlement présente de nombreux avantages pour la protection des droits de l'homme s'il est mis en œuvre conformément à des principes établis et à des critères clairs visant à préserver l'intégrité de la procédure et du système africain des droits de l'homme plus généralement.

KEY WORDS: African human rights systems, amicable/friendly settlement, human rights protection, inter-America Commission of Human Rights, African Commission on Human and Peoples' Rights

CONTENT:

1	Introduction.....	222
2	Resolution of contentious cases in the African and Inter-American systems	224
2.1	Practice in the African human rights system	225
2.2	Practice in the Inter-American system	231
3	Considerations and criteria for pursuing a friendly settlement	234
3.1	Nature of the violation: serious or massive	235
3.2	Strategic case with precedent setting value	237
3.3	The need for objective criteria (guidelines) for friendly settlements	238
4	Conclusion	240

1 INTRODUCTION

The *Malawi Children's Rights* case stands out among the human rights cases in the African human rights system because it is one of the few that was successfully resolved through friendly settlement to the satisfaction of the parties.¹ Further, the case is notable because of its wide-reaching impact on enhancing legal protection of the rights and welfare of children in Malawi. The case was filed before the African Committee of Experts on the Rights and Welfare of the Child (African Children's Rights Committee or Committee) to challenge the law that governs child justice, care and protection.² The reason for this stemmed from the fact that the definition of a child set forth in the Children and Young Persons Act of 1969 stated that a child was any person under the age of fourteen, and a youth, anyone under the age of eighteen.³ Moreover, the Act was primarily punitive in nature, rather than restorative. The best interest of the child principle was also absent, resulting in an overly punitive law applicable to children under 18, in contradiction to Malawi's Bill of Rights and obligations under the African Charter on the Rights and Welfare of the Child (African Children's Charter). The effect of this law and its application led to widespread violations of children's rights, and in particular, a

1 Communication 4/Com/001/2014 *IHRDA on behalf of Malawian Children v Malawi*, friendly settlement, Oct.2016 (*Malawi Children's Rights* case) available at <https://www.ihrda.org/2015/12/ihrda-on-behalf-of-malawian-children-v-the-republic-of-malawi/> (accessed 28 August 2019).

2 Children and Young Persons Act of Malawi, 1969.

3 Malawi Fact Sheet: Justice for Children (UNICEF) <https://www.unicef.org/tdad/Malawifactsheetjusticeforchildrenfull.pdf> (accessed 28 August 2019).

significant number of children detained in Malawi's correctional facilities without recourse to effective remedies or child-friendly measures for their rehabilitation and reintegration into society. In response, the friendly settlement committed the state to reform its national laws to bring them into conformity with its obligations under the African Children's Charter and ensure that the best interest of the child principle was duly reflected in these reforms. The resolution did not benefit a single victim but an entire class, highlighting the potential impact and benefit of a successfully negotiated friendly settlement agreement.

While the friendly settlement procedure has existed in both the African and Inter-American human rights systems for as long as these mechanisms have been operating, their practical application, efficacy and impact on the protection of human rights in the regions has differed. Over the past twenty years, this procedure has become increasingly popular in the Inter-American system as a way to settle human rights complaints lodged against states, primarily at the level of the Inter-American Commission on Human Rights (Inter-American Commission). To date, over 150 settlements have been successfully negotiated at the level of the Inter-American Commission. Moreover, the number of settlements has increased substantially over the past twenty years and implementation of these agreements is reportedly to be better overall as compared to implementation of Court judgments in contentious cases.⁴ Not all agreements are successful, however, and when they fail, they can contribute to delayed justice and further exacerbate precarious conditions for victims. This option may also be employed as a dilatory tactic to avoid fulfillment of state obligations to promptly investigate, prosecute and punish violations. According to the practice in the Inter-American system, which will be elaborated further below, friendly settlement has served as an effective tool for protecting human rights of the applicants and victims in many cases, although, given that it is highly subject to the will of the parties, some settlements do fail while others are only partially implemented.

In contrast, the amicable settlement option in the African human rights system is far less common and not as well favoured.⁵ Of the contentious cases brought before the three human rights protection mechanisms in the system,⁶ one of the few settlements successfully negotiated by the parties to date, and endorsed by the African Children's Rights Committee is the *Malawi Children's Rights* case.⁷ The agreement is currently being implemented by the state and remains unprecedented in the history of the African human rights

4 IACHR Report, 'Impact of the Friendly Settlement' (2nd Edition) OEA/Ser.L/V/II.167 doc.31, 1 March 2018.

5 VO Ayeni & TO Ibraheem 'Amicable settlement of disputes and proactive remediation of violations under the African human rights system' (2019) 10 *Beijing Law Review* 406-422.

6 African Commission on Human and Peoples' Rights, African Committee of Experts on the Rights and Welfare of the Child, and the African Court on Human and Peoples' Rights.

7 The *Malawi Children's Rights* case (n 1).

system.⁸ It stands out in part because it reflects important principles that reinforce the integrity of a settlement procedure including fairness, equity, consent of the parties, participation, transparency and accountability. This case raises fundamental questions, primarily, as to the advantages and disadvantages of the settlement option for the effective protection of human rights on the continent; the potential for achieving greater state compliance through the settlement mechanism; why this option is not a common practice in the African human rights system; and finally, whether this option should be promoted in the system and how it should be improved. In light of the practice in the Americas and Africa, respectively, the article seeks to interrogate and evaluate the overall utility of the settlement procedure and its potential for furthering human rights protection at the regional level. To make this determination, the article will seek to measure the benefits of the procedure as per its efficiency, effectiveness, complexity, comprehensiveness, victim participation/agency, interest of the state and sponsoring institution, compliance and effective protection of human rights.

2 RESOLUTION OF CONTENTIOUS CASES IN THE AFRICAN AND INTER-AMERICAN SYSTEMS

The individual complaint mechanism is a common feature of the regional human rights protection systems. In both the African and Inter-American human rights systems, individuals have the possibility to file a human rights complaint against a member state that has ratified the core regional instrument giving the body the mandate to determine whether the state has violated its human rights obligations. In the African human rights system, the core instrument is the African Charter on Human and Peoples' Rights (African Charter); or, the African Children's Charter, specific to the rights of the child. The African Charter not only set forth state obligations on human rights broadly, but lay out the procedures for filing individual complaints, the criteria for determining admissibility of a case, the procedure for making a determination on the merits, honouring the right to remedy and issuing merits decisions, or Court judgments, as well as outlining state obligations on compliance.⁹ Other special mechanisms are provisional or precautionary measures designed to respond to urgent cases where victims' lives or physical integrity are at imminent risk and in need of urgent protection.

While the procedure on individual communications is relatively similar in both systems, the provisions on friendly settlement differ. In the African system, the African Charter specifies that the procedure is only available to interstate communications, limiting its applicability to

8 <https://www.ihrda.org/2018/02/ihrda-malawi-settlement-agreement-malawi-submits-4th-progress-report-to-acerwc/> (accessed 28 August 2019).

9 IAHCR Rules of Procedure (2011); ACHPR Rules of Procedure (2010).

individual communications.¹⁰ The Inter-American system (American Convention and Commission Rules of Procedure) has elaborated a detailed procedure on when and how friendly settlements will be introduced, negotiated and monitored.¹¹ The African system, save the African Children's Rights Committee, has yet to elaborate specific or detailed standards or procedures governing amicable settlements for individual communications, this has contributed to its limited application and impact in the region.

2.1 Practice in the African human rights system

Amicable settlement will be looked at in the context of the three protection mechanisms for the region: the African Commission; the African Children's Rights Committee; and the African Court. This is followed by an analysis of the practice thus far.

2.1.1 African Commission on Human and Peoples' Rights

The African Commission, being the longest standing human rights mechanism in the region, boasts a wide body of jurisprudence and practice, from which the two more recently established mechanisms can build to develop a more robust procedure that is beneficial to all parties, and the mechanisms themselves. The procedure in the African Commission is premised on reaching a resolution through mediation and conciliation.¹² The procedure in the African Charter provides that, 'after having obtained from the States concerned and from other sources all the information it deems necessary and after having tried all appropriate means to reach an amicable solution based on the respect of Human and Peoples' Rights, the Commission shall prepare, within a reasonable period of time from the notification referred to in Article 48, a report stating the facts and its findings.'¹³ More specifically, the Rules of Procedure provides that, once a communication has been declared admissible, the Commission puts itself at the disposal of the parties in a bid to secure a friendly settlement of the dispute.¹⁴ The Commission offers its 'Good Offices' for friendly settlement at any stage of the proceedings.¹⁵ If both parties express willingness to settle the matter amicably, the Commission will appoint a rapporteur, usually the Commissioner who has been handling the case, or a Commissioner responsible for promotional activities in the State concerned or a group of commissioners.¹⁶ If a friendly settlement is reached, a report containing the terms of the settlement is presented to the Commission

10 African Charter, art 52.

11 IACHR Rules of Procedure, rule 40.

12 Ayeni & Ibraheem (n 5) 66, citing *Free Legal Assistance Group & Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 4.

13 Article 52, African Charter.

14 ACHPR Rules of Procedure, rule 90.

15 ACHPR Rules of Procedure (n 14).

16 ACHPR Rules of Procedure (n 14).

at its session. This will automatically bring consideration of the case to an end. On the other hand, if no agreement is reached, a report is submitted to the Commission accordingly by the Commissioner(s) concerned and the Commission will take a decision on the merits of the case.¹⁷

On the procedure set out in the African Charter, an important clarification must be made in that this procedure is provided for under Section III of the Rules of Procedure, which pertains to interstate communications, and not in Section IV, which pertains to other communications, namely individual communications.¹⁸ This is one major distinction between the provisions in the African Charter and the American Convention for example, which has an elaborated procedure made available within the individual complaint procedure of the Inter-American Commission.

In practice, the procedure has been infrequently applied and largely in an *ad hoc* manner.¹⁹ While the procedure was meant to be reserved for interstate complaints, the African Commission has applied the mechanism to individual complaints on several occasions, yet at the significant advantage of state parties and the disadvantage of the individual petitioners who may lack knowledge, participation and consent to the terms of the agreement.²⁰ The practice developed by the Commission has been illustrated in numerous cases where matters have been declared 'amicably solved' even where the complainants' views had not been solicited.²¹ This was evident in one of the earliest cases considered by the Commission, *Peoples Democratic Organisation for Independence and Socialism v The Gambia*, where the state's proposed solution was adopted without due consideration given to the complainant's position. This deferential approach to the state apparatus has been repeated in cases such as *Modise v Botswana* and *Kalenga v Zambia*, whereby on the mere offer to settle a dispute, the state's proposal was readily accepted;²² thereby differentiating it from the process at the Inter-American Commission or the African Children's Rights Committee, which is premised on the participation of the parties, a willingness on both sides to engage in a settlement and consideration of the views of both parties to inform the agreement, one which is held to a standard of conformity with human rights principles.

On one hand, the Commission practice to extend amicable settlement to individual communications even where not explicitly provided for in the Charter should be noted. On the other hand, the lack

17 ACHPR Rules of Procedure, rule 91; BD Mezmur 'No second chance for first impressions: the first amicable settlement under the African Children's Charter' (2019) 19 *African Human Rights Law Journal* 62-84.

18 Sec III, art 52, African Charter.

19 Unpublished: L Kuveya 'The effectiveness and propriety of friendly settlements in the African regional system: a comparative analysis with the Inter-American and European regional systems' unpublished LLM dissertation, University of Pretoria, 2006.

20 Mezmur (n 17) 65; Ayeni (n 5) 414; Kuveya (n 19) 23.

21 Ayeni & Ibraheem (n5 above) 412-413.

22 Kuveya (n 19) 34, 36; Ayeni & Ibraheem (n 5) 412.

of a more detailed procedure with objective criteria and standards for the negotiation process, terms of the agreement and its subsequent implementation creates obvious weaknesses in terms of generating trust in this as an effective mechanism to generate sound and balanced resolutions.²³ The absence of an elaborated procedure has contributed to an inconsistent practice over the years and settlements that have been biased towards the state and unduly subject to the power imbalance and overt influence of state parties.²⁴ One key weakness in the agreements has been the absence of the inclusion of reparations or compensation for victims, which should be integral to the mandate and functions of a human rights protection mechanism. Moreover, the agreements to date have been shrouded in secrecy, meaning that the details of the agreements and resolutions have generally not been made public. This lack of transparency in the procedure can compromise the African Commission's mandate of advancing human rights accountability, justice and reparations for victims of human rights violations.

Due to this series of factors, amicable settlement has not been particularly effective in satisfying victim's rights to justice and a remedy. It has not involved their participation and consultation and has tended to be used in favour of states parties to the detriment of victims. While the mechanism has potential for success and impact in the region, as highlighted in the *Malawi Children's Rights* case, it has yet to become an effective tool for the resolution of individual human rights claims as applied by the African Commission. Finally, while it has been observed that part of the reason for this practice may stem from the initial lack of clarity of the Commission's mandate to adjudicate individual claims, after so many years, and upon considering the evolution of the individual complaint mechanism, the need to fully implement this mechanism for its various benefits is emerging, thereby calling for the need for reforms and strengthening.

2.1.2 African Court on Human and Peoples' Rights

For its part, the Protocol to the African Charter on the Establishment of African Court on Human and Peoples' Rights (African Court Protocol) and the Rules of the African Court stipulate that the Court may try to reach an amicable settlement in a case pending before it in accordance with the provisions of the Charter.²⁵ The Court Rules set out a procedure less restrictive than what is provided for in the African Charter. It sets out two avenues: out-of-court settlements and settlements negotiated under the auspices of the Court.²⁶ The settlement is dependent on the will of the parties, they then negotiate

23 Ayeni & Ibraheem (n 5) 414.

24 Mezmur (n 17); Ayeni & Ibraheem (n 5) 413 (citing Communication 44/90 *Peoples' Democratic Organisation for Independence and Socialism v The Gambia; Modise v Botswana* (2000) AHRLR 30; *Kalenga v Zambia* (2000) AHRLR 321; F Viljoen *International human rights law in Africa* (2012) 411; Kueveya (n 19).

25 Article 9, Court Protocol.

26 Rule 56 and 57, Rules of Court.

and agree on the terms and report to the Court, which the Court may endorse through a judgment indicating the resolution, or may decide to proceed with consideration of the case.²⁷ The procedure is not on its face restricted to interstate complaints, therefore making the mechanism applicable to cases that come before the Court. It remains relevant with respect to applications filed directly to the Court, giving the parties an option for a negotiated resolution over a judgment finding state responsibility for violations. The criteria on which the Court may decide to endorse or override the settlement is not stated in the Rules. The settlement under the auspices of the Court is one where the Court promotes the mechanism by engaging the parties, facilitates negotiations and the final resolution, which is issued in a judgment of the Court.²⁸ The only suggested criteria for a settlement to be endorsed, according to the Protocol, is that it is based on the respect for human rights, although this is not further elaborated.

In practice, while amicable settlement appears to be an accessible option available to the parties, the Court has not yet endorsed an amicable settlement to date. In some situations, applicants have expressed interest without corresponding state interest to conclude an agreement. Member states' actual knowledge and appreciation of the procedure and how it works seems to be a key factor affecting its regular application. A standard operating procedure to guide negotiations and approve friendly settlements is lacking. Development of criteria and guidelines on the procedure would promise to enhance transparency and accessibility of the procedure, while greater publicity about the procedure can be instrumental to its adoption by states going forward.

2.1.3 African Committee of Experts on the Rights and Welfare of the Child

As to the Committee of Experts, which oversees the implementation of the African Children's Charter, the body has a mandate to receive communications from any person, group, NGO,²⁹ UN member states.³⁰ Procedures on the individual complaint mechanism and amicable settlement are set out in relative detail in the Committee's Revised Guidelines on Communications where amicable settlement is provided either as an out of court settlement or settlement under the auspices of the Committee.³¹ This allows for the parties to voluntarily resolve the dispute any time before a decision is made by the Committee.³² The settlement agreement must be communicated to the Committee for endorsement before it can be concluded, or the

27 Rule 56, Rules of Court.

28 Rule 57, Rules of Court.

29 NGO must be officially recognised by the AU.

30 Art 44, African Charter on the Rights and Welfare of the Child.

31 Sec XIII: Amicable Settlements, African Committee of Experts Guidelines on Communications, available at: https://www.acerwc.africa/wp-content/uploads/2018/07/Revised_Communications_Guidelines_Final-1.pdf (accessed 28 August 2019).

32 Sec XIII (n 29).

Committee may decide to continue with consideration of the case.³³ The procedure under the auspices of the Committee states that a settlement may be called on by the Committee or the parties with the Committee using its good offices and playing a role of mediator.³⁴ The process is entirely dependent on the willingness and consent of the parties, thus the procedure may be terminated where consent is not present or if the case deals with serious and massive violations of children's rights.³⁵ The provision on serious and massive violations is noteworthy as it intends to ensure protection of child rights through a formal accountability mechanism. This is in line with practice from the Inter-American system whereby cases of serious and massive violations generally do not lend themselves to friendly settlement based on the gravity of the violations and the need to pursue justice in such cases.³⁶ This was best illustrated in the *Velasquez Rodriguez* case, where the Inter-American Commission was not in a position to promote an amicable settlement based on the fact that the rights at issue were not ones that could be addressed through negotiation, thereby establishing the standard of 'necessary and suitable' conditions to enter into a friendly settlement.³⁷

In contrast to the provisions in the African Charter and the African Commission's Rules of Procedure, the Committee's provisions on individual communications and amicable settlement appear to apply to all communications under consideration. The African Children's Rights Committee Revised Guidelines on Communications elaborates the procedure to consider communications and details the amicable settlement procedure.³⁸ The procedure is relatively developed in that it sets out criteria for a friendly settlement, one of the underlying criteria for endorsement is that it respects the rights and welfare of the child as provided in the Children's Charter. This is an important principle that runs through the African system's provisions on amicable settlement (respect for human rights); however, it is still unclear which terms and conditions of a settlement would adequately conform with, or contravene, the Children's Charter or African Charter. This may only be seen through the practice of the Committee or Commission, which has yet to be developed.

In practice, the provisions allow for a wide application of the settlement option, any time before the Committee decides on the merits of the matter.³⁹ It allows parties considerable freedom to negotiate the terms as long as they are in agreement. The procedure is premised on *mutual consent* of the parties and can be terminated under three conditions: where the Committee finds the dispute is not suitable to friendly settlement; where one of the parties withdraws consent; or

33 As above.

34 As above.

35 As above.

36 Mezmur (n 17) 67-68.

37 Mezmur (n 17) 68.

38 African Children's Rights Committee Revised Guidelines (2014), rule XIII.

39 Sec XIII (n 29).

where the matter raises serious and massive violations of children's rights.⁴⁰ Notably, there are provisions on publication of the settlement agreement reinforcing the principle of transparency and accountability while also allowing the parties and public to participate in the monitoring of the implementation of the agreement. The procedure was tested for the first time in 2016 when the Government of Malawi approached the Institute for Human Rights and Development in Africa (IHRDA), the author of the communication, with an express interest to resolve the matter amicably.⁴¹ The state demonstrated willingness to address the issues in the case (law reform to bring national laws into conformity with Malawi's international obligations), indicating that it had already begun to take measures in this regard. The terms were discussed, agreed on, and the draft agreement shared with the Committee for consideration and endorsement.⁴² The agreement was the first successful amicable settlement concluded by the Committee to date; meanwhile, the state has continued to report on a periodic basis as to the implementation of the terms.⁴³ A very noteworthy section of the Revised Guidelines and a clear departure from the practice of the African Commission are the provisions on publication of the terms of the settlement agreement. It states that once the parties endorse the agreement it then becomes public. This practice promotes transparency and accountability and enhances public awareness and monitoring of the agreement. It also reinforces the Committee as an effective human rights protection mechanism.

While this process was relatively smooth and straight forward, in part due to the fact that the state initiated the process and willfully committed to introduce necessary law reforms that it had already begun to consider; it is not clear how other child rights cases that are more complex, involving multiple violations, and requiring various reparations measures, would be resolved. Even where this serves as positive precedent for the region and for the sister mechanisms, it still suggests the need for more detailed guidelines or a manual on amicable settlement beyond what is provided in the Revised Guidelines on Communications.⁴⁴ Much like the Commission, if this procedure is to

40 Revised Guidelines (n 38).

41 *Malawi Children's Rights* case (n 1).

42 The author was at the time serving as the Director of Programs at IHRDA and took part in the negotiations with the Government of Malawi in the case.

43 IHRDA 'Public Statement of IHRDA during the April 2018 Session of the ACERWC' (April 2018) <https://www.ihrda.org/2018/04/statement-by-ihrda-on-the-status-of-implementation-of-the-agreement-between-malawi-and-ihrda-in-the-malawi-childrens-case-31st-ordinary-session-of-the-acerwc/> (accessed 28 August 2019).

44 To encourage the use of friendly settlement, more guidance on the key components or criteria for a friendly settlement would be helpful. Due consideration may be given to the different types of violations or groups affected. Such an instrument can assist the mechanisms and the parties to navigate this procedure and conclude an agreement that can be objectively assessed as human rights compliant. The Inter-American Commission on Human Rights has developed a 'Handbook on the Friendly Settlement Mechanism in the Petition and Case System' which is meant to guide the public and parties on the use of friendly settlement, its components, how it works and best practices.

be promoted as a viable, or even a preferred option to resolve human rights disputes, and given the range of human rights issues that may need to be addressed through this forum; negotiations left solely to the parties without further guidance and standards can have equally detrimental effects.

Beyond this, the settlement of the *Malawi Children's Rights* case is positive precedent in large part because it demonstrates how a human rights dispute can be effectively managed and resolved between the parties in a conciliatory fashion, which is noteworthy for several reasons. It represents a more speedy way to resolve a dispute and seek a remedy to the benefit of the parties and the mechanism itself (reduces backlog of cases); it creates a greater likelihood of compliance where the parties have determined and agreed to the terms as compared to a decision that is imposed on a member state; it is a participatory process that promotes agency of the victims/petitioner who become active players in the process and the outcome affecting them.⁴⁵ Where the settlement is fair and equitable with participation and consent of the parties, it represents a win-win situation for all stakeholders. States avoid the public shame of a decision made against them and benefit from an improved public image by a show of political will to engage and voluntarily resolve the matter. Many of these lessons are reflected in the *Malawi Children's Rights* case including the all important factor of compliance; the state has complied with its periodic reporting obligation, and since succeeded in securing the Constitutional amendment on the definition of a child to conform with the Children's Charter.⁴⁶ In a system where human rights compliance is a persistent challenge, this mechanism provides potential for securing greater compliance by states who understand the mechanism, its role, objectives and how they can benefit from the process.

2.2 Practice in the Inter-American system

In contrast to the practice in Africa, friendly settlement has been an increasingly favored mechanism over the past twenty years in the Inter-American system, primarily taking place before the Inter-American Commission as a measure to promote a resolution before the matter is referred to the Inter-American Court on Human Rights for judgment and a finding of state responsibility is made.⁴⁷ The interest to promote this mechanism over the years has been driven by states, the Inter-American Commission itself, and users of the system. This has been reflected in a series of amendments to the Commission's Rules of Procedure (2000, 2011, 2013 respectively), whereby the procedure was

45 Ayeni (n 5) 407-408.

46 IHRDA public statement (n 40).

47 In the Inter-American system, there is no direct access to the Inter-American Court on Human Rights, thus all complaints are filed with the Inter-American Commission on Human Rights and transferred to the Court where the state has not complied with the merits decision. Friendly settlement is a particularly useful tool to encourage states to resolve the matter on their own terms instead of being the subject of a finding of state responsibility made against them.

further elaborated, detailed and integrated into the individual complaint mechanism.⁴⁸ Initially promoted as a strategy to manage the excessive backlog of cases, the mechanism has emerged to prove effective in terms of satisfying victims' rights to participation and reparation, as well as improved compliance by states to deliver on their commitments and obligations.⁴⁹

The procedure is offered as an option to parties after a petition is declared admissible and before a merits determination is made. The reforms over the years have led to a procedure that is more flexible (no strict deadlines for submission of evidence, or concluding the settlement), giving more discretion to parties to decide when to initiate, continue or terminate the agreement, and include basic criteria⁵⁰ for approving the settlement reports. The key components of a friendly settlement include the terms and conditions of the agreement covering the measures that the state will adopt to resolve the matter. This would normally include a wide range of reparations measures to benefit individuals and groups.⁵¹ The terms are put forward by the parties for consideration and agreement. The state's declaration on its responsibility may or may not feature in the settlement agreement; roughly 50 per cent of friendly settlements include a declaration of state responsibility in the Inter-American system, a unique feature of this system's settlement agreements.⁵² Agreements are published and monitored through a follow up mechanism premised on regular reporting on compliance, and publication on the status of compliance in the Commission's annual reports.

While the friendly settlement procedure was merely an option for the parties some twenty years ago, it is now a more fully integrated feature in the individual communication procedure of the Inter-American Commission leading to an increasingly frequent practice in the region.⁵³ Studies on the practice applied in the Americas reveal that the procedure can have multiple positive effects both at the individual

48 ACHR report (n 4); Between 2010-2013, the IACHR instituted several reforms of the friendly settlement procedure with the support of OAS Member States. This included: creation of a friendly settlement working group within the IACHR; establishment of an internal protocol to facilitate processing of friendly settlements; a consultation process with OAS Member States and civil society on how to improve on the procedure; publication of a 2013 report on the impact of friendly settlement procedure in the Inter-American human right system; and the reform of the IACHR Rules of Procedure to better integrate friendly settlement into the individual complaint mechanism; P Engstrom, *The Inter-American human rights system: impact beyond compliance* (2019), <https://doi.org/10.1007/978-3-319-89459-1> (accessed 28 August 2019).

49 IACHR report (n 4) 2.

50 Basic criteria include the voluntary consent, willingness of the parties (victims) to the terms of the agreement and that the agreement is grounded in fundamental human rights principles.

51 Friendly settlements may include all or a combination of the five forms of reparations.

52 P Engstrom *The Inter-American human rights system: impact beyond compliance* (2019), <https://doi.org/10.1007/978-3-319-89459-1> (accessed 28 August 2019).

53 IACHR report (n 4).

and institutional levels.⁵⁴ At the institutional level, it may be particularly effective to address the backlog of cases in an overloaded system; and it can contribute to a more speedy resolution of the case as it is concluded without lengthy or formal procedural phases.⁵⁵ At the individual level, it is capable of delivering comprehensive remedies for the direct victims and may include guarantees of non-repetition which aim to prevent the future recurrence of violations and address structural elements causing violations. Finally, it provides promise with respect to enhancing compliance where the state willfully agrees to the terms as compared to imposed measures through a merits decision or judgment finding state responsibility. Compliance with friendly settlements over merits decisions in the Inter-American system has been recorded at 67 per cent *partial* compliance of friendly settlements over 56 per cent *partial* compliance with merits decisions.⁵⁶ As to total compliance, an estimated 32 per cent of friendly settlements are fully complied with as compared to 5 per cent of merits decisions.⁵⁷

Some of the noted consequences of the procedure relate to the impact of not making a finding of state responsibility for human rights violations. Friendly settlement by its nature does not require a finding of state responsibility by the human rights monitoring body as does a merits decision or African Court judgment. Many advocates and victims feel that this is a crucial element of the human rights complaint process, as a declaration of state responsibility is a form of relief for victims and is the basis upon which they can expect reparations. This may be addressed in the friendly settlement terms by having the state declare its responsibility and adopt subsequent measures to resolve the matter, but it should be a mutually agreed to term and not imposed by the oversight body. Second, this procedure can have a detrimental effect on the development of jurisprudence and norm elaboration, especially regarding novel issues that would further enrich the system, by engaging in a legal analysis and public pronouncement on the case.⁵⁸ The monumental impact of decisions by the Inter-American Commission and judgments by the Inter-American Court over the past twenty years cannot be overlooked in this regard; a rich body of jurisprudence has developed in areas such as the right to life; enforced disappearances of persons; indigenous peoples rights; women's rights; individual and collective reparations; due process; amnesty laws, amongst others. Finally, given that friendly settlements are subject to the will of the parties, if this will is not sustained, it can imply excessive delays without effective implementation.

Despite these observed weaknesses, a recent study reflects that the friendly settlement procedure in the Inter-American system proves to be effective in terms of meeting the needs and interests of the parties.⁵⁹

54 As above.

55 Ayeni (n 5) 407 and Engstrom (n 49) 62.

56 Engstrom (n 49) 74.

57 Engstrom (n 49) 75.

58 Ayeni (n 5) 408.

59 Engstrom (n 49) 82-83.

Further it is capable of providing comprehensive reparations; similar to what can be provided for in an Inter-American Commission merits decision or African Court judgment. This is a very critical element to the process as it is meant to satisfy victims' rights to an effective and adequate remedy and reparation for human rights violations. Moreover, these agreements can address individual and group rights claims, as well as structural or institutional weaknesses that would require preventative measures or related reforms, thereby having a broader impact on human rights protection for the population as a whole. While it was found that the duration of both the friendly settlement procedure and the processing of a case on its merits is not very different,⁶⁰ the direct involvement of the victims and parties was a notable difference that has a wide range of positive effects; notably the friendly settlement procedure allows for greater victim participation.⁶¹ It contributes to the restoration of dignity and promotes agency by engaging them directly in the matter affecting them. It is sometimes the first time that victims come face to face with authorities, engaging them in dialogue.

Finally, one notable feature of the Inter-American system is its consistent practice of transparency. It is worth noting that both friendly settlements and merits decisions (those not being referred to the Inter-American Court for adjudication) are published on the Inter-American Commission website and reported on in the Commission's annual report, also readily available online. This practice is an important factor in reinforcing the human rights protection mandate of the Inter-American Commission as it promotes accountability and reinforced public trust and confidence in the system.

3 CONSIDERATIONS AND CRITERIA FOR PURSUING A FRIENDLY SETTLEMENT

A comparative analysis of the African and Inter-American human rights systems reveals that while the application of the procedure has differed between the mechanisms, the procedure presents a viable option for the effective resolution of human rights matters at the regional level. It is apparent from the practice thus far that the procedure needs to be further elaborated in the African system so that clear standards and guidelines are adopted. This will contribute to the strengthening of the system by avoiding *ad hoc* processes that are not grounded in specific human rights principles; it will instill confidence of the parties to enter into these agreements and to clearly understand and fulfill their obligations. In particular, where the procedure is grounded in principles of fairness and equity, while also premised on the equal participation and consent of the parties, especially the victims, this procedure can be equally, if not more effective in providing a resolution to the benefit of the parties. As a consequence, it can

60 Engstrom (n 49) 82.

61 Engstrom (n 49) 83.

contribute to the reduction in the backlog of cases, benefiting the human rights oversight body, and increase the likelihood of compliance leading to greater or more effective human rights protection, as we have seen in the *Malawi Children's Rights* case. A quick scan of the practice in the Inter-American system can provide examples and relevant lessons for consideration when setting out to develop an adequate framework to guide the friendly settlement procedure in the African system. For example, the current procedure, while not mandatory, is institutionalised within the individual complaints mechanism. It is an available mechanism to all parties who wish to pursue it; it is premised on the willing participation of the parties to negotiate the terms; it is subject to the consent of the parties, and the discretion of the Commission to indicate that the matter may be appropriate for settlement and that it respects fundamental human rights principles.⁶² To aid the parties, the Commission makes itself available and provides resources such as copies of relevant judgments and settlements that can serve as objective criteria for developing terms of the agreement.⁶³ The standard practice includes the publication of agreements once approved by the Commission, and a follow-up mechanism requiring parties to report on implementation, which degree of compliance is published in the Commission's annual reports.⁶⁴ It is important to note that while the Commission has introduced tangible criteria for the approval of agreements, it has equally strived to maintain a flexible mechanism whereby there are no deadlines or timeframes for the negotiation of agreements and all OAS member states regardless of their ratification status of the American Convention may participate in the process.⁶⁵

Before elaborating on recommended criteria for a framework to guide friendly settlements at the regional level, there are two important factors for considering the suitability of a friendly settlement procedure as compared to the pursuit of the matter on the merits.

3.1 Nature of the violation: serious or massive

While the nature of the violation has not been extensively commented on to date, it is a factor that has a bearing on whether friendly settlement or adjudication of the case ought to be pursued. The choice of which has a bearing on ensuring effective human rights protection in the region. Both in the African and Inter-American systems, violations categorised as serious or massive in nature, may need to be critically evaluated before entering into a friendly settlement to adequately satisfy principles of justice. While there is no clear definition of the term in the African Charter or the American Convention, it is better understood through the jurisprudence of the regional bodies, whereby multiple violations of the right to life, the right to be free from cruel,

62 Engstrom (n 49) 19.

63 Engstrom (n 49) 22.

64 Engstrom (n 63).

65 Engstrom (n 63).

unusual an degrading treatment or punishment, the right to be free from torture, as well as matters that involve multiple violations and multiple victims, are considered cases that rise to the threshold of 'serious and massive' in the African system, or 'serious and widespread' in the Inter-American system. Cases involving mass arrests, extrajudicial killings, forced disappearances, forced evictions or acts of sexual violence for example, may fall within this category.⁶⁶

The sole reference to serious and massive violations in the African Charter is in article 58 where a different procedure is provided; consequently, friendly settlement is not out-rightly provided for with respect to these types of cases.⁶⁷ The practice is not as clear, however, as a number of cases that rise to this degree of severity are channeled through the individual complaint mechanism and may be subject to friendly resolution. In the African system, the human rights institutions reserve the right to override a friendly settlement and proceed with consideration on the merits. However, established criteria for the basis of this decision and is lacking, and equally relevant jurisprudence on the matter is yet to be developed. This creates a gray area whereby friendly settlement handled by the African Commission may be susceptible to manipulation without established criteria or guidelines for the approval of these agreements.

Human rights doctrine requires that where violations occur, the state is obligated to deliver justice and a remedy. Therefore, engaging in a friendly settlement for serious or massive violations should be avoided. It should not be seen as an opportunity to circumvent state obligations to address impunity for human rights violations. Indeed, on this matter, the African Children's Rights Charter is the only body that has clearly stated in its Revised Guidelines that friendly settlement is not applicable to massive and serious violations.⁶⁸ This is a noteworthy provision that should inform the other institutions when elaborating more detailed guidelines on the friendly settlement mechanism.

In the Inter-American system, it is similar; the Inter-American Commission reserves discretion to terminate a friendly settlement if it deems *the matter is not susceptible to such a resolution*.⁶⁹ The fact that the case involves serious or massive violations may qualify here based on the fact that such a resolution can be seen to contradict principles of justice and interests of the victims.⁷⁰ For example, as in the case of *Velasquez Rodriguez v Honduras*, some violations may be so egregious

66 African Commission Communication 227/99 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR) 2003 http://www.achpr.org/files/sessions/33rd/communications/227.99/227_99_democratic_republic_of_congo_burundi_rwanda_uganda.pdf; and 279/03 – 296/05 *Sudan Human Rights Organization, Centre on Housing Rights and Evictions v Sudan* http://www.achpr.org/files/sessions/45th/communications/279.03-296.05/achpr_45_279.03_296.05_eng.pdf (accessed 28 August 2019).

67 Art 58, African Charter.

68 Sect XIII (2)(iv)(e) African Children's Rights Committee Revised Guidelines.

69 Art 41 IAHCR Rules of Procedure.

70 *Mezmur* (n 17) 67; *Velasquez Rodriguez v Honduras* (Preliminary Objections) IACHR (26 June 1989).

that they would not be susceptible to an agreement that does not include state accountability measures to investigate, prosecute and punish perpetrators.⁷¹ The friendly settlement therefore cannot be seen as an opting out of state responsibility for the most serious violations. For some victims, the pursuit of justice and accountability against the state and receiving a public declaration of state responsibility is an important form of satisfaction that cannot be equally satisfied in a friendly settlement agreement.⁷² It may be one of the reasons why the practice in the Inter-American system reflects a higher number of cases involving serious and massive violations being determined on their merits; even though each case is decided on a unique set of factors, namely the interest of the parties (states and victims), and does not always produce a coherent practice.

The nature of the violation therefore is an important consideration that the parties and the human rights body should consider, in terms of ensuring that serious and massive violations are effectively brought to justice and victim reparations satisfied. Alternatively, if such cases are resolved through friendly settlement, the establishment of objective criteria would be a helpful measure to ensure that the agreements are effectively in line with human rights principles (such as the duty to investigate, prosecute and punish is adopted as a key component of the agreement).

3.2 Strategic case with precedent setting value

The other element that figures as an important consideration with respect to the appropriateness of the friendly settlement procedure and human rights protection in the region is whether the case is being brought as part of a larger strategy to trigger large-scale reforms, to address long-standing injustices, or to challenge structural, institutional weaknesses. In short, if the matter represents an emblematic case with potential for norm elaboration on a novel issue, or is likely to set precedent that will expand human rights protection on a particular topic or for a special group, the case would be better suited for adjudication where a determination on the merits is made, an elaboration of the rights violations is laid out, and a finding of state responsibility is published. This type of case contributes to the development of rich jurisprudence, expanding rights protection that becomes a reference for the region and beyond. Friendly settlement for such cases may satisfy the victims' immediate interests, at the expense of establishing important protection that could benefit an entire population. For these reasons, the victims and their lawyers may prefer to pursue a case on its merits; and depending on the facts and

71 As above; Inter-American jurisprudence places emphasis on the duty to investigate, prosecute and punish where violations are found constituting a fundamental principle in all decisions emanating from the Inter-American system of human rights.

72 *Mtikila v Tanzania*, App. 11/2011, African Court, Reparations, (13 June 2014), http://www.african-court.org/en/images/Cases/Ruling%20on%20Reparation/Ruling_on_Reparation_Appl.011-2011.pdf (accessed 28 August 2019).

circumstances of the case, the Commission may also decide that the matter *may not be susceptible to be settled through this forum*. In terms of furthering human rights protection in the region, a friendly settlement may not be most conducive to achieve this goal and should be carefully considered before opting for this procedure.

Similarly, where rich jurisprudence exists on an established matter, a friendly settlement is well suited to be applied given that the parties would have sufficient information on what the outcome would likely be, and this in turn can propel them to enter into friendly settlement to quickly dispense with the case and allow them to focus on delivering an adequate and prompt remedy, rather than getting tied up in lengthy adjudication of the matter.

3.3 The need for objective criteria (guidelines) for friendly settlements

A closer look at the practice in the Inter-American and African systems confirms that there are no clear or objective criteria governing friendly settlements. At present, the parties have considerable freedom to decide if and when they want to enter into a settlement agreement. They are free to discuss and agree to the terms, impose timeframes for implementation and any other relevant matters. The two main criteria set out in the Inter-American and African systems are the element of voluntariness or consent by the parties, and the requirement that the agreement be in line with human rights principles. Given the complexity of human rights matters coming before the regional systems, where many cases involve multiple violations and numerous victims; and given the potential for such cases to have a long-lasting and broad impact on advancing human rights protection in the region, the elaboration of a framework for friendly settlements can provide critical and practical guidance for the parties with respect to negotiating and agreeing to terms that are indeed grounded in human rights principles.

The framework would benefit from setting out basic, fundamental principles that would be used to govern such agreements. These may include principles of justice, fairness, equity, non-discrimination and the fundamental right to a remedy. Friendly settlements are capable of providing comprehensive reparations and this too should be elaborated for the parties so as to provide them with sufficient information about the key components of a friendly settlement and to ensure their right to remedy is adequately satisfied through this procedure. Further, the principle of *victim-centredness* is important to emphasise so as to ensure that the agreement is informed by victims' interests for justice and a remedy. Importantly, victim participation and consultation foster empowerment and the restoration of their dignity through the process. Further, the element of accountability and transparency should feature in the criteria; these guard against the strategic use of the agreements by states to circumvent their obligations to investigate, prosecute and punish perpetrators, or maintain decisions hidden from the public eye. The endorsement by the oversight body should be premised on these

principles and guidelines and if the agreements do not meet the minimum criteria set out in the framework, the human rights institution would have an objective basis upon which it can set aside the agreement and decide to pursue the matter on its merits.

Other elements that can feature within the guidelines are the factors mentioned above, the nature of the violation and the value of the case for setting precedent, generating structural or legal reforms, or expanding protection of human rights through norm elaboration (strategic value of the case). While these need not be requirements, they can be elaborated on for the benefit of the parties to fully consider the facts of their case and the implications of a friendly settlement on human rights protection at the individual and societal level. Other aspects that the guidelines may touch on are procedural issues including the timelines for, and methods of implementation of the agreements. Parties may be encouraged to discuss and mutually agree on reasonable timelines for implementation of the agreement. Depending on the circumstances of each case and agreement, there will be aspects (public apology) that may be subject to immediate implementation, while other aspects (law reform) that may require a longer period. Setting mutually agreed upon timelines facilitates the monitoring of implementation of agreements. If implementation is excessively delayed, the parties would have the option to review the terms or consider termination, and opt to pursue the matter through the normal course of adjudication.

Also, the method of implementation may also be discussed and determined mutually between the parties. There are some cases where this may be more relevant such as with cases that affect entire communities and call for collective measures.⁷³ It is equally important that the measures employed are culturally relevant and conducive to local communities' traditions, customs and social welfare.⁷⁴

Another aspect that can benefit from further clarification and a standard operating procedure is the element of review and approval by the relevant human rights oversight body. While the criteria provide an objective basis for evaluation, it would be helpful to establish a procedure for the endorsement and whether it will be guided by one or a panel of appointed Commissioners/Judges for the task. The process of monitoring and reporting on the implementation of the agreement is equally important to set out clearly. The guidelines should establish that the agreements are made available to the public and that regular reports be provided by the parties to ensure implementation is on course. These are good practices, of which the African Children's Rights Committee is already putting into place with the monitoring of the *Malawi Children's Rights* case.

73 *Center for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Enderois Welfare Council v Kenya* 276/2003 ACHPR (4 February 2010) <https://www.refworld.org/cases/ACHPR,4b8275a12.html> (accessed 28 August 2019); The case involves mass eviction of an entire indigenous community.

74 *Center for Minority Rights* (n 73).

In terms of the African human rights system, beyond the need for a specialised framework on friendly settlements, there may be need to clarify the practice with respect to complaints by individuals. According to the African Charter, the language suggests that friendly settlement is an option only available to states not individuals meanwhile Rule 109 of the Commission's 2010 Rules of Procedure suggest that amicable settlement is applicable to all communications. In practice, friendly settlements have been applied to individual communications, but clarification of this practice grounded in the African Charter or its interpretation would be important for the increased use of this mechanism without subjecting the Commission to legal challenges by state parties.

Finally, once guidelines are adopted, the friendly settlement mechanism can be widely promoted as a measure capable of delivering on victims', applicants', and states' interests in resolving the matter amicably before a finding of state responsibility is issued. This can be done by integrating the measure in the individual complaint mechanism. Second, greater awareness of the mechanism among state and the public is necessary. To date, it is presumed that the AU member states are not fully aware of this mechanism and how it can be employed to their benefit. The fact that this mechanism can shield states from public naming and shaming is an incentive that is likely to incentivise them to seeking a resolution before a finding of state responsibility is made public. Moreover, by voluntarily engaging in a friendly settlement, this contributes to improving the public image of the state by showing good faith in resolving the matter and meeting victim demands. Therefore, where the human rights regime has so far been largely premised on naming and shaming of states, sometimes with little tangible outcomes, the friendly settlement mechanism presents a different spin, a more positive and constructive approach to addressing human rights violations and more effectively delivering reparations to victims. States should be brought on board to learn about the benefits of the mechanism and to thereby enhance protection of human rights in the region, both at the individual and broader, societal level.

4 CONCLUSION

We have seen from the analysis above that friendly settlements can have both positive and negative elements and effects on human rights protection in the region. In the Inter-American system it has proven to deliver results particularly in the areas of effectiveness, comprehensiveness, compliance and even victim's agency and empowerment through their effective participation in the agreements. Specifically, it may represent a win-win situation for all parties by avoiding the naming and shaming of states; by generating a resolution and delivery of reparations to the victims; and finally, by reducing the backlog of cases that can otherwise compromise the integrity of the human rights protection system by failing to deliver decisions in a timely manner.

To date, the practice of friendly settlement has varied across the regions for different reasons. In the Inter-American system it has been promoted in large part to manage the backlog of cases that would otherwise be left clogging the system, resulting in excessive delays. In the African system it has not become widely used and when it has, it has been a process frequently manipulated by states, leading to agreements concluded largely in their favour, rather than in the best interest of the victims and the protection of their rights to remedy and justice. As such, friendly settlement is a tool that depending on the approach taken, can be used to advance the respect for human rights or undermine them. In order for the African human rights system and its mechanisms to uphold the fundamental rights enshrined in the African Charter, as well as other core instruments, a specialised framework should be considered to guide parties on the best practices and international principles to be applied when negotiating and sanctioning such agreements.⁷⁵ A specialised framework on friendly settlement would lay out objective criteria for their endorsement, when and how to initiate negotiations, standards for monitoring and termination of agreements, and best practices. An objective and transparent process will reinforce confidence in the mechanism, and in turn, encourage parties to engage the mechanism.

At present, the African Commission, as the institution most accessible to the public and receiving the largest number of human rights communications in comparison to the other mechanisms, is struggling with a backlog of cases, causing considerable delays in the processing time of communications. On average, a communication can take several years to be considered before a merits decision is adopted. Delays aside, compliance with Commission decisions is a persistent challenge; coupled with a weak enforcement mechanism. This combination of factors demands creative solutions and strategies to ensure that the regional human rights protection mechanism can effectively deliver on its mandate in a timely fashion. In response, the friendly settlement procedure represents several unexplored opportunities for enhanced human rights protection in the region. The *Malawi Children's Rights* case is a prime example of fundamental reforms that a successfully negotiated settlement can deliver.

To render the friendly settlement procedure more effective and impactful in Africa, the Commission, the Committee and the Court, would be further strengthened by introducing relevant amendments to their rules of procedure and by putting in place guidelines governing the friendly settlement procedure.

75 This may be in the form of guidelines or similar tool. The IACHR published a 'Handbook on Friendly Settlements in the Petition and Case system' that aims to assist the users of the system to navigate this mechanism, while at the same time providing best practices with respect to the key components of these agreements.

II

**ARTICLES RELATED TO THE THEME OF
THE YEAR 2019: 'REFUGEES,
RETURNEES AND INTERNALLY
DISPLACED PERSONS: TOWARDS
DURABLE SOLUTIONS TO FORCED
DISPLACEMENT IN AFRICA'**

**ARTICLES PORTANT SUR LE THÈME DE
L'ANNÉE 2019: « ANNÉE DES RÉFUGIÉS,
DES RAPATRIÉS ET DES PERSONNES
DÉPLACÉES: VERS DES SOLUTIONS
DURABLES AUX DÉPLACEMENTS
FORCÉS EN AFRIQUE »**

The protection of climate refugees under the African human rights system: proposing a value-driven approach

*Michael Addaney**, *Ademola Oluborode Jegede*** and *Miriam Z Matinda****

ABSTRACT: The predicament of climate refugees has gained international attention. However, there is no explicit legal protection for them under international law, including African regional law. Their legal protection is not clear. Some scholars and practitioners argue that the existing international framework on refugees does not cover climate refugees. At the African regional level, the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa refers to climate-induced displacement but it does not govern migration beyond borders. This article examines international human rights and refugee law instruments, particularly the 1951 UN Convention Relating to the Status of Refugees and 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, to identify the challenges and prospects in the legal recognition and protection of climate refugees in Africa. It finds that the gaps existing in the refugee protection regime for climate refugees is historical and continues up to the present. The article consequently argues that the best way to ensure protection for climate refugees in Africa is the operationalising by the AU of its solidarity and humanistic approach as a demonstration of its commitment to the ideals of Pan-African cooperation for addressing common continental problems.

TITRE ET RÉSUMÉ EN FRANCAIS:

La protection des « réfugiés du climat » dans le système africain des droits de l'homme: la proposition d'une approche fondée sur les valeurs

RÉSUMÉ: La situation précaire des réfugiés climatiques a attiré l'attention de la communauté internationale. Cependant, le droit international, y compris le droit régional africain, ne les protègent pas. Leur protection légale n'est pas claire. Praticiens et doctrinaires sont d'avis que le cadre international existant sur les réfugiés ne couvre pas les réfugiés climatiques. Au niveau régional africain, la Convention de l'Union africaine de 2009 sur la protection et l'assistance aux personnes déplacées en Afrique fait référence au déplacement induit par le climat, mais ne régit pas la

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migration au-delà des frontières. Cette contribution examine les instruments internationaux relatifs aux droits de l'homme et au droit des réfugiés, en particulier la Convention des Nations Unies de 1951 relative au statut des réfugiés et la Convention de l'OUA de 1969 régissant les aspects spécifiques des problèmes des réfugiés en Afrique, afin d'identifier les défis et les perspectives de la reconnaissance et de la protection juridiques des réfugiés climatiques en Afrique. La contribution constate que les lacunes existant dans le régime de protection des réfugiés climatiques sont historiques et se perpétuent jusqu'à présent. Par conséquent, cette contribution estime que le meilleur moyen d'assurer la protection des réfugiés climatiques en Afrique est la mise en œuvre par l'Union africaine de son approche solidaire et humaniste, démontrant ainsi son attachement aux idéaux de la coopération panafricaine visant à résoudre les problèmes continentaux communs.

KEY WORDS: climate change, climate refugees, international human rights law, refugee protection, refugee law, solidarity

CONTENT:

1	Introduction.....	243
2	Climate refugees: legal gaps and protection challenges.....	245
3	Protection of climate refugees: African human rights system and a value driven approach	252
4	Conclusion.....	258

1 INTRODUCTION

Climate change as a potential trigger of flight or voluntary international migration has gained significant attention.¹ Developing countries are particularly vulnerable to climate change due to the limited resources to cope with its consequences.² Due to the continent's weak adaptive capacity, Africa is particularly vulnerable as evidenced by the fifth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC).³ The IPCC unequivocally posits that the threat of climate change to Africa may potentially reverse current development gains.⁴ Complicating matters further is the rapid expansion of the Sahara Desert in terms of growth and spatial extent, often spilling into

1 See, generally, B Mayer & F Crépeau (eds) *Research handbook on climate change, migration and the law* (2017); B Mayer *The concept of climate migration* (2016); W Kälin & N Schrepfer *Protecting people crossing borders in the context of climate change: normative gaps and possible approaches* (2012); F Biermann & I Boas 'Climate change and human migration: towards a global governance system to protect climate refugees' in J Scheffran, M Brzoska, HG Brauch, PM Link & J Schilling (eds) *Climate change, human security and violent conflict* (2012).

2 See, generally, S Behrman & A Kent (eds) *Climate refugees: beyond the legal impasse?* (2018); Intergovernmental Panel on Climate Change (IPCC). *Climate change 2014: impacts, adaptation, and vulnerability. Summary for policymakers*. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (2014).

3 IPCC, *Managing the risks of extreme events and disasters to advance climate change adaptation* (2012).

4 IPCC. *An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development and Efforts to Eradicate Poverty: Summary for Policymakers* (2018), <http://ipcc.ch/report/sr15/> (accessed 10 August 2019).

precarious zones, placing communities at risk. The Food and Agriculture Organization (FAO) observes that an estimated 319 million hectares of Africa's land is vulnerable to desertification-related hazards due to sand movement.⁵ The intense rate of desertification could make most parts of the African continent uninhabitable. For example, the United Nations (UN) reports that desertification could send about 50 million Sub-Saharan migrants elsewhere by 2020, with 700 million Africans being forcefully displaced across the continent due to land degradation by 2050.⁶ Already, the FAO has revealed that about 26.4 million people were displaced annually in Africa due to climate-related disasters between 2008 and 2015.⁷ UN reports and resolutions have also drawn the link of climate change to human rights of vulnerable populations and thus, adaptation to the adverse effects of climate change will require measures that address the multi-dimensional impacts of climate change such as cross border climate-induced migration.⁸

Although the plight of climate refugees has gained prominence in international discourses, their legal protection under international and regional law in Africa is not clear. Some scholars have argued that the existing international framework on refugees, particularly the 1951 Convention Relating to the Status of Refugees (UN Refugee Convention) and 1969 Convention governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention), do not cover climate-induced asylum seekers. The only instrument to have mentioned climate-induced displacement at the African regional level, the 2009 African Union (AU) Convention for the Protection and

5 Food and Agriculture Organization (FAO), 'The magnitude of the problem', <http://www.fao.org/docrep/x5318e/x5318e02.htm> (accessed 10 August 2019).

6 'Desertification: The people whose land is turning to dust' *BBC News*, 2 November 2015, <https://www.bbc.com/news/world-africa-34790661> (accessed 10 August 2019); IPBES Secretariat, 'Media Release: Worsening Worldwide Land Degradation Now 'Critical', Undermining Well-Being of 3.2 Billion People', 23 March 2018, <https://www.ipbes.net/news/media-release-worsening-world-wide-land-degradation-now-%E2%80%98critical%E2%80%99-undermining-well-being-32> (accessed 10 August 2019).

7 FAO (n 5).

8 See, UNHCR res. 10/4 (25 March 2009), OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights* (A/HRC/10/61) (15 January 2009); UNFCCC COP, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention* (15 March 2011), Decision 1/CP.16, referred in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1, at preamble; OHCHR, *A New Climate Change Agreement Must Include Human Rights Protections for All: An Open Letter From Special Procedures Mandate-Holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change on the Occasion of the Meeting of the Ad Hoc Working Group on the Durban Platform for Enhanced Action in Bonn* (20-25 October 2014) (17 October 2014).

Assistance of Internally Displaced Persons in Africa (Kampala Convention) appears not to govern migration beyond borders.⁹ The article investigates whether the gap in the existing refugee protection regime for climate refugees is historical, and if so, how existing values within key instruments under the African human rights system can ensure sufficient protection to those who, due to changing climate conditions, are forced to leave their countries of origin. The article is divided into four parts. Part one is this introduction; followed by part two which assesses the gaps and challenges in the existing legal regime in relation to the protection of climate refugees in Africa. Part three analyses how the AU can recognise and offer protection for climate refugees under the African human rights system through the African values of humanity and pan-African solidarity. Part four summarises the argument and concludes the discussion.

2 CLIMATE REFUGEES: LEGAL GAPS AND PROTECTION CHALLENGES

The legal gaps and protection challenges in the existing refugee protection regime for climate refugees is historical. The reasons for this position are not farfetched. The structure and normative content of the international refugee protection system was strongly influenced by the system for protecting aliens and national minorities by the League of Nations. For instance, the Aliens' Law recognises the distinctive vulnerability of individuals who were without the effective protection of their country of habitual resident.¹⁰ Hathaway underscores the specific vulnerabilities of individuals who leave their home states when he asserted that

the individual, when he leaves his home State, abandons certain rights and privileges, which he possessed according to the municipal law of his State and which, to a certain limited extent, especially in a modern democracy, gave him control over the organization of the State ... In a foreign State, he is at the mercy of the State and its institutions, at the mercy of the inhabitants of the territory, who in the last resort accord him those rights and privileges which they deem desirable.¹¹

This implies that the national law of a foreign country, without international law, might not offer sufficient protection to foreign nationals facing harm or the violation of their human rights. The Aliens'

9 AO Jegede 'Indigenous peoples, climate migration and international human rights law in Africa, with reflections on the relevance of the Kampala Convention' in B Mayer & F Crépeau (eds) *Research handbook on climate change, migration and the law* (2017) 169-189; B Glahn, 'Climate refugees? Addressing the international legal gaps', International Bar Association, 11 June 2009, <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=B51C02C1-3C27-4AE3-B4C4-7E350EBoF442> (accessed 15 July 2019).

10 The Alien Friends Act of 1798 and the Alien Enemy Act of 1798. The two Acts allowed the president to imprison and deport non-citizens who were deemed dangerous. See, generally, R Lillich *The human rights of aliens in contemporary international law* (1984) 5-40; C Amerasinghe *State responsibility for injuries to aliens* (1967) 23; A Roth *The minimum standard of international law applied to aliens* (1949) 113.

11 JC Hathaway *The rights of refugees under international law* (2005) 75.

law thus merely accommodated the fundamental concerns of foreign nationals in a minimal manner in order to ensure sustained international relations between states. The evolution of the Aliens' Law led to the validation of some exclusive harms in the sphere of international law. States that fail to meet the minimum standards of protection that aliens are entitled to can thus be compelled to account for such violation through the applicable recognised international mechanisms.¹² No doubt, the Aliens' Law was therefore the first international legal mechanism to deny the absolute right of states to treat persons within their jurisdiction in whatever manner they deemed appropriate. The law does this through the recognition of the distinctive defenselessness of individuals outside the effective protection of their home state and thus, provided a mixture of unreserved and conditional responsibilities owed to aliens. These responsibilities were enforced by an interstate accountability mechanism that was operationalised at the multilateral and bilateral level. However, while this development laid the groundwork for the successive evolution of the existing international refugee protection system, the Aliens' Law neither requires any state to accommodate foreigners fleeing home country by law nor confer any clear set of rights on foreigners accommodated in a host state. What is clear is that the Aliens' Law still affords states a great degree of discretion to deal with aliens in certain manner as they wish and hardly reflects the modern day of justice required by migrants.

The Minorities Treaties, similar to the Aliens' Law, were adopted shortly after the World War I to promote the interests of states through demanding that the countries defeated respect the human rights and dignity of ethnic and religious minorities residing within their territories.¹³ The underlining rationale was to avoid the possibility of another world war. The Minorities Treaties are, a major development over the normative and procedural framework of the Aliens' Law,¹⁴ however, certain gaps are glaring in terms of protection. For instance, apart from the fact that it is not clear whether refugees can constitute a minority in terms of the provisions of the treaties, there is no official standing that citizenship can be conferred on populations belonging to minority groups. It may be argued that Minorities Treaties were not an international regime for the protection of the human rights of minorities because it applied only to states that were forced to accept

12 As above.

13 These were unilateral declarations made before the League of Nations. The treaties containing provisions relating to minorities included the Treaty of 28 June 1919 between the Principal Allied and Associated Powers and Poland, placed under the guarantee of the League of Nations, 13 February 1920; the Treaty of 10 September 1919 between the Principal Allied and Associated Powers and Czechoslovakia, placed under the guarantee of the League of Nations, 29 November 1920; the Treaty of 10 September 1919 between the Principal Allied and Associated Powers and Serb-Croat-Slovene State, placed under the guarantee of the League of Nations, 29 November 1920; and Articles 62 to 69 of the Treaty of Peace with Austria (signed at St. Germain-en-Laye on 10 September 1919), placed under the guarantee of the League of Nations, 22 October 1920. See H Rosting 'Protection of minorities by the League of Nations' (1923) 17 *American Journal of International Law* 647-8.

14 As above.

the provisions on minority rights as part of the broad terms of peace. Nonetheless, the provisions in the Minorities Treaties were also applicable in states that voluntarily made general declarations to respect the rights of minorities as a requirement to be admitted into the League of Nations.

The emergence of the contemporary international refugee protection mechanism closely aligns with the development of the international human rights system and humanitarian action¹⁵ as they are both products of the 20th century.¹⁶ The codification of the international refugee protection regime happened shortly after the Universal Declaration of Human Rights (Universal Declaration) and its normative content and structure were largely influenced by the Universal Declaration. The system for protecting refugees at the international level is therefore human rights-based and places the rights and dignity of vulnerable groups and individuals at the centre of protection. Hathaway argues that the international refugee protection system is to be understood as system that responds to situation-specific vulnerabilities without which refugees may be denied of meaningful benefits required for living dignified lives under the international human rights system.¹⁷ Hence it does not surprise that the rights of refugees are recognised and guaranteed in the International Bill of Rights which emphasise dignity as a human rights norm.¹⁸ Yet, such provisions are not without inherent weaknesses in terms of the protection of climate refugees. For instance, the Universal Declaration recognises the right to seek refuge as a basic human right and guarantees in article 14(1) that 'everyone has the right to seek and to enjoy in other countries asylum from persecution'.¹⁹ However, article 14(2) fails to provide for an exhaustive regulation on the scope of neither the right nor the type of protection that asylum seekers and refugees may enjoy. No doubt, climate refugees may be covered by article 13(2) of the Universal Declaration which provides that everyone has the right to leave any country including his or her own,²⁰ a provision which is reaffirmed by the International Covenant on Civil and Political Rights (ICCPR) in its article 12(2).²¹ However there are weaknesses in this regime. There are acceptable limitations on the right

15 As above.

16 M Addaney 'A step forward in the protection of urban refugees: the legal protection of the rights of urban refugees in Uganda' (2017) 17 *African Human Rights Law Journal* 218-243.

17 Hathaway (n 11) 26.

18 WA Schabas *The Universal Declaration of Human Rights: The travaux préparatoires, volume 1, October 1946 to November 1947* (2013) 37. Human rights provisions of the UN Charter including the Universal Declaration (1948), ICCPR (1966), and ICESCR (1966) form the international Bill of Rights.

19 Universal Declaration, art 14(1) & (2).

20 Universal Declaration, art 13(2).

21 The International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, 999 UNTS 14668, art (12)(2).

to leave one's country,²² practically, it is commonly the lack of the right to a third country which constrains the right to leave one's country.²³

There have been arguments to address the weaknesses in the human rights regime, but these are not without objections. For instance, some scholars argue that international human rights law should oblige states to consider the extraterritorial impacts of their contributions to the climate crises.²⁴ This implies that people from developing states fleeing the adverse effects of climate change may be admitted into developed states who are accountable for the historic emissions causing climate change. For example, the wording of the ICCPR that restricts a state's obligations to individuals with its effective control or jurisdiction,²⁵ is comprehensive to include other person in a different state who are adversely affected by the extraterritorial consequences of the state's contributions to the global climate crises. In order to be considered under the jurisdiction of a state under international law, an individual should be within the 'effective control' of such state.²⁶ The other weakness with the ICCPR in relation to protecting the rights of refugees is that most rights do not directly speak to the needs of climate refugees who are often unrecognised and largely undocumented.

The historical development of the international refugee protection system is instructive in examining the protection of climate refugees. For instance, the failed efforts of the international community to repatriate European refugees after the World War II boosted and influenced arrangements for resettling refugees in third countries.²⁷ It is recorded that more than 1 million refugees were resettled by the then International Refugee Organisation (IRO) from 1947 and 1951.²⁸ The inability of the IRO to resettle or repatriate all refugees within its mandated timeframe led to the development of the existing international refugee protection system as the UN found a solution in the assimilation of refugees through a new international human rights system.²⁹ Consequently, the United Nations High Commissioner for Refugees (UNHCR) was established alongside the development and

22 As above.

23 Mayer (n 1).

24 JH Knox 'Linking human rights and climate change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477-498.

25 Although the ICCPR actually refers to duties extending only to individuals 'within [the State's] territory and subject to its jurisdiction,' the general view is that the language should be read disjunctively, to require the state to respect and ensure the rights of those within its territory *and* those within its jurisdiction. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), (2004), ICJ 136, para 111.

26 Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para 6.

27 Independent Commission on International Humanitarian Issues (ICHI) 'Refugees: The dynamics of displacement' (1986) 32.

28 As above.

29 UN Department of Social Affairs 'A study of statelessness' UN Doc E/1112, (1949) 23.

adoption of the UN Refugee Convention,³⁰ with the Convention becoming the foundation of refugee rights protection under international law. The 1951 Refugee Convention and the adoption of its Protocol³¹ in 1967 was significantly driven by the need to construct a new framework to govern international action in response to the colossal calamity that befell persons displaced in Europe through the World War II.³² Both the UN Convention and its 1967 Protocol were widely signed with 147 states parties to one or both mechanisms, comprising over 50 states from African. However, climate refugees are not covered by the conventional definition enshrined in the UN Refugee Convention and the seriousness of the climate crisis should inspire similar action from the UN.

Under the UN Convention, states committed themselves to the obligation of non-refoulement, or non-returning of persons with well-founded fear of persecution on the grounds of their race, religion, nationality, membership of a particular social group, or political opinion.³³ The protection of non-discrimination, under article 3, states that the provisions guaranteed under the Convention should be applied by states 'without discrimination as to race, religion or country of origin'.³⁴ Non-penalisation, under article 31, ensures that states do not penalise refugees 'on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened ... enter or are present in their territory without authorization ...'³⁵ The principle of non-refoulement, under article 33 entails that no state 'shall expel or return (refouler) a refugee in a manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion'.³⁶

Under this obligation, such persons, whether individually or in groups, were not to be returned to the frontiers of territories where their lives or human rights would be undermined. Arbel and others argue that the principle of non-refoulement has assumed the status of customary international law that binds states which are not states parties to the UN Convention and 1967 Protocol.³⁷ Persons or groups fleeing their habitual country of residence on the grounds of climate-related events such as famine, drought, or flooding may not meet the

30 Hathaway (n 11 above).

31 The 1967 Protocol erases the geographical and temporary limitations provided in the 1951 Convention and made the Convention a truly internationally inclusive system of protection for those fleeing persecution.

32 A Guterres *UN Refugee Agency, 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* (2011) 1.

33 E Lauterpacht and D Bethlehem 'The scope and content of the principle of non-refoulement: opinion' in E Feller, V Turk and F Nicholson (eds) *Refugee protection in international law: UNHCR's Global Consultation On international protection* (2003) 87, 142.

34 1951 Convention, art 3.

35 1951 Convention, art 31.

36 1951 Convention, art 33.

37 As above.

requirements stipulated in the 1951 Convention's definition of a refugee under Article 1 since it is impossible for such a person or group to articulate a 'well-founded fear' of persecution. The provisions in the UN Convention have however been generously interpreted since its adoption to respond to developments in international law particularly in the field of international human rights and humanitarian law. For example, states now recognise people fleeing armed conflict as refugees; and most states also recognise gender-based violence including rape, female genital mutilation and forced sterilisation as a form of persecution as provided in the UN Convention.³⁸ However, legal protection of climate refugees is yet to benefit from such generous interpretation of its provisions. Also, the instrument is non-binding and hence lacks a treaty body to monitor member states' compliance with the obligations imposed by it. Also, the right of non-refoulement has drawbacks in that states disagree about its breadth, a development that has led to inconsistent protection of refugees.³⁹ Arguably these disagreements undermine the application of the principle to respond to the plights of climate migrants.

At the African regional level, the 1969 African Union (AU) (formerly Organisation of African Unity [OAU]) Convention governing the specific aspects of refugee problems in Africa defined refugees to include persons who are fleeing 'events seriously disturbing public order'.⁴⁰ This definition can be understood to cover persons fleeing climate-induced disasters and extreme weather events, but, requires further clarification by the treaty monitoring body. The 1984 Cartagena Declaration on Refugees contains similar provision.⁴¹ It implores states parties to define refugee as person who is among others 'fleeing their country because their lives, safety or freedom have been threatened by... massive violation of human rights or other circumstances which have seriously disturbed public order'.⁴² These definitions were applied by some states in the Horn of Africa during the 2011-12 droughts in

38 See, generally, E Arbel, C Dauvergne and J Millbank (eds) *Gender in refugee law: from the margins to the centre* (2014).

39 S Momin 'A human rights based approach to refugees: a look at the Syrian refugee crisis and the responses from Germany and the United States' (2017) 9 *Duke Forum for Law and Social Change* 55-79. For instance, Hathaway posits that states fear that the existing treaty-based regime for refugee protection maybe be threatened by those who seek to 'leverage' undefined asylum by extending non-refoulement and refugee rights to 'non-refugees'. See JC Hathaway 'Leveraging asylum' (2010) 45 *Texas International Law Journal* 506, 507. Goodwin-Gill on the other hand supports a broader application of the notion to all who are at risk. He observes that Hathaway's observation 'lacks a sense of the big picture, of a world in which customary international law is a dynamic or, a continuing process, responding, growing, contracting, and refining under the lens of daily practice by States and international institutions'. See, GS Goodwin-Gill 'Non-refoulement, temporary refuge, and the "new" asylum seekers' in DJ Cantor and J-F Durieux (eds) *Refuge from inhumanity? war refugees and international humanitarian law* (2014) 447.

40 Africa Union (AU), Convention Governing the Specific Aspects of Refugee Problems in Africa, art 1(2) (10 September 1969)

41 *Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama* (22 November 1984).

42 As above.

admitting displaced persons from Somalia.⁴³ Also, some states in Latin America granted asylum to persons who were displaced by the 2010 earthquake in Haiti.⁴⁴ These scenarios are analogous to the circumstance of climate refugees fleeing the adverse effects of climate change such as flooding and water-related risks, hunger and starvation and extreme heat as it was generally accepted by states in Latin American that Haitian asylum seekers had a 'well-founded fear of persecution by non-state actors that arose from the vacuum of governmental authority after the earthquake'.⁴⁵ Although the OAU Refugee Convention is obligatory in Africa, it has no monitoring mechanism and has hardly been applied to respond to the situations of climate refugees. Also the Cartagena Declaration is a soft law. The apparent weaknesses in the refugee protection regime regarding the protection of climate refugees has inspired scholars to explore how the legal weaknesses could be addressed. Some scholars have argued for a reform of the UN Refugee Convention through the adoption of a second protocol to revise the definition of refugees to include climate migrants.⁴⁶ Other scholars such as Moberg argues that political refugees may suffer collateral damage by losing the specificity of their protection through any substantial revision of the definition in the UN Refugee Convention scope.⁴⁷ The potential within the AU Kampala Convention for climate induced displacement and extraterritorial application has also been explored as an option in the context of indigenous peoples.⁴⁸ Recognising and protecting the rights of climate refugees has, nevertheless, always been and continues to be subject to political, economic, legal and humanitarian contestations.⁴⁹

Yet, failure to find a durable solution may lead to the greatest humanitarian crises in the 21st century. For instance, the First Assessment Report of the IPCC observes that the highest single impact of climate change will be on human migration.⁵⁰ The report recognises that while people moving across international borders due to climate-

43 E Ferris & J Bergmann 'Soft law, migration and climate change governance' (2017) 8 *Journal of Human Rights and the Environment* 6-29.

44 As above.

45 Nansen Initiative, 'Protection Agenda' (2015) 54, <https://nanseninitiative.org/wp-content/uploads/2015/02/protection-agenda-volume-1.pdf> and <https://nanseninitiative.org/wp-content/uploads/2015/02/protection-agenda-volume-2.pdf> (accessed 25 January 2019).

46 DZ Falstrom 'Stemming the flow of environmental displacement: creating a convention to protect persons and preserve the environment' (2002) 13 *Colorado Journal of International Environmental Law and Policy* 17.

47 KK Moberg 'Extending refugee definitions to cover environmentally displaced persons displaces necessary protection' (2009) 94 *Iowa Law Review* 1121.

48 AO Jegede 'Rights away from home: climate-induced displacement of indigenous peoples and the extraterritorial application of the Kampala Convention' (2016) 16 *African Human Rights Law Journal* 58-82.

49 B Mayer 'Climate change and international law in the grim days' (2013) 24(3) *European Journal of International Law* 949; F Biermann and I Boas 'Preparing for a warmer world: towards a global governance system to protect climate refugees' (2010) 10 *Global Environmental Politics* 60-88.

50 UN Human Rights Council, *Report of the Office of the U.N. High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, 20-41, UN Doc A/HRC/10/61 (15 January 2009).

related events are entitled to general human rights guarantees in the receiving state, they may not have legitimate right of entry.⁵¹ International law instruments on climate change, the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol, and the 2015 Paris Agreement do not offer any protection to climate refugees,⁵² but, promisingly, climate-induced migration was incorporated into the agenda of the 2010 Cancun Adaptation Framework. Consequently, article 14(f) of the Cancun Framework obliges states parties to adopt ‘measures to reinforce understanding, coordination and cooperation relevant to climate-induced displacement, migration, and planned relocation’.⁵³ Therefore, the question that falls for consideration is whether there exists in the African regional human rights system a set of values that can shape the debate on the recognition and protection of climate refugees in Africa.

3 PROTECTION OF CLIMATE REFUGEES: AFRICAN HUMAN RIGHTS SYSTEM AND A VALUE DRIVEN APPROACH

The discussions in section two demonstrate that the international and regional instruments developed under the auspices of the UN and AU are not sufficient in protecting climate refugees leaving identifiable gaps in the international framework. These gaps are primarily related to a lack of an explicit confirmation of the link between climate change and forced migration and corresponding obligations of supranational and international humanitarian institutions. The UN, however, has long encouraged the development of regional human rights systems to complement the international system of human rights protection.⁵⁴ Regional human rights systems comprise of regional instruments, mechanisms and institutions which play significant role in the promotion and protection of human and peoples’ rights.⁵⁵ Regional human rights systems are developed to reflect mainly regional values and offer a more specific framework than international system.

The OAU (now AU) became the third after Europe and the Americas to establish a pan-regional system for human rights protection. In particular, the African human rights system is driven by

51 As above.

52 R Kuusipalo ‘Exiled by emissions - climate change related displacement and migration in international law: gaps in global governance and the role of the UN Climate Convention’ (2017) 18 *Vermont Journal of Environmental Law* 615-647.

53 Conference of the Parties to the Framework Convention on Climate Change, *Report of the Conference of the Parties on its Sixteenth Session*, 14, 14(f), UN Doc. FCCC/CP/2010/7/Add.1 (15 March 2011), <https://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf> (accessed 12 August 2018).

54 The role of regional human rights mechanisms, European Parliament, Directorate General for External Policies – Policy Department, doc EXPO/DROI/2009, 19-20.

55 J Klucka ‘Regional judicial and non-judicial bodies: an effective means for protecting human rights?’ (2018) 1 *Eastern European Yearbook on Human Rights* 56.

the goal of safeguarding collective security, territorial integrity and the promotion of solidarity among African states. Regional human rights instruments and mechanisms, thus, support the identification of international human rights norms and standards that reflect the particular human rights concerns of geographic regions as well as in implementing these instruments on the ground.⁵⁶ The AU can arguably encourage regional efforts to host refugees which would be cost-effective and, particularly at times when there are similarities in local languages and customs across neighbouring states.⁵⁷ Regional approaches also have the potential to help pre-empt migration flows and in managing cross border displacement which might cost far less than supporting individuals who arrive in a country *en masse* because of climate-induced conflict.⁵⁸ However, the success of the legal protection of climate refugees in Africa would fundamentally depend on states' commitment to and involvement in regional negotiations in this regard. Arguably, finding durable solution to the predicament of climate refugees in Africa requires states to embrace the spirit of pan-African solidarity and regional cooperation in order to minimise the human suffering associated with the adverse effects of climate change. These two concepts could thus form a value-driven human rights-based approach to climate refugee protection in Africa.

In relation to the spirit of pan-African solidarity, the African human rights system is by tradition observed to be driven by a communistic understanding of humanity, human values and the individual human being.⁵⁹ In a typical African society, the individual interests and rights are subsumed under the broader interests and well-being of the community and in a suitable context, community may imply any form of social unit that consists of more than a single human being. Winks argues that 'the collective units or groups include the individual family group through the clan, the tribe, the people, the nation, and the state to the Pan-African community'.⁶⁰ The communal culture as developed and practised in Africa is underpinned by communistic values in the sense of the African conception of right and wrong and good and evil. This notion strongly influences the origins, contents, ethos and objectives of the African human rights system.

The African Charter on Human and Peoples' Rights (African Charter),⁶¹ which is the fundamental instrument of the African human rights system, recognises individual rights as well as peoples' rights. The Charter unequivocally emphasises that 'the virtues of the historical

56 As above

57 VO Kolmannskog *Norwegian Refugee Council, Future Floods of Refugees: A Comment on Climate Change, Conflict and Forced Migration* (2008) 19-21 http://www.nrc.no/arch/_img/9268480.pdf (accessed 10 August 2019).

58 HJ Schellnhuber *Climate Change as a Security Risk* (2008) 204-07, http://www.wbgu.de/wbgu_jg2007_engl.pdf (accessed 10 August 2019).

59 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* 447-464.

60 *Ibid.*

61 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, entered into force on 21 October 1986.

tradition and the values of African civilisation should inspire and characterise the reflection on the concept of human and peoples' rights by recognising that fundamental human rights originate from the attributes of human beings'.⁶² Important from the perspective of climate refugees, as a collective and individuals, the African Charter underscores the critical necessity in giving special consideration to the right to development and to the recognition that civil and political rights cannot be detached from economic, social and cultural rights in their realisation as well as universality and that the fulfilment of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights.⁶³ This is necessary for climate refugees whose problems often straddle around the violation of both political and socio-economic rights at individual and collective levels. The international and regional refugee law in Africa generally guarantees the rights of all refugees and migrants, including the right to housing;⁶⁴ the right to work;⁶⁵ the right to education;⁶⁶ the right to access the courts;⁶⁷ the right to freedom of movement within the territory;⁶⁸ as well as the right to be issued with identity and travel documents⁶⁹ to aid them to live decent lives in dignity.⁷⁰ However, as indicated earlier in the article, there are millions of climate refugees in Africa who are exposed to abuse as they are not recognised, and thus, need protection to safeguard their human rights and fundamental freedoms. Mayer argues that recognising and offering protection to climate refugees requires a political decision due to the challenges associated with negotiating for a legal solution.⁷¹ Consequently, in the spirit of pan-African solidarity, the negotiation of legal solutions for climate refugees should be more feasible as it affords an opportunity to demonstrate the commitment of member states to the belief system which informed the formulation and adoption of the African Charter. More so, it was something similar that led to the adoption of the OAU Refugee Convention to respond to the specific protection challenges that was confronting refugees in Africa. Hence, the AU needs to be guided by its shared values and guiding principles in order to find a durable solution

62 African Charter, preambular para. 4.

63 TP Van Reenen & H Combrinck 'The UN Convention on the Rights of Persons with Disabilities in Africa: progress after 5 years' (2011) 8 *SUR International Journal on Human Rights* 133-165 at 137.

64 1951 Convention, art 21.

65 1951 Convention, arts 17, 18 & 19.

66 1951 Convention, art 22.

67 1951 Convention, art 16.

68 1951 Convention, art 26.

69 1951 Convention, arts 27 & 28.

70 Addaney (n 16); ZA Lomo 'The struggle for protection of the rights of refugees and IDPs in Africa: making the existing international legal regime work' (2000) 18 *Berkeley Journal of International Law* 6.

71 B Mayer *The concept of climate migration* (2016). See, also, B Docherty & T Giannini 'Confronting a rising tide: a proposal for a convention on climate change refugees' (2009) 33 *Harvard Environmental Law Review* 363; J McAdam 'Swimming against the tide: why a climate change displacement treaty is not the answer' (2011) 23 *International Journal of Refugee Law* 2.

as the African continent is regarded as the most vulnerable to the adverse effects of climate change.

Besides, the transformation of the OAU into the AU in 2000 has reinforced the consciousness that the sustainable development of Africa is significantly dependent on effective regional integration and pan-African solidarity, protection of human rights, good governance,⁷² and more importantly, the operationalisation of African shared values. The concept of African shared values, is however contested as scholars such as Smith claim that Africans have not collated or explicitly conceptualised a value system and as such, values are ingrained in customs, traditions and established practices.⁷³ Notwithstanding, Gluckman argues that ‘the denial of an African conception and system of law is an erroneous position stemming from a belief imbued with ignorance about how law works among Africans’,⁷⁴ African shared values has been conceptualised as ‘the norms, principles and practices adopted by the AU, which provide the basis for collective actions and solutions in addressing the political, economic and social challenges that impede Africa’s integration and development’.⁷⁵

As informed by the shared values of Africa, the principle of pan-African solidarity has remained a fundamental basis in African regional law since the establishment of the OAU in 1963, with the founding charter proclaiming among others the ‘promotion of unity and solidarity among African states’,⁷⁶ and the ‘co-ordination and intensification of their co-operation and efforts to achieve a better life for the peoples of Africa’.⁷⁷ The AU exists to also ‘achieve unity and solidarity between African countries and the peoples of Africa’.⁷⁸ The principle of solidarity under international law is generally conceptualised as an appreciation and recognition by each member of a community that it determinedly conceives of its own interests as being inseparable from the interests of the whole community.⁷⁹ From this perspective, due to the unique vulnerability of the continent and its peoples to the adverse consequences of climate change, member states of the AU have to rally behind the principle of solidarity in recognising and protecting populations and peoples fleeing such effects since regional efforts will require mutual cooperation and support. It is plausible, then, that the principle of solidarity strongly influences any

72 See ‘Agenda 2063: The Africa we want’ <http://archive.au.int/assets/images/agenda2063.pdf> (accessed 7 July 2019).

73 K M’Baye ‘The African conception of law’ in R David (ed) *The legal systems of the world and their common comparison and unification* (1975) 56.

74 M Gluckman *The allocation of responsibility* (1986) 173.

75 K Matlosa ‘The African Union’s African Governance Architecture linkages with the African Peace and Security Architecture’ (2014) 4 *GREAT Insight Magazine* 14

76 Charter of the Organization of African Unity, 25 May 1963 (OAU Charter), art 2(1)(a).

77 OAU Charter, art 2(1)(b).

78 Constitutive Act of the African Union, 11 July 2000 (AU Constitutive Act), art 3(a).

79 RSJ MacDonald ‘Solidarity in the practice and discourse of public international law’ (1996) 8 *Pace International Law Review* 290.

regional action towards the protection of climate refugees under African regional law.

Underpinned and influenced largely by the principle of solidarity, the OAU Convention expanded the definition of refugee to include those fleeing 'events seriously disturbing public order'⁸⁰ in order to protect people fleeing events that were associated with the independence struggle. While expanding this to cover climate refugees in Africa may face political resistance, its relevance is not assailable. Any effort of the AU to recognise and protect climate refugees will without doubt be challenging as the UNHCR has clearly clarified that persecution is customarily related to action by the authorities of a state either by the national authorities persecuting someone or because they let someone be persecuted.⁸¹ This condition makes any regional effort to afford protection to climate refugees difficult and politically challenging.⁸² However, relying on the AU shared values and fundamental principles such as pan-African solidarity and cooperation requires a rethinking on how such value is applicable in the context of cross border climate migration on the African continent is promising.

Central to the conception of human and peoples' rights or pan-African solidarity is the values of African humanism the principles of compassion, community and solidarity. Poe explains it as effort by African peoples to creatively harness their cultural diversity and innovate around their common challenges for the collective empowerment and development of the African peoples.⁸³ Boshoff and Owiso summarised the objective of Pan-Africanism as follows:⁸⁴

The endeavour by African peoples to overcome the geographic barrier of an expansive continent and peoples spread widely across the globe; contemporary effects of historical evils such as slavery, colonialism, apartheid and neo-colonialism; arbitrarily imposed colonial borders; and other natural and social barriers by harnessing positive values rooted in the diverse African cultures in order to achieve socio-economic and political development of the collective.

The implication is that pan-African solidarity is underpinned by the resolve to promote unity among the African peoples through ensuring economic (and political) integration and addressing the continent's underdevelopment through a people-centric approach. The spirit and rationale of pan-Africanism outlined in the AU mechanisms is clearly needed if the AU is to locate a durable solution for the predicament of climate refugees on the continent which is fast becoming a human security concern. For instance, article 3(a) of the AU Constitutive Act,

80 *Africa Union Convention Governing the Specific Aspects of Refugee Problems in Africa*, art 1(2) (10 September 1969)

81 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to The Status of Refugees* (1979) 39.

82 Inter-Agency Standing Committee (IASC), *Climate change, migration and displacement: Who will be affected?* (2008) 4, <http://unfccc.int/resource/docs/2008/smsn/igo/022.pdf> (accessed 10 August 2019).

83 DZ Poe Kwame Nkrumah's contribution to *Pan-Africanism: an Afro-centric analysis* (2003) 43-44.

84 Constitutive Act of the African Union, adopted on November 7, 2000 and entered into force on 26 May 2001, art 3(a).

on the objectives of the AU, seeks to ‘achieve greater unity and solidarity between the African countries and the peoples of Africa’.⁸⁵ This provision is particularly significant in the quest to offer protection to climate refugees in Africa in an era when states are closing their borders to refugees. The principle of pan-African solidarity and mutual assistance underlined the formation of the OAU (now the AU) and is being tested in the era of climate change that requires cooperation in managing its adverse impacts such as human migration.

Pan-Africanism, the broader notion that informs pan-African solidarity, is a complex and multi-faceted concept.⁸⁶ From the perspective of pan-African solidarity and humanism, it can however be argued that internationally and regionally recognised fundamental human rights in so far as they are aimed at demonstrating the principles of compassion, community and solidarity should be applicable to climate refugees. Although pan-African solidarity as a principle was invoked largely to rid the continent of colonial domination, the struggle for the survival and equality of the African peoples, sustained economic development and a healthy environment still remain.⁸⁷ Gonthier observes that the ‘the first value of solidarity is the recognition that there are certain people within the community who require special protection’.⁸⁸ Mayer takes this further by arguing that more than compassion and generosity, human rights and humanitarian action symbolise this demand for protection of human dignity in society.⁸⁹ Although the OAU Refugee Convention has often been justified through the notions of solidarity, the provisions are not applicable to climate refugees.⁹⁰ As a result, regional solidarity may need to be invoked to justify a moral, if not legal, obligation of states to somehow intervene to offer assistance to other states whose populations are facing climate-related displacement through admitting their citizens into their territories on humanitarian grounds. Thus, affording protection to climate refugees on the grounds of the AU’s shared values and guiding principles would restore trust in its damaging and weakening reputation as just being a paper tiger.

Pan-African solidarity is also an important aspect of the concept of ‘African humanism’ which generally embraces the various social theories and beliefs that the individuality of a person are inseparably connected to their relationships with others in society.⁹¹ An example of this humanism is the ethical concept of Ubuntu which is embodied in

85 Constitutive Act of the African Union, adopted on November 7, 2000 and entered into force on 26 May 2001, art 3(a).

86 F Viljoen *International human rights law in Africa* (2012) 152.

87 Winks (n 59).

88 CD Gonthier ‘Liberty, equality, fraternity: the forgotten leg of the trilogy, or fraternity, the unspoken third pillar of democracy’ (2000) 45 *McGill Law Journal* 574

89 Mayer (n 1) 357.

90 See, for example, Resolution adopted by UN General Assembly on Assistance to Refugees, Returnees and Displaced Persons in Africa, G.A. Res. 65/193, UN G.A.O.R., 6th Sess., Supp. No. 49, A/RES/65/193 (2010).

91 Winks (n 59).

the Nguni proverb *umuntu ngumuntu ngabantu* (accurately translates, a person is a person through people) succinctly expresses the notion of African humanism. *Ubuntu* 'incases the fundamental values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity'.⁹² Thus, the conception that 'we are not islands unto ourselves' is central to the understanding of the individual in African thought.⁹³ Despite its many detractors,⁹⁴ African humanism is undeniably justifiable as a legal value, and that pan-African solidarity carries distinctive jurisprudential significance that can be invoked to influence regional action towards the protection of climate refugees in Africa as Ubuntu requires the balancing of competing interests to promote the continental vision of a caring society based on good neighbourliness and shared concern.

Regarding the value of cooperation, in addition to its relevance to pan-African solidarity, it can be argued that the AU can adopt a regional policy to legally recognise and protect climate refugees. A regional cooperation has the prospect of helping to preempt refugee flows as well as in managing climate refugees which may be relatively less costly as compared to managing regional climate-induced conflicts or mass climate-induced migration.⁹⁵ In the end, the effectiveness of the legal recognition and protection of climate refugees in Africa would largely depend on the commitment of states to cooperate and act in this regard. If the AU cannot do anything without the consent of states, it should do everything possible to encourage states to cooperate especially through the spirit of pan-African solidarity and regional cooperation to lessen the human suffering arising from the adverse effects of climate change.

4 CONCLUSION

This article establishes that gaps existing in the refugee protection regime for climate refugees is historical and continues to date. It further contends that the best way to ensure protection for climate refugees in Africa is the operationalising by AU of its solidarity and humanistic approach as a demonstration of its belief in the ideals of Pan-African cooperation for addressing common continental problems. From the perspective of pan-African solidarity, AU and African states that would be hosting climate refugees should bear this as a moral and ethical duty as the obligations enumerated in the international and regional refugee protection framework largely fall on host states. Based on the same approach, hosting states should ensure that the standards of treatment

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

93 *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 1 SA 474 (CC) para 53.

94 See generally, IJ Kroeze 'Doing things with values II: the case of *Ubuntu*' (2002) 13 *Stellenbosch Law Review* 252.

95 German Advisory Council on Global Change, *Climate Change as a Security Risk* (2008) 204-07 http://www.wbgu.de/wbgu_jg2007_engl.pdf (accessed 29 July 2019).

as established in the regional refugee protection system and human rights law are fully enjoyed in the host states through the adoption of appropriate legislation and policy measures. Aside the recognition and protection of climate refugees in Africa, the international community, especially the developed states that have contributed largely to the climate crisis have an obligation. This is in terms of supporting regional efforts through financial assistance proportional to their contributions to climate change so as to help states parties to instruments under the African human rights system to fully commit to the implementation of a value driven approach.

The African Union Protocol on Free Movement of Persons in Africa: development, provisions and implementation challenges

Romola Adeola*

ABSTRACT: In 2016, the African Union launched a Common African passport to enhance free movement of persons. The essence of the free movement arrangement of the African Union is to create a united Africa while promoting continental integration in the spirit of pan-Africanism. Continental free movement of persons was also conceived as a migratory solution and as an important step towards promoting seamless borders in view of the African Union Agenda 2063. In 2018, African leaders formally adopted the Protocol on Free Movement of Persons geared towards fostering intra-continental mobility and improving the wellbeing of all African persons. This article examines the normative framework and strategies for the furtherance of free movement of persons in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le Protocole de l'Union africaine relatif à la libre circulation des personnes en Afrique: évolution, normes et défis de mise en œuvre

RÉSUMÉ: En 2016, l'Union africaine a établi un passeport africain commun pour accroître la libre circulation des personnes. Le leitmotiv du nouveau régime juridique de l'Union africaine sur la libre circulation est de promouvoir une Afrique unie et favoriser l'intégration continentale dans l'esprit du panafricanisme. La libre circulation des personnes au niveau continental a également été conçue comme une solution migratoire et une étape importante dans l'ouverture des frontières africaines dans le cadre de l'Agenda 2063 de l'Union africaine. En 2018, les dirigeants africains ont officiellement adopté le Protocole relatif à la libre circulation des personnes visant à encourager la mobilité et à améliorer le bien-être de tous les Africains. Cet article examine le cadre normatif et les stratégies pour la promotion de la libre circulation des personnes en Afrique.

KEY WORDS: African Union, free movement, integration, Protocol on the Free Movement of Persons, mobility

CONTENT:

1	Introduction.....	261
2	The regional integration processes	264
3	The Protocol development process	268
4	The provisions of the African Free Movement Protocol.....	271
5	Implementation challenges	273
6	Conclusion	275

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1 INTRODUCTION

Article 12 of the African Charter on Human and Peoples' Rights (African Charter) guarantees the right to free movement of persons.¹ This right is explicit in the Constitutions of all 55 African states' Constitutions. Through norms and jurisprudential provisions, the African Commission on Human and Peoples' Rights (African Commission) has emphasised the significance of this right as integral to the furtherance of other human rights. In *Sudan Human Rights Organisation and Another v Sudan*, the African Commission recognised freedom of movement and residence as 'two sides of the same coin', observing that it is imperative for states to 'ensure that the exercise of these rights is not subjected to restrictions'.² Notably, in 2019, the African Commission adopted a General Comment on article 12(1) of the African Charter in which it focused on the right to move freely and choose residence within the borders of a state.³ The significance of this General Comment primarily resonates from the fact that it is usually assumed that movements within state borders are without impediments. The General Comment provides guidance on the protection of this right and its content in relation to different categories of persons including refugees and internally displaced persons (IDPs).

The intellectual history of the right to free movement of persons dates back to ancient philosophy, and the practice of free movement in Africa precedes colonial times. Globally, there is a consensus that mobility, being as old as human history, is a part of the DNA of all humans as migratory species.⁴ Mobility was an opportunity for seizing on new opportunities. Historically, people moved in search of basic needs such as food and shelter. In the colonial era, movement was mostly centred around colonial capitals and motioned along artificially imposed borders. Shortly after independence, mobility in Africa became a function of independent states' regulation curated through immigration controls with limited pathways for access. However, one of the consequences of these limited pathways has been that migration has become a much-contested issue and increasingly has become a growing concern for policymakers within and outside the continent.

With the rise in the migrant population crossing the Mediterranean Sea into Europe, policy-makers have increasingly become aware of the need to proffer lasting solutions to migration. In Africa, this realisation

1 African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981) (the African Charter) art 12.

2 Communication 279/03-295/05, *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan* (2009), para 188.

3 African Commission General Comment No 5 on the African Charter on Human and Peoples' Rights: the right to freedom of movement and residence (art 12(1)) (2019).

4 F Crépeau 'Governing migration under the Global Compacts: towards an agenda for facilitating human mobility' presented at the 2017 Annual Conference of the McGill Institute for the Study of International Development on 'Questioning crisis: rethinking forced migration in theory and practice' (15-16 March 2017).

has prompted a different approach by the African Union (AU) linked to the knowledge that an effective management of the movement of people can create beneficial opportunities for the growth and advancement of trade and development on the continent. Given that migration is an integral part of societal formations in Africa, states are increasingly becoming aware of the essence of mobility. The need to respect the human rights of migrants has led to the development of the Global Compact for Safe, Orderly and Regular Migration at the UN level,⁵ and increasingly led to calls for the facilitation of mobility.⁶ In Africa, one of the proposed migratory solutions has been the creation of a continental citizenship. Continental citizenship aims at fostering a unified identity among African states. In the AU Constitutive Act, AU member states committed to achieving continental unity, solidarity among peoples, and the promotion of the human rights of all persons on the continent.⁷ The need to coordinate and harmonise the policies of existing regional economic communities was also affirmed together with ensuring the inter-dependency of member states. In reflecting the desire for a continental citizenship, the AU Assembly proposed a continental legal structure.

At the post-Valetta Consultative Meeting on Migration held in Kenya in December 2015, AU member states emphasised the need to foster an African free movement regime partly in view of the fact that migration was a right that must be protected.⁸ However, this realisation dates back to the early 1990s when member states of the Organisation of African Unity (OAU) decided to establish a protocol for the free movement of peoples on the African continent.⁹ The aim of the Protocol was 'to achieve progressively the free movement of persons, and to ensure the enjoyment of the right of residence and the right of establishment' of African peoples within the continent.¹⁰

While a continental framework on free movement of people has been a distant dream for the last two decades, at the regional level, AU member states have developed frameworks to foster migration at the level of the regional economic communities (RECs). Recognising the imperative of advancing continental movement not only of goods and services but also of the African people, the AU at its 50th anniversary

5 New York Declaration for Refugees and Migrants, adopted by the UN General Assembly Resolution 71/1, UN Doc A/RES/71/1 (19 September 2016); Report of the Special Rapporteur on the human rights of migrants on a 2035 agenda for facilitating human mobility, Note by the Secretariat, UN Doc A/HRC/35/25 (28 April 2017).

6 'Evidence-based approach crucial to migrants and migration – top UN official' *UN News* (21 February 2018).

7 African Union Constitutive Act, adopted by the Organisation of African Unity, OAU Doc CAB/LEG/23.15 (11 July 2000).

8 Report of the African Consultations on Migration factoring in outcomes of the Valetta Summit on Migration, held in Nairobi, Kenya (14-15 December 2015).

9 Treaty Establishing the African Economic Community 1991, art 43(2) (AEC Treaty).

10 AEC Treaty, art 43(1).

committed to hastening the integration of a united Africa.¹¹ In accelerating this vision, the AU Assembly resolved to ‘facilitate African citizenship to allow free movement of people’.¹² In facilitating African citizenship, a key strategy emphasised in the Agenda 2063 policy document is the introduction of an African passport and ‘abolishment of visa requirements for all African citizens in all African countries by 2018’.¹³ This key strategy was further emphasised by the AU Assembly at the 25th Summit held in Johannesburg, South Africa.¹⁴ At this Summit, the Assembly stressed a commitment to ‘[e]xpeditate the operationalization of the African passport’,¹⁵ and called on the AU Commission to set up a meeting of the AU Executive Council for the purpose of developing the Protocol on Free Movement of Peoples in Africa (African Free Movement Protocol).¹⁶

Between 2016 and 2017, the AU Commission drafted the instrument which the AU Assembly eventually adopted in January 2018. In March 2018, the AU also adopted the Agreement Establishing the African Continental Free Trade Area (ACFTA) in Kigali, Rwanda. Integral to the process of advancing free trade is the furtherance of free movement.¹⁷ Unlike the ACFTA, ratification of the Free Movement Protocol has been slow-paced.¹⁸ But while time will tell if it will enjoy broad-based support, it is a crucial continental instrument.

This article examines the continental Free Movement Protocol as a continental response to migration. In advancing the discussion, this article begins with a discussion on the regional integration processes. The relevance of this is to demonstrate what already exists in the furtherance of free movement of persons in Africa and what challenges need to be addressed given that the Free Movement Protocol seeks to create a common African identity and has enormous potential for fostering continental mobility.

- 11 50th Anniversary Solemn Declaration adopted by the 21st Ordinary Session of the AU Assembly, Addis Ababa Ethiopia (26 May 2013), art C.
- 12 As above.
- 13 African Union *Agenda 2063: The Africa we want* (African Union Commission 2013), para 67(k).
- 14 Declaration on Migration, adopted at the 25th Ordinary Session of the AU Assembly held in Johannesburg, South Africa (14-15 June 2015), AU Doc Assembly/AU/18(XXV).
- 15 As above.
- 16 As above.
- 17 Agreement Establishing the African Continental Free Trade Area (2018), art 3.
- 18 As at October 2019, 28 states had ratified the ACFTA while 54 states had signed; as at 16 July 2019, 32 states had signed up to the Free Movement Protocol while 4 states had ratified the instrument. See List of countries which have signed, ratified/acceded to the Protocol to the Treaty Establishing the African Economic Community relating to Free Movement of Persons, Right of Residence and Right of Establishment (16 July 2019); List of countries which have signed, ratified/acceded to the Agreement establishing the African Continental Free Trade Agreement (8 October 2019).

2 THE REGIONAL INTEGRATION PROCESSES

In understanding the continental free movement initiative, it is relevant to discuss its building blocks – the RECs. In advancing the continental drive towards free movement of persons, the 1991 Abuja Treaty underscores the formation of RECs. Over the next two decades, RECs emerged with some form of free movement arrangements. Eight of these RECs are the building blocks of AU integration, namely, Economic Community of West African States (ECOWAS); East African Community (EAC); Common Market on Eastern and Central Africa (COMESA); Southern African Development Community (SADC); Economic Community of Central African States (ECCAS), Arab Maghreb Union (UMA); Community of Sahel Sub-Saharan Africa (CEN-SAD); and the Inter-Governmental Authority on Development (IGAD).

Through a 1975 Protocol Relating to the Free Movement of Persons, Residence and Establishment, ECOWAS states affirmed free movement of people.¹⁹ Earlier in 1975 following the establishment of the regional bloc, states committed to regarding ECOWAS member state citizens as citizens of ECOWAS and as such decided to ‘abolish all obstacles to their freedom of movement and residence within the Community’.²⁰ The rights of entry, residence and establishment were provided in the treaty and it was agreed that the ECOWAS Free Movement Protocol will be implemented within a 15-year period. Although the rights of entry and residence have been operationalised, the right of establishment is yet to fully materialise. However, ECOWAS member states have developed a common passport and significantly facilitated cross-border mobility setting a significant standard for other regional blocs.

As with ECOWAS, the EAC has also developed a free movement Protocol that recognises the rights of residence and establishment.²¹ As with the treaty establishing ECOWAS, the EAC Treaty requires states to ‘adopt measures to achieve the free movement of persons, labour and services’.²² The EAC Free Movement Protocol requires member states

19 ECOWAS states are: Benin, Côte d’Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Togo and Burkina Faso. Protocol A/P.1/5/79 Relating to Free Movement of Persons, Residence and Establishment, adopted by the Authority of Heads of State and Government of Economic Community of West African States in Dakar, Senegal (29 May 1979) (ECOWAS Free Movement Protocol); Supplementary Protocol A/SP.2/5/90 on the Implementation of the third phase (right of establishment) of the protocol on free movement of persons, right of residence and establishment, 1990; A Adedeji ‘ECOWAS: a retrospective journey’ in A Adebajo and IOD Rashid (eds) *West Africa’s security challenges: building peace in a troubled region* (2004) 21, 28.

20 Treaty of the Economic Community of West African States, adopted by the Heads of State and Government in West Africa (28 May 1975) (ECOWAS Treaty), art 27.

21 Protocol on the Establishment of the East African Community Common Market (EAC Free Movement Protocol) was adopted in 2009 in Tanzania, entering into force in July 2010.

22 Treaty Establishing the East African Community Treaty (1999) (EAC Treaty).

of the EAC to 'ensure non-discrimination of the citizens' and guarantees the entry, stay and movement of citizens.²³ Unlike ECOWAS, a common EAC passport has not been rolled out in all EAC member states. While Burundi, Kenya, Rwanda, Tanzania and Uganda have are issuing a common EAC passport, South Sudan is yet to embark on this process.

As with these RECs, the Treaty establishing COMESA provides for the free movement of persons.²⁴ Article 4(6)(e) of the COMESA Treaty require states to 'remove obstacles to the free movement of persons, labour and services, right of establishment for investors and right of residence within the Common Market'.²⁵ A free movement protocol was subsequently adopted. It articulates the commitment of COMESA member states to allow free entry of citizens of member states 'as a first step towards the gradual relaxation and eventual elimination of visa requirements within the Common Market'.²⁶ Only four states have ratified the Protocol²⁷ and free entry is yet to be achieved in all COMESA member states. As at 2015, free entry was allowed COMESA nationals in three states: Seychelles, Rwanda and Mauritius.²⁸ Zambia has also waived visas for COMESA nationals on business visits.²⁹ Unlike ECOWAS, the COMESA Free Movement Protocol does not provide for an implementation time-frame.³⁰

In 2005, SADC developed a free movement protocol, following resistance to an initial progressive protocol. The resistance, launched by South Africa, Botswana and Namibia was due in part to the socio-economic disparity in the region.³¹ Following a revision of the initially proposed instrument, SADC member states agreed on a regional protocol geared towards facilitating free movement of persons in the region.³² Unlike the EAC and ECOWAS instruments, the SADC Free Movement Facilitation Protocol refrains from the language of rights in contextualising residence and establishment. While free entry in the region, as with ECOWAS, is guaranteed for 90-days, states do not

23 EAC Free Movement Protocol (n 21), art 7(2).

24 Common Market for Eastern and Southern Africa Treaty (1993) (COMESA Treaty).

25 As above, art 4(6)(e).

26 Protocol on the Free Movement of Persons, Labour, Services, Right of Establishment and Residence, adopted in Kinshasa, Democratic Republic of Congo (1998) (COMESA Free Movement Protocol).

27 G Mwaura 'Why more states should ratify the COMESA Protocol' *The New Times* 11 June 2016.

28 A Odhiambo 'More COMESA members scrap visa requirement for travellers' *The East African* 4 March 2015.

29 'Zambia drops visa requirement for all COMESA citizens' *Lusaka Times* 5 March 2015.

30 Odhiambo (n 28).

31 See JO Oucho and J Crush 'Contra free movement: South Africa and the SADC Migration Protocols' (2001) 48(3) *Africa Today* 138.

32 Protocol on the Facilitation of Movement of Persons, adopted by the Heads of State and Government of the Southern African Development Community (18 August 2005) (SADC Free Movement Facilitation Protocol).

comply with this provision in practice.³³ The SADC Free Movement Facilitation Protocol does not provide a time-frame for implementation. Rather, it defers this decision to an implementation framework to be determined by each SADC Member state.³⁴

As with the three regions, a free movement protocol also exists in the ECCAS region,³⁵ annexed to the ECCAS Treaty.³⁶ Article 2(1) of the ECCAS Free Movement Protocol allows nationals of ECCAS member states to 'freely enter the territory of any Member State, travel there, establish residence there and leave at any time'.³⁷ As with the ECOWAS Free Movement Protocol, the ECCAS Free Movement Protocol establishes a time-frame for the realisation of the free movement phases with the right to establishment becoming effective 12 years after the entry into force of the instrument.³⁸ However, the implementation of free movement in the region has been slow-paced largely due to the political instabilities in the region.³⁹

As with ECCAS, free movement in the UMA region has also been slow-paced. In 1989, was founded with the objective of fostering regional integration, reinforcing the bonds of fraternity and progressively achieving free movement of persons.⁴⁰ But only three states in the region have an appearance of free movement.⁴¹ Between Morocco and Algeria, land borders have been effectively closed since 1994.⁴² Tunisia is the only state in the region that allows for the free movement of citizens of member states of the UMA.⁴³ Unlike the other RECs, there is no regional free movement protocol in the UMA region.

CEN-SAD does not also have a free movement protocol. While its formation treaty requires states to promote the free movement of persons,⁴⁴ free movement among member state has been slow-paced.

- 33 For instance, Mozambicans are allowed free entry into South Africa for 30-days.
- 34 SADC Free Movement Facilitation Protocol (n 32) art 4.
- 35 Treaty for the Establishment of the Economic Community of Central African States (1983) (ECCAS Treaty), art 4(1).
- 36 Protocol Relating to the Freedom of Movement and Right of Establishment of Nationals of Member States within the Economic Community of Central African States, adopted by the Heads of State and Government of the Economic Community of Central African States (1983) (ECCAS Free Movement Protocol).
- 37 ECCAS Free Movement Protocol (n 36), art 2(1).
- 38 As above, art 5(1).
- 39 SI Sánchez 'Free movement of persons and regional international organizations' in R Plender (ed) *Issues in international migration law* (2015) 223 at 247.
- 40 Treaty Establishing the Arab Maghreb Union (1989), art 2.
- 41 These states include: Libya, Tunisia and Morocco.
- 42 D Zisenwine 'Mohammed VI and Moroccan foreign policy' in B Maddy-Weitzman and D Zisenwine (eds) *Contemporary Morocco: state, politics and society under Mohammed VI* (2013) 70, 74; MH de Larramendi 'Intra-Maghrebi relations: unitary myth and national interests' in YH Zoubir and H Amirah-Fernández (eds) *North Africa: politics, region, and the limits of transformation* (2008) 179, 184.
- 43 'Algeria's closed border syndrome' *The North Africa Post* 5 August 2017.
- 44 Treaty establishing the Community of Sahel-Saharan States (1998); UN General Assembly *Request for the inclusion of a supplementary item in the agenda of the fifty-sixth session, Observer status of the Community of Sahelo-Saharan States in the General Assembly*, UN Doc A/56/191 (30 July 2001), para 6.

Aside from the regional diversity of its members, free movement in the region has also been affected by issues of terrorism and conflict.⁴⁵ As the largest REC, CEN-SAD comprises 29 African states across the north, west and eastern region. Although a Selective Visa Dispensation Programme was introduced to ease the free movement in the region, this programme applies to holders of diplomatic documents and special envoys.⁴⁶ However, most CEN-SAD member states belong to free movement arrangements.

As with UMA and CEN-SAD, IGAD does not also have a free movement protocol. However, the reason for this is different from UMA. IGAD was originally formed in 1986 as an Inter-Governmental Authority on Drought and Desertification (IGADD) with the aim of addressing issues of ecological concerns in the Horn of Africa.⁴⁷ In 1996, it was transformed into IGAD when it became clear that there were other political issues requiring attention of the community. With the expansive mandate, the need for an articulation of guidance on free movement became an imperative. In 2017, IGAD began developing a free movement protocol.⁴⁸ The process, which began with national consultations among IGAD member states, has enjoyed significant support from members of the community⁴⁹ who also belong to two other RECs with free movement arrangements: EAC and COMESA.

The different understanding of free movement among the various RECs illustrates a pertinent issue that must be addressed in the furtherance of free movement in Africa – and that is the absence of unanimity on how migration should be governed among AU member states. In the SADC region, for instance, free movement is still highly restricted due to the variable economic advancement of states within the region. While movement between South Africa and Namibia is mostly free,⁵⁰ overland movement between South Africa and Zimbabwe at the Beit Bridge border, for instance, is a significant challenge.⁵¹ The absence of a regional protocol on free movement in the UMA region as well as the persistent differences between Morocco and Algeria, creates a challenge for the actualisation of free movement. In the ECCAS region, movement is constricted due, in part, to conflict in the region. However, in the ECOWAS and EAC region, states have significantly advanced in their knowledge and practice of free

45 I Salami *Financial regulation in Africa: an assessment of financial integration arrangements in African emerging and frontier markets* (2012) 33.

46 NEPAD Agency for the African Union Capacity Development Division *Strengthening the institutional capacity of the Communauté des Sahélo-Sahariens (CEN-SAD)* (2015) 4.

47 R Bereketeab 'Inter-Governmental Authority (IGAD): a critical analysis' in K Mengisteab and R Bereketeab (eds) *Regional integration, identity and citizenship in the Greater Horn of Africa* (2012) 173.

48 'IGAD launches negotiations on Protocol on Free Movement of Persons' *Inter-Governmental Authority on Development (News)* 3 July 2017.

49 'IGAD continues consulting on free movement of persons with MS' *Inter-Governmental Authority on Development (News)* 13 November 2017.

50 M Peries 'Border crossing: South Africa to Namibia' *Maggie in Africa* 1 July 2016.

51 See 'This is how badly Zimbabweans are treated at Beit bridge border' *IOL* 14 March 2018.

movement. In practice, travelling overland in these regions is mostly hassle-free with commitments also being translated into practice through infrastructural development.⁵²

Seemingly in light of these different conceptions of free movement, the African Free Movement Protocol emphasises a graduated approach to the realisation of free movement in Africa. Moreover, the African Free Movement Protocol mandate RECs to work towards harmonising their protocols on free movement – which if done, has the potential of addressing the normative discrepancies in line with the African Free Movement Protocol.

However, a relevant question that flows from this relates to the significance of the African Free Movement Protocol in relation to other existing instruments on free movement at the level of the RECs. Arguably, a notable contribution of the African Free Movement Protocol is its emphasis on the formation of a common continental identity through the notion of a common African citizenship. Before considering the provisions, it is relevant to consider the development process of the African Free Movement Protocol. The next section engages in this discussion.

3 THE PROTOCOL DEVELOPMENT PROCESS

At the 50th anniversary of the AU in May 2013, the AU Assembly emphasised the need for a common African citizenship declaring an ‘unflinching belief in our common destiny, our shared values and the affirmation of the African identity; the celebration of unity in diversity and the institution of the African citizenship’.⁵³ The AU Assembly called for speedy implementation of continental integration and the facilitation of the ‘African citizenship to allow free movement of people through the gradual removal of visa requirements’.⁵⁴ This need was mooted in the Agenda 2063 document.

In December 2015, a joint meeting was held by the AU, the International Labour Organisation and the Centre for Citizens Participation in the African Union at the Pan-African Parliament in Midrand, South Africa. The purpose of the meeting was to assess and analyse the progress made towards free movement on the continent; to identify the legal, structural, political and operational gaps; to highlight lessons learnt and good practices from the RECs; and to provide concrete solutions and identify opportunities for the advancement of the continental free movement of persons’ campaign.⁵⁵ During this meeting, it was emphasised that it is important to find ways to stimulate the implementation of free movement within the RECs. Setting up an

52 See ‘Nigeria and Benin make a new break for the border’ *News24* 29 October 2018.

53 50th Anniversary Solemn Declaration (n 11) art A(ii).

54 As above, art C(i).

55 Meeting on validation of the study on free movement of persons in Africa (Concept Note), Midrand, South Africa (7-9 December 2015).

information exchange system was essential for pairing countries with good practices and combatting negative perceptions on free movement of persons. Overall, having a continental free movement protocol was regarded as desirable. Between 2016 and 2017, a draft Protocol was prepared, discussed and debated by AU member states, the RECs and relevant stakeholders. In February 2017, the AU Peace and Security Council adopted a resolution emphasising the desirability of continental free movement over perceived security and economic challenges and called on the AU Commission to 'expedite the finalization of the Protocol on Free Movement of Persons'.⁵⁶

At the first meeting of experts in the Seychelles, the draft Protocol was examined with the objective of providing independent experts with the opportunity to consider the instrument and advance critical perspectives that will improve on the document.⁵⁷ Participants at the meeting included migration experts, academics, civil society representatives, legal experts and international organisations including the International Organization for Migration. Some of the critical issues raised for consideration in improving the draft protocol was the need to: build capacity for prompt facilitation of free movement and replicate lessons on easing free movement from RECs such as ECOWAS and EAC. The need to create predictable standard systems and processes to ease mobility was also emphasised as with the creation of humane conditions that facilitate mobility. Five key imperatives for the free movement of persons that were identified include: deepening integration, human rights, visa openness, pioneering the role of RECs and the establishment of a common travel document. Some of the benefits of free movement that were emphasised include tourism, greater intra-continental trade, facilitation of regular mobility, increased remittances flow and facilitation of regular and documented labour migration. Although there were challenges that could arise from this process, it was emphasised that the benefits of free movement outweigh the negative perceptions. Seven African states were recognised for the adoption of progressive policies: Benin, Ghana, Mauritius, Namibia, Rwanda, Senegal and the Seychelles.

At the meeting of RECs in the Seychelles, it was acknowledged that the continental protocol would benefit from comparable lessons from the various RECs in the facilitation of free movement.⁵⁸ The three-phased approach on the right to entry, establishment and residence was proposed. The RECs emphasised that it was imperative to address issues of border management which is critical in the facilitation of free movement. It was further proposed that an implementation plan be developed and that there was a need for civic engagement to foster an appreciation of the free movement benefits and counter xenophobia.

56 Peace and Security Council Communique, 661st Meeting, Addis Ababa, Ethiopia (23 February 2017), para 14.

57 Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Independent Experts Meeting, Rapporteurs' Report, Victoria, Seychelles (28 February – 1 March 2017).

58 Draft Protocol on Free Movement of Persons in Africa, Victoria, Seychelles (2-3 March 2017).

At the meeting of member states in Ghana, the need for states to adopt coherent migration frameworks was emphasised.⁵⁹ It was further emphasised that there was a need to address deep political misconceptions on the facilitation of free movement including concerns of national security, public health and economic disparities among states. It was expressed, however, that it was risky to delay the continental agenda to address these challenges. Rather, a differentiated integration approach should be countenanced as an integration strategy. However, member states sought clarity on whether the decision of the AU Assembly on free movement required an immediate entry into force of the continental protocol. It was agreed that free movement should be graduated in phases given that not all member states were at the same level in terms of integration.

At the meeting of member states in Rwanda, the draft protocol was reviewed.⁶⁰ It was agreed that certain definitions should be added to the protocol including the right of entry, establishment and territory. It was agreed that the continental protocol should be implemented in accordance with the road map for implementation which would be decided by the AU Assembly as an annexure to the instrument. Member states requested the AU Commission to draft a new article on remittances to the effect that transfers of earning and savings be facilitated through bilateral, regional, continental and international agreements. The meeting further called for a harmonisation of national laws and policies in accordance with the proposed implementation road map. In a subsequent meeting of the RECs, held in Ethiopia, it was agreed that the road map for Implementation should have indicative time frames by which member states had to comply with their obligations under the instrument.⁶¹ Further, the meeting noted that there was a need to ensure harmonisation of the provisions of the Free Movement Protocol with the Continental Free Trade Area processes.⁶²

In September 2017, a meeting was held in Mauritius to examine and validate the draft Implementation Plan.⁶³ The issue of monitoring and evaluation of the continental protocol was deliberated and it was agreed that rather than establishing a new mechanism, the role of the AUC should be retained. It was agreed that the draft Protocol should be submitted to the AU Specialized Technical Committees (STC) on Migration, Refugees and Returnees and on the STC on Justice and

59 Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Member States Experts' Meeting, Rapporteurs' Report, Accra, Ghana (20-24 March 2017).

60 Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Member States Experts' Meeting, Rapporteurs' Report, Kigali, Rwanda (23-26 May 2017).

61 Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Regional Economic Communities and Member States Experts' Meeting, Rapporteurs' Report, Addis Ababa, Ethiopia (17-19 July 2017).

62 Agreement Establishing the African Continental Free Trade Area, adopted by the AU Assembly in Kigali, Rwanda (March 2018).

63 Draft Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, Member States Experts' Meeting, Outcome Statement, Flic En Flac, Mauritius (4-6 September 2017).

Legal Matters ahead of the planned adoption by the AU Assembly in January 2018. At the Ministerial Meeting in October 2017, it was agreed that there was a need to harness the benefits of intra-continental migration and also address the root causes of irregular migration. The Ministers approved the instrument for transmission to the STC on Justice and Legal Affairs and to the AU organs leading up to adoption.⁶⁴ In January 2018, the free movement protocol was eventually adopted.⁶⁵

4 THE PROVISIONS OF THE AFRICAN FREE MOVEMENT PROTOCOL

There are 39 articles in the African Free Movement Protocol, divided into seven parts. In the first part, key terms are defined, including the concept of 'free movement of persons'. Under article 1, free movement of persons 'means the right of nationals of a member state to enter, move freely and, reside in another member state in accordance with the laws of the host member state and to exit the host member state in accordance with the laws and procedures for exiting that member state'.⁶⁶ While incorporating the rights of entry and residence, this definition does not include the right of establishment which is an integral phase of the free movement of persons. However, the definition of terms provides for the meaning of the right of establishment similar to the provision of the ECOWAS Free Movement Protocol. Under this provision, the right of establishment means 'the right of a national of a member state to take up and pursue the economic activities specified in article 17(2), in the territory of another member state'. These activities include: 'business, trade, profession, vocation', 'economic activity as a self-employed person'.⁶⁷ Similar definitions are echoed in the EAC Free Movement Protocol and in the COMESA Free Movement Protocol.⁶⁸

The second section articulates core principles of the African Free Movement Protocol including non-discrimination on the basis of 'nationality, race, ethnic group, colour, sex, language, religion, political

64 Specialized Technical Committee on Migration, Refugees and Internally Displaced Persons, 2nd Ordinary Session Ministerial Meeting, Kigali, Rwanda (20-21 October 2017) AU Doc AU/STC/MRIDP/Dec. (II), para 1(A)(i).

65 Protocol on Free Movement of Persons, Right of Residence and Right of Establishment in Africa, adopted by the AU Heads of States and Government Thirtieth Ordinary Session in Addis Ababa, Ethiopia (January 2018) (African Free Movement Protocol); Decision on the Legal Instruments, adopted by the AU Assembly at the 30th Ordinary Session, held in Addis Ababa, Ethiopia (28-29 January 2018), AU Doc Assembly/AU/Dc.676(XXX), para 2(e).

66 African Free Movement Protocol (n 65), art 1.

67 African Free Movement Protocol (n 65), art 17(2).

68 Also, the SADC Free Movement Facilitation Protocol recognises economic activity, profession either as an employee or a self-employed person as with establishing and managing a trade, profession, business or calling. See SADC Free Movement Facilitation Protocol (n 32) art 18.

or any other opinion, national and social origin, fortune, birth or other status as provided by article 2 of the African Charter.⁶⁹ It also articulates the progressive realisation of free movement along the three phases: entry, residence and establishment. For implementation, the African Free Movement Protocol makes reference to the Roadmap as guiding standard. However, it articulates that the African Free Movement Protocol should not be interpreted to 'affect more favourable provisions for the realisation of the free movement of persons, right of residence and right of establishment' which may be contained in other regional and continental instruments.⁷⁰ Moreover, the progressive realisation of the African Free Movement Protocol should not be interpreted to prevent an accelerated implementation of the treaty by any of the RECs, or state before the time stipulated for implementation in the Roadmap.⁷¹

The third section addresses the content of the right to entry, the African common passport, border communities, students, researchers and workers. Significantly, this provision requires states to 'implement the right of entry by permitting nationals of Member States to enter into their territory without the requirement of a visa.'⁷² This provision aims at fostering visa-free entry which is still a challenge for African nationals in many African states. This provision further requires states to allow entry into their territories for a period of 90-days. As such, echoing similar allowances under the ECOWAS Free Movement Protocol and SADC Free Movement Facilitation Protocol. The African Free Movement Protocol further mandate states to adopt an African passport and with the support of the AU Commission facilitate its issuance. This provision serves as a legal basis for the common African passport which the AU Assembly launched in Kigali, Rwanda, in July 2016. On the free movement of residents of border communities, states are mandated to facilitate mobility through bilateral or regional agreements.⁷³ On the movement of students and researchers, states are mandated to develop programmes to facilitate exchange of students and researchers.⁷⁴ This is imperative in building an inter-continental knowledge base and for the portability of qualification and skills.

The fourth section relates to the rights of residence and establishment. Although the provisions in these sections recognise the rights of nationals of member states to residence and establishment in host member states, it subjects the realisation of the rights to the laws and policies of host member states.⁷⁵ The interpretation of this claw-back will be useful in clearly articulating what it implies with respect to a states' obligation to promote international human rights commitments. The fifth section relates to mutual recognition of

69 African Human Rights Charter (n 1) art 2; African Free Movement Protocol (n 65), art 4(1).

70 African Free Movement Protocol (n 65), art 5(3)(a).

71 African Free Movement Protocol (n 65), art 5(3)(b).

72 African Free Movement Protocol (n 65), art 6.

73 African Free Movement Protocol (n 65), art 12.

74 African Free Movement Protocol (n 65), art 13.

75 African Free Movement Protocol (n 65), arts 16 and 17.

qualification, social security, mass expulsion and the issue of expulsion generally. The prohibition of mass expulsion of non-nationals draws coherence from the African Charter which requires states to prevent mass expulsion and avoid expelling persons on account of race, nationality, ethnicity or religion.⁷⁶ This section further require states to promote agreements for the facilitation of remittances, protect properties acquired in host member states and protect specific groups such as refugees.

While the sixth section relates to the realisation of the African Free Movement Protocol, the seventh section discusses issues of dispute settlement among states, signature, ratification and accession and entry into force of the African Free Movement Protocol. While primary implementation of the Protocol is the duty of member states, the RECs are also tasked with the duty of promoting, monitoring and evaluating the implementation of the Protocol.

Moreover, the AU Commission is mandated to follow up on the implementation of the African Free Movement Protocol. In coordination with state parties, the AU Commission is required to initiate a continental follow-up arrangement for assessing the implementation status of the African Free Movement Protocol. Upon 15 ratifications, the treaty enters into force. However, if it is to be effective, there are pertinent issues that need to be addressed. The next section considers pertinent implementation challenges.

5 IMPLEMENTATION CHALLENGES

One of the central challenges that need to be addressed, as was earlier noted, is the disparate understanding among states on what free movement entails. This will, among others, impact on a plethora of issues including treaty ratification and domestication. If the African Free Movement Protocol is to be realised, there has to be unanimity among states in the furtherance of the continental vision. It is imperative to emphasise that in advancing this unanimity, states, individually and acting as a collective, need to leverage on shared values of 'solidarity of states' and 'care for the weakest'⁷⁷ significantly, in areas of peace and security, combatting human smuggling, addressing irregular migration and in issues of refugee protection.

Another challenge that must be addressed is the issue of populism which often finds expression in xenophobic actions. Not only does this threaten the notion of unity, it runs contrary to the ideals of continental integration. In addressing this challenge, the notion of a common African citizenship emphasised in the formative documents must be translated into tangible deliverables significantly through research,

76 African Charter (n 1) art 12; see F Viljoen *International human rights law in Africa* (2012).

77 Towards greater unity and integration through shared values (Discussion Paper, 23 November 2010) 14 <http://www.iag-agi.org/IMG/pdf/Discussion-paper-towards-greater-unity-and-integration-through-shared-values.pdf> (accessed 12 November 2018).

awareness-raising and sensitisation programmes. This should leverage on values such as Pan-Africanism which are at the root of African solutions to African problems. While it would be needful for the RECs to lead this process given that they are saddled with the responsibility of promoting implementation, there needs to be an effective synergy with the AU Commission and AU member states.

Further, existing border disputes between AU member states must be resolved. It is crucial for disputes such as those between Djibouti and Eritrea over the Doumeira island, and between Cameroon and Equatorial Guinea over the River Ntem to be decisively resolved. This will be crucial for cooperative border management and for the furtherance of the free movement of border communities. Moreover, given that these disputes hardly reflect commitment towards seamless borders, states must engage in negotiations on resolving these disputes with the involvement of the RECs and the AU Commission.⁷⁸

Also, the issue of security, which is partly responsible for the resistance of some states must be addressed. Addressing such security concerns will require collective efforts towards combatting the root causes, for example, terrorism and transnational organised criminal activities. In a 2018 Communique, the PSC emphasised the need for states to 'make use of their respective security services to undertake joint border tactical and operational measures with their respective neighbouring countries, to curb illegal migration and transnational organized criminal activities'.⁷⁹ However, it is also important that such efforts do not result in human rights abuses of groups such as refugees.

Moreover, if free movement is to become a reality, there has to be greater visa openness. Although Africans do not need visas to access 25 percent of other African countries and can also get visas on arrival in 24 percent of other African countries,⁸⁰ progress is still required to achieve continental free movement. This progress should leverage on the practices of the Seychelles and Benin that have visa-free policies.

Another issue that needs to be addressed is infrastructure. The infrastructural deficit on the continent affects the economic progression of states and wellbeing of populations. Sub-Saharan Africa is considered the 'only region [in the world] where road density has declined over the past 20 years'.⁸¹ With only 34 percent of rural Africa having access to roads,⁸² free movement of persons may be a challenge. In the furtherance of the continental agenda, there must be concerted efforts on states in addressing the challenge of intra and inter-state infrastructure. There must be significant investments in road networks,

78 See G Oduntan 'Africa's border disputes are set to rise – but there are ways to stop them' *The Conversation* 14 July 2015.

79 AU Peace and Security Council *Communique of the 771st meeting of the AU Peace and Security Council on the African migrants crisis: imperative for expediting free movement policy in Africa* (2018).

80 African Development Bank Group *Visa openness report* (2018) 10.

81 World Bank Group *Africa's pulse: an analysis of issues shaping Africa's economic future* (2017) 39.

82 Z Campos 'The economic cost of poor infrastructure' *African Finance & Tech* 28 February 2018.

rail services and air transport that adequately connects the continent. Moreover, it is important that government officials, particularly in immigration and border management, are trained on the content of the African Free Movement Protocol, so as to ensure efficiency in service delivery towards achieving the free movement of persons in Africa.

6 CONCLUSION

The overarching objective of the African Free Movement Protocol is to facilitate continental mobility for the purpose of advancing trade, promoting socio-economic development and enhancing political integration. However, much of these will essentially be a function of implementation. As a first step towards implementation, it is important for states to ratify the instrument and where necessary, ensure domestication. Moreover, implementation must be a function of enhancing institutional support and in this regard, it is crucial for states to ensure that local capacity is built in enhancing compliance. Infrastructural deficit, border disputes, and issues of peace and security must also be collectively addressed. Hence, it is imperative for states to collectively promote continental peace and security through existing regional and continental frameworks and in line with existing standards including the African Charter and the African Charter on Democracy, Elections and Governance.

La prévention de l'apatridie dans le système africain des droits de l'homme

*Renaud Fiacre Avlessi**

RÉSUMÉ: L'apatridie n'est pas un phénomène nouveau en Afrique. Cependant, il a pris des tournures inquiétantes ces dernières années. Cette contribution questionne l'apport des normes juridiques du système africain des droits de l'homme dans la prévention de l'apatridie. L'analyse se base fondamentalement sur la Charte africaine des droits de l'homme et des peuples, ses instruments connexes et la pratique de la Commission et de la Cour africaines des droits de l'homme et des peuples. L'article aboutie à deux résultats. D'abord, il constate que l'arsenal normatif en matière de prévention de l'apatridie en Afrique n'est pas totalement satisfaisant. Ensuite, il démontre que la Cour et la Commission de par leurs jurisprudences, jouent un rôle important dans la prévention du phénomène. En vue d'une protection étanche à l'avenir, l'auteur propose d'une part, l'adoption et l'entrée en vigueur imminente du protocole à la Charte africaine sur les aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique, d'autre part, l'érection des garanties au plan national contre l'apatridie et le respect des décisions issues des mécanismes de contrôle de la Charte africaine par les Etats.

TITLE AND ABSTRACT IN ENGLISH:

Prevention of statelessness under the African human rights system

ABSTRACT: Although statelessness is not a new phenomenon in Africa, its recent developments are worrisome. This article interrogates the extent to which African human rights norms contributed to prevent statelessness. The analysis is essentially based on the African Charter on Human and Peoples' Rights and its protocols and on the practice of the African Court and Commission on Human and Peoples' Rights. The article finds that African human rights norms are not sufficiently equipped to prevent statelessness although the African Court and Commission have played important role in the prevention of statelessness. It recommends the rapid adoption and entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects on the Right to a Nationality and the Eradication of Statelessness in Africa. It also recommends that domestic legislation aiming to prevent statelessness should be adopted whilst urging respect of decisions issued by the African Court and Commission on Human and Peoples' Rights.

MOTS CLÉS: apatridie, nationalité, jurisprudence, Charte africaine, Commission africaine, système africain de protection des droits de l'homme, prévention, droits de l'homme, Cour africaine

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SOMMAIRE:

1	Introduction.....	277
2	Une prévention normative à géométrie variable.....	282
2.1	Le silence de la Charte Africaine des droits de l'Homme et des peuples	283
2.2	Les efforts de la Charte africaine des droits et du bien-être de l'enfant et du protocole de Maputo.....	287
3	Une prévention jurisprudentielle admirable.....	292
3.1	L'office de la Commission Africaine des droits de l'homme et des peuples	292
3.2	La parade de la Cour Africaine.....	294
4	Conclusion.....	297

1 INTRODUCTION

Il en va de la nationalité comme de l'air qu'on respire: on en aperçoit l'importance quand elle manque.¹ Ceux d'entre nous qui sont citoyens d'un pays ont tendance à considérer comme allant de soi les droits et obligations que nous confère la citoyenneté.² Or, le nombre d'apatrides dans le monde et en Afrique est considérable et les conséquences de l'absence ou de la perte de nationalité sont dramatiques. Dans quelle mesure les mécanismes juridiques africains existants assurent-ils la prévention de l'apatridie? C'est la question à laquelle se propose de répondre la présente contribution.

L'apatride, selon l'article 1er de la Convention de New York sur le statut de l'apatride de 1954, « désigne une personne qu'aucun Etat ne considère comme son ressortissant par application de la législation ». Philip Leclerc³ ajoute à cette définition « ou de sa constitution »⁴ comme pour marquer le fait que le droit de la nationalité puise dans certains cas, directement de la constitution elle-même et non de la loi *stricto sensu*. A la suite de la définition conventionnelle précitée, le Haut-Commissariat des Nations Unies pour les Réfugiés (UNHCR) précisera plus tard qu'est également apatride, l'individu dont la nationalité n'est pas déterminée.⁵ Or, la Cour internationale de Justice (CIJ), à travers son célèbre arrêt *Nottebohm* du 6 avril 1955, définit la nationalité comme le « lien juridique ayant à sa base un fait social de rattachement, une solidarité effective d'existence, d'intérêts, de sentiments jointe à une réciprocité de droits et de devoirs ».⁶

La nationalité permet l'exercice de certaines prérogatives étatiques, comme la protection diplomatique. Elle confère aussi, un statut juridique nécessaire à l'exercice de nombreux droits civils et politiques.

- 1 D Felice 'Nationalité, vote, immigrés' <http://www.lalibre.be/> (consulté le 15 novembre 2016).
- 2 Haut-Commissariat des Nations unies pour les réfugiés (UNHCR) *Nationalité et apatridie: un guide pour les parlementaires* (2010) 3.
- 3 Ancien responsable de l'unité 'apatridie' du Haut-Commissariat des Nations Unies pour les Réfugiés (HCR).
- 4 Lire interview accordée à Haude Morel et Leo Dobbs le 18 mai 2007 www.unhcr.org (consulté le 12 mars 2017).
- 5 HCR 'Glossaire extrait de L'appel global' www.unhcr.org/fr/4ad2f61ae.pdf (consulté le 20 février 2016).
- 6 Voir CIJ, Affaire *Nottebohm (Liechtenstein c. Guatemala)*, 6 avril 1955, 2e phase; Voir G Distefano et al *Bréviaire de jurisprudence internationale* (2005) 307.

Elle s'acquiert souvent selon des modalités variées et diverses; soit par naissance, soit par naturalisation ou par alliance.

En outre, l'apatridie expose celui qui en est victime à la violation de ses droits, lui enlève toute dignité, pire il fait de lui un étranger en tout pays et de la pire condition.⁷ Il faut donc le protéger, lui porter secours, l'extirper de l'impasse; et mieux encore, prévenir le phénomène. Longtemps ignorée et reléguée au second rang, l'apatridie, s'est révélée de nos jours, comme le mal du 21^e siècle.⁸ Aucun Etat, aucune région, ne sont épargnés. Le nombre des « sans Etat » a atteint le triste record des 12 millions⁹ dans le monde. En Afrique, l'ampleur reste encore méconnue du fait de l'absence de statistiques fiables dans nombre d'États africains. Toutefois, le UNHCR a pu avancer le chiffre de 750.000 apatrides en Afrique de l'Ouest¹⁰ et celui d'un million en Afrique en général.¹¹

La situation d'infortune qu'engendre l'apatridie, a conduit à une prise de conscience collective. Cette prise de conscience a abouti à l'adoption de nombreuses conventions et à la multiplication des groupes de travail, des colloques et des conférences¹² sur la question au niveau international, régional et national. Autrement dit, la protection du droit à une nationalité est devenue un objet nouveau dans l'agenda international, et une préoccupation importante du calendrier interne des Etats. Ainsi, une variété de textes au niveau universels liées à la nationalité et à l'apatridie ont été adoptés. Les plus importants sont : la Déclaration universelle des droits de l'homme de 1948,¹³ la Convention de 1954 relative au statut des apatrides¹⁴ et de la Convention de 1961 sur la réduction des cas d'apatridie.¹⁵

7 E Montcho Agbassa 'La nationalité de la femme mariée en droit béninois' in N Gbaguidi (dir) *Dix ans d'application du code des personnes et de la famille du Bénin Bilan et perspectives* (2005) 309-320.

8 'Le département de l'information du Secrétaire Général de l'ONU a évoqué l'apatridie comme l'un des dix sujets dont le monde devrait entendre parler d'avantage'. Comité permanent du HCR 'Rapport intérimaire sur l'apatridie en 2009', 29 mai 2009, EC/60/SC/CRP.10 para 4. Voir A Nanteuil 'Réflexion sur le statut d'apatridie en Droit International' in *Droit international et nationalité* (2012) 320-335.

9 Voir Comité permanent du HCR, Rapport intérimaire sur l'apatridie en 2009, 29 mai 2009, doc.EC/60/SC/CRP.10, para 4.

10 UNHCR *Nationalité et Apatridie en Afrique de l'Ouest note d'information* (2015) 2.

11 *Ibid.*

12 Notamment la Conférence régionale ministérielle sur l'apatridie, Abidjan, 23 au 25 février 2015, UNHCR; La réunion des Experts des États membres du 7 au 11 mai 2018 à Abidjan en Côte d'Ivoire; Elaboration du plan d'action de Banjul 2017-2024, de la Communauté des Etats de l'Afrique de l'Ouest (CEDEAO) pour l'éradication de l'apatridie.

13 Voir article 15 de la Déclaration universelle des droits de l'homme.

14 Voir l'article 27 de la Convention de 1954 relative au statut des apatrides: 'Les États contractants délivreront des pièces d'identité à tout apatride se trouvant sur leur territoire et qui ne possède pas un titre de voyage valable'.

15 Article 1er de la Convention de New York sur la réduction des cas d'apatridie de 1961: 'Tout État contractant accorde sa nationalité à l'individu né sur son territoire et qui, autrement, serait apatride. Cette nationalité sera accordée,

A l'échelle continentale, aucune référence au droit à la nationalité n'est faite dans la Charte africaine des droits de l'homme et des peuples. La Charte africaine des droits et du bien-être de l'enfant de 1990 comble, en partie, cette lacune. Aussi, ce droit à une nationalité a, en outre, été élaboré en 2003 avec l'adoption du Protocole sur les droits des femmes en Afrique.¹⁶ De même, la Commission africaine des droits de l'homme et des peuples a abordé les questions relatives à la nationalité et à l'apatridie dans sa résolution 234.¹⁷

En dépit de la carence législative, il existe une super activité jurisprudentielle relative à la protection de la nationalité. Cette jurisprudence émane tant de la Commission que de la Cour africaines des droits de l'homme et des peuples. On peut citer respectivement, l'affaire *John K. Modise*,¹⁸ l'affaire *Amnesty International c. Zambie*,¹⁹ et la première et récente décision de la Cour Africaine des Droits de

15 a) De plein droit, à la naissance, ou b) Sur demande souscrite, suivant les modalités prévues par la législation de l'État en cause, auprès de l'autorité compétente par l'intéressé ou en son nom; sous réserve des dispositions du paragraphe 2 du présent article, la demande ne peut être rejetée. L'État contractant dont la législation prévoit l'octroi de sa nationalité sur demande conformément au littéra b du présent paragraphe peut également accorder sa nationalité de plein droit à l'âge et dans les conditions fixées par sa loi.

16 Voir l'article art 6(g) du Protocole de Maputo.

17 La résolution 234 'Réaffirme que le droit à une nationalité pour toute personne est un droit humain fondamental implicitement inscrit dans les dispositions de l'article 5 de la charte africaine des droits de l'homme et des peuples et essentiel à la jouissance des autres droits et libertés fondamentaux prévus à ladite Charte;

Demande aux Etats Africains de s'abstenir d'adopter des mesures discriminatoires en matière de nationalité et de procéder à l'abrogation des textes législatifs qui privent ou destituent des personnes de leur nationalité pour des motifs de race, de groupe ethnique, de couleur, de sexe, de langue, de religion, d'opinion politique ou autre, d'origine nationale ou sociale, de fortune, de naissance ou tout autre statut, en particulier lorsque les mesures et lesdits textes ont pour conséquence de rendre une personne apatride;

Demande aux Etats africains de respecter les normes de procédure minimum afin que les décisions relatives à la reconnaissance, l'acquisition, la privation ou le changement de nationalité ne contiennent aucun élément arbitraire et soient susceptibles de faire l'objet d'un examen par un tribunal impartial, conformément aux droits visés à l'article 7 de la Charte africaine;

Demande également aux Etats africains d'adopter et de mettre en œuvre les textes législatifs constitutionnels pertinents et autres, afin de prévenir et de réduire l'apatridie, en conformité avec les principes fondamentaux du droit international et de l'article 6 de la Charte africaine des droits de l'homme et du bien-être de l'enfant et plus particulièrement de: a) Reconnaître que tous les enfants ont le droit à la nationalité de l'Etat où ils sont nés, s'ils se trouvaient autrement apatrides; b) Interdire le refus ou la privation arbitraires de nationalité; c) Réaffirmer l'égalité des droits des hommes et des femmes et des personnes de toute race ou groupe ethnique en matière de nationalité; et Invite les Etats africains à ratifier tous les traités internationaux et africains des droits de l'homme pertinents, y compris la Convention relative au statut des apatrides et la Convention sur la réduction de l'apatridie' <http://citizenshiprightsafrika.org/wp-content/uploads/2016/07/CADHP-R%C3%A9solutions-sur-la-nationalit%C3%A9-201314.pdf> (consulté le 20 octobre 2019).

18 *John K. Modise v Botswana*, Communication No 97/93(2000).

19 *Amnesty International v Zambie*, Communication No 212/98 (1999).

l'Homme et des Peuples dans l'affaire *Anudo Ochieng Anudo*.²⁰ La liste n'est pas close.²¹ Il ressort de l'examen de ces affaires et des études réalisées sur l'apatridie, que les sources du phénomène sont diverses et variées. L'apatridie découle souvent des lacunes dans les lois sur la nationalité (discrimination en matière d'acquisition de la nationalité), de la privation arbitraire de la nationalité, des processus liés à la succession des Etats ainsi que des pratiques administratives restrictives, par exemple en matière de délivrance de documents prouvant la nationalité d'une personne.²² De surcroît, l'apatridie peut résulter de la gestion peu rigoureuse de l'état civil (problème d'enregistrement des naissances), de la gestion peu rigoureuse des frontières par les autorités étatiques²³ et de la politisation de la nationalité.²⁴

En Afrique, trois causes sont récurrentes. En matière de gestion peu rigoureuse des frontières et de l'état civil, on peut citer l'exemple de la frontière entre le Bénin et le Burkina Faso. En effet, dans la région litigieuse de Kourou/Koualou revendiquée par les deux Etats, on note l'absence ou l'insuffisance de service d'état civil et d'hôpitaux.²⁵ Ce qui fait courir de grand risque d'apatridie aux populations de ladite région. Dans le même registre on peut mentionner le cas des populations de Djifa située à la frontière entre le Niger et le Nigéria où 82% de la population n'a pas de document d'identification et 61% courent le risque d'apatridie.²⁶ En outre, les lacunes dans les lois sur la nationalité ont généré des cas d'apatridie au Sénégal. L'histoire d'Oulimata est édifiante. « Sénégalaise, elle est mère de deux garçons nés en France d'un père originaire d'un pays d'Afrique de l'est. Jusqu'en 2013, les femmes sénégalaises ne pouvaient pas transmettre leur nationalité à leurs enfants nés à l'étranger sauf si le père était inconnu ou apatride. Le père des enfants d'Oulimata est ressortissant d'un pays instables qui requiert la présence physique des enfants pour obtenir la confirmation de leur citoyenneté. La famille avait peur de se rendre dans le pays en raison de la guerre. De ce fait, ses enfants se sont retrouvés apatrides ». ²⁷ Enfin, la déchéance semble, de plus en plus devenir sur le continent, une arme d'élimination des adversaires politiques, en

20 Affaire, *Anudo Ochieng Anudo c. Tanzanie*, arrêt du 22 mars 2018.

21 Voir le Comité Africain d'Experts sur les droits et le bien-être de l'enfant, dans sa première décision dite affaire *Children of Nubian Descent in Kenya*, 2011.

22 UNHCR *Nationalité et Apatridie en Afrique de l'Ouest note d'information* (2017) 2.

23 G Aïvo 'Frontière et apatridie en Afrique' (2016) 3 *Revue africain de la Démocratie et de la gouvernance* 107-124.

24 On assiste à l'usage abusif des lois sur la nationalité pour réduire au silence des opposants politiques. Les cas de John Modise au Botswana, de Kenneth Kouanda et d'Alasane Ouatarara en Côte d'Ivoire, respectivement citoyen ordinaire, ancien président de la république et premier ministre et dont la nationalité avait été contestée sont illustratifs. Voir E Dabonne 'Les crises de nationalité' (2016) n°001 in *Revue CAMES/SJP* 123-131.

25 Aïvo (n 25) 113.

26 B Hassane *Etude sur la problématique de la documentation et du risque d'apatridie au sein des populations déplacées au nord du Nigéria vers la population de Djifa* (2015) 7.

27 UNHCR *L'apatridie en Afrique de l'ouest votre monde à la renverse* (2018) 9.

témoigne l'emblématique affaire de la nationalité de l'ancien Président de la Zambie, Kenneth Kaunda,²⁸ et l'affaire *Baba Alpha* au Niger.²⁹ Tout ceci fait penser à Hervé Dabonne, qu'on assiste à une crise de la nationalité.³⁰

Le grand malaise est que les apatrides ne sont généralement pas reconnus comme des personnes devant la loi et font face à de grandes difficultés pour voyager, se marier et accéder à l'éducation ou aux soins de santé. L'apatridie est le déni d'un large éventail de droits. En résumé, être apatride signifie souvent qu'il est impossible de vivre sa vie comme les autres au sein de la société. Cette redoutable infortune que constitue l'apatridie est manifestement une violation des droits de l'homme.³¹ Pire, elle peut être une source de conflit.³² La question fondamentale qui se pose est de savoir si les normes régionales africaines et les mécanismes de contrôle sont en mesure de prévenir l'apatridie.

L'intérêt du présent sujet se justifie à la fois sur le plan théorique et pratique. D'abord sur le plan théorique, la situation difficile des « *apatrides* » est sous-évaluée, insuffisamment documentée et nécessite de toute urgence des réponses plus fortes et plus efficaces.³³ Les études³⁴ et réflexions³⁵ sur le sujet se contentent d'évoquer les généralités sur l'apatridie sans s'intéresser souvent à la réponse apportée par le système africain de protection des droits de l'Homme ou réserve à ce dernier, une part infime. Ensuite, sur le plan pratique, la présente étude est une contribution au débat sur la nécessité de la prévention de l'apatridie en Afrique par l'analyse de l'effet des normes juridiques sur la situation des personnes à risque. De plus, l'Affaire, *Anudo Ochieng Anudo Tanzanie*, et le projet de Protocole à la Charte sur la nationalité en Afrique,³⁶ donnent la mesure de l'importance de la présente réflexion. Car, ce projet de texte spécifique donne un nouveau

28 Voir Communication No 211/1998, *Legal Resources Foundation c. Zambie*.

29 <https://rsf.org/fr/actualites/niger-le-journaliste-baba-alpha-condamne-la-mort-civique> (consulté le 11 octobre 2019).

30 Dabonne (n 24) 123-131.

31 Du droit à la nationalité consacré par l'article 15 de la déclaration universelle des droits de l'homme de 1948.

32 Crise ivoirienne. Guillaume Soro Chef du Mouvement Rebelle s'exprimait en ces termes 'Donnez-nous des cartes d'identité et nous rendrons nos kalachnikov'. Voir B Mamby *La nationalité en Afrique* (2001) 28.

33 UNHCR *L'apatridie cadre d'analyse pour la prévention la réduction et la protection* (2008) 1.

34 Notamment les études académiques, RF Avlessi *La prévention de l'apatridie en droit béninois* (2017) 108; Aïvo (n 23).

35 R Likibi *Le droit de l'apatridie: Pratique et controverses* (2013) 418; B Mamby *La nationalité en Afrique* (2011); B Mamby *La nationalité la migration et l'apatridie en Afrique de l'Ouest* (2015); B Mamby *Les lois sur la nationalité en Afrique Une étude comparée* (2010); UNHCR *L'apatridie cadre d'analyse pour la prévention la réduction et la protection* (2008).

36 Le projet sur l'élaboration d'un Protocole à la Charte africaine des droits de l'homme et des peuples sur le droit à la nationalité en Afrique a été adopté par la résolution 277, lors de la 55ème Session ordinaire de la Commission africaine des droits de l'homme et des peuples, tenue à Luanda en Angola, du 28 avril au 12 mai 2014. Elle fait suite à la résolution 234 et souligne fondamentalement 'la nécessité

visage à la protection du droit de la nationalité par l'érection de plusieurs garanties contre l'apatridie.³⁷

L'étude fait recours à plusieurs disciplines des sciences juridiques, notamment, le droit de la nationalité, le droit international privé, le droit international public, les droits de l'homme. Elle a été menée à l'aune de la documentation juridique et sociologique ainsi que des données statistiques. L'analyse de la Charte africaine des droits de l'homme et des peuples, de la doctrine ainsi que de la jurisprudence de la Commission et de la Cour africaines des droits de l'homme et des peuples forme la trame de l'étude. Elle a abouti à la conclusion selon laquelle, l'arsenal juridique en matière de nationalité est à renforcer malgré l'excellente contribution de la Cour et de la Commission africaines des droits de l'homme et des peuples. Pour parvenir à ces résultats, il s'est agi d'abord de constater que la prévention normative de l'apatridie est à géométrie variable (2) avant de noter, contre toute attente, l'existence d'une prévention jurisprudentielle de l'apatridie admirable (3).

2 UNE PREVENTION NORMATIVE A GEOMETRIE VARIABLE

L'arsenal normatif sur l'apatridie n'est pas satisfaisant. En claire, la prévention assurée par les instruments africains manque de ferveur. Elle est surtout caractérisée par le silence de la Charte africaine des droits de l'homme et des peuples sur la question de la nationalité (2.1). Toutefois, les efforts de rattrapage tentés par la Charte africaine des droits et du Bien-être de l'enfant et le Protocole à la Charte africaine des droits de l'homme et des Peuples relatif aux droits de la femme en Afrique (Protocole de Maputo) participent à la correction de cette imperfection (2.2).

de franchir de nouvelles étapes significatives vers l'identification, la prévention, la réduction de l'apatridie et la protection du droit à la nationalité' <http://citizenshiprightsfranca.org/wp-content/uploads/2016/07/CADHP-R%C3%A9solutions-sur-la-nationalit%C3%A9-201314.pdf> (consulté le 20 octobre 2019).

37 Union Africaine, *Note explicative du projet de protocole a la charte africaine des droits de l'homme et des peuples sur les aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique*, 2018. Voir Article 3: consécration du droit à la nationalité, Article 5: attribution de la nationalité selon le droit du sol et prise en compte des enfants trouvés, article 8: prise en compte des Populations nomadiques et transfrontalières, article 18: Limitation des Expulsions https://au.int/sites/default/files/newsevents/workingdocuments/35139-wd-note_explicative_projet_de_protocole_nationalite_juin2018_pour_la_cts.pdf (consulté le 30 octobre 2019).

2.1 Le silence de la Charte Africaine des Droits de l'Homme et des Peuples

Partie intégrante du bloc de constitutionnalité de beaucoup de pays africains,³⁸ il n'est pas superflu de se questionner sur la contribution de la Charte africaine à la prévention de l'apatridie.

A première vue, la Charte africaine, ne contient pas de dispositions spécifiques sur le droit à une nationalité.³⁹ Aucune référence à l'apatridie n'y figure, non plus. Elle évoque, par ailleurs, l'appartenance de l'individu à la communauté sans aucune précision sur les modalités de la détermination de cette appartenance. Cette omission que l'on pourrait qualifier de « volontaire »⁴⁰ du droit à la nationalité a pu être motivée par le projet d'un « peuple Africain »,⁴¹ nourri par les rédacteurs de la Charte. Hélas, l'assimilation totale du concept de peuple, marque de la régionalisation de la fraternité, devrait être nécessairement et très rapidement abandonnées car la jouissance des droits est désormais subordonnée à la qualité de national.⁴²

Néanmoins, certaines dispositions de protection des droits de l'individu prévues par la Charte peuvent servir à la prévention de l'apatridie. Il s'agit notamment du droit à l'égalité (l'interdiction de la discrimination) et du droit à la dignité individuelle.

Premièrement, il importe de noter que la relation entre apatridie et discrimination est évidente. De ce fait, l'apatridie provient souvent directement de la discrimination opérée par les lois sur la nationalité en Afrique. Ces discriminations le plus souvent fondées sur le sexe, la race et l'éthnie, violent le droit à l'égalité instituée par les articles 2⁴³ et 3⁴⁴ de la Charte africaine. Ces deux articles ont servi de base à la Cour

38 Article 7 de la Constitution béninoise du 11 décembre 1990; article 65 de la Constitution camerounaise du 18 janvier 1996; la loi constitutionnelle sénégalaise du 22 janvier 2001.

39 Déclaration d'Abidjan des ministres des Etats membres de la CEDEAO sur l'éradication de l'apatridie de 2015 constate que: 'La Charte Africaine des Droits de l'Homme et des Peuples ne contient expressément aucune disposition sur le droit à la nationalité'.

40 L'article 28 de l'avant-projet de la Charte africaine des droits de l'homme et des peuples (CAB/LEG/67/1) préparé par le Juge Keba Mbaye disposait que: 'Toute personne a droit à la nationalité de l'État de son territoire de naissance s'il n'a pas droit à une autre nationalité' et que 'nul ne peut être arbitrairement privé de sa nationalité ni du droit de changer de nationalité', cfr Union Africaine (UA) *Le droit à la nationalité en Afrique* (2014) 2 <https://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=54db1d4c8> (consulté le 30 octobre 2019).

41 'Le terme peuple s'impose dans le langage courant lorsqu'il s'agit d'identifier les populations d'une région par rapport aux populations d'autres régions du monde (Amérique, Asie, Europe, Océanie), c'est la dimension régionale du concept de peuple'. Voir M Mubiala *Le système régional africain de protection des droits de l'homme* (2005) 15.

42 B Goldman 'Droit à la nationalité et nationalité imposée' in *Travaux du Comité français de droit international privé* (1955) 43-60.

43 Lire l'article 2 de la charte africaine.

44 Lire l'article 3 de la charte africaine.

constitutionnelle du Bénin pour déclarer certaines dispositions discriminatoires de la loi 65-17 du 23 juin 1965 portant Code de nationalité en République du Bénin contraire à la Constitution.⁴⁵

Avant l'inédite décision DCC 14-172 du 22 septembre 2014 de la Cour constitutionnelle du Bénin, il était impossible pour la femme béninoise de transmettre la nationalité à son époux et à son enfant. En effet, l'étranger qui épouse un citoyen béninois n'a pas les mêmes droits selon que son conjoint béninois soit un homme ou une femme puisque dans le premier cas, elle acquiert d'office la nationalité béninoise⁴⁶ par le seul lien du mariage et la garde en dépit de sa nationalité d'origine.⁴⁷ Alors que, dans le second cas, il ne peut en faire l'acquisition que par décision de l'autorité publique. De telles dispositions sont potentiellement génératrices d'apatridie.

La Cour constitutionnelle sous le visa d'une part, des articles, 2 et 3(1) de la Charte africaine et de l'article 26 de la Constitution du 11 décembre 1990,⁴⁸ a jugé que l'impossibilité pour la femme de transmettre sa nationalité à son époux est discriminatoire⁴⁹ et donc, contraire à la Constitution du 11 décembre 1990. Le juge constitutionnel, pour arriver à cette conclusion a pris par les détours du principe de l'égalité. Concrètement un étranger qui se marie à une femme béninoise aujourd'hui peut acquérir la nationalité béninoise.⁵⁰ Cette affaire s'inscrit dans la même veine qu'une décision rendue par de la Haute Cour du Botswana en 1992. Dans ce procès *Unity Dow*, une avocate a contesté la constitutionnalité du Code de la nationalité du Botswana pour discrimination en fonction du genre. La Cour a de ce fait déclaré la disposition contestée contraire à la constitution.⁵¹

45 Cour Constitutionnelle du Bénin, DCC 14-172 du 22 septembre 2014 <https://www.refworld.org/pdfid/547729054.pdf> (consulté le 30 octobre 2019).

46 Article 18 de la loi n°65-17 'Sous réserve des dispositions des articles 19, 20, 22 et 23, la femme étrangère qui épouse un dahoméen acquiert la nationalité dahoméenne au moment de la célébration du mariage.'

47 Décision DC 8 du 16 juin 1992 de la Cour Constitutionnelle du Bénin.

48 Article 29 de la Constitution béninoise du 11 décembre 1990: 'L'Etat assure à tous l'égalité devant la loi sans distinction d'origine, de race, de sexe, de religion, d'opinion politique ou de position sociale. L'homme et la femme sont égaux en droit. L'Etat protège la famille et particulièrement la mère et l'enfant. Il veille sur les handicapés et les personnes âgées'.

49 La Cour dans sa décision DCC 14-172, définit la notion de discrimination comme 'une discrimination est une inégalité de traitement fondée sur un critère prohibé par la loi dans un domaine visé. Elle peut être directe lorsqu'une inégalité est créée de manière explicite et intentionnelle, ou indirecte, lorsqu'une règle, une pratique ou un critère apparemment neutre, a un effet défavorable sur un groupe visé par un critère de discrimination. Elle peut ne pas être intentionnelle. Parmi les critères de discrimination généralement retenus, il y a: la race, la couleur, le sexe, la religion, l'opinion politique, l'ascendance nationale ou l'origine sociale, l'âge, le handicap, l'état de santé, la nationalité'.

50 Montcho (n 9) 318-319.

51 Arrêt de la Haute Cour du Botswana, *Unity Dow c. Attorney General*, MISCA 124/1990, juin 1991 in *Recueil africain des décisions de droits de l'homme* (1992): 'Le temps où les femmes étaient traitées comme du bétail et n'existaient que pour obéir aux caprices et aux désirs des hommes est depuis longtemps révolu et ce serait faire injure à la pensée moderne et à l'esprit de la Constitution que de juger que la Constitution a été délibérément faite pour permettre la discrimination fondée sur le sexe' (traduction non officielle).

Au surplus, le Code de nationalité béninoise du 23 juin 1965 fait une discrimination en matière de transmission de la nationalité par la femme. En réalité, l'article 12 dispose:

« Est Dahoméen: 1°- l'enfant né d'un père dahoméen

2°- l'enfant né d'une mère dahoméenne lorsque le père est inconnu ou n'a pas de nationalité connue ». L'article 13 dispose aussitôt « Est Dahoméen, sauf la faculté s'il n'est pas né au Dahomey de répudier cette qualité dans les six mois précédant sa majorité, l'enfant né d'une mère dahoméenne et d'un père de nationalité étrangère ».

La condition posée par l'article 12 est épouvantable. La nationalité de la mère n'est transmise que lorsque le père est inconnu ou n'a pas de nationalité connue. Or, une telle condition est supprimée pour « l'enfant né d'un père béninois ». Ce surplus de critère mis à charge de l'enfant né d'une mère béninoise entretient « une supériorité de l'homme sur la femme ». ⁵² Plus loin, l'article 13, quant à lui, prévoit que l'enfant né hors du territoire national d'un père de nationalité étrangère puisse répudier la nationalité de sa mère avant sa majorité, alors que pour le père, la transmission est sans condition.

Le juge constitutionnel conclut donc que « l'article 12(1) et l'article 13 du code de nationalité béninoise créent une inégalité fondée sur le sexe du géniteur ». ⁵³ Elles sont de ce fait « contraires à la constitution ». ⁵⁴ Par cette jurisprudence originale, la Cour constitutionnelle du Bénin a conjuré de façon efficace le risque d'apatridie qui planait autour de l'époux étranger et surtout autour de l'enfant. Cette jurisprudence de la Cour constitutionnelle béninoise, confirme la position de Likibi, selon laquelle le juge prend une place importante dans le cadre de la création prétorienne du droit ⁵⁵ au service de la lutte contre l'apatridie.

On en retient aussi comme Nanteuil que, même les textes qui ne font pas référence à l'apatridie ou à la nationalité apportent aux apatrides ou aux personnes à risque un certain nombre de droits fondamentaux, qui leur sont reconnus en tant qu'individu. ⁵⁶ Ainsi, les juridictions nationales africaines sont appelées à suivre l'exemple du juge constitutionnel béninois afin de protéger les citoyens victimes de discrimination en matière de nationalité et d'apatridie. ⁵⁷ Mieux, les Etats qui ont adoptés des dispositions discriminatoires devraient revoir leurs législations. En priorité, il s'agit entre autres du Burundi, de la Guinée, du Kenya, du Libéria, de Madagascar, du Mali, du Soudan, du Togo, ⁵⁸ du Zimbabwe de la Gambie ⁵⁹ qui pratiquent encore une

52 Voir Décision DCC 14-172 du 16 septembre 2014.

53 *Ibid.*

54 *Ibid.*

55 Likibi (n 35) 149.

56 Nanteuil (n 10) 322.

57 Manby (n 35) 5.

58 Lire l'article 3 de l'ordonnance n°78-34 du 7 septembre 1978 portant code de nationalité togolaise: 'Est Togolais:

1-l'enfant né d'un père Togolais;

2-l'enfant née d'une mère togolaise et d'un père n'ayant pas de nationalité ou dont la nationalité est inconnue'.

discrimination basée sur le genre en matière de nationalité d'origine à des enfants nés sur le territoire ou à l'étranger.⁶⁰

Deuxièmement, il est une évidence que l'acquisition de la nationalité est la première image de l'existence juridique de l'être humain. Tout bien considéré, la Charte proscrit toutes formes d'acte arbitraire portant entorse à la dignité inhérente à la personne humaine et à la reconnaissance de sa personnalité juridique. Or, faut-il le rappeler, l'apatridie constituerait bien la forme par excellence de la méconnaissance de la personnalité juridique des personnes. En l'absence de toute forme de statut juridique reconnu, ils sont continuellement menacés d'exploitation de détention et d'expulsion. Le témoignage de Lara une ancienne apatride, qui a été constamment refoulée aux frontières est illustrateur.⁶¹ Plus concret, la Commission a eu recours au droit à la dignité pour prévenir l'apatridie. Elle constate dans l'affaire *Amnesty International contre la Zambie* : « qu'en forçant les plaignants d'une part, à vivre comme des apatrides dans des conditions dégradantes, et d'autre part, qu'en les privant de l'affection de leurs famille » que le gouvernement Zambien a porter entorse à la dignité et de ce fait a violé l'article 5 de la Charte africaine.

Toutefois, une consécration claire et sans ambiguïté aurait pu éviter ces contournements aux juridictions chargées de protéger la nationalité des individus. La Charte a ainsi raté une excellente occasion de protéger un droit qui est au centre de tous les droits. Cette situation aurait pu générer une sorte de vide juridique, en l'absence de la possibilité offerte à la Cour de recourir à d'autres instruments pertinents de protection des droits de l'Homme.⁶² Heureusement, de *lege feranda*, le projet de protocole à la Charte africaine sur les aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique, prévoit clairement

59 Article 10 de la Constitution de la République de Gambie: 'A person born outside The Gambia after the coming into force of this constitution shall be a citizen of The Gambia by descent, if at the time of his or her birth either of his or her parents is a citizen of The Gambia otherwise than by virtue of this section or any comparable provision of any earlier constitution'. Le Libéria porte les mêmes lacunes dans sa constitution, section 20(1)(3).

60 Ces dix (10) Etats 'attribuent la nationalité d'origines sur une base discriminatoire, et privilégient le père à différents degrés'. C Yakite *La nationalité et l'apatridie en Afrique* (2018) 35.

61 'Se faire dire "non" par le pays où je vis ; se faire dire "non" par le pays où je suis née ; se faire dire "non" par le pays d'où mes parents sont originaires, se faire dire encore et encore "vous n'êtes pas des nôtres!". On a l'impression de ne plus exister, de ne plus savoir même pourquoi on vit. Etre apatride, c'est avoir en permanence le sentiment d'être sans valeur'. UNHCR *Nationalité et apatridie un guide pour les parlementaires* (2014) 5.

62 L'article 3(1) du protocole à la Charte prévoit une très large compétence matérielle de la Cour; il est en effet libellé comme suit 'La Cour a compétence pour connaître de toutes les affaires et de tous les différends dont elle est saisie concernant l'interprétation et l'application de la Charte, du présent Protocole, et de tout autre instrument pertinent relatif aux droits de l'homme et ratifié par les États concernés'.

le droit à la nationalité en son article 3,⁶³ dans les termes que celui de la DUDH.

Malheureusement ce protocole n'a pas pour l'heure été adopté. L'entrée en vigueur de ce protocole viendrait compléter les lacunes constatées au niveau de la Charte africaine.

Mais, avant l'entrée en vigueur du protocole sur la nationalité, la Charte africaine de l'enfant et du bien-être et le protocole de Maputo participent à la prévention de l'apatridie en Afrique.

2.2 Les efforts de la Charte africaine des droits et du bien-être de l'enfant et du Protocole à la Charte africaine des droits de l'homme et des Peuples relatif aux droits de la femme en Afrique

Le droit à la nationalité a été élaboré par la Charte africaine des droits et du bien-être de l'enfant (Charte africaine sur le droit de l'enfant) et le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme en Afrique, communément appelé « Protocole de Maputo ». Ces deux textes catégoriels ont, tour à tour, consacré le droit à la nationalité contrairement à la Charte africaine. Il convient d'abord d'interroger la réponse de la Charte africaine sur le droit de l'enfant à la problématique de l'apatridie avant d'examiner la contribution du protocole de Maputo.

Premièrement, la Charte africaine des droits et du bien-être de l'enfant pose des garanties essentielles visant à éviter l'apatridie pour les enfants. Le texte, protège le droit à la nationalité pour l'enfant de quatre manières.⁶⁴ La première protection consiste en la reconnaissance du droit à un nom,⁶⁵ autrement la garantie d'une identité pour l'enfant. La deuxième mesure concerne, l'injonction faite aux Etats d'enregistrer les naissances.⁶⁶ La charte fait de l'enregistrement des naissances, un moyen de taille dans la prévention de l'apatridie. Car l'enregistrement des naissances serait donc un des moyens essentiels de prévention des cas d'apatridie, en ce qu'il permet l'établissement des documents d'identité des personnes et facilite la détermination de leur nationalité. Enfin, la troisième et la dernière précaution se rapportent à la consécration du droit à la nationalité pour

63 Article 3 projet de protocole à la Charte africaine des droits de l'homme et des peuples de 2018 sur les aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique 'Les Etats parties conviennent et reconnaissent que:

- a. Tout individu a droit à une nationalité;
- b. Nul ne peut être privé ou se voir refuser arbitrairement la reconnaissance de sa nationalité ni le droit de changer de nationalité'.

64 Lire l'article 6 de la Charte africaine de l'enfant et du bien-être.

65 Article 6(1) de la Charte africaine de l'enfant et du bien-être: 'Tout enfant a droit à un nom dès sa naissance'.

66 Article 6(2) de la Charte africaine de l'enfant et du bien-être: 'Tout enfant est enregistré immédiatement après sa naissance'.

chaque enfant⁶⁷ du continent. Ainsi, les Etats sont appelés à adopter des législations souples conciliant, le droit du sol⁶⁸ et le droit du sang.⁶⁹

Les Etats se sont engagés lors de la conférence d'Abidjan à réduire les risques d'apatridie en renforçant les mécanismes de l'Etat civil et en veillant particulièrement à ce que chaque enfant soit enregistré immédiatement après la naissance.⁷⁰ Mieux, les rapports soumis par les Etats au Comité sur les droits de l'enfant révèlent d'énormes progrès réalisés par certains gouvernements en matière de la garantie du droit à la nationalité. A cet effet, l'Algérie, à la faveur d'une révision de son code de nationalité a corrigé les discriminations entretenues par l'ancienne loi de 1970.⁷¹ Concrètement, l'article 7⁷² de l'ordonnance 05-01 du 27 février 2005 accorde la nationalité à tout enfant né sur le territoire algérien.⁷³ Le Burkina Faso quant à lui, a mis en place un mécanisme de rattrapage pour les déclarations de naissances effectuées hors délais. Conformément à l'article 106 du Code des personnes et de la famille du Burkina : « Toute naissance survenue sur le territoire national doit faire l'objet d'une déclaration à l'officier d'état civil du lieu de naissance dans les deux mois à compter du jour de sa naissance ». Cependant, Lorsque ce délai n'a pas été respecté pour des raisons diverses, le défaut d'acte de l'état civil peut être suppléé par jugement c'est-à-dire par décision du juge.⁷⁴

Le Bénin aussi, s'est conformé à la Charte en adoptant en décembre 2015 un nouveau code de l'enfant qui consacre les mêmes droits⁷⁵ évoqués par l'article 6 et va plus loin en pénalisant l'absence de déclaration des naissances. De façon précise⁷⁶

Quiconque soit le père ou la mère, l'ascendant ou le proche parent, le médecin, la sage-femme, la matrone, soit le chef de village ou de quartier de ville ou toute autre personne ayant assisté à une naissance qui par négligence ou par intention de nuire, ne procède pas à la déclaration de naissance à l'officier de l'Etat civil, dans les délais prescrits par la loi, est puni d'une amende de vingt-cinq mille (25.000) à cinquante mille (50.000) francs CFA

67 Lire l'article 6(3) de la Charte africaine de l'enfant et du bien-être.

68 Le droit du sol encore appelé *jus soli* est le mode d'acquisition de la nationalité en vertu de la naissance sur le territoire d'un Etat.

69 Le droit du sang encore appelé *jus sanguinis* est le mode d'acquisition de la nationalité par la filiation.

70 Voir UNHCR *Plan d'action de Banjul de la Communauté des Etats de l'Afrique de l'Ouest (CEDEAO) pour l'éradication de l'apatridie 2017-2014*.

71 Ordinance 70-86 of 15 December 1970 on the Algerian Code of nationality.

72 Ordinance 05-01 of 27 February 2005 on the Algerian Code of nationality, article 7 'is of Algerian nationality by birth, in Algeria'.

73 <https://acerwc.africa/wp-content/uploads/2018/04/EN-Algeria-Initial-Report.pdf> (consulté le 20 octobre 2019).

74 https://acerwc.africa/wp-content/uploads/2018/04/Burkina_Faso_Initial_Report.pdf (consulté le 20 octobre 2019).

75 Lire les articles 17 ; 19 ; 23 et 25 de la loi n°2015-08 du 08 décembre 2015 portant Code de l'Enfant en République du Bénin.

76 Article 333 du Code béninois de l'enfant.

Les peines sont plus sévères pour les médecins, les sages-femmes et les matrones qui ne transmettent pas les fiches de naissances dans les délais requis.⁷⁷

De plus, l'article 6 de la Charte a fort inspiré le Comité sur les droits de l'enfant, dans sa première décision dite affaire *Children of Nubian Descent in Kenya*. En l'espèce, les plaignants alléguaient que les nubiens au Kenya sont originaires des Monts Nouba qui s'élèvent dans une région située maintenant au centre du Soudan et furent enrôlés de force dans l'armée coloniale britannique au début du 20^{ème} siècle alors que le Soudan était sous domination britannique. Lors de leur démobilisation, ils auraient demandé à retourner au Soudan, mais le gouvernement colonial de l'époque refusa et les contraignit à rester au Kenya. Les plaignants allèguent que lors de l'accession du Kenya à l'indépendance, le problème de la citoyenneté des nubiens n'a pas été directement abordé et qu'ils ont toujours été traités comme des étrangers parce que le gouvernement stipulait qu'ils n'avaient aucune terre ancestrale au Kenya et de ce fait, ne pouvaient se voir accorder la nationalité kényane. Alors, les parents rencontrent beaucoup de difficultés pour enregistrer leur naissance. De ce fait, les plaignants invoquent principalement la violation de l'article 6 en particulier des alinéas 2, 3 et 4 qui énoncent que l'enfant doit être enregistré et avoir une nationalité dès sa naissance. Le Comité africain reçoit la plainte, l'examine au fond et constate entre autres la violation de l'article 6 de la Charte. L'organe traite de l'incapacité du Kenya à enregistrer et à attribuer la nationalité aux enfants d'origine nubienne vivant dans le pays contraire à l'article 6 de la Charte.

Pour corriger cette situation, le Comité sur les droits de l'enfant, recommande entre autres solutions que le gouvernement du Kenya prenne toutes les mesures législatives, administratives et autres nécessaires afin de garantir que les enfants d'ascendance nubienne au Kenya, qui sans cela se retrouveraient apatrides, puissent acquérir la nationalité kényane et la preuve de cette nationalité dès la naissance. Cette décision est un précédent qui donne un contenu concret à l'article 6 de la Charte. Il est souhaitable que les Etats dans lesquels les enfants sont exposés à l'apatridie puissent travailler à la garantie du droit à la nationalité pour ces derniers.

Toutefois, il convient de préciser que malgré les éloges qui lui sont faites en matière de prévention de l'apatridie, la Charte africaine sur le droit de l'enfant comporte une insuffisance. Elle est muette sur la situation des enfants trouvés. En revanche, le projet de protocole à la Charte africaine sur les aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique prévoit cette éventualité. Selon l'alinéa 2(a) de l'article 5 de ce texte, « Un État partie attribue également la nationalité à: a. L'enfant trouvé sur son territoire de parents inconnus, qui sera réputé né sur son territoire de parents

77 Article 334 du code béninois de l'enfant: ' Tout médecin accoucheur, toute sage-femme ou toute matrone qui ne transmet pas à l'officier de l'état civil, dans les délais requis par la loi , les fiches de naissance des enfant nés dans son centre de travail, est puni d'une amende de 50.000 à 200 000 francs d'emprisonnement de 15 à 30'.

possédant sa nationalité, à moins que sa filiation soit établie avant sa majorité et qu'il n'acquiert alors la nationalité d'un de ses parents ». Cette bonne pratique est déjà présente dans la législation algérienne.⁷⁸ C'est aussi le cas du code de l'enfant du Bénin, qui donne pouvoir au procureur de procéder à la déclaration de naissance des enfants retrouvés et dont les parents ne sont pas connus.⁷⁹

Au demeurant, en dehors de la Charte, le Protocole de Maputo comporte quelques vertus en matière de prévention de l'apatridie.

Quelle est la nationalité de la femme africaine? La réponse à cette question n'est pas évidente. En effet, nombreux sont les textes qui interdisent encore aux femmes mariées à des non-ressortissants de transmettre leur propre nationalité à leurs enfants ou leur mari, alors que les hommes peuvent le faire sans difficulté.⁸⁰ L'avènement du Protocole de Maputo a jeté à travers deux dispositions, les fondamentaux pour que le droit de la nationalité devienne plus égalitaire. D'une part, l'article 6 du Protocole en son point g dispose : « La femme mariée a le droit de conserver sa nationalité et d'acquérir la nationalité de son mari ». Par ce fait, le texte protège la nationalité de la femme par le mécanisme de la double nationalité. Ainsi, le mariage ne saurait avoir un effet sur sa nationalité. Dans cette logique, les Etats comme le Botswana, la Côte d'Ivoire, le Lesotho et le Madagascar, le Niger prévoient automatiquement la double nationalité pour la femme mariée.⁸¹ Cet idéal voulu par le protocole n'est toujours pas été respecté par certains Etats. A titre d'exemple, le code de nationalité du Malawi⁸² et celle du Soudan du Sud⁸³ ne permettent pas la double nationalité.

D'autre part, le texte, proscrie toutes discriminations à l'égard des femmes dans la transmission de la nationalité.⁸⁴ Selon le point (f) de l'article 6 du protocole : « La femme a le même droit que l'homme en ce qui concerne la nationalité de leurs enfants sous réserve des

78 Ordinance 05-01 of 27 February 2005 on the Algerian Code of nationality, article 7: 'is of Algerian nationality by birth, in Algeria: i. A child born in Algeria of unknown parents: However, a child born in Algeria of unknown parents shall be deemed never to have been Algerian if, during his minority, his parentage is legally established in respect of a foreign national and if he/she is given the nationality of the foreign national's country, in accordance with their national law. The newborn child found in Algeria is presumed born in Algeria, unless it is proven otherwise. ii. A child born in Algeria of unknown father and a mother, whose only name is on his/her birth certificate, without further particulars may prove nationality thereof.

79 Article 19 de la loi n°2015-08 du 8 décembre 2015 portant code de l'enfant en République du Bénin: 'L'enfant, à sa naissance doit être déclaré à l'officier d'état civil par son père ou sa mère. Lorsqu'il s'agit d'un enfant retrouvé dont les parents ne sont pas connus, la déclaration est faite par le procureur de la République territorialement compétent'.

80 Manby (35) 19.

81 Union Africaine (n 37) 33.

82 Voir le Citizenship Act de 1966 <https://citizenshiprightsfr.org/region/malawi-fr/?lang=fr> (consulté le 08-10-2019).

83 Sudan Nationality Act, 2003, Section 9.

84 Lire l'article 6 Protocole de Maputo.

dispositions contraires dans les législations nationales et des exigences de sécurité nationale ». ⁸⁵ Le Protocole met la femme sur le même piédestal que l'homme, pour préserver ⁸⁶ ses enfants du risque d'apatridie engendré par les effets pervers du jeu des législations en matière de la nationalité. Par ailleurs, depuis l'adoption du Protocole, des évolutions sont observées sur le continent africain. Le cas d'Oulimata, une sénégalaise rend compte de cette avancée. Une réforme intervenue en juin 2013 permet aux femmes et aux hommes d'être égaux en matière de transmission de leur nationalité à leurs enfants et à leurs époux. ⁸⁷ Depuis, les Etats adoptent de plus en plus des législations neutres en matière de nationalité. ⁸⁸ Mieux, la Commission Africaine des Droits de l'Homme et des Peuples s'érige en gardien de cette égalité. Ainsi, au cours de l'examen du rapport soumis par le Burundi, la Commission lors de sa 13^{ème} Session Extraordinaire du 19 au 25 février 2013 a enjoint à l'Etat burundais: « d'abroger toutes les dispositions discriminatoires à l'égard des femmes contenues dans les textes de lois », ⁸⁹ après avoir constaté: « L'existence des dispositions discriminatoires à l'égard des femmes dans certaines lois notamment dans le code des personnes et de la famille, le code de la nationalité ». ⁹⁰

La contribution des deux textes est immense dans la lutte contre l'apatridie. Cependant, il faudrait que les Etats soumettent conformément à l'article 62 de la Charte africaine, leurs rapports de façon régulière pour une évaluation de l'effectivité du respect desdits textes par la Commission africaine.

La proclamation du droit à la nationalité au plan régional n'est pas la seule étape dans le combat pour la réduction de l'apatridie. Certaines instances comme la Commission africaine et la Cour africaine veillent, à travers leur œuvre jurisprudentielle, à la prévention de l'apatridie.

85 *Ibid.*

86 *Ibid.*

87 *Ibid.*

88 'En mars 2010, le Parlement kenyan a adopté un nouveau projet de constitution, le premier depuis la constitution de l'indépendance de 1963. La constitution a été approuvée par voie de référendum en août 2010 et est entrée en vigueur le même mois. En conséquence de cette adoption, le Code de la nationalité kényan est appelé à être réformé en profondeur. Les principales modifications sont les suivantes:

Fin à la discrimination de genre en vertu de la loi sur la capacité d'une femme de transmettre sa nationalité à son enfant ou son conjoint. Mamy (37) 67.

89 Observations finales et recommandations relatives au Rapport Périodique cumulé de la République du Burundi, 13^{ème} Session Extraordinaire 19 au 25 février 2013, Banjul, Gambie In [https://www.policinglaw.info/assets/downloads/ACHPR_Concluding_Observations_on_Burundi_\(2014\)_French_original.pdf](https://www.policinglaw.info/assets/downloads/ACHPR_Concluding_Observations_on_Burundi_(2014)_French_original.pdf) (consulté le 15 septembre 2019).

90 *Ibid.*

3 UNE PREVENTION JURISPRUDENTIELLE ADMIRABLE

La texture des instruments juridiques africains en matière de préservation du droit à la nationalité, ne préfigurait pas d'une jurisprudence abondante sur les questions relatives à la nationalité en Afrique. La Commission africaine (3.1) et la Cour africaine vont déjouer ce pronostic en rendant des décisions chargées d'enseignements (3.2).

3.1 L'office de la Commission Africaine des Droits de l'Homme et des Peuples

La proclamation du droit à la nationalité au plan régional n'est pas la seule étape dans le combat pour la réduction de l'apatridie. Certaines instances comme la Commission africaine veillent à l'effectivité dudit droit.⁹¹ En effet, la Commission joue un rôle quasi judiciaire de protection et de promotion.⁹² Elle procède à un examen contradictoire des requêtes à l'issue de laquelle elle établit les responsabilités et indique s'il y a lieu, le versement des dommages-intérêts aux victimes des violations.⁹³ C'est pourquoi, on parle d'ailleurs de la jurisprudence de la commission.

La Commission est l'organe mandaté pour assurer le contrôle de l'application de la Charte africaine. C'est à ce titre qu'elle s'est érigée en gardien et protecteur du droit à la nationalité sur le continent. Deux importantes affaires ont permis à l'institution de préciser le contenu de ce droit. Il s'agit respectivement des affaires *John K. Modiste c. Botswana*⁹⁴ et *Amnesty International c. Zambie*.

Dans la première affaire, John Modise, par trois fois de suite, a fait l'objet de déportation vers l'Afrique du Sud et finalement condamné pour entrer illégale au Botswana. Ne disposant pas la nationalité sud-africaine, il a résidé dans le « Bantoustan » sud-africain du Baphutatswana où il a vécu pendant sept années avant d'être déporté une cinquième fois. Il s'est retrouvé dans une zone de non droit entre le Baphutatswana et le Botswana où il a vécu pendant cinq semaines avant d'être admis au Botswana sur une base humanitaire. Modise ne disposant ni la nationalité Sud-africaine, ni celle du Botswana demande au gouvernement de lui reconnaître sa nationalité de naissance.

91 Voir article 30 de la Charte africaine.

92 Voir les articles 55, 56, 57 et 58 de la Charte africaine.

93 Voir JL Antagana-Amougou 'Commentaire de l'article 66 de la Charte africaine des droits de l'homme et des peuples' 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 droit de l'homme* (2011) 905-906.

94 Affaire *John K. Modise v Botswana*, Communication N° 97/93(2000).

La commission africaine a d'abord considéré, que « la souffrance et l'indignité dans lesquelles était placé Modise constitue une violation de l'article 5 de la Charte Africaine ». ⁹⁵ Ensuite a-t-elle fait remarquer que le défaut de possession de nationalité du requérant l'a empêché de se présenter aux fonctions électives de son pays. Ceci constitue alors une violation de son droit d'accès aux fonctions électives tel que garanti par l'article 13 de la Charte africaine qui à son tour consacre l'éligibilité en tant que droit fondamental. ⁹⁶

Le second contentieux qui oppose Amnesty International (représentant John Lyson Chinula et William Steven Banda) contre la Zambie, s'inscrit dans le même sillage que le premier. Les droits en cause sont presque analogues. En effet, le sieur William Steven Banda a reçu un ordre d'expulsion le 10 novembre 1991 et déporté illégalement, par malice politique vers le Malawi le 25 octobre 1994; à son tour, John Lyson Chinula a été enlevé de son domicile et déporté également vers le Malawi. Les victimes étaient toutes les deux d'éminentes personnalités politiques en Zambie. Elles étaient des membres dirigeants de l'UNIP, le parti qui a été au pouvoir jusqu'en 1994. La principale raison évoquée pour la déportation de ces hommes politiques est que leur présence risque de compromettre la paix et l'ordre en Zambie. Aucune raison de fait ou de droit n'a été évoquée pour justifier cette conclusion. Les actions intentées devant les tribunaux d'ordre nationales par les deux hommes pour que justice soit faite ont été vaines. C'est alors qu'Amnesty International, qualifiant la déportation de ces deux hommes d'exil forcé, introduit une requête devant la Commission africaine. La Commission africaine dans ses conclusions invoqua une panoplie de droits touchés. En premier, elle soutint « qu'en forçant les plaignants à vivre comme des apatrides dans des conditions dégradantes, le gouvernement zambien les a privés d'affection de leur famille et privé ces familles du soutien apporté par ces hommes, et que ceci constitue une violation de la dignité humaine, violant ainsi l'article 5 de la Charte ». ⁹⁷ En plus, la commission a observé que l'impossibilité pour les victimes d'attaquer en justice leur expulsion ⁹⁸ est une violation « du droit de saisir les juridictions nationales compétentes » et le « droit à un procès juste et équitable » consacré par l'article 7 de la Charte.

Les deux affaires expliquent comment, la Commission africaine de « façon quelque peu contournée » a protégé les individus contre l'apatridie. L'instance a d'une part, confirmé la prise en compte de la

95 Communication 97/93.

96 Confère article 13 al 2 de la Charte Africaine ' tous les citoyens ont également le droit d'accéder aux fonctions publiques de leurs pays'.

97 Communication n°201/98, *Amnesty International c. Zambie* para 50.

98 Communication n°201/98, *Amnesty International c. Zambie*, Douzième rapport annuel d'activité de la Cour africaine 1998-1999, para 33. Voir aussi, Communication n°159/96, *Union interafricaine des Droits de l'Homme et autres c. Angola*, 11e rapport d'activité de la Cour africaine.

question d'apatridie par la Charte africaine⁹⁹ et d'autre part, évoqué l'exigibilité du droit à la nationalité. De ce fait, aucun Etat ne peut de façon arbitraire déchoir ou refuser de reconnaître le droit à la nationalité à ses nationaux. Ce fut un précédent important qui a donné au droit à la nationalité en Afrique, tout son sens et sa splendeur.

3.2 La parade de la Cour africaine

L'affaire *Anudo ochieng Anudo* a enfin offert une occasion à la juridiction de lever le doute sur la justiciabilité du droit à la nationalité en Afrique. Au surplus, l'affaire a permis à la Cour de protéger la nationalité qui, selon Yves Calier serait à la fois un droit fondamental et un facteur d'atteinte des droits.¹⁰⁰

Dans cet arrêt du 22 mars 2018 qui oppose Anudo Ocheing Anudo à la République Unie de Tanzanie, le requérant déclare que « Sa nationalité tanzanienne lui a été retirée, il a été expulsé au Kenya d'où il a été ré-expulsé en Tanzanie, mais ne pouvant plus rentrer en Tanzanie, il est demeuré dans la « zone tampon » située entre la République Unie de Tanzanie et la République du Kenya, à Sirari ». ¹⁰¹

La Cour a été donc saisie à titre principale au fin de constater la violation du droit à la nationalité et de faire droit à la victime. Ainsi, pour préserver le requérant de l'apatridie, la décision des juges s'est basée sur trois piliers. A savoir, la reconnaissance du droit à la nationalité, du droit de ne pas être expulsé de manière arbitraire et du droit d'être entendu par une juridiction.

3.2.1 Sur Le droit à une nationalité.

En l'espèce, il a été demandé à la Cour si le retrait de la nationalité du requérant a été arbitraire ou conforme aux normes internationales des droits de l'homme. Pour répondre à la question posée, la Cour va recourir à la Déclaration universelle des droits de l'homme et à la jurisprudence de la CIJ¹⁰² pour palier le silence de la Charte africaine. Ainsi, la juridiction, dans une double démarche, va reconnaître que: « l'octroi de la nationalité relève de la souveraineté des Etats et par conséquent, chaque Etat détermine les conditions d'attribution de la

99 'La Commission a estimé que le refus de la nationalité qui a entraîné l'apatridie du demandeur équivaut à une violation des droits fondamentaux, notamment le droit à la protection par la loi, le respect de la dignité, la liberté de circulation, le droit de partir et de revenir dans son propre pays, le droit de participer à son gouvernement le droit d'accéder aux services publics, le droit de propriété et le droit à une vie de famille'.

100 J-Y Calier 'Droit de l'homme et nationalité' (2003) 63 *Annales de droit de Louvain* 683.

101 Voir l'Affaire *Anudo Ochieng Anudo* Contre la République Unie de Tanzani, arrêt du 22 mars 2018.

102 CIJ Affaire *Nottebohm, (Liechtenstein contre Guatemala)* Arrêt du 6 avril 1955 20.

nationalité », ¹⁰³ tout en précisant que « le pouvoir de priver une personne de sa nationalité doit être exercé conformément au droit international, pour lutter contre l'apatridie ». ¹⁰⁴ De surcroît, pour les juges, la jouissance de la nationalité est la règle et la déchéance, l'exception. De ce fait, nul ne peut être déchu de façon arbitraire de sa nationalité. La notion d'arbitraire renvoie au caractère inapproprié, à l'injustice, au manque de prévisibilité et au non-respect des garanties judiciaires ainsi que les principes du caractère raisonnable, de la nécessité et de la proportionnalité. ¹⁰⁵ Après avoir constaté que « Le Droit international n'admet la déchéance de la nationalité que dans les situations très exceptionnelles suivantes: i) être fondées sur une base juridique claire; ii) servir un but légitime conforme au droit international; iii) être proportionnelle à l'interdit qu'elle vise de protéger; v) respecter les garanties procédurales permettant à l'intéressé de faire valoir tous ses moyens de défense devant un tribunal indépendant », ¹⁰⁶ les juges vont conclure au caractère disproportionné et rapide de la déchéance. ¹⁰⁷ Cette position de la Cour, a pour l'ultime objectif de lutter contre la banalisation de la déchéance de la nationalité et la reconnaissance du droit à la nationalité comme un droit fondamental.

3.2.2 Le droit de ne pas être expulsé de manière arbitraire.

Peut-on expulser un citoyen de son propre pays ou l'empêcher d'y retourner? En effet, à la suite du retrait de sa nationalité et de l'annulation de son passeport, le requérant a été déclaré « immigrant clandestin » et expulsé de son pays en vertu de l'article 11(1) de la loi tanzanienne sur l'immigration, laquelle loi dispose que: « L'entrée en Tanzanie de tout immigrant clandestin est illégale ». A priori, la question a été déjà tranchée par l'article 12(2) de la Charte africaine qui dispose: « Toute personne a le droit de quitter tout pays, y compris le sien, et de revenir dans son pays ». Cependant, l'article 12 n'aborde pas spécifiquement le point de l'expulsion en lien avec la déchéance de la nationalité. Une observation du comité des droits de l'Homme de l'ONU sur la liberté de circulation a réglé la question en ces termes « qu'il existe peu de circonstances dans lesquelles l'interdiction d'entrer dans son propre pays pourrait être raisonnable. Un Etat partie ne peut, en privant arbitrairement une personne de sa nationalité ou en expulsant une personne vers un pays tiers, empêcher cette personne de rentrer dans son propre pays ». ¹⁰⁸ De surcroît, la Cour note que même si l'Etat défendeur considérait le requérant comme un étranger, il est évident que les conditions de son expulsion n'ont pas respecté la règle

103 Para 77.

104 Para 78.

105 Comité des droits de l'homme des Nations Unies, Observation générale No 35 Article 9, para 12.

106 Para 79.

107 Para 132.

108 Comité des droits de l'Homme de l'ONU, Observation générale No 27 sur la liberté de circulation.

prescrite de l'article 13 du Pacte international relatif aux droits civils et politiques (PIDCP) qui dispose qu' « un étranger qui se trouve légalement sur le territoire d'un Etat partie au présent Pacte ne peut en être expulsé qu'en exécution d'une décision prise conformément à la loi ». Voilà autant d'éléments qui justifient le caractère arbitraire de l'expulsion du sieur Anudo. L'objectif poursuivi par la Cour en protégeant contre l'expulsion arbitraire est de permettre au requérant d'exercer les voies de recours contre la décision de déchéance de sa nationalité. Cette même solution a été adoptée par la Commission africaine dans l'affaire *Amnesty International c. Zambie*.

3.2.3 Du droit d'être entendu par un juge

Tout litige, dans sa résolution, est soumis à une procédure légalement établie. Celui portant sur la nationalité n'est guère épargné.¹⁰⁹ Lorsque le doute sur la nationalité présente des motifs sérieux, la saisine des tribunaux devient le moyen approprié pour vaincre le doute et prévenir la nationalité. La fonction de cette procédure est soit pour rappeler à l'Etat ses engagements pris au plan international en faveur des droits de l'homme, soit pour éviter l'arbitraire dans la procédure d'octroi ou de déchéance de la nationalité. Tout ceci, suppose non seulement le recours au juge, mais davantage, la garantie des droits procéduraux. Dans la présente affaire, le requérant, n'a pas eu droit aux voies de recours pouvant lui permettre de contester la déchéance de sa nationalité. La Cour constate que le sieur Anudo avait, au titre des principes généraux de droit, le droit de recours devant une juridiction nationale. Le fait qu'il a été arrêté puis expulsé immédiatement vers le Kenya ne lui a pas laissé la possibilité d'exercer un tel recours. De même, lorsque par la suite, il s'est retrouvé dans la zone tampon, il lui était très difficile d'utiliser ce recours. Par ce fait, la Tanzanie a violé l'article 7 de la Charte et 14 du PIDCP. La présente affaire est l'illustration parfaite de l'inconfort ou encore du périple que vivent les apatrides. Ils sont exposés à toutes sortes d'abus et de refus.

Après avoir constaté la violation des trois droits indiqués, la Cour dans son *dictum* final, a ordonné à l'Etat défendeur d'amender sa législation pour ouvrir aux individus des recours judiciaires en cas de contestation de leur nationalité.¹¹⁰ Plus intéressant, la juridiction enjoint à l'Etat tanzanien de prendre toutes les mesures nécessaires pour rétablir le requérant dans ses droits en lui permettant de revenir sur le territoire national. Toutes ces mesures concourent à la prévention de l'apatridie en Afrique.

109 G Katchovi *Le contentieux de la nationalité en droit positif béninois*, mémoire de master, Chaire Unesco (2015-2016) 11.

110 Para 132.

4 CONCLUSION

Le premier droit de l'apatride, c'est le droit à la nationalité. Longtemps relégué au second rang, l'apatridie bénéficie aujourd'hui d'une grande et forte mobilisation. Pour une raison simple, la communauté internationale ne pouvait continuer ainsi à faire litière d'une cause si obsédante. Selon Monica Pinto, la leçon a été bien apprise et depuis 1948,¹¹¹ « tout individu a le droit à une nationalité et nul ne peut être arbitrairement privé de sa nationalité, ni du droit d'en changer ».¹¹²

Le droit de chacun à la nationalité est un droit fondamental de l'être humain. Nul Etat ne peut y déroger sans entrer en contradiction avec le Droit international des droits de l'Homme. La transition du droit de la nationalité au droit à une nationalité a été bien assurée. Ce droit, faut-il le rappeler, est substantiel dans la mesure où il conditionne l'exercice de bien d'autres.¹¹³ Il est indispensable de posséder une nationalité pour participer pleinement à la société et pour jouir de différents droits: droits politiques, droit d'obtenir un passeport national et de l'utiliser pour voyager, droit de pénétrer sur le territoire d'un pays et d'y résider. Dans la pratique, la nationalité facilite également la jouissance de l'ensemble des droits humains fondamentaux. Les apatrides peuvent être détenus pour la seule raison qu'ils sont apatrides et se voir refuser l'accès aux services éducatifs et médicaux, ainsi que l'accès au marché de l'emploi.

La réponse apportée par le système africain des droits de l'homme est admirable mais insuffisante. Le logiciel de la prévention est à repenser, il faut absolument un renouveau de la prévention. Le continent doit se doter des instruments de dernières générations. Il faut notamment mettre en place une Agence africaine de prévention et de protection de l'apatridie et d'un plan d'action réaliste. Le salut viendra aussi, d'une jurisprudence constante et des Etats qui respectent les décisions des juridictions régionales. Mieux, il est temps de travailler à l'émergence d'une citoyenneté africaine à l'instar de la citoyenneté européenne. C'est l'un des objectifs à attribuer au projet de protocole à la Charte sur la nationalité en Afrique.

111 M Pinto 'L'identification des sources du droit international de la nationalité: du droit de la nationalité au droit à la nationalité; du droit de l'Etat au droit de la personne; de la souveraineté aux droits de l'homme' in *Droit international et nationalité* (2012) 45 à 45.

112 Article 15 de la DUDH.

113 Likibi (n 35) 148.

Legal protection of refugee children in Africa: positive aspects and shortcomings

Cristiano d'Orsi*

ABSTRACT: Despite the legal measures that have been put in place for their protection, refugee children in Africa remain at risk. Africa is the first continent in the world where every persecuted individual has the right 'to seek and obtain asylum in other countries' (article 12(3) of the African Charter on Human and Peoples' Rights). In Africa, refugee children are at risk mostly because the continent lacks a clear definition of 'sovereignty'. African countries interpret the adjective 'sovereign' to their own advantage, in terms of the rights and responsibilities imposed on foreigners – including refugees – entering their territory. Although the overall treatment of refugee children has over the last decades improved in Africa, they nonetheless remain a vulnerable category of persons. If refugee children are targeted because they are 'foreigners', such discrimination could be curbed and even eradicated through the education of the youth. The various international treaties that African nations have adopted (in particular, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child) provide an important legal umbrella for the protection of refugee children. However, in many instances, the bulk of the protection is still carried out by NGOs. Consequently, there is still a long way to go before African refugee children will be treated with the dignity that is due to all the children in the world, irrespective of their origin.

TITRE ET RÉSUMÉ EN FRANCAIS:

Protection juridique des enfants réfugiés en Afrique: développements positifs et faiblesses

RÉSUMÉ: Les enfants réfugiés en Afrique demeurent en danger en dépit des mesures juridiques adoptées par les Etats pour les protéger. L'Afrique est le premier continent au monde où toute personne persécutée a le droit de « demander et obtenir l'asile dans d'autres pays » (article 12(3) de la Charte africaine des droits de l'homme et des peuples). En Afrique, la principale menace des enfants réfugiés émane du fait que le continent n'a pas de définition claire de la notion de « souveraineté ». Les pays africains interprètent l'adjectif « souverain » à leur profit, en mettant l'accent sur les droits et les responsabilités imposés aux étrangers qui franchissent leur frontière – dont les réfugiés. Bien que le traitement global des enfants réfugiés se soit amélioré au cours des dernières décennies en Afrique, ils demeurent néanmoins une catégorie de

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personnes vulnérables. Si les enfants réfugiés sont ciblés parce qu'ils sont des « étrangers », cette discrimination future pourrait être enrayerée voire éliminée grâce à l'éducation des jeunes. Les différents traités internationaux que les pays africains ont adoptés (en particulier la Convention relative aux droits de l'enfant et la Charte africaine des droits et du bien-être de l'enfant) constituent un important cadre juridique pour la protection des enfants réfugiés. Cependant, dans de nombreux cas, l'essentiel de la protection est toujours assuré par les ONG. Par conséquent, un chemin important reste encore à parcourir pour que les enfants réfugiés africains soient traités avec la dignité qui est due à tout enfant, quelle que soit son origine.

KEY WORDS: Refugee children, best interests, African Charter on the Rights and Welfare of the Child, sovereignty, national security

CONTENT:

1	Introduction	299
2	'Best interests' – the principle at the core of (refugee) children's protection	300
3	Other core principles of the wellbeing of refugee children in Africa: is effective protection taking place?	302
4	Efforts to implement norms protecting refugee children in Africa despite resistance of (some) states.....	307
5	Sovereignty: blurred thresholds in Africa	311
6	Conclusion: final assessment and recommendations on how to improve the protection of refugee children in Africa	314

1 INTRODUCTION

This article investigates the positive aspects and the shortcomings of the protection of refugee children in Africa. The shortcomings are often due to the element of 'sovereignty', whereby African countries decide who may enter their territory and under what conditions, given that the right of free movement of people does not imply the right of entry or stay.¹ The article starts by analysing the concept of the 'best interests' of children and its interpretation and application in Africa. Thereafter, the discussion focuses on other relevant principles that should be guaranteed for the protection of refugee children in Africa. This is followed by a detailed examination of the possible shortcomings of that protection, and particularly, if and why the international and regional legal instruments for the protection of children's rights are still not adequately implemented on the continent. Finally, the concept of sovereignty is scrutinised as well as ways in which this concept is used to limit the protection of refugee children in Africa. The study concludes with observations on the current situation and recommendations to address the key stumbling blocks in the protection of refugee children on the African continent.

1 AU 'The Migration Policy Framework for Africa' EX.CL/276 (IX) (25-29 June 2006) 18.

2 'BEST INTERESTS': THE PRINCIPLE AT THE CORE OF (REFUGEE) CHILDREN'S PROTECTION

All solutions to improve the conditions of African refugee children should be viewed from the core principle of the 'best interests' of the child. This principle is derived from article 3 of the 1989 UN Convention on the Rights of the Child (CRC) and taken up by article 4 of the 1990 African Charter on the Rights and Welfare of the Child (African Children's Charter).²

Article 3(1) of the CRC stipulates:

- 1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Article 4(1) of the African Children's Charter more briefly contends that '[i]n all actions concerning the child undertaken by any person or authority the best interests of the child shall be the primary consideration.' Kaime considers this last expression ill-defined as it fails to clearly describe the range of factors that must be taken into consideration when determining what specifically constitutes the best interests of a child – both in general and for refugee children in particular.³ Moreover, as JM Pobjoy affirms:⁴

Although the role of the 'best interests' principle is well established as a matter of international obligation, there has, at a domestic level, traditionally been a general lack of enthusiasm with the idea that the 'best interests' principle may provide an independent basis for international protection.

The 'best interests' principle must apply in all actions regarding refugee children, irrespective of whether public or private entities are undertaking those actions.⁵ This principle is well-suited to finding a durable solution for refugee children. A durable solution should normalise the child's situation by ensuring their mental and physical health, intellectual development and adequate material security.

2 UNGA, Convention on the Rights of the Child (20 November 1989) UNTS, vol 1577, 3; OAU, African Charter on the Rights and Welfare of the Child (11 July 1990) CAB/LEG/24.9/49.

3 T Kaime *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective* (2009) 110. However, at 111, the author contends: 'Yet, the seemingly expansive formulation of the principle in the Charter is also its most important characteristic. It allows a contextual application of the principle on a case-by-case basis, allowing for a result that is specific to each child.' In this regard, according to UNHCR: 'The principle of the best interests of the child requires that the harm be assessed from the child's perspective. This may include an analysis as to how the child's rights or interests are, or will be, affected by the harm. Ill-treatment which may not rise to the level of persecution in the case of an adult may do so in the case of a child.' See: UNHCR, *Guidelines on international protection no 8: Child asylum claims under articles 1(A) (2) and 1 (F) of the 1951 Convention and 1967 Protocol relating to the Status of Refugees* (22 December 2009) HCR/GIP/09/08, para 10.

4 JM Pobjoy *The child in international refugee law* (2017) 201.

5 Kaime (n 3) 113.

Arriving at such a solution would require the participation of the children involved.⁶ The validity of this notion is manifest in, for example, the protracted refugee settlement of Kyaka II, South West Uganda, where refugee children have clearly demonstrated their capacity to speak about their needs and protection with adults in different environments such as schools and churches.⁷

Through the 'best interests' approach, the African Children's Charter has adopted uniform standards for the treatment of refugee children, indicating that parties to the African Children's Charter must comply with these standards.⁸ In Africa, however, the concrete interpretation given to the notion of 'best interests', particularly in the case of refugee children, has at times been interpreted in an ambiguous way, on the basis of what I define as the 'best interests of the sovereignty of the host country'. For example, if the reunification of children with their family is generally regarded as being in their best interests,⁹ in the case of refugee children, reunification with their biological family should not always be dogmatically pursued as the best solution for them. Individual situations should be carefully assessed and reunification should not be advised when the parents or relatives have been responsible for the children's flight. For instance, this can be seen where children flee from cultural practices such as genital mutilation or forced marriage,¹⁰ as was the case in Rwanda during the 1994 genocide. The child's background is therefore fundamental in deciding upon the right solution for them.¹¹

Amnesty International (AI) has pointed out that reunification is not only represented by the return of the unaccompanied minor refugee to their country of origin. For it to be in the best interests of the child, it should also involve the organisation of such reunification. A prime example is what happened in Somalia when, in December 2006, the Kenyan authorities forcibly repatriated a number of children back to Somalia where civil strife was still raging, despite hundreds of these children already having acquired refugee status. This repatriation was ostensibly to reunify the children with their families, however, in effect, it served to alleviate the burden on Kenyan authorities. In this particular case, it was certainly not in the best interests of the Somali children to be reunified with their families in their country of origin.¹²

6 T Kaime 'From lofty jargon to durable solutions: unaccompanied refugee children and the African Charter on the Rights and Welfare of the Child' (2004) 16 *International Journal of Refugee Law* 340.

7 A Skeels 'Refugee children's participation in protection: a case study from Uganda' in UNHCR, *New Issues in Refugee Research*, research paper No 241 (2012) especially at 10-14.

8 T Kaime 'The protection of refugee children under the African human rights system: finding durable solutions in international law' in J Sloth-Nielsen (ed) *Children's rights in Africa: a legal perspective* (2008) 186.

9 UNHCR *Guidelines on Determining the Best Interests of the Child* (May 2008) 31.

10 Kaime (n 6) 343-344.

11 Kaime (n 8) 160.

12 AI *Kenya Denied refuge: the effect of the closure of the Kenya/Somalia border on thousands of Somali asylum-seekers and refugees* (2 May 2007) 3-4.

In a 2014 request for advisory opinion, the African Court on Human and Peoples' Rights (African Court) emphasises the nature of the best interests of the child, which should take priority over technical points that could obstruct justice for children.¹³ This opinion highlights that the principle of 'best interests' should first and foremost be considered when determining 'any person's or authority's actions towards or on behalf of children' (article 4(1) of the African Children's Charter).

3 OTHER CORE PRINCIPLES OF THE WELLBEING OF REFUGEE CHILDREN IN AFRICA: IS EFFECTIVE PROTECTION TAKING PLACE?

Certain general principles underline the obligation of African states to protect the rights of all children, and are of relevance to children in the context of refugee protection. Apart from the 'best interests', another key principle is that of 'non-discrimination' (as set out in article 3 of the African Children's Charter) and that of right to life, survival and development of the child (article 5 of the African Children's Charter).¹⁴

In the communication entitled *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Senegal*, the African Committee of Experts on the Rights and Welfare of Children in Africa (African Children's Rights Committee)¹⁵ stresses the significance of these principles in reinforcing the other rights guaranteed under the African

13 ACHPR *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Standing of the African Committee of Experts on the Rights and Welfare of the Child on Human and Peoples' Rights* (Request No 002/2013, 5 December 2014). In detail, para 95 of the advisory opinion affirms: 'The Court is persuaded that the arguments that the best interests of the child should be of paramount and well founded. It is also persuaded [...] that the best interests of the child should in some instances, trump technical requirements that could hinder accessibility to courts of justice for children.'

14 In full, article 3 stipulates: 'Every child shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in this language, religion, political or other opinion, national and social origin, fortune, birth or other status.' Article 5 stipulates: '(1) Every child has an inherent right to life. This right shall be protected by law. (2) State Parties to the present Charter shall ensure, to the maximum extent possible, the survival, protection and development of the child. (3) Death sentence shall not be pronounced for crimes committed by children.'

15 The African Children's Rights Committee is established by article 32 of the African Children's Charter ('The Committee shall be established within the Organization of African Unity to promote and protect the rights and welfare of the child'). As A Lloyd affirms: 'The African Committee is mandated to collect and document information, to commission interdisciplinary assessments of situations on African problems in the children's rights sphere, to organise meetings, to encourage national and local institutions concerned with the rights and welfare of the child, and to give its views and make recommendations to governments where necessary.' (A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: raising the gauntlet' (2002) 10 *The International Journal of Children Rights* 186).

Children's Charter.¹⁶ Ensuring non-discriminatory access of refugee children to economic, social and cultural rights and promoting the concept of leisure and play, which encourage the fullest possible development of a child's personality, will allow for such development (article 12 of the African Children's Charter).¹⁷

Equally important is protecting children in the context of forced migration from exploitation, detention and separation from their families, which clearly contradicts their best interests (arts 15(1), 17, 19, 25, 27 of the African Children's Charter). This concept was reinforced by the African Union (AU) in 2018, when it demanded an end to the detention of children due to their migration status, asking for relevant authorities to establish alternatives to detention which would be in the best interests of the child.¹⁸ In this regard, in the case *Modise v Botswana*, the African Commission on Human and Peoples' Rights (African Commission) affirms:¹⁹

The complainant was deported to South Africa and was forced to live for eight years in the 'homeland' of Bophuthatswana, and then for another seven years in 'No-Man's Land', a border strip between the former South African Homeland of Bophuthatswana and Botswana. Not only did this expose him to personal suffering, it deprived him of his family, and it deprived his family of his support. Such inhuman and degrading treatment offends the dignity of a human being.

In addition, holding a child without permitting them to have any contact with their family, and refusing to inform the family whether and where the child is being held is considered by the African Commission as inhuman treatment of both the prisoner and their family.²⁰

It is blatantly obvious that the development of refugee children in countries of transit and destination can be severely affected by constraints on their rights or the rights of their parents. Public international law prohibits *refoulement*. This term refers to the repatriation of anyone to a country where they would be at risk of torture, cruel, inhuman or degrading treatment or the repatriation of a refugee to any country where, in any manner whatsoever, their life or freedoms would be threatened (in this regard see, for example, article

16 African Children's Rights Committee *Decision on the Communication submitted by the Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) against the Government of Senegal* Communication No 001/2012 (15 April 2014) paras 40-45.

17 Article 12 stipulates: 'State Parties shall recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts. 2) State Parties shall respect and promote the right of the child to fully participate in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.'

18 AU *Migration Policy Framework for Africa and Plan of Action 2018-2030* (May 2018) 72.

19 African Commission *Modise v Botswana*, Communication 97/93, 10th ACHPR AAR Annex X (1996-1997) para 32.

20 African Commission *Amnesty International et al v Sudan*, Communication Nos 48/90, 50/91, 52/91, 89/93 13th Activity (Report 1999-2000) para 54. In this regard, see also ACHPR *The Law Office of Ghazi Suleiman v Sudan*, Communication Nos 222/98 and 229/99, 16th Activity Report (2002-2003) para 44.

33 of the UN Refugee Convention,²¹ article 2(3) of the OAU Refugees Convention²² or article 3 of the United Nations (UN) Convention Against Torture).²³

Prohibition of '*refoulement*' would also include access to asylum procedures and procedures to establish whether children have been subjected to trafficking and/or other serious human rights violations.²⁴ Child trafficking presents particular challenges in Africa, and special requirements should be made to ensure the protection of, and assistance to child victims of trafficking, many of who according to the United Nations Children's Fund (UNICEF) are refugees.²⁵

The 2006 Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children, provides AU member states with comprehensive guidance in addressing human trafficking and developing comprehensive counter-trafficking strategies that are based on the '4Ps' – prevention, protection, prosecution and partnership.²⁶ Furthermore, the AU Commission Initiative against Trafficking (AU.COMMIT) raises awareness of the Ouagadougou Action Plan and drives its implementation.²⁷ The AU Horn of Africa Initiative, launched in 2014, builds on these efforts and promotes dialogue and concrete initiatives that address human trafficking and smuggling within and from the Horn of Africa region.²⁸ In addition, Agenda 2063's First 10 Year Implementation Plan calls for the empowerment of youth and children, ending child labour exploitation, marriages, trafficking and soldiering by 2023.²⁹

As briefly mentioned above, international law also provides that the detention of children, including refugee children, should generally be avoided. Where strictly necessary, children should only be detained as a last resort. The detention must always be justified by law and should

- 21 UNGA Convention relating to the Status of Refugees (28 July 1951) UNTS, vol 189, No 2545, 150. In detail, article 33(1) stipulates: 'No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'
- 22 OAU Convention governing the specific aspects of refugee problems in Africa (10 September 1969) UNTS, vol 1001, No 14691, 45.
- 23 UNGA Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984) UNTS, vol 1465, No 24841, 85.
- 24 Article 29 of the African Children's Charter stipulates: 'State Parties to the present Charter shall take appropriate measures to prevent: a) the abduction, sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child; b) the use of children in all forms of begging.'
- 25 UNICEF *Children make up almost one-third of all human trafficking victims worldwide* (27 July 2018).
- 26 AU-EU *Ouagadougou Action Plan to Combat Trafficking in Human Beings, Especially Women and Children As adopted by the Ministerial Conference on Migration and Development* (22-23 November 2006).
- 27 AU *AU Commission Initiative against Trafficking (AU.COMMIT) Campaign* (3 December 2012).
- 28 *The Khartoum Process* (13-16 October 2014).
- 29 AU Commission *Agenda 2063 The Africa We Want: A Shared Strategic Framework for Inclusive Growth and Sustainable Development First Ten-Year Implementation Plan 2014-2023* (September 2015) 24.

be for the shortest possible period of time.³⁰ Unfortunately, there is no similar provision in the African Children's Rights Charter.

Although detention of refugee children is often practised by African countries,³¹ in 2009 the UN Special Rapporteur on the human rights of migrants affirmed in 2009 that detention is never in the best interests of children.³² Furthermore, children should not be detained based on their migratory status or irregular entry into the country.³³ In this regard, to challenge the power of the relevant South African authorities, in the case *Centre for Child Law and Another v Minister of Home Affairs and Others* Judge De Vos affirmed as follows:³⁴

I am of the view that the detention of these children at Lindela [repatriation centre] is unlawful and invalid and should cease immediately. Furthermore, the way in which these children are being deported is not only unlawful, it is shameful.

Article 19 of the African Children's Rights Charter obliges states to ensure that children are not separated from their parents against their will.

The principle of family unity plays an important protective role for children in the context of forced migration, particularly in the situation of unaccompanied or separated children.³⁵ Family reunification also constitutes a key element of integration policies. The family is recognised as a natural and fundamental unit of society in relevant legal instruments such as article 23 of the International Covenant on Civil

30 Article 37(b) of the CRC stipulates: 'States Parties shall ensure that: [...] b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time [...].'

31 International Detention Coalition *Alternatives to immigration detention in Africa: A summary of member findings from six countries, 2015 – 2016* (2017) 19-20.

32 UNGA *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development Report of the Special Rapporteur on the Human Rights of Migrants, Jorge Bustamante A/HRC/11/7* (14 May 2009) para 62: 'Migration-related detention of children should not be justified on the basis of maintaining the family unit (for example, detention of children with their parents when all are irregular migrants). As UNICEF and other experts have stressed, detention of children will never be in their best interests.'

33 UN Committee on the Rights of the Child General Comment No 6 (2005) *Treatment of unaccompanied and separated children outside their country of origin* (17 May-3 June 2005) para 61: 'Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.'

34 Transvaal Provincial Division Court *Centre for Child Law and Another v Minister of Home Affairs and Others* 2005 (6) SA 50 (T) Case No 22866/04 (18 September 2004) para 23.

35 For a definition of 'unaccompanied' and 'separated' children see: International Committee of the Red Cross (ICRC) *Inter-agency Guiding Principles on Unaccompanied and Separated Children* (January 2004) 13: 'Unaccompanied children (also called unaccompanied minors) are children who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so.' 'Separated children are those separated from both parents, or from their previous legal or customary primary care-giver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members.'

and Political Rights (ICCPR),³⁶ article 18(1) of the African Children's Rights Charter, and article 18(1) of the African Charter on Human and Peoples' Rights (African Charter).³⁷

Considering article 18 of the African Charter,³⁸ in the 2010 Communication *Good v Botswana*, the African Commission contends:³⁹

[T]he State has the obligation to assist the family towards meeting its needs and interests and to protect the same institution from abuse of any kind by its own officials and organs and by third parties. In exercising the positive obligations, the State exercises a negative obligation, which is to refrain from violating the rights and interests of the family. In the present Communication, the sudden deportation of the victim with no justification, knowing fully that he will be separated from his minor daughter who was living with him runs counter to the protection States are required to give to the family under article 18.

However, when dealing with the separation of families, Starr and Brilmayer claim that international law places excessive weight on state sovereignty and imposes insufficient responsibility on states to protect human rights within the family.⁴⁰ Nevertheless, even if refugee children are separated from their families, in many African countries these children are legally protected in order to care for them. For example, in South Africa the Children's Act and Regulations provide the framework for the placement of unaccompanied refugee children in alternative care.⁴¹ A Children's Court places a refugee child in alternative care if it is found that the child is in need of care and protection.⁴² Section 150 of the Children's Act lists a number of indicators according to which the child's circumstances must be assessed to determine whether they are considered to be in need of care and protection.⁴³

36 UNGA International Covenant on Civil and Political Rights (19 December 1966) UNTS, vol 999, No 14668, 171.

37 UNGA African Charter on Human and Peoples' Rights (27 June 1981) UNTS, vol 1520, No 26363, 217.

38 Article 18 stipulates: '1) The family shall be the natural unit and basis of society. It shall be protected by the State, which shall take care of its physical health and moral. 2) The State shall have the duty to assist the family, which is the custodian of morals and traditional values recognized by the community. 3) The State shall ensure the elimination of every discrimination against women and ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions. 4) The aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs.'

39 ACHPR *Good v Botswana* (Communication 313/05) [2010] (26 May 2010) paras 212-213.

40 S Starr & L Brilmayer 'Family separation as a violation of international law' (2003) 21 *Berkeley Journal of International Law* 231.

41 Republic of South Africa Children's Act (38 2005) vol 492 19 June 2006 No 28944 amended by Children's Amendment Act 41 of 2007 and Child Justice Act 75 of 2008. See section 167 (Alternative Care).

42 South Africa Children's Act section 156.

43 Scalabrini Centre *Foreign Children in Care: South Africa. A Comparative Report of Foreign Children Placed in Child and Youth Care Centres in Gauteng, Limpopo and Western Cape Provinces of South Africa* (July 2019) 11.

4 EFFORTS TO IMPLEMENT NORMS PROTECTING REFUGEE CHILDREN IN AFRICA DESPITE RESISTANCE OF (SOME) STATES

In Africa, there is a historical lack of consensus as to the definition of ‘children’s rights’ within the context of different African cultures. This could pose problems when it comes to defending the rights of refugee children on the continent. Perceptions of what constitutes a child in Africa differ to those of the rest of the world (a child is defined as a person below the age of 18 years according to article 2 of the African Children’s Charter). This is highlighted by the fact that in Africa, a child is also considered an individual who has ‘responsibilities towards his family and society, the State and other legally recognized communities and the international community’ (article 31 of the African Children’s Rights Committee. There is no similar provision in the CRC). However, the African Children’s Rights Committee emphasises that children’s rights are ‘not contingent upon them fulfilling their ‘duties’, since duties co-exist interdependently with rights.⁴⁴

Yet, the African Children’s Charter seeks to reinforce the wellbeing of the child because it explicitly asserts the supremacy of the rights guaranteed therein over any custom, tradition, cultural or religious practice inconsistent with them (article 1(3)). It does, however, leave some leeway for the sovereignty of the African state; the practices just mentioned are only ‘discouraged’ but not explicitly declared illegal. This supremacy is elaborated further under article 21(1).⁴⁵

Furthermore, according to the African Children’s Rights Committee, the obligation under article 1(1) to adopt legislative and other measures to give effect to the African Children’s Charter⁴⁶ ‘is subject neither to progressive realization, nor to available resources.’⁴⁷ The African Children’s Rights Committee proceeded to affirm that

44 African Children’s Rights Committee *Decision on the Communication submitted by Michelo Hansungule and Others (on behalf of Children in Northern Uganda) against the Government of Uganda* Communication 1/2005 (15-19 April 2013) para 59.

45 Article 21(1) stipulates: ‘State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular: a) those customs and practices prejudicial to the health or life of the child; and b) those customs and practices discriminatory to the child on the grounds of sex or other status.’

46 Article 1(1): ‘Member States of the Organization of African Unity, Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake the necessary steps, in accordance with their Constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.’

47 African Children’s Rights Committee (n 44) para 37.

'effective implementation of laws with due diligence is part of states parties obligation under the Charter.'⁴⁸

The question of refugee children has been explicitly tackled in article 23⁴⁹ of the African Children's Charter. Bekker considers that the provisions of article 23 offer a higher threshold of protection for displaced children than the corresponding provisions contained in the CRC.⁵⁰ This article, however, cannot be read separately from articles 3 and 4 of the same instrument, which respectively provide for the 'enjoyment of the rights and freedoms recognized and guaranteed' in the African Children's Charter by 'every child', without any discrimination along with the 'best interests of the child.'

Article 3, which deals with 'non-discrimination', raises the African Children's Charter to a higher level of protection than provided for in the CRC, although it is considered a 'non-autonomous' norm of the African Children's Charter. This article is viewed as such because, since it is at the core of the freedoms and rights guaranteed by the charter, it has no independent existence. In other words, it can be invoked exclusively in relation to the implementation of a right protected by the same Charter.⁵¹ However, in Sub-Saharan Africa, there have been a number of clear breaches of this norm. An obvious example is the turmoil in Darfur, where the *Janjaweed* militia systematically raped and murdered Darfurian refugee children,⁵² yet Sudan has been party to the African Children's Charter since 2005.⁵³

The CRC also contains a provision on non-discrimination in article 2.⁵⁴ Sudan ratified this instrument before its domestic crisis, in 1990.⁵⁵ Unfortunately, however, in the first few years of the conflict, the Sudanese government regularly described the situation in Darfur as

48 African Children's Rights Committee (n 44) para 38.

49 In this regard, DM Chirwa points out: 'It must also have been noted that the Charter endorses the wider definition of "refugee" in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.' DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 169.

50 G Bekker 'The protection of asylum seekers and refugees within the African regional human rights system' (2013) 13 *African Human Rights Law Journal* 5.

51 Kaime (n 3) 98.

52 Kaime (n 8) 185. See also *Sudan: New Darfur Documents* (20 July 2004).

53 Ratification table of the African Children's Charter available at: <https://au.int/sites/default/files/treaties/36804-sl-AFRICAN%20CHARTER%20ON%20THE%20RIGHTS%20AND%20WELFARE%20OF%20THE%20CHILD.pdf> (accessed 10 October 2019).

54 Article 2 stipulates: '1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2) States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.'

55 Ratification table of the CRC available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&lang=en (accessed 10 October 2019).

‘tribal clashes’ and refused to acknowledge responsibility for its systematic attacks on civilians, and refugees included.⁵⁶

Another important point set out in article 23(2) of the African Children’s Charter⁵⁷ concerns the parties to the charter and their ‘cooperation’ with international organisations to better protect refugee children. This cooperation which, according to article 22(2) of the CRC, must be considered ‘appropriate’ by the signatory states of the convention⁵⁸ is, in contrast, seen by the African Children’s Charter as obligatory and without any restriction. The problem with this paragraph of article 23 of the African Children’s Charter is that it is not clear whether NGOs – which article 22(2) of the CRC explicitly considers – are included in the category of ‘existing international organizations.’ Consequently, the African Children’s Charter can be interpreted either way, without any explicit provisions that include or exclude NGOs.

In this regard, Thomas affirms that democratic values are served, rather than threatened, by NGOs and the conditionalisation of sovereignty. The role of NGOs in international compliance monitoring has destabilised the situation in which repressive regimes ignore their political opponents while seeking legitimacy abroad. Repressive regimes cannot refrain from making concessions to NGOs pressure for greater respect for human rights, and therefore open the door to democratic transformations such as those which occurred in several African countries, for example, South Africa.⁵⁹

A debate has also been raised about the fact that article 23(2) of the African Children’s Charter provides for exclusive cooperation with ‘existing’ organisations, which is intended to be a restriction ‘[i]n a way that only organizations that were already in existence when the charter came into effect fall under article 23’⁶⁰ and, as such, they are allowed to assist with the protection of refugee children’s rights on the continent. Be that as it may, the AU, and especially its Assembly, has always endeavoured to improve the life of refugee children in Africa. Considerable progress has been made in this regard although it is clear that the respect of article 23 of the African Children’s Charter and of

56 Human Rights Watch *Failing Darfur* (September 2008).

57 Article 23(2) stipulates: ‘States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives or an unaccompanied refugee child in order to obtain information necessary for reunification with the family.’

58 Article 22(2), first sentence, of the CRC stipulates: ‘For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.’

59 DC Thomas ‘International NGO’s, state sovereignty, and democratic values’ (2001) 2 *Chicago Journal of International Law* 394.

60 M Gose *The African Charter on the Rights and Welfare of the Child*, Community Law Centre, University of Western Cape (2002) 122.

article 22(2) of the CRC relies substantially on state practice and on the work of the African Children's Rights Committee.⁶¹

Positive state practice, however, often, *de facto*, is lacking due to the socio-economic conditions of the countries on the continent.⁶²

In recent years, several countries have submitted their initial reports to the African Children's Rights Committee. In each case, the authorities of the countries in question have shown optimism about the treatment of refugee children. But, for example, not in the case of Niger where, for years, the phenomenon of refugee children has been considered stranger to the country.⁶³

In Burkina Faso, most refugee children have been provided with identity documents and can benefit from a fund called 'soins et entretien des réfugiés' to cover both medical care and school tuition.⁶⁴ Similar support has been provided in Senegal and Cameroon.⁶⁵

Refugee children in Kenya have the same social, economic and cultural rights as other children in the country. This includes the right to privacy, family life, non-discrimination, as well as a right to free primary education. However, the country continues to be ill-equipped to deal with increasing incidences of sexual and gender-based violence against refugee children.⁶⁶ In contrast, Uganda seems to have faced many difficulties in providing refugee children with basic medical and educational facilities 'owing mainly to the unfavourable environment within which [these children] live.'⁶⁷

The same situation applies in Mali where, in spite of the existence of a specific domestic provision on the equal treatment of refugees and nationals in many key aspects of daily life,⁶⁸ difficulties in detecting and protecting non-accompanied refugee children remain considerable.⁶⁹

61 Gose (n 60) 22-23.

62 A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: an introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 32.

63 African Children's Rights Committee, *Niger, Initial State Report* (2008) 35. At that page, it is affirmed that the phenomenon of refugee children is '[l]ittle known in Niger [...].'

64 African Children's Rights Committee *Burkina Faso, Initial State Report* (2006) 116.

65 African Children's Rights Committee *Senegal, Initial, First and Second Report* (2009) 85; African Children's Rights Committee, *Cameroon, Initial State Report* (2009) 50.

66 African Children's Rights Committee *Kenya, 1st State Party Report* (June 2013) 87-88.

67 African Children's Rights Committee *Uganda, Initial State Report* (2007) 27.

68 Mali Loi n° 1998-40 du 20 juillet 1998 portant sur le statut des réfugiés [Mali], N° 1998-40 (18 May 1998) article 13: 'Le bénéficiaire du statut de réfugié reçoit le même traitement qu'un national en ce qui concerne l'accès aux soins médicaux, au marché du travail, à la sécurité sociale et à l'éducation, notamment pour ce qui est des frais d'inscription et des œuvres universitaires'.

69 African Children's Rights Committee *Mali, Initial State Report* (2007) 95.

More recently, the African Children's Rights Committee called upon the South African government to eliminate all forms of discrimination against refugee children by removing barriers which hinder access to basic services such as education, health care, birth registration and child protection services. In particular, the African Children's Rights Committee urged the authorities of South Africa to ensure that refugee children are able to access basic services without the need to present any form of documentation.⁷⁰ In this regard, the AU also recommends that African states ensure, through legislative policy, that refugee children have adequate access to gender-responsive and culturally appropriate health care, education and shelter.⁷¹

The authority of the African Children's Rights Committee remains debatable, however, as it lacks the power to impose any form of sanction, and its decisions are not binding for the parties. It can only make recommendations which are then submitted to the AU Assembly, although the African Children's Charter is silent as to how the AU Assembly can act upon them. Finally, article 44(2) of the African Children's Charter provides for confidentiality in the communication received by the African Children's Rights Committee. For the African Children's Rights Committee, this confidentiality has been considered more of a 'shield to hide behind' when it comes to assessing human rights violations of refugee children in Africa, rather than a means of exposing them.⁷²

5 SOVEREIGNTY: BLURRED THRESHOLDS IN AFRICA

A defining aspect of national sovereignty is the right of states to determine which persons are allowed to enter their national borders. Many African states exercise this power by placing restrictions on who can and who cannot enter and remain within their borders. Traditionally in international law, sovereignty has been considered as the unlimited power of the state that is subjected exclusively to those rules of law that it has explicitly accepted. Article 2(7) of the Charter of the UN stipulates:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters, which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.⁷³

Yet, in a growing number of fields, states are bound by universal rules irrespective of explicit acceptance of them. On one hand, there is an

70 African Children's Rights Committee *South Africa, Concluding Observations and Recommendations of the African Committee of Experts on the Rights and Welfare of the Child to the Government of the Republic of South Africa on its First Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child* (March 2019) 4.

71 AU policy (n 18) 80.

72 Lloyd (n 62) 26. See, also Chirwa (n 49) 170.

73 UN Charter of the United Nations (24 October 1945) 1 UNTS XVI.

increasing number of rules of *jus cogens* (peremptory norms) to which all states are considered bound.⁷⁴ On the other hand, there is a practical need to follow universal technical rules in many fields. For example, the African Children's Rights Committee, in its 2011 Communication over Children of Nubian Descent in Kenya, clearly contends that

although states maintain the sovereign right to regulate nationality, in the African Committee's view, state discretion must be and is indeed limited by international human rights standards, in this particular case the African Children's Charter, as well as customary international law and general principles of law that protect individuals against arbitrary state actions.⁷⁵

A second aspect of sovereignty concerns international solidarity. The more each state is full master of its own territory, the less each state feels responsible for what happens in other sovereign states. Nonetheless, this situation is gradually changing with other states that may share some responsibility for what happens within states in troublesome areas of the world.⁷⁶ In Africa, a typical example of this circumstance is the concept of 'burden sharing' enshrined in article 2(4) of the OAU Refugees Convention.⁷⁷

International solidarity has often been considered by doctrine at the cornerstone of refugee protection. This principle states that a refugee is a person of concern to the international community. It also ascertains the obligation to extend refugee status and protection to those obliged to flee persecution and to treat them with dignity. It declares the state's duty to share the liability of finding durable solutions for people deprived of a community.⁷⁸ The principle expounded in the provision of the OAU Refugees Convention, which reflects the historical reality that several states, due to their geographical position, are required to accept larger numbers of

74 Articles 53 and 64 of the 1969 Vienna Convention of the Law of the Treaties stipulate, respectively: '53) A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character'; '64) If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.' See: UN Vienna Convention on the Law of Treaties (23 May 1969) UNTS, vol 1155, No 18232, 331.

75 African Children's Rights Committee *Decision on the Communication submitted by the Institute for Human Rights and Development in Africa and the Open Society Justice Initiative (on behalf of Children of Nubian Descent in Kenya) against the Government of Kenya* Communication 2/2009 (22 March 2011) para 48.

76 H Schemers 'Different aspects of sovereignty' in G Kreijen (ed) *State, sovereignty, and international governance* (2002) 185-186.

77 Article 2(4) stipulates: 'Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.'

78 G Martin 'International solidarity and cooperation in assistance to African refugees: burden-sharing or burden-shifting?' (1995) 7 *International Journal of Refugee Law*, special issue 253.

refugees than others,⁷⁹ have been widely lauded⁸⁰ and its logic originates in the premise that helping refugees is a jointly held moral duty and obligation under international law.⁸¹ International solidarity could be considered as part of what Reisman defined in 1990 as the ‘people’s sovereignty rather than the sovereign’s sovereignty.’⁸²

A third aspect of sovereignty is that it also performs a positive role in the international legal order, the state being, in many instances, the executive branch of the international community.⁸³ National authorities increasingly argue that there are practical reasons for tightening border controls, often appealing to the safeguard of ‘national security’ (regarding this expression, see, for example articles 9, 28, 32 and 33 of the Geneva Convention on Refugees as well as article 6(1) of the OAU Convention on Refugees, article 12(2) of the Banjul Charter, articles 8(1), 13(3)(b), 22(3), 22(4), 26(2), 39(2) and 40(2) of the Convention on the Protection of the Rights of All Migrants Workers and Members of their Families).

Osisanya describes ‘national security’ as the ‘ability of a state to cater for the protection and defence of its citizenry.’⁸⁴ However, although one of the objectives of the AU is ‘to defend the sovereignty, territorial integrity and independence of its Member States’ (article 3(b) of its 2000 Constitutive Act) there is no general consensus on a given definition of ‘national security.’⁸⁵

Against this backdrop, it is not surprising to find that the language of human rights and the potential scrutiny which rights protection entailed were almost entirely absent from the preoccupations of the founders of the Organization of the African Union (OAU, predecessor of the AU) in the early 1960.⁸⁶

- 79 J Van Garderen & J Ebenstein ‘Regional developments: Africa’ in A Zimmermann (ed) *The 1951 Convention Relating the Status of Refugees and its 1967 Protocol: A commentary* (2011) 193.
- 80 The UNHCR Executive Committee (ExCom) reaffirms in conclusion No 100 (LV A/AC.96/1003) *International cooperation and burden and responsibility sharing in mass-influx situations* (8 October 2004) the ‘[i]mportance of international burden and responsibility sharing in reducing the burdens of host countries, especially developing countries’ (preamble).
- 81 A Suhrke ‘Burden-sharing during refugee emergencies: the logic of collective versus national action’ (1998) 11 *Journal of Refugee Studies* 398: ‘By institutionalizing the sharing in accordance with agreed principles of equity, states can discharge these obligations in a manner that simultaneously promotes national interests. Organized sharing means more predictable responses, greater international order [...] during a refugee emergency.’
- 82 WM Reisman ‘Sovereignty and human rights in contemporary international law’ (1990) 84 *American Journal of International Law* 869.
- 83 Schemers (n 76) 186.
- 84 S Osisanya National Security versus Global Security, UN Chronicle (October 2014) <https://unchronicle.un.org/article/national-security-versus-global-security> (accessed 10 October 2019).
- 85 AU Constitutive Act of the African Union. Lomé (11 July 2000) UNTS, vol 2158, No 3733, 328.
- 86 AB Akinyemi ‘The Organization of African Unity and the concept of non-interference in internal affairs of member states’ (1972-1973) 46 *British Yearbook of International Law* 394.

6 CONCLUSION: FINAL ASSESSMENT AND RECOMMENDATIONS ON HOW TO IMPROVE THE PROTECTION OF REFUGEE CHILDREN IN AFRICA

The adoption of the African Children's Charter represents a regional response to human rights concerns, and it reflects the reality of children's human rights issues in Africa. However, the nature of the charter can still be considered as embryonic, which is also evident in the lack of any real academic debate and, subsequently, lack of consensus on what 'children's rights' may mean in different African cultures. Moreover, given the socio-economic conditions on the continent, it is almost impossible for most countries to fully comply with the rights enshrined in the African Children's Charter.⁸⁷

Olowu observes that the African Children's Charter does not represent a mere list of rights but, rather, it constitutes a different way of viewing children and their relations within society and their place in it.⁸⁸ Yet, despite of the existence of the African Children's Charter and the CRC, dealing with the plight of refugee children in Africa is for the most part left to international NGOs, with both regional and national initiatives lacking any real impetus. It is true that article 23(2) of the African Children's Charter provides for state cooperation with international organisations in order to guarantee stronger protection of children in Africa. However, the implementation of the norms contained in the African Children's Charter is still largely insufficient to genuinely improve the situation of refugee children on the continent.⁸⁹

In third world nations, which are usually neither free nor democratic,⁹⁰ the legal protection of refugee children has many shortcomings. Apart from the legal protection often being inaccessible to children themselves and their families, it is also very difficult to inculcate a culture of respect for the rights and welfare of the child and, consequently, to raise the legitimacy of children's rights.⁹¹ Far from constituting a panacea that solves all the problems of refugee children

87 Kaime (n 8) 193. In this regard, see also: Lloyd (n 62) 32. For a national example of difficult practice in the protection of minors see, for example: C Fritsch, E Johnson & A Juska 'The plight of Zimbabwean unaccompanied minors in South Africa: a call for comprehensive legislative action' (2009-2010) 38 *Denver Journal of International Law and Policy* 623-658.

88 D Olowu 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 35.

89 Kaime (n 8) 194.

90 Freedom House *Freedom in the World* (2019) 12-13: '[M]any countries in the region still struggled to deliver basic freedoms and protect human rights [...] Space for political activity continued to close in several countries [...] Several of the continent's aging authoritarian leaders continued to cling to power [...].'

91 Kaime (n 3) 144.

in the region, the African Children's Charter remains an instrument of great potential to protect a category of vulnerable individuals.⁹² If the African Children's Charter remains an instrument with great potential to protect refugee children, African states should undertake a number of initiatives to, for example, prioritise the best interests of the child and provide a continuum of care and support for all unaccompanied and separated refugee children, including those who are trafficked, to ensure that they have access to key services such as education, family tracing and well-functioning, professional guardianship systems.

The AU considers the issue of family tracing particularly important. Indeed, the organisation encourages countries to give priority to family tracing and reunification for separated and unaccompanied refugee children. Where tracing is unsuccessful, other mechanisms should be put in place to allow for the adoption of the children when possible. In this last scenario, where children are allowed to be adopted by citizens, they should be given the opportunity to choose their nationality upon attaining majority in accordance with national law.⁹³ In addition, the AU recommends that African states ensure the protection of stateless children and observe the best interests of the child.⁹⁴ A recent report released by the Scalabrini Centre in Cape Town indicates that in the South African provinces of Limpopo and Gauteng, in the first six months of 2019, in 151 cases it was deemed necessary by residential social workers that family tracing be undertaken for a refugee child. In 109 cases, family reunification within South Africa was considered a possibility. However, in 73 of these cases attempts to reunify family in South Africa were ongoing or had failed.⁹⁵

African states should make an additional effort to encourage the integration of refugee children by providing them with education, training and economic opportunities equal to those of nationals, and by facilitating their naturalisation and promoting family reunification policies as recommended in article 10 of the CRC⁹⁶ and article 23 of the African Children's Charter. In this regard, the AU is clear in

92 Kaime (n 3) 185. However, as G Bekker contends: 'The eve of the 30th anniversary of the adoption of the African Charter on Human and Peoples' Rights presents the ideal opportunity to reassess, consolidate and streamline rights protection on the continent. As part of this process, serious consideration ought to be given to the question of whether the rights of African children are adequately served by the *status quo* or whether they might be better served by the abolition of the tasks institution of the African Committee of Experts and the reassigning of the tasks entrusted by the ACRWC to it, to the African Commission on Human and Peoples' Rights.' G Bekker 'The African Committee of Experts on the Rights and Welfare of the Child' in M Ssenyonjo (ed) *The African regional human rights system: 30 years after the African Charter on Human and Peoples' Rights* (2012) 263.

93 AU *Migration Policy Framework for Africa and Plan of Action 2018-2030* (n 18) 60.

94 AU policy (n 18) 64.

95 Scalabrini Centre (n 43) 26.

96 Article 10(1) stipulates: 'In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.'

encouraging the integration of children of long-term refugees by providing them with education, and economic opportunities equal to those of nationals, facilitating their naturalisation and promoting family reunification policies.⁹⁷

Finally, it should not be taken for granted that the rights of refugee children will automatically be protected under national laws by implementing the relevant international instruments adopted, possibly putting in place domestic mechanisms for the enforcement of those instruments.

The general acceptance – in Africa as in other areas of the world – of legal obligations with respect to the protection of human rights has been an important step forward. It is recognised that every category of persons has a right to protection of the most fundamental human rights. However, this right is not complete without an obligation from the world community to guarantee these rights. International cooperation calls for all states be bound by some minimum requirements of international law without being able to claim that their sovereignty allows them to reject basic international regulations.⁹⁸

While institutions responsible for the promotion of human rights and the protection of refugee children in Africa have made some progress in advancing these rights, there are still a number of challenges. The most important of these impediments is the lack of political will on the part of states to implement recommendations of the African Children's Charter and, in general, of the AU. This is because states all too often continue to view the protection of refugee children as a matter of national sovereignty. As can be seen from the discussion above, this notion is corroborated by the lack of follow-up mechanisms embedded within the African Children's Charter procedures.⁹⁹

Against this backdrop, the 2017 Children's Bill in Kenya clearly rejects any form of discrimination towards refugee children.¹⁰⁰ The South African government is also going to considerable lengths to eradicate any form of xenophobic discrimination. This effort was reflected by the introduction, in March 2019, of the National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. Through this plan, the government commits to 'decolonise the mind' through '[u]sing the education system to instil it in the minds of children that every person is entitled to their human rights and no person has superiority over another.'¹⁰¹

97 AU *Migration Policy Framework for Africa and Plan of Action 2018-2030* (n 18) 63.

98 Schemers. (n 77) 187-192.

99 Bekker (n 50) 28-29.

100 Government of Kenya *The Children Bill* (2017). See, for example, article 33(2)(h) facilitating '[t]he enhancement of the best interests of children among displaced or unaccompanied children held in care, whether in refugee camps or in any other institution.'

101 Government of South Africa *National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance* (March 2019) 59.

Within this context, the AU strongly encourages the implementation of the Programme of Action of the World Conference against Racism and Xenophobia, held in Durban in 2001. This could be achieved through the adoption of national legislative and policy frameworks, including measures to ensure the fair and non-discriminatory treatment of forced migrants, regardless of their status, with particular focus on preventing discrimination against children.¹⁰² In particular, in the Declaration which resulted from the Durban Conference, participants noted that

with concern the large number of children and young people, particularly girls, among the victims of racism, racial discrimination, xenophobia and related intolerance and stress[ed] the need to incorporate special measures, in accordance with the principle of the best interests of the child and respect for his or her views, in programmes to combat racism, racial discrimination, xenophobia and related intolerance, in order to give priority attention to the rights and the situation of children and young people who are victims of these practices.¹⁰³

Although participants reaffirmed the sovereign right of each state to formulate and apply its own legal framework and policies when it came to the protection of refugees, they nonetheless agreed that these policies should be consistent with applicable human rights instruments, norms and standards, and should remain free from any form of discrimination whatsoever.¹⁰⁴

I would like to conclude this study by quoting Reisman, who stated:¹⁰⁵

No one is entitled to complain that things are getting too complicated. If complexity of decision is the price for increased human dignity on the planet, it is worth it. Those who yearn for 'the good old days' and continue to trumpet terms like 'sovereignty' without relating them to the human rights conditions within the states under discussion, do more than commit an anachronism. They undermine human rights.

Will Africa learn this lesson soon? I do very much hope so.

102 AU policy (n 18) 73.

103 UNGA *Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance* A/CONF.189/12 (31 August 8 September 2001) para 72.

104 UNGA (n 103) para 47.

105 Reisman (n 82) 876.

III

CASE COMMENTARIES

COMMENTAIRES DE DECISIONS

Entre imperium illimité et *decidendi* timoré: la réparation devant la Cour africaine des droits de l'homme et des peuples

Sègnonna Horace Adjolohoun* et Sylvain Oré**

RÉSUMÉ: Dans le contexte d'une Commission africaine des droits de l'homme et des peuples dont le pouvoir de réparation des violations a fait l'objet de contestation par les Etats, on peut avancer que l'adoption en 1998 du Protocole à la Charte portant création d'une Cour africaine des droits de l'homme et des peuples n'a pas eu pour unique ambition la judiciarisation du système africain des droits de l'homme. On note en effet que l'article 27(1) du Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine confirme l'existence dans la Charte d'un droit à réparation. Sur cette fondation normative, lorsqu'elle rend, le 14 juin 2013, son premier arrêt sur le fond dans l'affaire *Reverend Christopher Mtikila c. Tanzanie*, la Cour inaugure par la même occasion l'impérium que lui confère l'article 27(1) du Protocole. En revanche, en se prononçant sur les réparations un an plus tard, soit le 13 juin 2014, c'est la portée de son impérium que révèle la juridiction continentale. Sur la trajectoire jurisprudentielle qu'elle dessine à la suite des arrêts *Mtikila*, la Cour pose donc les bornes indiscutables d'un pouvoir de réparation auquel la lettre de l'article 27(1) ne pose aucune limite. A l'opposé de cette tendance jurisprudentielle, la Cour a cependant, à maintes occasions, fait montre d'une action décisionnelle timorée, mettant du coup un franc bémol à son pouvoir affirmé de réparer des violations pourtant constatées. Nous démontrons dans cet article que l'approche adoptée par la Cour pose problème d'abord, par une pratique qui restreint le droit à réparation là où le législateur ne l'a pas entendu; ensuite, par une auto-censure qui peut entamer la légitimité de la Cour notamment par la concession d'une marge d'appréciation nuisible à l'autorité judiciaire et aux droits des victimes; et, enfin, par une inhibition de la capacité de la juridiction continentale à accomplir sa mission de renforcement de la protection des droits humains dans le système africain.

TITLE AND ABSTRACT IN ENGLISH:

Between unlimited *imperium* and restrained *decidendi*: reparation in the African Court on Human and Peoples' Rights

ABSTRACT: Against the background of the operation of the African Commission on Human and Peoples' Rights whose power to provide reparation for violations has been challenged by States, it can be posited that the adoption in 1998 of the Protocol to the

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African Charter on Human and Peoples' Rights on the establishment of an African Court on Human and Peoples' Rights did not aim solely at judicialising the African human rights system. It must indeed be noted that article 27(1) of the Protocol confirms the existence in the Charter of a right to reparation by expressly providing that 'if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation.' In light of this normative foundation, the delivery, on 14 June 2013, of the Court's first judgment on the merits in the matter of *Reverend Christopher Mtikila v United Republic of Tanzania* inaugurates the *imperium*, that is the reparation powers, conferred upon the Court by article 27(1) of the Protocol. Conversely, the Court's ruling on reparations issued a year later, on 13 June 2014, is illustrative of the scope of its reparation powers. On the jurisprudential trajectory that it shapes subsequent to the *Mtikila* judgments, the Court therefore set the indisputable foundations of a reparation power which is unlimited in the letter of article 27(1). Contrary to that jurisprudential position, the Court has in several instances demonstrated a restrained decision-making, therefore putting a dramatic limitation on its assumed power to grant reparations for well-established violations. In this article, we show that the Court's approach raises issues firstly, through a practice that restricts the right to reparation where the drafters did not mean to; secondly, through self-censorship that may erode the legitimacy of the Court, including by conceding a margin of appreciation that is detrimental to judicial authority and the rights of victims; and, finally, through a restriction of the Court's ability to discharge its mandate of reinforcing the protection of human rights in the African system.

MOTS CLÉS: réparation, système africain, judiciarisation, compétence, juridiction, marge d'appréciation, équité procédurale et substantielle, légitimité, autorité, exécution

SOMMAIRE:

1	Introduction	319
2	La réparation par un <i>imperium</i> illimité	321
	2.1 L' <i>impérium</i> de la substance des réparations.....	322
	2.2 L' <i>impérium</i> de l'adaptabilité des réparations.....	328
3	La réparation par un <i>decidendi</i> timoré.....	332
	3.1 Le <i>decidendi</i> du droit à réparation	332
	3.2 Le <i>decidendi</i> de l'exécution des réparations	338
4	Conclusion.....	343

1 INTRODUCTION

Dans le système africain des droits de l'homme, l'existence d'un droit à réparation a fait polémique au sein de la doctrine par suite du défaut de disposition expresse dans la Charte africaine des droits de l'homme et des peuples (la Charte africaine ou la Charte).¹ En conséquence, les Etats ont contesté voire défié le pouvoir de la Commission africaine des droits de l'homme et des peuples (la Commission africaine ou la Commission) d'accorder réparation aux victimes.² La Commission a dû, face à la contestation, forger un droit à réparation par construction prétorienne induite, entre autres, des principes de « l'effet utile » et de la coutume.³ Dans ce contexte, on peut avancer que l'adoption en 1998 du Protocole à la Charte portant création d'une Cour africaine des

1 SH Adjolohoun *Droits de l'homme et justice constitutionnelle en Afrique: la modèlè béninois à la lumière de la Charte africaine des droits de l'homme et des peuples* (2011) 47-55; GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 441 at 442.

droits de l'homme et des peuples (la Cour africaine ou la Cour) ne s'est pas limitée à la judiciarisation du système. On note en effet que l'article 27(1) dudit Protocole confirme l'existence dans la Charte d'un droit à réparation. Il dispose: « [l]orsqu'elle estime qu'il y a eu violation d'un droit de l'homme ou des peuples, la Cour ordonne toutes les mesures appropriées afin de remédier à la situation, y compris le paiement d'une juste compensation ou l'octroi d'une réparation ». Par avenant procédural à cette garantie de réparation, l'article 63 de son Règlement intérieur dispose que « [l]a Cour statue sur la demande de réparation (...) dans l'arrêt par lequel elle constate la violation (...) ou, si les circonstances l'exigent, dans un arrêt séparé ».

Sur cette fondation normative, lorsqu'elle rend, le 14 juin 2013, son premier arrêt sur le fond dans l'affaire *Reverend Christopher Mtikila c. Tanzanie*,⁴ la Cour inaugure par la même occasion l'impérium que lui confère l'article 27(1), du Protocole. En revanche, en se prononçant sur les réparations un an plus tard, soit le 14 juin 2014, c'est la portée de son impérium que révèle la juridiction continentale.⁵

Sur la trajectoire jurisprudentielle qu'elle dessine à la suite des arrêts *Mtikila*, la Cour pose les bornes indiscutables d'un pouvoir de réparation auquel la lettre de l'article 27(1) ne pose aucune limite. C'est cet impérium illimité qui se manifeste dans l'arrêt *Norbert Zongo et autres c. Burkina Faso* sur les réparations par lequel la Cour ordonne la réactivation de procédures judiciaires gelées plus d'une décennie durant et le versement aux ayant-droits de dommages et intérêts équivalant à près d'un million de dollars américains.⁶ De l'arrêt *Evariste Minani c. Tanzanie*⁷ où elle ordonne le versement d'une compensation pour défaut de disponibilité de l'aide juridictionnelle à l'arrêt *Lucien Ikili Rashidi c. Tanzanie*⁸ où l'Etat est condamné au paiement d'un montant de 10.000.000 de shilling tanzaniens pour fouille rectale, la Cour fait la preuve plus que suffisante d'un pouvoir de réparation dont l'aura est à la fois large et diverse.

2 Voir G Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 10; SH Adjolohoun *Giving effect to the human rights jurisprudence of the ECOWAS Court of Justice: compliance and influence*, Thèse de doctorat, Université de Pretoria (2013) 96-99; JD Boukongou 'The appeal of the African human rights system' (2006) 6 *African Human Rights Law Journal* 288-292.

3 Voir Adjolohoun (n 1) 60-74; *Kenneth Good c. Botswana*, Communication 313/05 (2010) AHRLR 43 (ACHPR 2010); *Antoine Bissangou c. République du Congo*, Communication 253/2002 (2006) AHRLR 80 (ACHPR 2006); *Marcel Wetsch' Okonda Koso et autres c. République Démocratique du Congo*, Communication 281/2003 (2008) AHRLR 93 (ACHPR 2008).

4 *Reverend Christopher Mtikila c. Tanzanie* CAFDHP (fond, 14 juin 2013) 1 *RJCA* 34.

5 *Reverend Christopher Mtikila c. Tanzanie* CAFDHP (réparations, 13 juin 2014) 1 *RJCA* 74.

6 *Norbert Zongo et autres c. Burkina Faso* CAFDHP (réparations, 5 juin 2015) 1 *RJCA* 265.

7 *Minani Evarist c. Tanzanie*, CAFDHP (fond et réparations, 21 septembre 2018).

8 *Lucien Ikili Rashidi c. Tanzanie* CAFDHP (fond et réparations, 28 mars 2019).

A l'opposé de cette tendance jurisprudentielle, la Cour a cependant, à maintes occasions, fait montre d'une action décisionnelle timorée, mettant du coup un franc bémol à son pouvoir affirmé de réparer des violations pourtant constatées. De manière notable, on relève ainsi que dans l'arrêt sur le fond de l'affaire *Mohamed Abubakari c. Tanzanie*,⁹ la Cour rejette la demande de remise en liberté du requérant qu'elle conditionne à la preuve de « circonstances exceptionnelles ou impérieuses » avant d'admettre la même demande comme applicable dans son arrêt en interprétation.¹⁰ Par ailleurs, c'est l'identification et le choix des facteurs applicables selon les circonstances des causes examinées qui posent problème. A cet égard, on note que la Cour n'a pas adopté une approche nécessairement constante quant à la technique d'évaluation du quantum de la réparation, à la devise utilisée, à la philosophie de sa finalité ou encore à l'égalité ou la similarité des victimes concernées. Cette seconde tendance de sa jurisprudence montre les signaux empiriques de l'application par la Cour de l'approche auto-censurée d'un pouvoir de réparation que le législateur n'a pas entendu limiter.¹¹

Le caractère coutumier du droit à réparation en droit international public et, de manière plus prégnante, en droit international des droits de l'homme, est établi. Il n'est pas besoin non plus de convaincre quant à l'importance critique de la mise en œuvre d'un droit explicite et justiciable à la réparation dans le système africain des droits de l'homme. Au demeurant, la fonction de judiciarisation du système africain que lui confère le Protocole fait de la Cour africaine le maillon de l'effectivité du droit à réparation, en particulier dans la Charte africaine. Ces considérations justifient que l'on s'intéresse aux développements liés à la pratique de la réparation devant la Cour africaine. Nous proposons d'y consacrer cette réflexion et convoquons, pour se faire, les grands principes du droit à réparation notamment en droit international mais surtout la jurisprudence de la Cour sur les questions discutées. Il est également fait recours à la doctrine, selon le cas et en tant que nécessaire. Notre démarche consiste à démontrer que si la Cour confirme que son pouvoir de réparation procède, sur la fondation normative, par un impérium illimité (2), elle a souvent réfréné cet élan par l'expression d'un *decidendi* timoré (3).

2 LA REPARATION PAR UN IMPERIUM ILLIMITE

En s'intéressant à l'étendue du pouvoir de réparation conférée à la Cour, on peut l'envisager d'une part, du point de vue de la substance des réparations (2.1) et, d'autre part, relativement à leur adaptabilité tant au préjudice souffert qu'à la victime requérante (2.2).

9 *Mohamed Abubakari c. Tanzanie* CAFDHP (fond, 3 juin 2016) *RJCA* 624.

10 *Mohamed Abubakari c. Tanzanie* CAFDHP (interprétation, 28 septembre 2017).

11 Voir sur la question, SH Adjolahoun '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.

2.1 L'impérium de la substance des réparations

Le caractère illimité du pouvoir de la Cour quant à la substance des réparations qu'elle peut ordonner s'entend d'une part au type de réparation (2.1.1) et, d'autre part, au quantum de la réparation (2.1.2).

2.1.1 La substance liée à la typologie de la réparation

Aux termes des dispositions de l'article 27(1) du Protocole, la Cour peut ordonner « toutes les mesures appropriées » à l'effet de remédier aux violations qu'elle constate. En référence à la typologie généralement admise en droit international des droits de l'homme, les mesures de réparation d'une violation incluent la restitution, l'indemnisation (ou compensation), la réhabilitation (ou réadaptation), la satisfaction et les garanties de non-répétition.¹²

Au sens de cet énoncé fondateur de son pouvoir de réparation aux termes de l'article 27(1) du Protocole, la Cour n'est donc pas limitée quant au type de mesure qu'elle peut ordonner à l'Etat défendeur de prendre à l'effet de réparer la violation constatée. La jurisprudence de la juridiction illustre largement cette acception du pouvoir réparateur que lui confère le législateur continental. Il en est ainsi par exemple concernant les mesures de restitution,¹³ de compensation,¹⁴ de réhabilitation,¹⁵ de satisfaction¹⁶ et de garanties de non-répétition.¹⁷ Pour ce qui est des mesures de réhabilitation et de non-répétition, si la Cour ne s'est pas à ce jour prononcée expressément sur la première, faute d'une demande spécifiée à cet égard, elle a conclu par exemple dans l'affaire *Lucien Ikili Rashidi c. Tanzanie* que la demande de non-répétition des violations était devenue sans cause étant entendu que le requérant et les membres de sa famille ne résidaient plus sur le territoire de l'Etat défendeur.¹⁸

En sus de ces mesures de réparation admises dans la pratique du droit international, la lettre de l'article 27(1) du Protocole ne laisse aucun doute sur ce que la Cour africaine peut ordonner d'autres mesures pour autant qu'elles soient « appropriées » et que les demandes y afférentes satisfassent aux conditions de preuve admises aux termes des principes généraux de droit et de la jurisprudence non contestée par les Etats.

Pour ce qui concerne le caractère non-exclusif de la typologie des mesures, les illustrations en foisonnent dans la jurisprudence de la

12 Voir Cour africaine des droits de l'homme et des peuples, *Lignes directrices sur les réparations* (2019) 12-15.

13 *Lohé Issa Konaté c. Burkina Faso*, CAFDHP (réparations, 3 juin 2016) 1 RJCA 358 para 60.

14 *Kenedy Ivan c. Tanzanie*, CAFDHP (fonds et réparations, 28 mars 2018), para 90.

15 *Ngosi Mwita Makungu c. Tanzanie*, CAFDHP (fond, 7 décembre 2018), para 86.

16 *Norbert Zongo* (réparations), para 100.

17 *Reverend Christopher Mtikila* (réparations), para 43.

18 *Lucien Ikili Rashidi*, para 147.

Cour. La plus en vue des mesures ordonnées à cet égard est sans doute la mise en conformité de la législation nationale au droit international auquel l'Etat concerné est partie. Dans la portion législative *stricto sensu*, on ne peut s'empêcher de rappeler le trio *Action pour la Protection des Droits de l'Homme (APDH) c. Côte d'Ivoire*,¹⁹ *Anudo Ochieng Anudo c. Tanzanie*²⁰ et *Association pour le Progrès et la Défense des Droits des Femmes (APDF) et Institut pour les Droits de l'Homme et le Développement en Afrique (IHRDA) c. Mali*.²¹

Dans le premier arrêt, *APDH c. Côte d'Ivoire*, la Cour, ayant constaté que la composition de la Commission Electorale Indépendante de Côte d'Ivoire ne respectait pas le droit à l'égalité et les principes d'indépendance et d'impartialité, a ordonné à l'Etat défendeur de « mettre la loi portant composition de la Commission en conformité avec » la Charte africaine des droits de l'homme et des peuples, la Charte africaine de la démocratie, des élections et de la gouvernance (Charte de la démocratie) et le Protocole de la CEDEAO sur la bonne gouvernance et les élections. Dans l'affaire *Anudo c. Tanzanie*, la Cour ordonne à l'Etat défendeur « d'amender sa législation à l'effet d'offrir aux individus des recours juridictionnels en cas de contestation de leur nationalité ». ²² Enfin, dans l'affaire *APDF et IHRDA c. Mali*, ayant conclu que certaines dispositions du Code de la famille relatives à l'âge de la majorité et à l'accès à l'héritage violent entre autres le droit à l'égalité dans le Protocole de Maputo et la Charte africaine des droits et du bien-être de l'enfant, la Cour ordonne au défendeur de « modifier la loi contestée en l'harmonisant avec les instruments internationaux ... ». ²³

Il n'y a pas lieu à débat qu'en décidant ainsi, la Cour ordonne, en application de l'article 27(1) du Protocole, des mesures appropriées au-delà de celles généralement admises dans la typologie du droit international sur les réparations rappelée *supra*. En notant par ailleurs qu'il s'agit là d'un contrôle de conventionalité tombant sans surprise dans le champ de compétence matérielle de la Cour, il faut constater que la juridiction a pu, dans certaines espèces, ordonner de surcroît. Le cas échéant, il est difficile de nier que la Cour africaine ait pu faire œuvre de contrôle conventionnel de constitutionnalité.

On peut convoquer à cet égard au moins deux décisions majeures. Rendue dans l'affaire *Reverend Christopher Mtikila c. Tanzanie*, la première décision, qui inaugure en outre sa jurisprudence sur les réparations, est également celle par laquelle la haute juridiction continentale contrôle la conformité à l'article 13 de la Charte africaine, des dispositions de la Constitution tanzanienne exigeant le parrainage par un parti politique de tout candidat à un poste électif, magistrature suprême, parlement ou conseils communaux. La Cour conclut dans son

19 *Actions pour la Protection des Droits de l'Homme (APDH) c. Côte d'Ivoire*, CAFDHP (fond, 18 novembre 2016) 1 RJCA 697.

20 *Anudo Ochieng Anudo c. Tanzanie*, CAFDHP (fond, 22 mars 2018).

21 *Association pour le Progrès et la Défense des Droits des Femmes (APDF) et Institut pour les Droits de l'Homme et le Développement en Afrique (IHRDA) c. Mali*, CAFDHP (fond et réparations, 11 mars 2018).

22 *Anudo Ochieng Anudo* (fond), para 132.

23 *APDF et IHRDA* (fond et réparations), para 135(x).

arrêt que les dispositions attaquées violent la liberté d'association et le droit à la participation politique avant d'ordonner à l'Etat défendeur de réviser sa Constitution pour la mettre en conformité avec la législation continentale.²⁴

Quatre ans après cette sentence réparatrice inaugurale, la Cour rend un deuxième arrêt dans l'affaire *Sébastien Germain Ajavon c. Bénin*. Dans cette cause, le préjudice invoqué par le requérant est évalué par lui à 550.000.000 de francs CFA, soit un peu plus d'un milliard de dollars américains, qu'il estime avoir été causé par la procédure entreprise à son encontre pour trafic de drogue.²⁵ En réponse, la Cour ordonne à l'Etat défendeur de « prendre toutes les mesures nécessaires pour annuler l'arrêt no. 7/3C.COR rendu le 18 octobre 2018 par la Cour de répression des infractions économiques et du terrorisme (CRIET) de manière à en effacer tous les effets ... ». ²⁶ Ici, la Cour rompt avec une constance jurisprudentielle établie sur plus d'une dizaine d'arrêts précités et marquée par un rejet systématique des demandes d'annulation des décisions des juridictions internes relatives à l'inculpation et la condamnation du requérant. La juridiction avait alors, pour unique motif, réitéré comme par fidèle redondance qu'elle n'est pas une juridiction d'appel des décisions rendues par les juridictions internes.²⁷ Il eut certainement fallu, comme le souligne le Juge Niyungeko dans son opinion individuelle, qu'en ordonnant sur un point aussi important, la Cour motiva préalablement sa décision.²⁸ Pourrait-on, au contraire, considérer que la mesure ordonnée allant de soi, cette omission n'a pas entamé le *decidendi* de la Cour?

Sur le caractère approprié des mesures auxquelles il est fait référence à l'article 27(1) il faut rappeler, à titre de préalable, que, de sens général, le caractère approprié d'une mesure de réparation s'entend comme celle susceptible au mieux de remédier à la violation dans la considération du préjudice souffert. S'agissant des conditions de preuve et d'accès à la réparation, la Cour a adopté largement celles retenues au titre des principes généraux de droit et de la jurisprudence internationale: la responsabilité de l'Etat et l'obligation de réparation; l'existence d'un lien de causalité entre la violation constatée et le préjudice souffert; la définition du dommage; le contenu de la réparation et ses bénéficiaires.²⁹

S'il n'y a pas de doute sur le sens et la portée des termes liminaires de l'article 27(1) sus énoncés, on ne peut en dire de même pour les termes conclusifs de la disposition. Le texte du Protocole fait en effet

24 *Reverend Christopher Mtikila* (fond), paras 111, 115 et 126.

25 *Sébastien Germain Ajavon c. Bénin*, CAFDHP (fond, 29 mars 2019) para 283.

26 *Ibid*, para 292(xxii).

27 Voir l'arrêt fondateur à cet égard, *Ernest Francis Mtingwi c. Malawi*, CAFDHP (compétence, 15 mars 2013) 1 RJCA 197 paras 14-16.

28 Voir *Sébastien Germain Ajavon c. Bénin* (fond), Opinion individuelle du Juge Gérard Niyungeko, paras 27-29.

29 Voir F Ougergouz 'Les articles 60 et 61 de la Charte africaine des droits de l'homme et des peuples' in L Burgorgue-Larsen (dir) *Les défis de l'interprétation et de l'application des droits de l'homme: de l'ouverture au dialogue* (2017) 151-156. Voir également *Norbert Zongo* (réparations), para 55.

référence à « toutes les mesures appropriées y compris le paiement d'une juste compensation ou l'octroi d'une réparation ». ³⁰ La portion finale peut prêter à confusion puisque, comme rappelé *supra*, la compensation est considérée en droit international comme l'une des mesures de réparation. Il s'ensuit que cette mesure ne saurait en principe s'appliquer comme une alternative à la réparation en ce sens qu'elle est réparation au même titre par exemple que la restitution. A titre de clarification de la norme et pour lever la confusion que paraît causer le texte, il suffira de noter que la terminologie du Protocole n'est pas simplement celle de « compensation » mais plutôt de « juste compensation ». On pourrait alors postuler, par le légitime bénéfice de cette précision, que le Protocole stipule pour la « juste » compensation en opposition à la compensation totale ou intégrale.

Par argumentaire comparé, la juste compensation est celle adoptée par la Cour européenne des droits de l'homme à laquelle le législateur européen confère, aux termes de l'article 41 de la Convention européenne des droits de l'homme, des pouvoirs de réparation bien en deçà de ceux dont peut se prévaloir la Cour africaine. La seconde juridiction confirme d'ailleurs cette interprétation lorsqu'elle considère de jurisprudence constante que le but essentiel de la réparation n'est pas d'ériger celle-ci en une sanction pour l'Etat ou un motif d'enrichissement pour le requérant-victime. ³¹ Sur la question débattue, il convient par conséquent d'entendre l'article 27(1) du Protocole comme offrant à la Cour une double option. Elle peut soit procéder à une réparation par juste compensation, voire une réparation au franc symbolique, dont la détermination est laissée à son entière discrétion, soit à une réparation qui devrait alors être intégrale et s'apprécier au cas par cas selon qu'il s'agisse de remédier à un préjudice matériel ou moral.

On peut retenir de ce qui précède que l'impérium de la Cour est illimité quant au type de mesures réparatrices qu'elle peut ordonner. Il en est de même s'agissant du quantum de la mesure ordonnée.

2.1.2 La substance liée au quantum de la réparation

En droit, le quantum s'entend de la quantité de la réparation octroyée à la victime tel qu'il est généralement d'application dans l'évaluation des dommages et intérêts. ³² Pris ainsi, il serait peu pratique d'appliquer la notion de quantum à des types de réparation tels que la restitution ou la réhabilitation. L'évaluation quantitative de la réparation convien-drait en revanche aux mesures de compensation généralement applicables lorsqu'est irréalisable la restitution qui consiste à replacer la victime dans le statut *quo ante*, c'est-à-dire, la situation antérieure au préjudice. Par exemple, pour appliquer la compensation suite à une procédure d'expropriation illégale, le juge doit inévitablement exercer le pouvoir d'évaluation du quantum en

30 Nous avons souligné.

31 Voir *Norbert Zongo* (réparations).

32 Black Law Dictionary, 9^{ème} édition (2009) 1361-1362.

l'occurrence sur la base de la perte ou du préjudice subi. Il est bien entendu que si le préjudice allégué est matériel, le quantum sera évalué sur la base des preuves documentaires apportées par la victime. Si le préjudice est moral, l'évaluation sera laissée à la discrétion de la Cour même si elle devrait par logique de causalité se prononcer sur la base de différents facteurs allant de la situation du requérant à celles des victimes directes ou indirectes, mais également à la gravité de la violation et aux autres circonstances de la cause.

C'est dans cette proportion qu'il faut apprécier la discussion sur le caractère illimité de l'impérim de la Cour quant à l'évaluation du quantum des réparations dont l'article 27(1) du Protocole lui donne onction normative. En stipulant que la Cour peut ordonner « *toutes les mesures appropriées y compris le paiement d'une juste compensation ou l'octroi d'une réparation* », ³³ la norme prévoit indiscutablement que la compensation doit être appropriée. Ce que la norme n'induit pas moins, c'est qu'une compensation, pour être appropriée, doit inévitablement être quantifiée. La Cour corrobore une telle acception de son pouvoir d'évaluation du quantum des réparations octroyées aux victimes.

Dès ses premiers arrêts sur la réparation, à l'image de celui rendu dans l'affaire *Norbert Zongo c. Burkina Faso*, le juge africain des droits de l'homme n'a ainsi aucune hésitation à accorder aux ayant-droits des victimes directes, des dommages et intérêts totalisant la somme de 500.000.000 francs CFA – soit environ 1.000.000 de dollars américains – représentant quasiment les trois-quarts de la demande formulée par les requérants. ³⁴ Le quantum pris individuellement, la Cour accorde jusqu'à 25.000.000 francs CFA aux épouses ou encore 15.000.000 francs CFA aux enfants. ³⁵ Dans ses arrêts subséquents, elle accorde des réparations compensatoires de 300.000 shillings tanzaniens pour violation du droit au procès équitable notamment le défaut d'assistance judiciaire, ³⁶ 4.000 dollars américains pour quatre ans de délai anormalement long dans la conduite d'une procédure judiciaire, ³⁷ ou encore 5.000 dollars américains pour violation du droit à la dignité par suite d'une fouille rectale. ³⁸

Légalement fondée sur l'expresse volonté du législateur, une telle générosité d'impérim quasiment sans borne, ne semble pas se limiter au quantum des réparations.

La même observation pourrait s'appliquer à l'administration de la preuve du préjudice souffert dans l'évaluation du quantum des réparations. D'une part, la Cour fait œuvre de jurisprudence constante en s'alignant sur la pratique du droit international général rappelée

33 Nous avons souligné.

34 *Norbert Zongo* (réparations), para 36.

35 *Ibid*, para 111(ii).

36 *Minani Evarist* (fond et réparations), para 81; *Diocles William c. République Unie de Tanzanie*, CAFDHP (fond et réparations, 21 septembre 2018), para 101.

37 *Wilfred Onyango Nganyi et autres c. Tanzanie*, CAFDHP (réparations, 4 juillet 2019), paras 97(iv)(a)(b).

38 *Lucien Ikili Rashidi*, para 160(x).

plus haut. Elle exige ainsi, dans quasiment toutes les espèces, que le requérant fasse la preuve matérielle du préjudice à défaut de quoi les demandes sont systématiquement rejetées,³⁹ il est vrai à l'issue d'un examen minutieux de la foule de réclamations souvent égrenées par les victimes.⁴⁰ Lorsque la preuve est faite, la Cour n'hésite cependant pas, comme on peut le noter dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda*, à accorder la totalité du montant de 230.000 francs rwandais demandé par la requérante au titre de remboursement des frais de traitement administratif du dossier judiciaire.⁴¹ Elle ordonne également le remboursement des honoraires d'avocat à la hauteur approximativement mesurée de la perte subie sur la base du principe d'équité, en forfait mais en déduisant logiquement certains frais déjà couverts par des compensations antérieures et en relevant que la requérante n'a eu gain de cause que partiellement.⁴² Pourtant, d'autre part, la Cour sait faire preuve de flexibilité notamment face à des victimes dont la perte matérielle ou morale a été indubitablement et préalablement établie. Les puristes de la preuve pourraient d'ailleurs qualifier de trop souple cette tendance de la Cour à admettre, comme elle l'a fait par exemple dans l'affaire *Wilfred Onyango Nganyi et autres c. Tanzanie*, la preuve incomplète, imparfaite ou partielle d'un préjudice matériel.⁴³

S'il est pertinent de s'y intéresser plus amplement, le raisonnement de la Cour quant aux facteurs présidant à l'évaluation du quantum dans certaines espèces et circonstances n'est pas l'objet de la présente discussion. On pourrait tout de même relever, en passant, que les marges significatives entre les réparations accordées pour préjudice moral dans des cas similaires voire identiques soulèvent la question de l'équité mais également du bon exercice par la Cour de son impérium à cet égard.⁴⁴

Outre la substance des réparations, c'est dans leur adaptabilité que se manifeste l'impérium illimité de la Cour.

2.2 L'impérium de l'adaptabilité des réparations

On note dans le droit autant qu'on l'observe par la pratique que le pouvoir de réparation de la Cour s'étend à la détermination de

39 *Norbert Zongo* (réparations), *Lohé Issa Konaté* (réparations), *Wilfred Onyango Nganyi* (réparations) et *Lucien Ikili Rashidi*.

40 Par exemple, dans l'arrêt *Wilfred Onyango Nganyi* (réparations), les requérants présentent une liste de sept (7) demandes se rapportant aux préjudices soufferts par une cinquantaine de victimes directes et indirectes.

41 *Ingabire Victoire Umuhoza c. Rwanda*, CAfDHP (réparations, 7 décembre 2018) 38-40.

42 *Ibid.*, 42-46.

43 *Wilfred Onyango Nganyi* (réparations), paras 36-38.

44 Par exemple, la Cour accorde 150 dollars pour défaut d'aide juridictionnelle dans *Minani Evarist*; 4.000 dollars pour quatre ans de délai anormalement long dans *Wilfred Onyango Nganyi*; 5.000 dollars pour violation du droit à la dignité par suite de fouille annale dans *Lucien Ikili Rashidi*; et 15.000 dollars pour préjudice morale suite à un an d'emprisonnement dans *Lohé Issa Konaté*.

l'adaptabilité des mesures accordées aussi bien au préjudice souffert (2.2.1) qu'au requérant dont le statut de victime a été établi (2.2.2).

2.2.1 L'adaptabilité au préjudice

Au plan normatif, il suffira de renvoyer à nouveau à la terminologie de « mesures appropriées » à laquelle fait référence l'article 27(1) du Protocole. L'impérium de la Cour afférent à l'adaptabilité de la réparation est affirmé puisque la disposition stipule que lesdites mesures sont ordonnées pour « remédier à la situation », c'est-à-dire au préjudice établi ou prouvé. La Cour a fait application d'une telle acception de la norme à maintes reprises, du reste de manière quasi constante, soit par interprétation positive soit par interprétation négative.

Par interprétation positive, la Cour a conclu, par exemple dans l'affaire *Alex Thomas c. Tanzanie* que la mesure de constatation de violation requise par le requérant est adaptée au préjudice qu'il a souffert en ce que la violation du droit à l'aide juridictionnelle a eu pour conséquence grave sa condamnation à une peine d'emprisonnement de trente ans.⁴⁵ De même, dans l'affaire *Lucien Ikili Rashidi*, la Cour a conclu que les fouilles rectales effectuées sur la personne du requérant constituaient une violation grave de son droit à la dignité qui nécessitait une réparation par constatation de violation mais également par versement de dommages et intérêts pour préjudice moral.⁴⁶ Une telle interprétation est qualifiée de positive en ce que la Cour l'a avancée pour conclure que la mesure demandée par le requérant ou qu'elle ordonne *proprio motu* est effectivement adaptée ou la plus adaptée au préjudice souffert en l'espèce.

Pour ce qui est de l'interprétation négative, elle est entendue comme celle fondant la conclusion par la Cour que la demande faite par le requérant est exagérée ou n'est pas celle qui convient au préjudice constaté ou aux circonstances de la cause. Cette approche interprétative est illustrée par la position de la Cour dans l'affaire *Mohamed Abubakari c. Tanzanie* lorsqu'après avoir constaté une série de violations du droit au procès équitable, le juge n'a tout de même pas accédé à la demande du requérant d'ordonner la réouverture du procès au motif qu'une telle mesure serait injuste pour lui.⁴⁷ La Cour a estimé qu'eu égard à ce que le requérant avait déjà purgé plus de la moitié de la peine, soit 19 années sur 30, et que la nouvelle procédure pourrait être longue,⁴⁸ il était plus approprié d'ordonner à l'Etat défendeur « de prendre toutes les mesures appropriées, dans un délai raisonnable, en vue de remédier aux violations ».⁴⁹

La nature du préjudice fonde également la base de calcul du quantum comme l'illustre l'arrêt *Armand Guehi c. Tanzanie*. Dans

45 *Alex Thomas c. Tanzanie*, CAfDHP (fond, 2015) 1 *RJCA*, para 123.

46 *Lucien Ikili Rashidi*, para 84.

47 *Mohamed Abubakari* (fond), para 235.

48 *Ibid.*

49 *Mohamed Abubakari* (réparations), para 236.

cette espèce, la Cour considère que la violation a duré dix jours et sur la base de l'équité, accorde un montant de 500 dollars américains au titre de réparation pour une privation de nourriture subie par le requérant.⁵⁰ De même, dans l'affaire *Ingabire Victoire Umuhoza* citée *supra*, la Cour accorde à la requérante des dommages et intérêts de 100.000 dollars américains en relevant que « lorsqu'il s'agit de personnes détenues dans les conditions telles que décrites par la requérante, le préjudice moral qu'elles évoquent se présume de sorte qu'il n'est plus nécessaire de l'établir autrement ».⁵¹ Cet édit n'est pas inédit puisqu'il prend sa source jurisprudentielle dans l'arrêt *Norbert Zongo* (réparations) qui forme désormais la trame d'un *decidendi* constant de la Cour sur la question.

Il est vrai que la discussion serait partielle si l'on n'évoquait pas la nature plutôt controversée de cette position de la Cour qui a ultérieurement admis, dans son arrêt en interprétation rendu dans la même affaire *Abubakari*, que la reprise du procès pourrait être une mesure envisageable par l'Etat défendeur.⁵² Il s'agit là cependant d'une question à laquelle il est plus judicieux de retourner dans une manche ultérieure de la présente réflexion.

Pour l'heure, et après s'être intéressé à l'impérium de la Cour relatif à l'adaptabilité des réparations au préjudice, on peut presque logiquement se pencher sur la même question relativement au requérant, soit à la victime de la violation constatée.

2.2.2 L'adaptabilité au requérant-victime

Sur ce point, on peut aisément avancer que si la Cour a pouvoir pour décider de l'adaptabilité de la réparation en rapport avec le préjudice subi, il en va de même par implication en ce qui concerne le requérant. L'on est bien fondé à ainsi conclure puisque le préjudice à réparer est évidemment subi par un requérant qui peut aussi être la victime.

Cet aspect de l'impérium de la Cour se manifeste en ce que la juridiction n'a pas hésité à interpréter son pouvoir de réparation comme susceptible de prévoir pour toutes les catégories de requérants ou de victimes. On peut d'abord noter, même si ce n'est que sous un angle procédural, que, de manière quasi systématique, la Cour considère la situation du requérant comme un élément déterminant lorsqu'elle évalue le caractère raisonnable du délai dans lequel elle a été saisie après l'épuisement des recours internes.⁵³ Il s'agit là d'une approche notable puisque dans les espèces concernées, la Cour conclut presque toujours au respect de cette condition de recevabilité prescrite à l'article 56(6) de la Charte⁵⁴ et, plus généralement, à la recevabilité de

50 *Armand Guehi c. Tanzanie*, CAFDHP (fond et réparations, 7 décembre 2018), para 180.

51 *Ingabire Victoire Umuhoza* (réparations), para 59.

52 *Mohamed Abubakari* (interprétation). Voir sur la question, Adjolohoun (n 11).

53 *Mohamed Abubakari* (fond), para 92.

54 *Frank David Omary et autres c. Tanzanie*, CAFDHP (28 mars 2014, recevabilité) 1 RJCA 371, para 85.

la requête.⁵⁵ La même approche prévaut quant à la motivation sur la base de laquelle la Cour conclut à la violation ou non d'un droit substantiel. Ainsi, pour conclure que le droit à l'aide juridictionnelle a été violé, la Cour retient comme facteur prépondérant l'indigence du requérant.⁵⁶

La situation du requérant, victime ou non, tient également une voix prépondérante au chapitre lorsqu'il s'agit d'établir le statut de victime pour les besoins d'examen des demandes de réparation. Les prémices de cette approche sont ébauchées par la Cour dans son arrêt *Norbert Zongo* (réparations) lorsque la juridiction estime que la notion de victime dépasse celle des héritiers en première ligne pour inclure « d'autres personnes proches » du *de cuius* « dont on peut raisonnablement penser qu'elles ont pu subir un préjudice moral caractérisé du fait de la violation des droits de l'homme concernée ». ⁵⁷ La Cour a ainsi pu accorder réparation non seulement aux conjoints mais également aux enfants, pères et mères des défunts.⁵⁸ C'est d'ailleurs cette position qui s'est raffermie dans l'arrêt *Ingabire Victoire Umuhoza* puisque les époux et trois enfants de la requérante se sont vu allouer, conjointement avec elle, un montant de 55.000.000 francs rwandais pour préjudice moral présumé. En l'espèce, la Cour s'est fondée au principal sur ce que « les accusations portées contre la requérante, son emprisonnement et les restrictions portées à ses communications avec son époux et ses enfants sont autant d'actes de nature à entamer fortement le moral de ceux-ci ». ⁵⁹

Cette première jurisprudentielle va s'appliquer dans une diversification ingénieuse qui confirme l'acception libérale de l'article 27(1) dont la Cour se fait la fidèle interprète. A titre d'exemple, pour conclure au droit à la réparation et à son adéquation en l'espèce, la Cour va, dans l'arrêt *Anaclet Paulo c. Tanzanie*, fonder son argumentaire dès le fond sur ce que l'assistance judiciaire gratuite « était d'autant plus nécessaire que le requérant affirme être un profane en droit et qu'il était aussi dans l'incapacité de se payer les frais d'une représentation ». ⁶⁰ A hauteur d'évaluation du quantum, la Cour complète cette motivation en décidant d'accorder le montant de 300.000 shilling tanzaniens sur le fondement que la violation constatée « a causé un préjudice non-pécuniaire au requérant qui a demandé une compensation adéquate conformément à l'article 27(1) du Protocole ». ⁶¹ En bonne discipline jurisprudentielle, c'est sans surprise un argumentaire, une conclusion et un quantum identiques qu'adopte la Cour dans l'affaire *Minani Evarist c. Tanzanie*. ⁶²

55 *Ibid*, para 144.

56 *Wilfred Onyango Nganyi* (fond, 18 mars 2016), 1 *RJCA*, para 108; *Christopher Jonas c. Tanzanie*, CAFDHP (fond, 28 septembre 2017), paras 77-78; *Mohamed Abubakari* (fond), para 139; et *Diocles William* (fond et réparations), paras 85-87.

57 *Norbert Zongo* (réparations), para 46.

58 *Ibid*, para 50.

59 *Ingabire Victoire Umuhoza* (réparations), paras 66-69, 72.

60 *Anaclet Paulo c. Tanzanie*, CAFDHP (fond, 21 septembre 2018), para 93.

61 *Ibid*, paras 106-107.

62 *Minani Evarist*, para 85.

En ordonnant également à l'Etat défendeur, dans l'arrêt *Anudo Ochieng Anudo c. Tanzanie*, de prendre les mesures nécessaires au retour du requérant sur son territoire dans un différend portant sur la nationalité de ce dernier, la Cour a pris en compte une reconnaissance antérieure de nationalité et le risque avéré d'apatridie.⁶³ A contrario, la Cour a plutôt considéré, comme elle l'a fait dans l'arrêt *Armand Guehi c. Tanzanie*, que la mesure de remise en liberté demandée par le requérant n'était pas justifiée. Pour conclure ainsi, elle s'est fondée sur ce que les violations procédurales constatées n'ont pas affecté la condamnation prononcée par les juridictions internes à tel point qu'en leur absence, la situation du requérant aurait été différente.⁶⁴ Dans la même affaire, le requérant obtient des dommages et intérêts d'un montant de 2.000 dollars américains pour une procédure anormalement longue sur la base d'un excès de délai d'un an et 10 mois mais surtout en prenant en compte le fait que le requérant était accusé de meurtre et qu'il encourait la peine capitale.⁶⁵

L'adaptabilité des réparations au requérant s'est élargie aux « autres formes de réparations » notamment la non-répétition, la restitution ou encore la publication de l'arrêt sur le fond ou les réparations.⁶⁶

Les décisions ainsi examinées, qu'elles illustrent une tendance constante ou primaire, ne laissent aucun doute sur la claire conscience judiciaire qu'à la Cour d'un impérium que le législateur n'a pas entendu limiter dans le chef des réparations. En revanche, une parcelle significative de la jurisprudence de la juridiction sur la même question révèle une approche hésitante, manifestement volontaire et regrettamment durable. Fort heureusement, un espoir de libéralisme justifié se dégage au bout de la construction prétorienne même si on peut avoir l'impression que la jurisprudence reste à stabiliser. Ces tendances gouvernent l'ère de la réparation par un *decidendi* timoré.

3 LA REPARATION PAR UN *DECIDENDI* TIMORE

La tendance hésitante ou timorée est observée dans l'acceptation qu'a la Cour tant du droit à réparation (3.1) que de ses pouvoirs de supervision de l'exécution des réparations ordonnées (3.2).

3.1 Le *decidendi* du droit à réparation

On peut se satisfaire, par le bénéfice de l'analyse précédente, du libéralisme qu'embrasse la Cour lorsqu'elle détermine les

63 *Anudo Ochieng Anudo* (fond), paras 103-106 et 132(ix).

64 *Armand Guehi*, paras 164-166.

65 *Ibid*, 181.

66 Voir par exemple, *Armand Guehi*, *Lucien Ikili Rashidi* et *Wilfred Onyango Nganyi* (réparations) en leurs sections examinant les réparations concernées.

conditionnalités du droit à réparation garanti par l'article 27(1) du Protocole. Il apparaît cependant qu'une large frange de sa jurisprudence restreint énergiquement ce libéralisme aussi bien par des exigences d'accès au droit (3.1.1) que par des principes d'évaluation du quantum (3.1.2).

3.1.1 Les conditionnalités du droit à réparation

Sur cette question, on peut estimer que deux grands moments ont marqué la formation du droit à réparation au prétoire de la Cour. Il s'agit d'une première ère absolutiste et d'une seconde ère évolutive, les deux s'étant succédées sans pour autant que s'en dégage une constante jurisprudentielle définitivement affirmée.

Sous l'ère absolutiste, la jurisprudence paraît de toute évidence formatée par une certaine auto-censure assumée. C'est en tout cas l'indiscutable fondation que pétrit la Cour dans l'arrêt *Alex Thomas c. Tanzanie* lorsqu'elle pose le principe « qu'elle ne peut ordonner la remise en liberté du requérant que dans des cas très spécifiques et/ou des circonstances impérieuses ». ⁶⁷ Ce n'est pas tant ou seulement de poser un tel principe en conditionnalité qui peut intriguer que de fermer au requérant les portes de la réparation en rejetant sa demande au motif « qu'en l'espèce, le requérant n'a pas indiqué des circonstances spécifiques et impérieuses qui justifieraient que la Cour ordonne » la remise en liberté. ⁶⁸

Primo, poser les « circonstances impérieuses » en conditionnalité tend à restreindre ou exiger là où le Protocole ne le fait pas, la Cour elle-même ayant réglé, comme rappelé *supra*, la question des conditionnalités de la preuve dans son arrêt de principe rendu dans l'affaire *Norbert Zongo* (réparations). En formant dans ledit arrêt le bloc de l'administration de la preuve en matière de réparation, la Cour n'y a élu que l'unique principe général de droit *actori incumbit probatio*. *Secundo*, dans le même arrêt *Alex Thomas* posant le principe des « circonstances impérieuses », la Cour écarte la reprise du procès comme une mesure de réparation applicable en se fondant sur de nombreux facteurs qu'elle a dégagés par elle-même des faits de la cause sans le secours de moyens invoqués par le requérant. ⁶⁹ Enfin, cet arrêt prémice rendu en 2015, la Cour se maintient dans cette première limitative sur une dizaine d'arrêts, ⁷⁰ courant par quatre années, jusqu'à ce que soit libérée la réparation au plein sens du Protocole avec le célèbre arrêt *Mgosi Mwita Makungu c. Tanzanie*. ⁷¹ Nous avons opiné dans d'autres circonstances qu'une telle approche jurisprudentielle

67 Voir *Alex Thomas* (fond), para 157.

68 *Ibid*, para 157.

69 *Ibid*, paras 158-159.

70 Par exemple, dans l'arrêt *Nguza Viking (Babu Seya) et Johnson Nguza (Papi Kocha) c. Tanzanie*, CAFDHP (fond, 23 mars 2018), la demande de remise en liberté est rejetée pour être devenue sans objet par suite de la grâce présidentielle, para 141; et la Cour ordonne que soient prises 'toutes les mesures nécessaires pour rétablir les requérants dans leurs droits', para 147(x).

71 *Mgosi Mwita Makungu c. Tanzanie*, CAFDHP (fond, 7 décembre 2018).

pêche au moins doublement. D'une part, elle paralyse la fonction historique de la Cour dans le système africain des droits de l'homme. D'autre part, elle entame sa légitimité par l'observance d'une marge d'appréciation exorbitante au profit des États.⁷²

Si *Mgosi Mwita Makungu* parachève l'avènement de l'ère libérale, la Cour n'y est pas parvenue sans labeur jurisprudentiel. De l'intérieur, la juridiction s'est imposée une ère intermédiaire, un certain exode de l'absolutisme vers le libéralisme. Le mouvement est inauguré par les arrêts *Alex Thomas* (interprétation) et *Mohamed Abubakari* (interprétation) où la Cour se voit offrir l'opportunité de réguler la conjonction entre « circonstances exceptionnelles » et « mesures nécessaires ». On observe que c'est avec force argument qu'elle corrige ou du moins revire en décidant que « toutes les mesures nécessaires » incluent bien entendu la remise en liberté et « toutes autres mesures susceptibles d'annihiler les conséquences des violations établies, restaurer la situation préexistante et rétablir les requérants dans leurs droits ». ⁷³ En s'autorisant une utile distraction analytique, il peut être d'un certain intérêt de relever que six des huit juges de la formation *Alex Thomas* (fond) de l'ère dite absolutiste ont formé la portion majoritaire des 10 juges qui ont inauguré l'évolutionnisme dans *Alex Thomas* (réparations). De manière bien plus notable, le juge Ben Achour qui va demeurer, avec la juge Thompson jusqu'à son départ, l'œil de Caïn de la jurisprudence des réparations, exerce les fonctions de 'libéraliste' sur les sentiers vers *Mgosi Mwita Makungu*.⁷⁴

Au cours de la même session où sont rendus les arrêts jumeaux *Thomas* et *Abubakari* en interprétation, la Cour en applique l'évolutionnisme en vidant le fond dans les affaires *Kennedy Owino Onyachi c. Tanzanie*⁷⁵ et *Christopher Jonas c. Tanzanie*.⁷⁶ En différence notable dans l'arrêt *Kennedy Owino Onyachi*, sans motivation préalable et sans référence aux arrêts en interprétation, elle indique au dispositif « ordonner à l'Etat défendeur de prendre toutes les mesures nécessaires susceptibles d'annihiler les conséquences des violations établies, restaurer la situation préexistante et rétablir les requérants dans leurs droits. De telles mesures pourraient inclure la remise en liberté des requérants. ... ». Dans *Christopher Jonas*, la Cour rejette la demande de remise en liberté par une application stricte des arrêts *Alex Thomas* et *Mohamed Abubakari*, avec le bémol que le rejet

72 SH Adjolohoun, 'The African Court: need for a system-based approach to jurisprudential affirmation', *AfricLaw* <https://africlaw.com/2017/11/16/the-african-court-need-for-a-system-based-approach-to-jurisprudential-affirmation/#more-1318> (16 novembre 2017) (consulté le 5 novembre 2019); et en general, SH Adjolohoun (n 11).

73 *Alex Thomas* (interprétation), para 39, 44(iii, iv); *Mohamed Abubakari* (interprétation), para 42(iii, iv).

74 Voir par exemple, l'opinion dissidente conjointe des Juges Thompson et Ben Achour dans l'affaire *Alex Thomas* (fond) 1 Recueil de jurisprudence de la Cour africaine 516-517; les opinions partiellement dissidente et dissidente des deux mêmes Juges dans l'affaire *Mohamed Abubakari* (fond) 1 Recueil de jurisprudence de la Cour africaine 666-674.

75 *Kennedy Owino Onyachi c. Tanzanie*, CAFDHP (fond, 28 septembre 2017).

76 *Ibid* et *Christopher Jonas* (fond).

est « sans préjudice de la décision de l'Etat de considérer la prise d'une telle mesure ». ⁷⁷

En dépit de ce départ vers des horizons plus libéraux, la Cour n'avait toujours ni varié la charge de la preuve des circonstances ni ébauché des circonstances susceptibles de mériter la prise des mesures dans les arrêts *Kennedy Owino Onyachi* et *Mohamed Abubakari*. Elle n'avait pas non plus ordonné expressément la remise en liberté par motivation indépendante. Deux sessions plus tard, elle fait œuvre de constance en répliquant le précédent *Christopher Jonas* dans les arrêts *Kijiji Isiaga c. Tanzanie*, ⁷⁸ *Thobias Mango et un autre c. Tanzanie* ⁷⁹ et *Amiri Ramadhani c. Tanzanie*. ⁸⁰ Il est intéressant de noter que dans l'entregent, la Cour, dans son arrêt *Anudo Ochieng Anudo c. Tanzanie* relatif à la nationalité, ordonne à l'Etat défendeur de « prendre toutes les mesures nécessaires pour réintégrer le requérant dans ses droits » avec la précision manifestement inédite à la date de l'arrêt de faire ainsi « en l'autorisant à retourner sur le territoire national et d'assurer sa protection ». ⁸¹

Il faudra attendre un an plus tard, dans les arrêts *Diocles William c. Tanzanie* et *Minani Evarist c. Tanzanie*, rendus au cours de la même session, pour noter un affinement de la théorie des « circonstances exceptionnelles » ou plutôt l'esquisse d'un facteur les déterminant. La Cour y estime alors que les mesures de réparation telles que la remise en liberté ne peuvent être accordées que si « le requérant démontre suffisamment ou la Cour établit par elle-même que son arrestation ou son inculpation est exclusivement fondée sur des considérations arbitraires et que sa détention continue occasionnerait un déni de justice ». ⁸² En renvoyant dans l'arrêt *Diocles William* à la jurisprudence de ses consœurs européenne et interaméricaine référencée par citation directe paraphrasée et dans le corps de la motivation, ⁸³ la Cour s'appuie sur les facteurs additionnels de la nature et de l'étendue des violations ainsi que de la nature de l'infraction pour rejeter la demande de remise en liberté comme non justifiée. ⁸⁴ A différence cruciale, dans l'arrêt *Minani Evarist*, la Cour ne cite pas les Cours européenne et interaméricaine des droits de l'homme. En revanche, au contraire de l'argumentaire dans l'arrêt *Diocles William*, elle « observe » dans *Minani Evarist* que son refus d'ordonner la remise en liberté est sans préjudice de la décision de l'Etat défendeur de prendre une telle mesure. ⁸⁵ On note enfin avec une pointe de surprise que le dispositif de l'arrêt *Minani Evarist* ne fait aucune référence au rejet de la demande de remise en liberté. Elle s'y contente d'ordonner le

77 *Christopher Jonas* (fond), paras 95, 100(vii); 169(vii).

78 *Kijiji Isiaga c. Tanzanie*, CAFDHP (fond, 21 mars 2018), para 96.

79 *Thobias Mango et un autre c. Tanzanie*, CAFDHP (fond, 11 mai 2018), paras 155-156.

80 *Amiri Ramadhani c. Tanzanie*, CAFDHP (fond, 11 mai 2018), paras 85-86.

81 *Anudo Ochieng Anudo* (fond), para 132(ix).

82 *Diocles William*, para 101 et *Minani Evarist*, para 82.

83 *Diocles William* (fond et réparations), para 102.

84 *Minani Evarist* (fond et réparations), para 104.

85 *Ibid*, para 83.

versement d'une réparation de 300.000 shillings tanzaniens pour défaut de disponibilité de l'aide juridictionnelle.

A titre de constatation transversale, on peut suggérer que la conscience de la transition sur la question des « circonstances exceptionnelles » et des « mesures nécessaires » y associées est illustrée par ce que les grands arrêts qui la consacrent sont rendus au cours de la même session. Il va sans dire qu'il serait inimaginable une telle jurisprudence hormis la coordination et l'harmonisation judiciaires.

Lorsqu'aux sorties d'une transition laborieuse, elle entame l'ère libérale avec l'arrêt *Mgosi Mwita Mukungu*, on note que la Cour y va de plain-pied. Elle ordonne ainsi à l'Etat défendeur de « remettre le requérant en liberté dans les 30 jours du présent arrêt ». ⁸⁶ Se fondant sur l'historique retracée plus haut, il n'est pas exagéré de considérer qu'une telle rupture jurisprudentielle était auto-libératrice, marquée tant par la force de la formule déclaratoire que la brièveté du délai d'exécution impartit. Sur la substance de ce départ, la Cour reprend les grands principes évolutionnistes des « considérations arbitraires occasionnant un déni de justice » et la portée non-restrictive de son impérium aux termes de l'article 27(1) à « toutes les mesures appropriées » « y compris la remise en liberté du requérant ». ⁸⁷ En se fondant sur les éléments factuels pris au dossier, elle démontre par elle-même en quoi les violations constatées étaient de nature à affecter l'inculpation et la condamnation et que la période de vingt années sur trente purgées par le requérant rendrait injuste toute mesure de réparation autre que la remise en liberté. ⁸⁸

Une fois la réparation libérée, l'arrêt *Armand Guéhi c. Tanzanie* rendu au cours de la même session que *Mgosi Mwita Makungu* apparaît comme un condensé exhaustif de la théorie de la Cour sur les conditionnalités des réparations. On note qu'y sont cités tous les grands arrêts sur la question avec l'émergence des éléments nouveaux de l'application *in casu*, du principe de proportionnalité entre la mesure demandée et l'étendue de la violation ainsi que de la nécessité d'éviter le double préjudice. ⁸⁹ Cependant, les développements post-*Mgosi Mwita Makungu* laissent apparaître que l'ère libérale n'a pas nécessairement consacré un point de non-retour. Le constat en est fait dans l'arrêt *Kenedy Ivan c. Tanzanie* rendu trois mois plus tard lorsque la Cour, alors même qu'elle y reprend les précédents pertinents, rejette la demande au motif que « le requérant n'a pas démontré les circonstances exceptionnelles ». ⁹⁰ En revanche, l'arrêt *Wilfred Onyango Nganyi c. Tanzanie* vient comme un motif de satisfaction lorsque la Cour évalue le mérite de la demande de remise en liberté en

86 *Mgosi Mwita Mukungu* (fond), para 90 (vii).

87 *Ibid*, para 84.

88 *Ibid*, para 85.

89 *Ibid*, para 164-165.

90 *Kenedy Ivan*, para 93.

fondant expressément et principalement son argumentaire sur le précédent *Mgosi Mwita Makungu*.⁹¹

Par argumentaire comparé, le législateur européen confère à la Cour européenne des droits de l'homme, aux termes de l'article 41 de la Convention européenne des droits de l'homme, des pouvoirs de réparation bien en deçà de ceux dont peut se prévaloir la Cour africaine. Pourtant, le juge européen a ordonné la remise en liberté du requérant comme l'illustre l'arrêt *Del Rio Prada c. Espagne* où la Cour se fonde principalement sur la nature de la violation et l'urgence d'y mettre un terme.⁹² La même tendance jurisprudentielle est observée devant la Cour interaméricaine des droits de l'homme qui, en dépit de la terminologie limitative de l'article 63(1), du Pacte de San José, n'a pas hésité, dans son arrêt *Loayza-Tamayo c. Pérou*, à ordonner la remise en liberté du requérant pour éviter une double incrimination.⁹³

Outre les conditionnalités du droit à réparation, c'est sur l'évaluation de son quantum qu'a pu être observée la réticence décisionnelle du juge africain des droits de l'homme.

3.1.2 Le quantum de la réparation

En sus des critères pris de la jurisprudence et de la typologie générale des réparations admise en droit international, la Cour a adopté des principes directeurs de la réparation tels que l'équité, la proportionnalité ou encore l'adaptabilité dont illustration a été faite plus haut. On se serait attendu dès lors qu'un principe aussi important que l'équité préside à l'administration de la justice des réparations au prétoire africain des droits de l'homme, notamment en ce qui concerne l'évaluation du quantum. C'est d'ailleurs cette attente que confirme la Cour dans l'arrêt *Norbert Zongo* (réparations) lorsqu'elle décide, fondée en outre par « le raisonnable exercice de sa discrétion judiciaire et sur la base du principe d'équité », d'allouer aux victimes l'intégralité des dommages et intérêts demandés qui « n'ont pas été formellement contestés par l'Etat défendeur ». ⁹⁴ Les montants accordés avaient alors varié de 50.000 dollars américains par conjoint à 30.000 par enfant et 20.000 par père ou mère. Au titre du même préjudice moral faisant suite en l'espèce à son emprisonnement pour une durée d'un an et à l'interdiction de son organe de presse, le requérant, journaliste de profession, se voit pourtant accorder dans l'affaire *Lohé Issa Konaté c. Burkina Faso* (réparations), une compensation de 20.000 dollars.⁹⁵

91 *Wilfred Onyango Nganyi* (réparations), paras 77-78.

92 Arrêt du 10 juillet 2012, CEDH 3^{ème} Section; *Broniowski c. Pologne* [GC], no 31443/96, para 194, 22 juin 2004; *Alexanian c. Russie*, no 46468/06, paras 239-240, 22 décembre 2008; et *Fatullayev c. Azerbaïdjan*, no 40984/07, paras 176-177, 22 avril 2010.

93 *Loayza-Tamayo c. Pérou*, 27 novembre 1998, paras 83-84.

94 *Norbert Zongo* (réparations), paras 61-62.

95 *Lohé Issa Konaté* (réparations), paras 56-59.

On relève qu'alors qu'elle constate la gravité de la violation et l'importance du préjudice, la Cour proclame l'équité sans nécessairement en épouser une constante application. Par exemple, dans l'arrêt *Armand Guéhi*, le requérant obtient une réparation pour préjudice moral d'un montant de 2.000 dollars américains par suite d'une procédure qui s'est anormalement rallongée d'un an et 10 mois. La Cour avait alors noté les circonstances spéciales de la cause, l'accusation de meurtre et le risque de la peine capitale, et établit qu'elles avaient causé de l'angoisse au requérant.⁹⁶ En comparaison, dans l'affaire *Wilfred Onyango Nganyi*, les requérants ont obtenu 3.000 dollars pour inculpation arbitraire et 4.000 pour quatre ans de procédure anormalement longue.⁹⁷ On peut également recourir comme jauge d'équité à l'arrêt *Ingabiré Victoire Umuhoza* (réparations) où la Cour reconnaît le préjudice moral lié à la réputation et l'avenir politique de la requérante,⁹⁸ la campagne de dénigrement orchestrée à son encontre,⁹⁹ sa souffrance physique et psychologique¹⁰⁰ ainsi que le stress et l'angoisse subis par son époux et ses enfants et corroborés par des rapports médicaux.¹⁰¹ En déterminant le quantum, la Cour note que la grâce présidentielle ayant conduit à sa remise en liberté représente une forme de réparation du préjudice moral. Sans relever les raisons de la grâce ni noter son effet sur les violations constatées, la Cour évalue le préjudice à environ 60.000 dollars conjointement pour la requérante et les membres de sa famille. Il pourrait être utile de faire observer que, dans l'arrêt sur le fond, la Cour avait constaté la violation de la liberté d'opinion et le caractère trop sévère de la peine prononcée dans cette cause portant au principal sur le déni du génocide.¹⁰² Enfin, dans l'affaire *Lucien Ikili Rashidi c. Tanzanie*, la Cour accorde au requérant un montant de 5.000 dollars pour fouille anale et 500 dollars par enfant ayant été témoin de la fouille et subi l'arrestation arbitraire.

En général, on note que la tendance ne s'estompe pas au fil des arrêts, d'une évaluation du quantum des réparations qui manque d'être systématisée, harmonisée et conséquemment motivée. Ce constat semble s'appliquer aux questions liées au défaut d'assistance judiciaire par exemple. On peut observer à cet égard que dans l'arrêt *Anaclet Paulo*, la Cour accorde le montant de 150 dollars pour défaut d'assistance judiciaire n'ayant pas affecté l'issue du procès, le requérant ayant été privé du droit de se faire représenter par un avocat dans les procédures devant les juridictions de jugement et d'appel. La procédure a duré plus de quinze années, la Cour ayant appliqué les théories les plus libérales du « faisceau des droits » et du caractère extraordinaire

96 *Armand Guéhi*, para 181.

97 *Wilfred Onyango Nganyi* (réparations), para 97.

98 *Ingabiré Victoire Umuhoza* (réparations), para 62.

99 n 98, para 60.

100 n 98, para 66.

101 n 98, para 68.

102 n 98, para 71. La Cour avait estimé que 'la déclaration de culpabilité et la peine prononcées contre la requérante pour avoir fait ces déclarations au Mémorial du génocide de Kigali et en d'autres occasions n'étaient pas nécessaires dans une société démocratique'. *Ingabiré Victoire Umuhoza* (fond, 24 novembre 2017), para 162.

du recours constitutionnel.¹⁰³ Le même montant est accordé dans l'affaire *Kenedy Ivan* sans justification différenciée d'avec *Anaclet Paulo*. En revanche, dans l'arrêt *Alex Thomas* (réparations), le requérant se voit accorder un montant de 1.000 dollars pour jugement *in absentia* et défaut d'aide juridictionnelle.¹⁰⁴

En somme, le commentateur manque de directives sur l'application de l'équité, la question étant de savoir, par exemple, si le montant accordé devrait l'être indifféremment de ce que la violation a entaché tout ou seulement partie des procédures concernées ou encore quels barèmes sont généralement applicables en droit interne. Les mêmes questions sont valides lorsque la compensation est identique d'une victime indirecte, parent proche du requérant, qui subvient aux besoins de plusieurs membres de la famille comme c'est le cas dans l'affaire *Alex Thomas* (réparations) à une autre victime se trouvant dans une situation différente. On est forcé de conclure à une tendance au nivellement sans motivation quant aux similitudes ou critères transversaux sur le constat révélé par exemple dans l'affaire *Wilfred Onyango Nganyi* que les mêmes critères n'ont pas présidé que dans l'affaire *Alex Thomas* alors que les mêmes montants sont accordés.¹⁰⁵

Le *decidendi* de la Cour pose des interrogations similaires quant à l'exécution des réparations.

3.2 Le *decidendi* de l'exécution des réparations

On peut examiner la pratique de la Cour par le double truchement du délai (3.2.1) et du suivi de l'exécution des réparations ordonnées (3.2.2).

3.2.1 Les délais de l'exécution

Aux termes des dispositions de l'article 30 du Protocole, la compétence de la Cour pour fixer les délais d'exécution des réparations qu'elle ordonne ne fait pas objet de contestation. Par implication, une telle compétence vaut pour les critères de détermination desdits délais, en particulier selon la nature de la mesure ordonnée. Sur ce point, on devrait interroger l'exercice que fait la juridiction d'un tel impérium.

Pour ce qui concerne les mesures pécuniaires, on note que dans l'affaire *Norbert Zongo*, l'Etat défendeur doit verser aux victimes un montant d'environ 1.000.000 de dollars dans un délai de six mois. Les délais d'exécution sont de six mois pour un montant de 70.000 dollars dans l'affaire *Lohé Issa Konaté*, 2.500 dans *Armand Guehi*, d'environ 70.000 dollars dans *Ingabire Victoire Umuhoza*, de 150 dollars dans *Anaclet Paulo*, sans délai d'exécution mais avec un délai de rapport de

103 Sur la jurisprudence de la Cour relative à ces théories, voir Adjolohoun (n 11).

104 *Alex Thomas* (réparations), paras 37-42.

105 n 104, paras 55-60; *Wilfred Onyango Nganyi* (réparations), para 97.

six mois.¹⁰⁶ Un léger bémol est observé dans l'affaire *Lucien Ikili Rashidi* où l'Etat doit verser le montant de 6.000 dollars payable dans les six mois du prononcé de l'arrêt avec rapport dans les mêmes délais sur les mesures prises à l'effet de l'exécution. Le montant est de 3.500 dollars payable en six mois avec rapport dans les mêmes délais et rapport tous les six mois jusqu'à exécution dans les affaires *Alex Thomas* (réparations), *Mohamed Abubakari* (réparations) et *Wilfred Onyango Nganyi* (réparations), la compensation s'élevant à 70.000 dollars dans la dernière espèce.

Au chapitre des mesures législatives et assimilées, on ne note pas du mieux quant à la coordination des délais et leur motivation. Par exemple, dans l'arrêt *Reverend Christopher Mtikila* (réparations) rendu en 2015, la Cour ordonne à l'Etat de « prendre toutes les mesures constitutionnelles, ... utiles dans un *délai raisonnable* ». ¹⁰⁷ Sur le constat du défaut d'exécution des réparations ordonnées dans l'arrêt rendu sur le fond en 2013, la Cour ordonne en outre à l'Etat de déposer un rapport d'exécution dans les six mois; de publier l'arrêt et son résumé comme ordonné au fond; et de rapporter quant à l'exécution de l'arrêt de 2015 dans un délai de neuf mois relativement à la publication des deux décisions. En revanche, dans l'affaire *Anudo Ochieng Anudo*, l'Etat doit « amender la législation nationale de manière à rendre disponibles des recours juridictionnels en cas de contestation de la nationalité » sans qu'aucun délai ne soit indiqué à cet effet. Quant à l'Etat défendeur dans l'arrêt *APDF et IHRDA*, il lui est ordonné de « modifier la loi contestée et mettre fin aux violations constatées; et se conformer à ses engagements concernant l'information, l'enseignement, l'éducation et la sensibilisation des populations ». Aucun délai n'est imparti pour se faire mais l'Etat doit déposer rapport dans un « délai raisonnable ne devant tout de même pas excéder deux ans pour compter de la date de notification de l'arrêt ». Dans l'affaire *Lucien Ikili Rashidi*, l'Etat est appelé à « prendre toutes les mesures pour s'assurer que les fouilles soit effectuées, lorsqu'elles sont nécessaires, dans le strict respect des conventions » internationales des droits de l'homme. Si aucun délai n'est imparti, l'Etat doit en revanche rapporter dans les six mois quant aux mesures prises en vue d'exécuter l'arrêt.

Les mesures judiciaires offrent également une base d'analyse de l'exercice par la Cour de son impérium quant aux délais. Relativement à la remise en liberté, on constate dans l'affaire *Mohamed Abubakari* que la Cour ordonne l'exécution dans « un délai raisonnable » avec rapport dans les six mois. La remise en liberté est ensuite ordonnée de manière tacite dans l'arrêt *Kennedy Owino Onyachi* sans le moindre délai d'exécution mais avec une obligation de rapporter dans les six mois. Dans l'affaire *Nguza Viking* où l'Etat doit faire appeler les témoins, donner copie des déclarations des témoins, entreprendre le test de virilité et réintégrer les requérants dans leurs droits, aucun délai n'est imparti alors que la demande de remise en liberté est déclarée sans objet. Le délai pour rapporter est fixé à six mois. Il est demandé au

106 *Idem* pour *Minani Evarist* et *Kenedy Ivan*.

107 Nous avons souligné.

défendeur, dans l'affaire *Kijiji Isiaga*, de remédier au défaut d'assistance judiciaire sans qu'aucun délai ne soit imparti, le rapport devant être fait dans les six mois. Dans l'arrêt *Alex Thomas*, la Cour ordonne la réouverture du procès et la présentation des moyens de la défense dans « un délai raisonnable » avec rapport dans les six mois.¹⁰⁸ Il est ordonné à l'Etat, dans l'affaire *Anudo Ochieng Anudo*, de prendre toutes les mesures pour autoriser le retour du requérant sur le territoire national et garantir sa sécurité mais sans qu'un délai ne soit mentionné alors que le rapport est à produire dans les quarante-cinq jours. Dans l'arrêt *Diocles William*, il s'agit de « rouvrir la procédure dans les six mois et de la conclure dans un délai raisonnable n'excédant pas deux ans après le prononcé du présent arrêt ». L'obligation de rapporter est elle-aussi enfermée dans les deux ans. Comme relevé plus haut, l'absence d'indication de délai d'exécution est notable en ce qui concerne certaines mesures comme l'illustre, dans l'arrêt *Lohé Issa Konaté*, l'ordre de radier, du casier judiciaire du requérant, toutes les condamnations pénales prononcées à son encontre et revoir à la baisse les montants des amendes, dommages-intérêts et dépens.¹⁰⁹ Enfin, sous ce chapitre, on note que la Cour ordonne que *Mgosi Mwita Makungu* soit remis en liberté dans les trente jours de l'arrêt et qu'un rapport soit produit dans les soixante jours.

La question de la publication des décisions de la Cour est aussi au menu des débats sous ce chapitre. La directive que semble introduire la Cour dans l'affaire *Norbert Zongo* est celle de la publication unique du résumé de l'arrêt, fourni par le greffe, au journal officiel et dans un quotidien national de large diffusion puis sur le site internet officiel de l'Etat défendeur pour une durée d'un an. C'est ce standard qui est répliqué dans l'affaire *Lohé Issa Konaté*. Il est important d'y noter que le délai d'exécution coïncide bien souvent avec celui de la production du rapport, les deux étant de six mois comme dans les affaires *Norbert Zongo* et *Lohé Issa Konaté*. En revanche, la publication doit être faite dans les trois mois du prononcé de l'arrêt et sur les sites internet du pouvoir judiciaire et du ministère des affaires constitutionnelles et juridiques où il devra rester disponible pour une période d'un an, rapport devant être fait dans les six mois. La formule est identique par ailleurs à l'exception de la variance que le rapport est requis tous les six mois jusqu'à exécution.¹¹⁰

On peut interroger les motivations de mesures aussi similaires dans des situations qui ne sont pas nécessairement proches. Entre autres, il y a lieu d'interroger l'adaptabilité des délais impartis à la nature des mesures ordonnées; aux systèmes internes budgétaire, judiciaire, administratif et réglementaire de l'Etat concerné ainsi qu'à l'équité entre Etats eu égard à l'identité des différentes mesures mais à la disparité de la fréquence et du quantum des mesures monétaires.

108 *Idem* pour *Mohamed Abubakari* (réparations).

109 *Lohé Issa Konaté* (réparations).

110 *Alex Thomas* (réparations), *Mohamed Abubakari* (réparations), *Wilfred Onyago Nganyi* (réparations).

Une frange non moins importante de l'impérium de la Cour relatif à l'exécution des mesures ordonnées est celle relevant de leur suivi.

3.2.2 Le suivi de l'exécution

A titre de préalable, il est utile de rappeler qu'aux termes de l'article 31 du Protocole, « La Cour soumet à chaque session ordinaire de la Conférence un rapport annuel sur ses activités. Ce rapport fait état en particulier des cas où un Etat n'aura pas exécuté les décisions de la Cour ». On note par ailleurs, qu'en application de l'article 3(2) du Protocole, « En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide ». On devrait aisément en déduire que, sur la question de savoir si elle est compétente pour décider de l'exécution ou non de ses arrêts, la Cour a la compétence de sa compétence. Pour rappel comparé, c'est bien cette compétence qui a fondé la pratique devenue *opinio juris communis* de la Cour interaméricaine des droits de l'homme de procéder au suivi judiciaire de l'exécution de ses arrêts et de tenir toute audience qu'elle juge utile à cet égard.¹¹¹

Dans sa pratique actuelle, la Cour africaine se contente de déposer son rapport dont présentation est faite devant le Conseil exécutif de l'Union africaine lors des sommets ordinaires de l'organisation. Le rapport contient la mention des Etats qui se sont conformés ou non aux arrêts de la Cour. En général, le Conseil exécutif adopte ensuite une décision félicitant les Etats qui se sont conformés et encourageant les autres à coopérer avec la Cour. Au demeurant, la sanction du défaut d'exécution se résout en une répétition presque dénonciatrice au fil des sommets, des Etats qui ne coopèrent pas. Lesdits Etats peuvent d'ailleurs faire des observations, exiger des amendements voire dénoncer le rapport de la Cour concernant leur défaut d'exécution d'arrêts censés être revêtus de l'autorité de chose jugée et devenus exécutoires. Dans la même logique, la Cour s'est finalement vue intimer l'ordre de s'abstenir de mentionner dans son rapport les Etats qui ne se sont pas conformés à ses décisions. Pour faire suite à une telle démarche, le Conseil exécutif ne fait plus la moindre mention des Etats défaillants depuis le sommet de juillet 2018.¹¹²

Face à ces développements, la Cour n'a pas changé d'approche quant au suivi de l'exécution de ses arrêts. Lorsque par exemple dans l'affaire *Commission africaine (Ogiek) c. Kenya*,¹¹³ les requérants l'ont saisie à maintes reprises d'éléments prouvant la violation répétées des mesures provisoires ordonnées préalablement à l'arrêt sur le fond, la Cour n'a fait aucune réaction judiciaire aux demandes d'intervention y afférentes. A la lumière de ces rappels, on peut avancer que l'hypothèse d'une exclusion de l'intervention judiciaire de la Cour

111 Voir *Baena-Ricardo et autres c. Panama*, Cour interaméricaine des droits de l'homme (compétence), 28 novembre 2003, paras 61-67.

112 Voir Décision relative au rapport de 2017 de la Cour africaine des droits de l'homme et des peuples prises par le Conseil exécutif lors de sa 32^{ème} Session ordinaire (25-26 janvier 2018) Doc. EX.CL/1057(XXXII).

113 *Commission africaine des droits de l'homme et des peuples (Ogiek) c. Kenya*, CAfDHP (fond, 26 mai 2017).

après le prononcé de ses arrêts est à la fois textuellement inexacte et juridiquement illogique. En effet, le législateur n'aurait pas attribué à la Cour un rôle actif dans la production du rapport sur l'exécution s'il n'avait pas entendu lui conférer une compétence à cet égard. Eu égard à la fonction et à la compétence de la Cour, un tel rôle est nécessairement judiciaire et ne saurait se limiter à la compilation administrative d'un rapport susceptible de contestation par les Etats défaillants.

Au plan de la logique juridique, le rôle de suivi est inévitablement aussi judiciaire qu'administratif puisque le rapport présume un rapport factuel ou produit sur conclusions des parties ou investigations factuelles menées par la Cour. C'est d'ailleurs le fidèle reflet de sa pratique en la matière. A preuve, les informations formant le rapport sont obtenues par exécution de mesures ordonnées par la Cour dans le dispositif de ses décisions. Dans le même ordre d'idées, le rapport visant à déterminer le défaut d'exécution implique nécessairement une analyse factuelle et juridique pour y parvenir. Autrement, les Etats seraient bien fondés à attaquer la légalité d'un rapport produit par exemple sur la seule base des informations fournies par le requérant, en cas de silence du défendeur, ou obtenues dans une procédure *ex parte*. En tout état de cause, la restriction de la production du rapport à une stricte procédure administrative entame sérieusement l'impérium de la Cour quant au suivi et à l'exécution de ses arrêts. Il en est ainsi puisque les Etats auraient alors entière liberté, et c'est déjà d'ailleurs le cas, pour contester un rapport non-judiciaire au contraire de celui qui aurait été établi sur la base d'une décision judiciaire constatant le défaut d'exécution et ordonnant des mesures comminatoires. En effet, une telle contestation ne pourrait être que judiciaire et échapperait elle-aussi à l'assentiment des organes politiques de l'Union africaine.

Sur la base de cette compétence judiciaire quant au suivi, l'impérium de la Cour s'étendrait bien entendu au recours à toutes les méthodes usuelles de suivi judiciaire telles que les audiences, les décisions constatant défaut d'exécution ou encore des ordonnances en tant qu'applicables selon les circonstances. La contestation massive des ordonnances de mesures provisoires ordonnées par la Cour dans des affaires impliquant la République Unie de Tanzanie montre à suffisance que la problématique du suivi judiciaire de l'exécution des mesures ordonnées ne doit pas faire l'objet d'une préoccupation diffuse ou isolée. Tel que nous l'avons souligné dans d'autres circonstances, il y va de l'autorité de la Cour mais également de l'efficacité du système africain des droits de l'homme.¹¹⁴

Enfin, l'argument tendant à estimer qu'il serait futile de contrôler par des actes judiciaires subséquents des décisions judiciaires ignorées par les Etats peut n'être justifié ni en droit ni dans la pratique. Sur le point du droit, la démonstration préalable suffira. Au plan de la pratique, la Cour a déjà pratiqué le contrôle judiciaire. Une illustration fort à point en est faite lorsque dans son arrêt *Reverend Christopher Mtikila* sur les réparations, la Cour ordonne de nouvelles mesures en

114 Voir en général, Adjolohoun (n 11).

suivi de mesures ordonnées au fond et qui étaient restées lettres mortes.¹¹⁵ Il apparaît d'ailleurs que cette pratique n'est pas inédite puisque la Cour l'adopte à maintes reprises comme on peut le relever dans les arrêts *Norbert Zongo* (réparations) et *Wilfred Onyango Nganyi* (réparations). La procédure d'adoption par les organes politiques de l'Union africaine d'un Cadre de suivi de l'exécution des décisions de la Cour – et par extension, de celles des autres organes africains des droits de l'homme – est par conséquent, très certainement, un pas dans la direction de la jurisprudence.

Il est utile pour faire exhaustif, de relever la pertinence de certains axes principaux du Cadre de suivi qui, à cette étape, est examiné, avant adoption au Conseil exécutif, par le Comité technique spécialisé de l'Union africaine sur la justice et les affaires juridiques. Le document mi-technique mi-juridique qui prévoit pour une procédure étape par étape de suivi de la mise en œuvre et de l'exécution des décisions de la Cour, adopte la double approche judiciaire et politique, les deux options étant envisagées exclusivement ou successivement. De manière notable, il est prévu explicitement des audiences de constatations de défaut d'exécution ou non, ainsi que toute mesure utile à la production d'un rapport qui sera frappé du sceau judiciaire et sanctionné par un arrêt si nécessaire.

4 CONCLUSION

L'impératif de la présente réflexion est largement porté par la célèbre maxime *ubi jus ibi remedium* ; à tout droit positif est inhérent le principe tant d'un recours que d'une réparation en cas de violation. Pour répondre à cette exigence, la Cour africaine se doit d'aller au-delà de la simple fonction de judiciarisation des déficiences de la Commission africaine pour garantir aux victimes une protection efficace des droits proclamés par la Charte. Pour y parvenir, la Cour doit administrer la réparation dans le plein effet de l'impérum entendu à l'article 27(1) du Protocole. Une certaine école de pensée pourrait consister à arguer que la seule possibilité pour un justiciable africain de disposer du prétoire de la Cour africaine et d'obtenir la condamnation d'un Etat africain en l'état actuel des Etats de droit dans la région est déjà, en elle-même, une avancée notable. Notre postulat est que l'histoire du système africain des droits de l'homme lue conjointement avec la lettre et l'esprit du Protocole impose à la Cour d'aller plus loin pour fertiliser les états encore balbutiants des droits de l'homme sur le continent. Le maintien de la fonction juridictionnelle de la Commission de Banjul consolide ce postulat. En tout état de cause, la Cour doit éviter de restreindre ce que le législateur a libéralisé au risque de manquer à sa mission historique de complémentarité et, partant, de consolidation.

115 *Reverend Christopher Mtikila* (réparations), para 45.

Le droit à l'autodétermination en tant que droit fondamental de l'homme et des peuples à la lumière de l'avis de la Cour internationale de Justice sur l'archipel des Chagos

Rafaâ Ben Achour*

RÉSUMÉ: Dans son avis consultatif, rendu le 28 février 2019, à la demande de l'Assemblée générale des Nations unies, sur « les effets juridiques de la séparation de l'Archipel des Chagos de Maurice en 1965 », la Cour internationale de Justice a apporté une nouvelle contribution de taille à la définition, à la nature et à la portée du droit à l'autodétermination. Après avoir rappelé l'évolution de ce droit, la Haute juridiction internationale a affirmé que le droit à l'autodétermination a un champ d'application étendu en tant que « droit humain fondamental ». Elle a par ailleurs, précisé les modalités d'exercice de ce droit qui doit manifester la « volonté libre et authentique du peuple concerné ». Il en ressort, en confirmation de la position connue en droit international public, que tout détachement d'une partie d'un territoire autonome, est incompatible avec le droit à l'autodétermination.

TITLE AND ABSTRACT IN ENGLISH:

The right to self-determination as fundamental human rights in light of the Advisory Opinion of the International Court of Justice on the Chagos Archipelago

ABSTRACT: In its advisory opinion, issued on 28 February 2019, at the request of the United Nations General Assembly, on the 'Legal Effects of the Separation of the Chagos Archipelago of Mauritius in 1965', the International Court of Justice contributed significantly to the definition, the nature and the scope of the right to self-determination. After recalling the evolution of this right, the ICJ has held that the right to self-determination has a wide scope of application as a 'fundamental human right'. Besides, it has specified the procedures for exercising this right, which must demonstrate the 'free and genuine will of the people concerned'. It comes out, in confirmation of the position established in public international law, that any detachment of part of an autonomous territory is incompatible with the right to self-determination.

MOTS CLÉS: droit à l'auto-détermination, archipel des Chagos, Cour internationale de Justice, avis consultatif

SOMMAIRE:

1	Introduction.....	345
2	Le droit à l'autodétermination a un champ d'application étendu en tant que « droit humain fondamental »	348
2.1	Le droit à l'autodétermination en tant que droit humain	348
2.2	Le droit à l'autodétermination en tant que droit humain fondamental	350
3	Les modalités d'exercice du droit humain à l'autodétermination	351
4	Conclusion	353

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1 INTRODUCTION

Le droit à l'autodétermination, ou droit des peuples à disposer d'eux-mêmes, est un « principe politique d'inspiration démocratique »¹ qui a pour objectif de permettre à chaque population de « disposer d'elle-même », c'est-à-dire, de déterminer son propre statut politique, économique, social et culturel en toute liberté et en toute indépendance selon son libre choix.

Le droit des peuples à disposer d'eux-mêmes apparaît de ce point de vue comme un droit fondamental de l'homme et des peuples, selon l'heureuse expression choisie pour l'intitulé de la Charte africaine des droits de l'homme et des peuples de 1981.

Il s'agit d'un principe de consécration relativement récente en droit international. Il a surtout servi de base au mouvement d'émancipation des peuples assujettis à la domination coloniale. Dans son arrêt de 30 juin 1995, (*Affaire du Timor oriental*), la Cour internationale de justice l'a considéré comme l'un « [d]es principes essentiels du droit international contemporain [...] opposable *erga omnes* ».

Ce droit trouve son origine dans un principe apparu au milieu du 19^e siècle : Le principe des nationalités² même si ses racines historiques remontent à la Déclaration d'indépendance américaine de 1776 et à la Déclaration française de 1789.³ D'après le principe des nationalités, chaque nation a le droit de se constituer en État indépendant. Cependant, ce même principe a parfois servi de fondement à certaines politiques impérialistes et expansionnistes comme le pangermanisme, c'est-à-dire, droit pour l'Allemagne de grouper dans un État grand-allemand toutes les populations de langue allemande.

Le principe des nationalités a reçu une consécration politique dans les XIV points du Président Américain Wilson développés lors de l'implication des États-Unis dans la première guerre mondiale. En vertu du point 5:⁴

[U]n ajustement libre, ouvert, absolument impartial de tous les territoires coloniaux, se basant sur le principe qu'en déterminant toutes les questions au sujet de la souveraineté, les intérêts des populations concernées soient autant pris en compte que les revendications équitables du gouvernement dont le titre est à déterminer.

Le principe des nationalités a engendré au lendemain de la deuxième guerre mondiale le principe du droit des peuples à disposer d'eux-

1 J Salmon (dir) *Dictionnaire de droit international* (2001) 379.

2 R Redslob 'Le principe des nationalités' (1931) 37 *Recueil des Cours de l'Académie de Droit International de la Haye*.

3 Voir J-F Dobelle 'Commentaire de l'article 1 paragraphe 2' in J-P COT *et al* (dir) *La Charte des Nations Unies: commentaire article par article* 3ed (2005) 337-356.

4 Formulés par le président Wilson (1913-1921), dans un discours prononcé devant le Congrès, les Quatorze Points (8 janvier 1918) récapitulent les buts de guerre poursuivis par les États-Unis, neuf mois après leur entrée en guerre contre l'Allemagne (6 avril 1917). <https://langloishg.fr/2018/01/02/les-quatorze-points-du-president-wilson-8-janvier-1918/> (consulté le 5 novembre 2019).

mêmes. C'est sur proposition de l'URSS, que le droit des peuples à disposer d'eux-mêmes a été inséré comme l'un des buts de l'ONU, malgré la réticence de certains Etats, dont la Belgique.⁵

Ce sont les articles 1(2) et 55 de la Charte de l'ONU qui le mentionnent. En effet, au titre des buts et principes énoncés par la Charte, nous trouvons celui de « [d]évelopper entre les Nations des relations amicales fondées sur le principe de l'égalité de droits des peuples et leur droit à disposer d'eux-mêmes ». Dans sa résolution 545(VI) du 5 février 1952, l'Assemblée générale, insistait sur l'importance de garantir ce droit fondamental de l'homme dont la violation avait « [p]rovoqué dans le passé des effusions de sang et des guerres ». Dans cette même résolution, l'Assemblée générale « Décid[ait] de faire figurer dans le Pacte ou les Pactes internationaux relatifs aux droits de l'homme un article sur le droit de tous les peuples et nations à disposer d'eux-mêmes, et de réaffirmer ainsi le principe énoncé dans la Charte des Nations Unies. » Dans le même sens et dans sa résolution 637(VII) du 16 décembre 1952, l'Assemblée générale a affirmé que le « [d]roit des peuples et des nations à disposer d'eux-mêmes [était] une condition préalable de la jouissance de tous les droits fondamentaux de l'homme ». Par la suite, plusieurs autres résolutions allaient réaffirmer cette position de l'Assemblée.⁶

Depuis, plusieurs autres textes internationaux, notamment de droits de l'homme, ont repris et affermi le principe. On peut citer:

- la résolution fondatrice de l'Assemblée générale de l'ONU n° 1514(XV) du 14/12/1960 intitulée « *Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux* ». Aux termes de cette résolution: « [T]ous les peuples ont le droit de libre détermination, en vertu de ce droit ils déterminent librement leur statut politique et poursuivent librement leur développement économique, social et culturel ».
- les deux Pactes internationaux relatifs aux droits de l'homme adoptés le 16 décembre 1966 et entrés en vigueur en 1976. L'article 1er commun aux deux Pactes relatifs aux droits civils et politiques et aux droits économiques sociaux et culturels opère la transformation de ce droit politique en véritable droit de l'homme et surtout en droit des peuples opposable à tous: « [T]ous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel ».
- la résolution 2621(XXV) du 12/10/70 de l'Assemblée générale de l'ONU qui établit un programme d'action pour l'application intégrale de la résolution 1514.
- la résolution N° 2625(XXV) du 24/10/1970 de l'Assemblée générale de l'ONU qui érige le droit à l'auto-détermination en principe de droit international relatif aux relations amicales et à la

5 Dobelle (n 3) 337-356.

6 C'est le cas notamment des résolutions 738 (VIII) du 28 novembre 1953 et 1188 (XII) du 11 décembre 1957.

coopération entre Etats conformément à la Charte des Nations Unies.

- La Charte africaine des droits de l'homme et des peuples de 1981 qui dispose en son article 20(1) que:

Tout peuple a droit à l'existence. Tout peuple a un droit imprescriptible et er inaliénable à l'autodétermination. Il détermine librement son statut politique et assure son développement économique et social selon la voie qu'il a librement choisie

De son côté, la CIJ a confirmé le caractère de règle de droit international coutumier du droit des peuples à disposer d'eux-mêmes dans sa jurisprudence aussi bien en matière contentieuse qu'en matière consultative. Elle l'a fait notamment dans les décisions suivantes:

- Arrêt du 30 juin 1995 (*Timor oriental, Portugal c. Australie*);
- Avis du 21 juin 1971 (*Conséquences juridiques pour les États de la présence continue de l'Afrique du sud en Namibie nonobstant la résolution 276 (1970) du Conseil de sécurité*);
- Avis du 16 octobre 1975 (*Sahara occidental*);
- Avis du 9 juillet 2004 (*Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé*);
- Avis du 25 février 2019, (*Effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965*).

Mais bien que formulé et réaffirmé à plusieurs reprises, l'acceptation du droit à l'autodétermination n'est pas dépourvue de toute ambiguïté quant à son contenu et sa mise en œuvre pratique n'a fait l'unanimité qu'en matière de décolonisation. La multiplicité des proclamations du droit des peuples à disposer d'eux-mêmes contraste avec sa réalisation. La jouissance du droit dans la pratique se heurte, surtout dans le cas des États déjà formés, au principe de l'intégrité territoriale.⁷ Les États se montrent très réticents à l'égard de ce principe et adoptent une pratique qui tend constamment à le canaliser. Ceux d'entre eux qui se trouvent confrontés à des problèmes de minorités en rejettent purement et simplement l'acceptation retenue par la doctrine et la jurisprudence.⁸ Pour ces États, le droit des peuples à disposer d'eux-mêmes ne saurait servir de fondement à la sécession, étant entendu que reconnaître un tel droit aux minorités serait une porte ouverte à la déstabilisation de l'État et à son démembrement. L'ONU elle-même s'en est occupée de manière bien timide.⁹

Dans cette contribution, il s'agit pour nous de revisiter ce droit en tant que droit fondamental de l'homme à la lumière de l'avis de la CIJ sur l'Archipel des Chagos. Dans cet avis, rendu le 28 février 2019, à la demande de l'Assemblée générale des Nations unies, la CIJ apporte une

7 P Chrestila *Le principe d'intégrité territoriale: d'un pouvoir discrétionnaire à une compétence liée* (2002) 499.

8 Y Ben Achour 'Souveraineté étatique et protection internationale des minorités' (1994) 245 *Recueil des Cours de l'Académie de Droit International de la Haye* 321-461.

9 L'article 27 du Pacte international relatif aux droits civils et politiques énonce de manière bien timide: 'Dans les États où existe des minorités ethniques, religieuses ou linguistiques, les personnes appartenant à ces minorités ne peuvent être privées du droit d'avoir, en commun avec les autres membres de leur groupe, leur propre religion, et d'employer leur propre langue'.

nouvelle contribution de taille à la définition, à la nature et à la portée du droit à l'autodétermination. Comme le relève le juge Cançado Trindade dans son opinion individuelle, cet avis consultatif « [p]eut être considéré s'inscrire, [...], dans les efforts consentis de longue date par l'Assemblée générale elle-même pour appuyer sans réserve le droit des peuples et des nations à l'autodétermination ».¹⁰

Après avoir rappelé l'évolution de ce droit, la haute juridiction internationale affirme que le droit à l'autodétermination a un champ d'application étendu en tant que « droit humain fondamental » (2). Elle précise ensuite, les modalités d'exercice de ce droit qui doit manifester la « volonté libre et authentique du peuple concerné » dont la méconnaissance constitue un acte international illicite (3).

2 LE DROIT A L'AUTODETERMINATION A UN CHAMP D'APPLICATION ETENDU EN TANT QUE « DROIT HUMAIN FONDAMENTAL »

Dans sa demande d'avis consultatif du 22 juin 2017, l'Assemblée générale des Nations unies (ci-après l'AG) pose à la Cour les deux questions suivantes:

- a) Le processus de décolonisation a-t-il été valablement mené à bien lorsque Maurice a obtenu son indépendance en 1968, à la suite de la séparation de l'archipel des Chagos de son territoire et au regard du droit international, notamment des obligations évoquées dans les résolutions de l'Assemblée générale 1514 (XV) du 14 décembre 1960, 2066 (XX) du 16 décembre 1965, 2232 (XXI) du 20 décembre 1966 et 2357 (XXII) du 19 décembre 1967?;
- b) Quelles sont les conséquences en droit international, y compris au regard des obligations évoquées dans les résolutions susmentionnées, du maintien de l'archipel des Chagos sous l'administration du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, notamment en ce qui concerne l'impossibilité dans laquelle se trouve Maurice d'y mener un programme de réinstallation pour ses nationaux, en particulier ceux d'origine chagossienne?

Dans la détermination du droit applicable au processus de décolonisation de Maurice, la Cour affirme qu'elle « [e]st consciente que le droit à l'autodétermination, en tant que droit humain fondamental, a un champ d'application étendu ».¹¹ Il s'agit là d'une affirmation d'importance dans la mesure où pour la CIJ, le droit à l'autodétermination est non seulement un droit humain, c'est-à-dire un droit attaché à la personne humaine (2.1), mais également un droit humain fondamental (2.2).

2.1 Le droit à l'autodétermination en tant que droit humain

Les droits humains sont généralement définis en tant que droits inaliénables intrinsèques à la qualité humaine des individus ou des

10 Opinion individuelle, para 6.

11 para 144 de l'avis.

groupes. De ce point de vue, le droit à l'autodétermination est certainement un droit humain dans la mesure où il vise à libérer un groupe humain de l'avalissement et de la sujétion à une domination exercée au nom d'une supériorité de civilisation. Le droit à l'autodétermination permet à un peuple de déterminer, selon son libre arbitre, son statut politique, économique social et culturel. C'est ce qui ressort de la résolution 1514 (XV) de l'Assemblée générale de l'ONU en date du 14 décembre 1960, portant Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux.¹²

Déjà, dans le préambule de la Déclaration, l'AG de l'ONU, avait établi une certaine corrélation entre le droit à la décolonisation et les droits humains.¹³ En effet, l'auguste Assemblée se déclare « [C]onsciente de ce que les peuples du monde se sont, dans la Charte des Nations Unies, déclarés résolus à proclamer à nouveau leur foi dans les droits fondamentaux de l'homme, dans la dignité et la valeur de la personne humaine, dans l'égalité de droits des hommes et des femmes, ainsi que des nations, grandes et petites, et à favoriser le progrès social et instaurer de meilleures conditions de vie dans une liberté plus grande ». Mieux, l'article 1er de la Déclaration est on ne peut plus clair puisqu'il proclame que « La sujétion des peuples à une subjugation, à une domination et à une exploitation étrangères constitue un déni des droits fondamentaux de l'homme ». L'article 1er commun aux deux Pactes de 1966 a donné à cette proclamation de principe une valeur conventionnelle.

Reconnu en tant que droit humain, le droit à l'autodétermination rejoint ainsi les droits de l'homme classiques tels que proclamés par les textes nationaux fondateurs, notamment, la Déclaration des droits de l'Etat de Virginie du 12 juin 1776 et la Déclaration française des droits de l'homme et du citoyen du 3 novembre 1789.

Dans l'avis consultatif sur l'Archipel des Chagos, la CIJ constate et confirme cette valeur juridique, mais étant donné que la question qui lui est posée ne concerne que le statut territorial de Chagos, la Haute juridiction passe très vite sur cet aspect de droit humain. Ceci n'a pas empêché la CIJ à l'affirmer qu'il s'agit par ailleurs d'un droit humain fondamental.

12 Dans l'esprit des fondateurs de l'ONU, le droit de peuples à disposer d'eux-mêmes n'impliquait pas automatiquement l'indépendance des pays et peuples coloniaux.

13 Voir dans le même sens: CIJ Arrêt du 27 juin 2001, *LaGrand (Allemagne c. Etats-Unis)* para 89: 'La Cour a déjà établi que le paragraphe 1 de l'article 36 crée des droits individuels pour les personnes détenues, en sus des droits accordés à l'Etat d'envoi, et que, par voie de conséquence, les "droits" visés au paragraphe 2 désignent non seulement les droits de l'Etat d'envoi, mais aussi ceux des personnes détenues' (nous soulignons).

2.2 Le droit à l'autodétermination en tant que droit humain fondamental

La notion de droit fondamental de l'homme trouve son origine dans la Charte des NU.¹⁴ En effet, il est affirmé dans le paragraphe 2 du Préambule que les peuples des NU sont résolus « à proclamer à nouveau [leur] foi dans les droits fondamentaux de l'homme ».

Dans le sillage de la Charte, la Déclaration des Nations unies sur l'octroi de l'indépendance aux pays et aux peuples coloniaux affirme haut et fort que: « La sujétion des peuples à une subjugation, à une domination et à une exploitation étrangères constitue un déni des droits fondamentaux de l'homme ». Expression récurrente dans plusieurs résolutions des Nations unies dont la résolution 2625 du 24 octobre 1970, l'expression a revêtu une signification juridique particulière.

Désormais, on fait la distinction entre droits humains d'une part, et droits humains fondamentaux, d'autre part. Ces derniers seraient les droits bénéficiant d'une garantie renforcée. Ils sont définis comme étant « les droits essentiels [...] pour assurer un ordre international de liberté, de justice et de paix ». La notion prête en réalité à confusion notamment avec une notion voisine, celles de droits de l'homme indérogeables,¹⁵ introduite par la Convention européenne des droits de l'homme et des libertés fondamentales¹⁶ et reprise par le PIDCP.¹⁷ Ces droits dits indérogeables sont définis comme étant des « droits de l'homme de caractère impératif auxquels il n'est pas permis de déroger en aucune circonstance pas même en cas de crise ou de menace de guerre ou de danger public exceptionnel, de proclamation d'un état d'exception ».¹⁸

Même si le droit à l'autodétermination n'est mentionné dans aucun instrument international des droits de l'homme comme étant un droit indérogeable, il n'est pas incongru de le considérer ainsi, dans la mesure où il est, au niveau de tout un peuple, la condition d'existence de ce dernier, sa condition d'accès à la personnalité juridique

14 J-Y Morin *Libertés et droits fondamentaux* (1999); J-Y Morin *Défis des droits fondamentaux* (2000).

15 D-O Hayim 'Le concept d'indérogeabilité en droit international: Une analyse fonctionnelle', Thèse présentée à l'Institut de Hautes Etudes Internationales et du Développement pour l'obtention du grade de Docteur en Etudes internationales Spécialisation en droit international, Genève 2012 <https://www.peacepalace.library.nl/ebooks/files/383349435.pdf> (consulté le 5 novembre 2019).

16 Article 15: 'En cas de guerre ou en cas d'autre danger public menaçant la vie de la nation, toute Haute Partie contractante peut prendre des mesures dérogeant aux obligations prévues par la présente Convention, dans la stricte mesure où la situation l'exige et à la condition que ces mesures ne soient pas en contradiction avec les autres obligations découlant du droit international. 2. La disposition précédente n'autorise aucune dérogation à l'article 2, sauf pour le cas de décès résultant d'actes licites de guerre, et aux articles 3, 4 (paragraphe 1) et 7.'

17 Article 4(2): 'La disposition précédente n'autorise aucune dérogation aux articles 6, 7, 8(1); 8(2), 11, 15, 16 et 18 [du Pacte]'.

18 Salmon (n 1) 398.

internationale. L'article 20 de la Charte africaine dispose dans ce sens que « [t]ous les peuples ont droit à l'existence ». Pour sa part, l'article 1(3) du PIDC le laisse d'ailleurs entendre quand il stipule que « [L]es Etats parties au présent Pacte, y compris ceux qui ont la responsabilité d'administrer des territoires non autonomes et des territoires sous tutelle, sont tenus de faciliter la réalisation du droit des peuples à disposer d'eux-mêmes, et de respecter ce droit, conformément aux dispositions de la Charte des Nations Unies ». La CIJ est allée dans ce sens dans son arrêt du 30 juin 1965, *Timor oriental*, dans lequel elle affirme « [q]u'il n'y a rien à redire à l'affirmation du Portugal selon laquelle le droit des peuples à disposer d'eux-mêmes, tel qu'il s'est développé à partir de la Charte et de la pratique de l'Organisation des Nations Unies est un droit opposable *erga omnes* ». ¹⁹ Dans l'avis qui nous intéresse, la Cour confirme la même position en ces termes: « Le respect du droit à l'autodétermination étant une obligation *erga omnes*, tous les Etats ont un intérêt juridique à ce que ce droit soit protégé ».

Certains auteurs, vont même jusqu'à considérer que le droit des peuples à disposer d'eux-mêmes constitue une règle de droit général impératif (*jus cogens*), dans la mesure où ce droit figure sur la liste d'exemples des règles impératives établie par la Commission de droit international dans son rapport sur le droit des traités. ²⁰

Dans ce même avis sur l'Archipel des Chagos, la CIJ confirme sa jurisprudence constante en la matière en se déclarant « consciente que le droit à l'autodétermination, en tant que droit humain fondamental, a un champ d'application étendu ». Compte tenu du libellé des questions qui lui étaient posées, la Cour ne pouvait pas aller au-delà de cette reconnaissance et admet que « cependant, afin de répondre à la question posée par l'Assemblée générale, elle se limitera, dans le cadre du présent avis consultatif, à l'analyse du droit à l'autodétermination dans le contexte de la décolonisation ». Cela montre que le droit à l'autodétermination, non seulement, englobe le droit à la décolonisation mais le dépasse en incluant l'autodétermination du statut politique, économique social et culturel.

3 LES MODALITES D'EXERCICE DU DROIT HUMAIN A L'AUTODETERMINATION

Les modalités d'exercice des droits de l'homme sont multiples. Si au plan interne, l'exercice de certains droits et libertés obéit soit à un régime préventif, soit à un régime répressif, et passe par le respect et l'accomplissement de certaines procédures administratives (déclaration préalable, autorisation, etc.) et judiciaires, ²¹ notamment en cas de violation, les modalités d'exercice du droit à l'autodétermination sont spécifiques et s'exercent désormais sous le

19 para 20 de l'arrêt, *Rec* 1995, 102.

20 En ce sens, P Daillier et al *Droit international public* 8ed (2009) 578.

21 J Robert & J Duffar *Droits de l'homme et libertés fondamentales* 8ed (2009).

contrôle de l'Assemblée générale des Nations unies surtout après la désuétude du régime international de tutelle.²²

Dans sa résolution 2621 (XXV) du 12 octobre 1966, intitulée « Programme d'action pour l'application intégrale de la Déclaration sur l'octroi de l'indépendance aux pays coloniaux », l'Assemblée générale affirme « [l]e droit inhérent des peuples coloniaux de lutter par tous les moyens nécessaires contre les puissances coloniales qui répriment leur aspiration à la liberté et à l'indépendance ». Cette reconnaissance du droit à la résistance sera confortée par l'article 1(4) du premier Protocole additionnel de Genève du 8 juin 1977, aux termes duquel, parmi les conflits armés internationaux, figurent

[l]es conflits armés dans lesquels les peuples luttent contre la domination coloniale et l'occupation étrangère et contre les régimes racistes dans l'exercice du droit des peuples à disposer d'eux-mêmes, consacré dans la Charte des Nations Unies et dans la Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les Etats conformément à la Charte des Nations Unies.

Dans son avis du 25 février 2019, la Cour rappelle les modalités de mise en œuvre du droit à l'autodétermination, telles qu'elles ont été posées par le principe VI de la Déclaration 1541 (XV) du 15 décembre 1966.²³ D'après cette résolution « on peut dire qu'un territoire non autonome a atteint la pleine souveraineté:

- a) Quand il est devenu un Etat indépendant;
- b) Quand il est librement associé à un Etat indépendant; ou
- c) Quand il est intégré à un Etat indépendant.

La Cour « [r]appelle que, si l'exercice de l'autodétermination peut se réaliser au travers de l'une des options prévues par la résolution 1541 (XV), il doit être l'expression de la volonté libre et authentique du peuple concerné ».

L'expression de la volonté libre et authentique du peuple concerné n'obéit pas à un mode unique et déterminé par avance pour tous les cas,

22 En 1945, la Charte des Nations Unies a institué un régime international de tutelle par son chapitre XII en vue de surveiller certains territoires qui ont fait l'objet d'accords particuliers de tutelle avec leurs puissances administrantes. Le régime de tutelle avait pour fin de favoriser le progrès politique, économique et social des territoires ainsi que leur évolution vers la capacité à s'administrer eux-mêmes ou vers l'indépendance. Il avait aussi pour objectif d'encourager le respect des droits de l'homme et des libertés fondamentales et de développer le sentiment de l'interdépendance des peuples du monde. Au cours des premières années d'existence de l'ONU, 11 territoires ont été placés sous régime de tutelle. Depuis, ils ont tous accédé à l'indépendance ou ont conclu un accord de libre association avec un autre État. Le dernier territoire à l'avoir fait est le Territoire sous tutelle des Îles du Pacifique (Palaos), administré par les États-Unis. En 1994, le Conseil de sécurité a mis un terme à l'Accord de tutelle régissant ce territoire, après que la population se fut prononcée pour la libre association avec les États-Unis lors du plébiscite de 1993. Les îles Palaos ont accédé à l'indépendance en 1994 et ont adhéré à l'ONU la même année, devenant le 185e État Membre. Plus aucun territoire n'étant placé sous tutelle, le Conseil de tutelle a achevé sa mission historique, <https://www.un.org/fr/decolonization/its.shtml> (consulté le 5 novembre 2019).

23 Intitulée: 'Principes qui doivent guider les Etats membres pour déterminer si l'obligation de communiquer des renseignements, prévue à l'alinéa e de l'article 73 de la Charte des Nations Unies, leur est applicable ou non'.

mais la consultation du peuple soumis au joug colonial demeure un mécanisme obligatoire, avec cependant la possibilité d'exceptions imposées par les circonstances particulières si elles existent.²⁴ La Cour cite à cet effet le paragraphe 59 de son avis sur le *Sahara occidental* qui déclare que:

[L]a validité du principe d'autodétermination, défini comme répondant à la nécessité de respecter la volonté librement exprimée des peuples, n'est pas diminuée par le fait que dans certains cas l'Assemblée générale n'a pas cru devoir exiger la consultation des habitants de tel ou tel territoire. Ces exceptions s'expliquent soit par la considération qu'une certaine population ne constituait pas un «peuple» pouvant prétendre à disposer de lui-même, soit par la conviction qu'une consultation eût été sans nécessité aucune, en raison de circonstances spéciales.

Appliquant ces principes à l'Archipel des Chagos détaché par la puissance coloniale britannique de Maurice au moment de l'accession de cet Etat à l'indépendance en 1968, contrairement au droit des populations soumises à une domination coloniale à leur intégrité territoriale, la Cour déclare de manière ferme que

[L]es peuples des territoires non autonomes sont habilités à exercer leur droit à l'autodétermination sur l'ensemble de leur territoire, dont l'intégrité doit être respectée par la puissance administrante. Il en découle que tout détachement par la puissance administrante d'une partie d'un territoire non autonome, à moins d'être fondé sur la volonté librement exprimée et authentique du peuple du territoire concerné, est contraire au droit à l'autodétermination ». Il en résulte de manière claire que tout détachement d'un territoire constitue un acte international illicite qui engage la responsabilité de la puissance coloniale administrante.²⁵ Le Royaume-Uni est donc dans l'obligation « [d]e mettre fin à son administration de l'archipel des Chagos, ce qui permettra à Maurice d'achever la décolonisation de son territoire dans le respect du droit des peuples à l'autodétermination.

4 CONCLUSION

A la veille de la célébration du sixantième anniversaire de l'adoption de la Déclaration sur l'octroi de l'indépendance aux pays et aux peuples coloniaux, des deux Pactes sur les droits de l'homme, il est curieux de voir persister des situations anachroniques avec l'évolution de la société internationale et surtout avec la consécration du respect des droits de l'homme comme norme de droit international. Des puissances coloniales continuent, non seulement à occuper illicitement des territoires détachés d'Etats dont l'indépendance a été reconnue et universellement acceptée, mais également à dénier à des populations leur droit fondamental de s'autodéterminer.

En 2019 encore, des puissances comme le Royaume-Uni et les Etats Unis, ont pu soutenir l'insoutenable dans le prétoire de la CIJ à La Haye et prétendre que le droit fondamental à l'autodétermination des peuples ne s'applique pas obligatoirement aux territoires non autonomes.

24 Par exemple, Hong Kong en 1997, et Macao en 1999, ont été cédés à la Chine en l'absence de toute consultation de populations concernées en vertu respectivement des accords sino-britanniques du 19 décembre 1984 et sino-portugais du 13 avril 1987.

25 Voir para 177 de l'avis.

Par ce nouvel avis consultatif sur les effets juridiques de la séparation de l'archipel des Chagos de Maurice en 1965, la CIJ n'a fait que réaffirmer des principes et des normes impératives de droit international connus et très largement admis. Même s'il n'innove pas, l'avis a le mérite de rappeler ces principes et ces normes et d'affirmer que le déni du droit fondamental à l'autodétermination constitue un déni des droits humains et donc un acte internationalement illicite.

Commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Mariam Kouma et Ousmane Diabaté c. Mali*

Eric Bizimana*

RÉSUMÉ: En tant que juridiction continentale chargée de protéger les droits de l'homme, la Cour africaine des droits de l'homme et des peuples construirait son autorité de juridiction de référence en rendant des décisions dépourvues d'erreurs et d'omissions judiciaires. Pour ce faire, la Cour doit bien motiver ses décisions, et dans certains cas, comprendre le droit et la pratique judiciaires des Etats membres. Ce commentaire souligne les lacunes contenues dans un arrêt rendu par la Cour, consistant notamment en une mauvaise lecture du droit et de la pratique judiciaires internes ainsi que des erreurs et omissions à statuer sur les moyens des parties. Ce faisant, le commentaire cherche à susciter un débat sur le fonctionnement et la capacité de la Cour à répondre efficacement aux déficiences judiciaires des Etats membres. Le commentaire propose aussi quelques réformes pouvant être entreprises par la Cour afin de réduire les erreurs et omissions judiciaires. Il s'agit notamment de la tenue systématique d'audiences contradictoires, ainsi que de l'amendement du Règlement de la Cour à l'effet d'élargir le recours en révision aux situations d'omissions ou d'erreurs judiciaires. Le commentaire propose enfin l'amendement du Protocole établissant la Cour à l'effet d'instituer un juge national ad hoc qui assisterait la Cour à mieux comprendre le droit et la pratique judiciaires des Etats membres lorsqu'elle exerce sa compétence contentieuse.

TITLE AND ABSTRACT IN ENGLISH:

Commentary of the African Court on Human and Peoples' Rights judgment on *Mariam Kouma and Ousmane Diabaté v Mali*

ABSTRACT: As a regional mechanism with a human rights protection mandate, the African Court on Human and Peoples' Rights (the Court) would establish its authority as a leading court by making pronouncements that are exempt of judicial errors and omissions. Thus, the Court has to provide reasons for its decisions, and, in deserving cases, seek to understand the law and judicial practice of respondent states. This case discussion underlines gaps in a judgment of the Court based on a wrong understanding of the domestic law and judicial practices, as well as errors and omissions to rule the pleas of the parties. By doing so, the discussion seeks to trigger a debate on the functioning of the Court and its ability to adequately respond to weaknesses in the judicial systems of the Respondent States. The commentary also proposes reforms that the Court could undertake to minimise judicial errors and omissions. These include the systematic holding of adversarial hearings on all contentious matters, as well as revision of the rules of the Court to broaden the provisions on revision of judgments to accommodate situations of omissions to pronounce on pleas and judicial errors. The case discussion further suggests revising the Protocol in a bid to institute *ad hoc* national courts which would assist the Court to better understand the law and judicial practice of states when handling contentious matters.

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MOTS CLÉS: *Mariam Kouma et Ousmane Diabaté, Mali*, code pénal, code de procédure pénale, instruction, jugement, Ministère public, Tribunal de première instance, Cour d'appel, qualification, recours internes, recours en révision, audiences contradictoires, juge national *ad hoc*

SOMMAIRE:

1	Introduction.....	356
2	Résumé des faits à l'origine de l'affaire.....	356
3	Procédure judiciaire interne.....	357
4	Observations sur les faits et la procédure judiciaire interne.....	358
5	Législation malienne pertinente	359
6	Résumé des prétentions des parties sur l'épuisement des recours internes.....	362
7	Résumé de l'arrêt de la Cour	362
8	Analyse de l'arrêt de la Cour.....	363
8.1	Absence de réponse à l'exception de prolongation anormale du procès pénal.....	363
8.2	Conclusion erronée à l'existence en faveur des requérants d'un recours pénal	364
8.3	Silence sur la charge de la preuve	365
8.4	Motivation insuffisante sur l'exception d'inefficacité du recours en réparation.....	365
8.5	Renversement du principe « le pénal tient le civil en l'état »	366
8.6	Absence d'examen du rôle du Ministère public dans une procédure pénale	367
9	Propositions de solutions pour un règlement efficace des affaires similaires	369
9.1	Elargir le droit de recours en révision	370
9.2	La tenue systématique d'audiences contradictoires en matière contentieuse	371
9.3	L'institution du juge national <i>ad hoc</i>	372
10	Conclusion	373

1 INTRODUCTION

L'arrêt de la Cour africaine des droits de l'homme et des peuples (la Cour ou la Cour africaine) sur la recevabilité de la requête 40/2016 concerne une affaire de blessures par machette perpétrées le 13 février 2014 à l'endroit de Mariam Kouma et de son fils Ousmane Diabaté, âgés respectivement de 44 et 15 ans à l'époque, par Monsieur Bossourou Coulibaly, alors âgé de 27 ans, à Bamako, au Mali.

Ce commentaire souligne les lacunes contenues dans l'arrêt de la Cour et cherche à susciter un débat sur le raisonnement suivi par la Cour dans l'affaire, objet de la présente réflexion. Pour permettre au lecteur de mieux comprendre les points qui seront discutés, le commentaire rappelle d'abord les faits à l'origine de l'affaire. Le commentaire examine ensuite la législation malienne pertinente car sans cet exercice, il devient impossible d'évaluer la conformité de cette législation aux instruments internationaux liant le Mali. La législation interne permet en outre d'évaluer l'attitude des institutions et autorités chargées d'appliquer la loi.

C'est sur base de cette évaluation, de la jurisprudence et des principes généraux du droit que l'arrêt de la Cour sera examiné. Ce commentaire propose enfin des solutions en vue d'une meilleure adjudication des affaires similaires.

2 RESUME DES FAITS A L'ORIGINE DE L'AFFAIRE

En janvier 2014, Mariam Kouma a vendu un singe à Boussourou Coulibaly pour une somme de 9000 Francs CFA. Le lendemain, Boussourou revint demander à Kouma de reprendre son singe et de lui restituer son argent. Il fit valoir que sa maman n'apprécie pas la domestication dudit singe. Devant le refus de Kouma de reprendre l'animal, Boussourou laissa le singe dans la cour de celle-ci et s'en alla. Pour obtenir le montant du remboursement exigé par Boussourou, Diabaté – fils de Kouma – revendit le singe à une tierce personne qui s'engagea à payer le prix les jours suivants. Voulant à tout prix récupérer son argent, Boussourou revenait presque chaque jour au domicile de sa cocontractante pour réclamer la restitution de la somme payée.

La nuit du 13 février 2014, lorsqu'il alla, à nouveau, chez Kouma pour la même réclamation, celle-ci lui intima l'ordre de ne plus « mettre les pieds » chez elle. Furieux, Boussourou se rendit précipitamment au domicile de la famille voisine, se saisit d'une machette, rebondit au salon de Kouma et lui asséna plusieurs coups à la tête et aux pieds en disant qu'il allait la tuer. Diabaté, le fils de Kouma, qui venait au secours de sa mère fut pourchassé par Boussourou qui lui infligea des blessures aux bras, aux épaules et au ventre. C'est alors que les voisins, alertés par les cris de Diabaté, appréhendèrent Boussourou pour le mettre à la disposition de la police. Kouma fut blessée au point de s'évanouir. C'est dans cet état qu'elle a été conduite à l'hôpital. La violence subie par elle était d'une intense gravité qu'elle a entraîné une incapacité physique de 60%, un traumatisme psychologique et une hospitalisation de cinq jours parmi bien d'autres conséquences.

3 PROCEDURE JUDICIAIRE INTERNE

Comme mentionné plus haut, ce sont les voisins de Kouma qui ont appréhendé Boussourou pour le mettre à la disposition de la police. Suite à l'enquête ordonnée par le Parquet de la République près le Tribunal de première instance de la Commune V du District de Bamako (Tribunal de première instance), Boussourou a été poursuivi pour coups et blessures volontaires simples. Le prévenu fut mis en comparution immédiate devant le Tribunal de Première instance. Au cours de l'audience publique du 20 février 2014, le Ministère public a requis la relaxe du prévenu en invoquant la démente de ce dernier. Le 27 février 2014, le Tribunal de première instance rejeta la réquisition du Parquet et condamna Boussourou à un an d'emprisonnement ferme pour coups et blessures simples sur base de l'article 208 du code de procédure pénale (CPP). Le Tribunal de première instance réserva, néanmoins, les intérêts de la partie civile au motif que celle-ci n'avait pas encore produit les preuves de l'incapacité de travail alléguée.

Le Conseil de Boussourou interjeta appel du jugement le même jour. Le Ministère public a également fait appel mais après expiration

du délai d'appel. Un mois après sa condamnation, Boussourou a été mis en liberté provisoire par la Cour d'appel de Bamako (Cour d'appel). Le Parquet général près la Cour d'appel ne s'est pas pourvu en cassation contre l'arrêt accordant la mise en liberté provisoire à Boussourou. Dans son arrêt du 24 mars 2014, la Cour d'appel considérant que le Tribunal de première instance n'avait pas vidé sa saisine, en ne se prononçant pas sur les intérêts civils, décida de renvoyer l'affaire au Tribunal de première instance.

4 OBSERVATIONS SUR LES FAITS ET LA PROCEDURE JUDICIAIRE INTERNE

Le Ministère public a qualifié les faits de coups et blessures volontaires simples. Une telle qualification n'est envisageable que lorsque les blessures, les coups, violences ou voies de faits n'ont occasionné aucune maladie ou incapacité de travail personnel.¹ Si les blessures, les coups, violences ou voies de faits occasionnent une incapacité de travail de plus de 20 jours, l'auteur encourt un emprisonnement de un à cinq ans; et si lesdits faits sont précédés d'une préméditation l'auteur encourt un emprisonnement de cinq à dix ans.² L'existence d'une incapacité ou son absence ne peut être connue qu'à l'issue d'une expertise médicale que le procureur pouvait requérir. Sans aucun effort pour se le procurer, le procureur demanda l'enrôlement de l'affaire en comparution immédiate devant le Tribunal de première instance. Le Tribunal de première instance n'a pas non plus requis l'expertise médicale, maintint les coups et blessures simples et prononça une peine d'un an d'emprisonnement ferme contre Boussourou. La gravité des blessures ne peut être appréciée que sur base d'une expertise médicale et trancher une affaire sans même requérir ce document clé constitue un manquement professionnel. En plus, l'infraction de violation de domicile a été ignorée par le Ministère public et le Tribunal de première instance. Le Tribunal de première instance a donc rendu un jugement sur base d'une enquête incomplète.

Kouma et son fils ne pouvaient faire appel de ce jugement qui leur était préjudiciable car « la faculté d'appeler appartient à la partie civile quant à ses intérêts civils seulement et lorsque la demande en réparation est supérieure à 100.000 francs » conformément au CPP.³

Seul le procureur de la République pouvait interjeter appel en vue d'aggraver la sanction infligée à Boussourou, mais il ne l'a pas fait dans le délai légal, ce qui conférait un caractère définitif au jugement rendu contre Boussourou par le Tribunal de première instance. Il apparaît donc que le manque de diligence de la part du Ministère public a été caractérisé par l'ignorance de l'infraction de violation de domicile, la non réquisition d'une expertise médicale, l'invocation d'une démente de Boussourou et le fait de ne pas faire appel de la condamnation dans

1 Loi 01-079 du 20 août 2001 portant code pénal du Mali, art 208.

2 n 1, art 207.

3 Loi 01-080 du 20 août 2001 portant code de procédure pénale, art 482.

le délai légal. Le Tribunal de première instance aurait dû également exiger cette expertise médicale.

Il serait erroné de croire que l'appel interjeté par Boussourou pouvait profiter à Kouma et à son fils Diabaté, car il suffirait à Boussourou de retirer sa plainte pour mettre fin à l'instance devant la Cour d'appel. Bref, il ne dépendait que de Boussourou pour espérer une aggravation de la sanction. Il serait illogique d'espérer que Boussourou allait s'accuser lui-même. En pratique donc, Kouma et Diabaté avaient définitivement perdu la possibilité de faire changer la qualification des faits. Il y a donc lieu de conclure que Kouma et Diabaté étaient privés d'un recours pénal effectif.

Quant à la décision de la Cour d'appel de renvoyer l'affaire devant le Tribunal de première instance, il s'agissait d'une démarche inutile et dilatoire puisque rien ne l'empêchait de se faire communiquer le dossier du Tribunal de première instance. Il y a lieu de conclure que la procédure pénale interne s'était définitivement avérée inefficace en ce qu'il n'offrait aucune perspective de faire réviser la qualification des faits. Pour cela, Kouma et Diabaté étaient en droit de compter sur l'exonération de l'obligation d'épuiser les recours internes devant la Cour. L'analyse de la législation malienne permet de voir plus clairement que le recours pénal était inexistant.

5 LEGISLATION MALIENNE PERTINENTE

La législation pertinente comprend le code pénal (CP) et le code de procédure pénale (CPP). D'une part, le CP permet d'évaluer le caractère raisonnable de la qualification des actes de Boussourou. D'autre part, le CPP aide à déterminer la procédure appropriée dans le cas d'espèce car, au Mali, la procédure varie en fonction de la gravité de l'infraction. Le CPP aide également à déterminer les pouvoirs du procureur et ceux du juge d'instruction. En fin de compte, la législation nationale sera utile pour déterminer les personnes à qui le CPP reconnaît le droit d'appel ainsi que les instances habilitées à recevoir cet appel.

Il est indiscutable que Boussourou a pénétré de force dans le domicile de Kouma, ce qui constitue une violation de domicile au sens de l'article 124 du CP. Cette constatation résulte d'une opposition exprimée par Kouma à ce que Boussourou remette les pieds chez elle.

Un autre fait non contesté par l'Etat défendeur dans l'arrêt commenté, *Mariam Kouma c. Mali*, est que Boussourou a blessé Kouma à la tête et aux autres parties du corps jusqu'à ce qu'elle perde connaissance. Ces faits peuvent être constitutifs de tentative de meurtre, infraction qui est punie comme meurtre, conformément aux articles 3 et 199 du CP. Le CP punit le meurtre précédé d'une autre infraction par la peine de mort,⁴ sauf circonstances exceptionnelles, auquel cas une peine d'emprisonnement à vie ou une peine d'emprisonnement de 5 à 20 ans peut être appliquée.⁵

4 n 1, art 201.

Faute d'être poursuivi du chef de tentative de meurtre, Boussourou aurait pu être poursuivi du chef de lésions corporelles préméditées entraînant une incapacité de travail au sens de l'article 207 du CP, auquel cas il aurait été passible d'une peine d'emprisonnement de 5 à 20 ans et d'une amende de 20 000 à 500 000 francs.

Au regard de la gravité des faits, la procédure appropriée était la suivante : le Ministère public aurait dû saisir le Tribunal de première instance pour désignation d'un juge d'instruction en vertu de l'article 55 du CPP, s'agissant de la double tentative de meurtre avec préméditation précédée de violation de domicile. Ce juge d'instruction devait alors ouvrir une information pour déterminer les infractions commises et les preuves disponibles. Après cette étape, le juge d'instruction saisisrait la chambre d'accusation de la Cour d'appel par le biais du Ministère public.⁵ La chambre d'accusation qui est un second degré d'instruction vérifie si les preuves retenues correspondent à la qualification de l'infraction. Si la chambre d'accusation estime que l'instruction justifie la mise en accusation de l'accusé, elle rend un arrêt de mise en accusation et de renvoi devant la Cour d'assises. C'est cette dernière Cour qui doit statuer sur la culpabilité de l'accusé et prononcer la sanction adéquate. Rien de cela n'a été fait.

Le Ministère public a poursuivi Boussourou du chef des voies de fait n'ayant occasionné aucune incapacité ou maladie conformément à l'article 208 du CP, délit mineur devant être jugé par un juge correctionnel. Une telle infraction est punie d'un emprisonnement de 11 jours à deux ans et/ou d'une amende de 20 000 à 100 000 francs. S'il y a préméditation, l'auteur encourt un emprisonnement de un à cinq ans et une amende de 25 000 à 150 000 francs. Une interdiction de se rendre en certains lieux pour une période de 1 à 10 ans peut également lui être infligée.

Il est évident que le Ministère public n'a pas tenu compte de l'incapacité de Kouma alors qu'il s'agissait d'un facteur important pour déterminer le quantum de la sanction applicable aux faits. Le Ministère public n'a pas accusé Boussourou de tentative de meurtre alors que les actes de l'auteur dénotent une intention de donner la mort à Kouma. Les indicateurs d'une telle intention incluent le fait d'aller chercher et d'utiliser une machette contre une femme qui ne pouvait physiquement opposer une résistance physique sérieuse à un homme de 27 ans, l'âge de Boussourou à l'époque, le fait de frapper avec ladite machette sur la tête de Kouma à plusieurs reprises jusqu'à son évanouissement, et le fait d'empêcher son fils de la secourir. En outre, le Ministère public n'a pas accusé Boussourou de violation de domicile de Kouma, alors que ce fait est indiscutable. Il y a lieu de conclure que le Ministère public n'a pas tenu compte des facteurs importants dans la qualification des faits commis par Boussourou. Le Tribunal de première instance n'a pas fait mieux.

Cette attitude des magistrats impliqués dans le traitement de l'affaire viole le devoir de compétence contenu dans leur serment.⁷ La

5 n 1, art 18(1).

6 n 3, art 185.

compétence est d'ailleurs mise en avant dans le processus de recrutement⁸ et de promotion des magistrats.⁹ Cependant, comme le soutient Nicolas Boring, si le maintien et le développement de la compétence sont encouragés tout au long de la carrière des magistrats, il n'y a pas assez de garde-fou contre l'incompétence après la passation de l'examen sanctionnant la formation initiale.¹⁰ Les magistrats sont également astreints au devoir d'impartialité et de diligence conformément au code de déontologie des magistrats.¹¹ En spécifiant clairement l'obligation de diligence, le législateur malien a voulu faire savoir aux magistrats que le manque de diligence emporte des conséquences professionnelles contre le magistrat fautif.¹²

Ces devoirs sont amplement justifiés au regard des pouvoirs que le CPP reconnaît aux magistrats investigateurs. Le Ministère public est chargé d'enquêter, de poursuivre, d'accuser le suspect et d'exécuter la condamnation.¹³ Le Ministère public a le pouvoir d'arrêter, de mettre en détention, de convoquer des témoins, de faire appel à des experts, d'accuser le suspect et d'exécuter la condamnation. Négliger ou mettre de côté les informations nécessaires ou utiles à la qualification des faits viole les devoirs de diligence et de compétence. Selon l'article 3 du CPP, le Ministère public peut engager et exercer l'action publique. Le Ministère public est dirigé par le procureur général. Ce dernier est chargé de veiller au respect de la loi sur toute l'étendue du territoire Malien. Chaque procureur et juge de paix lui soumet un rapport sur les affaires portées à leur connaissance.

Une victime d'un délit n'a pas les mêmes pouvoirs. Conformément à l'article 3 du CPP, la victime ne peut qu'initier l'action publique. Autrement dit, la victime peut dénoncer une infraction à une autorité compétente qui exerce alors l'action publique, ce qui signifie que la victime n'a aucun contrôle sur le déroulement de l'action publique. Conformément au CPP, la victime peut porter plainte devant la police, le parquet, le juge de paix (article 57) et le juge d'instruction (article 89).

Il convient de rappeler que le Ministère public veille à l'application de la loi par les autres autorités chargées de l'enquête. Il convient également de mentionner que le juge d'instruction n'est pas une instance d'appel des décisions prises par le Ministère public. Une fois que le procureur est saisi d'une affaire, la victime ne peut plus saisir le juge d'instruction, car cela entraînerait un cas de litispendance. En outre, une telle action ne présenterait aucun intérêt pour la victime, car le juge d'instruction travaille sous l'autorité du procureur.

7 Loi 02-054 du 16 décembre 2002 portant statut des magistrats au Mali, art 31.

8 n 1, arts 19-27.

9 n 1, arts 85 & 88; 89, 91, 97.

10 N Boring 'Malian rules of judicial ethics: a comparative study' (2014) 16 *The Law Library of Congress*.

11 Code de déontologie annexé à la Loi 02-054 du 16 décembre 2002 portant statut des magistrats au Mali, art 7.

12 Boring (n 10) 17.

13 n 3, art 147.

Une fois qu'une condamnation pénale est prononcée, la victime ne peut faire appel de celle-ci que sur les intérêts civils.¹⁴ Seul le Ministère public est investi du pouvoir de faire appel du dispositif pénal d'un jugement en vue de protéger les intérêts des victimes. S'il néglige ou refuse de faire appel alors que les circonstances de la cause le lui imposaient, le Ministère public viole les principes de compétence et de diligence. Il peut également violer le principe d'impartialité si le manquement est destiné à protéger une partie au préjudice de l'autre.

Dans l'affaire d'espèce, Kouma et Diabaté ont été victimes d'un manque avéré de diligence et de compétence de la part du Ministère public, des juges du Tribunal de première instance, et de ceux de la Cour d'appel.

C'est à la lumière de ces observations que le raisonnement de la Cour africaine dans *Mariam Kouma c. Mali* sera examiné. Mais avant de procéder à l'analyse, il importe de rappeler les prétentions des parties ainsi que les points saillants de l'arrêt de la Cour.

6 RESUME DES PRETENTIONS DES PARTIES SUR L'EPUISEMENT DES RECOURS INTERNES

Les deux parties étaient d'accord que les voies de recours internes n'étaient pas épuisées. Tous leurs moyens se focalisaient sur les exceptions à la règle de l'épuisement des recours internes. Les requérants ont invoqué trois exceptions à savoir : (1) la prolongation anormale et l'inefficacité du recours pénal du Ministère public,¹⁵ (2) l'inexistence des voies de recours pénal,¹⁶ et (3) l'inefficacité du recours civil.¹⁷ De son côté, l'Etat défendeur soutenait que les requérants n'avaient pas épuisé les recours internes et demandait à la Cour de déclarer la requête irrecevable.¹⁸

7 RESUME DE L'ARRET DE LA COUR

La Cour déboute les requérants sur toutes les exceptions invoquées. Concernant l'allégation de prolongation anormale, la Cour juge que le délai de deux ans et deux mois dont se plaignaient les requérants est celui de la procédure devant le Tribunal de première instance statuant comme juridiction de renvoi et appelée à vider sa saisine sur les intérêts civils des requérants. Elle a par conséquent conclu que cette procédure s'est prolongée par le fait des requérants eux-mêmes qui n'ont pas

14 n 3.

15 *Mariam Kouma et un autre c. Mali*, CAfDHP (Recevabilité, 21 mars 2018) paras 33-36.

16 *Mariam Kouma*, paras 49-50.

17 *Mariam Kouma*, paras 55-57.

18 *Mariam Kouma*, para 31.

fourni le certificat médical concernant Kouma.¹⁹ Sur l'allégation d'inexistence du recours pénal interne, la Cour estime que les requérants avaient la possibilité de faire un appel contre la qualification des actes commis par Boussourou mais qu'ils ont délibérément omis d'exploiter cette voie de recours.²⁰ Pour ce qui est de l'allégation d'inefficacité du recours civil, la Cour juge prématuré de préjuger de l'inefficacité du recours civil devant la Cour d'appel en ce sens que les requérants ne pouvaient pas interjeter appel qu'après décision du juge d'instance sur les intérêts civils.²¹

La lecture de l'arrêt ne permet pas de déceler les lacunes qu'il renferme. Celles-ci sont davantage notables lorsqu'on examine l'arrêt à la lumière des moyens présentés par les requérants, et du droit pénal malien applicable en cette affaire. Ces lacunes feront l'objet de la section suivante.

8 ANALYSE DE L'ARRÊT

8.1 Absence de réponse à l'exception de prolongation anormale du procès pénal

Dans sa jurisprudence devenue constante, la Cour africaine elle-même a établi que l'analyse du caractère raisonnable ou non de la durée d'une procédure « s'apprécie en tenant compte, en particulier, de la complexité de l'affaire ou de la procédure y relative, du comportement des parties elles-mêmes et de celui des autorités judiciaires pour déterminer si ces dernières ont affiché une passivité ou une négligence certaine ».²² La Cour rappelle cette jurisprudence dans l'arrêt *Mariam Kouma c Mali*.²³

Mais, la Cour se trompe sur l'allégation des requérants en affirmant que « le délai de deux ans dont se plaignent les Requérants est celui de l'instance devant le Tribunal de première instance de la Commune V, statuant comme juridiction de renvoi ... ». ²⁴ Ce faisant, la Cour africaine a examiné l'exception de prolongation anormale sous l'angle de la procédure civile devant le Tribunal de première instance alors que le délai dont se plaignaient les requérants était relatif à la procédure pénale et courait à partir de la saisine de la Cour d'appel le 27 février 2014 jusqu'à la saisine de la Cour africaine le 1 juillet 2016.

L'arrêt de renvoi rendu par la Cour d'appel du 24 mars 2014 n'était basé que sur un aspect purement administratif ainsi que l'exprime la seule motivation du juge sur ce point: « Considérant que le juge

19 *Mariam Kouma*, paras 37-47.

20 *Mariam Kouma*, paras 51-54.

21 *Mariam Kouma*, paras 59-60.

22 *Ayants droit de Norbert Zongo et autres c. Burkina Faso*, CAFDHP (Fond, 23 mars 2014) para 92.

23 *Mariam Kouma*, paras 37-38

24 *Mariam Kouma*, para 43.

d'instance doit vider sa saisine; que ceci est un préalable à la transmission du dossier devant la chambre des appels ». ²⁵ Le motif de renvoi n'est pas du tout convaincant dans la mesure où la Cour d'appel aurait pu se faire communiquer une copie du dossier. Les requérants avaient donc considéré, en toute justesse, que le renvoi opéré par la Cour d'appel faisait inutilement trainer la procédure pénale. La Cour africaine n'a pas examiné si le renvoi était nécessaire ou tout au moins utile au bon déroulement du procès pénal en appel. Autrement dit, la Cour africaine n'a pas cherché à examiner si la Cour d'appel avait fait preuve de diligence voulue dans le traitement de l'appel. En ne répondant pas à l'exception de prolongation anormale soulevée par les requérants, la Cour consacre un déni de justice.

8.2 Conclusion erronée à l'existence en faveur des requérants d'un recours pénal

La Cour affirme que les requérants avaient la possibilité de faire appel contre la qualification pénale mais qu'ils ont délibérément omis d'exploiter cette voie de recours. ²⁶ Les requérants avaient pourtant précisé qu'au Mali, les victimes d'une infraction n'ont pas la possibilité de faire appel du dispositif pénal d'un jugement ²⁷ et que le Ministère public est maître de l'action pénale. ²⁸ Ces arguments n'ont pas été contestés par l'Etat défendeur. L'absence de contestation sur ce point aurait dû être interprétée comme concession tacite de la part du Mali. Mieux, l'article 482 du CPP dispose que « la faculté d'appeler appartient à la partie civile quant à ses intérêts civils seulement ... ». L'Etat défendeur a même rappelé cette disposition dans son mémoire en défense. ²⁹ Les requérants avaient annexé copie du CPP à la requête initiale. Etant donné que l'arrêt sous analyse n'indique pas une autre disposition permettant l'appel, il est difficile de ne pas soutenir que la conclusion de la Cour sur ce point est gratuite et erronée.

La Cour juge en outre que les victimes avaient la possibilité de faire un recours en requalification des faits ³⁰ sans pourtant préciser devant quelle instance ou autorité un tel recours pouvait être exercé. Il est étonnant que la Cour aboutisse à une telle conclusion alors que l'Etat défendeur ne soutient nulle part que les victimes avaient cette possibilité. La conclusion est donc non seulement fautive mais elle manque également de fondement puisque la Cour n'a pas examiné les arguments des plaignants sur ce point crucial, développés dans les paragraphes 39 à 45 de la requête introductive d'instance. Un tel état de choses constitue une absence de motivation et un déni de justice.

25 *Ministère public c. Boussourou Coulibaly*, Cour d'appel de Bamako (Arrêt 206 du 24 mars 2014), page 1.

26 n 20.

27 Requête initiale des requérants, para 21. Voir aussi Duplique des requérants, para 5.

28 Requête initiale des requérants, para 39.

29 Mémoire en défense de la République du Mali, para 5.

30 *Mariam Kouma*, para 53.

8.3 Silence sur la charge de la preuve

Lorsqu'une partie, en l'occurrence, l'Etat défendeur, soutient que la communication doit être déclarée irrecevable parce que les recours internes n'ont pas été épuisés, il incombe à cette partie de démontrer l'existence desdits recours.³¹

Dans la mesure où les requérants avaient, en leurs moyens, indiqué que les victimes n'ont pas la possibilité de faire appel du dispositif pénal d'un jugement,³² il incombait à l'Etat défendeur de prouver l'existence de ce droit et devant quelle instance il peut être exercé. L'Etat du Mali avait même rappelé l'article 482 du CPP³³ qui dispose que « la faculté d'appeler appartient à la partie civile quant à ses intérêts civils seulement ... ». Cette disposition à elle seule suffisait pour convaincre la Cour que les victimes d'une infraction n'ont pas le droit d'appel contre le dispositif pénal d'un jugement.

La Cour aurait donc dû constater que l'Etat défendeur n'avait pas prouvé l'existence d'un recours permettant aux victimes de demander une requalification des actes commis par Boussourou. Pour n'avoir pas statué sur ce point, la Cour a consacré une décision non motivée.

8.4 Silence sur l'exception d'inefficacité du recours en réparation

Les recours judiciaires internes à épuiser au sens de l'article 56(5) de la Charte africaine des droits de l'homme et des peuples doivent être disponibles, efficaces et satisfaisants.³⁴ La Cour n'a pas appliqué cette jurisprudence dans l'arrêt faisant l'objet du présent commentaire parce qu'elle a estimé, à tort, qu'il était prématuré de préjuger de l'efficacité des recours internes.

En effet, Boussourou a été reconnu coupable de voies de fait et de coups et blessures simples par un jugement définitif. S'il devait réparer un préjudice au civil résultant de son infraction, ce serait un préjudice occasionné par des voies de fait et de coups et blessures simples. Il ne saurait plus être tenu de réparer le préjudice occasionné par des blessures graves subies par Kouma et qui ont causé une incapacité de travail de 60% car le lien de causalité ne peut être établi entre une agression mineure et le préjudice grave subi par Kouma. C'est pour cette raison que les victimes ont estimé qu'il était inutile de poursuivre une action civile vouée à l'échec. Récemment, la Cour a jugé que l'analyse de l'utilité du recours interne tient compte, entre autres, du

31 *The Nubian Community in Kenya v Kenya*, Communication 317/06, Commission africaine des droits de l'homme et des peuples (30 mai 2016) para 47; Voir aussi *Marcel Wetsh'okonda Koso and others c. République Démocratique du Congo*, Communication 281/03, Commission africaine des droits de l'homme et des peuples (24 novembre 2008) para 53.

32 Requête initiale des requérants, para 21; Duplique des requérants, para 5.

33 n 26.

34 *Christopher Mtikila c. Tanzanie*, CAfDHP (Fond, 14 juin 2013) para 82.1.

système juridique de l'Etat défendeur et de la situation personnelle du requérant.³⁵ L'application de cette jurisprudence aurait été utile dans l'adjudication de l'affaire sous analyse.

C'est avec regret que l'on note que la Cour n'a pas statué sur l'allégation d'inefficacité alors qu'il s'agit bien là du moyen principal avancé par les requérants pour requérir que s'applique l'exonération de l'obligation d'épuiser les recours internes. Il s'agit donc, une fois de plus, d'une absence de motivation. La Cour aurait en effet dû examiner si, en l'espèce, le recours civil pouvait prospérer indépendamment de la procédure pénale, car un recours civil ne peut pleinement remédier à une violation résultant d'un crime.³⁶ La Cour aurait dû aussi examiner si l'enquête et le procès pénal avaient été conduits dans le respect des principes de compétence, de diligence,³⁷ et d'égalité des armes.³⁸ Si elle s'était attelée à cet exercice, la Cour aurait relevé sans difficulté les manquements avérés qui ont émaillé l'enquête et la procédure judiciaire devant les juridictions maliennes. Elle aurait également constaté que le CPP ne garantit pas l'égalité des armes entre les victimes et l'auteur d'une infraction dans la mesure où les premières sont dépourvues du droit d'appel contre le dispositif pénal d'un jugement alors que le second jouit de ce droit.

8.5 Renversement du principe « le pénal tient le civil en l'état »

Le principe « le pénal tient le civil en l'état » fait obligation au juge civil de surseoir à statuer jusqu'à ce qu'un jugement pénal définitif soit rendu. Ce principe vise à préserver toute contradiction entre juridictions pénales et juridictions civiles.³⁹ Ce principe implique qu'un tribunal statuant au civil ne peut ordonner la réparation d'un dommage résultant d'une infraction qu'après la condamnation pénale définitive de l'auteur.

Il ressort de l'arrêt de la Cour d'appel que le renvoi n'était basé que sur un aspect purement administratif. La Cour d'appel a ainsi motivé: « Considérant que le juge d'instance doit vider sa saisine ; que ceci est un préalable à la transmission du dossier devant la chambre des appels ». ⁴⁰ Le motif de renvoi n'est pas du tout convaincant dans la mesure où la Cour d'appel pouvait demander copie du dossier. L'appel interjeté par Boussourou concernait le jugement de première instance

35 *Sebastien German Ajavon c. Benin*, CAfDHP (Fond, 29 mars 2019) para 110.

36 *Assenov et Autres c. Bulgarie* CEDH (28 octobre 1998), para 84.

37 Principes de Bangalore sur la déontologie judiciaire, valeur 6 https://www.unodc.org/documents/corruption/bangalore_f.pdf (consulté le 4 octobre 2019).

38 Directives et Principes sur le Droit à un Procès Equitable et à l'Assistance Judiciaire en Afrique, A.2.a.

39 A Vaudry, « L'adage: Le Pénal tient le civil en l'état » 2015 https://www.avocats-picovschi.com/l-adage-le-penal-tient-le-civil-en-l-etat_article_260.html (consulté le 10 août 2019).

40 *Ministère public c. Boussourou Coulibaly*, 1.

dans sa totalité et ne spécifiait pas les motifs d'appel. Il a été fait dans un seul paragraphe en ces termes:⁴¹

En ma qualité d'avocat régulièrement constitué pour assurer la défense des intérêts du sieur Boussourou Coulibaly, né vers 1987 à Lomé au Togo, physicien de nationalité malienne domicilié à Baco-Djicoroni, j'ai l'honneur de relever appel contre la décision rendue à l'audience du 27 février 2014 par le tribunal correctionnel de céans dans le cadre de l'affaire citée en référence.

Etant donné que le Tribunal de première instance n'avait pas statué sur la réparation au civil, il est aisé de voir que Boussourou cherchait à faire annuler ou réduire la sanction pénale à lui imposée. La Cour d'appel pouvait donc se faire communiquer une copie du dossier et statuer en appel au pénal. Et pourtant, la Cour africaine suit religieusement la position de l'Etat défendeur selon laquelle la poursuite de la procédure pénale devant la Cour d'appel dépendra de la clôture de l'action civile pendante devant le Tribunal de première instance.⁴² La Cour aurait dû examiner si le renvoi des parties devant le Tribunal de première instance était nécessaire ou tout au moins utile à l'administration de la justice, c'est-à-dire si la Cour d'appel était dans l'impossibilité de trancher l'affaire avant que le Tribunal de première instance ne vide sa saisine au civil. En réalité, la République du Mali a invoqué les lacunes administratives internes pour convaincre la Cour. Cela est contraire à l'adage: « nul n'est recevable à invoquer ses propres turpitudes ». Qui plus est, accepter que la poursuite de l'action pénale sera conditionnée par le fait de vider l'action civile n'est autre chose que le renversement du principe « le pénal tient le civil en l'état ».

8.6 Absence d'examen du rôle du Ministère public dans une procédure pénale

La Cour semble considérer le Ministère public comme une institution passive qui doit totalement dépendre des victimes pour mener l'enquête. Cette approche est non seulement contraire à l'esprit et à la lettre du CPP, elle ignore également les pouvoirs du parquet pour mener l'enquête.

A la lecture de l'arrêt sous analyse, l'on remarque que la Cour ne tente même pas d'examiner le rôle du Ministère public dans la conduite de l'affaire. Par ailleurs, la Cour affirme sans preuve que les victimes n'ont pas coopéré à l'enquête sur l'infraction.⁴³ Ce raisonnement est illogique car les victimes avaient tout intérêt à voir l'auteur puni. L'obtention d'un certificat médical n'était pas aussi simple pour un malade alors que le Ministère public ou le juge pouvait se le procurer facilement.

La Cour n'examine pas non plus les relations entre les différentes autorités impliquées dans l'enquête pénale et développe son raisonnement sur base d'un faux postulat. Elle juge ainsi, mais à tort,

41 Lettre d'appel datant du 27 février 2014.

42 Défense de la République du Mali, 3.

43 *Mariam Kouma*, paras 46-47.

que l'enquête a été menée par le juge d'instruction,⁴⁴ et que les requérants pouvaient exercer un recours en requalification devant la chambre d'accusation.⁴⁵ Or, il ressort des soumissions des parties que l'enquête a été menée par la police sous la supervision du Ministère public. Cela prouve que la Cour avait du mal à comprendre le déroulement de la procédure pénale.

Il serait erroné de penser que l'article 89 du CPP prévoit un recours contre la qualification faite par le Ministère public. L'article 89 dispose: « En cas de plainte avec constitution de partie civile, le juge d'instruction ordonne communication de la plainte au procureur de la République pour que ce magistrat prenne ses réquisitions ... ». Cette disposition indique clairement qu'il s'agit d'une plainte et non d'un appel. Le seul sens que l'on peut donner à cette plainte est qu'elle ne constitue qu'un moyen de déclencher une action pénale. En d'autres termes, une victime d'une infraction dispose de plusieurs options si elle veut porter plainte: elle peut le faire devant soit la police, soit le procureur, soit le juge d'instruction, soit une autre autorité que la loi investit d'une telle compétence. Lorsqu'une affaire est pendante devant un procureur, une partie civile perd la possibilité de saisir le juge d'instruction.

Comme indiqué ci-dessus, le Ministère public a négligé ou mis de côté des informations utiles au bon déroulement de l'enquête. Deux explications possibles peuvent justifier son attitude. Il s'agit soit d'une incompétence et d'un manque de diligence, soit d'une volonté délibérée de mettre Boussourou à l'abri d'une sanction proportionnelle à son forfait. La Cour n'a pas évalué l'attitude du Ministère public dans la conduite de l'enquête alors que les requérants y avaient consacré d'amples moyens. Il s'agit manifestement d'un déni de justice.

Il est important de faire observer qu'au Mali, le procureur de la République jouit de pouvoirs larges, et qu'il travaille sous l'autorité du ministre de la justice, membre du pouvoir exécutif. Il lui manque donc l'indépendance vis-à-vis du pouvoir exécutif.

Le manque d'indépendance du Ministère public est de plus en plus reconnu dans la jurisprudence comme un handicap à la jouissance des droits humains. A cet égard, la Commission africaine des droits de l'homme et des peuples (la Commission) a jugé que:⁴⁶

L'indépendance des fonctionnaires du Ministère public constitue une équation délicate dans les pays africains de la tradition juridique de droit civil qui ont hérité du système juridique et judiciaire continental ou français.

De son côté, la Cour semble se focaliser sur l'examen du comportement des magistrats du Ministère public au cas par cas. La Cour a en effet jugé que « ce qui importe au sens de l'article 7 de la Charte africaine c'est l'indépendance du juge saisi du recours » et que « seuls des comportements particuliers d'un procureur dans une affaire donnée

44 *Mariam Kouma*, para 53.

45 *Mariam Kouma*, para 54.

46 *IHRDA et autres c République Démocratique du Congo*, Commission africaine des droits de l'homme et des peuples, Communication 393/10 (juin 2016) para 133.

pourraient s'analyser comme des atteintes à l'indépendance du juge ». ⁴⁷On peut reprocher à cette interprétation d'ignorer que le procureur peut exercer des fonctions judiciaires et que la conduite d'une procédure pénale dépend en partie de lui. Le juge pénal tranche l'affaire opposant le Ministère public au prévenu. Si le procureur ne remplit pas correctement ses fonctions suite aux pressions émanant de l'exécutif, l'indépendance du juge restera intacte, mais les intérêts d'une victime d'un crime peuvent en pâtir. ⁴⁸

La Cour européenne des droits de l'homme juge que « le magistrat doit être indépendant de l'exécutif et des parties ». ⁴⁹ La Cour interaméricaine des droits de l'homme a aussi abouti à une conclusion similaire. ⁵⁰ Le Comité des droits de l'homme est aussi d'avis que le Ministère public ne devrait pas remplir les fonctions judiciaires en ce qu'il ne remplit pas généralement les conditions d'indépendance et d'impartialité. ⁵¹

Dans *Mariam Kouma c. Mali*, la Cour aurait donc dû s'inspirer de la jurisprudence de ses pairs suscités en vérifiant si au Mali, le Ministère public peut remplir des fonctions judiciaires en toute indépendance. Les arguments des plaignants sur l'attitude reprochable du Ministère public n'ont, semble-t-il, attiré aucunement l'attention de la Cour. L'arrêt de la Cour est entièrement silencieux sur ce point, ce qui constitue une absence de motivation.

9 PROPOSITIONS DE SOLUTIONS POUR UN REGLEMENT EFFICACE DES AFFAIRES SIMILAIRES

Les erreurs commises dans *Mariam Kouma c. Mali* peuvent se regrouper en trois catégories. La première catégorie contient des erreurs résultant soit d'une absence d'analyse, soit d'une mauvaise compréhension du droit pénal malien. La seconde catégorie regroupe les erreurs découlant d'une déformation des arguments des requérants. La troisième catégorie concerne l'absence ou l'insuffisance de motivation. En l'absence de possibilité d'appel et à cause des restrictions au recours en révision, les erreurs commises deviennent inattaquables, raison pour laquelle le recours en révision devrait être élargi. Les possibilités d'erreurs irréversibles peuvent aussi être minimisées par le biais d'un débat oral contradictoire et l'institution d'un juge national ad hoc.

47 *Norbert Zongo*, paras 123-125.

48 SH Adjolohoun et CM Fombad 'Separation of powers and the role of the public prosecutor in Francophone Africa' in CM Fombad (ed) *Separation of powers in African constitutionalism* (2016) 359, 363.

49 *Assenov et Autres c. Bulgarie* CEDH (28 octobre 1998) para 146.

50 *Chaparro Alvarez et Lapo Iniguez v Ecuador*, IACHR (21 novembre 2007) paras 83-84.

51 *Kulomin c. Hungary*, Communication 521/1992, UNHR (22 mars 1996), UN Doc CCPR/C/50/D/521/1992 (1996).

9.1 **Elargir le droit des parties à faire recours en révision**

Le droit de faire réviser une décision constitue une garantie procédurale en ce sens que même si les juges sont compétents et professionnels, les erreurs et les omissions à statuer sont parfois inévitables. Le droit de révision donne à la partie perdante la possibilité de faire corriger les erreurs et omissions commises en première instance. En l'absence du droit de révision, les erreurs commises par l'instance statuant au premier degré sont définitives au détriment de la partie perdante. La partie gagnante peut ainsi se voir attribuer un bénéfice non mérité. Il est donc de l'intérêt de la justice d'élargir le droit de recours en révision.

L'article 67(1) du Règlement intérieur de la Cour dispose que:⁵²

En application de l'article 28(3) du Protocole, une partie peut demander à la Cour de réviser son arrêt, en cas de découverte de preuves dont la partie n'avait pas connaissance au moment où l'arrêt était rendu. Cette demande doit intervenir dans un délai de six mois à partir du moment où la partie concernée a eu connaissance de la preuve découverte.

Il apparaît que le Règlement de la Cour est plus restrictif en comparaison avec le Règlement de la Commission.

Le Règlement intérieur de la Commission reconnaît au plaignant le droit de faire recours en révision en ces termes:⁵³

Lorsque la Commission a déclaré une Communication irrecevable, elle peut reconsidérer cette décision à une date ultérieure si elle en reçoit la demande écrite de l'auteur, sur la base d'éléments nouveaux.

L'article 111 du même Règlement intérieur indique les hypothèses dans lesquelles le droit à la révision est ouvert: (1) la découverte de faits de nature à constituer un facteur décisif, qui n'était pas connu de la Commission et de la partie demandant la révision, à condition qu'une telle ignorance ne soit pas due à une négligence, et (2) toute autre raison convaincante ou une situation que la Commission pourrait juger appropriée ou pouvant justifier la révision de la communication, dans un souci d'équité, de justice, et de respect des droits de l'homme et des peuples.

En comparant les deux Règlements - celui de la Commission et celui de la Cour - l'on relève que les deux mécanismes convergent sur un critère de révision à savoir la découverte « d'éléments nouveaux » par la Commission ou « de nouvelles preuves » par la Cour dont une partie n'avait pas connaissance au moment de la décision. Le Règlement intérieur de la Cour se limite là alors que celui de la Commission ouvre le droit à la révision dans d'autres situations.

En reconnaissant le droit à la révision à une partie qui présente « toute autre raison convaincante ou une situation que la

52 Règlement intérieur intérimaire de la Cour africaine des droits de l'homme et des peuples, art 67.

53 Règlement intérieur de la Commission africaine des droits de l'homme et des peuples, art 107(4).

Commission pourrait juger appropriée ou pouvant justifier la révision de la communication, dans un souci d'équité, de justice, et de respect des droits de l'homme et des peuples », le Règlement de la Commission autoriserait une partie à demander la révision en cas d'omissions à statuer, de motivation erronée ou insuffisante.

On aurait pu s'attendre à ce que la Cour, créée pour compléter le mandat de protection de la Commission, élargisse le droit de faire recours en révision prévu devant la Commission, à défaut de le maintenir. Le Règlement de la Cour est donc moins protecteur de droits humains en ce qu'il restreint le recours en révision.

Le Règlement intérieur de la Cour pourrait être plus protecteur des droits humains en élargissant les hypothèses de révision, notamment à l'encontre des arrêts entachés d'omissions ou de motivation insuffisante ou erronée.

9.2 La tenue systématique d'audiences contradictoires en matière contentieuse

Un débat oral contradictoire permet à l'organe juridictionnel d'obtenir un point de vue plus éclairé en posant des questions aux parties. Les parties elles-mêmes peuvent attirer l'attention des juges sur un point qui les intéresse. Un débat oral contradictoire est particulièrement utile lorsque le contenu et la pratique du droit interne sont en jeu.

Sur base de ces considérations, il y a lieu de conclure qu'une audience orale aurait amené la Cour à mieux comprendre le droit pénal malien et les moyens des parties. Par conséquent, à tout stade de procédure la Cour devrait organiser systématiquement des audiences contradictoires sur les affaires dont elle est saisie, lorsque ces affaires portent sur le droit et la pratique internes. La pratique d'audiences contradictoires est déjà suivie par les juridictions des communautés économiques régionales, en l'occurrence la Cour de Justice des Etats de l'Afrique de l'Est et la Cour de Justice de la Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO).

La pratique de la Cour de Justice de la CEDEAO est d'une pertinence particulière en ce sens que le contentieux devant cette juridiction est nettement dominé par des affaires des droits de l'homme.⁵⁴ En outre, la juridiction communautaire est sollicitée par des personnes provenant de quinze pays alors qu'actuellement la Cour africaine ne peut être saisie que par des actions dirigées contre neuf Etats. Etant donné que la Cour de Justice de la CEDEAO n'exige pas l'épuisement des recours internes, il pourrait être normal qu'elle soit plus sollicitée que la Cour africaine. Par exemple, la Cour africaine a rendu 17 arrêts sur toute l'année 2018⁵⁵ alors que la Cour de la

54 En décembre 2017, les recours pour violations des droits de l'homme occupaient 93% du contentieux (statistiques du greffe).

55 Rapport d'activités de la Cour couvrant la période du 1 janvier au 31 décembre 2018, para 11.

CEDEAO a rendu quasiment le même nombre d'arrêts—16 arrêts—au cours du premier trimestre de 2019.⁵⁶

A la différence de la Cour africaine composée de 11 juges non permanents, la Cour de la CEDEAO compte cinq juges exerçant à temps plein. Les juges de la Cour de la CEDEAO travaillent environ 190 jours par an.⁵⁷ En 2018, les juges de la Cour africaine ont siégé durant 106 jours.⁵⁸ L'on peut donc dire qu'un juge de la Cour de la CEDEAO a un volume de travail plus élevé que celui de la Cour africaine.

Le budget alloué à la Cour africaine au titre de l'exercice 2019 était de 12 245 321,13 dollars américains⁵⁹ alors que celui de la Cour de la CEDEAO au cours de la même période était de 19 524 949,20 dollars américains.⁶⁰ Le budget de la Cour africaine aurait monté à environ 15 000 000 dollars américains pour l'exercice 2019 alors que celui de la Cour de la CEDEAO est monté à 19 544 149,20 dollars.⁶¹ Certes, le budget de la Cour africaine est moins élevé que celui de la Cour de la CEDEAO mais au regard du volume du contentieux devant la seconde, et le nombre réduit de juges qui y siègent, l'on ne peut pas dire qu'elle fonctionne dans des conditions plus favorables que la Cour africaine. L'on peut donc raisonnablement considérer que la Cour africaine peut organiser des audiences publiques à l'instar de sa consœur ouest-africaine.

9.3 L'institution du juge national *ad hoc*

Il est difficile pour un tribunal continental de comprendre les particularités de chaque système juridique et judiciaire internes. Sans une compréhension claire de la législation et de la pratique internes, l'évaluation de l'attitude des autorités chargées de l'application de la loi devient très difficile. D'où le recours à l'office du juge national *ad hoc* par les juridictions internationales, en particulier les juridictions pénales. Le juge national *ad hoc* a en principe une bonne connaissance théorique et pratique du droit interne.

Quoique rare en matière de droits de l'homme, l'institution du juge national *ad hoc* n'en est pas totalement absente. La Cour européenne des droits de l'homme a, depuis 2010, eu recours à des juges *ad hoc* avec l'entrée en vigueur du Protocole N° 14. L'institution du juge national *ad hoc* est même considérée par certains comme ayant accru la confiance des Etats membres en la Cour et amené les Etat hésitants à reconnaître

56 Interim report of the President of the Community Court of Justice (2019) 1, accessible sur <http://prod.courtecawas.org/wp-content/uploads/2019/04/Interim-report-of-the-President-for-2019.pdf> (consulté le 5 octobre 2019).

57 Règlement de la Cour de Justice de la CEDEAO, art 24.

58 n 55.

59 n 55, para 28.

60 n 56.

61 n 56.

la compétence de la Cour.⁶² La Cour et les autres organes judiciaires continentaux ou régionaux devraient avoir la possibilité de faire recours à des juges ad hoc.

10 CONCLUSION

L'examen de l'arrêt de la Cour dans *Mariam Kouma c. Mali* a permis de relever des lacunes importantes dans le corps de l'arrêt mais également dans le Règlement intérieur de la Cour. Ces lacunes dans l'arrêt concernent d'une part les défauts ou insuffisances de motivation par omission d'examiner les moyens et arguments des parties sur des exceptions clés et la mauvaise lecture de la législation interne. Les lacunes se manifestent d'autre part au niveau du non-respect des principes juridiques en l'occurrence « le fardeau de la preuve » et « le pénal tient le civil en l'état ».

L'analyse a également permis de relever le caractère restrictif du Règlement intérieur de la Cour par rapport au Règlement intérieur de la commission. Les restrictions portent sur la diminution d'hypothèses d'admission des requêtes en révision. Tout en proclamant que la Cour complète les fonctions de protection que la Charte africaine des droits de l'homme et des peuples a conférées à la Commission,⁶³ le Protocole établissant la Cour restreint en réalité le droit de saisine.

Les erreurs commises dans l'arrêt de la Cour dans *Mariam Kouma c. Mali* pourraient être évitées ou tout au moins réduites si la Cour tenait systématiquement des audiences orales contradictoires à tout stade de procédure. De telles audiences permettraient à la Cour de mieux comprendre le droit et la pratique judiciaire internes des Etats parties. La Cour devrait également modifier son Règlement intérieur à l'effet d'élargir les hypothèses d'admission des requêtes en révision. D'autres solutions, en l'occurrence l'institution d'un juge national ad hoc pour aider la Cour à mieux comprendre les systèmes juridiques et judiciaires des Etats parties, ne peuvent résulter que d'un amendement au Protocole établissant la Cour.

62 Assemblée Parlementaire du Conseil de l'Europe 'Juges ad hoc à la Cour européenne des droits de l'homme: un aperçu' (2012) para 18 https://www.coe.int/t/dgi/brighton-conference/documents/pace_documents/AP_DOC_12827_FR.pdf (consulté le 10 août 2019).

63 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, art 2.

Interrogating the status of amnesty provisions in situations of transition under the Banjul Charter: review of the recent jurisprudence of the African Commission on Human and Peoples' Rights

Solomon Ayele Dersso*

ABSTRACT: During the course of the past three decades, various legal developments under international law have triggered academic debate and jurisprudential analysis on the legality of amnesties. While there is general recognition that states are not completely free to grant amnesty, the debate continues whether international law, with the exception of specific treaty obligations, generally bans the use of amnesty in all its forms, including in relation to serious violations, particularly in the context of transitions from war to peace. This case commentary reviews the analysis by the African Commission on Human and Peoples' Rights of the legal validity of amnesty provisions under the African Charter on Human and Peoples' Rights. It in particular examines how the *obiter dictum* in the African Commission's finding in the communication *Thomas Kwoyelo v Uganda* advances the Commission's jurisprudence on amnesty, and discusses the parameters that the Commission set for evaluating amnesty provisions including those that are additional, if not novel, to existing guidelines. Before this finding, the Commission's position on amnesty was inadequately articulated, generally formulated and confined to specific cases. This case note observes that while the African Commission, following a methodical line of analysis, establishes the legality of amnesty under the African Charter including in respect of serious violations, its *obiter dictum* in *Kwoyelo* also enhanced the frontiers of the law on the question of legal validity of amnesty. It did so by clarifying not only the scope of legality of amnesty provisions but also the substantive and procedural conditions amnesty provisions should meet.

TITRE ET RÉSUMÉ EN FRANCAIS:

Questionnement sur la conformité à la Charte de Banjul des règles d'amnistie en période de transition: évaluation de la récente jurisprudence de la Commission africaine des droits de l'homme et des peuples

RÉSUMÉ: Au cours des trois dernières décennies, divers développements juridiques en droit international ont déclenché un débat théorique et une analyse jurisprudentielle sur la légalité des amnisties. Bien que l'on soit généralement d'accord sur le fait que les États ne sont pas entièrement libres d'accorder l'amnistie, le débat porte le plus souvent sur la question de savoir si le droit international, à l'exception d'obligations conventionnelles précises, interdit l'utilisation de l'amnistie sous toutes ses formes, y compris en cas de violations graves, surtout lors de la transition de la guerre à la paix.

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Le présent commentaire examine l'analyse par la Commission africaine des droits de l'homme et des peuples de la validité juridique des dispositions d'amnistie à la lumière de la Charte africaine des droits de l'homme et des peuples. Il examine en particulier comment l'*obiter dictum* de la conclusion de la Commission africaine dans la communication *Thomas Kwoyelo c. Ouganda* avance la jurisprudence de la Commission en matière d'amnistie, et examine les critères définis par elle en vue d'évaluer les dispositions relatives à l'amnistie dont certains s'avèrent être novateurs par rapport aux directives existantes. Il y a peu, la position de la Commission sur l'amnistie était formulée en des termes généraux et limitée à des cas spécifiques. Ce commentaire conclut que, si la Commission africaine, suivant une ligne d'analyse méthodique, établit la conformité de l'amnistie à la Charte africaine, y compris en ce qui concerne les violations graves, son *obiter dictum* a également renforcé les limites du droit sur la question de la validité juridique de l'amnistie en précisant non seulement l'étendue de la légalité de ses dispositions, mais également les conditions de fond et de forme que doivent remplir les dispositions d'amnistie.

KEY WORDS: African Commission on Human and Peoples' Rights, amnesty, legality, transition, *obiter dictum*, *Kwoyelo v Uganda*

CONTENT:

1	Introduction	375
2	The legal authority of <i>obiter dicta</i>	376
3	Background to the communication	378
4	The finding of the Commission: <i>ratio decidendi</i>	379
5	Amnesty and human rights law	381
6	Analysis of the Commission's <i>obiter dictum</i>	384
7	Conclusion.....	387

1 INTRODUCTION

During its 62nd Ordinary Session held in Nouakchott, in the Islamic Republic of Mauritania, from 25 April to 9 July 2018, the African Commission on Human and Peoples' Rights (African Commission or Commission) handed down a landmark decision on Communication 431/12, *Thomas Kwoyelo v Uganda*.¹ As part of its consideration of the communication, the Commission adopted an *obiter dictum* on the status of amnesties within the framework of the African Charter on Human and Peoples' Rights (African Charter). As the Commission puts it, the *obiter dictum* was adopted in order to enable it to pronounce itself on the question of the compatibility of amnesty provisions, adopted in times of transition, with the rights guaranteed in the African Charter.²

While the Commission has previously encountered issues of amnesty, it has not given a fully-fledged authoritative opinion on the status of amnesty under the African Charter, particularly in the context of transition from conflict to peace. As the Commission itself admitted

1 African Commission on Human and Peoples' Rights, Communication 431/12, *Thomas Kwoyelo v Uganda (Kwoyelo)*; <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2018/129> (accessed 1 November 2019).

2 *Kwoyelo*, just before para 283, the Commission uses the heading '*Obiter dictum*' (see paras 284-293 for the text of the '*Obiter dictum*'). The plural form *obiter dicta* may perhaps better capture the Commission's observations, but this note uses the Commission's own terminology ('*Obiter dictum*').

in its *Kwoyelo* finding, there was a 'lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace'.³

This case discussion presents a review of the Commission's analysis on the legal validity of amnesty provisions under the African Charter. It in particular examines how the *obiter dictum* advances the Commission's jurisprudence on amnesty and the parameters that the Commission set for evaluating amnesty provisions, hence offering important elements that are additional, if not novel, to existing guidelines and understanding on the legality of amnesty provisions in transitional legal instruments.

After this introduction, the next part presents a brief analysis on the legal authority of *obiter dicta*, generally, before proceeding to consider how and why the Commission's *obiter dictum* in *Kwayelo* is of significant legal value. The discussion then proceeds to present as background an overview of the communication, outlining the facts of the case and the Commission's findings (drawing attention to the fact that while amnesty features as a major part of the case, its legal validity under the Charter was not an issue on which the Commission was called upon to pronounce itself). In the next section, the case discussion deals with amnesties and international human rights law in an attempt to situate the Commission's position in the broader international law context. Part 4 proceeds to analyse the *obiter dictum*, including the novel dimensions of the approach the Commission adopted and how this approach interfaces with the debate in international law on amnesty provisions. Finally, I provide a conclusion with suggestions on how best the guidance in the *obiter dictum* can be put in practice.

2 THE LEGAL AUTHORITY OF *OBITER DICTA*

Particularly in Common Law systems, a distinction is made between the *ratio decidendi* and *obiter dicta* contained in judicial decisions.⁴

The *ratio decidendi* refers to 'those statements of law which are based on the facts as found and upon which the decision is based.'⁵ These are the binding statements of law in a court decision. *Obiter dicta* are statements of law that are made in court decisions in passing, in the sense that they do not have direct impact on the outcome or finding of the court.

3 *Kwoyelo*, para 284.

4 See M Raz 'Inside precedents: *ratio decidendi* and *obiter dicta*' http://www.commonlawreview.cz/wp-content/uploads/2017/10/08_3CommonLRev212002.pdf (accessed 1 November 2019); R Hollier 'The ultimate guide to the ratio decidendi and obiter dictum' <https://www.thelawproject.com.au/ratio-decidendi-and-obiter-dictum> (accessed 1 November 2019).

5 Raz (n 4).

Obiter dicta may take different forms. It may be used to provide context or to provide a hypothetical case. It is also not uncommon to use *obiter dicta* to fully explore a relevant area of law even if it is not crucial for the determination of the outcome of the case concerned. While it is usually stated that *obiter dicta* are persuasive only and lack the force of precedent, the extent to which *dicta* are followed varies depending on how the *dicta* are used. McAllister states that there are ‘five factors that influence the path of a particular dictum: (1) the number of judges that endorsed the dictum; (2) the depth of the issuing court’s discussion of the dictum; (3) whether the dictum clarifies a line of demarcation in existing case law; (4) the relationship between the facts of the case and the statements made in dictum; and (5) the extent to which the issuing court stands by the pronouncements made in dictum.’⁶

‘Obiter dicta can guide, inform, or enlighten future case reasoning’.⁷ There are also instances in which it is used to clarify a legal issue in a case, although such legal issue does not affect the disposition of the case. *Obiter dicta* thus ‘have different degrees of weight.’⁸ It emerges that *obiter dicta* carry the most weight, to the point of establishing authoritative legal opinion, where they are used for clarifying a legal issue, intended to have such a force and involved sufficiently deep discussion of the matter.

In the case at hand, the African Commission used the *obiter dictum* to clarify the legal issue on the compatibility of amnesty under the African Charter. It is also clear from the African Commission’s decision that it sought to provide legally authoritative view on the question of the validity of amnesty under the African Charter. The Commission also engaged the issue at some length. It not only clarified whether and how amnesty can be compatible with the African Charter but also went as far as stipulating the procedural and substantive test that should be met to adopt amnesty provisions in conformity with the African Charter.

As is discussed further below, the issue addressed in the *obiter dictum* in the *Kwoyelo* finding has a close relationship with the facts of the case. While the *ratio decidendi* concerned with the question of whether the refusal of the government of Uganda to grant amnesty to Kwoyelo under the Amnesty Act of 2000 was discriminatory, the *dictum* addressed the question of the legal validity of amnesty as provided for in the Uganda Amnesty Act of 2000 under the African Charter.

The foregoing shows that the African Commission’s *obiter dictum* in *Kwoyelo v Uganda* presents an authoritative statement of its legal opinion on the question of the legal validity of amnesty provisions under the African Charter.

6 M McAllister ‘Dicta redefined’ (2011) 47 *Willamette Law Review* 162 at 165.

7 Legal Information Institute ‘Obiter dictum’ https://www.law.cornell.edu/wex/obiter_dictum (accessed 1 November 2019).

8 Hollier (n 4).

3 BACKGROUND TO THE COMMUNICATION

The communication concerns a complaint lodged against Uganda on behalf of Thomas Kwoyelo, a former child soldier, who, after being abducted as a child in 1987, became a member of the Lord's Resistance Army (LRA).⁹ The case arose from the treatment by Ugandan authorities of Thomas Kwoyelo following his capture by the Ugandan troops in 2009. The allegations presented in the complaint include abduction, torture and inhumane treatment, breach of fair trial rights and deprivation of medical treatment. The dimension of the communication that is of direct interest for the subject of this case discussion is the request to the African Commission to find the refusal by Ugandan authorities to grant amnesty to Kwoyelo as constituting a violation of his right to equal protection under the law.

As presented in the complaint, Kwoyelo was captured after a battle between the Ugandan army and LRA combatants in the Democratic Republic of Congo (DRC). After being taken to Uganda where he received medical care at a military hospital, he was arrested. Similar to other LRA fighters, Kwoyelo declared his renunciation of rebellion and applied to the Uganda Amnesty Commission to be granted amnesty under the 2000 Amnesty Act. In March 2010, the Amnesty Commission forwarded Kwoyelo's application to the Director of Public Prosecutions (DPP) for consideration with a recommendation that Kwoyelo should be allowed to benefit from the amnesty process. Instead of acting in line with the recommendation of the Amnesty Commission, the DPP charged Kwoyelo with various crimes including willful killing, taking hostages, extensive destruction of property, and violations of Uganda's 1964 Geneva Conventions Act.

While the case was pending before the International Crimes Division of the High Court of Uganda, Kwoyelo filed an application with the Constitutional Court of Uganda. He contended that his prosecution for acts falling within the Amnesty Act, but under which he has been declared to be eligible for amnesty, was a violation of his right to equality before the law. Despite the argument of the DPP that it was barred from granting amnesty to Kwoyelo due to the 'international' nature of the crimes for which Kwoyelo was charged, the Constitutional Court not only affirmed the constitutionality of the Amnesty Act but also held that the refusal of the DPP to grant amnesty to Kwoyelo in line with the recommendation of the Amnesty Commission constituted a denial of his right to equality before the law. The Constitutional Court further ordered the termination of Kwoyelo's trial.¹⁰ The Court of Appeal, which the DPP approached for a stay of execution of the Constitutional Court decision, upheld the findings of the Constitutional Court.

9 See RR Atkinson 'From Uganda to the Congo and beyond: pursuing the Lord's Resistance Army' https://www.ipinst.org/wp-content/uploads/publications/e_pub_uganda_to_congo.pdf (accessed 1 November 2019).

10 *Thomas Kwoyelo alias Latoni v Uganda* [2011] UGCC.

Having been unable to get satisfaction under the Ugandan legal system with the government refusing to implement the Constitutional Court decision, Kwoyelo filed a communication with the African Commission arguing on his amnesty application that the refusal of Uganda to grant him amnesty as it did to over 24,000 other individuals amounts to a violation of his right to equal protection under the law⁷ contrary to article 3 of the African Charter.

4 THE FINDING OF THE COMMISSION: *RATIO DECIDENDI*

In order to assess the allegation of violation of the right to equal protection under the law, the African Commission examined the question of whether the Amnesty Act was applied differently in respect of Kwoyelo and, if there was differentiation, whether the differentiation was justified. While the applicants for Kwoyelo, Onyango & Company Advocates, argued that ‘the granting of over 24,000 amnesty applications before and 274 more after the victim’s application was rejected including to persons who were holding higher command positions shows that he was selectively treated without any objective or reasonable explanation’,¹¹ the government of Uganda in its response argued that ‘the case of the victim was different from all other applicants who were granted amnesty because he was charged with serious violations of human rights and the others were not’.¹² Accordingly, on the question of whether the Amnesty Act was applied differently in respect of Kwoyelo, the Commission held that the facts that Kwoyelo was the only person whose application for amnesty was denied, that at the time of the filing of the communication 24000 amnesty applicants had been granted, and that 274 applicants were granted amnesty after Kwoyelo’s application established a case of ‘difference in treatment’.

With respect to the second question, namely, whether the difference in treatment was justified, the Commission considered the arguments of the respondent state based on a two-stage analysis. To the argument that the difference in treatment was justified on account of the requirement of prosecution of those suspected of committing most serious crimes or human rights violations under the Juba Agreement on Accountability and Reconciliation and the Annexure thereto of June 2007 and February 2008, the Commission held that the signing of the Juba Agreement did not stop the eligibility of the applicant under the Amnesty Act. The Commission further held that, without effecting corresponding and corollary amendments to the Amnesty Act, the Juba Agreement ‘is not sufficient and convincing legal ground to warrant differential treatment’.¹³ It thus held that being charged with serious

11 *Kwoyelo*, para 50.

12 *Kwoyelo*, para 168.

13 *Kwoyelo*, para 187.

crimes was not a stated ground for the denial of amnesty under the Act.¹⁴

To the argument that the enactment in 2010 of the International Criminal Court Act necessitated the prosecution of international crimes barring the application of the Amnesty Act, the Commission held that the refusal to grant amnesty by virtue of the ICC Act, which came into effect months after Kwoyelo was declared eligible for amnesty, 'would be a retroactive application of the law, which is a flagrant breach of the principle of legality.'¹⁵ It accordingly found that the justification that the state proffered for defending the legality of the difference in treatment was not reasonable. The Commission accordingly concluded that 'by interpreting and applying the provisions of the Amnesty Act differently without any reasonable justification or explanation, the Respondent state violated the right to equal protection of the law afforded to the Victim as provided under article 3 of the Charter.'¹⁶

The Commission was right in pursuing the two-level analysis that it adopted for determining the existence of violation of the right to equal protection of the law. As it is clear from the Commission's examination of the parties' submission on article 3 of the Charter, the two-level analysis principally involves technical review (the existence of difference and justifiability of difference).

The Commission did not engage in a review of whether the entitlement (in this case the amnesty) with respect to which a claim of unequal application of the law was invoked was deserved and legitimate under the African Charter. Questions may arise on whether the Commission should have engaged in an examination of that question.¹⁷ Yet, engaging in such an exercise would have been very problematic for the Commission. The question before the Commission, as framed in the submission of the parties, was whether the difference in the treatment of Kwoyelo was justifiable within the framework of the Amnesty Act. Understandably, the question of amnesty in the situation at hand is not confined to the case of Kwoyelo but implicates the entirety of Uganda's Amnesty Act. Since this issue was not directly framed in the submission of the respondent state, the Commission could be rightly excused for not engaging in the kind of exercise such a review would have required.

Yet, despite the appropriateness of confining the Commission's review to the Amnesty Act based on the two-level analysis, the Commission did not deem it proper to end its examination with making a determination on the existence or otherwise of violation of article 3 of the African Charter. Accordingly, the Commission found it important that it addressed the question of the compatibility of the use of amnesty provisions with the obligation of states under the African Charter to

14 *Kwoyelo*, para 180.

15 *Kwoyelo*, para 190.

16 *Kwoyelo*, para 195.

17 See P Bradfield 'Amnesty or no amnesty? The African Commission weighs in on the Kwoyelo case' (11 October 2018) <https://beyondthehague.com/2018/10/11/amnesty-or-no-amnesty-african-commission-weighs-in-on-the-kwoyelo-case/> (accessed 1 November 2019).

ensure the protection of the Charter rights by bringing those engaged in the perpetration of violations to justice. The Commission sought to accomplish this by adopting an *obiter dictum*.

Before considering a closer examination of what, in the view of the Commission, comes to be its most authoritative view on amnesty provisions, I will first proceed in the following section with a discussion on amnesty provisions and human rights. This helps us to put the Commission's analysis in the broader international law and comparative context.

5 AMNESTY AND HUMAN RIGHTS LAW

There is no established definition of amnesty under international law. The word 'amnesty' comes from the ancient Greek word *amnestia*, meaning 'forgetfulness.' As the origin of the word suggests, when used in the context of peace processes or transitions amnesty involves an act of letting certain wrongs be forgotten. The Commission observed in *Zimbabwe Human Rights NGOs Forum v Zimbabwe* that an 'amnesty is granted to a group of people who commit political offences, e.g. during a civil war, during armed conflicts or during a domestic insurrection.'¹⁸ The granting of amnesty thus leads to the limitation or exclusion of the application of criminal prosecution.

Despite the lack of established definition, amnesty is not without pedigree in international law. A case in point is article 6(5) of Additional Protocol II (of 1977) to the Geneva Conventions: 'At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.' It is on this provision of the Geneva Conventions that the South African Constitutional Court relied in affirming the legality of the amnesty clause under the Act establishing the South African Truth and Reconciliation Commission.¹⁹

Various legal developments over the course of the past few decades have increasingly challenged the legality of amnesty under international law. It is now widely recognised that as a matter of principle states are expected to investigate and prosecute those responsible for serious international crimes and gross violations of human rights. Important sources of authority for such assertion are the specific obligations that a select number of human rights treaties impose on parties for investigation and prosecution. The 1949 Geneva Conventions enumerate acts described as 'grave breaches,' and impose a duty on its parties to prosecute perpetrators of such breaches, but these provisions apply only to international armed conflicts. The

18 2005 AHRLR 128 (ACHPR 2005), para 196 (*Zimbabwe Human Rights Forum case*).

19 *Azanian Peoples Organization v President of South Africa* 1996 (4) SALR 671 (CC).

Convention on the Prevention and Punishment of the Crime of Genocide imposes an affirmative duty on state parties to criminalise genocide and to prosecute or extradite parties who are suspected of engaging in the perpetration of genocide. The Convention Against Torture also imposes obligations similar to the Genocide Convention, although its definition of torture is confined to those committed by or with the consent of a public official.

As far as customary international law is concerned, the position on whether there is complete ban on amnesties remains unsettled. There are international actors including the pronouncement of some international tribunals, some states and human rights advocates who hold that there is a customary norm of international law that bans amnesties. While there is thus general recognition that states are not completely free in terms of the granting of amnesty, it remains far from clear that international law, with the exception of specific treaty obligations, generally bans the use of amnesty in all its forms, including in relation to serious violations. This is particularly the case in the context of transitions from war to peace. The Special Court for Sierra Leone noted that there is 'no general obligation for States to refrain from amnesty laws on these [*jus cogens*] crimes.'²⁰ States therefore do not 'breach a customary international rule' in granting such amnesties.²¹

It emerges from review of state practice that the process of formation of a customary norm of international law banning the use of amnesties remains incomplete. The Belfast Guidelines on Amnesty and Accountability prepared by a group of international law scholars and practitioners pronounce that '*opinio juris* from domestic and hybrid courts together with state practice on amnesties does not reflect an established, explicit and categorical customary prohibition of amnesties for international crimes.'²² This is also supported by the jurisprudence of some international bodies. The Trial Chamber found that 'state practice in relation to other serious international crimes is arguably insufficiently uniform to establish an absolute prohibition of amnesties in relation to them.' This finding was supported by the Trial Chamber's review of the adoption, scope and application of amnesties in conflict or post-conflict countries in the last three decades. The Trial Chamber found that state practice of 28 states in the past three decades encompassed the implementation of amnesty laws, of which 18 cover the crimes of genocide, crimes against humanity and grave breaches of the Geneva Conventions.²³

20 *Prosecutor v Kallon & Kambara*, Decision on Challenge to Jurisdiction: Lome Accord Amnesty, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72 para 7

21 As above.

22 The Belfast Guidelines on Amnesty and Accountability 12.

23 Case of *NUON Chea et al*, 002/19-09-2007-ECCC/TC, Decision on IENG Sary's Rule 89 Preliminary Objections (*Ne Bis In Idem* and Amnesty and Pardon), 3 November 2011, D51/15, para 54, as cited in MG Karnavas 'Amnesties and pardons in international criminal law' <http://michaelgkarnavas.net/blog/2016/07/22/amnesties-and-pardons-part-ii/> (accessed 1 November 2019).

Various international law scholars point out that no conclusive evidence of the formation of international custom altogether prohibiting amnesty has emerged.²⁴ After reviewing the work of regional human rights bodies and international courts on the subject, Trumbull concluded as follows:²⁵

These international court decisions may suggest an emerging international norm that demands accountability. They do not, however, establish that all amnesties for serious human rights abuses are illegal under international law, or that states have an international obligation to prosecute violations of international law. Indeed, international courts have shown a willingness to allow states to decide how to hold perpetrators accountable, and how to provide appropriate redress for the victims.

As observed in the *Zimbabwe Human Rights Forum* case,²⁶ states have obligations under international human rights law to ensure that victims of violations of human rights are afforded a remedy. This obligation of states to ensure that the right of victims to get a remedy for violations suffered demands that they do not take actions that make it impossible for victims to have their violations remedied. It is interesting to note that what the African Commission found objectionable in that case was not amnesty per se but the fact that the particular law in question 'foreclosed any available avenue for the alleged abuses to be investigated, and prevented victims of crimes and alleged human rights violations from seeking effective remedy and compensation'.²⁷ The Commission further stated that the 'granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy'.²⁸ It is worth noting that in this particular case the African Commission did not engage the question of the room available for limitations on these obligations in the context of a transition from war to peace.

There are three points that emerge from these legal opinions of the Commission. The first is that the obligation of states principally consists of holding perpetrators accountable, which may take forms other than criminal prosecution and punishment. This obligation bars states from relieving perpetrators of all forms of accountability. Second, the obligation of states also precludes them from blocking victims from getting *any form of remedy* for the violations they suffered. Third, the implication of these legal positions under the African Charter is that there is no as such a general and absolute ban on amnesties as long as such amnesties do not absolve perpetrators from accountability altogether and inhibit victims from having access to remedy.

The lack of customary international law banning the use of amnesties however does not imply that all forms of amnesties are acceptable and legal under international law. Most importantly, while

24 J Dugard 'Dealing with crimes of a past regime. Is amnesty still an option?' (1999) 12 *Leiden Journal of International Law* 1001 at 1002-04; CP Trumbull IV 'Giving amnesties a second chance' (2007) 25 *Berkeley Journal of International Law* 283 (accessed 1 November 2019).

25 Trumbull (n 24) 301.

26 n 18.

27 *Zimbabwe Human Rights Forum*, para 211 (my emphasis).

28 *Zimbabwe Human Rights Forum*, para 215.

there are differences over the complete ban of amnesties in its entirety under international law, there is little, if any, dispute that international custom bans blanket or unconditional amnesties. In South Africa, for example, amnesty from prosecution was provided for 'acts, omissions, and offenses associated with political objectives and committed in the course of the conflicts of the past',²⁹ but only after the accused had made a full disclosure to the Truth and Reconciliation Commission. This is what is called conditional amnesty. Such amnesty is conditional to the extent that the amnesty depends on full disclosure and hence some measure of accountability and acceptance of responsibility. But it is not conditional in as far as the nature of the act is concerned.

The Uganda's Amnesty Act of 2000, which is the subject of the present case, stipulates in relevant sections as follows:

3.1. An Amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986 engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda.

3.2. A person referred to under subsection (1) shall not be prosecuted or subjected to any form of punishment for the participation in the war or rebellion for any crime committed in the course of the war or armed rebellion.

These provisions give general amnesty to rebels whereby no offences are excluded and all forms of insurgency are covered. There are no requirements in the Act that perpetrators have to meet other than renouncing armed rebellion. This is an example of unconditional amnesty.

It is clear from the foregoing that there has been a distinct narrowing in the overall permissibility of amnesties under international human rights law. However, state practice indicates a continued willingness to utilise amnesty provisions albeit in somewhat narrower ways. Even the jurisprudence of regional and international courts tends to limit the application of amnesties but have not rejected entirely the acceptability of amnesties.

6 ANALYSIS OF THE COMMISSION'S *OBITER DICTUM*

As noted earlier, the African Commission did not wish to end its consideration of the communication with a determination of whether Kwoyelo was discriminated against in terms of the application of the Amnesty Act. Underscoring the necessity for clarifying the question of amnesty, the Commission expressed the view that it 'deems it fitting that it pronounces itself on this issue given the lack of clear guidance on ensuring compliance with the requirements of the African Charter when states resort to the use of amnesty as necessary means for pursuing the objectives of achieving peace and justice in times of transition from violence to peace.'³⁰ It went on to explain that addressing the issue of amnesty via an *obiter dictum* was 'necessitated

29 Promotion of National Unity and Reconciliation Act 34 of 1995.

30 *Kwoyelo*, para 284

by the position that the Commission took herein above in finding violation of article 3 of the Charter in the application of amnesty, which, unless it is read carefully, may be wrongly interpreted as sanctioning blanket amnesty.³¹

In the *obiter dictum*, the Commission presented its position methodically. Unlike previous cases, which the Commission addressed, in this case there is clear consideration of the context of transition from conflicts to peace. The Commission started off by noting the emergence of international norms laying down rules regulating the use of amnesties. The Commission in particular noted 'rules of international law aiming at giving force to human rights and IHL principles prescribe the conditions that should be met when societies have to have recourse to amnesties as a necessary means of ending the continuation of armed violence and the violations that inevitably accompany such violence.'³² In so doing, the Commission signaled that what justifies amnesties is the necessity of ending continuation of armed conflict and hence fulfilling the right to peace under article 23 of the African Charter. Importantly, the Commission notes that the use of amnesties also advances further human rights needs in helping to end the violations that result from the continuation of conflicts.

The next point that the Commission addressed was what amnesties constitute and what their legal implications are. It observed that amnesties can be considered as 'legal measures that are used in transitional processes, often as part of peace settlements, to limit or preclude the application of criminal processes and, in some cases, civil actions against certain individuals or categories of individuals for violent actions committed in contravention of applicable human rights and IHL rules.'³³ It also noted that amnesties could be adopted as unilateral acts of the state or as part of a peace settlement that is given the force of law.

One issue that clearly weighed on the Commission's elaboration of its position on the compatibility of amnesties with the African Charter is its focus on the context of transition from peace to conflict. This specific attention to contexts of transition is indeed one of the factors that set the Commission's treatment of amnesties in the *obiter dictum* apart from its earlier pronouncements. This is not surprising given the fact that many countries on the continent have been affected by violent conflicts and the accompanying atrocious violations. The Commission thus noted that '[t]ypically, these are not normal or ordinary circumstances. Rather, they are characterised (by) lack of political and socio-economic stability, weak or dysfunctional institutions and diminished security.'³⁴ The upshot of this recognition of the extraordinary nature of contexts of transition from conflicts is that it demands the Commission to apply a standard different from what it applies in normal situations in its assessment of compatibility with the

31 As above.

32 *Kwoyelo*, para 285.

33 *Kwoyelo*, para 286.

34 *Kwoyelo*, para 287.

African Charter of measures adopted in contexts of transitions from conflict to peace.

The Commission elaborates the important distinction that needs to be made between blanket amnesties and conditional amnesties. After noting that blanket or unconditional amnesties relieve perpetrators of all responsibilities without the need for meeting any conditions, the Commission held that on account of their effect of excluding any form of accountability and hence enabling impunity, 'blanket amnesties are incompatible with human rights and IHL rules.'³⁵ What is interesting is not simply the Commission's clear rejection of blanket amnesties but also its rather restricted conceptualisation of conditional amnesties. Accordingly, the Commission held that '[co]nditional amnesties are those that usually offer relief from criminal conviction or criminal prosecution altogether for defined category of actors and on meeting certain preconditions including full disclosure of what they know about the conducts covered by the amnesty and acknowledgement of responsibility.'³⁶

It is clear from the Commission's conception of conditional amnesties and interesting to note that the focus of the Commission's view on conditional amnesties relate to criminal prosecution or conviction, hence suggesting that conditional amnesties do not preclude accountability altogether. Indeed, other forms of accountability measures such as investigation and being identified for responsibility, truth telling and hence accepting responsibility, facing certain limitations by doing community service or by being responsible for paying compensation or by being excluded from serving in public offices are not excluded.

To back up its position on conditional amnesties, which the Commission considers not to be necessarily incompatible with the African Charter, the Commission made reference to the position of international human rights treaties, the jurisprudence of regional bodies and its own jurisprudence under paragraphs 289-292. Although this is done in rather broad-brush fashion, this reference to the broader international jurisprudential discussion on the subject largely represents an accurate depiction of where international law stands. It is thus consistent with the discussion in the preceding section on amnesties and international human rights law.

After building with such methodological sequence the foundation for its view, the Commission presented its conclusions on the question of when amnesties could or could not be compatible with the African Charter. It thus held that it is its considered view 'that blanket or unconditional amnesties that prevent investigations (particularly of those acts amounting to most serious crimes referred to in article 4(h) of the AU Constitutive Act) are not consistent with the provisions of the African Charter.'³⁷ It goes on to state that 'African states in transition from conflict to peace should at all times and under any circumstances

35 *Kwoyelo*, para 288.

36 As above.

37 *Kwoyelo*, para 293.

desist from taking policy, legal or executive/administrative measures that in fact or in effect grant blanket amnesties, as that would be a flagrant violation of international law.'

With respect to conditional amnesties in a novel formulation, the Commission identified the procedural and substantive requirements that should be met when societies in transition 'resort to amnesties as necessary measures for ending violence and continuing violations and achieving peace and justice'.³⁸ Procedurally, the Commission took the view that 'amnesties should be formulated with the participation of affected communities including victim groups'.³⁹ It has to be recalled that it is with the request and active participation of northern Ugandan communities affected by the LRA violence that the Ugandan Amnesty Act was formulated and adopted. Substantively speaking, the requirement is that 'amnesties should not totally exclude the right of victims for remedy, particularly remedies taking the form of getting the truth and reparations. They should also facilitate a measure of reconciliation, with perpetrators acknowledging responsibility and victims getting a hearing about and receiving acknowledgment for the violations they suffered'.⁴⁰ It emerges from this that while the Commission considers that the use of conditional amnesties may not be incompatible with the African Charter, its endorsement of conditional amnesties is highly conditional and restrictive.

7 CONCLUSION

The great contribution of the *obiter dictum* of the African Commission in this case is in its recognition of the unavailability and even necessity of the use of amnesties in conditions of transition from conflict to peace. In so doing the Commission avoided a dogmatic wholesale rejection of the use of amnesties. The African Commission does not encourage amnesties. Instead, it frowns upon them. Yet, it does not totally ban them. It considers that an amnesty could be a necessary evil, the lesser of two evils that can be used as a last resort and as a necessary measure – but only under clearly defined conditions.

It thus emerges from the analysis of the *obiter dictum* of the African Commission that there are three considerations for determining the compatibility of amnesties with human rights obligations. These are:

- Are the amnesty measures necessary and proportionate to the objectives being pursued?
- Have victims and others affected by the conflict been given the opportunity to have a say in the formulation of the amnesty measures?
- Do the amnesty measures preclude any measure of redress or remedy for victims and accountability for perpetrators?

38 As above.

39 As above.

40 As above.

The African Commission's recognition of the possible use of amnesties in such contexts is dictated not only by practical considerations but also importantly by human rights considerations of the right to peace and preventing further violations. Most significantly, conditional amnesties as conceptualised by the Commission are endorsed without violating the requirements of accountability and the right of victims to a remedy. The Commission seems to suggest that the limitations that may arise from the use of conditional amnesties on the requirement of ensuring accountability and the right of victims to remedy are necessary and legitimate within the framework of the African Charter and the particular conditions prevailing in transitions from conflict to peace. Its introduction of the procedural and substantive requirements that should be met for conditional amnesties to be compatible with the African Charter represents a novel approach in international human rights law. This is an instance where an *obiter dictum* is used for not only clarifying an important legal issue but also establishing an authoritative legal opinion that expands the frontier of conventional view on such legal issue.

Silences that speak volumes: the significance of the African Court decision in *APDF and IHRDA v Mali* for women's human rights on the continent

Brenda K. Kombo*

ABSTRACT: The first judgment of the African Court on Human and Peoples' Rights interpreting the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol), *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*, sets an important precedent for women's human rights in Africa both through its explicit findings and through two key 'silences', or areas where the Court does not directly address Mali's arguments. Situated within a case concerning provisions of Mali's Persons and Family Code of 2011, these silences emphasise the applicability of women's human rights in diverse African socio-cultural contexts. This case commentary takes an interdisciplinary approach drawing on doctrinal legal research methodology and legal anthropology in order to situate the analysed case in a broader socio-cultural and historical context. Highlighting the significance of Family Code reform for women's status and attendant rights, the case discussion analyses the implications of the decision's silences. The first concerns Mali's argument that *force majeure* precludes legal wrongfulness and the second emerges from Mali's claim that it did not violate human rights but adapted the law to reflect 'social realities'. This case discussion contends that although elaboration of the Court's reasoning would have developed jurisprudence on *force majeure*, the Court properly refrained from directly addressing the latter argument, which rehashes debates about human rights universality versus cultural relativism. Nevertheless, the case serves as a powerful reminder of the need for further reflection on this enduring tension, and the case commentary accordingly makes recommendations for future research. Thus, even the Court's silences have potential to strengthen women's recourse for human rights violations in Africa because they implicitly reject the notion that either violent opposition to human rights norms or seemingly divergent socio-cultural realities justify derogation.

TITRE ET RÉSUMÉ EN FRANCAIS:

Des silences qui en disent long: l'effet de la décision de la Cour africaine dans l'affaire *APDF et IHRDA c. Mali* sur les droits des femmes en Afrique

RÉSUMÉ: Le premier arrêt de la Cour africaine des droits de l'homme et des peuples interprétant le Protocole de Maputo, l'affaire *Association pour le Progrès et la Défense des Droits des Femmes maliennes (APDF) et l'Institut des Droits de l'Homme et du Développement en Afrique (IHRDA) c. Mali* crée un précédent important pour les droits des femmes en Afrique à la fois grâce à ses constatations explicites et par

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deux « silences » clés, ou domaines dans lesquels la Cour n'aborde pas directement les arguments du Mali. Se trouvant dans une affaire concernant des dispositions du Code des personnes et de la famille du Mali de 2011, ces silences soulignent l'applicabilité des droits fondamentaux des femmes dans divers contextes socioculturels africains. Cette contribution adopte une approche interdisciplinaire s'appuyant sur l'approche juridique doctrinale et l'anthropologie juridique tout en situant l'affaire dans un contexte socioculturel et historique plus large. Après avoir souligné l'importance de la réforme du Code de la famille pour le statut et autres droits des femmes, la contribution analyse les conséquences attachées aux silences de la décision. Le premier concerne l'argument du Mali selon lequel un cas de force majeure exclut l'illicéité juridique et le second découle de l'affirmation du Mali selon laquelle il n'a pas violé les droits de l'homme, mais a adapté la loi aux « réalités sociales ». L'article postule qu'alors que le raisonnement de la Cour aurait pu développer la jurisprudence en matière de force majeure, la Cour s'est correctement abstenue de traiter directement de ce dernier argument, qui fait prendre un nouveau tournant aux débats sur l'universalité des droits de l'homme versus le relativisme culturel. Néanmoins, l'affaire rappelle de manière convaincante la nécessité de poursuivre la réflexion sur cette tension persistante et l'article propose en conséquence des recommandations pour les recherches futures. Ainsi, même les silences de la Cour pourraient renforcer le recours des femmes en matière de violations des droits humains en Afrique parce qu'ils rejettent implicitement la notion selon laquelle soit une opposition violente aux normes des droits de l'homme, soit des réalités socioculturelles apparemment divergentes justifient une dérogation.

KEY WORDS: African Court on Human and Peoples' Rights, derogation, *force majeure*, family law, Maputo Protocol, *APDFR and IHRDA v Mali*, women's rights, marriage

CONTENT:

1	Introduction.....	390
2	Background on family code reform in Mali and other African countries ..	392
3	Case summary	396
4	Two silences.....	397
4.1	Mali's argument that <i>force majeure</i> precludes legal wrongfulness.....	397
4.2	Mali's argument regarding adapting the law to 'socio-cultural realities'	405
5	Conclusion	412

1 INTRODUCTION

On 11 May 2018, the African Court on Human and Peoples' Rights (African Court or Court) issued its first decision interpreting the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) in the case of *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* (the *APDF and IHRDA* case). This landmark decision held that Mali's Persons and Family Code (Family Code) of 2011¹ violated provisions of the Maputo Protocol, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the African Charter on the Rights and Welfare of the Child (Children's Charter). Through this decision, which concerned sensitive issues about marriage and family life, the Court set an important precedent for women's human rights in Africa. However, it did this both through its explicit findings and through two key

1 Loi 2011-087 du 30 Décembre 2011 Portant Code des Personnes et de la Famille.

‘silences’, or junctures where the Court did not directly address the respondent state’s arguments. Linguists and other scholars posit that silence is not empty and neutral but has multiple meanings² and is closely bound with discourse.³ Thus, the silences in the case are communicative. While the article does not delve deeply into understanding the meanings of the silences as this would have necessitated direct engagement with the judges who drafted the decision, it briefly considers both what they might signal and whether the Court appropriately remained silent, while analysing in more detail some of the ideas that might alternatively have been directly articulated by the Court. Understanding these aspects of the decision as well as its significance requires going beyond the traditional confines of doctrinal legal research. As such, this case discussion takes an interdisciplinary approach that situates the case in a broader socio-cultural and historical context.

Following a brief background section on Family Code reform in Mali and other African countries and a brief summary of the *APDF and IHRDA* case, this commentary analyses the two major silences. The first concerns Mali’s argument that *force majeure* precluded legal wrongfulness, and the second emerges from Mali’s argument that far from violating human rights law, it simply adapted legislation to ‘social realities’.⁴ These silences have particular significance for women’s human rights because they pertain to derogation. Through its arguments, Mali sought to suspend some of its human rights obligations towards women based on protests that ensued after the National Assembly adopted the 2009 Family Code bill as well as Mali’s self-described efforts to ensure that the law remained in step with ‘social realities’. I argue that while the Court appropriately dismissed Mali’s *force majeure* argument, elaborating on its reasoning would have developed jurisprudence in this important area. Also, by only indirectly addressing Mali’s argument about ‘social realities’, the Court properly refrained from entering into the complex debate over universalism versus cultural relativism. Nevertheless, the case serves as a powerful reminder of the need for further academic and practical reflection on this tension, and accordingly make recommendations for future research. The Court’s response to these arguments had critical bearing on when states can justifiably limit women’s enjoyment of their human rights. While the Court did not directly respond to the arguments, it implicitly rejected them, thereby potentially strengthening women’s recourse for human rights violations.

2 See K Acheson ‘Silence as gesture: rethinking the nature of communicative silences’ (2008) 18 *Communication Theory* 535; M-L Achino-Loeb ‘Reflecting on silence and anthropology’ 30 March 2015 PoLAR Emergent Conversations <https://polarjournal.org/2015/03/30/emergent-conversations-part-2/> (accessed 5 July 2019).

3 M Foucault *The history of sexuality: Volume I: An introduction* trans R Hurley (1978).

4 *APDF & IHRDA v Mali*, (11 May 2018), Application 46/2016, para 67.

2 BACKGROUND ON FAMILY CODE REFORM IN MALI AND OTHER AFRICAN COUNTRIES

Since 2000, 23 French-speaking African countries have instituted Family Code reform in an effort to update legislation that is often rooted in the Napoleonic Code of 1804. New Family Codes have since been adopted in 11 of these countries,⁵ but reform is ongoing in 12 others.⁶ Although family law reform has been undertaken across the world since the onset of the twentieth century, it has often been fraught with contention, primarily due to the issues it raises concerning women's status and attendant rights as well as the influence of particular religious and cultural visions of the family. The process in Mali involved the adoption of two very different Bills by the National Assembly in the span of two years (2009 to 2011) and culminated in the enactment of the 2011 Family Code under consideration in the African Court case analysed here. While perhaps striking in its 'hyper-mediatization'⁷ and these divergent outcomes, Mali's experience is best understood within the broader context of family code reform in Francophone Africa.

In the period immediately after independence, many former French colonies fashioned their legislation after colonial texts.⁸ This meant that laws concerning the family were largely based on the Napoleonic Code, which placed married women under legal coverture.⁹ Article 213 of the Napoleonic Code, for example, stipulates: '[t]he husband owes protection to his wife, the wife obedience to her husband'.¹⁰ Other provisions in Chapters VI to VII of the Code provide that a husband chooses the place of residence (article 214) and must give consent for his wife to manage property (article 217). While a husband could divorce his wife based on adultery (article 229), she could only do so if he 'brought his concubine into their common residence' (article 230). Moreover, Title IX on 'Paternal power' grants the father exclusive control over children (article 373).

Seeking to eradicate these and other patriarchal provisions, women's organisations across Francophone Africa played a key role in

5 The Codes were adopted as follows: Mauritania (2001), Djibouti (2002), Morocco (2004), Benin (2004), Comoros (2005), Algeria (2005), Madagascar (legislation on marriage 2007), Mali (2011), Togo (2012), Democratic Republic of the Congo (2016), and Rwanda (2016).

6 Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Republic of Congo, Côte d'Ivoire, Gabon, Guinea, Niger, Senegal, and Tunisia.

7 O Koné 'La controverse autour du code des personnes et de la famille au Mali: enjeux et stratégies des acteurs' unpublished PhD thesis, Université de Montréal, 2015 2.

8 Koné (n 7) 14.

9 A Tunc 'Husband and wife under French law: past, present, future' (1956) 104 *University of Pennsylvania Law Review* 1064 at 1068; RB Rose 'Feminism, women and the French Revolution' (1995) 21 *Historical Reflections / Réflexions Historiques* 187 at 193-4.

10 *The Code Napoleon; or the French civil code* trans Barrister of the Inner Temple (1824).

reform efforts. Such efforts played out differently in various countries, but all featured concerns about the role of customary and religious norms and practices. In Chad¹¹ and Niger,¹² for example, draft legislation was received with strong disapproval, particularly from Islamic organisations who claimed that it failed to reflect Islamic tenets. In February 2011 hundreds of Muslim demonstrators in Niger publicly burned a copy of the draft code.¹³ To date, neither country has adopted a new family code.¹⁴ However, there are also counterexamples. In Benin, a provision on polygamy in the 2002 bill adopted by the National Assembly was invalidated by the Constitutional Court for contradicting constitutional gender equality principles.¹⁵ Also, the provisions promoting gender equality in Morocco's *Moudawana* or Family Code of 2004 place it 'among the most progressive in the Muslim world'.¹⁶

In Mali, the reform process formally began in 1998 as part of the PRODEJ¹⁷ project aimed at improving the functioning of the judiciary, with financial support from a range of partners including the World Bank, the United Nations Children's Fund, France, Canada, and the European Union.¹⁸ Gaining momentum from the growth of international feminism in the 1990s, the advent of multiparty elections in Mali, and support from Mali's donors, women's and other non-governmental organisations (NGOs) successfully called for reform of 1962 Code of Marriage and Guardianship and other legislation governing the family.¹⁹ The election in 1992 of President (Dr) Alpha Oumar Konaré whose government had 'a decidedly secularist and pro-Western orientation'²⁰ further contributed to this success, as did the deep personal commitment First Lady Adame Ba Konaré, a renowned historian, had to advancing women's human rights.²¹

- 11 Haut-Commissariat des Nations unies aux droits de l'homme 'Déclaration de fin de mission au Tchad du Groupe de Travail du Conseil des droits de l'homme sur la question de la discrimination à l'égard des femmes dans la législation et dans la pratique' 14 décembre 2017 <https://www.ohchr.org/FR/NewsEvents/Pages/DisplayNews.aspx?NewsID=22534&LangID=F> (accessed 7 July 2019).
- 12 Gabonéco 'Niger: Des centaines de Musulmans brûlent publiquement le projet de code de la famille, qu'ils qualifient de Satanique' 22 février 2011 <http://www.gaboneco.com/niger-des-centaines-de-musulmans-brulent-publiquement-le-projet-de-code-de-la.html> (accessed 25 July 2019).
- 13 As above.
- 14 Haut-Commissariat (n 11); Koné (n 7) 15.
- 15 M Hallward-Driemeier & T Hasan *Empowering women: Legal rights and economic opportunities in Africa* (2013) 93.
- 16 M N'Diaye *La réforme du droit de la famille: Une comparaison Sénégal-Maroc* (2016) 18 (my translation).
- 17 Programme décennal de développement de la justice.
- 18 Justice Mali, 'Rapport de la Table Ronde sur le PRODEJ' <http://justice.mali.org/table%20ronde.htm> (accessed 25 July 2019).
- 19 Loi 62-17 AN-RM du 3 Février 1962 portant Code du mariage et de la tutelle; B Soares 'Family law reform in Mali: Contentious debates and elusive outcomes' in M Badran (ed) *Gender and Islam in Africa: rights, sexuality, and law* (2011) 269-271 & 275-276; Koné (n 7) 20-21.
- 20 DE Schulz 'Political factions, ideological fictions: the controversy over family law reform in democratic Mali' (2003) 10 *Islamic Law and Society* 132 at 137.
- 21 Soares (n 19) 275.

From 1998, the government partnered with NGOs and international donors to organise public education campaigns²² and invited members of the public to share their views on the Family Code project at lively regional and national fora.²³ Over time, government officials and NGOs led the process while Islamic organisations were largely relegated to the background.²⁴ During consultations in late 2000, Muslims criticised the process as an attack on Islamic values by Western imperialism.²⁵ This opposition was significant given that over 90% of Mali's population practises Islam.²⁶ Nevertheless, by 2001, the Ministry for the Advancement of Women, Children and Families, MPFEF,²⁷ designated a committee of experts to draft the Family Code Bill.

In May 2002, right at the end of Konaré's second and final term, the draft was submitted to the Council of Ministers.²⁸ However, due to the ensuing wave of criticism, they did not present it to the National Assembly.²⁹ Following Amadou Toumani Touré's election as president in June 2002, the text languished in limbo for a few years, until the Ministry of Justice was charged with taking it up again.³⁰ Finally, in 2009, the National Assembly was presented with a revised version reminiscent of the 2002 text,³¹ which it passed by a large majority on 3 August 2009. Among other things, the text: recognised secular but not religious marriage, raised the marriage age to 18 for girls; removed the clause requiring a wife's obedience to her husband, provided for equal inheritance for men and women, granted natural children inheritance rights, and empowered women to be heads of the household upon divorce or their husband's death.³²

Rejecting this 2009 Bill as an aberration, Muslim groups organised a series of protests, with some individuals threatening to use violence if the president signed it into law.³³ The High Islamic Council, an organisation established by Konaré's administration in 2002 to promote the interests of the Muslim population, convened hundreds of

22 Soares (n 19) 276; Koné (n 7) 28.

23 As above; R De Jorio 'Between dialogue and contestation: gender, Islam, and the challenges of a Malian public sphere' (2009) 15 *The Journal of the Royal Anthropological Institute* S95 at S99.

24 Schulz (n 20) 160.

25 n 20, 133.

26 World Population Review 'Mali Population' 1 August 2019 <http://worldpopulationreview.com/countries/mali-population/> (accessed 13 August 2019).

27 Ministère de la promotion de la femme, de l'enfant, et de la famille.

28 Koné (n 7) 30.

29 As above.

30 Soares (n 19) 277; Koné (n 7) 30.

31 Soares (n 19) 285.

32 Mali, Defence on the Merits, *APDF & IHRDA* (24 November 2016) folio page 000541 at 000538; De Jorio (n 23) S98.

33 The New Humanitarian 'Threats of violence greet new family code' 11 August 2009 <http://www.thenewhumanitarian.org/report/85676/mali-threats-violence-greet-new-family-code> (accessed 26 July 2019); IRIN 'Mali: Back to the drawing board for new family code' 1 September 2009 <https://www.refworld.org/docid/4aa0c1941a.html> (accessed 26 July 2019).

Muslim clergy and village leaders in protest at Bamako's largest mosque on 9 August 2009³⁴ and then about 50,000 people in a meeting at a Bamako stadium on 22 August.³⁵ Other protests were organised across the country.³⁶ During these protests, the Secretary of the High Islamic Council, is reported to have said:³⁷

This code is a shame, treason [for Muslims] ... We are not against the spirit of the code, but we want a code appropriate for Mali that is adapted to its societal values. We will fight with all our resources so that this code is not promulgated or enacted.

Moreover, he criticised donors' role, stating, 'We do not want a code imported from donors, notably the European Union, which conditions its aid on certain social reforms, including the adoption of this code'.³⁸

In late August 2009, Touré consulted with members of the National Assembly, representatives of various state institutions, and heads of Muslim groups.³⁹ He subsequently announced a second reading of the Bill in a national address on 26 August in which he said (my translation):⁴⁰

Finally, it is necessary to remember that the Code of Personal status and the Family is special, because it governs three key domains: faith, tradition, and intimate life ... The repeated failures in the process of rereading the aforementioned Code sufficiently prove that changes in society cannot be decreed, because it is delicate and difficult.

Thereafter, Islamic organisations were invited to play a more active role in the revision of the Bill.⁴¹ When the new Code was promulgated on 30 December 2011,⁴² *Jeune Afrique* claimed it had 'the Islamists' benediction'.⁴³ However, a group of Malian civil society organisations viewed things differently, telling journalists that (my translation), 'Under pressure from Islamists, several articles guaranteeing women

34 The New Humanitarian (n 33).

35 Islam Pluriel 'Code de la famille contesté au Mali: le Président débute des consultations' 26 August 2009 <http://islam-pluriel.net/code-de-la-famille-con-teste-au-mali-le-president-debute-des-consultations/> (accessed 25 July 2019).

36 Koné (n 7) 36.

37 The New Humanitarian (n 33).

38 As above.

39 Islam Pluriel (n 35).

40 Il faut enfin retenir que ce Code des Personnes et de la Famille est particulier, parce que régissant trois domaines clés: La Foi, La Tradition, Et la Vie intime ... Les échecs répétés dans le cadre de la relecture dudit Code prouvent à suffisance que les changements de société ne se décrètent pas, car délicats et difficiles.

Ouestaf 'Discours du président malien annonçant le renvoi "en deuxième lecture" du nouveau code de la famille' (Texte intégral) 27 August 2009 <https://ouestaf.com/discours-du-president-malien-annoncant-le-renvoi-en-deuxieme-lecture-du-nouveau-code-de-la-famille-texte-integral/> (accessed 26 July 2019).

41 Koné (n 7) 196.

42 APDF & IHRDA (n 4) para 7.

43 B Ahmed 'Mali: un nouveau code de famille, avec la bénédiction des islamistes' 5 December 2011 <https://www.jeuneafrique.com/178253/politique/mali-un-nouveau-code-de-la-famille-avec-la-b-n-diction-des-islamistes/> (accessed 26 July 2019).

and children's rights were removed'.⁴⁴ The representative of one women's association decried the Code as having 'set [Mali] back 50 years'.⁴⁵

Unfortunately, the African Court's decision did little to settle the polarised debates. While a group of civil society organisations including the APDF released a press statement celebrating the judgment,⁴⁶ the Collective of Muslim Associations strongly condemned it and vowed to continue to fight efforts to impose a Code 'made in Europe'.⁴⁷ Political unrest that has been ongoing in Mali since 2012 presents an additional challenge to the government initiating further Family Code reform.⁴⁸ Nevertheless, the *APDF and IHRDA* case remains significant not just for Mali, but for the whole African continent.

3 CASE SUMMARY

In July 2016, the Malian APDF and a pan-African IHRDA jointly submitted an application to the African Court challenging provisions of the 2011 Malian Family Code. The organisations alleged that the Code violated the Maputo Protocol, CEDAW, and Children's Charter – all of which were ratified by Mali. More specifically, the applicants asserted that the Family Code violated the minimum marriage age and the right of consent to marriage for women and girls; inheritance rights for women, girls, and natural⁴⁹ children; and Mali's obligation to eliminate customs and practices that are harmful for women and children.

Rejecting Mali's arguments against jurisdiction and admissibility, the Court heard the case and unanimously held that the respondent state had violated the aforementioned instruments. First, the Court found that the Family Code did not comply with the female minimum age of marriage of 18, in keeping with article 6(b) of the Maputo Protocol and articles 2, 4(1), and 21 of the Children's Charter. As such, the Court held that Mali not only violated the marriage age provisions, but also violated the right to non-discrimination. Second, agreeing with

44 'Sous la pression des islamistes, plusieurs articles garantissant les droits des femmes et des enfants ont été supprimés.' ST Diarra 'Les femmes indignées par le nouveau Code de la famille' Inter Press Service News Agency 19 December 2011 <http://ipsnews.net/francais/2011/12/19/droits-mali-les-femmes-indignees-par-le-nouveau-code-de-la-famille/> (accessed 25 July 2019).

45 ST Diarra, 'Women's rights in Mali "set back 50 years" by new "Family Code" law' *The Guardian* 1 May 2012 <https://www.theguardian.com/global-development/2012/may/01/womens-rights-mali-50-years> (accessed 24 July 2019).

46 AK Diakité 'Jugement de la Cour Africaine condamnant le Mali' 11 May 2018 <http://www.etatcivil.pw/jugement-de-la-cour-africaine-condamnant-le-mali/> (accessed 26 June 2019).

47 L'Indicateur du Renouveau 'Cour africaine des droits de l'homme: L'APDF obtient la révision du Code de la Famille, le Collectif des associations musulmanes riposte' 1 June 2018 <https://www.maliweb.net/societe/cour-africaine-des-droits-de-lhomme-l-apdf-obtient-la-revision-du-code-de-la-famille-le-collectif-des-associations-musulmanes-riposte-2760068.html> (accessed 26 June 2019).

48 See, e.g., International Crisis Group 'Mali' <https://www.crisisgroup.org/africa/sahel/mali> (accessed 13 August 2019).

49 This is used to denote children born to parents who are not legally married.

the applicants, the Court held that the differing provisions applicable to religious ministers and civil registry officials within the Family Code left women and girls at risk of being married without their consent in violation of article 6(a) of the Maputo Protocol and article 16(1)(b) of CEDAW. Third, the Court held that the disparate provisions of religious and customary law regarding inheritance also violated article 21(1) of the Maputo Protocol as well as articles 3 and 4 of the Children's Charter. Finally, the Court held that through its adoption of the 2011 Family Code and failure to address early marriage and inheritance issues, Mali failed in its obligations to eradicate harmful practices or traditions, in violation of articles 2(2) of the Maputo Protocol, 1(3) and 21 of the Children's Charter, and 5(a) of CEDAW. Based on these determinations, the Court ordered Mali to bring its Code in line with its human rights obligations; address the violations; provide 'information, teaching, education and sensitisation' as required under article 25 of the Charter; and submit a report within two years of the judgment.

4 TWO SILENCES

The Court's explicit findings must be considered along with its silence regarding two arguments advanced by Mali. The commentary contends that while the Court should have responded to Mali's argument regarding *force majeure*, it appropriately declined to engage with Mali's argument about the law reflecting social realities. The latter argument continued the debate about the universality of human rights versus cultural relativism which, though deeply relevant, was beyond the scope of the decision.

Through both silences, Mali sought to justify derogation from women's human rights norms. Regarding *force majeure*, it sought to temporarily suspend certain rights based on the 2009 protests. However, through its cultural relativist argument, Mali seemed to seek a more indefinite suspension based on the alleged need to keep the law in line with social realities. The silences and their potential implications are considered in detail below.

4.1 Mali's argument that *force majeure* precludes legal wrongfulness

In response to the alleged violation of the minimum marriage age, Mali contended that the Family Code Bill adopted by the National Assembly on 3 August 2009 observed the state's human rights obligations but 'could not be promulgated' due to *force majeure*:⁵⁰

... a massive protest movement from Islamist circles against the Code halted the process ... But it is not just the pressure from Islamic organizations. Mali was faced with serious threat of social divide, the nation being torn apart and outbreak of violence, the outcome of which could be fatal for peace, harmony and social

cohesion. The mobilization of religious forces reached such a level that no act of resistance could contain it.

Consequently, the government involved Islamic organisations in a prolonged reform process resulting in the promulgation of the 2011 Family Code.⁵¹

Through its invocation of *force majeure*, Mali sought to justify its non-compliance with various provisions of the Maputo Protocol, CEDAW, and the Children's Charter. Although the Court did not address this defence, it agreed with the applicants who reiterated Mali's obligation to comply with these ratified instruments.⁵² The Court's silence regarding *force majeure* can only reasonably be interpreted as implicit dismissal of Mali's argument. The dismissal is supported by relevant sources of international law, but nevertheless presents a missed opportunity for the Court to further develop jurisprudence on derogation from human rights norms in the African context.

4.1.1 Brief background on *force majeure*

Force majeure has historically been recognised as a 'general principle of law'⁵³ with roots in Roman law and the maxim *ad impossibilia nemo tenetur*⁵⁴ or 'nobody is held to the impossible.'⁵⁵ At the international level, *force majeure* was codified in the International Law Commission's 2001 Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles).⁵⁶ The fifth Special Rapporteur for the draft articles, James Crawford describes the principle as a 'shield against an otherwise well-founded claim for the breach of an international obligation'.⁵⁷ In other words, *force majeure* operates as a temporary justification, excuse, or defence for what would otherwise be considered an internationally wrongful act.⁵⁸

4.1.2 Elements of *force majeure* and relevant decisions

Article 23(1) of the ILC Articles provides:

51 *APDF & IHRDA* (n 4) para 63.

52 n 4, para 68.

53 'Force Majeure' and 'Fortuitous Event' as Circumstances Precluding Wrongfulness: Survey of State Practice, International Judicial Decisions and Doctrine, International Law Commission Secretariat (27 June 1977) UN Doc A/CN.4/315 (1977) 61.

54 S Szurek 'Circumstances precluding wrongfulness in the ILC articles on state responsibility: *force majeure*' in J Crawford *et al* (eds) *The law of international responsibility* (2010) 375.

55 AX Fellmeth & M Horwitz *Guide to Latin in international law* (2011) <https://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-113> (accessed 15 July 2019).

56 Responsibility of States for Internationally Wrongful Acts, General Assembly (28 January 2002) UN Doc A/RES/56/83 (2002).

57 'Draft articles on responsibility of states for internationally wrongful acts' 2001 *Yearbook of the International Law Commission* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26 at 71.

58 Survey (n 53) 67; Draft articles (n 57).

The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

Force majeure may be a result of both natural and man-made situations.⁵⁹ However, it will not be recognised where: (1) doing so would violate a peremptory norm,⁶⁰ *jus cogens*; (2) the state invoking it has played a role in creating *force majeure* 'either alone or in combination with other factors',⁶¹ and (3) '[t]he State has assumed the risk of that situation occurring'.⁶² Moreover, article 27(a) provides a limited duration for a *force majeure* plea. As soon as the extraordinary situation ends, the justification can no longer apply.

There is a high burden of proof placed on the state invoking the defence and a low rate of success.⁶³ Federica Paddeu suggests that

[e]ven before this narrow codification, tribunals were sceptical of claims of *force majeure* and have, consequently, treated the plea with suspicion ... In view of its current stringent requirements, a plea of *force majeure* will be upheld only very rarely.⁶⁴

Even if the plea is successful, under article 27(b) of the ILC Articles, the invoking state might not be relieved from a duty to pay compensation for 'material loss' resulting from its act or omission.

Paddeu's assertion is supported by international case-law. Pleas of economic impossibility of performance are generally rejected because they fail to meet the material impossibility element of *force majeure*.⁶⁵ Even beyond economic considerations, in the *Rainbow Warrior Affair*, the Tribunal dismissed France's argument that *force majeure* (specifically, sickness and pregnancy) excused its failure to ensure that two French security agents who had bombed a civilian boat in Auckland Harbour remained on a remote island for three years as stipulated in its agreement with New Zealand.⁶⁶ Outside the international arbitral context, in *European Commission v Italian Republic*, the European Court of Justice held that Italy's failure to properly manage waste in the Campania region could not be excused by *force majeure*, which Italy argued resulted from 'criminal activity' in the region, public contractors' non-performance of their obligations, and local protest

59 Survey (n 53) 66.

60 ILC art 26, which reads:

Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.

61 ILC art 23(2)(a).

62 ILC art 23(2)(b).

63 See MN Shaw *International law* (2008) 796; C Binder 'Stability and change in times of fragmentation: the limits of *pacta sunt servanda* revisited' (2012) 25 *Leiden Journal of International Law* 909 at 917.

64 F Paddeu 'A genealogy of *force majeure* in international law' (2012) 82 *British Handbook of International Law* 381 at 494.

65 Draft articles (n 57) 76; Szurek (n 54) 479-480.

66 (30 April 1990) RIAA Vol. XX 215 at 253.

against setting up landfills.⁶⁷ The European Court of Human Rights later took notice of this determination in a case alleging that this waste mismanagement in Naples and other towns violated the European Convention on Human Rights (European Convention).⁶⁸ Only the decisions of the Iran-US Claims Tribunal seem to contradict this general trend of unsuccessful *force majeure* pleas.⁶⁹ There, the plea was often accepted with regard to the Iranian Revolution.⁷⁰

4.1.3 Derogation

In the African human rights context, an additional consideration must be made regarding *force majeure*, namely, the African Charter's lack of a derogation clause. This is unique, as other human rights instruments including the International Covenant on Civil and Political Rights (ICCPR),⁷¹ American Convention on Human Rights,⁷² and European Convention⁷³ contain derogation clauses while also delineating rights from which no derogation is allowed. Such clauses allow the state to temporarily suspend the exercise of certain rights during a public emergency while nonetheless adhering to various reporting and monitoring requirements.⁷⁴ Derogation does not provide states with a *carte blanche* to ignore human rights; rather, as Laurent Sermet contends, it must satisfy the conditions of 'necessity, proportionality, inviolability and temporality'.⁷⁵

In its individual communications, the African Commission on Human and Peoples' Rights (the Commission) has interpreted the lack of a derogation clause to mean that derogation from human rights obligations is not permitted even during emergencies.⁷⁶ In *Commission Nationale des Droits de l'Homme et des Libertés v Chad (Commission Nationale)*, the Commission held:⁷⁷

The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.

67 ECJ (4 March 2010) para 80.

68 *Case of Di Sarno and Others v Italy* ECHR (10 April 2012) para 111.

69 Binder (n 63) 920. She references GH Aldrich *The jurisprudence of the Iran-United States Claims Tribunal* (1996).

70 As above.

71 See article 4(1).

72 See article 27(1).

73 See article 15(1).

74 Binder (n 63) 927, 930.

75 'The absence of a derogation clause from the African Charter on Human and Peoples' Rights: a critical discussion' (2007) 7 *African Human Rights Journal* 142 at 150.

76 C Heyns 'The African regional human rights system: in need of reform?' (2001) 1 *African Human Rights Law Journal* 155 at 161-162; MA Tolera 'Absence of a derogation Clause under the African Charter and the Position of the African Commission' (2014) 4 *Bahir Dar University Journal of Law* 229 at 250-256.

77 (2000) AHRLR 66 (ACHPR 1995) para 21.

The Commission has since reiterated this position in several communications including *Media Rights Agenda v Nigeria*,⁷⁸ *Amnesty International and Others v Sudan*⁷⁹ (*Amnesty International*), *Article 19 v Eritrea*,⁸⁰ and *Sudan Human Rights Organisation and Another v Sudan*.⁸¹ However, Frans Viljoen posits that the Commission's argument was more nuanced in *Constitutional Rights Project and Others v Nigeria*,⁸² where it treated article 27(2) of the Charter as a derogation clause even though it is generally understood to be a limitations clause.⁸³ This would justify derogation 'with due regard to the rights of others, collective security, morality and common interest'.⁸⁴ Rejecting such conflation of limitation and derogation, Fatsah Ougurgouz argues that the Charter's missing derogation clause means that general international law must prevail.⁸⁵ If this is not already sufficiently perplexing, Melkamu Aboma Tolera contends that the Commission articulates a different position in state reports where it 'tends to regulate the behaviour of state parties during a declared state of emergency'.⁸⁶

Clearly, the interpretation of the absence of a derogation clause within the African Charter is unsettled. Some scholarship regards it as a 'flaw' or 'defect' that – in stark contradiction to the ICCPR and most African constitutions – puts human rights in jeopardy through its unrealistic expectation that states' human rights obligations must be fully observed even during emergency situations.⁸⁷ Others celebrate the omission as an innovation in human rights⁸⁸ or, at a minimum, appropriate recognition of the potential for abuse of such a clause in the African context⁸⁹ and an opportunity to further advance human rights.⁹⁰

What, then, does this mean for a plea of *force majeure*? Unless article 27(2) is taken as a substitute derogation clause, the African Commission's interpretation seems to suggest that all rights within the Charter are non-derogable. Consequently, even *force majeure* would not justify derogation.

78 (2000) AHRLR 262 (ACHPR 2000) para 73.

79 (2000) AHRLR 297 (ACHPR 1999) para 42.

80 (2007) AHRLR 73 (ACHPR 2007) para 87.

81 (2009) AHRLR 153 (ACHPR 2009) paras 165-167.

82 (2000) AHRLR 227 (ACHPR 1999) para 41.

83 *International human rights law in Africa* (2012) 334; see also Heyns (n 76) 161.

84 Charter, art 27(2).

85 *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* trans Hal Sutcliffe (2003) 434-437.

86 Tolera (n 76) 258.

87 See Heyns (n 76) 161-162; Tolera (n 76) 263-269.

88 AJ Ali 'Derogation from constitutional rights and its implication under the African Charter on Human and Peoples' Rights' (2013) 17 *Law Democracy and Development* 79.

89 Sermet (n 75) 161; Viljoen (n 83) 334.

90 Sermet (n 75) 161.

4.1.4 Analysis of Mali's claim

As indicated above, Mali contended that *force majeure* prevented the promulgation of the 2009 Family Code Bill which was subsequently submitted for a second reading 'under pressure and for fear of social divide'.⁹¹ Although Mali did not elaborate on its plea of *force majeure*, further analysis is warranted to determine whether the Court properly rejected the plea.

Can Mali invoke force majeure to derogate from its African human rights obligations?

The applicants alleged violations of the Maputo Protocol, CEDAW, and Children's Charter, which all lack derogation clauses. Relying on the Commission's communications could render further analysis moot, as this absence could be interpreted as prohibiting derogation from any of the obligations elaborated in these instruments, even during emergency situations. The applicants advanced this argument while referring to the *Commission Nationale*⁹² and *Amnesty International*⁹³ communications before the African Commission to argue that the protests could not justify derogation from human rights obligations.⁹⁴ However, under its contentious jurisdiction, the Court could establish a basis for derogation.⁹⁵

Did Mali's act conform with jus cogens?

Article 26 of the ILC articles suggests that the analysis must start with compliance with peremptory norms because an act that violates such norms cannot be justified even by circumstances precluding wrongfulness. Peremptory norms include: 'the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination'.⁹⁶

Even if it were found to violate human rights, Mali's passage of the 2011 Family Code did not violate peremptory norms. Though an appropriate candidate for *jus cogens*,⁹⁷ gender equality is not recognised as such.⁹⁸

91 n 32, 000533.

92 n 77.

93 n 79.

94 APDF & IHRDA Réplique à la réponse de la République du Mali (1 Février 2017) 000511 at 000508.

95 Heyns (n 76) 162; Tolera (n 76) 278-280.

96 Draft articles (n 57) 85.

97 L Askari 'Girls' rights under international law: an argument for establishing gender equality as a *jus cogens*' (1998) 8 *South California Review of Law and Women's Studies* 3.

98 H Charlesworth & C Chinkin 'The gender of *jus cogens*' (1993) 15 *Human Rights Quarterly* 63 at 70.

Did the protests against the Family Code constitute an ‘irresistible force’ or ‘unforeseen event’ beyond Mali’s control?

Force majeure requires state conduct that is ‘involuntary or at least involves no element of free choice’.⁹⁹ As Paddeu elaborates, ‘... the situation of *force majeure* nullifies the freedom of the state to comply with its international obligation: the choice of performance is taken from it’.¹⁰⁰ This is the key feature that distinguishes *force majeure* from distress and necessity.¹⁰¹

Mali would likely face some difficulty proving these elements. The irresistibility requirement means ‘the State concerned has no real possibility of escaping its effects’.¹⁰² As Paddeu indicates, the classic example of an irresistible force is ‘a natural force, which dragged or forced a vessel to enter a foreign port’.¹⁰³ Situations like this meet the requirement of ‘a constraint which the State was unable to avoid or oppose by its own means’.¹⁰⁴

Although *Autopista Concesionada de Venezuela v Bolivarian Republic of Venezuela*¹⁰⁵ (the *Aucoven* arbitration) has limited relevance because it was primarily governed by Venezuelan law,¹⁰⁶ the arbitration similarly involved protests that Venezuela characterised as *force majeure*. Venezuela argued that these protests had prevented it from raising highway tolls as stipulated in its agreement with *Aucoven*.¹⁰⁷ Venezuela nevertheless conceded that ‘the civil protest was not irresistible in the sense that it could not have been mastered by the use of force’.¹⁰⁸ Likewise, Mali would have to demonstrate that it lacked the means to prevent or stop the protests.

Alternatively, Mali might have tried to argue that the protests were ‘unforeseen.’ However, Giulia Pecorella points out the difficulty of such an argument in light of the respondent state’s characterisation of the resistance to the 2009 reforms as reflective of its ‘socio-cultural

99 Draft articles (n 57) 76.

100 Paddeu (n 64) 466.

101 Draft articles (n 57) 76.

102 As above.

103 Paddeu (n 64) 405.

104 Draft articles (n 57) 76.

105 ICSID Case No ARB/00/5, Award (23 September 2003).

106 n 105, para 105.

107 n 105, paras 32-39.

108 n 105, para 124.

realities'.¹⁰⁹ Moreover, as discussed above, Islamic groups had voiced their opposition to the reforms as early as 2000.

Did the protests make it materially impossible for Mali to perform its obligations?

Impossibility may result from natural or human activity¹¹⁰ but has a high threshold: '*Force majeure* does not include circumstances in which performance of an obligation has become more difficult, for example due to some political or economic crisis'.¹¹¹ Mali would again face difficulty because, as the tribunal held in *Rainbow Warrior*,

the test of [*force majeure*'s] applicability is of absolute and material impossibility, and ... a circumstance rendering performance more difficult or burdensome does not constitute a case of *force majeure*.¹¹²

While the protests against the 2009 Family Code bill clearly made it 'more difficult' and 'burdensome' for Mali to respect its human rights obligations, it would need additional evidence to support a claim of material impossibility.

Were the protests attributable to Mali's conduct?

Under the ILC articles, *force majeure* cannot apply where the state assumed the risk of the situation or where it is complicit in bringing it about.¹¹³ Mali did not assume the risk. Although there is no requirement that such an assumption be in writing, it must be 'clear',¹¹⁴ which is not the case here. Regarding complicity, *force majeure* does not 'cover situations brought about by the neglect or default of the State concerned'.¹¹⁵

The applicants argued that protests against the Code were evidence that Mali failed to fulfil its obligations to change socio-cultural norms and practices to the benefit of women and children through education and other measures under article 2(2) of the Maputo Protocol and 1(3)

109 'A commentary on the African Court's decision in the case APDF and IHRDA v Mali: why socio-cultural endemic factors of a society could never support arguments based on force majeure' International Law Blog 14 January 2019 <https://internationallaw.blog/2019/01/14/a-commentary-on-the-african-courts-decision-in-the-case-apdf-and-ihrda-v-republic-of-mali-why-socio-cultural-endemic-factors-of-a-society-could-never-support-arguments-based-on-force-majeure/> (accessed 20 July 2019).

110 The Draft articles provide the following examples: 'stress of weather which may divert State aircraft into the territory of another State, earthquakes, floods or drought', 'loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State' (n 57 & 76).

111 As above.

112 n 66, para 77.

113 See Draft articles (n 57) 78.

114 'Second Report on State Responsibility, by Mr. James Crawford, Special Rapporteur' 1999 *Yearbook* UN Doc A/CN.4498 and Add. 1-4 3 at 67.

115 Draft articles (n 57) 76-77.

of the Children's Charter.¹¹⁶ This could be taken as 'neglect' contributing to the situation and, thereby, bar a *force majeure* plea.

Another consideration: timeliness

As discussed above, article 26 places a time limit on *force majeure* pleas. This was emphasised in *European Commission v Italy* where the Court found as follows:¹¹⁷

Moreover, where it is possible to attribute an act to *force majeure*, the effects of that attribution can only last a certain time, namely the time which is in fact needed in order for an administration exercising a normal degree of diligence to put an end to the crisis which has arisen for reasons outside its control.

Protests over the proposed Family Code bill erupted in 2009 and the review process continued until the Family Code was adopted in 2011. Assuming Mali met the elements for a *force majeure* plea, which is questionable in light of the above, this plea might have succeeded while the crisis was ongoing but was unlikely to be tenable until 26 July 2016, when APDF and IHRDA filed the application.

4.1.5 Assessment of the Court's implicit rejection of Mali's *force majeure* argument

Mali's plea of *force majeure* faced many hurdles, with the key one being whether *force majeure* qualifies as an excuse for derogation under the human rights instruments in question. Although the Court appropriately dismissed the plea, elaboration of its reasoning would have been beneficial for the development of jurisprudence in this important but unsettled area concerning derogation from human rights obligations. Moreover, it would have provided additional clarity on whether there are any women's human rights obligations from which no derogation is permitted.

4.2 Mali's argument regarding adapting the law to 'socio-cultural realities'

The second key silence in this case emerges in Mali's defence to the alleged violation of the minimum marriage age. Mali asserted that there was no such violation; rather, the law was adjusted to reflect 'socio-cultural realities'. Mali informed the Court:¹¹⁸

... there is no point in passing legislation which will never be applied or hardly applied. The law must be in harmony with socio-cultural realities. There is no point in creating a gap between the two ... Therefore, the issue is not that of a violation of international obligations or the perpetuation of practices that are 'to be discouraged', but an adaptation of the said commitment to social realities.

116 Réplique (n 94) 000508.

117 *European Commission* (n 67) para 48.

118 Defence on the Merits (n 32) 000536-000535.

The Court only indirectly responded to this assertion through reference to state obligations under the Maputo Protocol and Children's Charter to take action towards eradicating harmful practices and customs as well as to put in place measures to ensure a minimum marriage age of 18.¹¹⁹ Later, in its finding on '[t]he alleged violation of the obligation to eliminate practices or traditions harmful towards women and children', the Court alluded to article 2(2) of the Protocol and similar provisions in CEDAW and the Children's Charter¹²⁰ under which states must

modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men.

Thus, while Mali sought to keep the law in step with contemporary 'socio-cultural realities', the Court emphasised its obligation to take steps towards changing such realities in order to advance the rights of women and children.

As described earlier, Mali's position echoed the one articulated by opponents of the 2009 Bill who criticised it for imposing non-Islamic and non-Malian values on Mali's people. The former president of the High Islamic Council, Imam Mahmoud Dicko, decried the reforms as 'socio-cultural mimicry [*mimétisme socioculturel*] that drains the reference points for our [Muslim] identity'.¹²¹ Similarly, in a documentary on the Family Code which aired on Al Jazeera in 2010, Hadja Safiatou Dembele, the president of the National Union of Muslim Women's Associations, said, 'Muslims are not against the Code. What we want is a Code that is adaptable to our customs, traditions and religion.'¹²²

Although this position was not articulated as such, it can be interpreted as an argument for cultural relativism. The respondent state, and individuals referenced above, were claiming that the human rights in question in the Family Code reform process did not apply universally because socio-cultural particularities in Mali – including religion – meant that a different set of norms took precedence. Thus, while Mali's argument cannot be considered a traditional legal defence, it situated the controversy within one of the most polarising debates in the human rights field. Some scholars described the debate as 'overdrawn'¹²³ and in her 2005 book, Fareda Banda wrote that she was 'not sure that there is much more to be said that has not already been

119 *APDF v IHRDA* (n 4) paras 73-75.

120 Under art 21(1) of the Children's Charter, state parties must 'take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child'.

121 Soares (n 19) 279.

122 R Stewart 'Family Code' Witness, Al Jazeera 12 Nov 2010 <https://www.aljazeera.com/programmes/witness/2010/09/201095141841631119.html> (accessed 6 August 2019).

123 UF Dahre 'Searching for middle ground: anthropologists and the debate on the universalism and the cultural relativism of human rights' (2017) 21 *International Journal of Human Rights* 611 at 612.

written on the matter'.¹²⁴ However, Mali's invocation of this debate attests to its continued relevance.

4.2.1 The great human rights' debate: universality versus cultural relativism

The debate over whether or not cultural relativism forecloses the universality of human rights is important because, as Mark Goodale suggests, the debate is really about the legitimacy of human rights.¹²⁵ Interestingly, although the 1993 Vienna World Conference on Human Rights sought to promote human rights across the globe, the Vienna Declaration and Programme of Action adopted at the conference highlighted the tension between universality and cultural relativism. Paragraph 5 of the Declaration states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

This tension was even more strongly articulated by the American Anthropological Association (AAA)'s statement on human rights¹²⁶ submitted by the AAA's Executive Board in June 1947 to the UN Commission on Human Rights (UN Commission),¹²⁷ which was drafting the Universal Declaration on Human Rights (Universal Declaration) at the time. The statement rejected the Universal Declaration as a document that imperially 'imposed'¹²⁸ Western values in the face of empirical evidence of the diversity of moral values across the globe, all of which deserved respect. Moreover, the statement criticised the Universal Declaration's focus on individuals without taking into account the significance of social groups.

A shift in the discipline and, perhaps most importantly, anthropologists' commitment to supporting indigenous groups, contributed to the publication of a new statement adopted by the AAA's membership in June 1999.¹²⁹ Although the statement still emphasised individual's and group's 'generic right to realize their capacity for culture',¹³⁰ it embraced human rights principles as reflected in the Universal Declaration and other instruments, while leaving space for a

124 F Banda *Women, law and human rights: an African perspective* (2005) 247.

125 M Goodale 'The myth of universality: the UNESCO "Philosophers' Committee" and the making of human rights' (2018) 43 *Law and Social Inquiry* 596 at 598.

126 American Anthropological Association '1947 Statement on human rights' 24 June 1947 <http://humanrights.americananthro.org/1947-statement-on-human-rights/> (accessed 7 August 2019).

127 As above.

128 As above

129 American Anthropological Association '1999 Statement on human rights' June 1999 <http://humanrights.americananthro.org/1999-statement-on-human-rights/> (accessed 7 August 2019).

130 As above.

vision of human rights that transcended them. Unlike the 1947 Statement which essentially signalled anthropology's disengagement with human rights, this new statement urged anthropologists to contribute to the study of the field.¹³¹

4.2.2 Reservations as a cultural relativist tool

Although reservations are a key modality through which states 'negotiate' the tension between universality and cultural relativism,¹³² Mali did not opt for this route. By entering reservations to treaties, states 'exclude or modify' the application of certain treaty provisions,¹³³ as long as the reservations meet conditions elaborated in the treaty or, where relevant, in article 19 of the Vienna Convention.¹³⁴ Some reservations can be read as the rejection of universal applicability of a treaty provision and insistence that certain domestic particularities be taken into consideration. Hence, Universal Rights Groups characterises reservations as 'an invaluable barometer of the universality of human rights'.¹³⁵

The Maputo Protocol and Children's Charter lack specific provisions on reservations, which are consequently governed by the Vienna Convention. Echoing the Vienna Convention, article 28(2) of CEDAW provides that '[a] reservation incompatible with the object and purpose of the present Convention shall not be permitted'. Observing these conditions, Mali might have placed reservations on some provisions in order to assert socio-culturally based prerogatives.

However, Mali ratified the Maputo Protocol,¹³⁶ CEDAW,¹³⁷ and

131 As above.

132 C Powell 'Introduction: locating culture, identity, and human rights symposium in celebration of the fiftieth anniversary of the Universal Declaration of Human Rights: introduction' (1998) 30 *Columbia Human Rights Law Review* 201 at 217.

133 Vienna Convention, art 2(1)(d); ILC 'Guide on practice on reservations to treaties' (2011) *Yearbook of the International Law Commission* Part 2 1.1(1).

134 It reads: A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) The reservation is prohibited by the treaty; (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

135 B Çali & M Montoya 'The march of universality? Religion-based reservations to the core UN treaties and what they tell us about human rights and universality in the 21st century' Universal Rights Group May 2017 <https://www.universal-rights.org/urg-policy-reports/march-universality-religion-based-reservations-core-un-human-rights-treaties-tell-us-human-rights-religion-universality-21st-century/> (accessed 5 July 2019) 13.

136 L Asuagbor 'Status of implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 18 March 2016 <https://reliefweb.int/sites/reliefweb.int/files/resources/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf> (accessed 7 August 2019).

137 UN Women 'Reservations to CEDAW' <https://www.un.org/womenwatch/daw/cedaw/reservations.htm> (accessed 7 August 2019).

Children's Charter¹³⁸ without any reservations. This is interesting in light of the fact that CEDAW, and particularly its article 16 on marriage and the family, has the largest number of reservations based on religion among all the core human rights treaties.¹³⁹ Instead of using reservations to carve out exceptions, Mali employed a cultural relativist argument in its defense at the African Court.

4.2.3 Searching for 'middle ground'

Unfortunately, reservations do not represent a solution to the challenge of establishing the universality of human rights. This debate continued even during anthropologists' 'exile'¹⁴⁰ from it. Issuing what might be taken as a call to action, Ronald Cohen wrote in 1989:¹⁴¹

Given the urgency of such issues, it is at best irrelevant, or worse even mischievous, to assert and defend simplistic polarities of relativism versus universal moral imperatives. What is desperately needed—and anthropology should be central to this quest—is a search for some middle ground.

Although even a cursory description of the key efforts to reconcile universalism and cultural relativism is beyond the scope of this article, it will highlight three of the more pragmatic efforts to go beyond this binary.

Perhaps the most well-known efforts pertaining to Islam and human rights have been undertaken by Abdullahi An-Na'im who begins with a commitment to the universality of human rights within a project seeking to establish their 'cultural legitimacy', particularly in Islamic contexts.¹⁴² According to An-Na'im, once rights are 'in conformity with recognized principles or accepted rules and standards of a given culture',¹⁴³ they will be respected and no longer viewed as foreign impositions.¹⁴⁴ He thus draws on the work of Alison Dundes Renteln who emphasises that moral diversity does not foreclose the possibility of cross-cultural universality and thereby calls for the use of empirical studies to 'validate' human rights.¹⁴⁵ Along the same lines, An-Na'im advocates for a 'cross-cultural approach'¹⁴⁶ in which, guided by 'the universal principle of reciprocity'¹⁴⁷ scholars, human rights

138 African Committee of Experts on the Rights and Welfare of the Child 'Reservations' <https://www.acerwc.africa/reservations/> (accessed 7 August 2019).

139 Çali & Montoya (n 134) 19 & 21. This must be put into context of CEDAW's 'near-universal ratification' (at 18).

140 Goodale (n 125) 487.

141 R Cohen 'Human rights and cultural relativism: the need for a new approach'(1989) 91 *American Anthropologist* 1014 at 1016.

142 AA An-Na'im 'Problems of universal cultural legitimacy for human rights' in An-Na'im *Muslims and global justice* (2011) 65 at 66.

143 An-Na'im (n 142) 69.

144 An-Na'im (n 142) 66.

145 *International human rights: universalism versus relativism* (1990) 88.

146 An-Na'im (n 142) 90.

147 'According to this principle, human rights are those that a person would claim for herself or himself and must therefore be conceded to all other human beings' An-Na'im (n 142) 95.

advocates, and others identify understandings of human rights, specifically focused on inherent human dignity and integrity, within and across particular cultural contexts which then instantiate universality.¹⁴⁸

Under controversial circumstances described by Mark Goodale, the United Nations Educational, Scientific and Cultural Organisation actually sought to undertake such a study in 1947 and 1948 in order to inform the drafting of the Universal Declaration.¹⁴⁹ Although the scale and impact of its survey have since been exaggerated,¹⁵⁰ this effort shared Renteln and An-Na'im's aspiration towards demonstrating the universality of human rights across the globe. Aside from the feasibility of such a large-scale project, one might question, as Goodale does, whether concepts like dignity and values lend themselves well to empirical study.¹⁵¹

Concerned about approaches that simplistically vilify culture for its detrimental impact on African women's human rights, Celestine Nyamu-Musembi and Sylvia Tamale conceptualise culture as a resource that should be mobilised in order to carve out space between universalism and cultural relativism. Nyamu-Musembi challenges the view of culture as a 'fence'¹⁵² blocking gender equality and highlights opportunities to use it as a 'pathway'¹⁵³ towards gender equality by harnessing its inherent dynamism to challenge discriminatory practices and leverage practices that advance women's human rights.¹⁵⁴ Similarly, Tamale urges recognition of the 'emancipatory potential' of culture from a critical human rights perspective.¹⁵⁵ In her view, women's human rights advocates must 'surface the positive, egalitarian aspects of African culture and use it to our advantage'.¹⁵⁶

Based on ethnographic research on gender violence, Sally Engle Merry introduced the idea of 'vernacularization' or translation of international human rights norms and practices in local contexts.¹⁵⁷ Viewing international human rights law itself as a 'cultural system',¹⁵⁸ Merry posits that particularly where gender issues are concerned, women's rights activists often play the role of translators who render

148 As above.

149 Goodale (n 125).

150 See Human Rights Comments and Interpretations; a symposium edited by Unesco, UNESCO (25 July 1948), UNESCO/PHS/3(rev.) (1948); Goodale (n 125) 611-614.

151 Goodale (n 125) 614-615.

152 Nyamu-Musembi 'Are local norms and practices fences or pathways? The example of women's property rights' in A An-Na'im (ed) *Cultural transformation and human rights in Africa* (2002) 126 at 137.

153 n 152, 132.

154 n 152, 144.

155 S Tamale 'The right to culture and the culture of rights: a critical perspective on women's sexual rights in Africa' (2008) 16 *Feminist Legal Studies* 47 at 48 & 65.

156 n 155, 64-65.

157 SE Merry *Human rights and gender violence: translating international law into local justice* (2006).

158 n 157, 16.

international human rights norms into language that is meaningful in the places where they work¹⁵⁹ much in the same way that a language translator renders a foreign or at least unfamiliar language into the vernacular, or local, language. In this way, they form a ‘bridge’¹⁶⁰ between universalism and cultural relativism. However, as she and Peggy Levitt note in a more recent publication, this process carries the risk that the meaning of even core human rights principles may be radically transformed, such that they are no longer recognisable.¹⁶¹

4.2.4 Lessons for Mali from the middle ground theorists

In *APDF and IHRDA*, the respondent state argued that so-called universal human rights norms on the minimum marriage age should not be applied in Mali in part because a different set of social, cultural, and religious values, beliefs, and practices applied which should – and arguably could – not be upended by international human rights law. The main lesson from the middle ground theorists is that one should not preclude the possibility of a reconciliation between the ‘Malian’ values perceived as under attack on the one hand and human rights on the other.

But what are these values? Mali’s cultural relativist argument rejected the universality of human rights and conceptualised culture as ‘a static, homogenous, and bounded entity defined by its specific “traits”’.¹⁶² This conceptualisation is one that anthropologists abandoned long ago ‘in favor of an understanding of culture as historically produced, globally inter-connected and, internally contested and marked with ambiguous boundaries of identity and practice’.¹⁶³ This suggests that there is still a possibility for human rights to have meaning and resonance in the current Malian context.

The middle ground theorists also caution human rights proponents against an uncritical understanding of culture. ‘[H]uman rights zealots’,¹⁶⁴ as Makau Mutua calls them, perpetuate the colonial civilising mission. The main difference is that now certain cultural beliefs and practices must be abandoned in order to embrace an idealised human rights modernity.¹⁶⁵ As Mutua contends, this fits into a ‘savages-victims-saviors (SVS) construction’¹⁶⁶ in which non-

159 Merry (n 157) 216.

160 SE Merry ‘The vernacularization of women’s human rights’ in S Hopgood *et al* (eds) *Human rights futures* (2017) 214.

161 n 160, 236.

162 A-BS Preis ‘Human rights as cultural practice: an anthropological critique’ (1996) 18 *Human Rights Quarterly* 286 at 289.

163 SE Merry ‘Changing rights, changing culture’ in JK Cowan *et al* (eds) *Culture and rights: anthropological perspectives* (2001) 31 at 41.

164 M Mutua ‘Savages, victims, and saviors: the metaphor of human rights’ (2001) 42 *Harvard International Law Journal* 201 at 218.

165 See Merry (n 157) 13; JL Comaroff & J Comaroff *Of revelation and revolution: Volume 2: the dialectics of modernity on a South African frontier* (1997).

166 Mutua (n 164) 201.

Western peoples are depicted as victims living in savage contexts and in need of Western saviours. The perspective must also be criticised

because it adopts an evolutionary understanding of culture which anthropologists have also abandoned.¹⁶⁷ Taken to its extreme, it could be viewed as cultural nihilism¹⁶⁸ and thus engenders strong opposition like the fear of loss of Malian and Islamic culture and identity, however undefined, expressed by opponents of the 2009 Bill. One might also question whether opponents were also rejecting the SVS construction.

However, it would be disingenuous to claim that most Malians simply had outdated understandings of culture. The fact that particular understandings of culture were shared by so many across the country or, at a minimum, strategically mobilised to support or defeat the bill, merits further study. The anthropologist's task, then is to contextualize these understandings, thereby not simply studying "culture" but studying more closely, the cultural production of the concept of "culture" within various social arenas.¹⁶⁹

The African Court appropriately declined to wade into the debate over universality versus cultural relativism, instead simply reminding Mali of its obligations to use a range of measures to promote gender equality and children's well-being. Nevertheless, scholars and activists should take the Court's relative silence as an invitation for further research. This research should continue to grapple with the debate over universality and cultural relativism not only from a theoretical perspective, but by undertaking ethnographic research in places like Mali to better understand this tension and how or even whether it can be overcome. Although many may have a vision of human rights as 'the last utopia',¹⁷⁰ such research must still remain critical of human rights as a project not only because of its origins, still uncertain claims of universality, and tendency towards the SVS construction,¹⁷¹ but also to avoid foreclosing the possibility of 'more promising mass-based movements for social justice'.¹⁷²

5 CONCLUSION

APDF and IHRDA is an important case that not only concerns women's human rights, but addressed what are generally perceived as sensitive issues regarding marriage and the family. By holding that Mali's 2011 Family Code violated human rights law, the African Court promoted gender equality within the family and beyond. Although the Court was largely silent regarding Mali's *force majeure* argument and cultural relativism claims, these silences still have potential to strengthen women's recourse for human rights violations in Africa because they implicitly rejected the notion that violent opposition to human rights

167 Merry (n 157) 13.

168 BK Kombo 'The policing of intimate partnerships in Yaoundé, Cameroon' unpublished PhD dissertation, Yale University, 2010 194.

169 Kombo (n 168) 95-96.

170 S Moyn *The last utopia: human rights in history* (2012).

171 Mutua (n 164) 201.

172 S Hopgood *et al* 'Introduction: human rights past, present, and future' in S Hopgood *et al* (n 160) 22.

norms or seemingly divergent socio-cultural realities justify derogation from human rights.

Perhaps the silences simultaneously serve as a marker of the possibilities and limits of human rights adjudication. Situating the case in its socio-cultural and historical context brings to light the complex dynamics at play. Such dynamics help explain why Mali advanced its *force majeure* and cultural relativist arguments. Taken collectively, the diverse sources that have informed this article demonstrate that the Family Code debate in Mali was not just a confrontation between 'Islamists' and women's rights advocates, but much more complex contestation over the legitimacy of the significantly donor-dependent Malian secular state, democratic participation in the reform process, the role of religion and culture in regulating the family, and various understandings of culture and social change all enmeshed with questions about women's human rights. Thus, the article contends that the silences also invite further interdisciplinary research. In the context of current instability in Mali, the future of the Family Code remains unsure. Nevertheless, it is clear that a positive future will require more dialogue on the meanings of culture and human rights in order to chart pathways towards gender equality.

The Advisory Opinion of the International Court of Justice on Chagos: a critical overview

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ABSTRACT: This case discussion seeks to draw attention to the Advisory Opinion by the International Court of Justice on 25 February 2019 concerning the Chagos Archipelago (*Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*). It underlines the legal arguments on the issue of the right to self-determination and the decolonisation process. The ICJ has highlighted the importance of the right to self-determination in the post-colonial context and upheld the necessity for the decolonisation process of Mauritius to be completed. The strong legal stand by the ICJ taken against the UK, despite the latter being a powerful state, is noteworthy. This Advisory Opinion is decisive not only for the Chagossians and their fate, but also for other African jurisdictions grappling with the issue of self-determination and an incomplete decolonisation process. The Opinion re-calibrates the debate on these two important international law issues by serving as an essential judicial tool to be applied in other similar cases.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'avis consultatif de la Cour internationale de Justice sur l'Archipel des Chagos: aperçu critique

RÉSUMÉ: Le présent commentaire d'arrêt vise à disséminer l'avis consultatif de la Cour internationale de justice (CIJ) sur l'Archipel des Chagos et met l'accent sur les arguments juridiques essentiels y énoncés au sujet du droit à l'autodétermination et du processus de décolonisation. La CIJ a souligné l'importance du droit à l'autodétermination dans le contexte postcolonial et a confirmé la nécessité de parachever le processus de décolonisation de l'île Maurice. Il convient de souligner la position juridique forte adoptée par la CIJ contre le Royaume-Uni, bien que ce dernier soit un État puissant. Cet avis consultatif est décisif non seulement pour les Chagossiens et leur destin, mais également pour les autres collectivités africaines en quête d'autodétermination et du parachèvement de leur processus de décolonisation. L'avis réajuste le débat sur ces deux importantes questions de droit international en servant d'instrument judiciaire important à appliquer dans des affaires similaires.

KEY WORDS: International Court of Justice, Chagos, Mauritius, United Kingdom, self-determination

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CONTENT:

1	Introduction.....	322
2	Jurisprudential development in the matter of Chagos Archipelago.....	324
2.1	The <i>Ventacassen</i> case 1975	324
2.2	<i>R Bancoult v Secretary of State for Foreign and Commonwealth Affairs</i>	324
2.3	<i>Bancoult v McNamara</i>	325
2.4	<i>Chagos Islanders v The Attorney General</i>	325
2.5	<i>Chagos Islanders v Attorney General and Another</i>	326
2.6	<i>Louis Olivier Bancoult (Claimant) v The Secretary of State for Foreign and Commonwealth Affairs (Defendant)</i>	326
2.7	<i>R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)</i>	327
2.8	<i>Chagos Islanders v the United Kingdom</i>	327
2.9	<i>The Queen (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs</i>	327
2.10	<i>Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland 2015</i>	328
3	An overview of the applicable legal framework in the Chagos matter.....	328
3.1	The principle of <i>uti possidetis</i> and territorial integrity.....	328
3.2	A right to self-determination with regards to Chagos.....	329
3.3	The decolonisation of Mauritius within the UN framework as a non-self-governing territory	331
3.4	Human rights implications	332
4	Critical evaluation of the Advisory Opinion of the ICJ in the separation of Chagos Archipelago from Mauritius in 1965.....	333
4.1	The context	333
4.2	The overarching questions behind GA Resolution 71/292	333
4.3	Advisory jurisdiction of the ICJ in giving an opinion on the legal consequences of the separation of Chagos.....	334
4.4	Submissions of states	336
4.5	Critical reflection on the Advisory Opinion	336
4.6	Legal effect of the Advisory Opinion and enforcement	339
5	Conclusion.....	340

1 INTRODUCTION

The Chagos Archipelago, situated in the middle of the Indian Ocean, has since 1965 continuously captured international attention due to the legally questionable conduct by the two nuclear super power countries, the United States of America (US) and the United Kingdom of Great Britain and the Northern Ireland (UK), of detaching the Chagos Archipelago from the territory of Mauritius for military purposes. The story of the Chagos Archipelago raises a wide array of legal questions across the field of decolonisation and equal rights to self-determination of peoples, territorial integrity and state sovereignty. The last remaining colony of the British Empire, the British Indian Ocean Territory (BIOT), was established in 1965, forcefully depopulating a population which has been on the island for two centuries, the Chagossians, in the exercise of the power of the Commissioner of the BIOT for the sole purpose of establishing a highly strategic advanced US military base during the Cold War.¹

After 51 years, the Republic of Mauritius under the prejudice of an incomplete decolonisation, is still sparring over the exercise of its exclusive rights over the Chagos Archipelago and its inability to implement a programme of resettlement for its Mauritian nationals of Chagossians origin. The UK stated in 2011 that the Islands will be ceded to Mauritius when they are no longer required for defence purposes,

1 Section 4 of the Immigration Ordinance 1 of 1971.

without indicating exactly when.² The UK had been making similar statement for the last 50 years in the form of promises of ‘returning’ Chagos to Mauritius after meeting its defence objectives.

By the time the Chagos Archipelago was excised from Mauritius by the British administration, clear principles of international law had already emerged to govern the process of decolonisation, among them the principles of self-determination and protection of territorial integrity. These principles require that the people of a non-self-governing territory (NSGT) have a right to determine their own future freely without conditions. On 16 September 2018 at its 71st session, the UN General Assembly included on its agenda the request for an Advisory Opinion by the International Court of Justice (ICJ) on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. The General Assembly asked the Court to provide its views on the lawfulness of the decolonisation process of Mauritius in the circumstance where the Chagos Archipelago was detached from the territory of Mauritius by an Order in Council of 8 November 1965, just over two years before Mauritius gained its independence on 12 March 1968.³

One of the main differences between the views of the UK and Mauritius rests in their competing interpretations of historical events as the basis of claims to sovereignty over the Chagos Archipelago. Before the granting of independence to the colony of Mauritius in 1968, the Chagos Archipelago was separated from Mauritius under section 3 of the Order in Council of 8 November 1965.⁴ In doing so, the UK violated a multitude of international law principles including GA Resolution 1514 (XV) which requires colonial powers to grant independence to their colonies as a whole territorial unit. Accordingly, Mauritius has unceasingly challenged the lawfulness of this detachment claiming that the Chagos Archipelago is a part of its territory as a matter of fact and law.

On 22 June 2017, the General Assembly adopted Resolution 71/292, which requested the ICJ to give the Advisory Opinion on Chagos by virtue of article 65 the Statute of the ICJ. A time limit was set for the submission of written statements by the United Nations and its Member States.⁵ On 17 January 2018, the Court adopted an order to extend the time limit for the filing of written statements to 1 March 2018. The ICJ subsequently held a hearing from 3 to 6 September 2018.

This case commentary critically assesses the Advisory Opinion given on the matter by the ICJ. For the purpose of a comprehensive

2 I Papanicolopulu ‘*Mauritius v United Kingdom*: submission of the dispute on the Marine Protected Area around the Chagos Archipelago to arbitration’ (2011) *EJIL: Talk!* <http://www.ejiltalk.org/mauritius-v-united-kingdom-submission-of-the-dispute-on-the-marine-protected-area-around-the-chagos-archipelago-to-arbitration/> (accessed 19 August 2019).

3 UN GA Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, 14 July 2016 UN Doc A/71/142.

4 Under the BIOT Order 1965 Statutory Instrument 1 of 1965.

5 In accordance with article 66(4) of its Statute.

background to the case, the first part of the commentary provides an overview of the cases decided on the Chagos matter in various judicial fora. This is followed by a brief outline of the legal framework of international law applicable to the matter. The Advisory Opinion is then critically analysed in substance with a particular focus on both the majority decision and the dissenting opinions.

2 JURISPRUDENTIAL DEVELOPMENT IN THE MATTER OF CHAGOS ARCHIPELAGO

Two major categories of lawsuit have resulted from the detachment of Chagos Archipelago. The first is between the Chagos Islanders and the UK over the legality of the forceful displacement of the Chagossians from their native land and claims to establish their right to return. The second is between Mauritius and UK for unlawful detachment and sovereignty claim over the Chagos Archipelago.

2.1 The Ventacassen case 1975

The Chagossians initiated a series of lawsuit to seek redress against the violation of their rights to stay in their homeland. The first litigation was brought in 1975 by Michel Ventacassen in the High Court of London claiming moral damages for deprivation of liberty, intimidation and expulsion from his native land. However, the case was settled by way of agreement in 1982. A sum of £4 million was paid to around 1,344 Chagossians for renunciation of their right to return. Their consent was taken down in the English language, thus, probably without their informed knowledge, as most Chagossian at that time did not understand English.⁶

2.2 R Bancoult v Secretary of State for Foreign and Commonwealth Affairs

In 1998, the leader of Chagos Refugee Group, Louis Olivier Bancoult, initiated a process of judicial review in the British High Court to challenge the legality of the Immigration Ordinance of 1971 which authorised the expulsion of Chagossians and removed their right to return to their native land. Bancoult sought a writ of certiorari from the Divisional Court to quash the ordinance for irrationality.⁷ It was argued that a Britisher had a fundamental constitutional right to live within the territory of which he was a citizen of and that such a right could neither be abrogated by the BIOT Order nor by the action of the Commissioner

6 C Grandison, S Kadaba & A Woo 'Stealing the Islands of Chagos' (2013) 3 *Human Rights Brief* 20 at 38-39.

7 G Murray & T Frost 'The Chagossians' struggle and the last bastions of imperial constitutionalism' in S Allen & C Monaghan (eds) *Fifty years of the British Indian Ocean Territory* (2018) 147.

and the Queen had no power to curtail the liberty an individual.⁸ It was also argued that the legislation was repugnant to articles of the Magna Carta, and in violation of articles 3, 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).

Lord Justice Laws and Gibbs observed that there had been an 'abject legal failure' in the removal of the islanders.⁹ Accordingly, the Ordinance was held *ultra vires*, as the power to legislate for peace, order and good governance did not include a power to expel an indigenous population. The Court quashed part of the 1971 Ordinance, granting the Chagossians the right to return to other islands of the Archipelago with exception to Diego Garcia because of the military facilities of the US there. However, in practice, many barriers remained. In response, the then Foreign Secretary, Mr Cook, stated in November 2000 that he would accept the ruling and that the government would not appeal against this decision and will carry a feasibility for potential resettlement of the Islanders.¹⁰ Hence the 1971 Ordinance was repealed, making way of the enactment of the Immigration Ordinance 2000.

2.3 *Bancoult v McNamara*

Meanwhile, in 2001, Olivier Bancoult filed another civil suit, this time in the US, for damages on the ground of forced relocation, racial discrimination, inhuman treatment, genocide, and destruction of real and personal property. He prayed for declaratory and injunctive relief. However, the case was dismissed by the District Court in 2004 for lack of jurisdiction over political decisions.¹¹ An appeal was made against this decision and it was upheld by the Court of Appeals of the District of Columbia in 2006 on the basis of being a non-justiciable political question.

2.4 *Chagos Islanders v The Attorney General*

Without success in Columbia, a group of Chagossians filed a suit in tort in the British High Court of Justice in April 2002. For the first time the Court was called to adjudicate for damages. In essence, the claimants

8 See *Entick v Carrington* [1765] EWHC KB J98

9 *R Bancoult v Secretary of State for Foreign and Commonwealth Affairs* (No 1) [2000] EWHC Admin 413. E MacAskill 'Evicted islanders to go home' *The Guardian* 4 November 2000 <https://www.theguardian.com/world/2000/nov/04/ewenmacaskill> (accessed 15 August 2019).

10 J Borger 'Exiled islanders win 40-year battle to return home as judges accuse UK of abuse of power' *The Guardian* 24 May 2007 <https://www.theguardian.com/world/2007/may/24/politics.topstories3> (accessed 15 August 2019).

11 *Bancoult v McNamara* 445 F. 3d 427 (DE Cir. 2006). Federal Courts 'Political question doctrine – D.C Circuit holds claims of harms to native inhabitants of the British Indian Ocean Territory caused by the construction of a US military base non-justiciable' (2007) 120 *Harvard Law Review* 860.

sought compensation and restoration of their property rights and unlawful deportation. Six wrongs were argued: misfeasance in public office, negligence, deceit, unlawful exile, breach of property rights and infringement of rights under the Mauritian Constitution. On the claims of misfeasance and deceit, no officers had been identified as having acted harmfully. The prejudice of wrongful exile was really an allegation of maladministration. The court also ruled that there was neither an arguable tort of unlawful exile, nor a duty of care to take reasonable steps for the well-being of the claimants. The claim was struck out for an abuse of process as it was time-barred.¹²

2.5 *Chagos Islanders v Attorney General and Another*

After a discouraging judgement in 2003, the claimants sought leave to appeal against the ruling that they had no cause of action and they were not entitled for damages due to the payment made in 1982 after the *Ventacassen* case 1975 for their expulsion from their islands. The Court held that Justice Ousley rightly decided that those who signed the renunciation forms compromised their claims for compensation. The Court of Appeal refused the claimant's application for leave to appeal by judgment dated 22 July 2004.¹³

2.6 *Louis Olivier Bancoult (Claimant) v The Secretary of State for Foreign and Commonwealth Affairs (Defendant)*

On 10 June 2004, Her Majesty in Council enacted the British Indian Ocean Territory (Constitution) Order 2004. Section 9 of the Order provides that 'no person has the right of abode in the territory' and 'no person is entitled to enter or be present in the territory except as authorised by or under this Order or any other law for the time being in force in the territory'. On the same date, the Immigration Order 2004 was promulgated, prohibiting entry without a permit in Chagos. This Order 2004 replaced the Ordinance of 2000. Olivier Bancoult again challenged the validity of the BIOT Order 2004 and lodged a new case.

12 *Chagos Islanders v Attorney General and Her Majesty's British Indian Ocean Territory Commissioner*, First Instance, Claim for Compensation, Case No HQ02X01287, [2003] EWHC 2222, ILDC 257 (UK 2003), 9th October 2003, United Kingdom; England and Wales; High Court [EWHC]; Queen's Bench Division [QBD].

13 *Chagos Islanders v Attorney General and Another* [2004] EWCA Civ 997; see also I Afsah 'Diego Garcia (British Indian Ocean Territory)' in P Minnerop, R Wolfrum & F Lachenmann (eds) *International development law: the Max Planck encyclopedia of public international law* (2019) 366.

The Court in 2006 quashed section 9 of the BIOT order for irrationality and for being *ultra vires*.¹⁴

2.7 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)*

The Chagossian's cause took a serious blow in the appeal against the 2006 case. The judgment delivered on 22 October 2008 upheld the new Order in Council by a majority to 3-2, stating that it was valid. Although a judicial review could be envisaged against Orders in Council, national security and foreign relations barred them from doing so.¹⁵

2.8 *Chagos Islanders v the United Kingdom*

A case related to this matter was also submitted to the European Court of Human Rights. In 2012, the Court declared the *Chagos Islanders* case to be inadmissible. By a majority, the Court ruled that as the Chagossians had accepted compensation from the UK, they had legally renounced their 'right to return' and as such their case was inadmissible. The ruling ruined the Chagossians' hopes of returning and to block any further legal avenues through the European Court by concluding that individual Chagossians had no right of individual petition to the court in future.¹⁶

2.9 *The Queen (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*

The Court concluded by emphasising that these are claims for judicial review, not an appeal against governmental decisions on their merits. The wisdom of governmental policy is not a matter for the courts and,

14 *Louis Olivier Bancoult (Claimant) v The Secretary of State for Foreign and Commonwealth Affairs (Defendant)* [2006] EWHC 1038; see also C Nauvel 'A return from exile in sight? The Chagossians and their struggle' (2007) 5 *Northwestern Journal of International Human Rights* 103.

15 *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Bancoult (No 2)* 2008 UKHL 61, 4 All E.R 1055; see also P Sand 'R (On the Application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs' (2008) 103 *American Journal of International Law* 317.

16 *Chagos Islanders v the United Kingdom* – European Court of Human Rights (application no 35622/04) ECHR 460 2012; see also A Raouf 'Still dispossessed – the battle of the Chagos Islanders to return to their homeland' *Minority Rights Group International Briefing* (2012) 5 https://minorityrights.org/wp-content/uploads/2015/07/MRG_Brief_Chagosv2.pdf (accessed 13 August 2019).

in a democratic society, must be a matter for the elected government alone.¹⁷

2.10 Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland 2015

In April 2010 the UK proclaimed the setting up of the Marine Protection Area (MPA) in the Chagos Archipelago. However, in December 2010, Mauritius brought claims against the UK pursuant to article 287 of the United Nations Convention on the Law of the Sea (UNCLOS) before the Arbitral Tribunal, challenging the creation of the MPA under article 2, 56 and 194. In March 2015, The Tribunal, appointed under Annex 7 of the UNCLOS, held that the creation of the MPA was illegal under UNCLOS and the fishing mineral and oil rights upon a subsequent its return of the territory to Mauritius was undermined.¹⁸

3 AN OVERVIEW OF THE APPLICABLE LEGAL FRAMEWORK IN THE CHAGOS MATTER

This section attempts to establish the legal framework on decolonisation and equal rights and self-determination of people with regards to the decolonisation of Mauritius in public international law in juxtaposition with the Charter and resolutions of the United Nation (UN) 1945 as well as the case law of the ICJ. The unlawful detachment of the Chagos Archipelago revolves mainly around two concepts, the principles of territorial integrity and self-determination.

3.1 The principle of *uti possidetis* and territorial integrity

The principle of *uti possidetis* originates from Roman Law,¹⁹ and with time it acquired the status of international customary law evolving from a private to an international rule applicable to the principle of territorial sovereignty, statehood, creation of states and territorial boundaries.²⁰

17 *The Queen (on the application of Hoareau and Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC; see also Landmark Chambers '*R (Hoareau and Bancoult) v Secretary of State for Foreign & Commonwealth Affairs* [2019] EWHC 221 (Admin) – Resettlement of the Chagos Islands' 8 February 2019 <https://www.landmarkchambers.co.uk/r-hoareau-and-bancoult-v-secretary-of-state-for-foreign-commonwealth-affairs-2019-ewhc-221-admin-resettlement-of-the-chagos-islands/> (accessed 13 August 2019).

18 See Minority Rights 'MRG applauds UN ruling on Chagos Marine Protected Area' 31 July 2015 <https://minorityrights.org/2015/07/31/mrg-applauds-un-ruling-on-chagos-marine-protected-area/> (accessed 13 August 2019).

19 F Heydte 'Discovery, symbolic annexation and virtual effectiveness in international law' (1935) 29 *American Journal of International Law* 452.

20 See J Dugard *International law: a South African perspective* (2006) 100.

As a general notion, *uti possidetis* may be explained as the inviolability of previous administrative borders within and outside the colonial context. However, in the matter of Chagos, the principle of *uti possidetis juris* may be applied, which consist of the principle of self-determination and non-intervention in domestic affairs of a country.²¹ Lone suggests that the principle of *uti possidetis* played an important role in the decolonisation process in Africa and she also argues that the purpose of this doctrine was to secure the territorial stability of newly created states, delimiting their maritime zones and boundaries.²² The ICJ expressed a similar understanding in the case of the *Frontier Dispute (Burkina Faso v Mali)* of 1986.²³

During the decolonisation process, while granting independence to Mauritius, the administering power should have preserved the sanctity of the territory as obtained in full rights and sovereignty, under the Treaty of Paris 1814. New state shall be declared from the totality of previous territory, therefore the dismemberment of the Mauritian territory in 1965 violates the principle of territorial integrity of Mauritius as a whole unit which extends to the Chagos Archipelago. Since then, Mauritius has continuously asked that the sanctity of its territorial integrity be restored. However, following the reports of the fourth Committee 2066 on the Questions of Mauritius, the General Assembly adopted resolution 2066 (XX), recalling GA Res. 1514 (XV) invited the administering power 'to take no action which would dismember the Territory of Mauritius and violate its territorial integrity'. This right was further strengthened to preserve its territorial integrity through the adoption of GA Res. 2232 (XXI) and 2357 (XXII).

3.2 A right to self-determination with regards to Chagos

The right to self-determination is the inalienable right of a colony to freely pursue political, economic, social and cultural development.²⁴ At the very outset, in relation to our case, we emphasise on the external aspect of self-determination which concerns the right of peoples to freely determine their political will as an independent state²⁵ rather than its internal aspect which consists the rights of people to aspire economic, social and cultural development within the domestic political and legal structure.²⁶ Prior to the excision of the Chagos Archipelago the General Assembly adopted Resolution 1514 (XV) with the purpose to dismantling colonialism in whatsoever manner.

21 C Parodi *Politics of South American boundaries* (2002).

22 F Lone *Uti possidetis juris* (2012).

23 See M Leigh 'Case concerning the Frontier Dispute (*Burkina Faso v Mali*)' (1987) 81 *American Journal of International Law* 411.

24 R Hingorani *Modern international law* (1979) 243.

25 H Hannum 'Rethinking self-determination, self-determination in international law' (1993) 34 *Virginia Journal of International Law* 973.

26 R McCorquodale 'Self-determination in international law' (1993) 34 *Virginia Journal of International Law* 1.

The principle of equal rights and self-determination of people has acquired a dynamic jurisprudential legacy in the wake of decolonisation even though it was viewed only as political aspiration as described by Higgins.²⁷ The doctrine progressed significantly since its inception in the UN Charter under article 1(2), which is to 'develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples'. The UN also provides the right to self-determination as a core objective under article 55 and 56 of the UN Charter as confirmed by the ICJ in the Western Sahara Advisory Opinion 1975 with a direct impact on the NSGT.

The principle is also codified in article 1 of both the International Covenant on Civil and Political Rights GA Res. 2200 A (XXI) and International Covenant on Economic, Social and Cultural Rights GA Res. 2200 (XXI) meanwhile the right became crystallised as a fundamental human right within the corpus of the ICJ since the advisory opinion on the legal consequences for states of the continued presence of South Africa in Namibia 1971. However, in the case of the *Republic of Mauritius v United Kingdom of Great Britain and Northern Ireland* 2015, the Arbitral Tribunal in an *obiter dictum* held that perhaps this right developed earlier between 1945-1965. Nevertheless, when the Mauritian territory was disrupted there was already an established rule which governed the process of decolonisation as provided by article 73 of the UN Charter and GA Res. 1514 (XV) which was based on free will of the people.

3.2.1 GA Res. 1514 (XV) Declaration on the Granting of Independence to Colonial Countries and Peoples

Adopted on 16 of December 1960, GA Res. 1514 (XV) is believed to have laid the foundation for decolonisation process, Advisory Opinion Western Sahara 1975. The GA Res. 1514 (XV) is of normative character, as it provides for 'all peoples having the right to self-determination'. The objective was to bring an end to colonialism in 'all its forms and manifestation' without further delay whereby the 'alien subjugation, domination and exploitation constitutes a denial of fundamental human rights and is contrary to the Charter of the United Nations'. In addition, the resolution further provides for immediate action concerning NSGT and to all such territories which have not acquired independence, giving all powers to those territories without any conditions, complying with their 'freely expressed will and desire'.

In order to safeguard the integrity of NSGT, paragraph 6 of GA Res. 1514 (XV) condemns all 'attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country' by stating its incompatibility with the purpose of the UN charter. Within the meaning of operative paragraph 6, an attempt leading to independence 1965 violates the purpose of GA Res. 1514 (XV). Even if the Council of

27 R Higgins 'The International Court of Justice and human rights, in international law: theory and practice' in K Wellens (ed) *Essays in honour of Eric Suy* (1998) 694.

Ministers gave their consent for the detachment, it can be noted that consent was not given as a sovereign state but rather Mauritius was still under the colonial authority of the UK which amounts to consent obtained by duress as argued by Lynch (1984).

3.2.2 Peremptory nature of self-determination in international law

The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among states, GA Res. 2625 (XXV) of 1970, reiterates the characteristics of self-determination thereby acquiring a *jus cogens* status of *erga omnes* character, that is a prima facie obligation towards all without derogation, South West Africa 1950. In the case of *East Timor (Portugal v Australia)* 1991 the ICJ recognised the right to self-determination having an *erga omnes* character essential to contemporary international law as claimed by Portugal.²⁸ More so, the character of *erga omnes* is further ascertained in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* 2004.

3.3 The decolonisation of Mauritius within the UN framework as a non-self-governing territory

In the endless effort to eradicating colonialism, the General Assembly Resolution on Third International Decade for the Eradication of Colonialism, GA Res. 65/119 invites members of the UN to intensify their collaboration with the Special Committee for a sustained implementation of GA Res. 1514 (XV) dismantling the remnants of colonialism completely. Being a remnant of decolonisation, Mauritania is still sparring upon the legality of its decolonisation procedure since 12 March 1968.

Garner defines decolonisation as a process by which a colony under a colonial power is granted independence from colonial masters divesting itself of sovereignty.²⁹ In this view, the law governing decolonisation predates the UN and finds its source in the League of Nations Mandate where colonies deprived from their sovereignty due to a result of war were placed under the Sacred Trust of Civilisation as provided by article 22 of the Covenant of the League of Nations 1919 (CLN). The Mandate was based on the premise that colonies should be independent. After the Second World War, the Sacred Trust of Civilisation evolved into the International Trusteeship established by the UN Charter affirming the continuity of the principle of self-determination and interest of inhabitants within the spirit of article 22 of the CLN. Later on, the ICJ confirmed it in the *South West Africa Advisory Opinion 1950* concerning the determination of the legal status of the Territory by stating that the Sacred Trust of Civilisation

²⁸ *East Timor (Portugal v Australia)* Judgment of 30 June 1995.

²⁹ B Garner *Black's Law Dictionary* 2014.

was still under obligation to submit report about its administration to the UN qualifying article 22 of the CLN as evolutionary in terms of customary law rather than static. Mauritius was originally listed as a NSGT in 1946 under GA Res. 66 (I).

The process of decolonisation has fundamentally been dependent upon the proper application of the principle of self-determination. In this endeavour, the General Assembly has been anchoring various decolonisation processes in the exercise of its powers and functions relating to NSGT. Although dismantling colonial legacies was not the primary objective of the UN, the Charter provides the legal framework to be followed in the matter of decolonisation relating to Trust and NSGT in Chapter XI, XII and XIII. Article 73 of the UN Charter on NSGT provides the guidelines, binding upon members administering such territories whose peoples had not yet reached a full capacity of self-government. The UK as an administering power had an obligation under article 73(b) to help Mauritius to develop a self-government considering their political aspiration and to transmit to the Secretary General all information pertaining to the social, economic and educational conditions of Mauritius under GA Res. 66 (I) in compliance with article 73(e) but the UK did not fulfil their obligations in good faith.

3.4 Human rights implications

Article 73(e) of the UN Charter requires that the UK had to transmit information about a permanent population on the Chagos and ensure their economic and cultural development including the right to remain in their homeland. In exercise of the power under Immigration Ordinance No.1 of 1971, the Chagossians were evicted from their land termed as transient labourers, thereby infringing article 9 of the Universal Declaration 1948 which provides that no one shall be subject to arbitrary exile. However, the Human Rights Committee in a Concluding Observation under paragraph 22 of its periodic report 2008 recommended that the Islanders must be able to exercise their right to return. After their eviction, the Chagossians suffered gross human rights violations and were subject to various forms of inhuman treatment without food and clothing and even without a decent house.³⁰ Therefore, this would violate the right to liberty and security of person under article 3 and protection against inhuman treatment under article 5 of the Universal Declaration. However, the Chagossians were also subject to arbitrary deprivation of their personal property, occasioning a violation of thereby violating article 17(2) of the Universal Declaration and eventually their quality of life under article 11(1) of the European Convention.

In the light of the discussion above, the NSGT had an inalienable right to self-determination and to genuinely and freely determine their

30 R Mahadew & D Raumnauth 'Assessing the responsibilities of the United Kingdom and Mauritius towards the Chagossians under international law' (2016) 29 *Afrika Focus* 39-57.

future. Independence should have been granted without any condition or reservation imposed on Mauritius against its desire. The Jurisprudence of the ICJ confirms the customary character of the right to territorial integrity of a NSGT as a consequence of the right to self-determination. The continued administration of the UK over Chagos Archipelago also breaches the principle of state sovereignty as Mauritius is not in exclusive control of its territory. Detachment without a freely expressed will of the people violates the essence of Resolution 1514 (XV) and 2066 (XX). Therefore, we can say that the decolonisation process of Mauritius is inconsistent with principle of international law.

4 CRITICAL EVALUATION OF THE ADVISORY OPINION OF THE ICJ IN THE SEPARATION OF CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965

In order to make a comprehensive and coherent evaluation of the Advisory Opinion of 25 February 2019, an analysis of both its legal and political context is undertaken. It is of paramount importance to link the dynamics of the ICJ in its advisory capacity within the scope of public international law and the jurisprudential evolution of the ICJ.

4.1 The context

The Advisory Opinion of the ICJ rendered on 25 February 2019, upon the request of the GA Res. 71/292 of 22 June 2017 adopted by 94 countries against 15 with 65 abstention, supported by the African Union and 6 South American States, was a culmination of almost 51 years of struggle by the Government of Mauritius and the Chagossian community. The adoption by 94 member states was a blow to the UK and a decisive moment for both Mauritius and the Chagossian community sending a clear message that the UN expects the UK to bring an end to this relic of the Cold War. The arguments of both sides are set out in the UK statement by Matthew Rycroft and explanatory memorandum by Mauritius of July 2016 by Sir Anerood Jugnauth and in its *aide memoire* of May 2017.

4.2 The overarching questions behind GA Resolution 71/292

The General Assembly of the UN requested its main judicial organ, the ICJ, established under article 92 of the UN Charter for an advisory opinion in compliance of article 96 of the Charter. The speech request reads as follows: 'The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion

on any legal question', within the meaning of article 65 of the Statute of the ICJ, to give an advisory opinion on the following questions:

- (a) Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?
- (b) What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?

The questions submitted to the Court have been drafted in a very clear and precise way, broadening its scope within international law thereby allowing the ICJ to exercise its jurisdiction and competence in a 'broader frame of reference', as to the interpretation of various issues arising under question (a) in relation to decolonisation. It is noted that question (a) does not in any way refer to the claim of sovereignty over BIOT but rather in disguised asks the ICJ whether the decolonisation of Mauritius has been conducted lawfully, recalling the detachment of the Chagos Archipelago prior to the independence of Mauritius in 1968 in the presence of the Lancaster Agreement 1965.

By excluding the concept of state sovereignty, the General Assembly secured the ICJ's ability to give a decision by circumventing the limitation of competency of the Court's discretionary power under article 65 of the Statute, in a territorial dispute of bilateral nature as submitted by the Israel and Australia on 28 February 2018. Hence, under paragraph 86 of the Advisory Opinion, the ICJ recognised that the question relates to the law of decolonisation directing the Court towards the violation of the right to self-determination of people. The gist of question (b) allows the Court to reflect upon numerous issues arising from a 'continued administration' that do not necessarily relate to decolonisation or sovereignty but also to the fundamental human rights, the right to return of the Chagossians and resettlement programme.

A request for reformulation of the questions in the oral submissions of several countries (paragraph 133) was noted, but the ICJ refused to do so seeing no reason for a restrictive interpretation. Nevertheless, Judge Donoghue in her separate dissenting opinion under paragraph 22, stated that the court could have reformulated the question and regretted that the Court did not adopt such an approach.

4.3 Advisory jurisdiction of the ICJ in giving an opinion on the legal consequences of the separation of Chagos

Among the 31 participating countries and the African Union, the UK, US, Israel, Australia and Chile raised a jurisdictional challenge on the competence of the Court. Article 65(1) of the Statute and article 96(a) of

the Charter provides the legal basis for requesting an advisory opinion on a legal question by an authorised body. The jurisprudence of the ICJ suggests that when the Court is requested for an advisory opinion, it will first scrutinise whether the request fall within its purview as in the Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons 1996, both in terms of *ratione personae* and *ratione materiae*.

4.3.1 The issue of *ratione personae* and *materiae*

The ICJ had to ascertain the *locus standi* of the requesting organ putting forward a question of legal character and whether the question is one arising within the scope of the activities of the requesting organ. Besides, the court recognised the unequivocal role of the requesting organ in assisting several colonies in their decolonisation process through GA Res. 1514 (XV) and the consistency of the General Assembly in calling upon colonial power to respect the territorial integrity of the NSGT under paragraph 168 of the Advisory Opinion on Chagos. Therefore, the Opinion would assist the functioning of the requesting organ to complete the decolonisation of Mauritius in a lawful manner.

In the *Western Sahara Advisory Opinion 1975*, the ICJ observed that a question framed raising an issue of law shall be given a reply based on law.³¹ In the present case, the Court applies the legality test of the article 96(b) upon the questions asked and rules that the question relates to international law, therefore it satisfies the criteria of legal character considering the Advisory Opinion on the legal consequences of the construction of a wall in the occupied Palestinian Territory 2004 and affirms the competency of the General Assembly under paragraph 56 of the Opinion on Chagos.

4.3.2 Discretionary power, compelling reasons and the principle of state consent

The ICJ may decline to give an opinion although having ascertained jurisdiction as stated in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory 2004* and *Advisory Opinion Certain Expenses of the United Nations* (Article 17(2), of the Charter) 1962. In giving an opinion, the Court cannot disregard its main objective which is to assist the General Assembly in its activity.³² The discretionary power to give or refrain from rendering an opinion exist to protect the integrity of the Court in its in role to assist the requesting organ meantime preserving its autonomy.³³ However, in the light of ICJ's jurisprudence, the court

31 ICJ *Western Sahara Advisory Opinion 16 October 1975* <https://www.icj-cij.org/files/case-related/61/061-19751016-ADV-01-00-EN.pdf> (accessed 25 May 2019).

32 PCIJ *Status of Eastern Carelia 23 July 1923* para 20 http://www.worldcourts.com/pcij/eng/decisions/1923.07.23_eastern_carelia.htm (accessed 20 May 2019).

33 ICJ *Declaration of independence in respect of Kosovo Advisory Opinion 22 July 2010* para 29 <https://www.icj-cij.org/files/case-related/141/141-20100722-ADV-01-00-EN.pdf> (accessed 20 May 2019).

may refuse a request under its discretionary power if there are 'compelling reasons'.

Korea, in its written submission on 28 February 2018, explains the essence of compelling reasons as an abstract nature of the question, a lack of purpose, lack of factual evidence and possibility to undermine or complicate the relevant political process. In addition, the Court also addressed the issue of *res judicata* of the Arbitral Award on Marine Protection Area 2015 raised by some countries. Moreover, Israel along with Australia in its written submission of 28 February 2018 argues as objection the principle of state consent to submit itself to the jurisdiction of the ICJ in a bilateral dispute for judicial settlement without consent.

Australia further argued that to give a reply would have the circumventing effect of the Principle of State Consent under international law considering *Western Sahara Advisory Reports 1975*. The vice President of the Court, Judge Xue, in her separate declaration highlights the issue of the principle of non-circumvention and acknowledges an intense debate on whether the court should have used its discretionary power to decline to give reply.

4.4 Submissions of states

Mauritius has always shared a good healthy relationship with all members state of the UN. Unflinching support was noted from countries such as India, Belize, Germany, Liechtenstein, Serbia, Guatemala, Cyprus, Argentina and Nicaragua have opposed the UK's claim of sovereignty of Chagos. However, some states such as Korea and France were neutral in their positions. In addition to this, the United States, Australia, Israel, Chile and UK fiercely opposed the claim of Mauritius. Altogether 31 states of the UN along with the regional support of the African Union Commission, filed written statements to the ICJ. In reply to this, the African Union and ten UN member states responded with written comments on the written statements. Twenty-one states and the African Union participated in the oral proceedings from 3 to 6 September 2018.

4.5 Critical reflection on the Advisory Opinion

The Advisory Opinion, delivered on 25 February 2019, was a major development under international law to the extent that it revisited the principle of decolonisation in the way it is perceived today and confirmed the right to self-determination as a crystallised one, strengthening its basis for future cases. The President of the Court, Abdulgawi Ahmed Yusuf, held that the detachment of the Chagos Archipelago did not comply with the 'free and genuine expression of the

people concerned',³⁴ and that the British administration of the UK constitutes 'a wrongful act'³⁵ of a continuing character. On this basis, it expressed the view that the UK had an obligation to relinquish control of the Islands to Mauritius as rapidly as possible and also declared the detachment of Chagos from Mauritius to be unlawful.

The Opinion confirmed a prima facie breach of the right to self-determination of people, territorial integrity and violation of human rights. Two lines of thought emerged from the Opinion. The first view is that the Court's Opinion confirming the detachment as unlawful implies that the UK cannot exercise sovereignty over Chagos post-independence. It followed therefore that sovereignty could not have been excised from Mauritius by the creation of a new colony. The UK was therefore called upon to transfer administration of BIOT to Mauritius, and not sovereignty. Second, the Court found that the unlawfulness was by reference to customary international law which of course by default would be part of English law. Therefore, automatically the existence of the BIOT, its Orders, Ordinances and Proclamations were deemed unlawful under international law.

The implications were to question the legal validity of BIOT and all its laws. However, it can be noted that the Court went further to stir a form of judicial activism despite the fact that Judge Cançado Trindade considered that the Court disregarded relevant points that deserved more attention and that it failed to consider some issues at all.³⁶ Finally, although being non-prescriptive as far as it could, the Court noted that all member states must cooperate to complete the decolonisation of Mauritius since self-determination is an obligation of an *erga omnes* character.³⁷ Every state – including UK and the US – has the duty to assist the General Assembly to promote through joint and separate action the completion of the Decolonisation of Mauritius and protection of human rights of Chagossians in accordance with the provisions of the Charter.

4.5.1 Discussing the separate opinions

A review of the opinions of the Judges enhances the understanding of the reasoning of the Court's application of the available international law to establish a normative judgment considering a comprehensive and rational jurisprudential evolution. By a majority of 13 to 1, the Court found that the decolonisation of Mauritius had not been lawfully completed, with a single dissenting opinion coming from American

34 ICJ Advisory Opinion *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* 25 February 2019 General List No 169 p 4 (*Chagos* case).

35 *Chagos* case (n 34) para 177.

36 See Separate Opinion of Judge Cançado Trindade para 1 <https://jusmundi.com/en/document/pdf/Opinion/ICJ-169-20190225-01-04/en/en-legal-consequences-of-the-separation-of-the-chagos-archipelago-from-mauritius-in-1965-request-for-advisory-opinion-separate-opinion-of-judge-cancado-trindade-monday-25th-february-2019> (accessed 30 September 2019).

37 *Chagos* case (n 34) para 180.

Judge Donoghue. All the fourteen Judges appended separate opinions and declaration to the ICJ ruling. In other words, they confined their remarks to the materials and arguments presented before the Court applying the relevant law to the factual evidence.

The 14 Judges unanimously found that the Court has jurisdiction to hear and determine the case of Chagos. Nevertheless, only 12 out of 14 Judges decided to comply with the request to pronounce themselves on the two substantive questions posed. While being instructive within the complexity of judicial argument, Judge Tomka was against complying with the request. In response to question (a), Judge Tomka agreed that the decolonisation of Mauritius was not lawfully completed and that the British Administration should bring an end to their activities on Chagos, but he disagreed with the reasoning of the Court in reaching this decision.³⁸ On the other hand, Judge Abraham contended that once the element constituting the offence of question (a) was found, the Court went beyond its scope in holding the UK to bring an end to its administration.³⁹

Both Judges considered that in an attempt to answer the questions the Court went beyond the scope of necessity to assist the General Assembly in its function while adjudicating on a bilateral dispute in disguise. Protecting the essence of an advisory opinion, Judge Tomka stressed that an advisory opinion may take the form of a contentious dispute due to its origin of bilateral nature. Therefore, he advocated that the Court must exercise caution not to exceed its scope further than required.⁴⁰ For Judge Tomka, it was not necessary for the Court to hold that decolonisation remained to be completed in answering question (b). Ruling as this matter dealt with the conduct of the UK and by doing so the Court embarked on the principle of state responsibility.⁴¹

4.5.2 Dissenting Opinion of Judge Joan Donoghue

In her dissenting opinion, Judge Donoghue agreed that the ICJ had jurisdiction to give an opinion but she also stressed the principle of judicial propriety and the need to provide compelling reason. According to her, the Court should have declined to give an Opinion in exercise of its discretionary power. She argued that the request was in

38 See Declaration of Judge Tomka para 9 <https://jusmundi.com/en/document/pdf/Opinion/ICJ-169-20190225-01-02/en/en-legal-consequences-of-the-separation-of-the-chagos-archipelago-from-mauritius-in-1965-request-for-advisory-opinion-declaration-of-judge-tomka-monday-25th-february-2019> (accessed 30 September 2019).

39 See Declaration of Judge Abraham p. <https://jusmundi.com/en/document/pdf/Opinion/ICJ-169-20190225-01-03/fr/fr-effets-juridiques-de-la-separation-de-larchipel-des-chagos-de-maurice-en-1965-requete-pour-avis-consultatif-declaration-de-m-le-juge-abraham-monday-25th-february-2019> (accessed 30 September 2019).

40 *Chagos* case (n 34) para 6.

41 *Chagos* case (n 34) para 9.

fact a bilateral dispute over sovereignty of Chagos Archipelago,⁴² best suited to be resolved through negotiation. Giving an Opinion could damage the credibility and undermine the integrity of the ICJ's consistent jurisprudence and could have the effect of circumventing the absence of UK's consent.⁴³

4.6 Legal effect of the Advisory Opinion and enforcement

The Advisory Opinion provided arguments which integrate customary law. Under public international law, the enforcement of decisions by the ICJ – whether a contentious case or an advisory opinion – is a complex matter. However, what should be considered here is whether the General Assembly can defer from the Advisory Opinion in the matter of Chagos. The answer to this question would probably lie within the provisions of the UN Charter in the absence of a binding mechanism similar to article 94 of the UN Charter which applies to contentious cases. Consequently, the General Assembly is not obliged to follow the opinion of the ICJ which is non-binding in nature. However, an advisory opinion is also not devoid of any politically probative force. Emanating from the highest jurisdiction of the international judicial system, an advisory opinion should be recognised as having a certain degree of authority.

The legitimacy of this particular Advisory Opinion has been enhanced with the General Assembly adopting Resolution 73/295, welcoming the opinion on 22 May 2019. By a recorded vote of 116 in favour to 6 against and with 56 abstentions, the Assembly reiterated that Mauritius will now be enabled to complete the decolonisation of its territory as soon as possible.⁴⁴ In his address to the Assembly, the Mauritian Prime Ministry highlighted the way forward as follows:⁴⁵

Stressing that the United Kingdom is obliged to end its administration and enable Mauritius to complete the decolonization of its territory, he said the Assembly must pronounce on the modalities required for such and that all Member States must cooperate with the United Nations to put those modalities into effect. It must also address the issue of resettlement, a question of human rights protection.

However, the worrying stand of the United Kingdom is worth highlighting:⁴⁶

42 See Dissenting Opinion of Judge Donoghue para 1 <https://jusmundi.com/en/document/pdf/Opinion/ICJ-169-20190225-01-06/en/en-legal-consequences-of-the-separation-of-the-chagos-archipelago-from-mauritius-in-1965-request-for-advisory-opinion-dissenting-opinion-of-judge-donoghue-monday-25th-february-2019> (accessed 30 September 2019).

43 As above.

44 United Nations 'General Assembly Welcomes International Court of Justice Opinion on Chagos Archipelago, Adopts Text Calling for Mauritius' Complete Decolonization' Plenary Seventy-third Session GA/12146 <https://www.un.org/press/en/2019/ga12146.doc.htm> (accessed 30 September 2019).

45 As above

46 n 32.

The United Kingdom is not in doubt about our sovereignty over the British Indian Ocean Territory', she said, which has been under its sovereignty since 1814. It has never been part of Mauritius. In 1965, Mauritius freely entered into an agreement that offered fishing rights and marine resource. The accord also included a United Kingdom commitment to cede the territory when it is no longer needed for defence purposes. The UK stands by its commitments made in the 1965 agreement, which Mauritius reaffirmed on many occasions since its 1968 independence, including through its own laws and Constitution.

The UN described the UK's position on the Advisory Opinion as being 'disrespectful of the Court and the United Nation'.⁴⁷ UK had up to 22 November 2019 to leave the Chagos without conditions as required by the Advisory Opinion. This has not been respected. Taking a position on the matter, South Africa has stated as follows during the UN General Assembly meeting:⁴⁸

'South Africa stands by the African Union's position that their right to self-determination and independence for Western-Sahara is non-negotiable. The complete decolonisation of Mauritius must be undertaken in accordance with the General Assembly resolution on the issues adopted earlier in 2019. That action sent a strong signal from the international community that control of the Chagos Islands archipelago should return to Mauritius'.

Christopher Pincher, State Minister at the Foreign and Commonwealth Office, replied to a parliamentary question in the UK House of Commons, stating the following:⁴⁹

'This is an inappropriate use of the ICJ Advisory Opinion mechanism and sets a dangerous precedent for other bilateral disputes. However, an Advisory Opinion is not a legally binding judgment, it is advice provided to the UN General Assembly at its request. And while the British Government respects the ICJ and has considered the content of the Advisory Opinion, it does not share the Court's Approach. No international tribunal has ever found UK sovereignty to be in doubt. We stand by our long-standing commitment to cede sovereignty of the territory to Mauritius when it is no longer required for defence purposes, but strongly refute Mauritius' claim that BIOT is part of Mauritius'.

5 CONCLUSION

Beneath the legal structure of the *Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* lies two straightforward political issues, sovereignty over Chagos and resettlement of the Chagossians. The Advisory Opinion of 25 February 2019 is a breakthrough for Mauritius, as it forces the UK to engage in diplomatic talks with Mauritius in reaching a settlement. However, neither litigation nor politics alone can solve this issue.

The fundamental question now is how the General Assembly will take forward the decolonisation process of Mauritius including the resettlement of its Mauritian nationals of Chagossian origin and the restoration of their human rights to abode after adopting the Opinion.

47 'Chagos – Territorial sovereignty' *Week End* 20 October 2019.

48 As above.

49 See UK Parliament 'British Indian Ocean Territory: Sovereignty: Written question – 117' <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-10-14/117/> (accessed 25 October 2019).

The Advisory Opinion will serve as basis to convince and garner support from all countries that abstained from voting on GA Res. 71/292. Nevertheless, there are decades of distrust to be washed away. It has long been known that the Outer Islands are not required for defence purposes. Therefore, as a first step, the other islands namely Peros Banhos, Salomon Islands, Nelsons Island, Three Brothers, Eagle, Egmont and Danger Islands can be restituted in full rights to Mauritius until the completion of its decolonisation, to introduce a pilot resettlement programme for Chagossians, thereby restoring their right to abode, jointly administered and financed by the UK and Mauritius as part of a bilateral accord. To achieve this, setting out a framework for diplomatic discussions would be the starting point. Diplomatic discussions between the two sovereign states are paramount to come up with a jointly and freely agreed settlement in form of a bilateral treaty.

Jean Claude de l'Estrac former Minister of Foreign Affairs of Mauritius, notes that it is unlikely that the UK will relinquish control over Chagos.⁵⁰ However, the Britain's Foreign Office has stated to the press that it will look 'carefully' at the ruling, while stressing that the Court's view is 'an advisory opinion, not a judgment and the defence facilities on Diego Garcia helps to protect people here in Britain and around the world from terrorist threats, organised argument to resettlement, especially after the terrorist attacks on New York on 11 September 2001 and the co-ordinated US military operation in Iraq in 2003'.⁵¹ In addition to this, with the emergence of the Asia-Pacific and China as a global economic force and strategic centre for trade in the region, the American military presence is important in the Indian Ocean as a safeguard to peace and security.⁵² Nevertheless, Mauritius has continuously reassured the UK and the US about the continuity of the military base. Diplomatic negotiation on the strategic and future use of Diego Garcia for Military and defence purposes to maintain international peace and security will be envisaged in the form of separate agreement or treaty between Mauritius, the UK and the US, with Mauritius having exclusive sovereignty.

From an international law point of view, it has to be said that it was re-assuring to see Judges of the ICJ upholding the sacrosanct principle of the right to self-determination in the decolonisation context against one of the most powerful countries of the world. The onus now lies with the UK to decide on a matter of human rights and fundamental freedoms of the Chagossians against matters related to defence.

50 J De L'Estrac 'Restitution des Chagos' *DefiMedia* 3 March 2019 <https://defimedia.info/restitution-des-chagos-par-les-britanniques-la-voie-diplomatique-serait-la-seule-planche-de-salut> (accessed 12 August 2019).

51 'UN court rejects UK's claim of sovereignty over Chagos Islands' *The Guardian* 25 February 2019 <https://www.theguardian.com/world/2019/feb/25/un-court-rejects-uk-claim-to-sovereignty-over-chagos-islands> (accessed 30 September 2019).

52 See Erickson A, Ludwig W & Mikolay J 'Just out in time for the geopolitical issue of the day: the Diego Garcia Bookshelf' <http://www.andrewerickson.com/2019/02/just-out-in-time-for-the-geopolitical-issue-of-the-day-the-diego-garcia-book-shelf/> (accessed 25 August 2019).

State compliance with decisions of the African Court: the case of *Alfred Agbesi Woyome v Ghana*

Renee Aku Sitsofe Morhe* and Richard Obeng Mensah**

ABSTRACT: Ghana is a state party to the African Charter on Human and Peoples' Rights and the Protocol thereto on the Establishment of an African Court. In the case of *Alfred Agbesi Woyome v Ghana*, the African Court on Human and Peoples' Rights ruled that Ghana should stay execution of a judgment debt against the applicant until the final determination of the substantive case before the African Court on its merits. The Ghanaian Supreme Court disregarded this ruling and ordered that Ghana should continue the process of identifying and attaching assets owned by the applicant to defray the judgment debt. In analysing the Ghanaian Court's decision, this case commentary finds that the lack of compliance with the orders of the African Court negatively affects respect accorded to this regional judicial institution.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'exécution des décisions de la Cour africaine par les Etats: cas de l'affaire *Alfred Agbesi Woyome c. Ghana*

RÉSUMÉ: Le Ghana est un État partie à la Charte africaine des droits de l'homme et des peuples et a reconnu la compétence de la Cour africaine des droits de l'homme et des peuples. Dans l'affaire *Alfred Agbesi Woyome c. Ghana*, la Cour africaine a décidé que le Ghana devait surseoir à l'exécution d'un arrêt condamnant le requérant à rembourser une dette jusqu'à ce qu'elle juge l'affaire portée devant elle au fond. La Cour suprême du Ghana a ignoré la décision de la Cour africaine et a ordonné que le Ghana poursuive le processus d'identification et de saisie des actifs appartenant au demandeur afin de rembourser la dette. En analysant la décision de la juridiction ghanéenne, cette contribution constate que le non-respect des ordonnances de la Cour africaine affecte négativement le respect accordé à cette institution judiciaire régionale.

KEY WORDS: African Court, Protocol to the African Charter, compliance, Ghana, *Woyome* case

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CONTENT:

1	Introduction.....	436
2	The contextual framework	439
2.1	The African Court on Human and Peoples' Rights	439
2.2	Problems with compliance and implementation of the African Court's decisions	440
3	Methodology	446
4	Findings: the Ghana Supreme Court's decision on order for stay of execution given by the African Court	446
4.1	Constitutional road block to stay of execution	447
4.2	Failure to plead human rights violation	448
5	Discussion	449
6	Recommendations	453
6.1	Naming and shaming	453
6.2	States must become parties to human rights treaties only after domestication	454
6.3	Liaising with all stakeholders and publicity for the African Court in individual countries	454
7	Conclusion	455

1 INTRODUCTION

For many years the African Union (AU) and its system for protection of human rights, especially the African Commission on Human and Peoples' Rights (African Commission), was referred to as a 'toothless bull dog' because of its inability to enforce decisions in cases of breach of fundamental human rights and freedoms.¹ The African Court on Human and Peoples' Rights (African Court) was then established in hope of rectifying the situation.² It is essential to note that the African Court is not an appellate court in the hierarchy of domestic courts.³ Hence, implementation and compliance with its decisions within the domestic arena is problematic since it appears to rely on good faith of member state parties. This problem was observed from Ghana's Supreme Court's decision in an application requesting it to implement an order from the African Court granting a stay of execution in the case of *Woyome v Ghana*.⁴

Woyome, the applicant in the case, and the government of Ghana entered into a contract under which the applicant provided engineering services to Ghana. However, there was dispute over the validity of the contract. The matter ended in the Ghanaian Supreme Court where the applicant was sued, together with two other defendants, by Mr Martin Alamisi Amidu under article 2 of the 1992 Constitution of Ghana.⁵ The Supreme Court found that payment of the contract sum of

- 1 A Ayinla & 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; E Mulembe 'Human rights and development in the twenty-first century: the African challenges' (1999) 31 *Zambia Law Journal* 41 at 67.
- 2 Founded under the Protocol to the African Charter on Human and Peoples' Rights on the establishment of the African Court on Human and Peoples' Rights, adopted in 1998, entered into force in 2004.
- 3 *Mtingwi v Malawi* (Application 1 of 2013) [2018] 1; (15 March 2013) para 14.
- 4 *Alfred Agbesi Woyome v Ghana* (Application 1/2017) (24 November 2017).
- 5 *Amidu No.3 v Attorney-General, Waterville Holdings (Bvi) & Woyome (No.2)* (2013-2014) 1 SCGLR 60.

GH¢51,283,480.59 to the applicant was unconstitutional. Subsequently, the applicant applied for a review of the judgment. The review bench of the Court in a unanimous ruling delivered by Dotse, JSC on 29 July 2014 ordered the applicant to pay to the government of Ghana the said contract amount which appears to be substantial. The applicant alleged that Justice Dotse, while refusing the review, included sentences that the applicant interpreted as biased and prejudicial to his case.⁶ The sentences included: 'the tendency where state resources are allowed to be dissipated must be brought to an end' and also '... this review application should resist any attempt to use this court as a conduit by which any acts of unconstitutionality in the siphoning of public funds will be given a semblance of authority and judicial blessing.'⁷

The applicant applied to the African Court alleging infringement of his human rights under the African Charter on Human and Peoples' Rights (African Charter) particularly article 2 on enjoyment of rights and freedoms recognised without distinction, article 3 on equality before the law and equal protection of the law and article 7 on the right to a fair trial. Before the hearing of this substantive case, however, the applicant asked for an interim order from the African Court for a stay of execution of the judgment delivered by the Ghanaian Supreme Court requesting him to refund the money. He brought the preliminary motion because as the sole and constitutional body entrusted with the responsibility to represent the government of Ghana in civil proceedings, the Attorney-General, the first respondent in that application, had proceeded to levy execution by resorting to judicial processes regulating execution of judgments. Subsequently, the Attorney-General also began valuing the applicant's properties in an effort to retrieve the money.

The applicant argued that if Ghana is allowed to continue valuing and taking his property he would suffer irreparable harm should the application before the African Court be eventually decided on its merits in his favour. In arguing before the African Court, the applicant also maintained that the interim measures should be ordered due to the urgency and gravity of the situation. The respondent state, Ghana, opposed the application for the interim measures and argued, among other grounds, that the question for determination was whether it was entitled under the laws of Ghana to recover the debts owed by the applicant.⁸ Also, that the issue is not (1) whether alleged irreparable breaches of human rights can be legitimately raised following its efforts to recover; or (2) whether this action would amount to a breach of Ghana's obligation under the African Court.⁹ The applicant, after filing this preliminary motion to the African Court, applied to the Ghanaian

6 As above, para 35.

7 As above.

8 In making its case, the government referred to art 40 of the Ghana 1992 Constitution on the need to protect the interests of Ghana in international relations.

9 See generally arts 5(3) & 34(6) of the Protocol.

Supreme Court¹⁰ pleading a stay of execution proceedings pending the final determination of the matter before the African Court. Before the Supreme Court could decide this application, the African Court ruled that Ghana should stay execution of the judgment against the applicant until the final determination of the substantive case on its merits. Four days after the decision of the African Court on the preliminary matter, the Supreme Court of Ghana also delivered its ruling¹¹ on the question of stay of execution. The Supreme Court, without considering the decision of the African Court on the preliminary motion, dismissed the application as having no merit. As a result, the Attorney-General did not comply with the decision of the African Court and continued the court processes of identifying assets owned by the applicant to defray the judgment debt.

This commentary relates to this decision of the Ghanaian Supreme Court. We submit that two possible scenarios could have emerged from the applicant's substantive case at the African Court if the interim order for stay of execution had been observed by Ghana and the applicant's properties preserved. These are that the African Court could have eventually ruled that (1) his rights had not been violated or (2) that his rights had been violated. In the former, the government wins and could proceed with attachment of the applicant's property. Also, in this former scenario, the interim order for stay of execution may only have delayed attachment of the properties and the government would still have had the opportunity to recover the money. In the latter scenario, the applicant wins and is able to keep his property. In both scenarios, at least, justice would have not only been done but also seen to have been done.

Indeed, during the course of writing this case commentary, the African Court ruled on the substantive matter and found in favour of Ghana.¹² Ghana had argued that the Protocol to the African Charter on the Establishment of an African Court (Court Protocol) had not been domesticated and that the application did not raise human rights claims. Ghana also argued that the African Court could not review decisions of the Ghana Supreme Court. While ruling in favour of Ghana that no human rights had been infringed, the African Court did caution against inflammatory speeches of judges, labelling Justice Dotse's statements as being unfortunate. The Court held that the statements did not give an impression of preconceived opinions and did not reveal bias especially since there were other judges on the panel and the decision about the review was unanimous. The African Court also established its jurisdiction over the case stating that article 3 of the Court Protocol only required ratification and not domestication.

Considering the decision of the Ghanaian Supreme Court not to acknowledge the preliminary decision of the African Court one wonders about the reaction of Ghana, as a state party to the Protocol, had the

10 *Martin Alamisi Amidu v The Attorney-General and 2 others* (2017) Supreme Court Civil Motion No. J8/08/2018. Judgement delivered on 28 November 2017.

11 As above.

12 *Woyome v Ghana* (Application 1/2017) 1970 African Court 13 (28 June 2019).

African Court given an adverse decision. This case discussion is concerned with the response of Ghana's Supreme Court to Woyome's application for stay of execution because it presented a conundrum about the enforceability of decisions from the African Court. The decision was against the tenets of state party obligation under the African Charter and its Court and has the potential to negatively affect respect accorded this regional judicial institution. The objective therefore is to present an analysis of the Supreme Court's decision to determine the basis of denial of stay of execution as ordered by the African Court. This discussion is divided into seven parts. Part 2 presents the contextual framework, which is the literature review. Part 3 presents the methodology. Part 4 outlines the findings, which presents the Supreme Court's decision and Part 5 presents our discussion. Finally, part 6 is the recommendations for the way forward. Part 7 is the conclusion.

2 THE CONTEXTUAL FRAMEWORK

2.1 The African Court on Human and Peoples' Rights

The African Court was established in terms of article 1 of the Court Protocol. The Court Protocol was adopted on 10 June 1998, in Ouagadougou, Burkina Faso, by the then Organization of African Unity (OAU).¹³ The Protocol entered into force on 25 January 2004. The African Court became operational in 2006 and is composed of 11 Judges elected by the Executive Council and appointed by the Assembly of Heads of State. The African Court has jurisdiction over all cases and disputes submitted to it regarding the interpretation and application of the Charter, the Court Protocol and any other relevant human rights instrument ratified by states.¹⁴ As the Charter deals with human and peoples' rights, any allegation of a breach of the rights of an individual falls in the purview of the Court. However, as illustrated in the case of *Michelot Yogogombaye v Senegal*,¹⁵ there is an avenue for individuals to access the Court but only when the violating state party has made a declaration recognising the competence of the Court to receive individual complaints.¹⁶ Further, the individual must have exhausted all local remedies. Ghana has recognised the competence of the African Court to receive individual complaints.

The African Court has the mandate to order reparations and compensation and its decisions are final and binding on all parties. As at June 2019, the Protocol had been ratified by 30 member states of the

13 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights 10 June 1998 <http://www.achpr.org/instruments/court-establishment/> (accessed 13 June 2019).

14 As above.

15 Appl. 1/2008, ACtHPR, Judgment (15 December 2009).

16 Art 34(6) of the Protocol.

African Union, namely: Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Congo, Côte d'Ivoire, Comoros, Gabon, The Gambia, Ghana, Kenya, Libya, Lesotho, Malawi, Mali, Mauritania, Mauritius, Mozambique, Niger, Nigeria, Uganda, Rwanda, Sahrawi Arab Democratic Republic, Senegal, South Africa, Tanzania, Togo and Tunisia. Of the 30 state parties to the Protocol, only seven, namely: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali and Tanzania, had made the declaration under article 34(6) accepting the jurisdiction of the African Court to receive cases from individuals and non-governmental organisations.¹⁷ Rwanda, which previously made the declaration has since withdrawn, revealing the difficulty states have with subsuming their judicial sovereignty with that of the African Court.¹⁸

As at June 2019, a total of 216 applications had been received by the African Court. 201 were from individuals, 12 from NGO's and 3 from the Commission. As at the time of writing, the Court had so far finalised 58 applications, transferred 4 applications to the Commission and had 154 applications pending. All the decisions of the African Court are communicated to the parties, in accordance with article 29(1) of the Protocol. Under article 31 of the Protocol, the Court submits an Activity Report to the Assembly, specifying cases completed, those pending and cases in which states had not complied with decisions of the court.

The expectation is that the African Court would be a supranational institution that would 'give teeth' to the Charter and hold state parties accountable for violations of human rights.¹⁹ Yet the Protocol does not describe how the Assembly is to respond to reports of noncompliance although the Executive Council, on behalf of the Assembly, is to monitor the execution of the African Court's orders. Without an effective enforcement mechanism however, these aspirations for the African Court cannot be met and the judgment of the African Court is useless.

2.2 Problems with compliance and implementation of the African Court's decisions

The typical follow-up procedures for enforcement of human rights standards do not seem to be effective or work to engender compliance of states.²⁰ In the 2016 activity report from the African Court to the

17 See <https://au.int/en/treaties> for more information on list of state parties that have deposited the article 34(6) declaration (accessed 15 November 2019).

18 On 3 March, 2016, the Court received a notification to the effect that the Republic of Rwanda has deposited with the AUC, a letter withdrawing from the art 34(6) declaration it deposited in February 2013.

19 C Heyns 'A human rights court for Africa' (2004) 22 *Netherlands Quarterly of Human Rights* 325-327; M Mutua 'The African human rights court: a two-legged stool?' (1999) 21 *Human Rights Quarterly* 351; FIDH 'Admissibility of complaints before the African Court, practical guide' June 2016 <https://www.refworld.org/pdfid/577cd89d4.pdf> (accessed 25 September 2019).

20 M Hakimi 'Secondary human rights law' (2009) 34 *Yale Journal of International Law* 601.

Assembly, Tanzania for example, in the case of Ally Rajabu 007/2015 and the case of John Lazaro 003/2016 on the issue of imposing the death penalty informed the African Court that it would be unable to implement the orders of the Court.²¹ Activity reports also reveal that Ghana in the first *Woyome* decision of the African Court on the preliminary matter of stay of execution, informed the Court that it would await the African Court's final decision but in reality did the opposite.

States that ratify international or regional human rights treaties do so with the understanding that no nation is an island and that in matters of human rights, there is the need to set universal standards. These standards basically mean the right to life, liberty and property for all people without discrimination²² and access to justice for all victims of violations of rights. Oba has observed that domestic human rights legislation may not be enough to stop massive human rights violations and this makes a strong case for concerted action by the international community and intervention by supranational courts.²³ Noting that international law is now being used in municipal courts to challenge violations of human rights in particular, points to a growing awareness of the African Charter in some African countries since the 1990s.²⁴ It has been also contended that the common law rules on enforcing foreign judgments, whereby foreign judgements are directly enforced in domestic arena, could also apply to enforce judgments rendered by international courts and tribunals.²⁵ For example, under the common law, the procedure for enforcing foreign judgments is just for the judgment creditor to issue a writ and plead that the judgment debt is due and owing.²⁶ In Ghana, the statute on the issue, Part V of the Courts Act 1993 (Act 459),²⁷ allows Ghana to have reciprocal relationship with any other country whereby judgment given by domestic superior courts could be enforced in both countries. Contending that judgements from international courts like the African Court should also be considered 'foreign judgments' means that in the absence of legislation incorporating provisions of the Charter and its Protocol into domestic

21 EX.CL/999.

22 UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A(III). <https://www.refworld.org/docid/3ae6b3712c.html> (accessed 15 August 2019), see especially arts 2, 3 & 17.

23 A Oba 'The African Charter on Human and Peoples' Rights and ouster clauses under the military regimes in Nigeria: before and after September 11' (2004) 4 *African Human Rights Law Journal* 275 at 300.

24 As above 301. See also the Ghanaian case of *Ernest Adofo v Ghana Cocoa Board* (2013-2014) 1 SCGLR 377, where Dr Date-Bah JSC held that rights of workers under the ILO Convention No. 87 of 1948 (Freedom of Association and protection of the right to organise) and article 2 of the ILO Convention No. 98 of 1949 (The right to organise and collective bargaining) cannot be restricted by domestic law.

25 R Liwanga 'From commitment to compliance: enforceability of remedial orders of African human rights bodies' (2015) 41 *Brooklyn Journal of International Law* 100 at 145.

26 R Oppong 'Recognition and enforcement of foreign judgments in Ghana: second look at the colonial inheritance' (2005) 31 *Commonwealth Law Bulletin* 19 at 23.

27 Courts Act, 1993 (ACT 459) with Courts (Amendment) ACT, 2002 (ACT 620) with the Courts (Amendment) ACT 2004, (ACT 674) secs 81-88.

laws, municipal courts (such as the Supreme Court of Ghana) could nevertheless implement and enforce orders of the African Court as foreign judgment. Such an understanding would make it easier to implement judgment from the African Court in domestic courts of member countries like Ghana.

All but one AU member states are party to the African Charter²⁸ and commitments to human rights principles feature in almost all AU documents. Prior to 2004, much of the work of the AU in the area of human rights was undertaken by the African Commission. The Commission is charged with promotion and protection of human and peoples' rights under conditions laid down by the Charter and also with interpretation of the Charter.²⁹ The Commission however attracted much discontent because although it played a prominent role in developing African jurisprudence in human rights, it was cash strapped, lacked the mandate to adjudicate cases brought by individuals and could not give binding opinions.³⁰ As noted above, the African Court rectified the situation when the Court Protocol allowed individuals to claim rights against state parties.

However, adhering to universal standards in human rights and to the jurisdiction of international and regional human rights bodies like the African Court, signifies the need to surrender some aspect of state autonomy for the common good of humankind. Surrendering state autonomy is very difficult for sovereign states and many defer to the theory of dualism to evade domestic application and enforcement of universal standards.³¹ But of what use are these human rights standards when they can neither be implemented nor decisions enforced domestically to the benefit of individual victims? The main obstacles to domestic enforcement of decisions from the African Court are (1) dualism and lack of compliance; (2) lackluster judiciary; and (3) failing national human rights institutions.

The first obstacle is dualism and lack of compliance with the African Court's decisions. In monists' states like the Netherlands and France, domestic courts can apply international law principles in deciding cases.³² Similarly, individuals are at liberty to rely on international law rules to support arguments in national courts. Consequently, monists believe that when a state ratifies an international human rights treaty, it becomes *ipso facto* part of its law and their parliament need not pass laws to give effect to them before they become operational. Under monism, whenever there is a conflict between international law and

28 54 out of 55 AU member states – all except Morocco – have ratified the African Charter.

29 Art 45 of the Charter.

30 LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 13 *Sur-International Journal on Human Rights* 119 at 128.

31 J Kalb 'The persistence of dualism in human rights treaty implementation' (2011) 30 *Yale Law & Policy Review* 71 95; A Roberts 'Comparative international law? the role of national courts in creating and enforcing international law' (2011) 60 *International and Comparative Law Quarterly* 57 at 59.

32 D Sloss 'Domestic application of treaties' (2011) <http://digitalcommons.law.scu.edu/facpubs/635> (accessed 13 June 2019).

municipal law, international law principles are supreme and must take precedence over the national law.³³ Conversely and traditionally, dualist states like Ghana hold the position that international law and municipal laws are two different laws altogether and the rules of international law are not applicable in municipal courts unless parliament passes a law to give effect to them. Hence, when dualist states become parties to an international treaty, the treaty does not automatically apply in domestic law. At best an international treaty is of persuasive authority unless and until Parliament ratifies it and enacts legislation incorporating the international treaty into domestic law. Hence, to dualist states, international and regional human rights law is inapplicable in municipal courts in the absence of an enactment by parliament giving effect to it. In the Ghanaian context, article 75 of the Constitution states:

- (1) The president may execute or cause to be executed treaties, agreements or conventions in the name of Ghana.
- (2) A treaty, agreement or convention executed by or under the authority of the president shall be subject to ratification by –
 - (a) Act of parliament; or
 - (b) A resolution of parliament supported by the votes of more than one-half of all the members of parliament.

In addition to the above, although a treaty ratified by Parliament binds Ghana internationally, for the treaty to be domestically applicable and capable of invocation in Ghanaian courts, Parliament must further pass a specific legislation to domesticate or transform it into Ghanaian law.³⁴

As noted by Ian Brownlie,³⁵ international practice however seems to favour the position that a state cannot rely on provisions of its own law or deficiencies in that law in response to claims of alleged breach of its international obligation.³⁶ Brownlie argued further that in treaty obligations there is a general duty to bring national law in conformity with obligations under international law.³⁷ In the *Free Zones* case, the Permanent Court of International Justice pronounced, amongst others, that France cannot rely on domestic legislation to limit the scope of its international obligations.³⁸ Further, although the Vienna Convention on the Law of Treaties recognises the fact that a treaty is a written

33 D Harris *Cases and materials on international law* (2010) 61.

34 K Mensah & C Nyinevi *The lawyer's companion, a guide to researching Ghanaian case law* (2015) 457. See also *Republic v High Court (Commercial Division) Accra; ex parte Attorney-General (NML Capital Ltd & Republic of Argentina, Interested Parties)* (2013-2014) 2 SCGLR 990 (the Argentine Warship Case). This case addresses the incorporation of customary international law and treaties into Ghanaian law. See also *Magaret Banful & Henry Nana Boakye v Attorney-General* (Writ no. J1/7/2016) unreported. (Judgement: 22 June 2017) (The Guantanamo Detainees Case) which addresses the making and ratification of treaties under art 75 of the 1992 Ghanaian Constitution.

35 I Brownlie *Principles of public international law* (2003) 34.

36 As above. See also *Free Zones of Upper Savoy and District of Gex (Fr. v Switz.)*, 1932 P.C.I.J. (ser.A/B) No. 46 (June 7).

37 Brownlie (n 35) 35.

38 n 36, para 25.

document between sovereign states,³⁹ article 26 of the Convention establishes that every treaty in force is binding on the parties to it and must be performed in good faith. Article 18 defines good faith to mean that a state must refrain from acts which would defeat the objects and purpose of a treaty. Article 27 of the Convention also affirms the principle that a state party may not invoke the provisions of its internal laws as justification for its failure to perform its obligation under a treaty.

The second obstacle is the problem of lacklustre judiciary in nation states. The concept of dualism makes implementation and enforcement largely dependent on the political will of state parties to enact legislation to give effect to the human rights obligations undertaken under treaties. The judiciary is the other arm of government and acts of the judiciary are imputed to the state.⁴⁰ As already seen, under article 30 of the Court Protocol states agree to be bound by decisions of the African Court and to ensure their execution. It is conceded however that although a decision reached by the African Court is final and binding on parties to the dispute, as already mentioned, the Court is not an appellate court in the hierarchy of domestic courts and enforcement of its decisions within domestic arena relies on the good will of state parties. Hence, although compliance is to be monitored by the executive,⁴¹ execution of judgments is based on willingness of state parties to cooperate.⁴²

National courts however continue to grapple with ideas of 'judicial sovereignty' and find it difficult to implement decisions from supranational judicial institutions like the African Court. Egede,⁴³ for example, argues that holding that human rights treaties are not enforceable unless domesticated defeat the very purpose for ratifying the treaties in the first place; which is to secure rights for the benefit of individuals.⁴⁴ He proposed that treaties can be applied indirectly and be of persuasive authority because they can be said to have attained some legitimacy as customary international law.⁴⁵ But we contend that

39 Vienna Convention on the Law of Treaties 1969, art 2(1).

40 The Supreme Court's decision seemed to be welcomed by the government especially the Deputy Attorney-General who was quoted as lauding the decision, Ghana Justice, *Supreme Court right for 'ignoring' African Court in Woyome case - Dame*, at <https://www.ghanajustice.com/2017/11/supreme-court-right-for-ignoring-african-court-in-woyome-case-dame> (accessed 10 April 2019). See also Citifm, *Ghana's Supreme Court rejects African Court ruling on Woyome* at <http://citifmonline.com/2017/11/ghanas-supreme-court-rejects-african-court-ruling-woyome/> (accessed 10 April 2019).

41 The Executive Council is composed of the ministers of foreign affairs or other such ministers or authorities as are designated by the governments of member states.

42 C Anyangwe 'Obligations of states parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 628.

43 E Egede 'Bringing human rights home: an examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 249.

44 Egede (n 43) 273.

45 Egede (n 43) 276.

such interpretation will depend on an activist judiciary.⁴⁶ Unfortunately in many parts of the world, including Ghana, judges especially those at the highest appellate courts, are appointed by the executive usually to influence policy and these judges, absent domestic law, may find it difficult to be independent in politically charged cases like the *Woyome* case where politics and law seem to collide.

Failing national human rights institutions are also an obstacle to domestic implementation of decisions from the African Court. National human rights institutions could be a conduit for state party compliance with decisions of the African Court. According to the Paris Principles,⁴⁷ part of the mandate of a national human rights institution is to give advisory opinions on legislative and administrative provisions in force in the particular country including making recommendations on bills and making proposals and reports on any matters concerning the promotion and protection of human rights.⁴⁸ National human rights institutions are therefore agents for proposing bills and laws and they should advise governments on such matters. Human rights institutions are to bring rights home by engaging other stakeholders in implementation of decisions from the African Court.⁴⁹ Therefore, human rights institutions must be more proactive and not gagged. Unfortunately, these institutions like Ghana's Commission on Human Rights and Administrative Justice are usually cash strapped and incapable of undertaking proper investigation in sophisticated cases involving the government. Additionally, some of these institutions like Ghana's Commission are quasi-independent and officials are still appointed with approval from the President.

The *Woyome* case revealed the impotency of national human rights institutions. Ghana's Commission did not intervene and chose to be silent when the Supreme Court refused to obey or acknowledge the interim order from the African Court. Indeed with the exception of few commentators who were alarmed that the decision of the Supreme Court could deter investors,⁵⁰ not much outcry followed the decision. The least the Commission could have done was act *suo muto* and write a position paper to the government on the obligations of state parties on

46 A Huneus 'Courts resisting courts: lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 493 533, where the author noted that the assumption is that independent courts enforce human rights commitments, constraining the executive, and promoting compliance with human rights regimes.

47 See website of Council of Europe <https://www.coe.int/en/web/portal> (accessed 13 June 2019).

48 As above.

49 See Network of African National Human Rights Institutions (NANHRI), *National Human Rights Institutions and African Regional Mechanisms*, <https://nhri.ohchr.org/EN/ExternalPublications/Guidelines%20on%20Implementation%20of%20decisions%20of%20Regional%20Human%20Rights%20Organs%20English%20Version.pdf> (accessed 4 August 2019) 9-12.

50 ASEPA, 'Disrespect for international treaty obligations forcing foreign investors out of Ghana' newswiregh <https://www.ghanaweb.com/GhanaHomePage/business/Disrespect-for-international-treaty-obligations-forcing-foreign-investors-out-of-Ghana-ASEPA-693481> (accessed 18 April 2019).

such matters. National human rights institutions should act as internal watchdogs and pressure points on the government.

The above concerns necessitated this research into the Supreme Court's decision to determine the basis for denial of stay of execution proceedings and its consequences for decisions from the African Court.

3 METHODOLOGY

The main data for our case discussion was obtained from the actual judgments of both the African Court and the Ghanaian Supreme Court. We also performed desk review and qualitative analysis of archival materials that included books, journal articles, international human rights documents and commentaries on the African Court. Internet search engines used were google and yahoo and websites visited were jstor and heinonline. The key words used in our search were 'African Court', 'Protocol to the African Charter', the 'enforcement of African Court's decisions', 'Ghana', and 'Woyome case'. The materials were read carefully looking out for key messages given to civil society, especially messages on the difficulty in domestication of human rights treaties and ways of addressing the problem in Africa. We presented our findings using prominent themes emerging from our analysis of the court cases which illustrated the underlying reasons for the Ghanaian Courts' decision. Our discussion is based on how these reasons could be addressed and overcome to optimise domestication and enforcement of the African Court's decisions. Our case discussion will be useful in evaluation and improvement of services of the African Court. It would also increase knowledge in international human rights law and lay basis for further research in this area for betterment of this institution.

4 FINDINGS: THE GHANA SUPREME COURT'S DECISION ON ORDER FOR STAY OF EXECUTION GIVEN BY THE AFRICAN COURT

The decision of the Supreme Court of Ghana is founded on the case of *Martin Alamisi Amidu v Attorney-General and 2 others*.⁵¹ The findings are placed under two themes which are (1) constitutional road block to stay of execution and (2) failure to plead human rights violation. The African Court orders on the applicant's preliminary application were that Ghana:

51 Civil Motion No.J8/08/2018 dated 28 November 2017 *Martin Alamisi Amidu v Attorney-General, Waterville Holdings (BVI) Ltd & Alfred Agbesi Woyome*, brought under 'Motion on Notice Pursuant to art 40 & 134 of the Ghanaian Constitution, 1992 & The Supreme Court Rules, 1996 (C.I. 16) Rule 73 for the Stay of Execution ...'

- (a) Stay the attachment of the applicant's property and take all appropriate measures to maintain the status quo and to avoid the property being sold until his application is heard and determined.
- (b) Report to the Court within fifteen days from the date of receipt of the order on the measures taken to implement this order.

In response to the applicant's motion for stay of execution proceedings, namely, the process of identifying and attaching his properties till final judgment from the African Court,⁵² the Supreme Court of Ghana per Yeboah JSC, on 28 November 2017, without addressing the import of the African Court's decision, dismissed the application. As already mentioned, the order for attachment was previously given by the Supreme Court when it found that the applicant had defrauded the country and must pay back the sum. In justifying the dismissal of the applicant's motion, the Supreme Court held:

- (1) That the Attorney-General of Ghana by going into execution, was only following the dictates of the 1992 Constitution which he could not disobey. That the Attorney-General was just obeying the mandate ascribed him under article 88⁵³ in conjunction with article 2.⁵⁴ Also, that the Attorney-General was duty bound to follow the orders of the Supreme Court to levy execution against the applicant in accordance with article 2(2), (3) and (4) of the constitution.⁵⁵ The Supreme Court reasoned that if refusing to carry out the terms of the order or direction of the Supreme Court constituted a high crime such as was potent enough to unseat a president or vice-president in office then none of the parties in the suit, being of lesser status than a president or vice, could neglect, refuse or otherwise fail to obey the orders of the Supreme Court.
- (2) That the applicant had failed to demonstrate any breaches of his rights or freedoms in the exhaustively copious compendium of fundamental rights and freedoms spelled out from articles 12 to 33 of the 1992 Constitution breach of which the court should determine the application in his favour.
- (3) That a stay of proceedings was a very serious and grave step with possibly far-reaching consequences for parties in a suit, and as such was a discretionary jurisdiction which ought to be employed only sparingly and in exceptional cases. That there was a burden on the applicant to show by available materials that there existed grounds for the grant of a stay of proceedings before a court could put a temporary halt to proceedings as he sought. And since the applicant had failed to discharge said burden there was neither sufficiency nor conviction of reasons for the court to halt the levying of execution against him by the Attorney-General.

4.1 Constitutional road block to stay of execution

On the first holding, the Supreme Court noted that the action by private individual Martin Alamisi Amidu which culminated in the execution

52 *Martin v Attorney-General* (n 51).

53 Art 88 of the Ghanaian Constitution gave powers to the Attorney-General of Ghana to discharge all legal duties including initiating and prosecuting criminal and civil cases on behalf of the state.

54 Art 2 of the Constitution stipulates that any person alleging that an enactment or an action is done in contravention of the Constitution, could bring an action before the Supreme Court.

55 Arts 2(2), (3) and (4) of the Constitution stipulates that a judgment of the Supreme Court in a suit invoking its original jurisdiction is entitled to absolute obedience.

process was brought under article 2 of the 1992 Constitution of Ghana. Article 2(1) of the Constitution states:

A person who alleges that –

- (a) An enactment or anything contained in or done under the authority of that or any other enactment; or
 - (b) Any act or omission of any person
- is inconsistent with, or is in contravention of a provision of this Constitution, may bring an action in the Supreme Court for a declaration to that effect.

The Court noted that it was the Supreme Court itself that gave orders for payment of the money by the applicant to the government of Ghana and hence, it is its duty to enforce the judgment in compliance with article 2(2), (3) and (4) of the 1992 Constitution which provides as follows:

- 2(2) The Supreme Court shall for the purposes of a declaration under clause (1) of this article, make such orders and give such directions as it may consider appropriate for giving effect, or enabling effect to be given, to the declaration so made.
- (3) Any person or group of persons to whom an order or direction is addressed under clause (2) *of this article by the Supreme Court, shall duly obey and carry out the terms of the order or direction*
- (4) Failure to obey or carry out the terms of an order or direction made given under clause (2) of this article constitutes a high crime under this Constitution and shall in the case of the president or vice-president, constitute a ground for removal from office under this Constitution.⁵⁶

According to the Court, the foregoing constitutional provision imposes strict compliance by President and the Vice-President and that failure to comply with the directions from the Court could lead to their impeachment. To the Court, since the breach of the above directions has far-reaching consequences, an ordinary citizen like the applicant must strictly comply with the directions given by the Court in the exercise of its original jurisdiction. The Court also held that the Attorney-General in representing the government of Ghana by executing the judgment under article 88 of the 1992 Constitution is carrying out the constitutional duties imposed on it and no more. The Court further stated that the constitution of a sovereign state like Ghana is supreme and all institutions of state derive their authority from it. The Court thus held that the execution of the judgment by the Attorney-General is a step to fulfil a constitutional mandate imposed on it when article 2 is read in conjunction with article 88. Consequently, the Court found no merit in the submissions of the applicant.

4.2 Failure to plead human rights violation

The second and third holdings were in response to the applicant's submission that if execution proceedings were not stayed before the application is heard by the African Court, his human rights would be violated. In making this submission, the applicant drew the Court's attention to various exhibits clearly showing that the applicant had actually filed an application on 4 September 2017 at the African Court

⁵⁶ Emphasis by the Supreme Court.

and same had been responded to by Ghana, the state party to this application. He submitted that since the matter was actively pending before the African Court, to determine the issues of human and peoples' rights affecting him, it would be fair and just for the government of Ghana to stay the proceedings till the final determination of the proceedings pending at Arusha, Tanzania. He further argued that Ghana which is a party to the Protocol, is obliged to comply with interim measures of the African Court within the time stipulated by the Court and to guarantee its execution.

In response, the Ghanaian Supreme Court held that the applicant had failed to demonstrate potential human rights violations by evidence; or to furnish the Court of record with such potential human rights violations. It also held that despite numerous provisions on fundamental human rights under the Ghanaian 1992 Constitution, the applicant could not refer to any of the provisions in the Constitution or any statutes whatsoever to demonstrate any breaches of his rights and freedoms. Yeboah JSC made references to Atkin's *Encyclopaedia of Court Forms in Civil Proceedings*⁵⁷ and some cases⁵⁸ which all affirm the common law principles that a stay of proceedings would be granted if there were special circumstances for its grant. The cases established that the burden lies with the applicant to show by available materials that there exist grounds for the motion. The Supreme Court decided that the applicant failed to discharge the burden and refused to grant the stay of execution proceedings.

5 DISCUSSION

The arguments on state judicial sovereignty made in this case are similar to those espoused by the government of Ghana through its Deputy Attorney-General before the African Court in the substantive matter. The Supreme Court's ruling in allowing those arguments and refusing to grant a stay of execution is very significant. As already stated, the African Court on 28 June 2019 ruled in the substantive matter and held for Ghana. Despite the African Court ruling, the case is a lesson on the importance of this regional human rights institution. There is a Ghanaian adage from old folklore that says that 'one does not point to his hometown with his left hand',⁵⁹ meaning that one should appreciate what he has including his origins, however humble. In Ghana it is always considered a sign of disrespect or bad manners to use the left hand in greeting or in making gestures. This adage can be related to the decision given by the Supreme Court. The African Court is a conduit for rights for individual Africans and must be celebrated. There is no denying the fact that the Supreme Court knew or ought to

57 Second edition, volume 35.

58 *Republic v Committee of Inquiry (RT Briscoe (Ghana Ltd))* (1976) 1 GLR 166 CA; *Brutuw v Aferiba & Others* (1979) GLR 566.

59 See AWAKE! Akan proverbs — a mirror on social norms, Watch Tower online library <https://wol.fw.org/en/wol/d/r1/lp-e/102003206#h=3> (accessed 8 May 2019).

know about the jurisdiction of the African Court especially since our current Chief Justice, Sophia Akuffo JSC, had served as a pioneer judge and one of the Chairpersons at the African Court.

The Ghanaian Supreme Court missed the opportunity to elevate the African Court and educate the public. Instead the importance of the African Court was minimised in considerations of judicial supremacy and constitutional provisions. The African Court adequately debunked these considerations in its final decision so there is no point in belabouring the issue except to say that the Ghanaian Court erred when it stated that the applicant had failed to lead evidence before it to demonstrate any breach of his rights or freedom. The domestic court ought not to have pronounced on this issue since it was the subject matter of the substantive application before the African Court. Besides, Ghana being a party to the application before the African Court cannot be a judge in its own cause and conclude that it has not violated any of the applicant's rights or freedoms. The unfortunate pronouncement of the Ghanaian Supreme Court is prejudicial to the determination by the African Court on whether or not Ghana has violated the applicant's rights. Indeed, the Court erred when it stated that the applicant had failed to refer to any of the provisions under Chapter 5⁶⁰ of the 1992 Constitution or any statutes whatsoever to demonstrate any breaches of his rights and freedoms.

From the Court's own pronouncements, the applicant drew its attention to various exhibits which clearly showed that the applicant had actually filed an application on 4 September 2017 at the African Court. As has been pointed out earlier, the application before the African Court alleged violations of articles 2, 3 and 7 of the African Charter by the respondent state, Ghana. The substance of the forgoing articles under the Charter have been enshrined under article 17 (equality and freedom from discrimination), article 19 (fair trial) and article 20 (protection from deprivation of property) of the 1992 Constitution of Ghana. It is worth stating that Ghana's provisions on fundamental human rights and freedoms under Chapter 5 of its constitution is more situated in the provisions of the African Charter.⁶¹ It could thus be concluded from the foregoing that the domestic court erred in its observation on specific rights or freedoms the applicant was alleging their violation by Ghana.

Further, the Supreme Court of Ghana narrowly interpreted article 2(4) of the 1992 Constitution. The Court grounded its decision to dismiss the applicant's motion for a stay of execution and proceedings on article 2(4) of the Constitution, which provides that failure to obey the orders or directions of the Court constitutes high crime. Under the article, a President or Vice-President could be impeached for being guilty of high crime. The Supreme Court therefore reasoned that the Attorney-General in representing the government of Ghana by

60 This chapter deals with fundamental human rights and freedoms.

61 RO Mensah 'Constitutional boundaries to human rights in Ghana: measuring the scope of private and public interests in the right to sexual orientation' in M Addaney (ed) *Women and minority rights law in Africa: reimagining equality and addressing discrimination* (2019) 151.

executing the judgment is carrying out the constitutional duties imposed on it and that failure to do so will result in dire consequences like impeachment. The above interpretation by the Court is erroneous in the sense that high crime is not applicable to the context of the application before the Court. The Court itself has the power to stay its proceedings or execution of its judgment at any time if there is a good reason for doing so. It is submitted that staying execution of the Court's judgment or its proceedings due to the interim measures of the African Court or pending the final determination of the application before it or both constitutes judicial exercise of its power. Once the Court has stayed the execution of its judgment, the issue of high crime will not arise since there will be no obligation to carry out the terms of the Court's judgment until the order staying the said execution has been quashed by the Court. From the forgoing, therefore, the Supreme Court's reasoning in relation to article 2(4) of the 1992 Constitution of Ghana is unfortunately not tenable.

In addition, a constitution must be interpreted as a whole. Essentially, in interpreting any constitutional provision, a court is enjoined to ensure that its interpretation of the said constitutional provision will be in harmony with the other provisions of the Constitution. In this particular case, by focusing on only article 2(4) of the Constitution, the Supreme Court of Ghana failed to also point out that a President or a Vice-President can be impeached under article 69(1)(a) of the Constitution for wilful violation of a human right provision under the Constitution. The article in question states in part:

The president shall be removed from office if he is found, in accordance with the provisions of this article –

- (a) to have acted in wilful violation of the oath of allegiance and the presidential oath set out in the second schedule to, or in wilful violation of any other provision of this Constitution.

Hypothetically, this means that, had the African Court determined that Ghana had indeed violated the rights and freedoms of the applicant, steps could have been initiated to remove the President of Ghana from office especially as Ghana failed to comply with interim measures of the African Court. Contrary to the interim position of the African Court, by deciding that the government of Ghana could go into execution, the Supreme Court caused Ghana to compromise its obligations under the Court Protocol. The domestic court's decision had also put the President of Ghana in a very delicate position even if personally, he was willing to comply with the interim measures of the African Court. Contrary to the view of Ghana's Supreme Court in the case of *Martin Alamisi Amidu v Attorney-General and 2 others* where the applicant failed to establish a special circumstance to justify the stay of its proceedings, the foregoing complexities were enough reasons for which the Court should have granted the request of the applicant.

Since the judiciary is one branch of government, its actions are deemed to be those of the state. Hence, the actions of the Supreme Court of Ghana are imputed to Ghana. The applicant was not seeking to evade the payment of the judgment debt but rather prayed to the honorable Court for stay of execution pending the determination of the matter before the African Court. The decision of the Supreme Court to

proceed with execution irrespective of the order for stay from the African Court was unfortunately misplaced. That the constitutional provision must be complied with does not mean that it precludes a stay of execution especially if its enforcement would make proceedings in the African Court of no effect.⁶² If such a stance were maintainable, no application for a stay of execution would ever deserve to be granted. The posture of Ghana's Supreme Court weakens the African Court. The message, however unintended, is that the African Court decisions can be disobeyed with impunity. State parties cannot elect when to abide by decisions of the African Court. Such posture leads to dilution of human rights standards. The possibility of constitutional blockade to compliance with the African Court's decisions means that realisation of rights for individuals is not guaranteed. Individuals may lose respect and confidence in the African Court's ability to provide remedy for human rights abuses and may be deterred from relying on the African Court.

Finally, as already noted, the Ghanaian Supreme Court came to its conclusion because of the vexing issue of dualism. There are many benefits that accrue to a country by virtue of being part of a human rights treaty or court. One such benefit is less international scrutiny and a sense of belonging to the international community.⁶³ The assumption is that African countries sign human rights treaties to appease donor agencies and organisations and to be in good standing with these organisations.⁶⁴ Unfortunately, in some cases, after ratifying these human rights documents there is no corresponding substantive change in domestic law and its application. For example, although Ghana has signed and ratified the Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol) and Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol, till date, there is no specific legislation on women's rights. The few rights guaranteed women are found scattered across the 1992 Constitution and a few sections of the Criminal Offences Act, 1960 (Act 29) and the Domestic Violence Act, 2007 (Act 732). Such is the case even though the rights accorded women in the Maputo Protocol go beyond the few provisions in Ghanaian law. Of what use is membership of a treaty to individuals if they cannot get access to justice?

62 See *Dzobo v Agbeblewu and Others* (1991) 1 GLR 294 where the court held that an appellate court to which an application for the stay of execution of a judgement which was the subject matter of an appeal had been made ought to see to it that the appeal, if successful, was not nugatory. See also *Djokoto & Amisah v BBC Industrials Co. (Ghana) Ltd & City Express Bus Services Ltd* (2011) 2 SCGLR 825. This case also held that in deciding applications for stay of execution, the courts must grant stay where the balance of hardship will fall on the applicant. See further *Amankwah v Kyere* (1963) 1 GLR 409 which established that a stay of execution simply means to suspend the enforcement of a judgement or order. It does not take away other rights or prevent the exercise of any remedy or right which exists apart from the process of the court.

63 G Bekker 'The African Court on Human and Peoples' Rights: safeguarding the interests of African states' (2007) 51 *Journal of African Law* 154.

64 Bekker (n 63) 158.

6 RECOMMENDATIONS

6.1 Naming and shaming

Naming and shaming is an informal enforcement tool that has been used to coerce state parties into compliance with decisions of supranational institutions and standards.⁶⁵ After the Second World War, when debates were held on whether to form regional arrangements on human rights, critics of regionalism had concerns that regional arrangements would lead to dilution and lowering of human rights standards and also that remedies in cases of individual violations may delay because of the need to first exhaust all local or regional remedies. Despite the concerns regional human rights systems flourished, starting with the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁶⁶ to the American Convention on Human Rights,⁶⁷ and then the African Charter.

These bodies were established because it was hoped that within regions it would be fairly easy to enforce commitments of states to each other since states would be less resistant to change agreed to by their peers. It was also hoped that publicity about human rights would be more effective within the regional arrangements and that deviation from human rights standards could be easily sanctioned by bonds of mutuality. The above hopes have not materialised to a large extent and since traditional state reports and the loose follow up system for enforcing human rights have been slow in ensuring compliance, we suggest that naming and shaming should be utilised by the African Court. Publicising names of defaulters in the activity book is a start but there is need for this to be highlighted in every sphere of the AU activity so that presidents and government officials from countries with bad human rights records are not given positions within the Union.

Further, it is high time that the AU, especially the Executive Council responsible for monitoring compliance on behalf of the Assembly of Heads of States, begins to name and shame countries that have not yet operationalised the AU human rights documents in domestic law. It is recommended that the AU should liaise with the various national human rights institutions to undertake this exercise to audit domestication of human rights documents. Apart from providing data, this

- 65 B Taebi & A Safari 'On effectiveness and legitimacy of 'shaming' as a strategy for combatting climate change' (2017) 23 *Science and Engineering Ethics* 1289. See also K Kinzelbach & J Lehmann 'Can shaming promote human rights? publicity in human rights foreign policy: a review and discussion paper' (2015) https://www.gppi.net/media/Kinzelbach_Lehmann_2015_Can_Shaming_Promote_Human_Rights.pdf (accessed 2 May 2019).
- 66 Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9 <https://www.refworld.org/docid/3ae6b38317.html> (accessed 15 August 2019).
- 67 Organization of American States (OAS), *American Convention on Human Rights, Pact of San Jose*, Costa Rica, 22 November 1969 <https://www.refworld.org/docid/3ae6b36510.html> (accessed 15 August 2019).

exercise will make NHRIs more relevant, since many have become dormant in their respective countries.

6.2 States must become parties to human rights treaties only after domestication

It is recommended that one method of preventing state parties from raising constitutions and other domestic laws as an obstacle to the enforcement of their human rights obligations is to ensure that a state party is recognised as part of an international human rights agreement or treaty when such a state has passed the appropriate domestic law giving effect to the human rights obligations undertaken in the agreement. The closest example is membership of the European Union and its Charter which is based on not only being a party to the European Convention on the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights, but also on embedding the Court in domestic arena in order to grant rights to individual citizens.⁶⁸ Until then, states must only be known as 'signatories' to treaties. This is an effective recommendation which may require changes to international law rules but its benefit would be immense since most African countries want to be part of the human rights system, especially for public relations purposes.⁶⁹ Belonging to such systems is usually a precondition for foreign aid⁷⁰ and western development grants. Indeed, many development partners of African countries do not want to grant aid that would facilitate human rights violations.⁷¹ It is proposed that such a rule will ensure that many states take the necessary steps to domesticate human rights obligations undertaken at international and regional and even sub regional level.

6.3 Liaising with all stakeholders and publicity for the African Charter in individual countries

From the Universal Declaration⁷² to the African Charter,⁷³ states are encouraged to publicise, educate and teach the human rights provisions. Under the Charter, state parties

shall have the duty to promote and ensure through teaching, education and publication, the respect for the rights and freedoms contained in the present

68 R Spano 'The future of the European Court of Human Rights – subsidiarity, process-based review and the rule of law' (2018) 18 *Human Rights Law Review* 473.

69 E Massimino 'The power of human rights law' (2015) 41 *Human Rights* 2-4 24-25.

70 O Hathaway 'Why do countries commit to human rights treaties?' (2007) 51 *Journal of Conflict Resolution* 588 at 596.

71 J Quigley 'Perestroika African style: one-party government and human rights in Tanzania' (1992) 13 *Michigan Journal of International Law* 611 647.

72 Art 26, sec 2 of the UDHR.

73 Art 25 of the Charter.

Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.⁷⁴

It is recommended that this mandate can be effectively achieved when the African Court liaises with all stake holders, not only the NHRIs but also the judiciary, law faculties and members of Bar associations. Publicity would demystify the Court and also encourage acceptability and accessibility. It is important for domestic stakeholders like the judiciary to understand the nature of state party obligations before the African Court. Many African judges including those in Ghana are willing to use international or regional human rights law and cases in domestic court decisions but these are only resorted to for persuasive authority.⁷⁵ Decisions from the African Court however are expected to be binding and complied with and so publicity is very important if decisions of the African Court are not to be seen as *brutum fulmen*, meaningless thunderbolts and in this sense, ineffectual legal judgments.

7 CONCLUSION

The Ghanaian Supreme Court's decision has many implications for how the African Court is viewed and the ability of the African Court to provide a remedy for violation of individual human rights in the country and in Africa. The decision highlighted the need to strategise to prevent state parties using constitutional blockade to deny domestic realisation of human rights. The decision also revealed a number of flaws in domestic implementation of human rights and the lack of power of the African Court to enforce its decisions. Hopefully, this case discussion has contributed to debate in this area, increased knowledge of the African human rights system generally and laid the ground for further research.

74 As above art 25.

75 See generally, *CHRAJ v Ghana National Fire Service & the Attorney General*, Suit No. HR 0063/2017 (23 April 2018) the Ghanaian Human Rights Court drawing extensively on CEDAW, held that Fire Service Regulation 33(6), which authorised dismissal of women who got pregnant within the first year of employment, was discriminatory, unjustifiable, illegitimate and illegal; *Mensah v Mensah* (2012) 46 Ghana Monthly Judgments 48, Dotse JSC referred to the Universal Declaration and CEDAW to grant a woman equal share in matrimonial property; *Attorney-General v Dow*, (1992) BLR 119 (CA) the Botswana Court of Appeal declared sections of the Citizenship Act, 1982, as amended by the Citizenship (Amendment) Act, 1984 (Act No. 17 of 1984) ultra vires the Constitution. In making this decision, the Court noted that although Botswana had ratified the African Charter but had not incorporated it into domestic law, the Charter and the UDHR could still aid in interpretation of the Botswana Constitution.

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

*Andrew Novak**

ABSTRACT: In March 2019, the African Court on Human and Peoples' Rights declared *Dexter Eddie Johnson v Ghana* inadmissible on the basis that the case had already been decided by the UN Human Rights Committee and therefore was 'settled' under article 56(7) of the African Charter. The UN Human Rights Committee had previously found Ghana in violation of its international human rights obligations by sentencing Johnson to a mandatory death sentence for murder, reaffirming a considerable body of comparative and international jurisprudence that the mandatory death penalty was a human rights violation. In finding the case inadmissible, the African Court construed Ghana's violation narrowly, as encompassing only the initial 2008 death sentence. However, conceiving of Ghana's violation more broadly, including its failure over ten years to commute Johnson's death sentence or offer him a sentencing hearing, and its failure to implement the 2014 finding of the UN Human Rights Committee, would have been consistent with the Court's rules and prior jurisprudence. Certainly, the combination of the delay, conditions on death row, and mental state of the petitioner would establish an additional human rights violation beyond the initial mandatory death sentence. Although the UN Human Rights Committee and the African human rights system have reciprocal rules to prevent re-examination of the same facts twice, the African Court was more restrictive in its admissibility holding in *Johnson* than the Committee would have been. The Court therefore missed an opportunity to contribute to the growing jurisprudence against the mandatory death penalty and has left Johnson without a remedy.

TITRE ET RÉSUMÉ EN FRANCAIS:

Une opportunité manquée au sujet de la peine de mort obligatoire: commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Dexter Eddie Johnson c. Ghana*

RÉSUMÉ: En mars 2019, la Cour africaine des droits de l'homme et des peuples a déclaré irrecevable la requête en l'affaire *Dexter Eddie Johnson c. Ghana*, au motif que le cas avait déjà fait l'objet d'un règlement par le Comité des droits de l'homme des Nations Unies et avait par conséquent été « réglé » au sens de l'article 56(7) de la Charte africaine. Le Comité des droits de l'homme des Nations Unies avait précédemment conclu que le Ghana avait violé ses obligations internationales en matière de droits de l'homme en condamnant Johnson à une peine de mort obligatoire

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pour meurtre, réaffirmant ainsi une jurisprudence établie en droit comparé et international selon laquelle la peine de mort obligatoire constitue une violation des droits de l'homme. En déclarant la requête irrecevable, la Cour africaine a fait une interprétation restrictive de la violation commise par le Ghana comme n'incluant que la peine de mort initiale prononcée en 2008. Cependant, concevoir la violation du Ghana plus largement, y compris son incapacité pendant 10 ans à commuer la peine de mort prononcée contre Johnson ou à lui accorder une audience sur la détermination de sa peine, et son incapacité à mettre en œuvre les conclusions du Comité des droits de l'homme de 2014, auraient été conformes aux règles de la Cour et de sa jurisprudence antérieure. Certes, la combinaison du retard, des conditions dans le couloir de la mort et l'état mental du requérant établirait une violation supplémentaire des droits de l'homme allant au-delà de la peine de mort obligatoire initiale. Bien que le Comité des droits de l'homme des Nations Unies et le système africain des droits de l'homme disposent de règles analogues pour empêcher le réexamen des mêmes faits à deux reprises, la Cour africaine a été plus restrictive quant à la recevabilité de l'affaire *Johnson* que le Comité l'aurait été. La Cour a donc raté une opportunité de contribuer à la jurisprudence croissante contre la peine de mort obligatoire et a laissé Johnson sans recours.

KEY WORDS: African Court on Human and Peoples' Rights, comparative constitutional law, admissibility, Ghana, *Johnson v Ghana*, mandatory death penalty, *non bis in idem*, *res judicata*

CONTENT:

1	Background	457
2	Ghana's mandatory death penalty in global context.....	459
3	The African Court ruling in <i>Johnson v Ghana</i>	463
4	Conceiving of Ghana's violation as 'continuing'	465
5	Conclusion.....	468

1 BACKGROUND

On 28 March 2019, the African Court on Human and Peoples' Rights (African Court) declared the matter of *Dexter Eddie Johnson v Ghana* inadmissible on the grounds that the case had already been decided by the UN Human Rights Committee in Geneva.¹ The decision was an expansion of article 56(7) of the African Charter on Human and Peoples' Rights (African Charter), which prevents the African Court from considering any case that has been 'settled by these States involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organization of African Unity or the provisions of the present Charter.'² In declaring the case inadmissible, the African Court refused to join a growing global consensus that mandatory capital punishment is a human rights violation because it overpunishes, and therefore constitutes cruel and degrading treatment.³ As explained below, however, the African Court could have ruled that Ghana's continuing failure to commute Johnson's death sentence or implement the views of the UN Human Rights Committee, was a separate violation

1 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Ruling (Jurisdiction and Admissibility) (28 March 2019).
2 African Charter on Human and Peoples' Rights (1982) 21 ILM 58.
3 A Novak *The global decline of the mandatory death penalty: constitutional jurisprudence and legislative reform in Africa, Asia, and the Caribbean* (2014) 6-7.

of the African Charter and was not precluded by article 56(7). The result is that the African Court missed an opportunity to join the chorus of courts around the world that have found the mandatory death penalty to be cruel and degrading treatment.

Dexter Johnson is a British national convicted in 2008 of murdering an American national four years earlier, which resulted in a mandatory death sentence under Ghanaian law. In a subsequent constitutional challenge, the Ghanaian Supreme Court upheld the mandatory death penalty in a disastrous 2011 opinion that involved significant statutory misinterpretation and disregarded weighty comparative jurisprudence.⁴ Perhaps most troubling, the Supreme Court's decision mischaracterised the nature of a discretionary death penalty in which a judge could weigh aggravating and mitigating factors and appropriately tailor a death sentence to the 'most serious crimes' in accordance with article 6 of the International Covenant on Civil and Political Rights (ICCPR).⁵ The majority created a straw man, predicting chaos and uncertainty if judges had discretion to substitute the death penalty with a lesser punishment.⁶ By contrast, a dissent by Justice Samuel Date-Bah found jurisprudence from throughout the common law world 'irrefutable' and noted that Ghana's constitutional provisions were *in pari materia* with those of other common law jurisdictions. He believed that a determination that all murders were equally heinous and deserving of death was 'an unreasonably inflexible ideological position, belied by actual human experience'.⁷

With the door closed in domestic courts, Johnson's legal team, including lawyers working pro bono with the Death Penalty Project in London, challenged Ghana's mandatory death sentence at the UN Human Rights Committee in Geneva. On 27 March 2014, the Committee affirmed its earlier findings against the mandatory death penalty in the Commonwealth Caribbean and found that Johnson's death sentence violated article 6(1) of the ICCPR, which prohibits arbitrary deprivation of life.⁸ The Committee reiterated its earlier views that a *de facto* moratorium on the death penalty or the existence of a clemency mechanism to seek a commutation of the sentence did not make a mandatory death sentence consistent with the right to life.⁹ The Committee believed that Ghana was in breach of the right to life at Article 6 of the ICCPR and therefore did not reach the alternative grounds that the mandatory death penalty constituted cruel and degrading punishment (article 7) or the right to a fair trial (article 14).

4 *Dexter Johnson v Republic* (2011) 2 SCGLR 601. A Novak 'The mandatory death penalty in Ghana: a comparative constitutional perspective on *Dexter Johnson v Republic*' (2014) 12 *Cardozo Public Law Policy and Ethics Journal* 669.

5 International Covenant on Civil and Political Rights (1966) 999 UNTS 171.

6 *Johnson* (n 4) 692-93, 699.

7 *Johnson* (n 4) 622 (Date-Bah JSC dissenting).

8 *Johnson v Ghana*, Communication 2177/2012, UNHR Committee (27 March 2014), UN Doc CCPR/C/110/D/2177/2012.

9 *Weerawansa v Sri Lanka*, Communication 1406/2005, UNHR Committee (17 March 2009), UN Doc CCPR/C/95/D/1406/2005; *Thompson v St Vincent and the Grenadines*, Communication 806/1998, UNHR Committee (18 October 2000), UN Doc CCPR/C/70/D/806/1998.

Finally, the Committee added that Ghana was obligated to provide Johnson with an effective remedy, including commutation of his death sentence.¹⁰

Ghana never implemented the UN Human Rights Committee's views and Johnson remained under an automatic death sentence. For that reason, Johnson's legal team approached the African Court in 2017 to increase pressure on the Ghanaian government to respect its international human rights obligations. On 28 September 2017, the African Court issued an Order for Provisional Measures to prevent Johnson's execution while the case was still pending.¹¹ Finally, on 28 March 2019, the African Court ruled that Johnson's case was inadmissible owing to the earlier UN Human Rights Committee ruling. As a result, the African Court did not reach the merits of Johnson's application and missed an opportunity to clearly and unequivocally condemn the mandatory death penalty as a human rights violation.

2 GHANA'S MANDATORY DEATH PENALTY IN GLOBAL CONTEXT

The death penalty was mandatory for murder at English common law, mitigated only by the monarch's frequent commutations of death sentences, often to transportation to a penal colony.¹² The punishment passed to most former British colonies, with three exceptions. The first was the United States of America, which as early as the 1790s began to separate murder into degrees and use judicial discretion in sentencing.¹³ The second exception was British India where the 1860 Penal Code allowed a judge to reduce a death sentence to life imprisonment with valid reasons, except for murder committed by a life-term prisoner.¹⁴ The third exception was South Africa and neighboring countries, which developed the doctrine of extenuating circumstances, whereby a judge could reduce a death sentence based on certain types of mitigating factors.¹⁵

The 1892 Criminal Code in Ghana, like the penal codes of most colonies in the Caribbean, West and East Africa, and Southeast Asia, provided for a mandatory death penalty for murder. The post-

10 *Johnson* (UNHRC) (n 8) paras 7.4, 9.

11 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Order for Provisional Measures (28 September 2017).

12 JM Beattie *Policing and punishment in London, 1660-1750* (2001) 362-63.

13 Pennsylvania was the first state to make the change, in 1793. ER Keedy 'History of the Pennsylvania statute creating degrees of murder' (1949) 97 *University of Pennsylvania Law Review* 759 at 771.

14 India Penal Code Act, Number 45 of 1860 secs 302 and 303; D Skuy 'Macaulay and the Indian Penal Code of 1862: the myth of the inherent superiority and modernity of the English legal system compared to India's legal system in the nineteenth century' (1998) 32 *Modern African Studies* 513 at 513, 518-20, 526-27.

15 Criminal Procedure and Evidence (Amendment) Act 46 of 1935; A Novak 'Capital sentencing discretion in Southern Africa: a human rights perspective on the doctrine of extenuating circumstances' (2014) 14 *African Human Rights Law Journal* 24.

independence Criminal Offences Act of 1960 retained much of the colonial criminal law architecture except that it abolished juvenile corporal punishment.¹⁶ Even in the early years after independence, Ghana used the death penalty relatively infrequently, though under military dictatorship in the 1970s and 1980s a separate system of military courts authorised firing squad for civilians accused of national security offenses.¹⁷ Today, Ghana retains the mandatory death penalty for murder, genocide, attempted murder by an incarcerated prisoner, and treason.¹⁸

By the time of Johnson's constitutional challenge to the mandatory death penalty, the Ghanaian government was seriously considering abolition of the death penalty. In 2012, a constitutional review commission presented a White Paper to then-President John Atta Mills advocating death penalty abolition.¹⁹ The constitutional amendments must be passed by Parliament and then approved in a public referendum with a super majority, though in principle it has the support of the two major parties.²⁰ A 2015 public opinion survey in Ghana revealed that the large plurality (48.3%) of respondents strongly opposed the death penalty and only a small minority (8.6%) were strongly in favour. Seven in ten supported a discretionary death sentence instead of a mandatory one.²¹ As to its international posture, Ghana routinely abstains on the UN General Assembly and UN Human Rights Council resolutions calling for abolition of the death penalty.²² As no executions have been carried out since 1993, Amnesty International declares Ghana *de facto* abolitionist.²³

The decline of the mandatory death penalty in the English-speaking world over the last 25 years is the product of a remarkable confluence of grassroots advocacy, strategic litigation, and intervention by United Nations and regional human rights systems. The first common law countries to abolish the mandatory death penalty were the United States and India. In the United States, the Supreme Court struck down North Carolina's recently-passed mandatory death sentence in 1976 on the grounds that it was 'arbitrary' insofar as it constrained a judge's

16 RB Seidman & JD Abaka Eyison 'Ghana' in A Milner (ed) *African penal systems* (1969) at 68-69.

17 J Appiahene-Gyamfi 'Crime and punishment in the Republic of Ghana: a country profile' (2009) 33 *Journal of Comparative and Applied Criminal Justice* 309 at 313; B Agyeman-Duah 'Ghana, 1982-6: the politics of the P.N.D.C.' (1987) 25 *Journal of Modern African Studies* 613 at 625-627.

18 Criminal Offences Act, No 29 of 1960, secs 46, 49, 49A, 180.

19 Republic of Ghana *White paper on the report of the Constitutional Review Commission of Inquiry* (June 2012) 44.

20 Ghana Constitution art 290 (1993).

21 J Tankebe, KE Boakye & AP Atupare *Public opinion on the death penalty in Ghana: final report* (2015) at ix.

22 'Moratorium on the use of the death penalty' UN General Assembly, UN Doc A/RES/69/186 (18 December 2014); 'Moratorium on the use of the death penalty' UN General Assembly, UN Doc A/RES/71/187 (19 December 2016); 'Moratorium on the use of the death penalty' UN General Assembly, UN Doc A/RES/73/175 (17 December 2018).

23 Amnesty International Global Report *Death Sentences and Executions 2018* (April 2019) 49.

sentencing discretion while failing to control the discretion of other actors in the criminal justice process.²⁴ In India in 1983, the Supreme Court used a similar rationale to abolish the mandatory death penalty for prisoners already serving a life sentence, the remaining exception at Section 303 of the Penal Code.²⁵ These two decisions have gone global, widely cited in later Constitutional challenges to the mandatory death penalty.

The Death Penalty Project in London, working with pro bono lawyers in London law firms, represented hundreds of death row inmates in the Commonwealth Caribbean before the Judicial Committee of the Privy Council, then the highest court of appeal for English-speaking Caribbean jurisdictions.²⁶ In a famous series of cases, the Privy Council found the mandatory death penalty unconstitutional on the grounds that it overpunished, and therefore constituted cruel and degrading treatment.²⁷ The Privy Council also accepted a fair trial challenge, as the punishment deprives death row inmates of a sentencing hearing. The decision was reaffirmed in 2018 by the Caribbean Court of Justice, which invalidated the mandatory death penalty in Barbados, the last holdout in the region.²⁸ The Privy Council's long line of jurisprudence was reaffirmed by complementary judgments from the Inter-American Court and Commission of Human Rights and from the UN Human Rights Committee.²⁹

After the victories in the Caribbean, the Death Penalty Project and its partners succeeded in challenging the mandatory death penalty in Malawi, Uganda, and Kenya.³⁰ Like the Commonwealth Caribbean countries, these jurisdictions developed enormous death rows but had not executed anyone in years. In addition, these countries have bills of rights that are modeled on the ICCPR and other international

24 *Woodson v North Carolina* (1976) 428 US 280.

25 *Mithu v Punjab* (1983) 2 SCR 690.

26 L Hughes-Hallett 'Death to death row' (March/April 2015) *The Economist* 1843 Magazine; A Boon, 'Cause lawyers in a cold climate: the impact(s) of globalization on the United Kingdom' in A Sarat and S Scheingold (eds) *Cause lawyering and the State in a Global era* at 169-70.

27 *Reyes v Queen* [2002] UKPC 11 (appeal from Belize); *Queen v Hughes* [2002] 2 AC 259 (PC) (appeal from Saint Lucia); *Fox v Queen* [2002] 2 AC 284 (PC) (appeal from Saint Kitts and Nevis); *Balson v State* [2005] 4 LRC 147 (PC) (appeal taken from Dominica); *Coard v Attorney General* [2007] UKPC 7 (appeal taken from Grenada); *Queen v Monelle* Criminal Case 15/2007 (Antigua and Barbuda High Court of Justice, 18 September 2008); *Bowe v Queen* (2006) 68 WIR 10 (PC) (appeal taken from Bahamas).

28 *Nervais and Severin v Queen* [2018] CCJ 19 (AJ) (27 June 2018).

29 *Thompson v Saint Vincent and the Grenadines*, Communication 806/1998, UNHR Committee, UN Doc CCPR/C/70/D/806/1998 (2000); *Edwards v Bahamas* case 12.067, Inter-American Commission on Human Rights, Report No 48/01, OEA/Ser.L/V/II.111, doc. 20 (2000); *Hilaire, Constantine, and Benjamin v Trinidad and Tobago*, Inter-American Court of Human Rights (Ser. C) No. 94 (21 June 2002).

30 *Kafantayeni v Attorney General* [2007] MWHC 1; *Attorney General v Kigula* [2009] 2 EALR 1 (Uganda SC); *Muruatetu v Republic* (14 December 2017) Petitions 15/2015 and 16/2015 (Kenya SC).

instruments, as in many former colonies.³¹ Ghana's Constitution is representative of this template, as it contains a right to life, right to human dignity, right to be free from cruel and degrading treatment, and right to a fair trial.³² A constitutional challenge also succeeded in Bangladesh, which has a penal code derivative of India's 1860 Penal Code.³³ However, challenges in Malaysia and Singapore failed because those two Constitutions lack some of the important human rights protections found in other postcolonial constitutions or in international instruments.³⁴ Seen in this context, the Ghana Supreme Court decision was highly aberrational, running contrary to the Commonwealth-wide trend, as Ghana has a modern constitution with an elaborate bill of rights, unlike Malaysia and Singapore.

Reflecting the global trend away from mandatory capital punishment, both the UN Human Rights Committee and the African Commission on Human and Peoples' Rights (African Commission) have issued General Comments on the Right to Life that address the mandatory death penalty. According to the African Commission's General Comment 3, issued in 2015, '[i]n no circumstances shall the imposition of the death penalty be mandatory for an offence'.³⁵ This falls within the scope of the African Charter's prohibition on the arbitrary deprivation of life at article 4.³⁶ In 2018, the UN Human Rights Committee issued General Comment 36, which relates to article 6 on the right to life under the ICCPR. According to the Committee, 'mandatory death sentences that leave domestic courts with no discretion on whether or not to designate the offence as a crime entailing the death penalty, and on whether or not to issue the death sentence in the particular circumstances of the offender, are arbitrary in nature'.³⁷ The General Comments serve dual roles, reflecting the consensus of state practice while also laying out normative constraints on state behaviour. The abolition of the mandatory death penalty is a successful example of how domestic constitutional litigation has helped alter international norms on capital punishment.

31 W Dale 'The making and remaking of Commonwealth constitutions' (1993) 42 *International and Comparative Law Quarterly* 67 at 67-68; AW Munene 'The bills of rights and constitutional order: a Kenyan perspective' (2002) 2 *African Human Rights Law Journal* 135 at 154; M Ndulo & R Kent 'Constitutionalism in Zambia: past, present and future' (1996) 40 *Journal of African Law* 256 at 263.

32 Ghana Constitution arts 13, 15, 19 (1993).

33 *Bangladesh Legal Aid and Services Trust v Bangladesh* (2010) 30 BLD (HCD) 194.

34 *Yong Vui Kong v Public Prosecutor* [2010] SGCA 20; *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157 (CA).

35 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).

36 African Charter on Human and Peoples' Rights (1981), art 4.

37 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.

3 THE AFRICAN COURT RULING IN *JOHNSON V GHANA*

The African Court ruled with a majority of 9 to 1 that Dexter Johnson's application was inadmissible, and therefore the Court did not reach the merits of the mandatory death penalty challenge. By a vote of 8 to 2, the Court found that the UN Human Rights Committee's previous findings precluded consideration of the mandatory death penalty challenge by the African Court.³⁸

The applicant's submissions traced the Ghanaian constitutional litigation through the Supreme Court decision in 2011 and detailed his two clemency petitions to the President in December 2011 and April 2012. The application also detailed the UN Human Rights Committee's March 2014 findings that Ghana's mandatory death penalty violated article 6(1) of the ICCPR. The applicant argued that the mandatory death penalty in Ghana violated the right to life (article 4 of the African Charter), prohibition on cruel and degrading treatment (article 5), right to a fair trial (article 7), and the corresponding rights under the ICCPR and Universal Declaration of Human Rights. The applicant sought a declaration from the African Court that Ghana should take immediate steps to substitute the applicant's death sentence with a lesser sentence and provide legislative changes in other mandatory death cases. The Court agreed that it had jurisdiction in the case as Ghana was a state party and Johnson was an actual victim.

Turning to admissibility, the African Court listed the seven criteria in Rule 40 of the Court's rules, which are based on article 56 of the African Charter. The application must not be (1) anonymous and must be (2) compatible with the African Charter. In addition, the application cannot be (3) disparaging or insulting or (4) based exclusively on news articles. The application must be (5) filed after exhausting local remedies and (6) in a timely manner. Finally, and most relevant here, the application must not (7) deal with a case that had been settled by the parties already, in accordance with the UN or African Charters. The Court found the case was timely, owing to the applicant's indigence and the time spent pursuing the clemency application and the communication to the UN Human Rights Committee. The applicant further argued that the UN Human Rights Committee's decision did not preclude consideration by the African Court, since it did not address any matter related to the UN or African Charters and was not 'settled' insofar as Ghana did not comply with the Committee's views.

The African Court, however, ruled that the last prong of the admissibility test, that the case had already been 'settled' in accordance with the UN and African Charters, rendered Johnson's application inadmissible. A case was 'settled' if it had previously been adjudicated if three major conditions had been fulfilled. First, the parties were identical. Second, the two applications at the UN Human Rights Committee and the African Court were the same or derivative, or at

38 *Johnson* (n 1).

least ‘flow[ed] from a request made in the initial case’. And third, the previous application resulted in a final decision on the merits. The African Commission had previously determined that a case was inadmissible if it involved the ‘same parties, the same issues and ... [was] settled by an international or regional mechanism’.³⁹ The Court found all three conditions fulfilled and therefore the case had already been ‘settled’. Although the Human Rights Committee’s views were not based on the UN or African Charters, but rather the ICCPR, they involved nearly identical human rights provisions to those contained in the African Charter. To the Court, ‘it does not matter that the decision of the HRC has been implemented or not’ or that the decision ‘is classified as binding or not’. Although the Human Rights Committee was not a ‘court’, its experts were not ‘judges’, and its views were not ‘decisions’, the underlying rationale for article 56(7) of the African Charter was to protect a state from having to account more than once for the same human rights violation.⁴⁰ Decisions of other international or regional tribunals operated a ‘res judicata’ principle that prevented relitigating them elsewhere.

Two Judges dissented. The first, Judge Rafâa Ben Achour of Tunisia, argued that Johnson’s claim was inadmissible not because it had been ‘settled’ by the UN Human Rights Committee, but because it was untimely. He rejected the majority’s ruling that the UN Human Rights Committee’s decision ‘settled’ the case for purposes of article 56(7) of the African Charter. However, he explained that six years and six months had passed from the Supreme Court of Ghana’s decision which exhausted domestic remedies and the application to the African Court, longer than the longest ‘reasonable time’ period upheld by the Court to that point, five years and five months. According to Judge Achour, only judicial remedies count for ‘exhausting domestic remedies’, so non-judicial relief such as seeking clemency or applying to the UN Human Rights Committee would not toll the time period.⁴¹ This is in my view a debatable interpretation. Seeking a pardon and petitioning the UN Human Rights Committee have real costs, raising complex legal issues and requiring significant legal fees. Johnson was also indigent. Given this context, an interpretation that a delay of six years and six months is timely versus five years and five months is an equally defensible interpretation of the law.

The second dissenting Judge, Judge Blaise Tchikaya of the Republic of Congo, similarly rejected the majority’s holding that Johnson’s case had been ‘settled’ by the UN Human Rights Committee. Tchikaya argued that the Court’s decision was a ‘setback for human rights development’ and added that an exception to the *non bis in idem* principle should have applied. *Non bis in idem* required a binding court judgment that was *res judicata*, that is, already judged. The principle derived from criminal law and was intended to protect a defendant’s

39 *Johnson* (n 1) para 48.

40 *Johnson* (n 1) paras 54-55.

41 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples’ Rights, Dissenting Opinion of Judge Rafaa Ben Achour (28 March 2019).

rights after he or she had previously been prosecuted. Tchikaya argued that the UN Human Rights Committee was not a prior judgment: it was not a court, its 'views' were not a decision, and its experts were not judges. In addition, the facts were not the same. The challenge at the UN Human Rights Committee was whether Johnson's mandatory death sentence was compliant with article 6 of the ICCPR, while the challenge at the African Court was whether Ghana's *continued refusal* to commute Johnson's mandatory death sentence or provide him a sentencing hearing violated the African Charter.⁴² This was a new and greater harm, as Johnson faced the mental anguish on death row over many years from the initial sentencing decision. In my view, Judge Tchikaya's decision is particularly convincing both because it directly addresses rather than disregards Ghana's actual violation, which the majority did not do, and because it better aligns with the purposes of the African Charter to protect individuals' human rights and complement other human rights regimes like that created by the ICCPR.

4 CONCEIVING OF GHANA'S VIOLATION AS 'CONTINUING'

The African Court's decision was not inevitable. The rule prohibiting reconsideration of a human rights violation that had been considered elsewhere serves the purposes of both administrative efficiency and consistent jurisprudential development, so that the human rights mechanisms do not conflict. In the current case, however, administrative efficiency was only a weak consideration since the case had been fully briefed and a consistent jurisprudential development was not an issue, as the *Johnson* case could have been distinguished from the African Court's prior precedent while still retaining the integrity of article 56(7).

Perhaps the best argument in favor of article 56(7) is that such a rule is reciprocal to those at other regional and international tribunals. The UN Human Rights Committee does not accept petitions that have been considered by regional tribunals, including the African Court, in order to 'avoid unnecessary duplication' at the international level.⁴³ Article 56 of the African Charter and Rule 40 of the Rules of the African Court are the reciprocal provisions of article 5(2) of the First Optional Protocol to the ICCPR and Rule 99 of the UN Human Rights Committee, which prohibit consideration of any case that had previously been considered by other international tribunals. Article 5(2) of the First Optional Protocol to the ICCPR, states in relevant part: "The Committee shall not consider any communication from an individual unless it has ascertained that the same matter is not being

42 *Dexter Eddie Johnson v Ghana*, Application 16/2017, African Court on Human and Peoples' Rights, Dissenting Opinion of Blaise Tchikaya (28 March 2019).

43 UNHR Committee, 'Procedure for complaints by individuals under the human rights treaties', <https://www.ohchr.org/en/hrbodies/tbpetitions/Pages/IndividualCommunications.aspx> (accessed 13 October 2019).

examined under another procedure of international investigation or settlement'.⁴⁴

Rule 99 of the UN Human Rights Committee provides more specific guidance. Under Rule 99, a case is inadmissible if it fails to meet any of six criteria: (1) it is anonymous; (2) the applicant was not an actual victim; (3) the communication is an abuse of the right of submission because it is frivolous, duplicitous, or untimely; (4) the communication is not incompatible with the purposes of the Covenant; (5) the matter was already examined 'under another procedure of international investigation or settlement'; or (6) the individual has not exhausted all domestic remedies.⁴⁵ These criteria are almost identical to article 56(7) of the African Charter. Furthermore, the Human Rights Committee found a communication admissible in *Prince v South Africa* (2007) even though the African Commission had already dismissed the complaint. The Committee found that the complaint was no longer 'being examined' by the Commission and therefore was eligible to be considered on the merits.⁴⁶ The Human Rights Committee therefore is less strict about the application of article 5 of the ICCPR than the African Court is with article 56 of the Charter.

For three reasons, however, the African Court should have considered Ghana's violation as continuing, as new and separate harm than that considered by the UN Human Rights Committee. First, in death penalty cases, delay and conditions on death row may create a human rights violation that is derivative of but conceptually separate from the initial death sentence.⁴⁷ Johnson had been on death row in Ghana for ten years by the time of the African Court's final ruling. The initial death sentence was determined to be a violation of article 6 of the ICCPR, but was Ghana's *only* violation the passing of the initial mandatory death sentence in 2008? To me, it appears possible to consider that Ghana's violation of the African Charter was not just the 2008 death sentence (already found to be a violation by the UN Human Rights Committee and therefore inadmissible), but rather the failure over ten years to rectify the violation and either remove Johnson from death row or provide him with a sentencing hearing. The African Court did not address when a state's failure to comply with its international obligations over a long period of time could become a separate violation of the African Charter.

Second, the controlling precedent at the African Court could be distinguished from the *Johnson* case, as it did not involve a continuing violation of the African Charter. In *Johnson v Ghana*, the majority and

44 First Optional Protocol to ICCPR (1966), art 5(2)(a).

45 Rules of procedure of the Human Rights Committee, UNHR Committee (9 January 2019), UN Doc CCPR/C/3/Rev.11 (2019).

46 *Gareth Anver Prince v South Africa*, Communication 1474/2006, UNHR Committee (31 October 2007), UN Doc CCPR/C/91/D/1474/2006, para 6.2.

47 P Hudson 'Does the death row phenomenon violate a prisoner's human rights under international law' (2000) 11 *European Journal of International Law* 833 at 844-847. The UNHR Committee has not found that delay *alone* constitutes a violation of Article 7 of the ICCPR, but a violation may arise when combined with conditions of death row and the mental state of the prisoner.

one of the dissents emphasised the African Court's March 2018 decision in *Jean-Claude Roger Gombert v Côte d'Ivoire*, which held that a ruling of the Community Court of Justice of the Economic Community of West African States (ECOWAS Court) precluded consideration of the same matter by the African Court.⁴⁸ In that case, the ECOWAS Court issued a judgment on the merits finding no violation of the ECOWAS Treaty where a seller of property failed to convey a plot of land to a buyer after payment had been made.⁴⁹ When the buyer of the property filed a complaint at the African Court, the judges found that the matter had already been 'settled' by the ECOWAS Court.

However, the *Gombert* judgment has two notable features that distinguish it from *Dexter Johnson v Ghana*. First, the ECOWAS Court judgment was actually a final ruling of a court, the UN Human Rights Committee's views are non-binding recommendations from experts. Nonetheless, I accept the reciprocity of the two organisation's rules not to revisit the other body's rulings. Second, and more importantly, the UN Human Rights Committee found Ghana in violation of the ICCPR and at the time of the application to the African Court, Ghana was still in violation. By contrast, Côte d'Ivoire had not been found to be in violation of the ECOWAS Treaty or the African Charter. This is an important point because Dexter Johnson claimed that Ghana had violated the African Charter *by failing to comply* with the UN Human Rights Committee's Views. In other words, his application to the African Court could have been construed not as a challenge to his original death sentence, but as a challenge to Ghana's subsequent and continuing failure to rectify the human rights violation. The *Gombert* case would not have prevented such a reading.

Finally, the African Court's invocation of the *non bis in idem* rule as the rationale for article 56(7) did not preclude an interpretation in which Ghana's violation was not the 2008 sentence alone but the decade-long failure to rectify it. The *non bis in idem* principle is a core protective mechanism found in most of the world's legal systems. In English common law, it may be conceived as a prohibition on double jeopardy or as 'autrefois acquit, autrefois convict' (previously acquitted, previously convicted). It also operates as the principle of *res judicata pro veritate habetur* (a thing adjudged is regarded as truth), which operates as a principle of finality in continental European legal systems. The prohibition on double jeopardy is also codified in international human rights instruments.⁵⁰ Conway writes that the rule is derived from Roman law and has Greek and Biblical roots.⁵¹ However, the *non bis in idem* principle as originally conceived only applies to criminal

48 *Jean-Claude Roger Gombert v Côte d'Ivoire*, Application 38/2016, African Court on Human and Peoples' Rights, Judgment (22 March 2018).

49 *La Société Agriland v Côte d'Ivoire*, Judgment ECW/CCJ/JUD/07/15, ECOWAS Community Court of Justice (24 April 2015).

50 D Bernard 'Ne bis in idem – Protector of defendants' rights or jurisdictional pointsman?' (2011) 9 *Journal of International Criminal Justice* 863 at 864.

51 G Conway 'Ne bis in idem in international law' (2003) 3 *International Criminal Law Review* 217 at 221-22.

offenses and not to disciplinary or administrative measures.⁵² Therefore, a ruling from the UN Human Rights Committee, which is non-binding and not a judgment of a court of law, could have been distinguished from a ruling of an international or regional court on this basis.

Furthermore, the world's legal systems differ as to whether they apply *res judicata* to 'offences' or to 'facts'. For instance, van den Wyngaert and Stessens write that, if a person took prohibited drugs across the border from country A to country B, jurisdictions differ as to whether that person could be prosecuted for export of drugs in country A and import of drugs in country B. If *res judicata* applied to offences only, and not to facts, then the defendant could be tried twice; that would not be true if a same-facts analysis were used. European civil law systems frequently use a 'facts' analysis, while common law systems tend to use an 'offences' analysis.⁵³ The African Court could well have used a broader test encompassing Ghana's full range of conduct, rather than the narrow violation of passing a mandatory death sentence initially. The UN Human Rights Committee only considered whether the initial mandatory death sentence in 2008 was a violation of the ICCPR. However, Ghana's subsequent conduct, including its denial of clemency and its failure to implement the UN Human Rights Committee's Views, not to mention more than ten years (at this point) of delay on death row, may well have been violations of the African Charter that were not precluded by the earlier UN Human Rights Committee decision.

5 CONCLUSION

Article 56(7) and the reciprocal rules at other regional and international courts prohibiting the 're-litigation' of issues 'settled' by other human rights bodies exist to conserve resources and prevent conflicting judgments. It is a rule designed to reduce inefficiencies and inconsistencies caused by forum shopping. It certainly does not have the gravity of the prohibition on double jeopardy in criminal proceedings. Condemning Ghana for a continuing human rights violation twice is hardly the same as trying an offender for a criminal offence twice. A strict application of article 56(7) is not necessary and operates as a constraint on developing human rights jurisprudence. It places concerns for administrative efficiency above substantive human rights concerns.

A better reading would be to treat article 56(7) narrowly and find admissible cases in which an applicant is worse off due to a continuing violation, despite the earlier ruling of another international or regional

52 A Poels 'A need for transnational *non bis in idem* protection in international human rights law' (2005) 23 *Netherlands Quarterly of Human Rights* 329 at 336-37.

53 C van den Wyngaert & G Stessens 'The international *non bis in idem* principle: resolving some of the unanswered questions' (1999) 48 *International and Comparative Law Quarterly* 779 at 789-90.

tribunal. In *Johnson v Ghana*, the African Court missed a golden opportunity to join a chorus of voices around the world in condemning the mandatory death penalty as cruel and degrading punishment. A different decision could have galvanised the moribund cause of death penalty abolition in Ghana, to which both major political parties have committed in principle but failed to achieve. Doing so would have ended the perpetual uncertainty faced by death row prisoners in Ghana, who have never had the opportunity to present mitigating evidence to a judge or jury, but who are unlikely ever to be executed.

Is the African Court's decision in *Dexter Eddie Johnson v Ghana* a missed opportunity? A reply to Andrew Novak

Mwiza Jo Nkhata *

ABSTRACT: This note is a reply to Andrew Novak's commentary on the African Court's ruling in *Dexter Eddie Johnson v Ghana*. Novak's thesis is that the African Court missed an opportunity, by dismissing the application by Dexter Eddie Johnson, to join other courts that have declared the mandatory death penalty as being against international human rights law. In my reply, I argue that the Court did not miss any opportunity because the case before the Court did not provide the Court with an opportunity to pronounce itself on the substantive issues raised by the applicant. My main argument is that Novak makes an error by over-focussing on the potential merits of Dexter Eddie Johnson's case, in determining that the Court missed an opportunity, when the case itself was preliminarily dismissed for inadmissibility. My conclusion is that the African Court correctly applied article 56(7) of the African Charter on Human and Peoples' Rights in declaring the application inadmissible.

TITRE ET RÉSUMÉ EN FRANCAIS:

La décision de la Cour africaine dans *Dexter Eddie Johnson c. Ghana* est-elle une opportunité ratée? Une réponse à Andrew Novak

RÉSUMÉ: Ce commentaire de décision est une réponse au commentaire d'Andrew Novak sur la décision de la Cour africaine dans l'affaire *Dexter Eddie Johnson c. Ghana*. La thèse de Novak est qu'en rejetant la demande de Dexter Eddie Johnson, la Cour africaine a manqué l'occasion de rejoindre d'autres juridictions qui ont décidé que la peine de mort obligatoire était en marge du droit international des droits de l'homme. Cette contribution soutient que la Cour n'a raté aucune opportunité, car l'affaire dont elle était saisie ne lui offrait pas l'occasion de se prononcer sur les questions de fond soulevées par le requérant. Mon principal argument est que Novak commet une erreur en se focalisant de manière indue aux potentielles questions de fond de l'affaire *Johnson* pour conclure que la Cour a raté une occasion, alors que l'affaire elle-même a été rejetée pour irrecevabilité. Le présent commentaire conclut que la Cour africaine a fait une application correcte de l'article 56(7) de la Charte africaine des droits de l'homme et des peuples en déclarant la requête irrecevable.

KEY WORDS: African Court on Human and Peoples' Rights, mandatory death penalty, admissibility, Ghana, *Johnson v Ghana*, *res judicata*

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CONTENT:

1	Introduction.....	471
2	The Court's decision in <i>Johnson v Ghana</i> and its context.....	472
3	A summary of Andrew Novak's argument.....	473
4	For everything there is a season: in defence of the Court's ruling.....	473
4.1	A case is defined by the parties' pleadings.....	474
4.2	The choir, the chorus and the alleged missed opportunity.....	475
4.3	The allegation of continuing violations and article 56(7) of the Charter.....	476
4.4	The Court and the precedent in <i>Gombert v Côte d'Ivoire</i>	478
4.5	The proliferation of international dispute resolution mechanisms and <i>res judicata</i>	479
5	Conclusion.....	482

1 INTRODUCTION

In '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',¹ Andrew Novak argues that the decision of the African Court on Human and Peoples' Rights (African Court or Court) represents a missed opportunity for the Court. In his view, the African Court, by finding the case inadmissible, refused to 'join a growing global consensus that mandatory capital punishment is a human rights violation'. According to Novak, instead of declaring the case inadmissible under article 56(7) of the African Charter on Human and Peoples' Rights (African Charter), the Court should have 'ruled that Ghana's continuing failure to commute Johnson's death sentence or implement the views of the UN Human Rights Committee (HRC or Committee), was a separate violation of the African Charter and was not precluded by article 56(7).'²

In this brief note, I attempt to respond to Novak's arguments. My position is that, regrettable though the decision of the Court may seem to people like Novak, especially considering that the Court has yet to pronounce itself on the death penalty under the African Charter, it is erroneous to categorise the Court's decision as a 'missed opportunity.' As I will demonstrate later, I contend that Novak's major mistake, in labelling the decision as a missed opportunity, stems from him inferring conclusions from the possible merits of Johnson's case and imputing those conclusions to a determination on admissibility.

In terms of presentation, the section following from this introduction summarises the Court's decision in *Dexter Eddie Johnson v Ghana (Johnson v Ghana)*.² Thereafter, a quick summary of Novak's argument is presented. The section following thereafter attempts to highlight why the Court's decision cannot be classified as a missed opportunity. The conclusion is the last part of the note.

1 In this volume of the *African Human Rights Yearbook* at 456-469.

2 Application 16/2017, Ruling (Admissibility), 28 March 2017.

2 THE COURT'S DECISION IN *JOHNSON v GHANA* AND ITS CONTEXT

In 2008 Johnson was convicted of murder and sentenced to death. He appealed against both his conviction and sentence all the way to the Supreme Court of Ghana without success. In 2012 he filed a communication against Ghana before the Human Rights Committee. In its views, the Committee held that the automatic and mandatory imposition of the death penalty, which applies in Ghana, amounts to an arbitrary deprivation of the right to life contrary to article 6(1) of the International Covenant on Civil and Political Rights (ICCPR). Following from this finding, Ghana was ordered to provide Johnson with an effective remedy including the possible commutation of his sentence. The HRC also requested Ghana to file a report about the measures taken to implement its views within 180 days. Ghana, it turns out, never took any steps to implement the views of the HRC.

In 2017, Johnson filed an application before the Court. In this application, Johnson, centrally, asked the African Court to pronounce that the imposition of the mandatory death penalty for murder, which applies in Ghana, is contrary to articles 4, 5 and 7 of the Charter, articles 6(1), 7, 14(1) and 14(5) of the ICCPR and articles 3, 5 and 10 of the Universal Declaration of Human Rights (Universal Declaration). In considering Johnson's application, the Court confirmed that it had jurisdiction to hear the matter but that the application was inadmissible for failure to comply with the admissibility requirements under the Charter.

It must be recalled that admissibility of applications before the African Court follows the criteria set out in article 56 of the Charter. These requirements are also restated in Rule 40 of the Rules of Court (Rules). In *Johnson v Ghana*, the decision of the Court turned on the applicability of article 56(7). Article 56(7) stipulates that an application before the Court shall be considered if it does 'not deal with cases which have been settled by those states involved in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the [African Charter]'.³

In applying the requirement in article 56(7), the Court relied heavily on its earlier decision in *Jean Claude Gombert v Côte d'Ivoire*³ from whence it extracted the test for determining when a matter can be said to have been already 'settled'. According to the test applied by the Court, a matter is deemed to have been 'settled' if there is a convergence of three conditions and these are: first, the identity of the parties; second, the identity of their applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case, and, third; the existence of a first decision on the merits.⁴ The Court, in applying this test, found that Johnson's case, as filed

3 Application 38/2016. Judgment of 22 March 2018.

4 *Johnson v Ghana* (n 2) para 48.

before it, had already been settled by the HRC. In the Court's reasoning, first, the parties that were before the HRC were the same parties that were involved in the case. Second, it found that the applicant before it was raising the same issues that he had raised before the HRC. Third, the court held that there was already a decision on the merits of the applicant's application by a body that was 'legally mandated to consider the dispute at international level.'⁵ It bears pointing out that the Court did allude to Ghana's non-implementation of the views of the HRC. According to the Court, however, the fact that Ghana had opted not to implement the views of the HRC did not mean that the matter had not been 'settled' within the meaning of article 56(7).

3 A SUMMARY OF ANDREW NOVAK'S ARGUMENT

I will be careful not to distort Novak's argument. However, my reading leads me to conclude that Novak's argument is as follows: The rule prohibiting the reconsideration of cases that have already been adjudicated on by other bodies is meritorious as it serves 'both administrative efficiency and consistent jurisprudential development, so that human rights mechanisms do not conflict.' The validity of this rule notwithstanding, *Johnson v Ghana*, as filed before the Court, could have been distinguished from the communication filed before the HRC without offending the principle in article 56(7) of the Charter. The key ground for distinguishing the case before the Court from the communication before the HRC, is that at the time *Johnson v Ghana* was filed before the African Court, Ghana had yet to implement the views of the HRC. This failure to implement the findings of the HRC should have been treated as a continuation of the violation of Johnson's rights and also as 'new and separate harm than that considered by the UN Human Rights Committee'. Further, the Court should not have over-relied on *Gombert v Côte d'Ivoire* since this was a 'final ruling of a court, whereas the UN Human Rights Committee's views are non-binding recommendations from experts.' Furthermore, the Court's reliance on the *non bis in idem* principle was wrong since it applies primarily to criminal offences and that, therefore, 'a ruling from the UN Human Rights Committee, which is non-binding and not a judgment of a court of law, could have been distinguished from a ruling of an international or regional court on this basis.'

4 FOR EVERYTHING THERE IS A SEASON: IN DEFENCE OF THE COURT'S RULING

In my view, stripped to its bones, the argument by Novak revolves around two key points. First, the failure by Ghana to implement the views of the HRC amounted to a continuation of the violation of

5 As above, para 51.

Johnson's rights, which had begun with the imposition of the mandatory sentence, and also created a fresh violation of Johnson's rights. Second, because of the preceding, the Court should not have adopted a 'zealous' interpretation of article 56(7) with the result that notwithstanding the HRC's views on the same matter, the Court should have found the case admissible. As earlier alluded to, I view this argument as misapprehending the Court's ruling in *Johnson v Ghana* and draws conclusions that do not follow from the pleadings that Johnson filed with the Court. In the following paragraphs I attempt to explore why the Court's ruling is correct, in principle.

4.1 A case is defined by the parties' pleadings

I believe it is important, at the outset, to dispose of Novak's argument that the Court should have addressed the question whether a state's 'failure to comply with its international obligations over a long period of time could become a separate violation of the African Charter.' In Novak's view, Johnson's case before the African Court was different from the communication filed before the HRC since, over and above complaining about his mandatory sentence of death, he also raised issue with Ghana's failure to implement the views of the HRC.

In paragraph 24 of the Court's ruling, a summary of the prayers made by Johnson before the Court is reproduced. While I see no need to fully restate these prayers, it is notable that nowhere in the prayers did Johnson seek any relief specifically arising from the alleged continued violation of his rights due to Ghana's failure to implement the views of the HRC. This much is also clear from a review of a copy of the application filed by Johnson before the Court. Admittedly, the application does make reference to the fact that Ghana had failed to implement the findings of the HRC up to the time the case was being filed with the Court. In my view, however, Johnson did not specifically invite the Court to consider that Ghana's failure to implement the views of the HRC was a separate and distinct violation of his rights and that, importantly, this created an exception to the application of the requirement under article 56(7). While Johnson's application did raise the question of the continuing violation of his rights, so far as I can tell, this was raised for purposes of establishing the Court's temporal and territorial jurisdiction and not create an exception to the application of article 56(7) of the Charter.

It is apparent to me that Johnson's legal representatives were fully aware of the possible effect of article 56(7) on their client's case. They therefore argued that their client's case fell within the exceptions to the application of the rule in article 56(7). Two arguments were raised as justifying the exception: first, that Johnson's case did not deal with any issues that had already been dealt with in accordance with the Constitutive Act of the African Union (AU) or the Charter of the United Nations or any other AU legal instrument. It was argued that although Johnson had earlier filed a communication before the HRC, this had been resolved on the basis of the ICCPR and hence, ostensibly, his application was not caught by article 56(7). Second, Johnson argued

that since Ghana had failed to implement the views of the HRC the issues that he was raising before the Court remained ‘unsettled.’

Johnson’s argument in respect of the supposed non-applicability of article 56(7) to his case was fully dealt with by the Court. I have not been able to discern any consistent argument against the Court’s findings on this particular point by Novak. To recap, in response to the first argument, the Court held that although the HRC may indeed have used the ICCPR in adopting its views, the provisions under consideration and the principles that were applied were substantially similar to those available under the Charter. This, according to the Court, meant that the HRC had pronounced itself on substantially the same issues on which Johnson was inviting the Court to adjudicate.⁶ Further, in response to the second limb of Johnson’s argument for an exception under article 56(7), the Court held that for purposes of understanding ‘settlement’, it did not matter that the original decision had not been implemented. According to the Court, what is important is that there must be a decision on the merits by a body competent in international law to conduct the adjudication.⁷

Given the above context, it is important to recall that courts determine cases on the basis of the issues that the parties have raised before them. It is, therefore, important that parties, in framing their cases, must clearly plead the issues over which they wish the Court to pronounce itself. With regard to *Johnson v Ghana*, my own assessment is that in the absence of the applicant specifically raising the alleged continuing violation as an exception to the requirements in article 56(7), it is not fair to castigate the Court for not considering it. Although the Court is a human rights court, it must still follow procedural safeguards lest it be accused of appropriating for itself powers that it has not been given by its founding instruments.

4.2 The choir, the chorus and the alleged missed opportunity

Following Novak’s argument, I sense that the ‘choir’ refers to the courts around the world that have outlawed the mandatory death penalty and the ‘chorus’ is the message being conveyed by this choir, to wit, that the mandatory death penalty is inconsistent with human rights. According to Novak, therefore, the Court, in *Johnson v Ghana* missed an opportunity to join the choir and sing the same chorus. In my view, however, the Court did not have a proper invitation to join the choir and was not, therefore, in a position to sing the chorus.

I also believe it is here that Novak makes a fatal error in his argument. The Court could only join the ‘choir’ if it received a proper invitation. In practical terms, this means that the Court can only

6 As above, para 52.

7 As above, paras 51 and 54.

pronounce itself on any issue once an application has fulfilled the requirements as to jurisdiction and admissibility.⁸ Singing the ‘chorus’, in my view, amounts to the Court pronouncing itself on the merits and taking a position as to whether the mandatory death penalty is against the Charter or not. In respect of the *Johnson* case, it is clear that the application having been dismissed for inadmissibility the question as to whether an opportunity was missed or not should not arise. Novak’s argument, surreptitiously, also assumes that should the Court have gone on to consider the merits, only one conclusion was tenable and that is to outlaw the mandatory death penalty. This assumption disregards the chasm across the globe in approaches in relation to the death penalty, generally, and the mandatory death penalty, specifically. While progress has indeed been registered in rolling back both the death penalty and the mandatory death penalty, it is also an incontestable fact that this progress has not been uniform and universal.

I also believe it is not insignificant to note that to date, the Court has yet to pronounce itself in relation to the death penalty or mandatory death penalty under the African Charter. For others, this lack of pronouncement on what is invariably a very contested issue may seem anomalous. The truth of the matter, however, is that the Court must wait for an appropriate case, one that fulfils the requirements as to jurisdiction and admissibility and poses the correct questions for the Court’s determination. Only then ought the court to make a pronouncement. In fairness, therefore, the door is not closed yet but the visitor with the correct passcode has not knocked yet.

4.3 The allegation of continuing violations and article 56(7) of the Charter

The notion of ‘continuing violations’ is indeed well known in the African human rights system. Generally, the notion of ‘continuing violations’ has been applied to confer jurisdiction on the Court, and also the Commission, to assume jurisdiction over a matter where jurisdiction would have been lacking especially because the violations at stake happened before the respondent state became a party to the treaty being applied.⁹ Although the precise boundaries of the principle seem uncertain,¹⁰ it applies where the on-going effects of the original violation(s) are still apparent even though the original violation may be dated. As earlier pointed out, in the context of *Johnson v Ghana*, Novak argues that the failure by Ghana to implement the views of the HRC entailed that there was a continuation of the violation of Johnson’s rights and also ‘a new and separate harm than that considered by the UN Human Rights Committee.’ This, in his view, should have

8 Rule 39, Rules of Court.

9 Communication 335/2006, *Dabolorivhuwa Patriotic Front v Republic of South Africa* <http://www.worldcourts.com/achpr/eng/decisions/2013.04DPFvSouthAfrica.pdf> (accessed 9 October 2019).

10 <https://www.refworld.org/pdfid/577cd89d4.pdf> (accessed 10 October 2019).

persuaded the Court to distinguish from its earlier jurisprudence and declare the case admissible.

Earlier in this note I pointed out that on a strict reading of the application that was filed, Johnson did not ask the Court to specifically consider the non-implementation of the views of the HRC as a distinct violation of his rights. In my view, therefore, while the failure by Ghana to implement the views of the HRC may have created distinct violations of Johnson's rights and also continued the violation of his rights occasioned by the mandatory sentence of death, the fact of there being continuing and distinct violations did not carve out any exception to the requirement in article 56(7).

The other issue that falls to be determined, however, is the question of the appropriate remedial action, for Johnson, in light of Ghana's conduct. Was Johnson's remedy the commencement of exactly the same action before another forum? Despite Novak's classification of the views of the HRC as non-judicial and non-binding, a point that I address later in this note, I believe Johnson was not at liberty to start shopping for *fora* after the HRC rendered its views. If he was at liberty to forum shop, at what point exactly would a line be drawn limiting him from further inviting courts/tribunals from pronouncing on his grievances? In my view, enforcement of decisions of courts and tribunals is separate from the process of obtaining the orders themselves. This is even more poignant in international relations where the consent and cooperation of states is key to the enforcement of any decision. I doubt that the non-implementation of the views of the HRC by Ghana was down to the fact that the views of the HRC were viewed as non-binding and mere recommendations. In any event, under the ICCPR, and the First Optional Protocol, states have undertaken to take steps to ensure that the ICCPR is implemented including compliance with the decisions of the HRC.¹¹ Even with the views of the HRC, Johnson still had a basis on which he could have engaged with the Ghana for implementation of the views. In my view, it is arguable that even a favourable decision from the Court would not automatically have solved Johnson's problems. He would still have to engage with the Government of Ghana for implementation. Although the Court is built on a different legal platform from the HRC, the implementation of its decisions still requires the cooperation and willingness of states. Again, although the HRC is, technically, not a court, I do not think Johnson's remedy, in light of Ghana's conduct, lay in re-filing exactly the same dispute before another forum. If this is deemed the permissible option, there practically can be no possible limit to the number of *fora* that a litigant could go if his first relief is not implemented.

11 Article 2 of the ICCPR – <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 11 October 2019) and Article 1 Option Protocol to the ICCP – <https://www.ohchr.org/en/professionalinterest/pages/opccpr1.aspx> (accessed 11 October 2019).

4.4 The Court and the precedent in *Gombert v Côte d'Ivoire*

Novak also takes issue with the Court's reliance on *Gombert v Côte d'Ivoire*. In his view, the Court could have distinguished *Johnson v Ghana* while at the same time maintaining the integrity of article 56(7). He points to two features that, supposedly, could have grounded the distinction. First, *Gombert v Côte d'Ivoire* was a final determination by the Court of Justice of the Economic Community of West African States (ECOWAS Court of Justice) whereas the views of the HRC are non-binding recommendations. Second, in *Gombert v Côte d'Ivoire* the ECOWAS Court of Justice did not find Côte d'Ivoire to have violated the ECOWAS Treaty or the Charter. I will try to respond to these two points sequentially.

With regard to the alleged non-binding character of the decisions of the HRC, I believe the correct starting point should be General Comment 33 (GC 33) of the HRC.¹² GC 33 is on the obligations of states parties under the First Optional Protocol to the ICCPR. In paragraph 11 of GC 33 it is stated thus:

While the function of the Human Rights Committee in considering individual communications is not, as such, that of a judicial body, the views issued by the Committee under the Optional Protocol exhibit some important characteristics of a judicial decision. They are arrived at in a judicial spirit, including the impartiality and independence of the Committee members, the considered interpretation of the language of the Covenant, and the determinative character of the decisions.

In paragraph 13 of the GC, the HRC further stated as follows:

The views of the Committee under the Optional Protocol represent an authoritative determination by the organ established under the Covenant itself charged with the interpretation of that instrument. These views derive their character, and the importance which attaches to them, from the integral role of the Committee under both the Covenant and the Optional Protocol.

GC 33 makes it clear that the HRC is not a judicial body strictly speaking but that its processes and decision-making follows processes akin to judicial decision-making. This, it is argued, makes the HRC very similar to a judicial body and also imbues its findings with the same authority that normally attaches to findings of judicial bodies including *res judicata*. One must be alive to the fact that there are, presently, multiple *loci* for the resolution of disputes internationally and that not all these are referred to as 'courts'. In spite of this, many such bodies are endowed with the authority to resolve disputes with finality. It is this ability to resolve disputes with finality that is key. Since the HRC does have the ability to resolve disputes with finality, there is thus a strong case to be made for the *res judicata* effect of its views. The Court was, therefore, correct to attribute a *res judicata* effect to the views of the HRC.

I note, however, that Novak is willing to concede the 'finality' of the decisions of the HRC to the extent that there is a reciprocity of

12 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f33&Lang=en (accessed 9 October 2019).

application of the principle of *res judicata* as between the Court and the HRC. My point, however, is that over and above the reciprocity in the application of the principle of *res judicata*, it must be acknowledged that the views of the HRC do have binding effect. In practice, states have complied, with these views and used them to guide their conduct accordingly. It is rather disingenuous to argue that these views are not binding simply by picking one instance in which there was a failure to comply with the views. It cannot be that the views of the HRC, if complied with should be accepted as being binding and deemed non-binding recommendations when they have not been complied with.

Additionally, does it matter that *Gombert v Côte d'Ivoire* followed from a finding of no violation by the ECOWAS Court of Justice? My understanding of the argument by Novak on this point is that this matters since, in Johnson's case, the finding of a violation and a failure by Ghana to implement the views of the HRC meant that Ghana had an obligation to take steps to implement the terms of the judgment. The contrast with *Gombert v Côte d'Ivoire* is that the final order of the ECOWAS Court of Justice did not require the respondent state to take steps to implement the order of the Court. In my view, especially for purposes of establishing *res judicata*, the finding of a violation or lack thereof is not determinative. What is key is the existence of a decision on the merits of the case by a competent body.

It is also important to note that the decision in *Johnson v Ghana* did not solely turn on the Court's application of *Gombert v Côte d'Ivoire*. In attempting to ascertain the precise parameters for the application of the requirement in article 56(7), the Court drew inspiration from decisions by the Commission.¹³ The fact that 'settlement' of a dispute in international law comports with the three conditions highlighted by Court finds resonance in the Commission's jurisprudence on the same point. The Commission, it must be recalled, is the only entity whose mandate primarily revolves around the interpretation and application of the Charter. It is also notable, in my view, that Novak does not seem to take issue explicitly with the Court's position about the three conditions that must be fulfilled in order for settlement to be established.

4.5 The proliferation of international dispute resolution mechanisms and *res judicata*

I prefer to address Novak's treatment of *res judicata* and *non bis in idem* within the broader context of the proliferation of international dispute resolution mechanisms. I start by conceding that there is nothing wrong with his restatement of the principles. As Novak correctly states, *non bis in idem* operates to prevent double jeopardy and also establish the *res judicata* effect of judicial decisions. I should add, and agree with Conway, that *ne bis in idem* is the criminal law

13 *Johnson* (n 2) para 48.

manifestation of a broader principle aimed at protecting the finality of judgments encapsulated in the doctrine of *res judicata*.¹⁴

It is important to note that any current survey of international law will reveal the proliferation of third party dispute resolution mechanisms. This proliferation evokes conflicting responses.¹⁵ On the one hand are those that view it as a positive development, while on the other hand, are those who perceive it as a harmful development. On the harmful side, the proliferation, it is argued, creates a risk of conflicting jurisprudence on the same norms. The presence of multiple institutions with overlapping jurisdiction, therefore, presents a danger to the unity of international law. On the positive side, it is argued, the proliferation has resulted in a quantitative increase in the number of dispute settlement mechanisms. This increase can be seen as a vote of confidence in the peaceful settlement of disputes envisaged under the Charter of the United Nations. The result is that, contrasted to the situation about sixty years ago, international dispute settlement mechanisms are no longer the preserve of states.

In relation to *res judicata* as a legal doctrine, it is clear that its importance and applicability is beyond contest.¹⁶ Two reasons are often flagged as justifying *res judicata*.¹⁷ First, as a matter of public policy, litigation must always have an end. Second, as a matter of private justice, no one should be proceeded against twice in respect of the same cause. Whether approached as a norm of customary international law or a general principle, *res judicata* speaks to the finality of judicial decisions. The crux of the principle stipulates that once a competent body has settled a dispute with finality, and appellate avenues have been exhausted, the parties are bound by the final decision and may not re-litigate the same issues.¹⁸

I sense that Novak raises two objections to the Court's application of *non bis in idem* and *res judicata*. First, he contends that 'the *non bis in idem* principle as originally conceived only applies to criminal offences and not to disciplinary or administrative measures.' Following this reasoning, he further contends that the Court should have treated the findings of the HRC differently since these are 'non-binding and not a judgment of a court of law.' Second, he argues that legal systems

14 G Conway 'Ne bis in idem in international law' (2003) 3 *International Criminal Law Review* 217.

15 K Oellers-Frahm 'Multiplication of international courts and tribunals and conflicting jurisdiction – problems and possible solutions' https://www.mpil.de/files/pdf1/mpunyb_oellers_frahm_5.pdf (accessed 12 October 2019).

16 *Trail Smelter Arbitration [United States v Canada]* (1941) III RIAA 1950 and *Laguna del Desierto [Argentina v Chile]* 113 ILR 1 paragraph 68. While the applicability of *res judicata* is often beyond doubt, its application is not always free of controversy – N Ridi 'Precarious finality? reflections on *res judicata* and the question of the delimitation of the Continental Shelf case' (2018) 31 *Leiden Journal of International Law* 383 at 385.

17 W Dodge, *res judicata*, in *Oxford Public International Law, Max Planck Encyclopedia of Public International Law*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778726 (accessed 20 August 2019).

18 Y Shany *The competing jurisdictions of international courts and tribunals* (2003) 245.

across the world differ in the manner in which they apply *res judicata* especially whether they apply it to ‘offences’ or ‘facts’. In his view, the Court should have adopted a broader understanding of *non bis in idem* and *res judicata* which would have led it to conclude that the actual violation alleged by Johnson was not simply the death sentence from 2008 but Ghana’s subsequent failure to implement the views of the HRC.

First, it is not in doubt that article 57(7) embodies *non bis in idem* and *res judicata*. Although the origins of the *non bis in idem* principle may indeed lie in criminal law, it is not correct to say that its applicability, especially in so far as it establishes the *res judicata* effect of decisions, is limited to criminal law. While the hazards of re-litigating the same issue(s) may be especially grave at the personal level, this should not be read to imply that the principle applies only to criminal proceedings. The rationale for *res judicata*, as briefly explored above, applies both in criminal and civil proceedings. Concededly, the criminal law justification for *non bis in idem* may not apply wholesale to civil matters but the rationale underlying the principle, which speaks to finality of decisions, is very much the same.¹⁹ As a matter of fact, from an international law perspective, key jurisprudential developments in respect of *res judicata* have emerged from arbitration proceedings which are, arguably, civil in nature.

Second, while indeed there are variations in the manner in which *non bis in idem* and *res judicata* are conceptualised and applied across different legal systems,²⁰ the Court, in *Johnson v Ghana* was not confronted with a choice of adopting the conceptualisation of the principles from any one legal system. If anything, the Court was faced with establishing an interpretation of *res judicata* from an international law perspective which would then inform its construction of article 56(7). It is thus important to keep in mind that, given the nuanced variation to *non bis in idem* and *res judicata*, across legal systems, and also in international law, the Court’s key role was to establish an interpretation of the requirement as contained in article 56(7).

In my view, therefore, given the facts of *Johnson v Ghana*, and the framing of article 56(7), the Court took a reasonable and well-grounded approach. I earlier conceded that decisions of the HRC are, indeed, technically not judgments but that nevertheless they do have *res judicata* effect. Among other reasons, this is especially because, presently, there are many *loci* for dispute resolution in international law. Since there is, generally, no direct and hierarchical relationship between these adjudicatory bodies, and also not to undermine the unity of international law, the adjudicatory bodies ought to be aware of developments from other tribunals/courts. This awareness should be particularly acute where such bodies are involved in the interpretation and enforcement of similar norms. In the context of the present discussion, it is fair for the Court to pay attention to what the HRC

19 See Conway (n 14) 222-223.

20 As above, 221.

pronounces even if the Court itself is not, technically, bound to follow the views of the HRC.

5 CONCLUSION

Under the adjudicatory mechanism created by the Charter and the Protocol, just as is the case with many other *fora*, the Court does not proceed to pronounce itself on the merits of a case if the same is found to be inadmissible. The requirements that an application must fulfil before it can be declared admissible are circumscribed by article 56 of the Charter and repeated in Rule 40 of the Rules. Among these requirements is the requirement that any case before the Court must not have been already resolved by another competent mechanism in line with the principles of the Charter or the United Nations Charter. In resolving the admissibility of applications, however, the Court does not consider the potential merits or de-merits of the application and merely applies the conditions as outlined in article 56 of the Charter. It is acutely important to bear in mind the fact that the admissibility requirements before the Court are, strictly, as stipulated in article 56 of the Charter. Given the facts in *Johnson v Ghana*, especially as pleaded before the Court, it is fair to say that there was no opportunity that the Court missed so far as pronouncing itself on the death penalty is concerned. At an appropriate time, faced with the appropriate facts, I am of the view that the Court will, certainly, pronounce itself on the death penalty or the mandatory death penalty under the Charter. However, if the Court had proceeded to find *Johnson v Ghana* admissible, the Court would have been guilty of ignoring its own precedent about the meaning of 'settlement' within the context of article 56(7) when no compelling reasons for such a position existed. In my view, underlying Novak's argument is the assumption that had the Court proceeded to deal with the merits of the case, only one possible outcome was feasible, which is, to declare the mandatory death penalty in Ghana, and by implication in Africa, against the Charter. In fairness, the matter is slightly more nuanced and complicated than this assumption would let us believe.

L'affaire *Armand Guehi c. Tanzanie* et la question du droit à l'assistance consulaire: l'intrusion d'une nouvelle préoccupation dans le corpus juridique des droits de l'homme en Afrique

*Nemlin Hie Arnaud Oulepo**

RÉSUMÉ: Le 7 décembre 2018, la Cour africaine des droits de l'homme et des peuples rendait son arrêt dans l'affaire *Armand Guehi c. Tanzanie*. L'affaire *Guehi* donnera l'occasion à la Cour de connaître d'un nouveau grief, et par la même occasion d'expérimenter pour la première fois un mécanisme procédural prévu par son Protocole. En effet la Cour sera confrontée à la question de la violation du droit à l'assistance consulaire prévu par l'article 36 de la Convention de Vienne sur les Relations Consulaires. Ce commentaire argue que l'interprétation peu développée, fournie par la Cour, tend à confondre assistance judiciaire et assistance consulaire. Ce faisant elle s'éloigne de la jurisprudence constante de la Cour Internationale de Justice en la matière et compromet la prise en compte du droit d'assistance consulaire dans le corpus juridique des droits de l'homme en Afrique. Par ailleurs en ayant eu recours au mécanisme de l'intervention dans la présente instance, la République de Côte-d'Ivoire remet en avant la volonté certes timide mais nécessaire des Etats africains de protéger les intérêts de leurs ressortissants. L'auteur propose un aperçu historique de la question de l'assistance consulaire avant de pointer les failles de l'interprétation donnée par la Cour d'Arusha.

TITLE AND ABSTRACT IN ENGLISH:

The *Armand Guehi v Tanzania* case and the issue of the right to consular assistance: the introduction of a new concern into African human rights law

ABSTRACT: On 7 December 2018, the African Court on Human and Peoples' Rights delivered its ruling in *Armand Guehi v Tanzania*. The *Guehi* case gave the opportunity to the Court to deal with a right and a procedural mechanism which have not been raised before it in the past. The Court dealt with the violation of the right to consular assistance provided for under article 36 of Vienna Convention on Consular Relations. This case commentary argues that the interpretation provided by the Court was wrong because its interpretation conflated judicial assistance and the right to consular assistance. Such an interpretation departs from the position constantly adopted by the International Court of Justice regarding the right to consular assistance. This right may thus be considered as not forming part of the African human rights corpus. Further, the intervention of Côte d'Ivoire in the proceedings demonstrates the willingness by African countries to stand by their citizens before international courts. The case commentary begins by briefly providing the historical background of the right to consular assistance before discussing weaknesses of the Court's interpretative approach.

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MOTS CLÉS: *Armand Guehi c. Tanzanie*, Tanzanie, assistance consulaire; Convention de Vienne sur les Relations Consulaires; article 36; Cour africaine des droits de l'homme et des peuples

SOMMAIRE:

1	Introduction.....	484
2	Le droit de notification à l'assistance consulaire: un retard africain difficilement comblé.....	487
2.1	Evolution du droit relatif à l'assistance consulaire.....	487
2.2	L'état de la jurisprudence internationale.....	489
3	Evaluation de la décision de la Cour.....	492
3.1	Assistance judiciaire et assistance consulaire : une confusion par la Cour.....	492
3.2	L'intervention de la République de Côte-d'Ivoire : un rôle de pionnier.....	498
4	Des perspectives encourageantes.....	499
5	Conclusion.....	500

1 INTRODUCTION

Le 7 décembre 2018, lors de sa session délocalisée à Tunis, la Cour africaine des droits de l'homme et des peuples (Cour) rendait un arrêt en l'affaire *Armand Guehi c. Tanzanie*.¹ Ce faisant la Cour de Arusha venait ainsi de mettre fin à plus de trois années de contentieux relatives à la condamnation à la peine capitale d'un ressortissant ivoirien par la Tanzanie. Cette affaire, aux contours les plus mystérieux dignes de scénarios « hollywoodiens », a pour origine une dispute conjugale. Le 4 octobre 2005, le couple Guehi (Armand Guehi et KS Angèle) originaire de Côte d'Ivoire, respectivement stagiaire et secrétaire au sein du Tribunal pénal international pour le Rwanda (TPIR) se rend à leur lieu de fonction. A bord de leur véhicule, le sieur Guehi non content de la tenue de son épouse, lui fait part de sa désapprobation et par la même occasion lui suggère d'en mettre une plus commode. Face au refus de son épouse, Monsieur Guehi allègue être descendu du véhicule, la laissant s'en aller seule à bord.² Ce sera le voyage de non-retour.

Constatant son absence, le TPIR émet un signalement en coordination avec les autorités tanzaniennes. La dépouille de KS Angèle est retrouvée le 5 octobre 2005, dans la région de Mkufi Estate, le corps marqué d'hématomes, encore plus important la mini-jupe de la discorde déchirée.³ Dernière personne vue en compagnie de son épouse, A. Guehi est arrêté le 6 octobre 2005 par les agents de sécurité du TPIR et remis aux autorités tanzaniennes. Interrogé sur le fait qu'il n'ait pas signalé la disparition de son épouse, il indiquera aux enquêteurs qu'il ne l'a pas jugé utile, dans la mesure où lors d'une précédente dispute, celle-ci avait séjourné pendant une semaine, hors du domicile conjugal, chez une amie. Il a donc estimé qu'elle aurait trouvé refuge chez cette dernière.⁴ Guehi connaîtra ainsi les vicissitudes du système judiciaire tanzanien, dont le récent arrêt de la

1 Affaire 1/2015 *Armand Guehi c. Tanzanie* CAFDHP (7 décembre 2017), arrêt.

2 Affaire 1/2015 *Armand Guehi c. Tanzanie* CAFDHP, mémoire en réplique, para 21-22 (document à disposition de l'auteur).

3 Affaire 1/2015 *Armand Guehi c. Tanzanie* CAFDHP, mémoire en réponse de la République de Tanzanie, para 2 (document à disposition de l'auteur).

4 *Armand Guehi* (n 2), para 21 (document à disposition de l'auteur).

Cour ne constitue pas l'épilogue.⁵ Pour autant que l'affaire *Guehi* soit identique aux autres affaires relatives à la condamnation à la peine capitale portées devant la Cour, elle diffère et de ce fait mérite analyse pour deux raisons.⁶ D'une part sur un plan purement procédural, l'affaire *Guehi* demeure à ce jour la première affaire dans laquelle, invité par la Cour, un Etat a effectivement fait valoir son droit d'intervention au titre de l'article 5(2) du Protocole portant création de la Cour.⁷ S'apparentant à une forme de protection diplomatique, les Etats n'avaient jusque-là jamais fait usage de cette disposition qui sombrait dans une désuétude.⁸ D'autre part, le requérant demandait à la Cour d'ordonner sa libération, en constatant entre autres griefs, que son droit à l'assistance consulaire de la Côte-d'Ivoire son Etat d'origine, a été violé par la Tanzanie.⁹

En effet, l'affaire *Guehi* présentait à la Cour l'opportunité de se prononcer pour la première fois sur un sujet tout aussi important que celui du droit d'accès et de notification à l'assistance consulaire au regard du droit international, notamment l'article 36(1)(b) et (c) de la Convention de Vienne sur les Relations Consulaires de 1963 (CVRC). L'article précité dispose :

Afin que l'exercice des fonctions consulaires relatives aux ressortissants de l'Etat d'envoi soit facilité :

[...]

- b) Si l'intéressé en fait la demande, les autorités compétentes de l'Etat de résidence doivent avertir sans retard le poste consulaire de l'Etat d'envoi lorsque, dans sa circonscription consulaire, un ressortissant de cet Etat est arrêté, incarcéré, ou mis en détention préventive ou toute autre forme de détention. Toute communication adressée au poste consulaire par la personne

5 Un recours a été ainsi porté devant la Cour d'Appel de Arusha. Cause List Arusha, *Armand Guehi c. The Republic*, 3/05/2016, <https://tls.or.tz/wp-content/uploads/2018/06/CAUSE-LIST-ARUSHANew.pdf> (consulté le 20 juillet 2019)

6 Quelques affaires relatives à une condamnation à la peine capitale devant la Cour Africaine des Droits de l'Homme et des Peuples: Affaire No 007/2015 *Ally Rajab & Others c. Tanzania* (18 Mars 2018), ordonnance portant mesures conservatoires. Affaire No016/2017 *Dexter Eddie Johnson c. Ghana* (26 Mars 2019), arrêt.

7 Ainsi dans l'Affaire No003/2015 *Kennedy Owino Onyachi, Charles John Mwanini Njoka* CAFDHP (28 Septembre 2017) arrêt, para 44. La Cour conformément à l'article 5(2) de son Protocole a invité la République du Kenya à formuler une requête d'intervention si elle souhaite, car l'affaire implique deux ressortissants kenyans. Le Kenya n'interviendra pas

8 Email du Greffe de la Cour Africaine des Droits de l'Homme et des Peuples confirmant que l'affaire *Armand Guehi c. Tanzania* est à ce jour la seule dans laquelle un Etat a exercé son droit d'intervention, 16 juillet 2019.

L'article 5(2) du Protocole portant création de la Cour Africaine des Droits de l'Homme et des Peuples dispose: 'Lorsqu'un Etat partie estime avoir un intérêt dans une affaire, il peut adresser à la Cour une requête aux fins d'interventions'. Cet article doit être lu concomitamment à l'article 35(2)(b) du Règlement de la Cour:

2. Sauf décision contraire de la Cour, le Greffier communique copie du dossier, selon le cas :

[...]

b) à l'Etat partie dont le ressortissant est victime de la violation alléguée.

9 Le requérant arguait entre autres de la violation par la Tanzanie de son droit à un procès équitable, de son droit à être jugé dans un délai raisonnable ainsi que de son droit de propriété.

arrêtée, incarcérée ou mise en état de détention préventive ou toute autre forme de détention préventive doit également être transmise sans retard par lesdites autorités. Celles-ci doivent sans retard informer l'intéressé de ses droits aux termes du présent alinéa.

- c) Les fonctionnaires consulaires ont le droit de se rendre auprès d'un ressortissant de l'Etat d'envoi qui est incarcéré, en état de détention préventive, ou toute autre forme de détention, de s'entretenir et de correspondre avec lui et de pourvoir à sa représentation en justice. Ils ont également le droit de se rendre auprès d'un ressortissant de l'Etat d'envoi qui, dans leur circonscription, est incarcéré ou détenu en exécution d'un jugement. Néanmoins, les fonctionnaires consulaires doivent s'abstenir d'intervenir en faveur d'un ressortissant incarcéré ou mis en état de détention préventive ou toute autre forme de détention lorsque l'intéressé s'y oppose expressément.

L'effort attendu de la Cour, était d'affirmer une position reconnue par la jurisprudence internationale. La violation du droit d'assistance consulaire mérite réparations sous diverses formes: libération ou réexamen de l'affaire ainsi que la révision du verdict de culpabilité et de la peine prononcée.¹⁰ Dans son interprétation, la Cour va affirmer une position qui s'écarte de la jurisprudence internationale, en assimilant les droits reconnus par l'article 36 de la CVRC à ceux de l'article 7 de la Charte africaine des droits de l'homme et des Peuples (Charte). En effet, de l'avis de la Cour étant donné que les garanties prévues par l'article 36 de la CVRC notamment le droit à un conseil, dont le requérant aurait pu bénéficier sont également prévues par l'article 7 de la Charte, la question d'un droit à l'assistance consulaire ne se posait plus. Nous proposons ainsi à travers ce commentaire de passer en revue l'interprétation du droit d'assistance consulaire par la Cour à la lumière de la jurisprudence internationale. Nous sommes d'avis qu'à travers une interprétation aussi restrictive de ce droit, la Cour a manqué l'opportunité d'affirmer une position africaine sur un droit tout aussi important que celui de l'assistance consulaire. L'affaire *Guehi* soulève plus globalement la problématique suivante : l'absence de violation par la Tanzanie de l'article 7 de la Charte l'exonère-t-elle pour autant de ses obligations au titre de l'article 36 de la CVRC? La violation des droits prévus par l'article 36 de la CVRC a parfois conduit à des relations tendues entre Etats.¹¹

Par souci de logique, notre commentaire partira d'une présentation générale du droit de notification relative à l'assistance consulaire (2) en accentuant le retard africain en la matière, de ce constat nous évaluerons la décision de la Cour (3), avant d'établir ses éventuelles conséquences (4).

10 *The Republic c. Mabvuto Alumeta* (2017), Sentence Rehearing Case No 36, High Court of Malawi; *Affaire LaGrand République Fédérale d'Allemagne c. Etats-Unis d'Amérique* CIJ (27 juin 2001) (2001) CIJ Recueil 466; *Affaire Avena Mexique c. Etats-Unis d'Amérique* CIJ (31 mars 2004) (2004) CIJ Recueil 12; *Affaire Jadhav Inde c. Pakistan* CIJ (17 juillet 2019).

11 Nous en voulons pour preuve les échanges vifs entre l'Inde et le Pakistan à propos de l'affaire *Jadhav*.

2 LE DROIT DE NOTIFICATION A L'ASSISTANCE CONSULAIRE: UN RETARD AFRICAIN DIFFICILEMENT COMBLE

Des informations disponibles, à l'exception de deux décisions de la Haute Cour de Malawi, les tribunaux africains n'avaient jusque là pas été sollicités pour se prononcer sur la question du droit à l'assistance consulaire tel que le prévoit l'article 36 de la CVRC.¹² Cette observation qui contraste pourtant avec la réalité, peut s'expliquer par deux hypothèses.¹³ La première est celle de l'ignorance des dispositions de la Convention tant par les individus que par les praticiens. La seconde concerne l'approche particulière des États africains vis-à-vis de la protection diplomatique ou consulaire.

Notre exposé nous conduira ainsi à définir les contours du droit d'assistance consulaire au sens de la CVRC à travers un bref survol historique (2.1), tout en relevant les positions adoptées par diverses juridictions internationales (2.2).

2.1 Evolution du droit relatif à l'assistance consulaire

Le droit à l'assistance consulaire part de l'idée toute simple qu'en vertu du lien de nationalité unissant un individu et un Etat, ce dernier est en droit de lui accorder sa protection.¹⁴ Cette protection est d'autant plus importante lorsque leur ressortissant est confronté au système judiciaire d'un Etat étranger. Bien avant l'adoption de la CVRC, les Etats avaient opté pour la voie bilatérale. Plusieurs traités d'amitié, de commerce et de navigation conclus entre les Etats-Unis d'Amérique et d'autres Etats comportaient ainsi une disposition relative à la notification consulaire en cas d'arrestation d'un ressortissant

12 *The Republic c. Lameck Bandawe Phiri* (2017), Sentence Rehearing Case No 25, High Court of Malawi; *Mabvuto Alumeta* (n 10) 2.

13 Sont parties à la Convention de Vienne sur les Relations Consulaires, les Etats africains suivants: Afrique du Sud, Algérie, Angola, Bénin, Botswana, Burkina-Faso, Cap-Vert, Cameroun, République Démocratique du Congo, Djibouti, Egypte, Guinée Equatoriale, Erythrée, Eswatini (ex Swaziland), Gabon, Gambie, Ghana, Guinée, Kenya, Lesotho, Liberia, Libye, Madagascar, Malawi, Mali, Mauritanie, Maurice, Maroc, Mozambique, Namibie, Niger, Nigeria, Rwanda, São Tome et Principe, Sénégal, Seychelles, Sierra Leone, Somalie, Soudan, Tanzanie, Togo, Tunisie, Zambie, Zimbabwe.

14 La Cour Permanente de Justice Internationale, dans l'affaire *Chemin de Fer Panevezys-Saldutiskis*, CPJI (28 Février 1939) Ser A/B, Fascicule No 76. Cette règle sera reprise aussi dans l'affaire *Nottebohm*. Voir *Affaire Nottebohm Liechtenstein c. Guatemala* CIJ (6 Avril 1955) (1955) CIJ Recueil 4. Nous estimons que ce principe vaut aussi pour l'assistance consulaire.

étranger.¹⁵ L'article 3(2) du Traité d'amitié, de commerce et de navigation entre les Etats-Unis d'Amérique et le Danemark dispose ainsi:¹⁶

Si un ressortissant de l'une des Parties est accusé d'un délit et mis en état d'arrestation dans les territoires de l'autre Partie, le représentant consulaire de son pays, dans le poste le plus proche devra être immédiatement avisé, dès lors que l'intéressé en fera la demande. Ledit ressortissant devra:

- (a) être traité d'une manière équitable et humaine ;
- (b) être informé officiellement et immédiatement des accusations portées contre lui ;
- (c) être traduit en justice sans autre délai que celui dont il a besoin pour préparer convenablement sa défense; et
- (d) bénéficier de toutes les facilités nécessaires, dans les limites raisonnables, pour assurer sa défense, notamment les services d'un conseil compétent.

Cette tendance au bilatéralisme, reflétait l'état général des relations consulaires entre Etats sur le plan international, qui en l'absence de traité multilatéral, étaient régies essentiellement par le droit international coutumier et les principes de coexistence pacifique et de relations amicales entre Etats. En 1949, la décision fut prise d'entamer un projet de codification portant sur les relations consulaires et les immunités. Tâche qui échoira à la Commission de Droit International (CDI) des Nations-Unies. Le 24 avril 1963 est adopté la Convention de Vienne sur les Relations Consulaires (CVRC), la résultante de compromis et de tractations si l'on en juge par les nombreux amendements et commentaires formulés par les Etats, depuis le projet de la Commission jusqu'à son adoption.¹⁷ Tenant en 79 articles, la Convention témoigne de la conviction de ses rédacteurs qui restent « persuadés qu'une convention internationale sur les relations, privilèges et immunités consulaires contribuerait elle aussi à favoriser les relations d'amitié entre les pays, quelque soit la diversité de leurs régimes constitutionnels et sociaux ». ¹⁸ Pour l'essentiel, la CVRC définit l'étendue des fonctions consulaires, régit les procédures de nomination et d'acceptation du personnel consulaire ainsi que les immunités rattachées à l'exercice de leur fonction. Traité classique au sens du droit international public, la CVRC mènerait son existence à l'image d'un long fleuve tranquille, en l'absence de l'inclusion d'une disposition au bénéfice de l'individu. En effet au cours des dernières décennies, la CVRC a gagné en notoriété du fait de son article 36. Cet

15 Article 3(2) Treaty of Friendship, Commerce and Navigation between the United States of America and the Republic of Nicaragua, 367 UNTS 3 (21 janvier 1956); article 3(2) Treaty of Friendship, Commerce and Navigation between the United States of America and the Federal Republic of Germany, 273 UNTS (29 Octobre 1954); article 2(2) Treaty of Friendship, Commerce and Navigation between the United States of America and Japan, 206 UNTS 2788 (2 avril 1953); article 2(2) Treaty of Friendship, Commerce and Navigation, with Protocol between Ireland and the United States of America, Irish Treaties Series 1950 No 7 (21 janvier 1950).

16 Article 3(2) Treaty of Friendship, Commerce and Navigation between the United States of America and Denmark, 421 UNTS 6056 (1 octobre 1951).

17 Pour un historique de l'élaboration de la CVRC, Voir Juan Manuel Gomez 'Vienna Convention on Consular Relations 1963: Introductory Note' United Nations Audiovisual Library of International Law.

18 Préambule de la Convention de Vienne sur les Relations Consulaires.

article cité précédemment oblige les autorités de l'Etat de résidence en cas d'arrestation, de détention ou incarcération d'un ressortissant étranger, d'informer sans retard les autorités consulaires de l'individu en question. Dans le cadre des traités d'amitié, de commerce et de navigation, la notification ne se faisait que sur demande expresse du ressortissant étranger arrêté, détenu ou incarcéré. L'innovation de l'article 36 est d'exiger que les autorités de l'Etat de résidence procèdent *proprio motu* à la notification.¹⁹

Du fait de l'obligation qu'elle fait peser sur les autorités de l'Etat de résidence, l'article 36 était l'une des dispositions les plus âprement discutées.²⁰ Il a ainsi réussi à faire naître au bénéfice de l'individu un droit de très grande importance, dans une convention dont le but initial était principalement de régir les relations consulaires entre Etats. Conscients du fait que les dispositions de la Convention méritent application, les Etats ont par acte séparé prévu de soumettre tous litiges pouvant survenir quant à l'interprétation ou l'application de la CVRC à la Cour Internationale de Justice.²¹ Plusieurs cours et tribunaux internationaux ont ainsi eu à se prononcer sur le droit à l'assistance consulaire.

2.2 L'état de la jurisprudence internationale

Comme indiqué, l'article 36 de la CVRC a très souvent été invoqué dans les cas où la vie d'un ressortissant étranger encourt un risque de préjudice irréparable. Dans l'affaire *LaGrand*, la République Fédérale d'Allemagne pria la Cour de dire qu'en manquant de l'informer de l'arrestation des frères LaGrand ainsi que de notifier ces derniers de leurs droits à l'assistance consulaire, les Etats-Unis d'Amérique étaient en flagrante violation de l'article 36 de la CVRC.²² En effet l'Allemagne

19 Article 36(1)(c) CVRC: 'Celles-ci doivent sans retard informer l'intéressé de ses droits aux termes du présent alinéa'.

20 United Nations Conference on Consular Relations, Summary records of plenary meetings and of the meetings of the First and Second Committees, Vol I, 1963, A/CONF.25/16.

'Mr. Kamel (United Arab Emirates) agreed that article 36 as prepared by the drafting committee would place a heavy burden on the authorities of the receiving State. The principle is understandable, but in practice it laid an impossible task on the receiving State and particularly on those which received a large numbers of immigrants and foreign tourists'.

'Mr. De Castro (Philippines) said that he had little to add to the arguments presented by the representative of Thailand. Paragraph 1(b) of article 36 as prepared by the drafting committee imposed excessive obligations on the receiving State. Moreover, it favoured nationals of the sending State as compared to nationals of the receiving State. In the Second Committee it had been argued that nationals of the sending State who were arrested or imprisoned should be protected because they were often ignorant of the laws and regulations of the receiving State. That argument was not valid as no one was supposed to be ignorant of the law.'

21 Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, 596 UNTS 487 (24 avril 1963).

22 *Affaire LaGrand* (n 10), Requête introductive d'instance de la République Fédérale d'Allemagne, para 4-5.

alléguait de l'information tardive de l'arrestation de Karl et Walter LaGrand. Elle ne l'aurait pas apprise officiellement par les autorités américaines mais plutôt par les détenus eux-mêmes.²³ Le risque de préjudice irréparable étant réel en l'espèce, c'est à bon droit que la Cour ordonna des mesures conservatoires tendant à surseoir toute exécution jusqu'à la fin de l'instance.²⁴ Les deux ressortissants allemands seront toutefois exécutés en dépit de l'ordonnance portant mesures conservatoires. Ce non-respect de l'ordonnance va ramener la Cour à une situation qu'elle avait déjà connue, celle dans laquelle, une requête introductive d'instance est devenue sans objet et donc aucune possibilité de *restitutio in integrum*. En effet, dans une affaire similaire relative à la violation du droit à l'assistance consulaire, le Paraguay s'est désisté de l'instance dans la mesure où son ressortissant, le sieur Angel Fernando Breard a été exécuté par les autorités de l'Etat de Virginie en dépit de l'ordonnance portant mesures conservatoires.²⁵

En ce qui concerne l'affaire *LaGrand*, la Cour devait se prononcer sur trois points essentiels. Premièrement, la nature obligatoire de ses ordonnances de mesures conservatoires. A ce sujet la Cour après un examen minutieux de l'article 94 de la Charte des Nations-Unies conclut à propos de l'ordonnance de mesures conservatoires:²⁶

Celle-ci ne constituait pas une simple exhortation. Elle avait été adoptée en vertu de l'article 41 du Statut. Ladite ordonnance avait par suite un caractère obligatoire et mettait une obligation à la charge des Etats-Unis.

Deuxièmement, la Cour devait rendre sa décision sur la violation de l'article 36(1) de la CVRC par les Etats-Unis. Par l'affirmative, elle reconnaîtra cette violation.²⁷ Finalement quant à la réparation, la Cour se rendant compte de l'impossibilité de toute *restitutio in integrum*, va plutôt envisager un ensemble de mesures au choix de l'Etat défendeur. Ces mesures consistent par exemple en le réexamen et la révision du verdict de culpabilité et de la peine.²⁸ L'affaire *LaGrand* sera prémonitoire d'un autre contentieux portant sur la violation de la CVRC par les Etats-Unis d'Amérique: l'affaire *Avena*.

Dans cette affaire, le Mexique saisissait la Cour pour des griefs similaires de violation de l'article 36 de la CVRC au sujet d'une cinquantaine de ses ressortissants incarcérés aux Etats-Unis. En se basant sur le précédent établi par l'affaire *LaGrand*, la Cour conclura en des termes similaires à la violation par les Etats-Unis de l'article 36 de la CVRC.²⁹ La consœur sud-américaine de la Cour africaine des droits de l'homme et des peuples a également eu à connaître une telle thématique. En effet, la Cour interaméricaine des droits de l'homme

23 *Ibid.*

24 *Affaire LaGrand* (3 mars 1999), Ordonnance portant mesures conservatoires, CIJ Recueil 9.

25 *Affaire Paraguay c. Etats-Unis d'Amérique* CIJ (10 novembre 1998), Ordonnance portant désistement du Paraguay, CIJ Recueil 426.

26 *Affaire LaGrand* (n 10) Arrêt, para 92-110.

27 *Ibid.*, voir paragraphe 3 du dispositif de l'arrêt.

28 *Ibid.*, voir paragraphe 7 du dispositif de l'arrêt.

29 *Affaire Avena Mexique c. Etats-Unis d'Amérique* CIJ (31 mars 2004), Arrêt, CIJ Recueil 12. Voir paragraphe 4-11 du dispositif de l'arrêt.

exerçant sa compétence non-contentieuse sur saisine du Mexique, était appelée à donner un avis sur le droit de notification et d'assistance consulaire. Concrètement, le Mexique demandait à la Cour de dire si toute condamnation d'un ressortissant étranger à la peine de mort sans l'avoir au préalable informé des droits prévus à l'article 36 de la CVRC, constituait une condamnation arbitraire. En soumettant cette question, le Mexique avait en vue l'article 6(1) du Pacte international relatif aux droits civils et politiques.³⁰ La Cour à la majorité, et par l'affirmative a estimé qu'une telle condamnation en de pareille circonstance est arbitraire et engage la responsabilité internationale de l'Etat ayant failli à l'obligation imposée par l'article 36 de la CVRC.³¹

Dans une perspective africaine, l'on ne saurait manquer de relever l'importance du contentieux ayant opposé la République de Guinée à la République Démocratique du Congo: l'affaire *Ahmadou Sadio Diallo*.³² Exerçant sa protection diplomatique au profit du sieur Diallo, la Guinée indiquait au nombre des griefs qu'elle imputait à la République Démocratique du Congo, la violation du droit d'assistance consulaire.³³ A sa décharge, la République Démocratique du Congo excipait qu'il ressortait des éléments factuels de l'affaire que la République de Guinée par ses représentants diplomatiques sur le territoire congolais avait parfaitement pris connaissance de l'arrestation de Monsieur Diallo. En concluant à la violation de l'article 36 de la CVRC, la Cour internationale de Justice a apporté une précision importante. En effet pour la Cour, il importe peu de savoir si les autorités de l'Etat d'envoi au sens de l'article 36 de la CVRC ont appris de quelque manière que ce soit l'arrestation, la détention ou l'incarcération de leur ressortissant. Pour la Cour, le but de l'article 36 est que la notification du droit à l'assistance consulaire doit impérativement provenir des autorités de l'Etat de résidence.³⁴

30 Article 6(1) Pacte International relatif aux Droits Civils et Politiques, 999 U.N.T.S. 171 (16 décembre 1966) 'Le droit à la vie est inhérent à la personne humaine. Ce droit doit être protégé par la loi. Nul ne peut être arbitrairement privé de la loi'.

31 Inter-American Court of Human Rights, *The right information on consular assistance in the framework of the guarantees of the due process of law* IACHR, Advisory Opinion OC-16/99 (1 octobre 1999).

32 *Affaire Ahmadou Sadio Diallo République de Guinée c. République Démocratique du Congo* CIJ (30 novembre 2010), arrêt, CIJ Recueil 636.

33 *Ibid.*, para 91-97.

34 *Ibid.*, para 95 'La Cour constate que les deux arguments mis en avant par la RDC jusqu'au second tour de plaidoirie sont dépourvus de pertinence. C'est aux autorités de l'Etat qui procède à l'arrestation qu'il appartient d'informer spontanément de son droit à demander que son consulat soit averti; le fait que cette personne n'ait rien demandé de tel non seulement ne justifie pas le non-respect de l'obligation d'informer qui est à la charge de l'Etat qui procède à l'arrestation, mais pourrait bien s'expliquer justement, dans certains cas, par le fait que cette personne n'a pas été informée de ses droits à cet égard. Par ailleurs, le fait que les autorités consulaires de l'Etat de nationalité de la personne arrêtée aient été informées par d'autres voies de l'arrestation de cette personne ne fait pas disparaître la violation de l'obligation d'informer celle-ci "sans retard" de ses droits, lorsque cette violation a été commise.'

3 EVALUATION DE LA DECISION DE LA COUR

A propos de la violation de l'article 36 de la CVRC dans l'affaire *Guehi*, la Cour de Arusha avait estimé qu'il était inopportun de s'y prononcer dans la mesure où selon elle, les droits consacrés par cet article le sont également par l'article 7(1)(c) de la Charte africaine des droits de l'homme et des peuples.³⁵ Raisonnement contestable, il appelle des observations préliminaires. Dans les affaires relatives à l'article 36 de la CVRC que nous avons analysé, l'invocabilité de cette convention ne souffrait d'aucune contestation tant l'Etat présumé en violation de celle-ci que l'Etat de nationalité de l'individu présumé victime de cette violation, étaient tous les deux parties à la Convention. La situation se compliquait dans l'affaire *Guehi*, dans la mesure où son Etat d'origine la Côte-d'Ivoire n'a pas ratifié ladite convention.

3.1 Assistance judiciaire et assistance consulaire: une confusion par la Cour

La Cour a conclu à la similarité des droits prévus par les articles 36 de la CVRC et 7(1)(c) de la Charte africaine des droits de l'homme et des peuples. En effet pour la Cour, en invoquant l'article 36 de la CVRC, *Guehi* faisait aussi référence à l'article 7 de la Charte qui prévoit entre autres le droit de toute personne à être assistée par un conseil de son choix.³⁶ Par cette interprétation la Cour a failli à établir une différence entre le droit à l'assistance judiciaire et le droit à l'assistance consulaire, bien qu'elle eut rappelé que pour le requérant « [...] une assistance consulaire, ne doit pas être confondue avec une assistance judiciaire ».³⁷

L'assistance judiciaire est celle à titre d'exemple, que l'on pourrait déduire du célèbre *Miranda warning*, rendu populaire à travers les séries télévisées américaines. Ainsi tout officier de police américain diligent ne manquera pas de rappeler lors d'une arrestation la phrase suivante:³⁸

You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer with you during questioning. If you cannot afford a lawyer, one will be appointed for you or before any questioning if you wish. If you decide to answer questions now without a lawyer present, you have the right to stop answering at any time.

35 *Armand Guehi* (n 1), paras 95-96. L'article 7(1)(c) de la Charte africaine des droits de l'homme et des peuples dispose:

Toute personne a droit à ce que sa cause soit entendue. Ce droit comprend:
[...]
c) le droit à la défense, y compris celui de se faire assister par un défenseur de son choix

36 *Ibid.*

37 *Ibid.*, para 87.

38 *United States c. Plugh* 648 US 118 (2011); *Miranda c. Arizona* 384 US 436 (1966).

L'assistance judiciaire est ainsi le droit de tout individu de se faire assister par un conseil de son choix dès l'instant où une suspicion ou une accusation est portée à son encontre. Pour les personnes indigentes, il est communément accepté sur la base du principe de l'égalité des armes, qu'elles soient représentées par des conseils fournis par l'Etat. C'est dans cette logique que la commission d'office et l'aide juridictionnelle sont présentes tant dans les systèmes juridiques de *common law* que de droit civil.³⁹ Le Pacte international relatif aux droits civils et politiques (PIDCP) considère d'ailleurs l'assistance judiciaire comme l'une des garanties dont tout accusé doit bénéficier.⁴⁰

Toute personne accusée d'une infraction pénale a droit, en pleine égalité, au moins aux garanties suivantes :

- d) à être présente au procès et à se défendre elle-même ou à avoir l'assistance d'un défenseur de son choix ; si elle n'a pas de défenseur, à être informée de son droit d'en avoir un, et, à chaque fois que l'intérêt de la justice l'exige, à se voir attribuer un défenseur, sans frais, si elle n'a pas les moyens de le rémunérer.

La confusion faite par la Cour entre assistance judiciaire et assistance consulaire est d'autant plus surprenante que dans un passé relativement récent elle avait eu à se prononcer sur la question de l'assistance judiciaire. En effet en se basant sur l'article 14(3) (f) du PIDCP lu conjointement avec l'article 7 de la Charte, la Cour avait estimé que la Tanzanie, dans les affaires *Alex Thomas* et *Mohamed Abubakari*, pour n'avoir pas fournir de conseils aux requérants était en violation de son obligation d'assistance judiciaire alors que leur état d'indigence était avéré.⁴¹

La Cour africaine, elle-même dispose d'une liste de conseils, qu'elle affecte à des requérants dont la situation d'indigence est avérée.⁴² Il ressort des éléments factuels de l'affaire *Guehi*, que le requérant a bien

39 RL Spangenberg & ML Beeman 'Indigent Defense Systems in the United States' (1995) 58 *Law and Contemporary Problems*; Voir Loi No 91-647 du 10 juillet 1991 relative à l'aide juridique (France).

40 Article 14(3)(d) Pacte international relatif aux droits civils et politiques, 999 UNTS 171 (16 décembre 1966). Dans le contexte africain voyons par exemple le Point G(a) dans African Commission on Human and Peoples' Rights '*Principles and Guidelines on the Right to a fair Trial and Legal Assistance in Africa*' (2003). Voir paragraphe 1 *The Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa* (2004). Voir Article 9 *Resolution on the Right to a Fair Trial and Legal Assistance in Africa (The Dakar Declaration and Resolution)* (1999).

41 Affaire 5/2013 *Alex Thomas c. Tanzanie* CAFDHP (20 novembre 2015), arrêt, para. 124. Affaire 7/2013 *Mohamed Abubakari c. Tanzanie* CAFDHP (3 juin 2016), arrêt, para. 111

42 African Court on Human and Peoples' Rights 'List of counsel accepted and on pro bono list under the legal aid scheme', <http://en.african-court.org/images/Legal%20Aid%20Scheme/List%20of%20Counsel/list1.pdf> (consulté le 25 juillet 2019).

Voir African Court on Human and People's Right 'Legal Aid Policy' (2016), http://en.african-court.org/images/Legal%20Aid%20Scheme/Policy/English_version_Legal_Aid_Policy_From_2016.pdf (consulté le 25 juillet 2019).

reçu une assistance judiciaire par la Tanzanie, qui lui a pourvu des conseils pour assurer sa représentation devant les tribunaux.⁴³

L'assistance consulaire quant à elle part d'une autre logique. Elle se base sur le lien de nationalité entre l'individu et son Etat d'origine. Dans le cadre spécifique de la CVRC, l'article 36 selon les termes d'un auteur joue le rôle de « *cultural bridge* ».⁴⁴ En effet seul face au système judiciaire d'un Etat étranger, il est plausible que l'individu souhaiterait avoir une attache avec les autorités de son Etat d'origine. Il pèse ainsi une double charge à l'égard des autorités de l'Etat de résidence, d'une part informer le ressortissant de ses droits prévus par l'article 36 de la CVRC, et d'autre part transmettre sans retard l'information relative à l'arrestation, la détention ou l'incarcération d'un ressortissant étranger à ses autorités consulaires. La formule du paragraphe 91 de l'arrêt *Guehi* selon laquelle « [qu'] Au cours de l'audience publique, l'Etat défendeur a affirmé qu'il n'était nullement tenu de fournir une assistance consulaire » est incorrecte.⁴⁵ En effet Guehi n'étant pas un ressortissant tanzanien, la Tanzanie ne pouvait pas matériellement fournir une assistance consulaire au requérant. Elle a plutôt au regard de la CVRC l'obligation de faciliter l'accès des ressortissants étrangers à l'assistance consulaire de leur Etat d'origine. Là se situe la nuance.

L'enchaînement des sous-paragraphes de l'article 36(1) nous indique que la notification du droit à l'assistance consulaire précède l'assistance matérielle. Il est évident qu'un ressortissant étranger et son Etat d'origine laissés l'un et l'autre dans l'ignorance de leurs droits selon la CVRC ne pourront jamais interagir.

La lecture de l'article 36(1)(c) dévoile ainsi les composantes de cette assistance consulaire. D'une part, un droit de visite, qui est très souvent l'occasion pour les autorités consulaires de l'Etat d'envoi de s'enquérir directement avec leur ressortissant sur les circonstances de son arrestation, les faits qui lui sont reprochés ainsi que son état de santé. Et dans bien des cas, assurer la correspondance dans le pays d'origine avec les parents du ressortissant arrêté, détenu ou incarcéré.

D'autre part, « les fonctionnaires consulaires ont le droit de [...] pourvoir à sa représentation en justice ».⁴⁶ Nous soupçonnons que l'origine de la similitude que la Cour a semblé déduire des articles 7 de la Charte et 36 de la CVRC, provient de cette disposition. En effet il n'est pas rare d'observer, en fonction du niveau de développement, que les ambassades ou consulats des Etats à l'étranger maintiennent une liste

43 *Affaire 1/2015 Armand Guehi c. République Unie de Tanzanie* CAFDHP, mémoire en réponse de la République de Tanzanie, para 49 (document à disposition de l'auteur).

44 S Veneziano 'The right to consular notification: the cultural bridge to a foreign national's due process rights' (2017) 49 *Georgetown Journal of International Law* 550.

45 *Armand Guehi* (n 35), arrêt, para 91.

46 Article 36(1)(c) Vienna Convention on Consular Relations, 596 UNTS 261 (24 avril 1963).

de conseils locaux capables de communiquer dans la langue officielle des autorités consulaires de l'Etat d'envoi.⁴⁷

Pouvoir à la représentation en justice signifie tout simplement, mettre en relation le ressortissant étranger et un conseil local à même de le conseiller sur la spécificité du système judiciaire de l'Etat de résidence. Ce droit demeure valable, en dépit du fait qu'un conseil ait déjà été attribué par les autorités de l'Etat de résidence. La Cour Internationale de Justice a apporté une clarification à ce sujet dans l'affaire *Jadhav*.⁴⁸

L'alinéa c) du paragraphe 1 de l'article 36 prévoit que les fonctionnaires consulaires ont le droit de pouvoir à la représentation en justice d'un ressortissant de l'Etat d'envoi en détention. Il présuppose que les fonctionnaires consulaires puissent organiser cette représentation en justice sur la base des conversations et de la correspondance qu'ils ont eues avec l'intéressé. La Cour estime que, même si elle est établie, l'affirmation du Pakistan selon laquelle M. Jadhav a choisi d'être représenté par un officier défenseur possédant les qualifications requises pour assurer une représentation en justice alors qu'il avait été autorisé à désigner l'avocat de son choix ne rend pas superflu le droit des fonctionnaires consulaires de pouvoir à la représentation en justice de l'intéressé.

Il ressort qu'en l'espèce, Guehi n'a jamais pu communiquer avec les autorités consulaires ivoiriennes. Ces dernières n'ayant pas été informées conformément à l'article 36 de la CVRC.

A sa décharge, la Tanzanie excipait à bon droit, l'inapplicabilité de la CVRC en l'espèce, étant donné que la Côte-d'Ivoire n'est pas partie à la Convention. Toutefois la Cour n'aurait-elle pas dû voir dans le droit d'assistance consulaire, la codification d'un droit international coutumier?

Dans l'affirmative, elle aurait dû rechercher la pratique des Etats les plus susceptibles d'avoir une activité récurrente en la matière.⁴⁹ Les Etats-Unis d'Amérique plusieurs fois parties à des affaires relatives à la violation du droit d'assistance consulaire, abondent dans le sens d'une reconnaissance de l'application du droit international coutumier. A cet effet un manuel de procédure à disposition des autorités policières dispose clairement ce qui suit:⁵⁰

While consular relations are now largely governed by the treaties [...] the United States of America still looks to customary international law as a basis to insisting upon adherence to consular notification and access requirement by a small number of countries not party to VCCR or any other bilateral agreement. The Department of State takes the view that consular notification and access [...] in the VCCR is a universally accepted, basic practice that should be followed even for nationals of countries not party to VCCR or the applicable bilateral agreement [...]

47 Consulat Général de France à Madrid 'Liste d'avocats francophones', <https://es.ambafrance.org/Liste-d-avocats-francophones> (consulté le 25 juillet 2019).

7 FAM 1990 List of Attorneys and Legal Resources (UNCLASSIFIED), <https://fam.state.gov/fam/07fam/07fam0990.html#M994> (consulté le 25 juillet 2019).

48 *Affaire Inde c. Pakistan* CIJ (17 juillet 2019), arrêt, paras 118-119.

49 S Salmon 'Determining customary international law: the ICJ's methodology between induction, deduction and assertion' (2015) 26 *European Journal of International Law* 417-443.

50 United States Department of State 'Consular Notification and Access 5th Edition' (septembre 2018), pp 43-44, https://travel.state.gov/content/dam/travel/CNA/trainingresources/CNA%20Manual%205th%20Edition_September%202018.pdf (consulté le 25 juillet 2019).

Thus, in all cases not covered by a mandatory notification agreement, and the minimum requirements are to inform an arrested, detained foreign national that his/her consular officers may be notified upon arrest; to notify these consular officers if the national requests; and to permit the consular officers to provide consular assistance if they wish to do so.

Even these customary international law requirements will not apply to the arrest of a foreign national if the United States and the foreign national's government have not made arrangement for the conduct of consular relations [...]

It could nevertheless be appropriate in such situations to inform the foreign national's government of an arrest or detention as a matter of courtesy.

Invité par la Commission de droit international à fournir ses commentaires sur la thématique « *Formation and Evidence of Customary International Law* », le Royaume-Uni de Grande Bretagne et d'Irlande du Nord a affirmé que dans les affaires, *Linda Anita Carty c. Doug Dretke* et *Khrishna Mahara c. The Secretary for the Department of Corrections for the State of Florida*, les États-Unis étaient en violation du droit d'assistance consulaire à l'égard de ressortissants britanniques. Ce droit selon le Royaume-Uni fait partie du droit international coutumier.⁵¹

L'esprit et la lettre de l'article 36 de la CVRC vont innover dans un certain nombre de résolutions de l'Assemblée Générale des Nations Unies, et de conventions relatives à la protection des droits de l'homme. A titre d'exemple, la règle 62(1) de l'*Ensemble des règles minima des Nations-Unies pour le traitement des détenus*, rebaptisé « Règles Nelson Mandela » dispose:⁵²

Les détenus de nationalité étrangère doivent pouvoir bénéficier de facilités raisonnables pour communiquer avec les représentants diplomatiques et consulaires de l'Etat dont ils sont ressortissants.

Le principe 16(2) de l'*Ensemble de principes pour la protection de toutes les personnes soumises à une forme quelconque de détention ou d'emprisonnement*, abonde dans le même sens:⁵³

S'il s'agit d'une personne étrangère, elle sera aussi informée sans délai de son droit de communiquer par des moyens appropriés avec un poste consulaire ou une mission diplomatique de l'Etat dont elle a la nationalité [...].

Dans la logique de cette reconnaissance du droit d'assistance et de notification consulaire, certains Etats ont prévu dans leurs codes de procédure pénale des dispositions allant dans le sens de son respect. Ainsi l'*Australian Crimes Act* dans sa section 23P intitulée « *Right of*

51 Voir Identification of customary international law: information provided by the United Kingdom of Great Britain and Northern Ireland (2014), pp.72-82; 83-104, http://legal.un.org/docs/?path=../ilc/sessions/66/pdfs/english/icil_uk.pdf&lang=E (consulté le 25 juillet 2019).

52 Ensemble de règles minima des Nations Unies pour le traitement des détenus (Règles Nelson Mandela), A/RES/70/175 (17 décembre 2015).

53 Ensemble de principes pour la protection de toutes personnes soumise à une forme quelconque de détention et d'emprisonnement, A/RES/43/173 (8 Décembre 1988); Voir Article 6(3) Convention contre la torture et autres peines et traitements cruels, inhumains ou dégradants, 1465 UNTS 85 (10 décembre 1984); Voir Article 10 Déclaration sur les droits de l'homme des personnes qui ne possèdent pas la nationalité du pays dans lequel ils vivent, A/RES/40/144 (13 décembre 1985); Voir Article 16(7) Convention internationale sur la protection des droits de tous les travailleurs migrants et des membres de leur famille, 2220 UNTS 2 (18 décembre 1990).

non-Australian nationals to communicate with consular office », dispose comme suit:⁵⁴

Subject to section 23L, if a person who is under arrest or a protected suspect is not an Australian citizen, an investigating official must, as soon as practicable:

- a) *inform the person that if he or she requests that the consular office of:*
 - i) *the country of which he or she is a citizen; or*
 - ii) *the country to which he or she claims a special connection;*
- b) *if the person so requests- notify that consular office accordingly; and*
- c) *inform the person that he or she may communicate with, attempt to communicate with, that consular office; and*
- d) *give the person reasonable facilities to do so; and*
- e) *forward any written communication from the person to that consular office and;*
- f) *allow the person a reasonable time to, or to attempt to, communicate with the consular office.*

Au Royaume-Uni, la procédure pénale exige la même déférence à ce principe surtout lorsque l'individu arrêté ou détenu est un ressortissant étranger. Ainsi l'article 7(1) du *Code of Practice C, Police and Criminal Evidence Act (1984)*, « *Citizen of independent Commonwealth and foreign nationals* », dispose:⁵⁵

A detainee who is a citizen of an independent Commonwealth country or a national of a foreign country, including the Republic of Ireland, has the right upon request, to communicate at any time with the appropriate High Commission, Embassy or Consulate. That detainee must be informed as soon as possible of this right and asked if they want to have their High Commission, Embassy or Consulate told of their whereabouts and the grounds for their detention. Such a request should be acted upon as soon as practicable.

Il en est de même pour l'article 14(1) et 14(2) du *Criminal Justice Act (1984)* en Irlande qui prévoit que:⁵⁶

The member of in charge shall without delay inform or cause to be informed any arrested person who is a foreign national and he may communicate with his consul and, if so wishes, the consul will be notified of his arrest. The member in charge shall, on request, cause the consul to be notified as soon as practicable. Any communication addressed to him shall be forwarded as soon as practicable. Consular officers shall be entitled to visit one of their national [...] who is an arrested person and to converse and correspond with him and to arrange for his legal representation.

Les exemples ci-dessus démontrent clairement que le droit à l'assistance consulaire relève du droit international coutumier comme en atteste la pratique des Etats. Ce constat aurait dû conduire la Cour à la reconnaissance d'une violation de ce droit à l'encontre du requérant. L'argument de la Tanzanie selon lequel seul le Tribunal Pénal International pour le Rwanda (TPIR) avait la charge de notifier les

54 Crimes Act 1914 Compilation 118 Vol 1 (amendé et en vigueur depuis le 20 septembre 2017)

55 Police and Criminal Evidence Act 1984 (PACE), Code C Revised: Code of Practice for the detention, treatment and questioning of persons by Police Officers, July 2018.

56 SI No 119/1987- Criminal Justice Act 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations, 1987.

autorités consulaires ivoiriennes de l'arrestation de Guehi, est inopérant.⁵⁷

3.2 L'intervention de la République de Côte-d'Ivoire: un rôle de pionnier

L'affaire *Guehi* présentait aussi à la Cour l'occasion d'être confrontée pour la première fois à l'exercice par un Etat de son droit d'intervention dans une affaire impliquant son ressortissant.⁵⁸ En effet l'intervention de la Côte-d'Ivoire aura permis de sortir le mécanisme de la « désuétude » dans laquelle il sombrait. L'intervention nécessite la réunion de deux dispositions importantes du Protocole et du Règlement de la Cour. Premièrement, les articles 35(2)(b) et 35(3) du Règlement de la Cour prévoient la communication de toute requête introductive d'instance, tant à l'Etat partie dont le ressortissant allègue une violation qu'à un certain nombre de parties désignées.⁵⁹

Ce faisant, la deuxième disposition peut ainsi être accomplie. En effet, une fois informé d'une requête dans laquelle son ressortissant allègue être victime de violation de droits de l'homme par un autre Etat, l'Etat de nationalité peut exercer son droit d'intervention conformément à l'article 5(2) du Protocole.

Mécanisme laissé à l'appréciation des Etats, ces derniers sont seuls juges de l'opportunité de l'exercice de ce droit. Par exemple, un Etat invité par la Cour à intervenir dans une instance, a décliné l'opportunité.⁶⁰ L'autre raison du non recours au mécanisme de l'intervention, tient au fait que la majorité des affaires portées devant la Cour concerne des violations alléguées de droits de l'homme, commises par des Etats contre leurs propres ressortissants.

Sans repère précédent sur la manière dont s'exerce concrètement l'intervention à une instance, la République de Côte-d'Ivoire va rechercher l'avis de la Cour, qui la renverra aux articles 53(1), 53(2) et 53(3) du Règlement de la Cour.⁶¹ Dans sa mise en oeuvre, l'intervention est centrée sur deux points essentiels d'une part celui de l'intérêt juridique à intervenir dans une instance, et d'autre part le lien existant

57 *Armand Guehi* (n 35), para 91.

58 Email du Greffe de la Cour Africaine des Droits de l'Homme et des Peuples confirmant que l'affaire *Armand Guehi c. Tanzanie* est à ce jour la seule dans laquelle un Etat a exercé son droit d'intervention, 16 juillet 2019.

59 Ces autres parties sont la Commission de l'Union Africaine, le Conseil Exécutif de l'Union Africaine et l'ensemble des Etats membres de l'Union Africaine.

60 *Kennedy Owino Onyachi, Charles John Mwanini Njoka* (n 7), para 44. La Cour conformément à l'article 5(2) de son Protocole a invité la République du Kenya à formuler une requête d'intervention si elle souhaite, car l'affaire implique deux ressortissants kenyans. Le Kenya n'interviendra pas.

61 Submissions of the State of Côte d'Ivoire in the matter 1/2015 – *Armand Guehi c. Tanzania* (13 May 2016), para 4 (document à disposition de l'auteur).

By note referenced AFCHPR/Reg./APPL. 001/2015/006 dated 5 May 2015, following a request for information by Cote d'Ivoire on the judicial requirements to be met before the Court to give the required assistance to its citizen, the Registry of the AFCHPR invited the State of Cote d'Ivoire to

entre l'Etat intervenant et les parties. En ce qui concerne l'intérêt juridique, la Côte-d'Ivoire entendait protéger ses intérêts ainsi que ceux de son ressortissant qui courait un sérieux risque de préjudice irréparable, en atteste la demande en indication de mesures conservatoires qu'elle adressera à la Cour.⁶² D'autre part, la Côte-d'Ivoire mentionnera plusieurs instruments juridiques internationaux, auxquels elle et la République de Tanzanie, étaient toutes les deux parties, en plus du lien de nationalité l'unissant au requérant.

Tout en épousant l'ensemble des griefs de son ressortissant, la Côte-d'Ivoire adoptera une position timide quant à la violation du droit à l'assistance consulaire. Etant certainement consciente qu'elle n'est pas partie à la CVRC, elle se contentera d'affirmer que « l'Etat défendeur avait le devoir de [...] prendre les mesures nécessaires pour qu'il bénéficie de l'assistance consulaire ».⁶³ Tout en ayant pas changé la condamnation de son ressortissant, l'intervention dans l'instance de la République de Côte-d'Ivoire démontre encore l'intérêt qu'ont les Etats africains à assurer la protection des droits de leurs ressortissants.

4 DES PERSPECTIVES ENCOURAGEANTES

La Cour a rejeté la violation du droit à l'assistance consulaire. Sa compétence *ratione materiae* élargie, comparativement à ses consœurs sud-américaine et européenne, lui permettait pourtant d'aller au-delà des dispositions de la Charte.⁶⁴ En concluant à la similitude des droits de l'article 36 de la CVRC et ceux de l'article 7 de la Charte africaine des droits de l'homme et des peuples, la Cour confirme l'importance de celle-ci dans l'évaluation des violations alléguées de droits de l'homme. Toutefois cet attachement aux dispositions de la Charte pourrait dans certains cas compromettre la prise en considération d'autres droits tout aussi importants que celui de l'assistance consulaire, ce qui ne doit pas

read the provisions under Rule 53(1)(2) and (3) of the Rules of Court including a copy of the form prepared by the Registry of the Court for that purpose.

62 *Ibid.*, para 16.

63 Armand Guehi (n 35), para 92.

64 Article 3(1) Protocole relative 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

La Cour a compétence pour connaître de toutes les affaires et tous les différends dont elle est saisie concernant l'interprétation et l'application de la Charte, du présent Protocole, et de tout autre instrument pertinent relatif aux droits de l'homme et ratifié par les Etats concernés.

Article 32(1) Convention Européenne des droits de l'homme

La compétence de la Cour s'étend à toutes les questions concernant l'interprétation et l'application de la Convention et de ses protocoles qui lui seront soumises dans les conditions prévues par les articles ...

Article 62(3) American Convention on Human Rights

The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention [American Convention on Human Rights] that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction ...

occulter quelques avancées dans d'autres juridictions sur le continent. Au Malawi, par exemple dans deux affaires impliquant la violation de l'article 36 de la CVRC, la Haute Cour a ordonné des réparations en conformité avec la jurisprudence internationale.

Dans l'affaire *Lameck Bandaawe Phiri c. The Republic*, après avoir constaté la violation de l'article 36 de la CVRC, la Cour en réparation du préjudice subi, a commué la condamnation à la peine de mort à trente années d'emprisonnement. Dans une autre affaire similaire, *Mabvuto Alumeta c. The Republic*, la Cour a ordonné la libération immédiate d'un ressortissant mozambicain suite à la violation de son droit à l'assistance consulaire.⁶⁵

Ces deux exemples laissent présager que les Etats africains seront désormais plus regardants à l'égard de leurs obligations de faciliter l'accès à l'assistance consulaire conformément à la CVRC. Un fait encourageant serait à titre d'exemple l'inclusion par les Etats africains de dispositions relatives à l'assistance consulaire dans leurs codes de procédure pénale, tel que l'avait suggéré le Mexique dans l'affaire *Avena* l'opposant aux Etats-Unis.⁶⁶ A l'heure de l'intégration africaine avec son corollaire de migration intra-régionale, il existe de fortes raisons de croire que l'affaire *Guehi* ne restera pas un cas isolé pour la Cour de Arusha. Elle sera certainement appelée à en connaître davantage. En prélude à ces nouvelles affaires, la Cour devrait être invitée à se prononcer à nouveau sur le droit à l'assistance consulaire, cette fois-ci en vertu de sa compétence consultative.

5 CONCLUSION

Les professeurs Christof Heyns et Sandra Babcock, intervenant en tant que *amici curiae* avaient cerné l'enjeu de l'affaire *Guehi*, lorsqu'ils affirmaient:⁶⁷

[...] The Honourable Court has itself influenced regional judicial standards. Amici curiae see this case as an opportunity for the Honourable Court to do so in relation to consular assistance, enshrining the right as an indispensable part of fair trial standards. To do so would provide valuable guidance for future cases across the African continent and throughout the globe.

L'enjeu était donc clairement d'affirmer une position africaine sur un sujet important du droit international. L'interprétation avancée par la Cour, a ainsi confondu assistance judiciaire et assistance consulaire. Il n'en demeure pas moins que par l'affaire *Guehi*, la question du droit à

65 *Lameck Bandaawe Phiri* (n 12) 3; *Mabvuto Alumeta* (n 12) 2.

66 N Klein 'Case notes: *Avena* and Other Mexican Nationals (*Mexico v United Republic of America*)' (2004) 14 *Australian Journal of International Law*, 143-157:

To the this end, Mexico had proposed that information on consular rights could be incorporated within the so-called Miranda warning: to the litany of "you have the right to remain silent, the right to have an attorney present during questioning, ..." could be added "if you are a national, you have the right to contact your consulate." The Court endorsed this suggestion.

67 *Amici Curiae* Brief of Professor Christof Heyns and Professor Sandra Babcock, para 143 (à disposition de l'auteur).

l'assistance consulaire s'est introduite dans le système juridictionnel des droits de l'homme en Afrique. Le récent jugement de la Cour Internationale de Justice dans l'affaire *Jadhav* confirme la jurisprudence constante de la Cour allant dans le sens du respect de l'article 36 de la Convention de Vienne sur les Relations Consulaires (CVRC).⁶⁸

68 *Affaire Jadhav Inde c. Pakistan* CIJ (17 juillet 2019), arrêt.