African Human Rights Yearbook
Volume 6 (2022)

The three institutions making up the African regional human rights system, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, and the African Committee of Experts on the Rights and Welfare of the Child, decided to jointly publish the *African Human Rights Yearbook*, to spearhead studies on the promotion and protection of human rights, and to provide a forum for constructive engagement about the African human rights system with academics and other human rights commentators on the continent. Volume 6 of the *Yearbook*, published in 2022, contains 17 contributions by scholars from Africa and beyond.

Annuaire africain des droits de l'homme
Volume 6 (2022)

Les trois institutions qui composent le système régional africain des droits de l'homme, la Cour africaine des droits de l'homme et des peuples, la Commission africaine des droits de l'homme et des peuples et le Comité africain d'experts sur les droits et le bien-être de l'enfant ont décidé de publier conjointement *l'Annuaire africain des droits de l'homme* pour encourager les études sur la promotion et la protection des droits de l'homme et offrir un forum d'interaction constructive sur le système avec les universitaires et observateurs du continent. Le Volume 6 de *l'Annuaire*, publié en 2022, contient 17 contributions de chercheurs du continent et d'ailleurs.

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THIS YEARBOOK SHOULD BE CITED AS (2022) 6 *AHRY*

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 2022 is 'Strengthening resilience in nutrition and food security on the African continent: strengthening AGRO-food systems, health and social protection systems for the acceleration of human, social and economic capital development'.

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

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L'*Annuaire 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 2022 «Renforcer la résilience en matière de nutrition sur le continent africain: accélérer le développement du capital humain et de l'économie sociale».

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

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Editorial
Éditorial

The African Charter on the Rights and Welfare of the Child (ACRWC) is the only region-specific children's rights instrument on the planet. It was adopted on 11 July 1990, just days after the ninth birthday of the foundational African Charter on Human and Peoples' Rights (ACHPR), adopted on 27 June 1981. The ACRWC created standards beyond those stipulated in the ACHPR for African Union Member States to rise to better protect and empower children.

The African Committee of Experts on the Rights and Welfare of the Child (the Committee) oversees the implementation of the ACRWC and was established under article 32 thereof. The Committee is mandated to promote and protect the rights enshrined in the ACRWC, to monitor their implementation, and interpret the provisions of the ACRWC. The Committee does not function in isolation but constitutes one-third of the African regional human rights system alongside the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. These three organs work collectively to realise the ACRWC and the ACHPR in harmony. With this aim in mind, the organs have been jointly publishing the *African Human Rights Yearbook* (*AHRY*) since 2017. The *AHRY* is an open-access publication intended to celebrate advances, identify gaps to be addressed, and foster collaborative approaches to discharging the mandate of all stakeholders in the African human rights project.

This sixth volume of the *AHRY* comprises peer-reviewed contributions focused on aspects of the African human rights system, and the standards of the African Union in this regard, as well as articles specially focused on the African Union's theme for the year 2022: *Strengthening Resilience in Nutrition and Food Security on The African Continent: Strengthening Agro-Food Systems, Health and Social Protection Systems for the Acceleration of Human, Social and Economic Capital Development*. The Committee recognises the right to adequate nutrition as part of the right to health stipulated by article 14(2)(c) of the ACRWC and is in the process of developing a General Comment on the Right of Children to Adequate Nutrition to better guide Member States on ensuring children are provided with adequate nutrition in a manner that respects and promotes all of the other rights of the child.

The provision of peer-reviewed, open-access academic research ensures the accessibility of credible information on a specific component of human rights discourse. Continuous engagement on the matters described in the *AHRY* is key to their amelioration. Much like the three organs of the African human rights system cannot function in isolation, the system- itself- cannot reach full efficacy if not subjected to rigorous academic scrutiny. The task of better understanding that which remains to be achieved is aided by the contributions that fill the

pages of this *Yearbook*. The onus lies on us all to critically engage with these contributions and take note of their key findings if we are to bring the aims envisioned by the ACHPR and ACRWC to fruition.

Hon. Joseph Ndayisenga
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 (CADBE) est le seul instrument régional des droits de l'enfant sur la planète. Elle a été adoptée le 11 juillet 1990, quelques jours seulement après le neuvième anniversaire de la Charte africaine des droits de l'homme et des peuples (CADHP), adoptée le 27 juin 1981. La CADBE a créé des normes allant au-delà de celles énoncées dans la CADHP afin de permettre aux États membres de l'Union africaine de mieux protéger les enfants et de les autonomiser.

Le Comité africain d'experts sur les droits et le bien-être de l'enfant (le Comité) été créé en vertu de l'article 32 de la CADBE pour superviser la mise en œuvre de cet instrument. Le Comité a pour mandat de promouvoir et de protéger les droits inscrits dans la CADBE et de surveiller leur mise en œuvre. Il a aussi pour mandat d'interpréter les dispositions de la CADBE. Le Comité ne fonctionne pas en vase clos. Il fait partie des trois organes du système régional africain des droits de l'homme, aux côtés de la Commission africaine des droits de l'homme et des peuples et de la Cour africaine des droits de l'homme et des peuples. Ces trois organes travaillent collectivement à la mise en œuvre harmonieuse de la CADBE et de la CADHP. Dans cette optique, ils publient conjointement l'*Annuaire africain des droits de l'homme* (*AHRY*), depuis 2017. L'*AHRY* est une publication en libre accès destinée à célébrer les avancées, à identifier les lacunes à combler et à favoriser les approches collaboratives en vue de l'exercice du mandat de toutes les parties prenantes du projet africain des droits de l'homme.

Ce sixième volume de l'*AHRY* comprend des contributions évaluées par des pairs et axées sur les aspects du système africain des droits de l'homme et sur les normes de l'Union africaine y afférents, ainsi que des articles portant spécialement sur le thème de l'Union africaine pour l'année 2022: *Renforcer la résilience en matière de nutrition sur le continent africain: Accélérer le développement du capital humain et de l'économie sociale*. Le Comité reconnaît le droit à une nutrition adéquate comme faisant partie du droit à la santé prévu par l'article 14(2)(c) de la CADBE et élabore actuellement une observation générale sur le droit des enfants à une nutrition adéquate afin de mieux guider les États membres pour garantir que les enfants reçoivent une nutrition adéquate d'une manière qui respecte et promeut tous les autres droits de l'enfant.

La mise à disposition de travaux de recherche universitaires évaluées par des pairs et en libre accès garantit l'accessibilité aux informations crédibles sur une composante spécifique du discours sur les droits de l'homme. L'amélioration de la qualité de ces informations passe par un examen continu des questions abordées dans l'*AHRY*. Certes, les trois organes du système africain des droits de l'homme ne peuvent pas fonctionner de manière isolée, toutefois le système lui-même ne peut pas atteindre sa pleine efficacité s'il n'est pas soumis à un examen académique rigoureux. La tâche consistant à mieux comprendre ce qui reste à accomplir est facilitée par les contributions présentées dans les pages de cet Annuaire. Il nous incombe à tous d'examiner de manière critique ces contributions et de prendre note de leurs principales conclusions pour atteindre les objectifs envisagés par la CADHP et la CADBE.

Hon. Joseph Ndayisenga
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

Monitoring second-order compliance in the African human rights system

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ABSTRACT: This article examines the mechanisms and instruments employed by the three main regional African human rights bodies – the African Commission and African Court on Human and Peoples' Rights and the African Children's Rights Committee – to monitor compliance with their decisions and judgments. Based on the assumption that second-order compliance monitoring contributes to greater effectiveness of human rights institutions and increased compliance with their pronouncements, we discuss the monitoring tools used by the institutions themselves as well as the roles of political monitoring and monitoring by civil society. Based on a stock-taking exercise we find that all three African human rights bodies still have much room for improving both the quantity and the quality of their monitoring instruments and processes. Acknowledging that the three bodies may to some extent be legally and politically constrained with respect to the use of some of these, and recognising that the AU's political organs mostly abstain from exercising the second-order compliance monitoring functions assigned to them, the article argues that civil society plays a critical role in contributing to such monitoring, a role that should be expanded upon and researched further.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le contrôle de 'second ordre' de l'exécution des décisions et jugements dans le système africain des droits de l'homme

RÉSUMÉ: Cet article examine les mécanismes et les instruments utilisés par les trois principaux organes régionaux africains des droits de l'homme – la Commission et la Cour africaine des droits de l'homme et des peuples, ainsi que le Comité africain d'experts sur les droits et le bien-être de l'enfant – pour contrôler l'exécution de leurs décisions et/ou jugements. En partant de l'hypothèse que le contrôle de conformité de second ordre – celui lié aux décisions et/jugements des organes des droits de l'homme – contribue à une plus grande efficacité des institutions des droits de l'homme et à un meilleur respect de leurs décisions, nous examinons les outils de contrôle utilisés par les institutions elles-mêmes ainsi que les rôles du contrôle politique et du contrôle par la société civile. Sur la base d'un inventaire, nous constatons que les trois organes africains des droits de l'homme ont encore une marge de manœuvre importante pour améliorer à la fois la quantité et la qualité de leurs instruments et processus de suivi.

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VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3-27
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Tout en reconnaissant que les trois organes peuvent, dans une certaine mesure, être limités juridiquement et politiquement en ce qui concerne l'utilisation de certains d'entre ces instruments, et conscient de ce que les organes politiques de l'UA s'abstiennent la plupart du temps d'exercer les fonctions de contrôle de conformité de second ordre qui leur sont attribuées, l'article soutient que la société civile joue un rôle essentiel en contribuant à ce contrôle, un rôle qui devrait être élargi et faire l'objet de recherches supplémentaires.

KEY WORDS: regional African human rights bodies, African Commission, African Court on Human and Peoples' Rights, African Children's Rights Committee, monitoring, compliance, second-order compliance

CONTENT:

1 INTRODUCTION

The fact that human rights treaties do make a difference at the domestic level is no longer open to serious debate.[1] The focus in recent years has shifted from compliance with treaties to compliance with the output of treaty bodies and international courts.[2] International law compliance has become a well-established subfield of international law and international relations scholarship.[3] Most of the literature on 'second-order compliance' – compliance with dispute-settlement and cognate types of decisions – emphasises the importance of mobilising critical

1 See generally O Hathaway 'Do human rights treaties make a difference?' (2002) 111 *Yale Law Journal* 1935; E Neumayer 'Do international human rights treaties improve respect for human rights?' (2005) 49 *The Journal of Conflict Resolution* 925; B Simmons *Mobilizing for human rights: international law in domestic politics* (2009).

2 LR Helfer & A-M Slaughter 'Toward a theory of effective supranational adjudication' (1997) 107 *Yale Law Journal* 273; W Cole 'Institutionalizing shame: the effect of Human Rights Committee rulings on abuse, 1981–2007' (2012) 41 *Social Science Research* 539; C Hillebrecht *Domestic politics and international human rights tribunals: the problem of compliance* (2014); V Shikhelman 'Implementing decisions of international human rights institutions – evidence from the United Nations Human Rights Committee' (2019) 30 *European Journal of International Law* 753; A von Staden 'The conditional effectiveness of soft law: compliance with the decisions of the Committee against Torture' (2022) *Human Rights Review*, available at https://link.springer.com/article/10.1007/s12142-022-00653-5 (accessed 27 October 2022).

3 For critical positions with respect to foregrounding questions of compliance and non-compliance, see R Howse & R Teitel 'Beyond compliance: rethinking why

compliance partners at all levels, before filing a case and after a decision has been rendered, as a significant factor for improving state compliance.[4] Despite the relative effectiveness of some human rights institutions compared with others, the scholarly consensus is that compliance with decisions and judgments of human rights bodies (HRBs) remains a critical challenge across the three regional and the United Nations (UN) human rights systems.[5] Without external pressure in the form of sustained monitoring and enforcement actions, states tend to take minimalist measures, if any, to implement the decisions and judgments of international human rights tribunals.[6]

In the European human rights system, the procedures for the execution of judgments and monitoring have been a major focus of research.[7] Research has demonstrated that the effectiveness of post-judgment monitoring by the Committee of Ministers is a significant contributor to the high compliance rate and overall efficacy of the European human rights system.[8] The monitoring of implementation and following-up of decisions of HRBs play a major role in persuading or 'cajoling' states, thus facilitating implementation and eventual compliance.[9] It is only recently that scholarship on the role of key actors in the execution and monitoring of the decisions and judgments of African human rights bodies (AHRBs) has begun to emerge.[10]

international law really matters' (2010) 1 *Global Policy* 127; L Martin 'Against compliance' in J Dunoff & M Pollack (eds) *Interdisciplinary perspectives on international law and international relations: the state of the art* (2013) 593.

4 F Viljoen 'The African human rights system and domestic enforcement in social and economic rights litigation' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: making it stick* (2017) 360; VO Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five African states', unpublished LLD thesis, University of Pretoria, South Africa, 2018, 213-214.

5 C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: what role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.

6 A von Staden *Strategies of compliance with the European Court of Human Rights: rational choice within normative constraints* (2018).

7 See, for example, M Marmo 'The execution of judgments of the European Court of Human Rights – a political battle' (2008) 15 *Maastricht Journal of European and Comparative Law* 235; EL Abdelgawad 'Dialogue and the implementation of the European Court of Human Rights' judgments' (2016) 34 *Netherlands Quarterly of Human Rights* 340.

8 B Çali & A Koch 'Foxes guarding the foxes? The peer review of human rights judgments by the Committee of Ministers of the Council of Europe' (2014) 14 *Human Rights Law Review* 301.

9 Sandoval, Leach & Murray (n 5) 71.

10 T Mutangi 'Enforcing compliance with the judgments of the African Court on Human and Peoples' Rights' in A Adeola (ed) *Compliance with international human rights law in Africa* (2022) 183; R Murray & D Long 'Monitoring the implementation of its own decisions: what role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 838; S Lungu 'An appraisal of the draft Framework for Reporting and Monitoring Execution of Judgments of the African Court on Human and Peoples' Rights' (2020) 4 *African Human Rights Yearbook* 144; R Murray, D Long, V Ayeni & A Some 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.

In this article we examine the mechanisms and instruments employed by the AHRBs to monitor compliance with their decisions and judgments. The article is structured as follows: First, we introduce and briefly discuss the key concepts of monitoring/following-up and effectiveness. Second, we analyse the legal and institutional framework for second-order compliance monitoring in the African human rights system. In the main sections of the article, we examine the various measures and tools used by the AHRBs and by relevant political and civil society actors to monitor second-order compliance and their relative promise of success. We conclude by offering thoughts for future research.

2 CONCEPTUAL CLARIFICATIONS

The terms 'monitoring' and 'follow-up' are often used interchangeably.[11] Monitoring involves the process of following up on the status of a decision's implementation,[12] with a view, ultimately, to achieving and ascertaining compliance.[13] It entails a range of activities, including the collection, verification and use of information relevant to the implementation of the decisions under review.[14] The goal is the creation of 'an evidence-based public record of the status of implementation at a given time'.[15] Monitoring may also include stick-and-carrot-type activities and other enforcement measures as well as dialogue-focused processes aimed at persuading and winning over relevant state actors. Overall, monitoring aims at persuading or cajoling national actors to take action on implementation and to 'determine whether the measures or actions taken do, in fact, satisfy the requirements of the decision or judgment'.[16]

There is a general assumption that mechanisms for monitoring compliance with the decisions of AHRBs are largely ineffective.[17] Though there is no universally accepted definition of judicial effectiveness,[18] there have been several attempts in existing scholarship to delineate its conceptual elements and to identify the factors that likely contribute to the effectiveness of the work of international judicial and quasi-judicial institutions.[19] While the frameworks and theories developed in the literature are geared towards

11 Murray, Long, Ayeni & Some (n 10) 152. Rule 125 of the Rules of Procedure of the African Commission (2020) uses the term 'follow-up' instead of monitoring.

12 F Viljoen *International human rights law in Africa* (2012) 340.

13 On the relationship between implementation and compliance see A von Staden 'Implementation and compliance' in R Murray & D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 17.

14 Murray, Long, Ayeni & Some (n 10) 165.

15 A Donald, D Long & A-K Speck 'Identifying and assessing the implementation of human rights decisions' (2020) 12 *Journal of Human Rights Practice* 125.

16 Sandoval, Leach & Murray (n 5) 1.

17 OC Okafor *The African human rights system: activist forces and international institutions* (2007) 41; see also Murray & Long (n 10).

18 Y Shany *Assessing the effectiveness of international courts* (2014) 4.

19 Helfer & Slaughter (n 2) 282.

illuminating the effectiveness of supranational adjudication overall, its insights also apply in principle to the second-order compliance monitoring mechanisms highlighted in this article.

Helfer and Slaughter define effective supranational adjudication as the ability of a court 'to compel or cajole compliance with its judgments'.[20] Some scholars have criticised this use of judgment compliance as a proxy for international court effectiveness.[21] Addressing the methodological difficulties in earlier studies, Shany defines international court effectiveness as the attainment of mandate provider's goals. The goal-based approach compares actual impact with desired outcomes and performance with expectation. Thus, an effective international court is one that attains within a predefined time frame the goals set for it by relevant constituencies or mandate providers.[22] This approach could result in the counterintuitive conclusion that institutions created as symbolic tokens and intended to achieve little by their mandate providers could be considered effective when they end up having only minor impact while those that, against intentions, turn out to be more consequential might have to be considered ineffective in light of the purpose for which they were created.

In this article, we do not address as such whether the second-order compliance mechanisms used by the AHRBs are effective or ineffective in bringing about compliance or accomplishing the goals of their mandate providers. Such an analysis would require detailed empirical analysis of the developments following the issuance of a judgment or decision and of subsequent monitoring activities for which sufficiently detailed data is currently not available. Instead, we describe the various tools currently employed by the three AHRBs under consideration and offer a check-list for examining such monitoring activities. Future research can build on this check-list to determine whether the assumption that more and better monitoring will lead to more compliance and greater improvements in human rights protection holds up in practice.

3 LEGAL AND INSTITUTIONAL FRAMEWORKS

The African human rights system was established formally in 1981 with the adoption of the African Charter on Human and Peoples' Rights (African Charter).[23] The Charter established the African Commission on Human and Peoples' Rights (African Commission) as its main

20 Helfer & Slaughter (n 2) 278.

21 Y Shany 'Compliance with decisions of international court as indicative of their effectiveness: a goal-based analysis' in J Crawford & S Nouwen (eds) *Select proceedings of the European Society of International Law* (2012) 231; Shany (n 18) 5; A Guzman 'International tribunals: a rational choice analysis' (2008) 157 *University of Pennsylvania Law Review* 171, 178.

22 Shany (n 18) 6.

23 The African Charter was adopted on 27 June 1981 and came into force on 21 October 1986. All 54 AU member states have ratified the Charter.

oversight and monitoring body.[24] The Commission functioned as the sole AHRB for nearly two decades until the Protocol establishing the African Court on Human and Peoples' Rights (African Court), adopted in 1998, entered into force.[25] The African Court complements the protective mandate of the Commission and provides judicial supervision of state compliance with the provisions of the African Charter and other human rights instruments. The Court has the power to issue legally binding judgments.[26] The third AHRB is the African Committee of Experts on the Rights and Welfare of the Child (Children's Rights Committee). The Committee monitors the implementation of the African Charter on the Rights and Welfare of the Child.[27]

3.1 African Commission

The primary obligation of African states under the African Charter is to recognise the rights, duties and obligations enshrined in the Charter and to take legislative and other measures to give effect to them.[28] The African Charter does not set out a clear process and procedure for the monitoring and enforcement of the 'recommendations' of the Commission. In many cases, the Commission has no information regarding the implementation of its recommendations, and without such information, it is extremely difficult to measure the level of implementation. An empirical study of 44 decisions of the Commission between 1987 and 2003 revealed that there was full compliance in only six cases, representing less than 14 per cent.[29] At the end of 2020, the Commission had adopted 147 decisions on the merits, and only a handful of these decisions have been implemented by states.[30]

For many years, the African Commission had no systematic follow-up or monitoring procedure for its decisions.[31] This lacuna has by now been filled through the Commission's Rules of Procedure.[32] The Commission uses a variety of channels and a broad range of tools and

24 VO Ayeni *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 7.

25 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (African Court Protocol) adopted 10 June 1998 and entered into force on 25 November 2005.

26 As above, art 30.

27 The African Children's Charter was adopted 11 July 1990 and entered into force on 29 November 1999.

28 African Charter, art 1.

29 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and People's Rights, 1994 - 2004' (2007) 101 *American Journal of International Law* 5-7.

30 Report on the status of communications & intersession report of the Working Group on Communications, August-November 2020, para 25, available at https://www.achpr.org/sessions/sessionsp?id=354 (accessed 27 December 2021).

31 Viljoen (n 12) 340.

32 Rules of Procedure of the African Commission on Human and Peoples' Rights 2020 adopted by the Commission during its 27th Extra-Ordinary Session held in Banjul (The Gambia) 19 February to 4 March 2020.

procedures to follow up and monitor its decisions, including the state reporting procedure, resolutions, promotional visits and on-site missions.[33] The Commission kick-started its monitoring practice by inserting in its decisions a provision that requests states to report on the measures they have taken to implement the Commission's decision in their subsequent periodic reports.[34] In other cases, the Commission, in its findings, required states to notify it in writing, within six months, of the measures taken to implement the decisions.[35] So far, the Commission did not develop a consistent practice around either of the two approaches. In 2006, the Commission adopted a thematic resolution on the implementation of its decisions, where it congratulates states that have complied with its recommendations and urges all states to indicate the measures they have taken within a maximum period of 90 days starting from the date of notification of the decision.[36]

The reporting timeline therefore was different for different states depending on what the Commission stated in its decision or the resolution on implementation. This state of affairs potentially could create confusion for states as state actors may be confronted with a dilemma: whether to follow the timeline stated in the decision or the one stated in the Commission's resolution on implementation. The period within which states must report to the Commission was later extended to six months (180 days) under Rule 112 of the Commission's Rules of Procedure 2010.[37] Currently, Rule 125 of the 2020 Rules of Procedure of the Commission governs the procedure for the monitoring of states' implementation of the Commission's decisions. The 2020 revised Rules of Procedure adopted pursuant to article 42 of the African Charter came into force on 2 June 2020.[38]

Within 180 days of the transmission of the decision to them, states are mandated to report to the Commission on all actions taken to implement the Commission's decisions. The Commission must forward any information from the state to the other party for comments within 60 days.[39] Thereafter, the Commission may request supplementary information from the state within three months.[40] The Commissioner appointed as rapporteur for a communication or any other member of the Commission so authorised may 'take such action as may be appropriate' to monitor the implementation of the decision.[41] It has

33 Viljoen (n 12) 341.

34 See, for example, *Purohit and Moore v The Gambia*, Communication 241/2001, Sixteenth Activity report 2002-2003, Annex VII, op para 2.

35 See for example, *Lawyers for Human Rights v Swaziland,* comm no 251/2002, 18th Annual Activity Report, Annex III.

36 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97(XXXX)06.

37 Rules of Procedure of the African Commission 2010, Rule 112(2).

38 Activity Report of the African Commission (January-December 2020) 31.

39 Rules of Procedure of the African Commission 2020 (n 32) Rule 125(1).

40 As above, Rule 125(3).

41 As above, Rule 125(5) & (6).

been argued that this mandate is broad enough to accommodate the conduct of implementation hearings.[42] During its ordinary sessions, the Commission reports on the implementation of its decisions.[43] Where a state's conduct raises issues of non-compliance, the Commission may refer the case 'to the attention of the competent policy organs of the African Union'.[44] Each activity report of the Commission must indicate 'the status of the implementation of its decisions, including by highlighting any issues of possible non-compliance by a State party'.[45] Unfortunately, once the Commission reports or refers a case of non-compliance to the policy organ of the AU, there is really no telling what the AU will do with the report.

3.2 African Court

Unlike the African Charter, the Protocol setting up the African Court stipulates the procedure for the execution of judgments of the Court. As of December 2021, the Court has received over 325 cases and finalised 130.[46] It has rendered 106 judgments and rulings and issued 90 orders.[47] As the Court itself notes, 'one of the major challenges facing the Court at the moment is the perceived lack of cooperation from the Member States of the AU, in particular, in relation to the poor level of compliance with the decisions of the Court'.[48] Out of the over 100 judgments rendered by the Court, only Burkina Faso has complied fully with the Court's judgments. Tanzania and Côte d'Ivoire have complied partially with some of the judgments.[49] Some states have indicated openly that they will not comply with the Court's judgments.[50]

The Protocol establishing the Court places the primary obligation for monitoring the execution of the judgments of the Court on the Executive Council of the AU.[51] The Court is required to communicate its judgments to the parties and transmit copies to AU member states, the African Commission and the Executive Council of the AU, the body that has primary responsibility for monitoring the execution of the Court's

42 Viljoen (n 12) 342.

43 Rules of Procedure of the African Commission 2020 (n 32) Rule 125(7).

44 As above, Rule 125(8).

45 As above, Rule 125(9).

46 African Court, 'AFCHPR Cases' available at https://www.african-court.org/cpmt/statistic (accessed 14 December 2021).

47 Activity Report of the African Court on Human and Peoples' Rights: 1 January-31 December 2020, para 11, available at https://www.african-court.org/wpafc/activity-report-of-the-african-court-on-human-and-peoples-rights-1-january-31-december-2020/# (accessed 14 December 2021). See also the Activity Report of the African Court on Human and Peoples' Rights: 1 January-31 December 2021, Annex II (Part A &B) available at https://www.african-court.org/wpafc/report-of-the-african-court-on-human-and-peoples-rights-afchpr-1-january-31-december-2021/ (accessed 3 November 2022).

48 As above, para 37.

49 As above, para 37.

50 As above.

51 African Court Protocol (n 25) art 29(2).

judgments on behalf of the AU Assembly.[52] The Court is mandated to submit a report of its activities to each session of the AU Assembly, and the report must contain cases in which one or more states have refused or unwilling to comply with decisions of the Court.[53]

The procedure for monitoring compliance with the decisions of the Court is contained in Rule 81 of the Court's Rules of Procedure 2020.[54] Without providing a specific timeframe, the rule requires State Parties to submit reports on compliance with the decisions of the Court, and these reports may be transmitted to the applicants for observations.[55] This approach may be better than the six-month timeframe provided in the Commission's Rules. It empowers the Court to take follow-up actions as soon as a judgment is communicated to the state even before the six-month period provided for in the Commission's Rules. Also, the Court may obtain relevant information from other credible sources in order to assess compliance with its decisions. So far, the Court has been quite reluctant to do this because of its concerns for the 'integrity, independence and neutrality' of those other sources.[56]

Rule 81(3) states: 'in case of a dispute as to compliance with its decisions, the Court may, among others, hold a hearing to assess the status of implementation of its decisions'. This would imply that the Court could do more than hold an implementation hearing; it could, for instance, adopt a resolution or embark on promotional visits, among other means. Where a state party has failed to comply with its decision, the Court is mandated to report the non-compliance to the AU Assembly.[57] Each activity report of the Court since 2014 contains the status of compliance with its decisions.[58] Yet, neither the Executive Council nor the AU Assembly has taken any enforcement measures against non-complying states. Recently, in 2018, the Executive Council requested the Court 'to undertake an in-depth study on mechanisms and framework for the implementation of its judgments.'[59] As of the time of writing, the Draft Framework for the implementation of Judgments of the Court is yet to be considered or adopted by the Executive Council.[60]

52 African Court Protocol (n 25) art 29(1) & (2).

53 African Court Protocol (n 25) art 31.

54 In addition, Rule 59(5) enables the Court to invite the parties to provide it with information on any issue relating to the implementation of provisional measures issued by the Court.

55 Rules of Procedure of the African Court 2020, Rule 81(1).

56 Activity Report of the African Court (2020) (n 47) para 37, note 5.

57 Rules of Procedure of the African Court 2020, Rule 81(4).

58 See Activity Report of the African Court (2014) paras 26-31.

59 See Activity Report of the African Court (2020) (n 47) para 20.

60 See generally Lungu (n 10).

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

The African Children's Committee considers individual communications as a necessary concomitant to its overarching mandate of monitoring the implementation of the African Children's Charter.[61] The mandate of the Committee under the Children's Charter is similar to the African Commission's mandate under article 45 of the African Charter. The Committee reviews state party reports, considers individual communications on violations of the rights of the child and undertakes promotional visits to states. As of October 2022, the Committee has finalised or overseen the settlement of nine cases:[62] the *Children in Northern Uganda* case,[63] the *Talibés* case,[64] the *Nubian Children* case,[65] the *Malawian Children Upper Age Limit case*,[66] the *Sudanese Nationality*[67] and *South Kordofan and Blue Nile* cases,[68] the *Cameroon Rape* case,[69] the *Mauritanian Child Enslavement* case[70] and, finally, the *Tanzanian Forced Pregnancy Test and School Expulsion* case.[71] The African Children's Charter does not include any provisions for following-up or monitoring the execution of the Committee's decisions.

61 African Children's Charter, arts 42(b) & 44.

62 African Children's Committee 'Table of Communications', available at https://www.African Children's Committee.africa/table-of-communications/ (accessed 18 October 2022).

63 *Hansungule and Others on behalf of children in Northern Uganda v The Government of Uganda*, comm no 001/Com/001/2005.

64 *The Centre for Human Rights and La Rencontre Africaine pour la Defense des Droits de l'Homme (Senegal) v Senegal,* comm no 003/Com/001/2012.

65 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of children of Nubian descent in Kenya v Kenya*, comm no 002/Com/002/2009.

66 *Institute for Human Rights and Development in Africa v Malawi,* comm no 004/Com/001/2014. See 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.

67 *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v TSudan,* comm no 005/Com/001/2015.

68 *Project Expedite Justice et al on behalf of children in South Kordofan and Blue Nile states v Sudan*, comm no 0011/Com/001/2018.

69 *The Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*, comm no 006/Com/002/2015.

70 *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania,* comm no 007/Com/003/2015.

71 *Legal and Human Rights Centre and Centre for Reproductive Rights on behalf of Tanzanian girls v Tanzania*, comm no 0012/Com/001/2019.

The Guidelines for Periodic Reports of State Parties and section XXI(2)(i)–(iv) of the Revised Communications Guidelines of the African Children's Committee make only scant reference to following-up on and monitoring the Committee's decisions.[72] The Communication Guidelines require the Committee to appoint a rapporteur for each communication who shall monitor the implementation of its decisions. The rapporteur shall monitor the measures taken by states to give effect to the decisions. He or she may make such contacts as is necessary and 'take such action as may be appropriate to ascertain the measures adopted by the state party'. At each session of the Committee, the rapporteur shall present a report on the status of implementation in the state party concerned.

4 JUDICIAL AND QUASI-JUDICIAL MONITORING MEASURES

AHRBs play a variety of roles in monitoring the implementation of their decisions. These include: information gathering, dialogue with parties, interpretation of their decisions, naming and shaming, reporting to the relevant AU organs and publication of lists of non-complying states, among others.[73] Fundamentally, dialogue and correspondence with parties is at the heart of the implementation monitoring process. The full implementation of a decision may take a long time, thus the ability to sustain dialogue over a prolonged period is crucial to implementation monitoring.[74] In general, AHRBs juggle a combination of dialogical processes, soft power diplomacy, sticks-and-carrots tactics as well as naming and shaming operations to bring state actors to the implementation table. Measures used include implementation hearings, the adoption of resolutions, judicial referrals and advocacy and similar visits and linking up with the state reporting process.

4.1 Implementation hearings

Implementation hearings are not found in the UN and the European human rights systems, but the practice is well established in the Inter-American system.[75] Both the Inter-American Commission and the Inter-American Court can call for an implementation hearing, and there is a clear procedure and criteria on holding a hearing on implementation.[76] To its credit, the African Commission has devoted some of its sessions to focusing on the implementation of its decisions. For example, as early as 1995, the Commission convened an

72 UK Mbuton 'The Role of the African Committee of Experts on the Rights and Welfare of the Child in the follow-up of its decisions on communications', unpublished LLM dissertation, University of Pretoria, South Africa (2017) 28.

73 Murray, Long, Ayeni & Some (n 10) 153.

74 Sandoval, Leach & Murray (n 5) 81.

75 As above.

76 Sandoval, Leach & Murray (n 5) 81.

extraordinary session to focus on the implementation of its decisions concerning Nigeria.[77] In at least two cases, the African Commission has used implementation hearings to bring stakeholders together to forge a way forward on implementation. The first implementation hearing by the African Commission took place on 26 April 2012 in the case of *Malawi African Association et al v Mauritania*,[78] where the Commission held a hearing to listen to the parties in the case, considered an 'implementation dossier' prepared by civil society organisations (CSOs) and followed-up on the overall implementation of its decision in the case.[79] In the *Endorois* case,[80] the Commission held an oral hearing at its 53rd Ordinary Session in April 2013, in Banjul, The Gambia, where parties updated the Commission on the implementation of the decision. The government of Kenya pledged at the oral hearing to submit within 90 days an interim report on measures it has taken to implement the decision and a comprehensive report at the Commission's next ordinary session. The Commission even sent a *note verbale* to the Republic of Kenya as a reminder of its pledge. Notwithstanding these efforts, the government of Kenya did not honour its pledge at the 54th ordinary session of the Commission held in Banjul, The Gambia, from 22 October to 5 November 2013.

The African Court's competence to hold hearings 'to assess the status of implementation of its decisions' and to 'make a finding and where necessary, issue an order to ensure compliance with its decisions'[81] is provided for in its Rules of Procedure. While the Court has not held any such hearings yet, it resolved to do so for the first time in the recent reparations judgment concerning the case of the Ogiek indigenous community in Kenya.[82] The African Children's Committee has held implementation hearings during its sessions. In October 2017, two member states – Kenya and Senegal – submitted their reports to the African Children's Rights Committee on the implementation of the *Children of Nubian Descent* case and the *Talibés* case, respectively. The reports were considered during an implementation hearing at the

77 Second Extra-ordinary Session Final Communique, 18-19 December 1995, para 1 and Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC. II/ES/ACHPR/4.

78 Communications 54/91, 61/91, 98/93, 164-196/97 and 210/98 (2000) AHRLR 149 (ACHPR 2000).

79 J Harrington & L Bingham 'Never-ending story: the African Commission evolving through practice in *Malawi African Association et al v Mauritania*' (2013) 7 *Human Rights & International Legal Discourse* 53.

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

81 African Court Rules of Procedure 2020, Rule 81(3).

82 *African Commission on Human and Peoples' Rights v Republic of Kenya (Reparations)* appl no 006/2012. judgment of 23 June 2022, op para xvi.

Committee's 29th ordinary session in Maseru, Lesotho.[83] During the hearing, the two states and the complainants participated and made presentations. The hearing was held in open session, but participation and engagement was limited to the states, the complainants and the authors of the communications.[84] CSOs, national human rights institutions (NHRIs) and other stakeholders were not permitted to contribute to the hearing.

Neither the African Commission nor the African Children's Committee has developed a consistent practice or coherent approach as to when and where to hold an implementation hearing, who should be present at such hearing and what the expectations are for the parties involved.[85] It is purely an ad hoc process facilitated by litigants and civil society. There is currently no established procedure for joint hearings and hearings *in situ* in any of the AHRBs. The implementation hearing procedure is still in its infancy, and there is no indication of an evolving practice or a coherent approach. While there is no direct causal link between an implementation hearing and eventual implementation, the hearing helps to maintain dialogue, keep the case on the radar and assist the HRB in understanding the implementation challenges that states face.[86]

4.2 Resolutions

Resolutions have been one of the principal tools used by the African Commission to advance human rights in Africa.[87] The Commission typically issues three kinds of resolutions: thematic, country-specific and administrative. In addition to the thematic resolution on the implementation of its decisions, adopted in 2006,[88] the Commission has issued resolutions targeted at specific countries to highlight the non-implementation of its decisions in those countries. For example, it issued Resolution 257 at the end of the 54th ordinary session, urging the government of Kenya to implement the *Endorois* decisions.[89] It also issued a similar resolution against Cameroon in 2018[90] and

83 See Centre for Human Rights 'Centre for Human Rights takes part in African Children's Rights Committee hearing on implementation' available at www.chr.up.ac.za/index.php/centre-news-a-events-2017/1813-centre-for-human-rights-takes-part-in-african-childrens-rights-committee-hearing-on-implementation.html%3e%20 (accessed 9 January 2022).

84 As above. See also Mbuton (n 72) 34.

85 Sandoval, Leach & Murray (n 5) 81.

86 As above, 81-83.

87 See generally J Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016.

88 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, ACHPR/Res.97 (XXXX)06.

89 Resolution Calling on the Republic of Kenya to Implement the Endorois Decision. ACHPR/Res.257, November 2013.

90 Resolution on the Human Rights Situation in the Republic of Cameroon. ACHPR/Res. 395 (LXII) 2018, 9 May 2018.

another calling on the government of Eritrea to implement its decision in *Zegveld and Another v Eritrea*.[91] It may be helpful for AHRBs to add periodic press releases to their monitoring arsenal to condemn recalcitrant states and also to celebrate those that comply.

4.3 Referral to a judicial body

There is a referral mechanism in both the European and the African systems. In the European system, the Committee of the Minister may, if it finds that a state refuses to comply with a judgment, refer the case back to the European Court under article 46(4) of the European Convention on Human Rights for a definitive judicial assessment.[92] So far this mechanism has been used only twice[93] and some commentators have expressed scepticism as to a judicial infringement procedure's utility when the underlying execution problems are largely of a political nature.[94] In the African system, only the African Commission has a mechanism for judicial referral when a state fails to comply with its decisions. Like other monitoring measures, this mechanism has been underutilised by the Commission. Under Rule 118 of its 2010 Rules of Procedure, the African Commission may refer a matter to the African Court where it finds that a state has refused or is unwilling to comply with its decisions or provisional measures.[95] However, the 2020 Rules of Procedure of the Commission are silent on referral to the African Court on the basis set out in Rule 118 (1) of the old Rules of Procedure. Still, the Commission may arguably continue to make judicial referrals when it deems them appropriate. The silence of the revised Rules of Procedure 2020 does not preclude the Commission from making referrals to the African Court as the jurisdiction to make such referral did not originate from its Rules of Procedure but from article 5(1)(a) of the African Court Protocol.

91 Resolution on the Human Rights Situation in Eritrea, ACHPR/Res.91(XXXVIII)05. See also *Zegveld and Another v Eritrea* Communication 250/02 (2003) AHRLR 85 (ACHPR 2003) (17th Annual Activity Report).

92 European Court of Human Rights, Guide on art 46 of the European Convention on Human Rights (31 August 2022) https://echr.coe.int/Documents/Guide_Art_46_ENG.pdf, para 30 (accessed 18 October 2022).

93 Proceedings under art 46(4) ECHR in the case of *Ilgar Mammadov v Azerbaijan*, appl no 15172/13, judgment of 29 May 2019, and in the case of *Kavala v Türkiye*, appl no 28749/18, judgment of 11 July 2022.

94 F de Londras & K Dzehtsiarou 'Mission impossible? Addressing non-execution through infringement proceedings in the European Court of Human Rights' (2017) 66 *International & Comparative Law Quarterly* 467.

95 Rules of Procedure of the African Commission 2010, Rules 112(2) & 118(1) & (2).

However, the judicial referral mechanism is problematic in itself. It presupposes that the Commission has up-to-date information about the measures states have taken to implement its decisions which will often not be the case.[96] Also, making a referral may be taken by some observers as an implicit acknowledgment of the Commission's weakness and an indirect assertion that the African Court will likely be more effective in bringing about a decision's implementation.[97] These problems perhaps explain why the Commission rarely refers cases to the Court. The African Commission has used the judicial referral mechanism only twice, in *African Commission v Libya*[98] and *African Commission v Kenya*,[99] to refer the non-implementation of its provisional measures to the African Court.[100] It has never used it for a decision on the merits of a case. Also, the Commission has not defined any criteria for referring cases to the Court, and the refusal or unwillingness of states to provide information on the status of implementation has only made matters worse for the Commission.[101]

4.4 Advocacy visits, missions and other promotional activities

In some instances, members of the African Commission and the African Children's Committee have used the opportunity of promotional or protective missions to gather information on the status of the implementation of specific decisions of the Commission or Committee relating to the host country. The authority of the Commission to carry out promotional missions derives from Rules 7(b), 76 and 86 of the African Commission's Rules as well as the provisions of articles 30 and 45 of the African Charter. For example, during a visit to Mauritania in 2012, members of the Commission asked questions about the status of the implementation of certain decisions of the Commission concerning the state of Mauritania.[102] Also, during a promotional visit to Botswana in 2005, members of the Commission posed questions on the status of the implementation of *Modise v Botswana*.[103]

96 We do not have hard data on this information gap for the AHRBs, but figures from the related context of the follow-up procedures of the UN Treaty Bodies regarding their individual communications procedures may be indicative. There the percentages of adverse decisions with least some follow-up information on their execution ranges between 0% and 67% across eight treaty bodies, with such information missing for hundreds of cases; AJ Ullmann & A von Staden "'A room full of views": introducing a new dataset to explore compliance with the UN Treaty Bodies' Individual Complaint Procedures' (2022) Table 1 (working paper, on file with authors).

97 Sandoval, Leach & Murray (n 5) 84-85.

98 *African Commission on Human and Peoples' Rights v Libya,* appl no 002/2013.

99 *African Commission on Human and Peoples' Rights v Kenya,* appl no 006/2012.

100 Sandoval, Leach & Murray (n 5) 84-85.

101 As above.

102 Report of the Promotional Mission to the Islamic Republic of Mauritania, held between 26 March and 1 April 2012 (2012) 9.

103 Report of the Promotional Mission to the Republic of Botswana, held 14-18 February 2005.

At its 19th session, the African Children's Committee designated some of its members to follow up on its decisions in Kenya, Senegal and Uganda.[104] The mission to Kenya took place in January 2013.[105] The follow-up team of the Committee was in Senegal in 2015. The follow-up mission to Uganda has yet to take place. It has been argued that the visits to Kenya and Senegal paved the way for the subsequent implementation hearings in the *Talibés* case and the *Nubian Children* case.[106] Promotional visits facilitate constructive dialogue and provide an opportunity for members of AHRBs to sensitise high-ranking government officials to their decisions against the state. Yet these visits happen rather infrequently and financial resources are inadequate to sponsor such visits on a regular basis.[107]

4.5 State reporting process

The state party reporting process is a fundamental mechanism for implementation monitoring, not only of treaty provisions but also of the decisions of AHRBs. It provides an ideal opportunity for the African Commission and the African Children's Committee to get feedback on their decisions, for the state to report on its implementation actions and for both parties to reflect through the process of constructive dialogue on the challenges of implementation.[108] The African Court is constrained in this regard as it has no mandate to receive, consider or review state party reports. Both the Commission and the African Children's Committee have put questions to states pertaining to the status of the implementation of their decisions during examinations of states periodic reports.[109] One shortcoming of this process as a monitoring measure is that very few African states are up to date with their reports, and those that submit reports provide inadequate information and make only scant references, if at all, to the decisions of the relevant AHRBs.

104 Report on the nineteenth session of the African Committee of Experts on the Rights and Welfare of the Child, 26-30 March 2012 Addis-Ababa, Ethiopia, African Children's Committee/Rpt (XIX) Original, 23.

105 Report on the twenty-first session of the African Committee of Experts on the Rights and Welfare of the Child, 15-19 April 2013 Addis-Ababa, Ethiopia, African Children's Committee/Rpt (XXI) Original: English, para 56.

106 Mbuton (n 72) 32.

107 The African Commission reported that most promotional visits could not take place due to lack of funds; 20th Activity Report of the African Commission, para 22.

108 Viljoen (n 12) 341.

109 Murray, Long, Ayeni & Some (n 10) 157; Sandoval, Leach & Murray (n 5) 77.

4.6 Taking stock of AHRB monitoring tools

Drawing inspiration from the checklist of 13 indicators developed by Helfer and Slaughter for evaluating the effectiveness of supranational tribunals[110] as well as Shany's goal-based model, we take stock of the AHRB's existing implementation monitoring mechanisms using 17 indicators: the status of the decision, whether binding of recommendatory; whether the AHRB issues detailed periodic compliance reports; whether the compliance reports are widely disseminated; the existence of an up-to-date database on the status of implementation; whether the implementation database is available on electronic platforms; active engagement with CSOs in implementation monitoring; the existence of a dedicated implementation unit within the Secretariat of the AHRB; the establishment of a dedicated special rapporteur for follow-up; the use of implementation hearings to follow up on decisions; whether or not the AHRB uses innovative implementation hearing formats such as joint hearings and hearings *in situ*; and whether or not the AHRB uses resolutions, press releases, state reporting process as well as promotional state visits for monitoring its decisions; whether or not the AHRB is able to refer its decisions to a judicial body for implementation review; whether or not the AHRB is mandated to refer its decisions to a political body and whether there is evidence of a direct or indirect impact of monitoring activities on state behaviour.

The assessments in relation to the indicators are based on our analysis of the activities of the three AHRBs. We do not claim that high values on these indicators will result in effective implementation monitoring in every case. However, we believe that a high aggregate score on the checklist will, all other things being equal, likely be indicative of a more effective monitoring regime. Out of a total of 34 points resulting from the 17 indicators with respect to which the three AHRBs have been assessed, the African Court scores 9 points (representing 27 percent of the total), the African Children's Committee scores 11 points (32 percent) and the African Commission scores 13 points (representing 38 percent). With all three AHRBs thus achieving less than half of the possible total score, it is fair to conclude that there is significant room for improvement with respect both to the number and the quality of their second-order compliance monitoring mechanisms and instruments. While not all mechanisms would necessarily result in improved compliance across the board, their absence or insufficient use will for certain not have any positive effects on implementation and compliance.

110 Helfer & Slaughter (n 2) 298.

Table 1: Implementation Monitoring Indicators[111]

#	Indicator	African Court	African Commission	African Children's Committee
1	Legal status of the decision[a]	2	1	1
2	Issuance of detailed periodic compliance reports[b]	1	0	0
3	Dissemination of compliance report[c]	1	0	0
4	Up-to-date database on the status of implementation[d]	0	0	0
5	Availability of implementation database on electronic platforms[e]	0	0	0
6	Active engagement with CSOs in implementation monitoring[f]	1	2	2
7	Existence of a dedicated implementation unit within the secretariat of the AHRB[g]	0	0	0
8	Special rapporteur for follow-up of decisions[h]	0	1	1
9	Regular use of implementation hearings[i]	0	1	1
10	Use of innovative implementation hearing formats such as joint hearings and hearings *in situ*[j]	0	0	0
11	Regular use of resolutions for monitoring[k]	0	1	0
12	Regular use of press releases and other media tools[l]	1	1	1
13	Use of state reporting process for monitoring[m]	0	1	1
14	Promotional visits to states that involve monitoring of decisions[n]	1	1	1

111 Note on scores: AHRBs that meet the requirements of an indicator receive 2 points; those that meet the requirements only partly receive 1 point and those that do not do so at all receive zero points.

15	Judicial referrals or appeals to other judicial bodies[o]	0	1	0
16	Political referrals[p]	2	2	2
17	Evidence of goal-related impact of monitoring activities on state behaviour[q]	0	1	1
	TOTAL	**9/34**	**13/34**	**11/34**

a. Legally binding = 2; recommendatory = 1; no clarity on status / no obligation on States to implement = 0.
b. Detailed report = 2; pseudo-report with scanty information = 1; no periodic compliance report = 0.
c. Dissemination of reports online, in the media and through other channels = 2; poor dissemination or reports are available in limited channels = 1; no dissemination strategy implemented = 0.
d. Up to date database = 2; scanty and outdated database = 1; no database on implementation = 0.
e. Database fully available online = 2; database partly available online = 1; no online database = 0.
f. Active engagement with CSOs = 2; passive or limited engagement = 1; no engagement = 0.
g. Implementation unit active and highly developed = 2; unit exists but not active = 1; no dedicated unit = 0.
h. Dedicated special mechanism / rapporteur exists = 2; mandate exists under a broader mechanism or members of the AHRB are assigned to follow-up cases on *ad hoc* basis = 1; no mandate established = 0.
i. Used most times or frequently = 2; used infrequently or rarely = 1; never used = 0.
j. As above.
k. As above.
l. As above.
m. As above.
n. As above.
o. Judicial referral exists and is used often = 2; judicial referral exists but is rarely used = 1; not available = 0.
p. Political referral exists and is used often = 2; political referral exists but is rarely used = 1; not available = 0.
q. Direct evidence exists = 2; anecdotal evidence exists = 1; no clear evidence of impact = 0.

5 POLITICAL MONITORING

The involvement of AU policy organs is crucial for the effective monitoring of AHRB decisions. Policy organs provide political support and the much-needed interface with states. This relationship is recognised in the treaties that set up each of the AHRBs as well as their respective Rules of Procedure. Rules 125(8) and (9) of the Rules of Procedure of the African Commission 2020 require the Commission to refer cases of non-compliance by states to competent AU organs. The Commission may also request the AU Assembly to 'take necessary

measures to implement its decisions'.[112] Similarly, the African Court shall report all cases of non-compliance with its judgments to the AU Assembly.[113] The African Children's Committee submits annual activity reports to the AU Assembly and may request 'specific actions on the part of the Assembly in respect of implementation of any of its decisions'.[114] These provisions underscore the intended critical role of the competent organs of the AU in monitoring the execution of the decisions and judgments of AHRBs.

The AU Assembly, for example, monitors the implementation of the decisions of AU organs and ensures compliance by states. It may impose sanctions on states that defy the decisions of AU organs. Since 2003, the Assembly has delegated the task of considering AHRB activity reports to the Executive Council, which meets more often and has more time for debate and deliberation. Each of the three AHRBs submits its annual report to the Executive Council for consideration on behalf of the AU Assembly. The Executive Council has used its decisions on the activity reports of the African Commission to urge states to comply with the decisions of the Commission.[115] Some members of the Executive Council, however, have also used the opportunity of greater engagement and scrutiny to mount political barricades against decisions and resolutions of the African Commissions that they consider offensive.[116]

Under article 29 of the African Court Protocol, the Court must notify the Executive Council of any judgment in order for the Council to monitor its execution on behalf of the AU Assembly. The Court's Protocol and Rules of Procedure clearly vest the responsibility for monitoring the execution of the Court's judgments in the Executive Council on behalf of the AU Assembly.[117] So far, the Council merely discharges this function on the basis of the report submitted to it by the Court. There is no indication that the Executive Council takes any further steps subsequent to the reports by the Court.[118] Accordingly, a monitoring process that ought to be political in nature has remained mostly judicial and administrative.

Activity reports of the African Children's Committee suffer a similar fate before the Executive Council and are rarely discussed or debated. The Executive Council has no internal mechanism for monitoring the execution of the decisions of AHRBs and does not take any enforcement action against states based on the non-compliance reports submitted to it by the AHRBs. It has also been suggested that AHRBs should

112 Rules of Procedure of the African Commission 2010, Rule 125(1).

113 Rules of Procedure of the African Court 2020, Rule 81(4).

114 African Children's Committee Rules of Procedure, Rule 82(4).

115 M Killander 'Confidentiality versus publicity: interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 575.

116 Ayeni (n 4) 285-287.

117 African Court Rules of Procedure 2020, Rule 81(4).

118 Coalition for an Effective African Court on Human and Peoples' Rights, *Booklet on the Implementation of the Decisions of the African Court on Human and Peoples' Rights* (2021) 7.

interface more with the Permanent Representatives Committee (PRC) which does the actual work on behalf of the Executive Council.[119] The PRC meets at least once a month and is empowered by its Rules of Procedure to 'monitor the implementation of policies, decisions and agreements adopted by the Executive Council'. Many human rights-related decisions taken by the Executive Council or the AU Assembly are usually first debated by the PRC.

In order to be effective, political monitoring of AHRB decisions requires the existence of one or more political bodies with a clear mandate for monitoring decisions and judgments; regular placement of the decisions and judgments of AHRBs on the agenda of the relevant AU policy organs; systematic monitoring and follow-up of the directives of the political body; evidence of direct actions taken against recalcitrant states following a review by the political body; the existence of a legal framework for engaging CSOs in the process of political monitoring; and active engagement of the AHRB whose reports, decisions or judgments are being reviewed, monitored or followed up. Stakeholders have also advocated that the Executive Council of the AU should establish a sub-committee in parallel with the PRC Sub-Committee on Democracy, Governance and Human Rights with sufficient time and resources at their disposal to adequately monitor the different AU organs' programs, activities and decisions in the field of democracy, governance and human rights.[120]

6 MONITORING BY CIVIL SOCIETY

CSOs play an important role in many monitoring and dispute settlement arrangements in the human rights domain and elsewhere.[121] In the African context, however, CSOs appear to have often been perceived solely as interested parties in the litigation process, with monitoring functions being reserved for judicial and political actors. AHRBs are more constrained in the roles they can play in implementation monitoring as they need to maintain their neutrality and independence. Political organs of the AU, too, are practically constrained by peer pressure and diplomatic considerations. CSOs are less restricted by such considerations and could thus assume more active roles in implementation monitoring. While these roles have yet

119 Viljoen (n 12) 181.

120 International Conference on the Implementation and Impact of the decisions of the African Court on Human and Peoples' Court: Challenges and Prospects, held from 1 to 3 November 2021, Dar es Salaam, United Republic of Tanzania, available at https://www.african-court.org/wpafc/the-dar-es-salaam-communique-conference-on-the-implementation-and-impact-of-decisions-of-the-african-court-on-human-and-peoples-rights/ (accessed 3 November 2022).

121 Council of Europe, Working with the Council of Europe: A Practical Guide for Civil Society (2022) available at https://rm.coe.int/work-with-coe-guide-english-2022/1680a66592 (accessed 19 October 2022).

to be more fully developed,[122] greater involvement of civil society would doubtlessly strengthen existing monitoring mechanisms.

An empirical study of 44 decisions of the African Commission between 1987 and 2003 found that one of the most statistically significant factors predictive of state compliance in a case is the involvement of CSOs in the case from submission of the communication up to the follow-up stage.[123] A significant number of litigants may be disadvantaged in the implementation process without the assistance of CSOs. They 'mobilise shame' against states that fail to implement the decisions of AHRBs.[124] For example, the Coalition for an Effective African Court provides information on the implementation of judgments of the African Court.[125] Recently, in December 2021, the Pan African Lawyers Union (PALU) and the West African Bar Association (WABA) held a two-day symposium in Abuja on the role of the legal profession, NHRIs and CSOs in the implementation of the decisions of AHRBs. Participants at the events emphasised the role of CSOs and NHRIs in providing publicity for the decisions of AHRBs so as to facilitate implementation.[126]

The African Commission has a robust relationship and engagement with CSOs.[127] It grants observer status to CSOs that work in the field of human rights, which entitles them to address the Commission during its public sessions, and they may request that a particular issue of public interest be included in the Commission's agenda.[128] Every two years, CSOs with observer status must submit an activity report to the Commission.[129] This, too, is an opportunity for CSOs to highlight the status of the implementation of specific decisions of the Commission. Resolutions by the Forum for the Participation of Non-Governmental Organisations (NGOs) in the Ordinary Sessions of the African Commission (NGO Forum) may be presented formally to the Commission for consideration and adoption.

122 Some recommendations with respect to enhancing the role of civil society in the African Commission's work have been made in International Justice Resource Center, Civil Society Access to International Oversight Bodies: Inter-American Commission on Human Rights (2018) available at https://ijrcenter.org/wp-content/uploads/2018/10/Civil-Society-Access-ACHPR-2018.pdf (accessed 19 October 2022).

123 Viljoen & Louw (n 29).

124 Viljoen (n 12) 384.

125 Coalition for an Effective African Court on Human and Peoples' Rights (n 135) 1.

126 F Olokor 'Obey sub-regional court decisions, tribunals, lawyers tell African govts' *Punch Newspapers,* 15 December 2021, available at https://punchng.com/obey-sub-regional-court-decisions-tribunals-lawyers-tell-african-govts/ (accessed 7 November 2022).

127 Sandoval, Leach & Murray (n 5) 94.

128 Activity Report of the African Commission (2020) para 40.

129 Resolution 361 on the Criteria for the Granting of and for Maintaining Observer Status with the African Commission on Human and Peoples' Rights.

The revised Rules of Procedure of the African Commission refer to the power of the Commission and its rapporteurs not only to request information on the implementation of its decisions from 'interested parties' but also to take such information into account.[130] The provision empowers the Commission to obtain information from diverse sources, including civil society and non-state actors. At its 27th Extraordinary Session held in Banjul in March 2020, the African Commission adopted Resolution 436 on the need to develop guidelines for shadow reporting. The Resolution consolidates the position of CSOs as critical compliance and monitoring partners.

The African Children's Committee has a strong relationship with CSOs as well, but its engagement with CSOs concerning implementation monitoring has been limited to CSOs that were authors of particular communications.[131] Thus, the Committee does not benefit from the input of other CSOs that could enrich its follow-up process and make it more effective. The Forum on the implementation of the African Children's Charter which brings together member states, NHRIs, CSOs and other stakeholders in order to improve the implementation of the African Children's Charter and reporting to the African Children's Committee has yet to place the implementation of the decisions of the Committee on its agenda.[132]

Even though CSOs play a key role in facilitating implementation monitoring, their role is often overshadowed by the focus on judicial and political actors. There is no question that CSOs could do more; for example, they have not been consistent in using their monitoring toolkits and are yet to develop independent tools for monitoring AHRB decisions. It would appear that CSOs often cherry-pick cases to monitor and follow up. After landmark judgments are delivered and celebrated, the confetti is quickly swept away and CSOs move on to other issues.

7 CONCLUSION

This article has discussed the mechanisms for monitoring the implementation of the decisions of the AHRBs. It reviewed the legal and institutional frameworks for monitoring implementation, especially the provisions in the founding treaties and the AHRBs' Rules of Procedure. It then reviewed select measures, such as implementation hearings, resolutions, judicial and political referrals and promotional visits, taken in order to follow up on and monitor the extent of the implementation of the various decisions of AHRBs.

A key finding emerging from the analysis is that the African Commission and the African Children's Committee, being quasi-judicial bodies, are less constrained than the African Court in monitoring and following-up on their decisions. In addition to their primary protective mandate, the Commission and the Committee have

130 Rules of Procedure of the African Commission 2020, Rule 125(6).

131 Mbuton (n 72) 36.

132 As above, 34-35.

expansive promotional mandates which provide immense opportunity for continuous engagement and dialogue with states through state missions and country visits as well as the review of periodic state reports. These unique opportunities for triggering a transnational legal process through interaction, interpretation and internalisation[133] are not available in the same measure to the African Court. In the spirit of positive complementarity, both the Commission and the African Children's Committee should make it a practice to ask about the implementation of judgments of the African Court while considering relevant state parties' reports. Obligations arising from judgments of the African Court are a part of states' obligations under the African Charter. The African Commission, perhaps due to its longer lifespan, has the most sophisticated implementation monitoring toolkit of the three AHRBs and is arguably the most effective in terms of monitoring and facilitating the implementation of its decisions, having held implementation hearings, though few, and using the state reporting process quite extensively to follow up on its decisions. The African Court, however, has been more consistent and effective at preparing, updating and disseminating its compliance reports, an area in which the African Commission and the African Children's Committee have performed quite poorly.

That said, the driving force for most implementation monitoring activities of AHRBs have been CSOs, yet little attention has been given to them so far in regard to implementation monitoring. Several initiatives for monitoring the implementation of the decisions of the African Commission and the African Children's Committee have been at the behest of CSOs; AHRBs and AU policy organs have yet to take the driver's seat. Since there are limited prospects for political monitoring due to a lack of political will by members of the AU Executive Council, implementation monitoring at least in the immediate future will depend on civil society actors and the AHRBs themselves. We remain skeptical as to the prospects of effective political monitoring in Africa and are concerned about the capacity of the African Court, a judicial institution that is constrained by institutional design, to monitor the implementation of its decisions to the same extent and using a comparable range of monitoring tools as the African Commission and the African Children's Committee. Post-judgment, the African Court may need to focus primarily on developing dialogical processes with critical compliance constituencies in respondent states rather than hoping that AU political organs will enforce its decisions through sanctions and other measures.

While acknowledging the enormous challenges confronting AHRBs, among the biggest impediments to implementation monitoring in Africa is a lack of consistency and clarity in the procedures and practices of the AHRBs. Each of the three AHRBs should establish a unit within its respective secretariat dedicated exclusively to the supervision of the execution of its judgments and decisions. In addition, each AHRB should appoint a special rapporteur

133 HH Koh 'Transnational legal process' (1996) 75 *Nebraska Law Review* 181.

for follow-up, tasked among other things with the responsibility of corresponding with parties and preparing detailed implementation reports. AHRBs should also adopt guidelines for the conduct of implementation hearings, including for joint hearings and hearings *in situ*. Finally, continued active engagement and dialogue with the European and the Inter-American human rights systems – as exemplified by the recent visit of an African Court delegation to Strasbourg[134] – will serve not only to enrich the institutions' respective jurisprudence, but also provide useful insights into best practices in the area of monitoring (and improving) the implementation of human rights decisions.

134 African Court press release 'African and European Human Rights Courts Meet in Strasbourg' (4 October 2022) available at https://www.african-court.org/wpafc/african-and-european-human-rights-courts-meet-in-strasbourg/ (accessed 19 October 2022).

Provisional measures in international human rights law: the practice of the African Court on Human and Peoples' Rights

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ABSTRACT: Under exceptional circumstances, international (human rights) courts issue orders on provisional measures preventing a party or parties before them from taking some actions pending the final determination of a case. The main purpose of such orders is to avoid a situation where the final disposition of a matter is pre-emptively rendered fully or partly meaningless by the conduct of a party. Article 27 of the Protocol Establishing the African Court on Human and Peoples' Rights also envisages the possibility where 'in cases of extreme gravity and urgency', the Court may adopt provisional measures to 'avoid irreparable harm to persons'. The African Court on Human and Peoples' Rights (Court), relying on this provision, has thus far issued about 50 orders of provisional measures, all of which were against respondent states. This article interrogates the Court's practice in this regard, with the view to fleshing out its jurisprudential inconsistencies and proposing recommendations to rectify the occasional misapplication of the procedure. Close scrutiny of the Court's jurisprudence reveals not only glaring discrepancies in approach but also, at times, unnecessary recourse to these measures even when situations do not necessarily warrant their adoption. As evidenced by the backlash from some states, which have openly expressed their refusal to comply with the Court's orders, the unwarranted use of provisional measures is likely to render the procedure ineffective and may also negatively affect the legitimacy of the Court in the eyes of its creators, the states. Therefore, the Court should fully and strictly adhere to the legal and factual conditions required to adopt provisional measures and always be alive to the intended purpose and nature of provisional measures. The Court particularly needs to adopt a balanced approach without being too liberal or too strict, as this would be overstepping its power or abdicating its responsibility to protect human rights.

TITRE ET RÉSUMÉ EN FRANCAIS:

Les mesures provisoires en droit international des droits de l'homme: la pratique de la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: Dans des circonstances exceptionnelles, les juridictions internationales (des droits de l'homme) rendent des ordonnances portant mesures provisoires empêchant une ou plusieurs parties devant elles d'entreprendre certaines actions en attendant la décision au fond dans une affaire. L'objectif principal de ces ordonnances est d'éviter une situation dans laquelle le règlement définitif d'une affaire par une juridiction internationale est rendu totalement ou partiellement sans objet par le comportement d'une partie. L'article 27 du Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples

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envisage également la possibilité pour la Cour d'adopter, 'dans des cas d'extrême gravité et d'urgence', des mesures provisoires pour 'éviter que des personnes ne subissent un préjudice irréparable'. La Cour, s'appuyant sur cette disposition, a jusqu'à présent rendu une cinquantaine d'ordonnances de mesures provisoires, toutes à l'encontre d'Etats défendeurs. Cette contribution examine la pratique de la Cour à cet égard, afin de mettre en évidence les incohérences de sa jurisprudence et de proposer des recommandations pour rectifier l'application parfois erronée de la procédure. Un examen attentif de la jurisprudence de la Cour révèle non seulement des divergences flagrantes d'approche, mais aussi, parfois, un recours inutile à ces mesures, même lorsque les situations ne justifient pas nécessairement leur adoption. Comme le montre la réaction de certains États, qui ont ouvertement exprimé leur refus de se conformer aux ordonnances de la Cour, le recours injustifié aux mesures provisoires est susceptible de rendre la procédure inefficace et d'affecter négativement la légitimité de la Cour aux yeux de ses géniteurs, les États. Par conséquent, la Cour doit respecter pleinement et strictement les conditions juridiques et factuelles requises pour adopter des mesures provisoires et être toujours attentive à l'objectif et à la nature des mesures provisoires. La Cour doit notamment adopter une approche équilibrée, sans être trop libérale ou trop stricte, car cela reviendrait à outrepasser son pouvoir ou à abdiquer sa responsabilité de protéger les droits de l'homme.

KEY WORDS: African Court on Human and Peoples' Rights, provisional measures, *prima facie* jurisdiction, urgency, irreparable harm

CONTENT:

1 INTRODUCTION

The power to issue provisional measures (also known as 'interim', 'precautionary', or 'preliminary' measures) [1] is inherent in the nature of judicial or quasi-judicial institutions. Accordingly, most treaties establishing international or regional courts and/or their rules of procedures contain provisions allowing the courts to indicate provisional measures to preserve the interests of parties pending the final determination of cases filed before them.[2] Article 27 of the Protocol Establishing the African Court on Human and Peoples' Rights (Protocol) similarly empowers the African Court on Human and Peoples' Rights (African Court) to adopt provisional measures in 'cases of extreme gravity and urgency and to prevent irreparable harm to

1 In this article, these expressions are used interchangeably.

2 See art 63 of the American Convention on Human Rights (adopted on 22 November 1969); art 27 of Rules of Procedure of the Inter-American Court of Human Rights (IACHR) (adopted on 24 November 2009); art 73-77 of Rules of Court of the International Court of Justice (ICJ) (1978); Rule 94 of the Rules of procedure of the HRC (adopted on 26 July 1989); Rule 100 of the Rules of Procedure of the African Commission on Human and Peoples' Rights (African Commission) (2020); Rule 39 of the Rules of Procedure of the European Human Rights Court (European Court) (3 June 2022).

persons'. In accordance with this provision, the African Court has thus far issued about 50 orders of provisional measures of which 22 were adopted against Tanzania, 15 against Benin, three against Côte d'Ivoire, two against Libya, two against Ghana, two against Malawi, and one against Kenya and Rwanda each. A close examination of these orders reveals that the Court regularly makes recourse to provisional measures and it is only on very rare occasions and quite recently that the Court began to deny prayers of applicants requesting the indication of provisional measures. Its case-law is also marked by some conceptual and normative ambiguity and inconsistency. Contrary to their very nature and purpose, the Court has also, in a few cases, taken unreasonably long time to consider requests for provisional measures.[3]

The Court's apparent liberal approach towards provisional measures may somehow be justified by the fact that these measures are inherently 'provisional' and do not necessarily prejudge the outcome of the case. Nevertheless, in some cases, provisional measures have grave consequences, for example, when they are issued to suspend national elections. In such instances, their misapplication would be indefensible by their 'provisional' nature. It is thus crucial to bear in mind not only their temporary nature but also the fact that provisional measures are exceptional procedures the use of which should only be dictated by compelling circumstances.

This article seeks to interrogate the jurisprudence of the Court and highlight areas where the Court's position towards provisional measures is problematic. It first offers a brief discussion on the nature and rationale of provisional measures and then examines how the Court deals with cases requiring urgent action to prevent irreversible harm to parties. A particular focus is given to the Court's assessment of the preliminary and substantive conditions required to adopt provisional measures. This will be followed by some general conclusions on the practice of the Court.

The article does not intend to engage in a full-fledged comparative analysis of international human rights jurisprudence on provisional measures. It nevertheless cites, when it is necessary to offer a comparative perspective, the case law of other regional and international human rights bodies, including that of the European Court of Human Rights (European Court), Inter-American Court of Human Rights (Inter-American Court), the UN Human Rights Committee (HRC), and the African Commission on Human and Peoples' Rights (African Commission).

3 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1243-1244; see also SMSM Dabiré 'Les ordonnances de la Cour africaine des droits de l'homme et des peuples en indication de mesures provisoires dans les affaires *Sébastien Ajavon c. Bénin* et *Guillaume Soro et autres c. Côte d'Ivoire*: souplesse ou aventure?' (2020) 4 *African Human Rights Yearbook* 476-496.

2 ORIGIN AND RATIONALE

The concept of provisional measures is not a recent invention and has its historical provenance in many ancient municipal Civil Procedure Codes and more formally, in the notion of '*interdict*' of the Roman law.[4] Over the course of many centuries, it has developed into a doctrine of *relief pendente lite*, which posits that 'the effective protection of private rights is the *quid pro quo* for the prohibition of self-help by individuals', thus, measures should be put in place to preserve the rights of one party to a case pending final resolution.[5] The concept was later, to be precise in the early 20th century, imported into international law through bilateral and multilateral treaties.[6] The earliest expressions of the concept are found in the 1902 Treaty of Corinto[7] and the Bryan 'cooling off' treaties,[8] which provided for peaceful settlement of disputes and provisions requiring parties to refrain from engaging in hostile acts such as war or mobilisation of force 'in order not to impede the settlement of the difficulty or question by the means established in the present convention'.[9] After the end of WWI, the League of Nations was established with its judicial organ, the Permanent International Court of Justice (PCIJ). The PCIJ was vested with, *inter alia*, the power 'to indicate ... any provisional measures which ought to be taken to reserve the respective rights of either party.'[10] This was subsequently included and expanded in the Statute of the International Court of Justice (ICJ) and other international treaties concluded on areas such as human rights and investment.[11]

The notion of provisional measures appears to have been introduced into international law to rectify one of its 'shortcomings', that is, 'the absence of adequate legal remedy safeguarding jeopardised interests when circumstances permitting no procrastination call for immediate action, before final judgment on the merits of a dispute can be pronounced.'[12] It is this same fact that also underpins the precautionary measures contemplated in existing provisions of

4 The notion of interdiction in Roman law denoted an order requiring the party to a case to do or not do a particular thing, usually in cases involving suits over property interests. CA Miles 'The origins of the law of provisional measures before international courts and tribunals' in CA Miles *Provisional measures before international courts and tribunals* (2017) 52.

5 As above, 20-21.

6 As above.

7 A treaty between Costa Rica, El Salvador, Honduras and Nicaragua, which provided in art 2 for the compulsory arbitration of disputes by Central American arbitrators.

8 A series of agreements concluded by the United States with many other countries shortly before and at the outbreak of World War I to settle disputes that could not be disposed of through arbitration.

9 Article XI of Treaty of Corinto (1902); see also art I, Treaty concerning the Construction of an Interoceanic Canal through the Territory of the Republic of Nicaragua, 5.8.1914 1 IELR 554; and GA Finch 'The Bryan Peace Treaties' (1916) 4 *American Journal of International Law* 10.

10 Art 41 of Statute of the Permanent Court of Justice (1920).

11 Art 41 of the Statute of the International Court of Justice (16 December 1920)

international human rights conventions and the various rules of procedures of the institutions established to implement them. In international human rights law, provisional measures constitute precautionary steps that international judicial and quasi-judicial institutions direct parties to take in order to maintain the integrity of their proceedings and ensure equality of parties.[13] The principal objective is to prevent irreparable prejudice to victims of an alleged violation of human rights and preserve their rights until the final determination of a matter. As such, provisional measures aim at securing the continued enjoyment of a right, or at least, seek to avert further violation of rights.[14]

Interim measures are partly grounded in pragmatic considerations pertaining to the time-consuming nature of international human rights adjudication. Proceedings may take years before a case is decided with finality and in the absence of such preventive steps, the judicial process may end up being purposeless and ineffective or the irreparable damages caused to one party may render the implementation of the final resolution practically impossible. Interim measures are thus instrumental not only in protecting individuals from ongoing human rights abuses but also in safeguarding circumstances that allow the future realisation of a court's decision.[15] In other words, it can be submitted that these measures have a direct bearing on a court's institutional ability to manage and resolve a dispute before it.

3 PROVISIONAL MEASURES IN THE JURISPRUDENCE OF THE AFRICAN COURT

Unlike its American counterpart,[16] the African Charter on Human and Peoples Rights (African Charter) does not contain a juridical basis for

12 E Dumbauld *Interim measures of protection in international controversies* (1932) 2.

13 In this regard, Rule 39 of the Rules of ECHR clearly stipulates that interim measures should be adopted 'in the interests of the parties or of *the proper conduct of the proceedings*'.

14 Pasqualucci notes in this regard that 'The overriding importance of interim measures in human rights cases arises from their potential to terminate abuse rather than primarily to compensate the victim or the victim's family after the fact'; JM Pasqualucci 'Interim measures in international human rights: evolution and harmonization' (2021) 38 *Vanderbilt Law Review* 1.

15 According to Justice Trindade 'Underlying the application of provisional measures of protection (...) are superior considerations of international *ordre public*, turned into reality in the protection of the human being'; AC Trindade 'The evolution of provisional measures of protection under the case-law of the Inter-American Court of Human Rights 1987-2002' (2003) *Human Rights Law Journal* 164.

16 Art 63(2) of the American Convention on Human Rights provides that 'In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission'.

adoption of provisional measures.[17] The African Commission, which was established as the monitoring body thereof,[18] has rather inferred its power from its protective mandate and relied on its Rules of Procedure to indicate provisional measures.[19] In contrast, article 27 of the Protocol clearly sets out the Court's power to issue an order for provisional measures and its Rules substantially reflect what the Protocol stipulates.[20] Rule 59(1) of the Rules of the Court provides that '[p]ursuant to article 27(2) of the Protocol, the Court may, at the request of a party, or on its own accord, in case of extreme gravity and urgency and where necessary to avoid irreparable harm to persons, adopt such provisional measures as it deems necessary, pending determination of the main Application'.[21] In accordance with this, as at 30 August 2022, the Court has dealt with provisional measures on 79 occasions in about 76 applications.[22]

The Court has invoked its power to indicate provisional measures both in its own motion (suo motu) or upon request by a party, often the one initiating proceedings. The Court issued its first order on provisional measures in *African Commission on Human and Peoples' Rights v Libya* in 2011. In this case, the Court directed *suo motu* Libya to 'immediately refrain from any action that would result in loss of life or violation of physical integrity of persons', having noted that 'there [was] an imminent risk of loss of human life and in view of the ongoing conflict in Libya'.[23] In the subsequent years, the Court continued to issue, in its own motion or upon request by one of the parties, several

17 The Charter, in its art 58(1), allows the Commission to only draw the attention of the Assembly of Heads of State and Government where one or more 'communications relate to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights'.

18 See art 30 of the Charter.

19 Rule 100(1) of the Rules of Procedure of the Commission declares that 'At any time after receiving a Communication and before determining its merits, the Commission may, on its initiative or at the request of a party to the communication, issue provisional measures to be adopted by the state concerned in order to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands'.

20 However, there is a slight difference in formulation between the Protocol and the existing Rules; art 27(2) of the Protocol makes it mandatory for the Court to indicate provisional measures as long as the conditions thereof are met while Rule 59(1) of the Rules uses the permissible language 'may' instead of 'shall'. Considering that the Rules are subsidiary to the Protocol, art 27 takes precedence. It is obvious that the Court enjoys a wide margin of discretion in ascertaining whether the conditions are fulfilled but once it affirmatively establishes this, it 'shall' indicate provisional measures.

21 Rule 59(1) of the Rules of the Court (2020). This provision is almost identical with Rule 51 of the 2010 Rules of the Court except that the latter uses 'interim measures' whereas the former uses the alternate expression 'provisional measures'.

22 In some cases, applicants requested for provisional measures in one application more than once. Eg, in *Ajavon v Benin* (027/2020) the applicant filed three separate requests for provisional measures and in *Guillaume Kigbafori Soro and 19 Others v Côte d'Ivoire* (012/2020) the applicant requested for provisional measures twice.

23 *African Commission on Human and Peoples' Rights v Libya* (provisional measures) (2011) 1 AfCLR 17.

orders for provisional measures in dozens of other applications involving the right to life and the death penalty,[24] election,[25] property,[26] freedom of movement,[27] the right to liberty,[28] the right to health,[29] and right to access legal representation and family.[30] It is evident from the Court's jurisprudence that, where a request comes from a party, adoption of provisional measures is not automatic. Rather, the Court retains the discretion to grant or deny the request depending on the circumstances of each case.[31]

The Court has generally been liberal when it comes to granting requests for provisional measures. The statistics speak for themselves; as indicated earlier, the Court has thus far adopted 50 orders for provisional measures in 76 applications. At the same time, there seems to be a clear shift in approach in its recent case law. The Court is increasingly becoming both robust in its reasoning and strict in applying the criteria for indicating provisional measures.[32] In the past, for example, the Court used to grant requests for provisional measures

24 *Armand Guéhi v Tanzania* (provisional measures) (2016) 1 AfCLR 587, paras 21-23; *Mugesera v Rwanda* (provisional measures) (2017) 2 AfCLR 149. In cases of the death penalty, it is now customary for the Court to adopt *proprio motu* provisional measures to prevent execution of individuals on death row. See *Ally Rajabu and Others v Tanzania* (provisional measures) (2016) 1 AfCLR 59; *John Lazaro v Tanzania*, 18 March 2016, *Evodius Rutechura v Tanzania* (provisional measures) (2016) 1 AfCLR 596; *Chalula v Tanzania* (provisional measures) (2019) 3 AfCLR 232; *Dominick Damian v Tanzania* (provisional measures) (2016) 1 AfCLR 69; *Crospery Gabriel and Ernest Mutakyawa v Tanzania* (provisional measures) (2016) 1 AfCLR 70.

25 *Sébastien Germain Ajavon v Benin* (provisional measures) (013/2017) (17 April 2020), *Guillaume Kigbafori Soro and Others v Côte d'Ivoire* (provisional measure) (012/2020) (17 April 2020); *Laurent Gbagbo v Côte d'Ivoire* (provisional measures) (025/2020) (25 September 2020).

26 *Woyome v Ghana* (provisional measures) (2017) 2 AfCLR 213 (confiscation of property); *Ghaby Kedieh v Benin* (provisional measures) (006/2020) (28 February 2020) (relating to ownership of land), *Houngue Eric Noudehouenou v Benin Order* (provisional measures) (004/2020) (22 November 2021) (in relation to issuance of national identity to allow the applicant to access his bank account).

27 *Ndajigimana v Tanzania* (provisional measures) (2019) 3 AfCLR 522.

28 *Lohé lssa Konaté v Burkina Faso* (provisional measures) (2013) 1 AfCLR 310; *ACHPR v Libya* (provisional measures) (2013) 1 AfCLR 145, *Houngue Eric Noudehouenou v Benin*, Order (provisional measures) (004/2020) (6 May 2020).

29 *Konaté* (n 28) paras 21-22. *ACHPR* (n 28) para 19(4); *Mugesera* (n 24), (the applicant alleges violation of the right against inhuman and degrading treatment as a result of denial of access to medical care, see para 26).

30 *ACHPR* (n 28) ('to preserve the integrity of the person of the detainee and protect his right to access legal representation and family'); see also *Mugesera* (n 24).

31 The Court asserts its discretionary power every time it considers applications made with a request for provisional measures. See *Johnson v Ghana* (provisional measures) (2017) 2 AfCLR 155, para 15, *Woyome* (n 26) para 24; *Charles Kajoloweka v Malawi* (055/2019) (provisional measures) (27 March 2020), para 20; *Guéhi* (n 24) para 17.

32 Clearly signalling a change in approach, in *Suy Bi and Others v Côte d'Ivoire*, the Court stressed that '[it] takes into account the applicable law with regard to provisional measures which are specific. The Court cannot issue a Ruling *pendente lite* except when the basic requisite conditions are met, i.e. extreme gravity, urgency and prevention of irreparable harm to persons. *Suy Bi and Others v Côte d'Ivoire* (provisional measures) (2019) 3 AfCLR 732, paras 27-29.

in general terms without applying the criteria with respect to each request or claims made in an application.[33] However, in its latest jurisprudence, despite some discernible discrepancies, the Court is increasingly showing the tendency to examine each request individually and sequentially and grant or deny the request on the basis of the outcome of such examination. The result of this individualised assessment of each claim and request has been that the Court indicated interim measures only with respect to one or some of the claims made by a party.[34]

The Court's recent shift in approach is clearly reflected again in the statistics. Between March 2013 and December 2019, the Court dealt with provisional measures in 38 applications and it declined to adopt such measures only in two applications. By contrast, in 2021, the Court received about 29 requests for provisional measures but granted only four, rejecting 22 and declaring moot, three of them. This may be because of the combined effect of a self-introspection into its practice, following recurring dissenting opinions of some judges of the Court itself,[35] and increasing criticisms from scholars and states that the Court is using its power to adopt provisional measures too liberally.[36]

4 CONDITIONS FOR PROVISIONAL MEASURES

As a precautionary step in judicial proceedings, the adoption of provisional measures is dependent on the fulfilment of certain conditions. These conditions vary from one court to the other but essentially, most of these conditions reinforce the exceptional nature of the regime.[37] The Protocol also stipulates some requirements for adoption of provisional measures. The Court always examines the

33 See *Mugesera* (n 24) paras 23-28.

34 In *Komi Koutché v Benin* (provisional measures) (2019) 3 AfCLR 725, the applicant requested provisional measures for his five allegations relating to an arrest warrant issued against him, domestic criminal proceedings, extradition requests, cancellation of his national passport and probation of his participation in election but the Court granted his request only in respect of the cancellation of his passport. See *Noudehouenou* (n 26) (only one from four requests).

35 As at August 2022, there are about 13 dissenting opinions and individual declarations appended to the Court's orders of provisional measures issued in seven applications.

36 Some respondent states, particularly, Tanzania, Ghana and Benin openly refused to comply with the Court's orders of provisional measures claiming that the Court is misusing its power or that it does not have such power with respect to some of the issues raised in the requests.

37 ICJ is duty bound to give notice of the measures, not only to Parties but also the UN Security Council. See art 41 (2) of the ICJ Statute, see also S Rosenne and TD Gill *The World Court: what it is and how it works* (1989) 95. The Rules of Procedure of the European Court of Justice also require that 'An application of a kind referred to in the preceding paragraphs shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measure applied for'. It also states that 'The application shall be made by a separate document'. See art 160(3) and (4), Rules of Procedure of the Court of Justice (2012).

fulfilment of these requirements, which we can generally group into two: preliminary and substantive conditions.[38] Preliminary conditions pertain to the question of jurisdiction, that is, whether the Court has the competence to consider and rule on the merits of the main application. On the other hand, the substantive conditions relate to the existence of extreme gravity, urgency or irreparable harm. As part of the Court's assessment of preliminary conditions, the Court has also addressed objections relating to non-compliance with the admissibility requirements set out in Article 56 of the Charter and Rule 50(2) of its Rules. Furthermore, the preventive and temporary character of provisional measures entails that the Court should use them for exceptional circumstances and for a definite period of time. Accordingly, we will examine the preventive nature and provisional dimension of the measures as part of the substantive conditions.

At the outset, it should be pointed out that the focus and depth of the Court's assessment of both preliminary and substantive conditions differ from one case to the other. Nonetheless, in general, the Court attempts to ascertain that all the conditions are met before it adopts a particular provisional measure.[39] In this exercise, the Court particularly takes into account the prevailing factual circumstances surrounding the case and assesses whether such circumstances meet the threshold of gravity and imminence set out in the Protocol. The Court often refuses to adopt provisional measures if, for instance, it is obvious that there is no situation revealing extreme gravity or urgency. Nor does it grant requests for provisional measures where no risk of irreparable harm is sufficiently demonstrated.

4.1 Preliminary conditions

4.1.1 *Prima facie* jurisdiction

In international adjudication, *prima facie* jurisdiction generally denotes 'first glance or first impression competence' of a tribunal. In ascertaining its *prima facie* jurisdiction, a tribunal simply accepts *pro tempore* ('for the time being') the facts as alleged by an applicant to be true and accordingly, examines whether there is a violation of one or more of the relevant treaty provisions applicable for the case before it.[40] This does not in principle require the applicant to provide proof of his factual claims and/or the tribunal to examine, in detail, the legal and factual basis of its jurisdiction. This is different from 'jurisdiction

38 It should be noted that preliminary conditions such as the question of material or personal competence may raise substantive issues and as such, the grouping is not meant to create distinction based on the nature of the conditions or the issues that might arise in relation to such conditions. The grouping is more related to the sequence of the Court's assessment given that the Court often addresses questions of jurisdiction and admissibility, if any, before it examines other conditions to indicate provisional measures.

39 *XYZ v Benin* (provisional measures) (2019) 3 AfCLR 754, paras 10, 21

40 *Oil Platforms Islamic Republic of Iran v United States of America*, ICJ (12 December 1996), Separate Opinion of Judge Higgins para 32.

proper', which involves a thorough examination of the legal foundation and factual circumstances of a tribunal's competence. In establishing its jurisdiction proper, it is not sufficient that a tribunal makes a first glance or temporary assessment of its competence but rather it should make a definitive finding that it has the power to determine the merits of the case. Furthermore, a tribunal ascertaining its *prima facie* jurisdiction does not necessarily need to respond to all objections to its jurisdiction while a tribunal seeking to establish its jurisdiction proper must assess and dispose of all objections, if any, to its competence.

When it deals with requests for provisional measures, the African Court, like some other international courts,[41] examines whether or not it has a *prima facie* jurisdiction on the merits of the application.[42] It is the first preliminary step that the Court takes before proceeding to consider the other conditions required to indicate provisional measures. Ordinarily, the Court does not exercise its power to indicate provisional measures of protection unless the rights claimed in the application, *prima facie*, appear to fall within the purview of its jurisdiction. The Court has not thus far defined what *prima facie* jurisdiction constitutes nor has it explained what the assessment of *prima facie* jurisdiction entails. In almost all its decisions on request for provisional measures, the Court simply uses its standard formulation that 'the Court need(s) not satisfy itself that it has jurisdiction on the merits of the case, but simply needs to satisfy itself, *prima facie*, that it has jurisdiction'[43] and then it continues to examine whether the basic jurisdictional requirements set out in Articles 3 and 5 of the Protocol are fulfilled.

The Court's case law also shows a rather inconsistent picture when it comes to the substantive assessment of its *prima facie* jurisdiction. In its second case against Libya, which concerned the alleged incommunicado detention of Saif Al-Islam Gaddafi,[44] the Court simply made reference to article 3 of the Protocol without further expounding on its material jurisdiction.[45] In comparison, in *Woyome v Ghana*, the Court established its *prima facie* (material) jurisdiction after affirming that the rights alleged to have been violated are protected by the

41 See for example, ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Order on request for the indication of provisional measures of 23 January 2020, paras 16-39.

42 The Court retains the discretion and remains the master of its jurisdiction and parties are bound by the interpretation given by the Court to the scope of its competence. See art 3(2) of the Court's Protocol.

43 *ACHPR* (n 23) para 15, *ACHPR* (n 28) para 10; *Hussein v Tanzania* (provisional measures) (2019) 3 AfCLR 768 para 8.

44 The son of the late Muhammed Gaddafi, ex-President of Libya.

45 The Court merely took 'judicial notice that provisional measures may be a consequence of *the right to protection* under the Charter, not requiring consideration of the substantive issues' (emphasis added *ACHPR* (n 28) paras 11 & 13. The Court gives the impression that it does not need to locate the allegations in an application in a specific provision or identifiable right protected by the Charter to issue an order of provisional measure. In his Separate Opinion, Justice Ouguergouz noted that 'the Court dealt with the issue of its *prima facie* jurisdiction at the personal level (*ratione personae*) only (paras 12 to 14) but did

Charter.[46] Despite such discrepancies, the Court's interpretation of its *prima facie* jurisdiction is primarily limited to its personal and material jurisdiction. It is very rarely that the Court considers its temporal jurisdiction, less so its territorial jurisdiction. Among the very few occasions on which the Court examined its temporal jurisdiction were when it dealt with *Mugessera* and *Noudehouenou* cases.[47] The reason why the Court had to establish its *prima facie* temporal jurisdiction in these matters was ostensibly because the respondent states had withdrawn their Declarations under article 34(6) of the Protocol.

However, to the author's knowledge, in no case has the Court ever attempted to establish its *prima facie* territorial jurisdiction while considering requests for provisional measures. This may be because in almost all the applications where provisional measures were considered, human rights violations were alleged to have been committed in the territory of the concerned respondent state. There will therefore likely be an issue when provisional measures are requested with respect to applications in which human rights violations are alleged to have been committed extraterritorially.[48]

On all occasions, the Court nonetheless confirms in general terms whether the state against which an application is filed is a party to the Charter and the Protocol.[49] Where the case is filed by individuals or NGOs, the Court also verifies if the respondent state has deposited the Declaration required under article 34(6) of the Protocol, instituting the individual complaint mechanism.[50]

It is important to note that the Court does not always require the appearance of a respondent state or hear parties in order to establish its *prima facie* jurisdiction. It does also require the exchange of pleadings between parties to be completed. The Court may establish its jurisdiction on the basis of initial filing of pleadings without conducting oral hearing.[51] However, it is generally accepted that there should

not ensure that it also had *prima facie* jurisdiction at the material level (*ratione materiae*), that is, that the rights to which it is necessary to avoid irreparable harm are *prima facie* guaranteed by the legal instruments to which the respondent state is a party to. It only sufficed for the Court to state that, in the present case, the rights in question are actually guaranteed under Articles 6 and 7 of the African Charter of which the Republic of Libya is party and the violation of which is alleged by the African Commission and thereby conclude that the Court's material jurisdiction is also established *prima facie*'. Separate Concurring Opinion of Fatsha Ougergouz, para 6.

46 *Woyome* (n 26) para 20, see also *Johnson* (n 31) para 20.

47 *Mugesera* (n 24) para 20. Application 004/2020, *Houngue Eric Noudehouenou v Benin*, order (provisional measures), 6 May 2020, paras 4-5.

48 In this regard, it is worth mentioning that in its recent landmark judgment in *Bernard Mornah v Benin and 7 Other Respondent States*, although there was no a request for provisional measures, the Court adopted the notion of extraterritorial application of human rights and affirmed that it has competence to examine human rights violations alleged to have been committed outside a state's national boundaries. *Bernard Mornah v Benin & 7 Other States* (Merits) (028/2018) (22 September 2022), paras 149-150.

49 *Chalula* (n 24) paras 10-11; *XYZ* (n 39) paras 13-16, *Hussein* (n 43) 3 AfCLR 768, paras 10-11, *Yayi v Benin* (provisional measures) (2019) 3 AfCLR 771, paras 16-18.

50 *Johnson* (n 31) para 11; *Mugesera* (n 24) para 3.

always be some information that 'appear to afford a basis on which [its] jurisdiction might be founded'.[52] Hence, a party seeking an order for provisional measures should adduce proof or a plausible source of *prima facie* case on the merits.

It should further be appreciated that the Court may indicate provisional measures despite the existence of valid objections to its competence. As was indicated earlier, the assessment of *prima facie jurisdiction* does not require the Court to examine and rule on objections to its jurisdiction. This precisely means that theoretically, the Court may adopt provisional measures without having 'jurisdiction proper'. Although the Court has not had such experience, the practice of other international courts evinces that provisional measures could be adopted even though the Court may later find that it has no jurisdiction proper. For instance, in the *Anglo-Iranian* case, the International Court of Justice issued an order for provisional measures while Iran (the respondent state) had raised objection to its jurisdiction which was later upheld.[53] Accordingly, the establishment of *prima facie* jurisdiction, and the adoption of provisional measures should not be taken as a definitive determination by the Court of its competence on the merits of a case. Parties could still raise objections to the Court's jurisdiction by adducing supporting evidence and depending on the weight of such evidence, the Court may dismiss or sustain the objections.

51 In the first case, the Court established its *prima facie* jurisdiction without even serving the application on the respondent state. Justifying this, it observed that 'in the present situation where there is an imminent risk of loss of human life and in view of the ongoing conflict in Libya that makes it difficult to serve the Application timeously on the Respondent and to arrange a hearing accordingly, the Court decided to make an order for provisional measures without written pleadings or oral hearings …' *ACHPR case* (2011) (n 22) para 13. In *Nuclear Tests* case, the International Court of Justice also held that 'the non-appearance of one of the states concerned cannot by itself constitute an obstacle to the indication of provisional measures'. *Nuclear Test Case (Austrialia v France)*, Order on the Request for the Interim Measures of Protection 22 June 1973, para 13, para 17.

52 This is a basic requirement to institute proceedings before the Court. Rule 40(1) of the Rules of the Court requires that all applications must contain a summary of the facts and of the evidence intended to be adduced. In its caselaw, the Court relied on the information provided in the initial application to establish its *prima facie* jurisdiction. The nature of information or evidence could be anything as long as it is sufficient to show that the Court, on first glance, has the competence to exercise its power. In *Nicaragua v United States of America*, to establish its prima facie jurisdiction, the ICJ accepted the affidavits sworn by Nicaragua's Foreign Minister and its Vice-Minister of the Interior ; a memorandum allegedly addressed to the United States Embassy in Honduras by the 'mercenary leaders'; United States legislative measures; texts of statements made in public or to the press by the President of the United States and senior officials of the United States administration; and a large number of reports in newspapers and reviews published in the United States. See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) Request for The Indication of Provisional Measures Order* of 10 May 1984, paras 26 & 29; See also *Nuclear Test Case* (n 51) paras 13 & 17.

53 *Anglo-Iranian Oil Co. Case*, Order of 5 July 1951; Anglo-Iranian Oil Co case (jurisdiction), judgment of July 22nd 1952 ICJ Reports I952, p115

4.1.2 Admissibility

The Charter as well as the Rules of the Court require that applications filed before the Court should meet certain conditions of admissibility.[54] These are: applications must disclose the identity of the applicant, be compatible with the Constitutive Act of the African Union and with the Charter, not contain disparaging or insulting languages, are not exclusively based on news disseminated through the mass media, are filed after exhaustion of local remedies and within reasonable time from the date local remedies were exhausted and finally, do not deal with cases which have already been settled in accordance with the principles of the Charter of the United Nations, the Constitutive Act of the African Union and the provisions of Charter.[55] Whenever it receives any application, the Court usually makes a preliminary examination of the fulfilment of these conditions and satisfies itself that the application is admissible prior to considering the merits.[56]

However, the Court has been consistent that it does not examine whether an application meets admissibility conditions for the purpose of indicating provisional measures. Instead, the Court deferred its consideration of admissibility to a later stage of the proceeding where it would examine its jurisdiction proper, the admissibility of the application and the merits of the case.[57] In *Houngue Eric Noudehouenou v Benin,* the respondent state challenged the applicant's request for provisional measures raising objections to the admissibility of the application.[58] The Court nonetheless dismissed the objection recalling that 'in the cases of provisional measures, the Charter nor the Protocol provided for conditions of admissibility, the examination of those measures being subject only to prima facie jurisdiction'.[59] Similarly, in the *Consolidated Applications 014/2020 and 017/2020, Elie Sandwidi and The Burkinabe Movement for Human and Peoples' Rights v Burkina Faso*, the respondent state had raised objections to the admissibility of the application, including the lack of exhaustion of local remedies. The Court rejected the respondent's objections affirming that issues of admissibility 'are immaterial as regards a request for provisional measures' are concerned.[60] The Court therefore prefers to prioritise the preservation of the rights of the applicant by postponing the determination of admissibility to a later stage. If the Court were however to delve into the

54 See Article 56 and Rule 50 of the Rules of Court (2020).

55 F Viljoen 'Introductory note: The jurisprudence of the African Court on Human and Peoples' Rights in 2018' (2021) *The Global Community Yearbook of International Law and Jurisprudence* 2019; L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374-398.

56 See Rule 49 of the Rules.

57 *Soro and Others* (n 25) paras 21-23; *Ajavon* (n 25) para 49; *Josiah v Tanzania* (provisional measures) (2016) 1 AfCLR 665, para 19; *Dominick Damian v Tanzania* (2016) 1 AfCLR 699, para 19.

58 *Houngue Eric Noudehouenou v Benin*, Order (Provisional Measures), 004/2020 (6 May 2020), para 27.

59 *As above*, para 28.

determination of admissibility, it would require it to take more time and collect and evaluate evidence such as on the fulfilment of the requirement of exhaustion of local remedies or whether the matter was previously settled within the terms of article 56(5) and (7) of the Charter, respectively.

Interestingly, in *Dexter Johnson v Ghana*, the Court granted the applicant's request for provisional measures ordering the respondent state to stay his execution, after he was convicted of murder and sentenced to the death penalty. In *Ghaby Kedieh v Benin*, a case involving a dispute over land, the Court similarly issued an order for a provisional measure suspending change of ownership of the disputed land.[61] The Court however later found that both applications were inadmissible.[62]

While the Court's jurisprudence is resoundingly clear that the adoption of provisional measures does not require assessment of admissibility conditions, one may still wonder whether the Court should indicate provisional measures in a situation where an application is evidently or likely to be inadmissible. This could be the case, for example, when the identity of the applicant is not properly revealed in the application as required under Rule 50(2)(a) of the Rules of the Court[63], or the application contains explicit and unambiguous disparaging or insulting language or was filed without exhaustion of local remedies contrary to Rule 50(2)(c) and (e) of the same. As in the *Dexter Johnson* case, the application may also clearly indicate that it concerns issues which have already been 'settled' within the terms of Rule 50(2)(g) of the Rules. In such cases, both the demands of judicial economy and procedural fairness may require the Court to summarily consider the request for provisional measures together with the application[64] and dismiss it thereof.[65] This will have a useful role in sparing the Court's limited resources from being expended on

60 *Elie Sandwidi and the Burkinabe Movement for Human and Peoples' Rights v Burkina Faso and 3 Other States,* (014/2020 and 017/2020) (25 September 2020), para 41; see also *Ajavon* (n 25) paras 30-32.

61 *Kedieh* (n 26) para 46.

62 *Johnson v Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99, paras 46-57; *Kedieh v Benin, 006/2020, Ruling (jurisdiction and admissibility)* (26 September 2021), para 70.

63 Note however that Rule 49(1)(b) of the Rules of the Court specify that an application which does not contain full information on the identity of the applicant may be processed by the Court where it is related to a request for provisional measures.

64 Unfortunately, as we will see later in this section, unlike the Rules of Procedures of other Courts (see for example, art 76 of the ICJ's Rules of Procedure), the Rules of the Court do not contain provisions allowing the Court to adopt accelerated procedure in order to prioritise some cases over others but nothing still prevents the Court therein from doing so. Indeed, in its decision on the Request for Advisory Opinion by the Pan African Parliament, the Court adopted an expedited procedure after having considered the urgency of the matter even though there was no legal basis in the Protocol or the Rules allowing the Court to do so. See *Advisory Opinion on the Request by the Pan African Parliament,* 001/2021 (16 July 2021), paras 13-20. Note that in the current Rules of the Court, the Court is empowered to prioritise cases which are selected to be dealt with under the pilot-judgment procedure. See Rule 66(1)(b) of the Rules.

applications with no prospect of success. Its European counterpart[66] has also followed the same approach with respect to applications which it identified 'manifestly unfounded' and eventually, declared inadmissible.[67]

Furthermore, it should be recalled that despite their 'temporary' nature, once adopted, provisional measures may be consequential in some cases, for instance, when they have the effect of suspending national elections. This is what actually happened in *Ajavon v Benin*, where the Court invoked its power to issue provisional measures and decided to postpone local elections until it ruled on the merits of the case.[68] If the Court did not eventually find violations, it is reported that the respondent state would have shouldered, in vain, 'the burden of technical budgeting of US$12 million, over two years of preparation, and the costs related to campaigning'.[69] It is therefore important that the Court, in dealing with requests for provisional measures, establishes not only that it has *prima facie* jurisdiction to examine the merits of an application but also that the application is *prima facie* admissible.

4.2 Substantive conditions

In addition to the preliminary conditions discussed above, as was pointed out earlier, there are substantive requirements that must be satisfied before the Court adopts an order for provisional measures. These are: *extreme gravity and/or urgency, irreparable harm to persons* and *the requirement necessity and such measures should be adopted provisionally and only for preventive purpose.*[70] The Court has repeatedly underscored that when these conditions, particularly, the requirement of gravity/urgency and irreparable harm are not met, it cannot indicate provisional measures.[71] The paper will now consider these conditions one after the other and examine how the Court has interpreted and applied them in its case law.

65 SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 29.

66 Nevertheless, the Rules of Procedure of the HRC require the Committee to specify, in its provisional measures, that such measures do 'not imply a determination on the admissibility or the merits of the case'. It is therefore contemplated that the Committee may indicate provisional measures regardless of the (in)admissibility of the petition.

67 *Collins and Akaziebie v Sweden*, ECHR (8 March 2007); *Izevbekhai v Ireland*, ECHR (17 May 2011); *Omeredo v Austria*, ECHR (20 September 2011). This is in accordance with Article 35 (2) (a) of the European Human Rights Convention, which permits the Court to declare an application inadmissible if it is 'incompatible with the provisions of the Convention or the Protocols thereto, *manifestly ill-founded*, or an abuse of the right of individual application' (emphasis added).

68 See *Ajavon* (n 25) para 69.

69 *Adjolohoun* (n 67) 29.

4.2.1 Extreme gravity and/or urgency

The first substantive prerequisite for the Court to issue an order for provisional measures is the existence of a situation of extreme gravity and/or urgency. There is a slight difference in formulation between the different versions of article 27(1) of the Protocol and Rule 59(1) of the Rules of the Court. In the English and Arabic versions, we find the expression 'extreme gravity *and* urgency', while the corresponding provisions of the French and Portuguese versions use the disjunctive term 'or', suggesting that the requirements of extreme gravity and urgency are not cumulative.[72] The case law of the Court is also not consistent on this; in some cases, the Court appears to have applied them alternatively[73] whereas in some other cases, the Court has applied the requirements of 'extreme gravity' and 'urgency' conjunctively often holding that the latter is 'consubstantial' (a rather theological term) with the former.[74] Nevertheless, given the nature of provisional measures, urgency and extreme gravity are not only essentially intertwined but also must always be applied cumulatively. It will therefore likely be incompatible with their very purpose if the Court

70 Strangely, in *Kodeih case*, the Court applying Rule 51(1) of the old Rules (2010) held that '... it is endowed to issue orders for provisional measures *not only* in cases of 'extreme gravity or urgency or when it is necessary to avoid irreparable harm' *but also* 'in the interest of the parties or of justice'. *Koedih* (n 25), para42 (emphasis added). This seems to suggest that the Court may indicate provisional measures in 'the interest of the parties or of justice' without examining the existence of a situation of extreme gravity or urgency. This would certainly be contrary to the nature of provisional measures and Rule 51 (1) of the old Rules itself does not envisage such possibility. Rule 51(1) provides that 'Pursuant to article 27(2) of the Protocol, the Court may, at the request of a party, the Commission or on its own accord, prescribe to the parties any interim measure which it deems necessary to adopt in the interest of the parties or of justice'. This provision leaves no impression that allows the Court to adopt provisional measures in the interests of the parties or of justice, where there is no urgency or extreme gravity or the measures are not necessary to avoid irreparable harm. It is also difficult to contemplate in practice a situation where the Court may adopt provisional measures 'in the interests of justice or of parties' without relying on the existence of a situation of extreme gravity and urgency. Furthermore, it should be noted that the current Rule 59(1) omits the reference to the 'interests of justice and of parties'.

71 *XYZ v Benin* (010/2020) (provisional measures), (3 April 2020), para 27, see also *XYZ v Benin* (2019) (provisional measures) 3 AfCLR 750, para 22, *Suy Bi and Others* (n 32), para 27.

72 Note that art 63(1) of the Inter-American Convention uses the conjunctive term 'and'.

73 *Koutché* (n 34) paras 22 and 26, *Kedieh* (n 26), paras 42-45; *Sandwidi and Others* (n 62), para 65; *Landry Angelo Adelakoun and Others v Benin* (012/2021) (25 June 2021), para 24; *Landry Angelo Adelakoun and Others v Benin* (012/2021) (24 March 2022), para 20; *Noudehouenou* (n 26), para 29.

74 *Koutché* (n 34) para 32, *Noudehouenou*, as above, para 26. In *Noudehouenou* case, the applicant requested for provisional measures that would oblige the respondent state to apologise him and the Court for making submissions on false and imaginary facts and for criticising the Court's decisions. The Court dismissed the request for lack of urgency without assessing the requirement of extreme gravity of the harm on his reputation and business (work). *Noudehouenou*, para 49.

decides to indicate provisional measures with respect to cases where there is a situation of extreme gravity but no urgency and *vice versa*.

In several applications, the Court has attempted to clarify the substantive content of a situation of extreme gravity and urgency and what it entails. In *Soro and Others v Côte d'Ivoire,* for example, the Court has observed that

> extreme gravity presupposes that there is a real 'risk and it is imminent that irreparable harm could take place before the court renders its final judgement' in the matter and there is urgency each time 'acts which may cause irreparable harm could take place at any time before the court renders its final decision in the matters' in question.[75]

Unfortunately, this interpretation of the Court erroneously conflates extreme gravity with the meaning of urgency. The notion of 'extreme gravity' is related with 'urgency' but the two are conceptually distinct from one another. Whereas intensity is inherent to the 'extreme gravity', imminence is only intrinsic to 'urgency'. As the Inter-American Court has rightly pointed out:

> In terms of gravity, for purposes of the adoption of provisional measures, the Convention requires that it be 'extreme,' that is, that it be at its most intense or highest level. The urgent nature implies that the risk or threat involved is imminent, which requires that the remedial response be immediate.[76]

In a similar fashion, the European Court indicates interim measures only where there is a '*serious* and *imminent* risk of irreparable harm'; thereby, establishing extreme gravity from the requirement of 'seriousness' and urgency from 'imminency' of the harm, respectively.[77] Accordingly, the standard of extreme gravity should be assessed on its own right based on the nature and degree of the harm whereas the existence of urgency should be gauged against the possibility and imminence of its occurrence. Again, a close study of the jurisprudence of the Court discloses that there is a considerable discrepancy in its interpretation and application of the two requirements.

The Court frequently states that each request for provisional measure shall be judged on a case-by-case basis, considering the circumstances or contexts of the case and of the applicant.[78] However, in practice, on several occasions, the Court has granted or denied requests for provisional measures without rigorous examination of the

75 *Soro and Others* (n 25), para 33, see also *Ajavon v Benin*, AfCHPR (Provisional Measures), (17 April 2020), para 61.

76 *Matter of the Penitentiary Complex of Curado regarding Brazil*, Provisional Measures, IACHR (22 May 2014), para 8, see also *Matters of Monagas Judicial Confinement Center ('La Pica'), Yare I and Yare II Capital Penitentiary Center (Yare Prison), Penitentiary Center of the Central Occidental Region (Uribana Prison), and El Rodeo I and El Rodeo II Capital Judicial Confinement Center*, Provisional Measures regarding Venezuela, IACHR (24 November 2009), *Considering clause 3 and Matter of two girls of the Taromenane indigenous peoples in voluntary isolation regarding Ecuador*, IACHR (31 March 2014).

77 See ECHR, *Interim Measures*, Fact sheet, August 2022, available at https://www.echr.coe.int/documents/fs_interim_measures_eng.pdf (accessed 21 August 2022).

78 *Ajavon v Benin* (002/2021) (29 March 2021) para 36 ; *Johnson* (n 31) para 15; *Chalula* (n 24) para 15; *Masudi Said Selemani v Tanzania*, 042/2019, Order of Provisional measure (20 November 2020) para 22.

standards of extreme gravity or urgency *vis-à-vis* the circumstances of the case including the particular situation of the applicant. In *Symon Vuwa Kaunda and 5 Others v Malawi*, for example, the Court nowhere in its decision referred to the requirement of urgency and simply rejected the Applicants' request for provisional measures to suspend a by-election only applying the requirements of urgency and irreparable harm.[79] On the other hand, the Court appears to have taken a definitive position that provisional measures should be indicated at all times with respect to cases involving the death penalty, regardless of demonstration of urgency and without consideration of other specific elements of each case. Suffice to mention a group of death penalty cases against Tanzania where the Court *suo motu* adopted provisional measures suspending the execution of applicants who were on death row after having been convicted of murder and sentenced to death.[80] In *Ally Rajabu and Others v Tanzania*, the Applicants were convicted and sentenced to the death penalty on 25 November 2011. The Court of Appeal of Tanzania confirmed their conviction and sentence on 25 March 2013. On 24 March 2015, the applicants filed their application before the Court challenging the decisions of domestic courts. A year later,[81] that is, on 18 March 2016, the Court *suo motu* adopted a provisional measure suspending the execution of the death penalty imposed on the applicants.[82] On the same day, in two other similar cases of *Armand Guehi v Tanzania* and *John Lazaro v Tanzania*, the Court *suo motu* indicated a provisional measure suspending the enforcement of the death penalty imposed on the applicants.

Strangely, in all the three cases, the Court neither referred to the requirement of urgency in its analysis nor did it attempt to establish from the facts that the possibility of the applicants' execution was imminent.[83] The Court exclusively relied on the nature of the punishment, that is, the death penalty, to satisfy itself that there existed a situation of extreme gravity and irreparable harm without taking into account, for instance, the *de facto* moratorium in place in the respondent state. Of course, it may be argued that a *de facto* moratorium does not minimise the risk of execution and thus, the criterion of urgency continues to exist as long as the death penalty remains imposed. However, considering the general trend towards abolishment of the death penalty, if there is a continuing *de facto* moratorium for some considerable time in a respondent state, this should be taken into account as a relevant factor in the assessment of urgency.[84]

79 In *Symon Vuwa Kaunda and 5 others v Malawi,* 013/2021 11 June 2021, paras 21-30

80 *Rajabu* (n 24); *Lazaro* (n 24).

81 This was five years after the decision of the High Court and three years following the decision of the Court of Appeal.

82 *Rajabu* (n 24) paras 14-20.

83 As above; see also *Guéhi* (n 24), paras 15-22; *Rajabu*, paras 12-18. In *Johnson* case, the Court referred to the criterion of urgency but failed to demonstrate how it was met in this particular case. See *Johnson* (n 31), para 16.

84 See on this point the separate opinion Justice Blaise Tchikaya in *Rajabu and Others v Tanzania* (merits and reparations) (2019) 3 AfCLR 539, paras 17-20.

Accordingly, if the Court had complied with its Rules and meticulously applied the requirement of urgency, it would have considered the fact that the applicants were not executed years after their conviction and that the Applicants themselves did not indicate anything in their application showing that the respondent state was taking steps to execute them any time soon. In fact, if death penalty cases were to be presumed as having always fulfilled the requirement of urgency, the Court itself would not have waited a year or so from the date the request was made to order provisional measures.[85] The Court's complete disregard of the requirement of urgency in the said death penalty cases is thus not only incongruent with the Protocol and its Rules but also with the nature of provisional measures. Provisional measures are not designed to deal with every possible risk of harm but rather only those imminent risks that are likely to materialise prior to the Court's decision on the merits and thus, require prompt intervention. As the Court itself has correctly observed in *Houngue Eric Noudehouenou v Benin*,

> Urgency (...) means a real and imminent risk that irreparable harm will be caused before it renders its final judgment. (...) the risk in question must be real, which excludes the purely hypothetical risk and justifies the need to repair it immediately.[86]

The requirement of urgency therefore ensures that provisional measures are used exceptionally only where situations reveal that there is a credible and evident risk with high probability of occurrence within the foreseeable future, in any case, before the Court disposes the case on merits. Note that in its more recent cases, the Court has shown some shift in its treatment of urgency in relation to the death penalty. Although its reasoning remains flawed, it has at least begun to apply the criterion of urgency in death penalty cases. In *Bashiru Rashid Omar v Tanzania*, for instance, the Court acknowledged that 'the Respondent state has been implementing a general moratorium and has not carried out any death sentence since 1994' but it did 'not deem such commitment sufficient in the face of such a serious risk as the execution of the Applicant'.[87] The Court accordingly established that there was urgency given that 'As a matter of fact, despite the moratorium and the lack of execution in a long time, the Respondent state may at any time carry out the death penalty'.[88] One rather notable case is *Akouedenoudje v Benin*[89] where the Court for the first time rightly applied the criterion of urgency. In this case, the Court noted that:

> The Applicant does not provide any evidence that he or any other specifically designated person is in a situation of urgency to which the provisions of the Inter-Ministerial Order must be applied. The Court further observes that the Applicant

85 In *Hussein case* (n 41), for instance, the applicant filed his request for provisional measures on 2 March 2018 but the court indicated provisional measures only almost a year later on 11 February 2019.

86 *Noudehouenou* (n 26), para 33

87 *Omar v Tanzania* (045/2020) (order of provisional measure) (21 February 2021), para 27

88 As above.

89 *Conoïde Togla Latondji Akouedenoudje v Benin* (024/2020) (25 September 2020), paras 23-24.

> does not provide evidence as to the reality and the imminence of the irreparable damage he will suffer as a result of implementation of the Inter-Ministerial Order.

Certainly, this is a good development in the Court's jurisprudence[90] However, the Court's general analysis still overlooks the element of imminence, something which inherently epitomises urgency. In the *Bashir Omar* case, for example, the Court should have found some evidence indicating the imminent possible reverse of the *de facto* moratorium, which the respondent state has observed over seventeen (17) years, instead of relying on an unsubstantiated possibility that 'the Respondent state may at any time carry out the death penalty'.[91]

Be this as it may, it should be pointed out that the criterion of urgency naturally requires prioritisation of applications for provisional measures over all other matters. Unlike the Rules of Procedure of other Courts,[92] the Rules of the Court do not explicitly provide a provision allowing or requiring the Court to give priority to requests for provisional measures.[93] Perhaps, for this reason, the Court has often taken longer time to adopt provisional measures than ordinarily expected.[94] As a result, either the requests for the provisional measure were overtaken by events[95] or that the Court indicated the measures too close to the expected date of materialisation of the expected harm.[96]

90 See also *Mwita v Tanzania* (012/2019) (9 April 2020), para 21 (In this case, while applying the criterion of urgency, the Court appears to suggest that urgency is inherent in the death penalty. However, this is not accurate. What is rather inherent in the death penalty is the criterion of extreme gravity, certainly, not urgency).

91 In fact, once the death penalty is imposed, the possibility of execution is always there whether the moratorium is *de facto* or *de jure*, as in the former, the practice may be changed or in the latter case, the law may be amended. The relevant question that should thus be considered in determining urgency is whether there is anything showing the possibility of a change of course in the practice or in the law before the Court is likely to finalise the determination of the matter on the merits. This could be the case if the government is in the process of enforcing or amending the law to change the *de facto* or *de jure* moratorium, respectively.

92 For instance, Rule 74 of the Rules of Procedure of the International Court of Justice (1978) provides: 'a request for the indication of provisional measures shall have priority over all other cases'.

93 Rule 59(2) of the Rules only envisages the possibility where the President of the Court may solicit and obtain the views of other Judges in case of extreme urgency. However, the Court is empowered to prioritise those cases which are selected to be dealt with under the pilot-judgment procedure. See Rule 66(1)(b) of the Rules.

94 In *Hussein v Tanzania*, the applicant requested for provisional measures on 2 March, 2018, but indicated provisional measures on 11 February 2019, in *Kajoloweka* (n 31), the request was made on 18 October 2019, but the Court adopted provisional measures on 27 March 2020; in *Omar* case (n 89), the request was made on 21 November 2020 but adoption was on 26 Feb 2021 and in *Mwita* (n 92), the request was made on 29 October 2019 but the provisional measure was indicated on 9 April 2020. See on this point, Separate Concurring Opinion Fatasha Ougergouz (n 28), para 5.

95 See *Koutché* (n 34) para 24; *Nyamwasa and Others v Rwanda* (interim measures) (2017) 2 AfCLR 1, paras 34-36

96 In *Ajavon v Benin* (062/2019), the Court received, on 9 January 2020, the specific request for provisional measures in respect of the elections to be held on 17 May 2020. The Court issued the order suspending the elections on 17 April 2020, 30 days before the scheduled election date, that is, 20 May 2020. paras 7-11. See also *Adjolohoun* (n 67) 23.

Astonishingly, in *Komi Koutché v Benin*,[97] the Court even declined to pronounce itself on a request for provisional measures to suspend elections declaring that 'the Application having been filed a week before the elections, it was materially unable to decide on such a request at such a short period of time'. The Court's position in this case becomes questionable when one looks at the jurisprudence of other regional and international human rights bodies. For example, the HRC adopted provisional measures within a day[98] or even on the same day of the request.[99] In *Shamayev and Others v Georgia,*[100] the European Court indicated a provisional measure prohibiting the extradition of the applicants within two hours from the time the request was made and considering the urgency, its order was communicated to the authorities of the respondent by phone. In view of this, a period of 10 days was sufficient for the Court to make its ruling on the request for provisional measures provided that all necessary conditions were met.

4.2.2 The requirement of necessity

Article 27(2) of the Protocol stipulates that the Court shall '...where *necessary* to avoid irreparable harm to persons, adopt such provisional measures as it deems *necessary*...'.[101] In this provision, the term 'necessary' is mentioned twice and on the first glance, the second 'necessary' appears to be tautologous. However, a careful reading of the provision reveals that the repetition is clearly intentional, to achieve two different purposes. The former entails that the Court must determine whether there is a situation that dictates the adoption of provisional measures in order to prevent irreparable harm, whereas the latter seems to relate to the nature of the provisional measures that the Court adopts. In this regard, the second 'necessary', appears to give the discretion to choose among a range of possible provisional measures that is/are best suitable to the circumstances of the case. Regardless of this distinction, what looks so evident in the provision is the weight that the drafters attached to the requirement of necessity in the regime of provisional measures.

Unfortunately, in none of its orders has, thus far, the Court thoroughly expounded or applied necessity as an independent condition for adopting provisional measures. In international law, necessity may denote several things, depending on the context in which it is used.[102] In the *Nicaragua* case, the ICJ, for example, noted that the term 'necessary' in Article XXIV of the Treaty of Friendship, Commerce

97 *Koutché* (n 34) para 24.

98 See *Michael Robinson v Jamaica* HRC (29 March 2000), initial submission of 9 December 1996, Rule 86/91 of 10 December 1996)

99 See *Mansaraj et al*; *Gborie et al* and *Sesay et al v Sierra Leone* HRC (16 July 2001), Initial submission of 12 and 13 October 1998)

100 E Rieter *Preventing irreparable harm: provisional measures in international human rights adjudication* (2010), 173; see also M Gavouneli '*Shamayev & 12 Others v Georgia & Russia*. App. 36378/02' (2006) 100 *The American Journal of International Law* 675.

101 See also Rule 59(1) of the Rules (emphasis added).

and Navigation[103], does not mean merely 'useful' or 'essential'.[104] Likewise, the European Court has observed that necessity as a condition to restrict human rights is 'not synonymous with 'indispensable' neither has it the flexibility of such expressions as 'admissible,' 'ordinary,' 'useful,' 'reasonable' or 'desirable.'[105] Furthermore, both the European Court and the Inter-American Court have stressed that proportionality is 'implicit in the standard of necessity'[106] and therefore, the assessment of necessity involves a balancing exercise, the choice of the most relevant or appropriate and the least intrusive (minimal impairing) measure.[107]

A logical interpretation of article 27 of the Protocol accordingly requires the Court to ascertain, prior to adopting provisional measures, whether the circumstances absolutely command their adoption. It must also make sure that the provisional measures indicated must also be materially able to prevent the irreversible harm. It becomes meaningless to adopt provisional measures not capable of preventing the harm or with respect to non-preventable harm. The standard of necessity enshrined in article 27 also requires the Court to undertake a sort of cost-benefit assessment[108] and should adopt provisional measures only if the benefit of such measures in preventing the irreversible harm outweighs the cost of enforcing such measures. For example, in *Ajavon v Benin*, the Court would have unlikely ordered suspension of local elections just a month before they were to be conducted if it properly had assessed the cost that the respondent state would have sustained as a result of complying with such measures *vis-à-vis* the harm that the applicant would incur as a result of his inability to participate in the election.[109] The Court would further have considered the appropriateness of the suspension and how likely was it able to prevent the purported irreparable harm.

102 In the regime of state responsibility, e.g., necessity implies an emergency situation obliging a state to engage in conduct that breaches its international obligations and it can raise it as a defence to preclude its international responsibility. Article 25, articles on state responsibility (International Law Commission, 2001).

103 *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), ICJ (26 November 19840 (1984), paras 224 and 282.

104 As above, paras 224 and 282.

105 As above.

106 *Compulsory Membership Advisory Opinion,* IACHR, No. 5 OC-5/85 (1985), para 46*, The Sunday Times v United Kingdom* ECHR (1979), para *59; Barthold v Germany* ECHR (1985), para 59.

107 *Advisory Opinion* (n 109), para 47. See also *Information severien Lentia and Others v Austria*, ECHR (24 November 1993), para 39, *Sigurdur A. Sigurjonsson v Iceland* ECHR (1993), para 41, *Amnesty International and Others v Sudan* AHRLR 30 (2000), para 80, *Christians against Racism and Fascism v the United Kingdom,* Commission decision *of* 16 July 1980, and *van Mechelen and Others v The Netherlands,* ECHR (23 April 1997) para 58.

108 In domestic systems, in relation to requests for injunctions, this exercise is done in accordance with the *principle of balance of convenience*, in which the likely injury or damage which would be sustained by one party if the injunction were not granted is weighed against the likely inconvenience or cost for the defendant if it was.

109 See *Ajavon* (n 77) para 69.

Finally, it should be borne in mind that, in establishing necessity, the Court does not have unfettered discretion. There is an element of objectivity in the requirement of necessity. For example, in the normal course of things, it is not necessary to order the release of an inmate, who is convicted of serious crime and sentenced to death while the suspension of execution of the sentence would suffice to avoid the irreparable harm to his life. Accordingly, the Court should exercise its discretion within the limits placed upon it by necessity, including the test of reasonableness.[110]

4.2.3 Irreparable harm to the person

The most problematic area of the Court's jurisprudence on provisional measures relates to the requirement of 'irreparable harm'. Article 27(2) of the Protocol provides that the Court shall exercise its power to indicate provisional measures if it is necessary to avoid 'irreparable harm to persons'. Three important elements are lumped together in this quoted expression: first, there must be 'harm', second, the harm must be of irreparable nature and thirdly, the harm must be directed against *persons*, a narrow and purposive interpretation of which suggests that the harm in principle should directly or indirectly affect 'natural' persons, who are generally the primary victims of 'irreparable' harm.[111] This excludes a harm affecting 'goods or legal interests that can be repairable'.[112]

The Court has rarely interpreted and applied these elements systematically and in a coherent manner. In fact, the Court's case law shows that there is glaring irregularity and lack of conceptual precision in its assessment of the standard of 'irreparable harm to persons' and its elements. In *Ajavon v Benin* (027/2019) and other cases,[113] the Court observed, for example, that '[w]ith respect to irreparable harm, the Court considers that there must be a 'reasonable probability of occurrence' having regard to the context and the Applicant's personal situation'.[114] On the other hand, in *Charles Kajoloweka v Malawi,* the Court remarked that:

> With respect to irreparable harm, the Court recalls that it is established in instances where the impugned acts are capable of seriously compromising

110 According to the IACHR, reasonableness is 'a value judgment and, when applied to a law, it implies conformity to the principles of common sense.' *Paniagua Morales and Others* case, IACHR (25 January 1996), paras 40-41.

111 It should however be noted that some forms of harm, such as destruction of property or attacks directed against the reputation of business may have an irreversible impact on even legal persons. Furthermore, individuals may also be the ultimate victim of measures directed against companies. In the case of *Ajavon*, e.g., the applicant was a shareholder of the companies, which were a subject of tax adjustment proceedings in domestic courts. However, even in this case, the Court ordered provisional measures with respect to seizures of the property of the Applicant and his family, and not of the companies. *Ajavon* (n 80), paras 41-48.

112 See *Matter of the Penitentiary Complex of Curado regarding Brazil*, IACHR (22 May 2014), para 8.

113 Houngue Eric Noudehouenou v Benin (024/2020) Order (Provisional Measures), para 31; *Cona*ïde Togia Latondji Akouedenoudje, (024/2020) (25 September 2020), para 22.

> the rights whose violation is alleged in a way that prejudice would be caused prior to the Court making a determination on the merits of the matter.[115]

It is evident that in *Ajavon,* the Court focused more on the 'probability of occurrence' of the harm[116] whereas in *Kajoloweka*, it emphasised, rightly so, on the nature of the harm itself, that is, whether it was capable of seriously prejudicing the rights alleged to have been violated. Apart from such absence of conceptual precision, the Court has also been generously adopting provisional measures in some cases without conducting a rigorous examination of the irreparable nature of the harm. All the same, in almost other identical cases, it has refused to grant requests for provisional measures strictly applying the same condition. Two comparable cases can be cited here in this regard.

First, in *Soro and Others v Côte d'Ivoire* (012/20)*,* the Court indicated provisional measures suspending the arrest and detention warrants of the applicants on the basis that implementation of the warrants would prevent them from participating in planned presidential elections in which one of them had already indicated to stand as a candidate.[117] According to the Court, the arrest and detention warrants issued against the applicants would engender risk of irreparable harm to the applicants, including, denying them the opportunity to participate in the said elections. In contrast, in a very similar case of *Komi Koutché v Benin*, the Court declined to grant the applicant's request to suspend legislative elections stating, among others, that his claims were connected with the merits of the case and that it was not anyway, able to deal with the request as it had been filed a week before the elections.[118] This was despite the fact that, as was the case in *Soro and Others,* an arrest warrant was issued against the applicants. While the two cases were obviously not identical and have their own peculiarities, the Court's appreciation of very similar risks of harm is discernibly different, to the extent that it could be viewed as applying double standard to similar situations.

Second, in the *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania*,[119] the applicants sought to obtain a provisional measure to stay parliamentary and presidential elections alleging that the respondent state failed to allow independent candidacy, as was ordered to do so by the Court earlier.[120] The applicants also cited the shrinking political space ahead of the elections,

114 *Ajavon v Benin*, (027/2017) (1 April 2021), para 29, see also *Ajavon* (n 77), para 61; *Noudehouenou* (n 26), para 33; *African Commission on Human and Peoples' Rights v Kenya* (provisional measures) (2013) 1 AfCLR 193, para 23; *Chrizant John v Tanzania* (2016) 1 AfCLR 702, para 16; *Gabriel and Mutakyawa v Tanzania* (2016) 1 AfCLR 705, paras 15-18; *Nzigiyimana Zabron v Tanzania* (2016) 1 AfCLR 708, paras 14-17.

115 *Kajoloweka* (n 30) para 23.

116 As discussed earlier, the 'probability of occurrence' is more related to the criterion of urgency than to the requirement that there must be an irreparable harm.

117 *Soro and Others* (n 24) paras 34-40.

118 *Koutché* (n 34) paras 24-26.

119 *Legal and Human Rights Centre and Tanganyika Law Society v Tanzania* (036/2020) (30 October 2020).

because of the government's ban on political activities such as political rallies and gatherings, arrests and harassment of opposition politicians and journalists and adoption of laws and policies that restrict media freedoms and free speech.[121] They submitted that in the absence of corrective actions and compliance with the Court's order, 'it will be difficult, if not impossible, to have a fair, just and credible electoral process' and consequently, conducting elections in this context would be grave and irreparable to them and the whole of the Tanzanian population.[122] The Court nevertheless refused to grant the request of the applicants. The Court stated, *inter alia*, that 'the Applicants have not demonstrated that they and Tanzanian citizens would be prevented from participating in the electoral process or that such a process would cause irreparable harm to them or in the exercise of their rights'.[123] Unfortunately, the Court did not consider the government's alleged actions such as arrests, promulgation of restrictive laws and arrests and harassment of opposition that the applicants cited to prove the existence of risk of irreparable harm.

One could also ask whether the aspect of 'irreparability' of the harm ever exists in relation to elections and those property-related cases, which do not directly affect the life of applicants.[124] Although it may be difficult to do so at international level, the recent jurisprudence of domestic courts show that elections, even those at the highest level, can be annulled or reversed.[125] In other words, strictly speaking, there is nothing inherently irreparable or irreversible when it comes to elections. The same applies to property interests except those which may, for instance, have sentimental value to the applicants and where a case involves a risk of serious and irreparable harm to the applicant's basic rights relating to their life or bodily integrity or human dignity.[126]

120 Consolidated Application *Tanganyika Law Society and the Legal and Human Rights Centre & Reverend Christopher Mtikila v Tanzania*, 009/2011 and 011/2011 (14 June 2013).

121 *Legal and Human Rights Centre* (n 122) para 8.

122 As above, para 19.

123 As above, para 28.

124 It is not, however, unusual for international human rights bodies to indicate provisional measures in contexts of elections, particularly where criminal proceedings are instituted against individuals with apparent intention to bar or disqualify them from participating in election. For example, in *Luis Inazio da Silva's v Brazil*, the UN Human Rights Committee issued provisional measures on 17 August 2018, requesting Brazil 'not to prevent [the petitioner] from standing for election at the 2018 presidential elections, until the pending applications for review of his conviction have been completed in fair judicial proceedings and the conviction has become final'.

125 In 2017 and 2020, for instance, the Kenyan and Malawian Supreme Courts respectively annulled Presidential elections citing irregularities in the election process. Kenya Supreme Court nullifies presidential election, orders new vote, *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*, Kenya Supreme Court Judgment (20 September 2017); *Mutharika & Another v Chilima & Another* MSCA Constitutional Appeal 1 of 2020 (2020) MWSC 1 (8 May 2020).

126 It does not seem to be justified to indicate provisional measures with respect to property interests simply because, in the absence of the measures, its recovery or reinstatement becomes difficult or cumbersome.

However, the Court has adopted provisional measures in connection to property interests, for example, to prevent seizure or confiscation of the property of an applicant, albeit without sufficiently explaining how such seizure or confiscation threatens the fundamental rights of the applicant with *irreversible* effect.[127]

In this vein, it is instructive to refer to the practice of the European Court. The latter indicates interim measures only in limited situations, and mostly, when there is a threat to 'core rights' such as the right to life or to prohibition against torture and inhuman or degrading treatment.[128] It has refused to adopt provisional measures in several instances involving an attempt to force a government to organise a referendum,[129] to prevent the imminent demolition of property,[130] to prevent the dissolution of a political party;[131] and to suspend constitutional amendments to change the term of office of judges.[132] In most of these cases, the ECHR rejected the requests for interim measures stressing that each case 'did not involve a risk of serious and irreparable harm of a core right under the European Convention on Human Rights'[133] Accordingly, in comparison to the African Court, the

127 See *Woyome* (n 25) para 25; *Kedieh* (n 26) para 45; *Ajavon* (n 117) paras 35; *Sandwidi and Others* (n 62) paras 77-78, the Court refused to grant provisional measures for lack of evidence of irreparable harm despite the fact the applicants were laid off from their position and they claimed to be in a destitute situation which declared that there was no proof. Note that in *Woyome, Ajavon* and *Kedieh* cases, the Court simply established the existence of irreparable harm from decisions of municipal courts allowing the seizure and execution, without seeking proof of the 'irreparable' harm that would be occasioned to the applicants' right to life or dignity as a result of the execution of the said decisions.

128 For purpose of indicating interim measures, it identifies, mainly, the right to life and the right to prohibition against torture and ill-treatment and exceptionally, the right to a fair trial (often relating to lifting judicial immunity of judges), the right to respect for private and family life, and freedom of expression as 'core rights'. Very exceptionally, the Court may indicate such measures in response to certain requests concerning the right to a fair trial (art 6 of the Convention), the right to respect for private and family life (Article 8 of the Convention) 8 and freedom of expression (art 10 of the Convention). See, eg, *ANO RID Novaya Gazeta and Others v Russia* ECHR (10 March 2022), https://hudoc.echr.coe.int/eng-press?i=003-7282927-9922567 (accessed 29 July 2022).

129 See concerning the inappropriate use of interim measures procedure with regard to requests for provisional measures against the French Government, press release of 21 December 2007, https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2226998-2371975%22] (accessed 29 July 2020)

130 *Upravlinnya Krymskoyi Yeparkhiyi Ukrayinskoyi Pravoslavnoyi Tserkvy (Crimean branch of the Ukrainian Orthodox Church of the Kyiv Patriarchate) v Russia*, ECHR (1 September 2020) https://hudoc.echr.coe.int/eng?i=003-6777466-9056249 (accessed 4 August 2022).

131 In the case of *Sezer v Turkey*, the Court declined to adopt an interim measure to prevent the Turkish Constitutional Court from dissolving the AKP (Adalet ve Kalkınma Partisi – Justice and Development Party). See press release of 28 July 2008. Unfortunately, the Court did not, at least not publicly, provide reasons for denying the request. https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-2445826-2632882%22]}

132 *Gyulumyan and Others v Armenia* press release of 8 July 2020, https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6744576-8998072%22]} (accessed 16 August 2022).

133 As above.

ECHR appears to have a clearer and stricter normative standard in its regime of interim measures.

In any event, it should be stressed that article 27 of the Protocol permits adoption of provisional measures where there is an actual/real danger or harm, even though it has not yet materialised. This excludes 'purely hypothetical risk' which does not justify the need to redress it immediately.[134] Interestingly, the Court seems to also require that individuals may not request for provisional measures on behalf of other persons. In *XYZ v Benin*, the Court rejected the application for provisional measures for, among others, 'the Applicant is asking the Court to order provisional measures in favour of persons who are not parties to the present case, [and]...failed to provide evidence of the urgency or gravity or irreparable harm that the implementation of the Decree could cause him *personally* .'[135] Needless to say, this does not preclude applicants from requesting provisional measures through legal representatives of their own choice.[136]

4.2.4 Preventive and provisional nature

The other criterion in the regime of provisional measures is that the measures shall be provisional. This arises from the very temporary and preventive nature of such measures. As they are adopted in response to an imminent danger, the provisional character of the measures is essentially intertwined with the requirement of urgency. It is inherent in the preventive nature of provisional measures that they cannot be adopted if they potentially or prematurely dispose of a case or an issue in a case. Due to the ancillary nature of the authority to indicate provisional measures, the final judgement in a case shall therefore not be rendered inoperative or practically unenforceable by the provisional measures. Although provisional measures may in some cases lay the basis for the final resolution of a case, parties cannot use them in order to obtain some sort of interim judgment.

In its case law, the African Court has consistently underscored the provisional and preventive nature of the measures.[137] The Court has

134 *Noudehouenou* (n 26), para33. In this case, the Court rejected the applicant's request holding that 'the requested provisional measure is based on *potential* violation of rights protected by the Charter, ICCPR and UDHR', which in other words means that the danger was not real or concrete. See also *Conoïde Togla Latondji Akouedenoudje v Benin (024/2020)* Order (provisional measure), (25 September 2020), para 21.

135 XYZ, as above, para 23 (emphasis added).

136 Indeed, several requests for provisional measures filed before the Court have been made through legal representatives. See eg, *Babarou Bocoum v Mali* (023/2020) (23 October 2020) and *Woyome case* (n 25).

137 See for example, *Yayi* (n 51) para 29; *Noudehouenou* (n 116) para 33. In *XYZ v Benin*, Justice Ben Achour also stated that 'By definition, the measure ordered by the Court is simply provisional. This means that not only is it not final, but that it is also reviewable or even revocable at any time if, having regard to the circumstances of the case, the Court deems such action necessary. This derives from the very nature of orders for provisional measures and the Court's discretionary power to make a determination' *XYZ* (n 39), Dissenting opinion of Judge Ben Achour para 20.

also emphasised that provisional measures 'will not in any way prejudge the findings it might make on its jurisdiction, the admissibility of the application and the merits of the case'.[138] The Court has often refused to indicate provisional measures with respect to claims that it deemed have the effect of pre-empting or prejudging the Court's latter and final determination of the case.[139] In *Konaté*, for example, the applicant, a journalist, was convicted of defamation and sentenced to a one-year term of imprisonment and the payment of fine as damages. In his application, he challenged his sentence of imprisonment as a violation of his right to freedom of expression and prayed the Court to order his immediate release pending the determination of his application on merits. The Court denied the prayer noting that the issues in the prayer 'correspond in substance', to one of the reliefs sought in the merits and granting the request 'would adversely affect consideration of the substantive case'.[140]

The preventive nature of provisional measures has the additional effect that they cannot be adopted if they serve no purpose in averting a prospective harm. As soon as the danger disappears,[141] the necessity to adopt a particular provisional measure also ceases to exist and if already adopted, it has to be lifted or modified, as necessary.[142] Various factors of legal or factual nature may remove the state of danger. In *Nyamwasa and Others*, for instance, the applicants requested the

138 *Nhabi v Tanzania* (provisional measures) (2019) 3 AfCLR 10 para 19; *Chalula* (n 24), para 19; *Koutché* (n 34) para 33; *XYZ v Benin* (2019) (provisional measures) 3 AfCLR 745 para 24; *XYZ* (n 73) para 22

139 The Court has held that 'a request for provisional measures prejudges the merits of an Application where the subject of the measures sought in the request is similar to the subject of the measure sought in the Application, where its purpose is to achieve the same result or, in any event, where it touches on an issue which the Court will necessarily have to adjudicate upon when examining the merits of the Application'. See *Ndajigimana* (n 27) para 25, *Glory Cyriaque Hossou and Another v Benin*, 016/2020, Order (25 September 2020), para 28. *Sandwidi and Others* (n 62) para 65; *Romaric Jesukpego Zinsou v Benin* 006/2021 (10 September 2021) para 26; In *XYZ v Benin*, the applicant requested for suspension of the work of Orientation and Supervisory Council (COS), an electoral institution, which the applicant alleged to have a composition making it an impartial body to organise free and fair elections. The Court stated that the request would touch upon the merits of the case. The Court refusing to grant the request observed that 'the application for provisional measures to suspend the functioning of the administrative structure, the COS in question *also touches on the question of the merits* on which the Court is called upon to rule in due course' (emphasis added).

140 *Konaté* (n 28) para 19, see also *Romaric Jesukpego Zinsou v Benin*, 6/2021 (10 September 2021) para 27 (relating to discrimination between nationals and non-nationals); *Romaric Jesukpego Zinsou & 2 others v Benin*, 7/2021 (2 September 2021), paras 22-23 (relating to the death of a student and alleged failure of the respondent state to take steps to prosecute and hold accountable the perpetrators of the crime).

141 Rule 94(3) of the Rules of Procedure of the UN ICCPR Human Rights Committee explicitly provides that 'the Committee will examine any arguments presented by the state concerned on the request to take interim measures, including *reasons that would justify the lifting of the measures*' (emphasis added). Unfortunately, a similar provision is not found in the Rules of Procedure of the African Court. Nevertheless, provisional measures as enshrined in the protocol and the rules of the Court are inextricably interlinked with the presence of persisting danger and there is no reason why the Court would not rescind if the danger no longer continues to exist.

Court to issue an order for provisional measure to suspend a planned referendum on a proposed amendment to a provision in the Constitution of Rwanda governing the term of Office of the President. The referendum was scheduled for 17 December 2015. Considering the urgency of the matter, the Court decided to hold a public hearing on the request on 25 November 2015. However, citing some logistical difficulties, the applicants claimed that they were unable to travel to the seat of the Court on the said date and implored the Court to defer the public hearing, which the Court did on 20 November 2015.[143] In the meantime, the referendum took place as it had been planned and by the time the Court dealt with the applicants' request for provisional measures, the request was moot. As a result, stressing the preventive nature of the measures and that the request was overtaken by events, the Court declared that it was unable to grant the request.[144] Similarly, in *Adama Diarra v Mali*, the Court declined to grant a request for provisional measures after the applicant was released and the request became moot.[145] Overall, the Court's understanding and application of the provisional character and preventive nature of provisional measures are proper and consistent with the lone exception that it often overlooks revoking provisional measures after dismissing an application for lack of jurisdiction or inadmissibility.[146] Provisional

142 This is also a common practice in other courts. For example, the European Court of Human Rights, in *A.S.B. v The Netherlands* decided to discontinue its consideration of interim measures after the applicant was given refugee status in the Netherlands and the risk of his expulsion to Jamaica was no longer there. *ASB v The Netherlands* (no. 4854/12), decision of 10 July 2012. In *A.E. v Finland*, the Court lifted the interim measures it had indicated in accordance with Rule 39 of its Rules, after confirming that the expulsion order issued against the applicant was rescinded by the respondent state. *A.E. v Finland* (no. 30953/11), decision of 22 September 2015 decision of 22 September 2015, para 30. See also *Abraham Lunguli v Sweden* (no. 33692/00) 1 July 2003. Interestingly, in *Sow v Belgium*, the Court maintained the interim measure that it had imposed until its judgment became final, that is, till the three-month period of appeal to the Grand Chamber lapsed. This was despite the fact that it found no violation. *Sow v Belgium*, (no. 27081/13), judgment of 19 January 2016, para 84.

143 Strangely, on 20 December 2015, the applicants' representative objected to the deferral of the public hearing despite the fact that the deferral was initially requested by the applicants' themselves. Apparently, the representative's objection appears to be against the Court's decision to defer the hearing for an indefinite period of time. In hindsight, one might indeed contend that the Court should either have ruled on the request for provisional measures without holding a public hearing, as public hearing is not a condition *sine qua non* to provisional measures, or at least, defer the hearing to another date before day on which the referendum was scheduled to be held, that is, 17 December 2015. Note that in the first *ACHPR case* (2011), the Court decided to adopt an order for provisional measures 'without written pleadings or oral hearings (provisional measures)', *ACHPR case* (2011) (n 23), para 13.

144 *Nyamwasa and Others v Rwanda* (interim measures) (2017) 2 AfCLR 1, paras 34-36.

145 In *Koutché* (n 34) the Court also held that it would not grant the applicant's request for provisional measures allowing him to participate in elections, considering that his request 'has been overtaken by events as these elections have already taken place' *Koutché* (n 34), para 24; Application 047/2020, *Adama Diarra v Mali* Order (Provisional measures), 29 March 2021, para 24. See also *Ndajigimana* (n 27), paras 24-27; XYZ (n 73), para 27; *Yayi* (n 51), para 27; *Bocoum* (n 14), para 23.

measures generally remain in force for the duration of the proceedings or for a shorter period. If a case is disposed of for any reason and at any stage, they lose meaning and purpose and thus, should be lifted. Accordingly, the Court should explicitly revoke provisional measures, if any, when it decides to dismiss an application for any reason and at any stage of the proceedings.

5 BURDEN OF PROOF

The other issue that arises in relation to provisional measures is the question of burden of proof. Both the Protocol and the Rules of the Court do not contain provisions regulating the burden or standard of proof applicable to the regime of provisional measures.[147] However, where the request for provisional measure comes from a party, the Internal Judicial Directions of the Court require that the request must state the reasons, specifying in detail the extreme gravity and urgency, and the irreparable harm likely to be caused as well as the relief sought.[148] The request must also be accompanied by all necessary supporting documents, including, if any, relevant domestic court or other decisions.[149] According to the Practice Directions, it is therefore incumbent upon the requesting party to provide information for the Court to satisfy itself that the preliminary and substantive conditions are met.[150] In line with this, in its caselaw, the Court generally applies the traditional legal maxim that 'he who alleges a fact shall prove it'.[151] It often requires the party making a request for provisional measures to provide evidence of existence of extreme gravity, urgency and irreparable harm.[152] Usually, the Court declines to grant the request if it is not supplied with enough information or evidence to establish, particularly, the existence of a situation of extreme gravity or urgency

146 For instance, in *Johnson case*, in its Ruling on Jurisdiction and Admissibility, the Court did not rescind its order for provisional measure despite the fact that the application was declared inadmissible. *Johnson* (n 64), para 62.

147 Rule 40(1) of the Rules simply prescribes that a party intending to commence proceedings shall file 'Application containing a summary of the facts and of the *evidence* intended to be adduced' (emphasis added).

148 *Practice Direction* no. 49, as above.

149 *Practice Direction* no. 51, as above.

150 Further, where the request relates to a case already pending before the Court, it shall bear the case number Direction nos. 50 and 51, *Practice Directions* (adopted at the Fifth Extraordinary Session of the Court held from 1 to 5 October, 2012).

151 In several cases, the Court observed that the applicant requesting for provisional measures shall 'bear the onus of proving that [the] request meets the requirements of both urgency and risk of irreparable harm'. See *Symon Vuwa Kaunda and 5 others v Malaw*i (013/2021) (11 June 2021), para 21; *Legal and Human Rights Centre and Tanganyika Law Society* (n 122), paras 27-28.

152 In the case of *Noudehouenou*, the Court took note of the applicant's allegation that he was suffering from serious health problems requiring urgent treatment but denied the request for provisional measures since the applicant did provide 'any evidence of his poor health other than mere assertions' and therefore he did not 'sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol'. Noudehouenou (n 26), paras 22, 38; see also *XYZ v Benin* (057/2019), (2 December 2019), para 25.

and the risk of irreparable harm.[153] A cursory look at the jurisprudence of the Court clearly shows that it is not sufficient for the Court to make serious allegations in order for the Court to adopt provisional measures. What rather matters most is not the seriousness of the allegations made but the evidence that a party adduces. Accordingly, the Court repeatedly affirmed that a mere allegation of illegality or risk of violation of human rights, however extreme and grave it might be, is insufficient.[154]

While generally it behoves the applicants to provide evidence substantiating their request for provisional measures, in some cases, the Court has shifted the burden of proof from the applicant to the respondent state.[155] In the death penalty cases in which the Court often indicates *suo motu* provisional measures, the Court has not even bothered itself to ask for evidence of any sort. It satisfied itself of the existence of urgency and irreparable harm by invoking the serious nature of the death penalty.[156] As was discussed earlier, this is because of the Court's erroneous assumption that all death penalty cases involve urgency, which is not necessarily true.[157] However, whether the Court considers adopting provisional measures on its own initiative or upon a request by a party, the existence of urgency, as that of extreme gravity and irreparable harm, should be sufficiently proved, including in the death penalty cases. In short, if the request for the measures comes from a party, regardless of the kind of harm (be it the death penalty, *incommunicado* detention, torture, among others), that party should in principle shoulder the burden of proof. On the other hand, if the Court seeks to do it on its own volition, it should make its decision on the basis of sufficient evidence by obtaining information from the applicant or other sources or inferring from the circumstances of the case.

Finally, it should be pointed out that there are situations where applicants may be unable to provide any evidence due to their peculiar circumstances. In such situations, it might be improper to apply the stringent principle that the applicants should prove their case. For example, in *Houngue Eric Noudehouenou v Benin*, the applicant

153 In *Noudehouenou* case, the Court took note of the applicant's allegation that he was suffering from serious health problems requiring urgent treatment but denied the request for provisional measures since the applicant did not provide 'any evidence of his poor health other than mere assertions' and therefore, he did not 'sufficiently demonstrated the urgency and irreparable harm he faces, as required by Article 27 of the Protocol'. *Noudehouenou* (n 26), paras 22, 38; see also *XYZ* as above, para 25. Note that the Court has not specified the means or type of information or evidence that the requesting party should produce. However, Direction 52 makes it clear that 'The Court will not consider requests for interim measures that are incomplete, or do not include sufficient information necessary to enable it make a decision', *Practice Directions* (2012).

154 In *Yayi case* (n 51), the Court also refused to indicate provisional measures requiring the release of detained demonstrators claimed to have been arbitrarily arrested by the respondent state, for lack of evidence to justify the existence of a situation of extreme gravity.

155 See *Noudehouenou* (n 26), para 58 (in relation to the applicant's request for expert report).

156 See above (n 84, 85, 87).

157 As above.

claimed that he was suffering from a serious health issue requiring urgent treatment.[158] Oddly, the Court refused to indicate provisional measures stating that the applicant did not provide 'any evidence of his poor health other than mere assertions'. This was notwithstanding the fact that the respondent state had failed to comply with the Court's earlier order of provisional measure requiring it to stay the arrest warrant issued against the applicant and as a result, he was in hiding to avoid arrest.[159] The applicant's particular situation clearly revealed the difficulty that he encountered to adduce evidence and warranted a more lenient approach from the Court.

6 LEGAL EFFECTS OF PROVISIONAL MEASURES

In view of the fact that the adoption of provisional measures is incidental to a tribunal's competence to rule on a matter, it is intuitive to think that there should not be anything controversial as far as the legal effects of provisional measures are concerned. Nevertheless, the legal consequence of the measures, particularly, their binding nature has been contested ever since international courts started to make recourse to such measures.[160] This is reflected in the common disregard shown by states to orders of provisional measures and the international tribunals' long reluctance to firmly pronounce themselves on the issue. In cases that appeared before the ICJ, for example, the Court had remained undecided on the issue for over 50 years until it, for the first time, explicitly determined the binding nature of provisional measures in 2001 in the *LaGrand* (*Germany v US*) case.[161] The international human rights bodies also similarly took a clear stance on the matter only very recently. The UN Committee Against Torture was the first body, which held in 1998 that interim measures generate international obligations and state parties have an obligation to comply with them in good faith.[162] Subsequently, the Human Rights Committee[163] and the Inter-American Court in 2000[164] and the European Court in 2005, affirmed that their respective orders of provisional measures were mandatory.[165] Despite states' frequent defiance, currently, there is thus a growing jurisprudential consensus

158 *Noudehouenou* (n 26) paras 38-39.

159 As above, para 38.

160 See E Hambro 'The binding character of the provisional measures of protection indicated by the International Court of Justice' (1956) 152-171, BH Oxman *Jurisdiction and the power to indicate provisional measures: the International Court of Justice at a crossroads* (1987) 323-354.

161 In response to the alleged violation by the United States of the Court's Order of provisional measure of 3 March 1999, the Court for the first time held that the 'Order was not a mere exhortation. It had been adopted pursuant to Article 41 of the Statute. This Order was consequently binding in character and created a legal obligation for the United States'. *LaGrand case (Germany v US)*, ICJ (27 June 2001) (2001), para 110.

162 *Cecilia Rosana Nunez Chipana v Venezuela*, Communication 110/1998 (16 December 1998), para13.

that provisional measures have a compulsory legal effect on parties. The failure to comply with provisional measures may consequently be equated to 'contempt of court' and engage a state's international responsibility.[166]

When we look at the Court's case law, it is more or less aligned with the prevailing position of other judicial and quasi-judicial bodies. The very fact that the Court's power to adopt provisional measures is categorically enshrined in the Protocol implies that its power has a conventional basis. State parties have therefore ratified the Protocol knowing that the Court has such power and that they cannot refuse to comply with its orders of provisional measures. Notwithstanding this, some respondent states have nevertheless challenged the binding nature of the Court's order of provisional measures, openly and others, obliquely by refusing to comply with the order.[167] However, the Court's response has been unequivocally clear, that is, respondent states must comply with the provisional measures and failure to do so constitutes a breach of their international obligation.[168] Accordingly, every time it adopts provisional measures, the Court requires respondent states to report back on the necessary measures that they (should) take to comply with its orders.[169] Where there is non-compliance, the Court reminds the concerned state to comply with its orders, and as part of its Annual Report, notifies the AU Assembly of Heads of state and Government of the nature of the provisional measures it adopted and the lack of compliance.[170] Unfortunately, very rarely has the Executive

163 It should be stated that perhaps, by the nature of its mandate and considering the perennial controversy on the compulsory nature of its recommendations, the Committee did not explicitly declare that its interim measures are binding. Instead, the Committee emphasised that a failure to comply with its interim measures is a grave breach of the obligations of state parties in the Covenant. *Piandiong et al v The Philippines*, HRC (19 October 2000), paras 5.1-5.4, see also the earlier case of *Glen Ashby v Trinidad and Tobago,* HRC (26 July 1994), para 6.5 (the Committee expressed its 'deep regrets' on the failure of the respondent state to respect its request for interim actions, and noted that if it had acceded to the request, it 'would have been compatible with the state party's international obligations'.

164 See the following orders of provisional measures: *Constitutional Court Case*, IACHR (14 August 2000); see also *James and Others v Trinidad and Tobago*, IACHR, (6 August and 24 November 2000, and 3 September 2002) and earlier cases of *Chunimá v Guatemala*, IACHR (1 August 1991), *Loayza Tamayo v Peru,* IACHR (July and 13 September 1996, 11 November 1997).

165 *Mamatkulov and Askarov v Turkey* ECHR[GC] (4 February 2005), paras 99-129. See also *Chamaïev and Others v Georgia and Russia*, ECHR (12 April 2005), para 473. *Paladi v Moldova*, ECHR [GC] (10 March 2009), paras 84-106.

166 The European Court, for example, finds violation of art 34 of the Convention where a state fails to comply with its order of interim measures. As above. See also *Grori v Albania* ECHR (7 July 2009); *DB v Turkey* ECHR (13 July 2010), see also Hambro (n 154) 153.

167 For instance, Tanzania has consistently rejected the Court's provisional measures relating to the death penalty alleging that the Court does not have the power to suspend the implementation of a criminal punishment lawfully imposed on an accused. Interestingly, this was despite the fact that Tanzania was not implementing the death penalty as a result of the *de facto* moratorium it has observed for almost two decades. Similarly, in *Woyome* and *Ajavon* (n 25) cases, the respondent states also challenged the Court's orders of provisional measures and indicated that they would not comply with the orders.

Council, the organ which is mandated to monitor the implementation of the decisions of the Court on behalf of the Assembly,[171] urged member states to comply with the orders.[172] The existing enforcement mechanism is therefore not only ineffective but also a lack of another follow-up simply means that the Court will continue to rely mainly on the will and cooperation of the states for the implementation of its provisional orders. Thus far, it is only Burkina Faso which has implemented the Court's decisions, including its order for provisional measure in the *Konaté* case. This clearly shows the urgent need for a reform and the critical importance of revamping the whole system of enforcement of the Court's decisions in a manner that ensures that non-compliance has consequences, be it political, economic and/or legal.[173]

7 CONCLUSIONS

The African Court has been frequently using its power of indicating provisional measures in cases involving situations of extreme urgency

168 In *ACHPR Case,* the Court stated that 'To date, the Libyan Government has still not complied with the Order of the Court, nor has it informed the Court of the measures it has taken or could take to comply with the said Order. Given that an Order of Provisional Measures issued by the Court is binding like any judgment of the Court, the Court notes that an execution of the death sentence by the Libyan government would constitute a violation of its international obligations under the Charter, the Protocol and other human rights instruments that it has duly ratified'. *ACHPR case* (2013) (n 27) para 23. Similarly, in *Noudehouenou* case, the Court stressed that the respondent state 'is obliged to implement' its earlier order of provisional measures. *Noudehouenou* (n 26) para 46.

169 See e.g., *Chalula* (n 24) para 20(b) (within sixty (60) days); *Joseph Mukwano v Tanzania* (provisional measures) (2016) 1 AfCLR 655, para 20(b) (within sixty (60) days), *Koutché* (n 34) para 34 (vii) (within fifteen (15) days). The Court's determination of the time limit for reporting is discrepant and appears to be made arbitrarily.

170 This is in accordance with art 31 of the Protocol and Rule 59 (3) of the Rules. See *ACHPR v Libya* (merits) (2016) 1 AfCLR 153, paras 17-18. Note that the requirement of notification of political organs exists in all the three, African, Latin America and European human rights systems. Under Rule 77 of its Rules of Procedure, the ICJ is directed to also communicate the provisional measures that it adopted to the Secretary-General for transmission to the Security Council.

171 Article 29 (2), the Protocol.

172 See Executive Council Decision on the 2016 Activity Report of the African Court on Human and Peoples' Rights Doc.Ex.Cl/999(XXX), Thirtieth Ordinary Session 25 - 27 January 2017, para 4 (the Council 'Calls upon member states to comply with the Orders of [the Court] in accordance with the Protocol of the Court and urges in particular the State of Libya to implement the Order of the Court').

173 Rule 81 of the Rules provides the procedure for monitoring compliance with the Court's decisions. It requires that state parties shall submit reports on compliance and that the Court may solicit the opinion of the applicant or obtain information from other sources to verify if the concerned state has implemented its decisions. If need be, the Court may hold a compliance hearing. In accordance with this Rule, the Court is currently in the process of creating a compliance unit, which will monitor the implementation of its decisions. Yet, the Court will have to report to the Assembly its finding of non-compliance with recommendations and its role stops there. By contrast, the European system has a better follow-up mechanism through the Committee of Ministers, which has a clearer mandate and regular sessions to consider cases of compliance pursuant to art 46(2) of the European Human Rights Convention.

and gravity and risks of irreparable harm. A close study of its practice shows that the Court for the most part has been very generous in its approach but also less rigorous in its reasoning. Its understanding and application of the different normative conditions to adopting provisional measures, notably, urgency, necessity and irreparability of harm, lack consistency and conceptual clarity. Looking at its more recent decisions, however, there is also a clear shift in approach to a stricter and more rigorous analysis of these conditions. Yet, as it was attempted to demonstrate in this paper, there is still a need for the Court to maintain consistency and conceptual precision. It is also important to be mindful that, as much as a too liberal or excessive adoption of provisional measures is unnecessary and runs counter to their exceptional nature, a too conservative approach equally defies the very purpose that they are intended to serve. It may also limit the Court's ability to consider and settle human rights disputes and render its proceedings ineffective. There should therefore be a balanced approach with a view to ensuring that the Court's power to indicate provisional measures is congruent with their nature and purpose as well as with the spirit and letter of the provisions of the Protocol and the Rules.

La notion d'intérêt dans la procédure contentieuse devant la Cour africaine des droits de l'homme et des peuples

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RÉSUMÉ: En matière contentieuse, quelques dispositions expresses du Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples, ainsi que du Règlement intérieur de la Cour, permettent de définir les conditions d'ordre procédural préalables à la saisine de la Cour. Ces dispositions prévoient également les critères essentiels aux fins d'une intervention dans le cadre d'une affaire en cours. Dans la mise en œuvre de ce droit de saisine et d'intervention, entre en scène la notion d'intérêt. Avec pour objectif de renforcer la position des rédacteurs des textes suscités, parallèlement de pallier les imperfections des observations de certains États, cette contribution met en exergue l'intérêt juridique et le présente comme une notion inopportune au moment de la saisine. En cours d'instance par contre, la participation des acteurs impliqués requiert un intérêt juridique davantage prononcé chez une catégorie d'acteurs, tandis que chez une autre catégorie, l'intérêt peut entraver la bonne marche de la procédure. Même si la jurisprudence de la Cour s'évertue à le faire, l'état actuel de la doctrine ne met pas suffisamment en évidence cette particularité du système de la Cour africaine des droits de l'homme et des peuples.

TITLE AND ABSTRACT IN ENGLISH:

The concept of legal interest in contentious proceedings before the African Court on Human and Peoples' Rights

ABSTRACT: In contentious matters, some explicit provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights and the Rules of Procedure of the Court define the procedural preconditions for submitting an application before the Court. These provisions also set out the essential criteria for intervention in a pending case. In the implementation of the right to submit an application and intervention, the concept of legal interest comes into play. With the aim of strengthening the position of the drafters of the African Court's Protocol and the Rules of the Court, and to compensate for the imperfections of the observations of certain states, this contribution discusses the concept of legal interest. It argues that legal interest is immaterial to the submission of application before the Court. However, during proceedings, the participation certain parties is subjected to their demonstrating they have legal

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interest. The rigid application of the concept of legal interest may be a hindrance nonetheless to the participation of a category of parties. Although the Court's jurisprudence demonstrates the Court's willingness to ensure broader participation in proceedings, the current state of scholarship does not sufficiently highlight this particularity of the African Court on Human and Peoples' Rights system.

MOTS-CLÉS: intérêt, Cour africaine des droits de l'homme et des peuples, Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples, *actio popularis*, intervention, partie au litige

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1 INTRODUCTION

La Cour africaine des droits de l'homme et des peuples (la Cour ou la Cour d'Arusha) a rendu à ce jour un nombre important de décisions venues confirmer l'intérêt qu'a suscité sa création, la protection des droits de l'homme ayant été présentée comme son fer de lance.[1] Cet objectif de protéger les droits de l'homme[2] incombe à la Cour qui s'y attèle en interprétant et en veillant à l'application des textes relatifs aux droits de l'homme en vertu du Protocole le créant.[3] La Cour vient ainsi renforcer le mandat de protection de la Commission africaine des droits de l'homme et des peuples (la Commission)[4] pour en permettre une meilleure efficacité.[5]

Dans la mise en œuvre de ce mandat de protection de la Cour exercé concurremment avec la Commission, la Cour se trouve face à des acteurs qui peuvent avoir un intérêt à faire valoir. L'intérêt ainsi manifesté devra varier, en raison des particularités, d'un acteur à un autre. Aussi, en fonction de chaque acteur, l'intérêt pourrait-il

1 M Kamto 'Introduction générale' 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) 18-31.

2 https://www.african-court.org/wpafc/information-de-base/?lang=fr#strategic (source consultée le 5 septembre 2022).

3 Art 3(1) du Protocole à la Charte africaine des droits de l'homme et des peuples, portant création d'une Cour africaine des droits de l'homme et des peuples.

4 Art 2 du Protocole à la Charte africaine des droits de l'homme et des peuples, portant création d'une Cour africaine des droits de l'homme et des peuples.

5 TM Makunya & S Bitagirwa 'La compétence consultative de la Cour africaine des droits de l'homme et des peuples: entre restrictions organiques et limitations matérielles' in EB Bope & M Mubiala (eds) *La République démocratique du Congo et le système africain de protection des droits de l'homme* (2021) 87-88.

intervenir à chaque étape de l'affaire, soit en gardant sa nature, soit en la modifiant. Cette observation révèle bien, nous semble-t-il, que dans toute affaire, la notion d'intérêt arpente diverses natures. Elle doit s'apprécier aussi bien au regard de l'acteur lui-même, qu'au regard de l'étape ou du moment précis de l'affaire. En outre, l'intérêt peut dépendre de la position ou du rôle de l'acteur dans l'affaire, sans préjudice de sa qualité. De ce fait, un État n'aura pas le(s) même(s) intérêt(s) à faire valoir s'il est défendeur dans une espèce portée contre lui devant la Cour ou s'il agit en tant qu'intervenant. Vraisemblablement, la notion d'intérêt recouvre d'innombrables significations qu'il sera utile d'exploiter en s'appuyant sur toute l'étendue de la jurisprudence de la Cour.

Dans ce *continuum,* la présente réflexion s'interroge premièrement sur le contenu général de la notion, le texte du Protocole n'en apportant aucune définition. À première vue, l'intérêt désigne un avantage matériel ou moral non juridiquement protégé qu'une situation donnée présente pour une personne.[6] C'est l'exemple des considérations humanitaires qui soutiennent ou constituent la base de certaines règles de droit sans former elles-mêmes des règles de droit.[7] A ce niveau l'intérêt existant n'a certes pas de caractère juridique, mais comme le souligne Jean Salmon, sa non-juridicité n'implique pas pour autant son délaissement.[8] En outre l'intérêt dont se prévaut une personne peut constituer un avantage matériel ou moral juridiquement protégé.[9] L'on évoque sur ce point l'«intérêt juridique», c'est-à-dire l'intérêt qui constitue l'élément sur lequel s'appuie tout sujet de droit pour agir en justice.[10] En d'autres termes, l'intérêt à agir (ou intérêt pour agir) découle d'un intérêt juridique. Ce faisant, le requérant doit démontrer que «l'action ou l'abstention du défendeur a eu pour effet de porter atteinte à un droit ou à un intérêt juridiquement protégé dont le demandeur était titulaire».[11] C'est sans aucun doute une condition importante de recevabilité de l'action en justice consistant dans l'avantage que procurerait au demandeur la reconnaissance par l'autorité judiciaire du mérite de sa prétention.[12]

On retiendra de l'intérêt à agir qu'il «ouvre» une affaire. Toutefois, l'intérêt juridique peut s'appréhender autrement, notamment lorsque l'affaire est auparavant ouverte. En témoigne l'intérêt que doit démontrer le sujet qui souhaite intervenir dans un différend auquel il n'est pas à l'origine partie. Cet «intérêt juridique en cause»[13] intervient comme permettant à l'affaire de connaitre de nouveaux éléments.

Outre l'intérêt non juridique et l'intérêt juridique, la notion d'intérêt peut être liée à la fonction: l'intérêt de la fonction, autrement

6 J Salmon (dir) *Dictionnaire de droit international public* (2001) 596.
7 Salmon (n 6) 596.
8 Salmon (n 6) 596.
9 Salmon (n 6) 596.
10 Salmon (n 6) 596.
11 Salmon (n 6) 596.
12 Voir G Cornu (dir) *Vocabulaire juridique* (2018) 1210.
13 Salmon (n 6) 597.

dit la théorie qui justifie certains privilèges par la nécessité de permettre aux membres d'une mission d'exercer librement leurs fonctions, à l'abri de toute contrainte.[14] L'expression se réfère couramment aux agents diplomatiques accrédités dans un État et à l'abri de toute contrainte de la part de cet État.[15] Par ailleurs, employée au pluriel, la notion d'intérêt peut enfiler d'autres sens. A ce titre, analysés dans une affaire portée devant une instance juridictionnelle, «les intérêts» concernent exclusivement le fond,[16] à la différence de «l'intérêt» qui prend en compte à la fois la procédure et le fond. Définis comme étant liés au revenu, à l'indemnisation du dommage ou encore à la participation de personnes physiques dans des sociétés, les intérêts peuvent être composés, moratoires ou punitifs.[17] Toutes ces définitions impliquent *in fine* une classification: d'une part la notion d'intérêt observée dans la procédure; et d'autre part celle(s) analysée(s) au fond.[18] Aux fins de la présente contribution, l'intérêt analysé dans la procédure occupera l'ensemble des réflexions, même s'il sera impossible d'occulter totalement l'intérêt au fond, notamment en raison des rapports qui existent entre ces deux éléments de différenciation.[19]

Ainsi, en dépit du fait que la Cour tienne compte des intérêts personnels,[20] de l'intérêt collectif,[21] des intérêts étatiques,[22] des conflits d'intérêts des ordres internes,[23] de l'intérêt des victimes,[24] des

14 Salmon (n 6) 597.

15 Salmon (n 6) 597.

16 Voir Salmon (n 6) 598-599.

17 Voir Salmon (n 6) 598-599.

18 Sur la classification, lire avec intérêt V Barbé et autres *La notion d'intérêt(s) en droit* (2020) 182.

19 Ce sont en réalité les intérêts en jeu (destinés au fond) qui incitent les parties à la naissance d'un contentieux juridictionnel ne prenant sa forme classique que lorsque l'intérêt dans la procédure aura été suffisamment évalué.

20 Voir par exemple *Sébastien Ajavon c. Bénin* (fond) (2019) 3 RJCA 136 para 50.

21 Voir par exemple *Demande d'avis consultatif par le Comité africain d'experts sur les droits et le bien-être de l'enfant* (avis consultatif) (2014) 1 RJCA 755 paras 85-86; *Christopher Mtikila et autres c. Tanzanie* (fond) (2013) 1 RJCA 34 paras 106.1-112; *Femi Falana c. Union africaine* (compétence) (2012) 1 RJCA 121 para 30; *Lohé Issa Konaté c. Burkina Faso* (fond) (2014) 1 RJCA 324 paras 133-134 et 143; *Mohamed Abubakari c. Tanzanie* (fond) (2016) 1 RJCA 624 para 147; *Commission africaine des droits de l'homme et des peuples c. Kenya* (fond) (2017) 2 RJCA 9 paras 129-130; *Umohoza c. Rwanda* (fond) (2017) 2 RJCA 171 paras 139-140; *Ajavon* (n 20) para 265; *Emile Touray et autres c. Gambie* 026/2020 arrêt exceptions préliminaires 24 mars 2022 para 42.

22 Voir par exemple *Mtikila* (n 21) para 106.1; *Falana* (n 21) para 9; *Konaté* (n 21) para 143.

23 Voir par exemple *Abubakari* (n 21) paras 5, 61, 107 et suivants; *Actions pour la Protection des Droits de l'Homme c. Côte d'Ivoire* (fond) (2016) 1 RJCA 697 para 117; *Mohamed Abubakari c. Tanzanie* (interprétation) (2017) 2 RJCA 140 para 7; *Woyome c. Ghana* (fond et réparations) (2019) 3 RJCA 245 paras 8, 15 et suivants.

24 Voir par exemple *Commission africaine des droits de l'homme et des peuples c. Libye* (fond) (2016) 1 RJCA 158 para 50.

intérêts dans la réparation du préjudice causé,[25] et de l'intérêt de la justice,[26] tous relatifs à l'intérêt au fond et appréciés que dans le cadre d'une démarche *in concreto*, il appert que l'intérêt dans la procédure s'applique objectivement à tous les sujets. Cette remarque sur l'intérêt dans la procédure permet, de notre point de vue, une approche globale plus satisfaisante de la notion d'intérêt devant la Cour. La procédure devant une instance juridictionnelle désignant ses modalités de saisine,[27] et à moins que le requérant ne témoigne d'un manque d'intérêt à poursuivre l'affaire,[28] ce sera l'action en justice notre fil conducteur. Quels sont par conséquent les rapports entre l'intérêt et l'action en justice devant la Cour africaine des droits de l'homme et des peuples? L'étude s'attache premièrement à présenter les catégories d'intérêt si l'on s'intéresse aux parties au litige. On en déduira une ferme distinction entre l'action en justice principale et l'action en intervention. En second lieu, la présente contribution examine les catégories d'intérêt relatives aux personnes tierces aux parties mais dont le rôle dans la procédure contentieuse est indispensable pour la plupart. L'étude s'achève avec le comportement de la Cour dans sa prise en compte de la notion d'intérêt, en comparaison avec celui d'autres juridictions. A cet effet, la Cour adopte une démarche singulière qu'il nous appartiendra de souligner dans quelques remarques conclusives.

2 LES CATÉGORIES D'INTÉRÊT RELATIVES AUX PARTIES À LA PROCÉDURE

L'expression «partie» pour désigner les «parties au litige» se réfère couramment à «chacune des personnes qui plaident l'une contre l'autre» au cours d'un procès.[29] En forçant à peine le trait, on observe la présence de la partie requérante et de la partie défenderesse. Traditionnellement, ces deux «parties» perçues comme telles occupent le vocabulaire des réflexions sur la procédure. L'entité ou la personne intervenante se présente alors comme une «apparition» étrangère au procès. Cette assertion a clairement été la politique de la Cour internationale de justice pour qui l'intervenant n'acquiert pas les droits ni n'est soumis aux obligations qui s'attachent à la qualité de

25 Voir par exemple *Christopher Mtikila c. Tanzanie* (réparations) (2014) 1 RJCA 74 para 29; *Norbert Zongo et autres c. Burkina Faso* (réparations) (2015) 1 RJCA 265 paras 19 et suivants; *Mohamed Abubakari c. Tanzanie* (réparations) (2019) 3 RJCA 349 para 26; *Mgosi Mwita Makungu c. Tanzanie* 006/2016 arrêt réparations 23 juin 2022 paras 19 et suivants.

26 Voir par exemple *Commission africaine des droits de l'homme et des peuples c. Libye* (mesures provisoires) (2011) 1 RJCA 18 para 10; *Peter Joseph Chacha c. Tanzanie* (recevabilité) (2014) 1 RJCA 413 para 57; et pratiquement toutes les affaires devant la Cour.

27 Salmon (n 6) 888.

28 Voir par exemple *Chrysanthe Rutabingwa c. Rwanda*(radiation) (2014) 1 RJCA 480 para 13; *Le Collectif des anciens travailleurs du laboratoire Australian Laboratories Services, ALS-Bamako (Morila) c. Mali* (radiation) (2016) 1 RJCA 689 para 28(iv).

29 Salmon (n 6) 805.

«partie».[30] Cependant, dans le droit de la Cour d'Arusha[31] l'entité intervenante revêt l'appellation de «partie». Dans son opinion individuelle émise en l'affaire *Armand Guéhi c. Tanzanie*, la juge Chafika Bensaoula ne manque pas de suivre le concept, en qualifiant la République de Côte d'Ivoire – alors intervenante – de «partie» au procès.[32] Sur ce fondement, la présente section évoque les catégories d'intérêt ayant trait à toute personne morale ou physique qui a un intérêt à défendre dans une affaire, qu'elle le fasse à titre principal (en ouverture d'instance) ou à titre subsidiaire (en intervention).

2.1 L'inexistence formelle de l'intérêt pour agir au profit de la qualité pour agir

Dans son opinion dissidente émise en l'affaire *Mtikila et autres c. Tanzanie*, le juge Fatsah Ouguergouz donnait une précision explicite sur la distinction entre la qualité pour agir et l'intérêt à agir. Tandis que la qualité pour agir relève de la compétence personnelle de la Cour, l'intérêt à agir renvoie à une question de recevabilité.[33] Défini comme «l'intérêt juridiquement reconnu ou protégé dont la Cour apprécie souverainement l'existence dans chaque cas d'espèce»,[34] l'intérêt pour agir touche à l'action que le requérant engage.[35] En revanche, la qualité pour agir relève du pouvoir d'une personne d'ester devant la Cour.[36]

En vertu du Protocole de Ouagadougou, la compétence contentieuse de la Cour, *ratione personae*, s'analyse au regard du critère pertinent requis pour le demandeur, qu'est la qualité pour agir. En effet, à la lumière du texte du Protocole, les États parties, la Commission et les Organisations intergouvernementales africaines ont «qualité pour saisir la Cour».[37] Les ONG et les individus quant à eux ne bénéficieront de cette prérogative de saisine directe de la Cour qu'à la condition que l'État mis en cause ait répondu à certaines exigences fixées par le Protocole.[38] Le Protocole se borne ainsi à fixer les conditions relatives à la qualité des acteurs qui saisissent la Cour, sans

30 CIJ *Différend frontalier, terrestre, insulaire et maritime (Salvador c. Honduras),* arrêt, *Recueil* (1990) 134, paras 98 et 135-136, para 102.

31 À l'instar du Règlement intérieur actuel de la Cour, qui au titre de ses définitions (règle 1(u)), entend par «parties» les requérants, les défendeurs et les intervenants.

32 *Armand Guéhi c. Tanzanie*, Intervention, 7 décembre 2018, Req. 001/2015 (Opinion individuelle de la juge Chafika Bensaoula) para 4.

33 *Mtikila* (Opinion dissidente du juge Fatsah Ouguergouz) paras 24-27. Certes, même si l'intérêt pour agir n'est pas formellement retenu au titre des conditions strictes de recevabilité des affaires devant la Cour.

34 *Mtikila* (Opinion dissidente du juge Fatsah Ouguergouz) para 25.

35 *Mtikila* (Opinion dissidente du juge Fatsah Ouguergouz) para 25.

36 *Mtikila* (Opinion dissidente du juge Fatsah Ouguergouz) para 25.

37 Art 5(1) du Protocole à la Charte africaine des droits de l'homme et des peuples, portant création d'une Cour africaine des droits de l'homme et des peuples.

38 Voir Art 34(6) du Protocole à la Charte africaine des droits de l'homme et des peuples, portant création d'une Cour africaine des droits de l'homme et des peuples.

prévoir de dispositions sur l'intérêt à agir, ce contrairement à d'autres systèmes régionaux où la qualité de victime prévaut pour ester en justice.[39] De la sorte, conformément à l'instrument, l'action en justice principale ou l'ouverture d'une affaire ne relève pas de l'intérêt à agir toutefois préférablement de la qualité pour agir. Les rédacteurs du Protocole se sont en effet délibérément refusés d'insérer dans le texte l'exigence préalable de la qualité de victime, «traduction processuelle de l'intérêt à agir».[40] Cette attitude volontaire guide implicitement la Cour vers une large marge d'appréciation de l'intérêt à agir.

Au regard de cette conception libérale de l'intérêt pour agir, dans ses conclusions sur la compétence et la recevabilité, la Cour est tenue d'évaluer la qualité pour agir de l'acteur qui la saisit, mais elle est souveraine quant à l'obligation de statuer sur l'intérêt à agir du demandeur. Dans l'hypothèse où elle venait à le faire, l'absence de cet intérêt à agir ne devrait constituer de motif de rejet de la demande, au risque que la Cour ne se heurte à une mauvaise application du Protocole.[41] Cette règle s'étend au système entier de la Charte, incluant la Commission.[42] Au regard de ce système auquel est liée la Cour d'Arusha, l'analyse par celle-ci de l'intérêt à agir s'avère une démarche superfétatoire. En conséquence, la Cour apprécie rarement l'intérêt pour agir du requérant. Ce n'est en réalité que dans quatre affaires qu'elle s'est attelée à le faire,[43] ce en répondant à l'exception tirée du défaut de l'intérêt à agir du requérant soulevée par le défendeur.[44] Dans la première affaire – l'affaire *Sébastien Ajavon c. Bénin* – la Cour se limite à rappeler le texte en vigueur, à savoir que l'exigence de l'intérêt à agir du requérant n'est pas prévue dans les instruments qu'elle applique.[45] Toutefois, dans le contentieux qui opposait Ali Ben Hassen à la République de Tunisie ainsi que dans l'affaire *XYZ c. Bénin* (requête

39 Art 34 de la Convention européenne des droits de l'homme; art 10 du Protocole additionnel A/SP/01.05 du 19 janvier 2005 portant amendement du Protocole A/P1/7/91 relatif à la Cour de Justice de la Communauté économique des États de l'Afrique de l'Ouest (CEDEAO). À ce titre la Cour de justice de la CEDEAO relève «d'un système particulier régional africain des droits de l'homme» qui exige des plaignants qu'ils aient un intérêt direct dans l'affaire, le rappelle la Cour d'Arusha dans *Sébastien Ajavon c. Bénin* (fond) (2021) para 48.

40 *Sébastien Ajavon c. Bénin* (fond) (2020) para 77.

41 Nous en voulons pour preuve l'attitude de la Cour à chaque fois qu'elle est sollicitée à cet effet, voir n 43.

42 Commission africaine des droits de l'homme et des peuples, Communication 277/2003 *Brian Spilg et autres c. Botswana*, paras 73-85; Voir aussi *Ajavon* (fond) (2019) (Opinion individuelle du juge Niyungeko) qui affirme en note infrapaginale jointe au para 11: «[L]'on sait à cet égard que dans le système de la charte, le requérant n'est pas requis de prouver un intérêt personnel pour avoir un *locus standi*»; Commission africaine des droits de l'homme et des peuples, Communications 25/89, 47/90, 56/91, 100/9, *Comité des Avocats pour les droits de l'homme, Union Interafricaine des Droits de l'Homme, Les Témoins de Jehovah (WTOAT) c. Zaïre*, para 51.

43 *Bernard Mornah c. République du Bénin et autres* (fond) (2022) paras 120-121; *Ali Ben Hassen c. Tunisie* (fond) (2021) para 38; *Ajavon* (n 40) para 76-77; *XYZ c. Bénin* (fond) (2020) Req. 059/2019 paras 54-58.

44 *Mornah* (n 43) paras 101-103; *Hassen* (n 43) paras 31 à 36; *Ajavon* (n 40) paras 73-75; *XYZ* (n 43) paras 52-53.

45 *Ajavon* (n 40) para 77.

059), la Cour semble accorder à l'intérêt à agir, une attention nouvelle sans la rendre indispensable à la saine. Elle estime ainsi que le demandeur, du fait d'être directement concerné par la question, «il est évident qu'il a un intérêt direct dans la matière».[46] Ces deux affaires montrent que la Cour adopte, de façon implicite, un comportement évolutif tendant à apprécier «sommairement» l'intérêt à agir comme le suggérait le juge Fatsah Ouguergouz dans l'affaire *Mtikila*.[47] Plus récemment dans l'affaire *Bernard Anbataayela Mornah*, la Cour s'est montrée encore plus expressive en ce qui concerne l'intérêt personnel inopportun du requérant pour agir.[48] D'ailleurs, en touchant la question du droit à l'autodétermination soulevée dans l'espèce, elle a considéré que vu son importance capitale pour l'ensemble du continent africain, le requérant était directement concerné par la question et qu'il avait à cet égard un intérêt personnel (quoique toujours inopportun) à agir.[49]

On croirait, dès lors, que l'attitude de la Cour sur la question de l'intérêt à agir est fonction des griefs soulevés par le défendeur. Or, dans l'affaire qui opposait Yogogombaye au Sénégal, alors que l'État défendeur soutenait que le requérant n'avait pas à s'immiscer dans une affaire dont il n'était pas victime,[50] la Cour, pour ainsi montrer sa souveraineté en l'espèce, n'avait pas eu besoin de se prononcer sur ce grief.[51] Cette attitude confirme la conception libérale de l'intérêt pour agir en ouverture d'instance.

Par ailleurs, «l'intérêt pour agir étant effectivement difficile à dissocier de la qualité pour agir»,[52] il n'en demeure pas moins que l'un n'implique pas d'office l'autre. A titre illustratif, on peut noter le problème majeur qui concerne les cas dans lesquels la personne qui saisit la Cour – et qui a qualité pour le faire en vertu du Protocole – n'est potentiellement pas une victime directe des violations alléguées. Comme la Cour a eu à le rappeler, l'exigence de la qualité pour agir au détriment de l'intérêt pour agir «tient compte des difficultés pratiques que les victimes de violations des droits de l'homme peuvent rencontrer pour porter leurs plaintes devant la Cour (…)».[53] De manière générale, la Cour affiche clairement sa position sur le point de savoir si le recours actionné devant elle par les individus et les entités est un droit objectif, voire plus, si elle permet une démarche d'*actio popularis*.

À l'analyse, la Cour permet davantage ce «mécanisme efficace de poursuite des litiges à grande échelle en vue de permettre aux nombreuses victimes incapables de présenter leurs propres réclamations, de le faire en une seule procédure».[54] Ainsi, poursuivant un intérêt général, celui de la protection des droits de l'homme sur le

46 *XYZ* (n 43) para 57; *Hassen* (n 43) para 40.
47 *Mtikila* (Opinion dissidente du juge Fatsah Ouguergouz) para 24.
48 *Mornah* (n 43) para 120.
49 *Mornah* (n 43) para 121.
50 *Michelot Yogogombaye c. Sénégal* (compétence) (2009) 1 RJCA 1 para 26.
51 Voir *Yogogombaye* (n 50) paras 36-40.
52 Barbé (n 18) 15.
53 *XYZ* (n 43) para 55.

continent,[55] la Cour encourage la recherche de l'intérêt public des victimes. On relève que l'*actio popularis* consiste soit pour une personne[56] à soumettre une requête auprès d'une juridiction dans l'intérêt d'une communauté à laquelle elle ne fait pas impérativement partie,[57] soit pour une entité[58] à l'instar d'une ONG à défendre les intérêts d'un ensemble de personnes regroupées via une seule requête déposée auprès de la juridiction. Laquelle démarche a été entreprise par les requérants dans les affaires *Commission africaine des droits de l'homme et des peuples c. Kenya* puis *Mornah*, de même critiquée par le défendeur dans l'affaire *XYZ c. Bénin* précitée.[59] Dans l'affaire opposant la Commission au Kenya, la requérante invoquait la violation du droit de la communauté *Ogiek* à parvenir au développement, et à disposer librement de ses richesses et de ses ressources naturelles, notamment au sujet du préavis d'expulsion de la forêt de Mau émis par le Kenya à son encontre.[60] Bien que n'étant pas portée par les membres de la communauté *Ogiek*, l'affaire a suivi son cours jusqu'à son arrêt en réparations rendu en 2022.[61] Une attitude similaire fut récemment adoptée par la Cour dans l'affaire *Mornah*, dans l'intérêt public de toute la République arabe sahraouie démocratique (RASD),[62] et qui a particulièrement fait l'objet de demandes d'interventions.

2.2 L'évolution de l'intérêt «pour intervenir»: Des seuls États à l'élargissement à «toute personne»

Il convient de noter de prime abord que l'intervention dans le cadre d'une affaire devant la Cour – et devant toute juridiction – est liée aussi bien au fond qu'à la procédure (notamment la recevabilité).[63] Cette section vise à mettre en relief l'intérêt requis aux fins d'une démarche

54 W Aceves 'Actio popularis? The class action in international law' (2003) *University of Chicago legal forum* 354; Cela n'exclut pas le fait que plusieurs requêtes soient émises à la fois, dans le cadre de l'*actio popularis*, ainsi l'a rappelé la Cour dans *XYZ* (n 43) para 44.

55 *Comité africain des droits et du bien-être de l'enfant* (n 21) para 75.

56 K Mbaye 'L'intérêt pour agir devant la Cour internationale de justice' (2020-2021) 209 *Cours de l'académie de droit international de la Haye* 318.

57 Voir l'exemple de la requête de Bernard Mornah (pourtant ressortissant ghanéen) au nom de la République sahraouie, reçue par la Cour.

58 Voir *Commission africaine des droits de l'homme et des peuples* (n 21) para 57.

59 *XYZ* (n 43) para 53.

60 *Commission africaine des droits de l'homme et des peuples* (n 21) paras 3-10.

61 Voir *Commission africaine des droits de l'homme et des peuples c. Kenya* (réparation) 23 juin 2022.

62 Le 22 septembre 2022, de par son arrêt 'historique' et sans précédent à l'échelle du Continent africain, la Cour défend le droit à l'autodétermination et à l'indépendance du peuple sahraoui. En conséquence, juge la Cour, tous les États ont l'obligation internationale d'aider les peuples opprimés dans leur lutte pour la liberté. La Cour affirme ici de manière ferme son attachement à l'*actio popularis*. A l'origine de l'affaire, une requête introduite par le ressortissant ghanéen Mornah contre la République du bénin et d'autres États. Le requérant alléguait que les États défendeurs n'avaient pas protégé la souveraineté, l'intégrité territoriale et l'indépendance de la République sahraouie.

63 Opinion individuelle de la juge Chafika Bensaoula (n 32) para 15.

procédurale d'intervention auprès de la Cour, du fait de l'évolution des textes et de leur influence sur la jurisprudence. Incident de procédure, l'intervention permet à un tiers initialement non-partie à un procès d'accéder au prétoire d'une juridiction en vue de défendre ses intérêts.[64] Aux termes de l'article 5(2) du Protocole, «lorsqu'un État partie estime avoir un intérêt dans une affaire, il peut adresser à la Cour une requête aux fins d'intervention». Une lecture combinée de cette disposition avec l'article 53(2) du Règlement intérieur par intérim de la Cour (Règlement intérimaire) permettait de conclure qu'au moment où le Règlement intérimaire était en vigueur, l'intérêt devait uniquement émaner d'un État. Cet intérêt d'ordre juridique dût être en cause[65] pour l'État intervenant. Les [rares] interventions étatiques connues jusqu'ici mettent suffisamment en évidence ce caractère volontaire des États intervenants, reflet dudit intérêt d'ordre juridique en cause.[66] En effet, l'intérêt étatique «pour intervenir» traduisait – toute proportion gardée – le choix des rédacteurs du Protocole d'exclure l'intervention forcée au profit de l'intervention volontaire des États.[67]

Laquelle exigence de la nature étatique de l'entité, seule autorisée à intervenir, fut reprise par l'article 33(2) du Règlement intérimaire, puis rappelée par la majorité des juges dans l'affaire *Commission c. Kenya*.[68] En 2019, ces derniers ont fidèlement traduit la lettre des rédacteurs et des commentateurs du Protocole.[69] Toutefois, l'opinion dissidente de la juge Chafika Bensaoula interpelle longuement sur la clarté même du texte de l'article 5 du Protocole qui – nous le rappelons – dispose:

> 1. Ont qualité pour saisir la Cour:
> (a) La Commission;
> (b) L'État partie qui a saisi la Commission;
> (c) L'État partie contre lequel une plainte a été introduite;
> (d) L'État partie dont le ressortissant est victime d'une violation des droits de l'homme;
> (e) Les organisations intergouvernementales africaines.
> 2. Lorsqu'un État partie estime avoir un intérêt dans une affaire, il peut adresser à la Cour une requête aux fins d'intervention.
> 3. La Cour peut permettre aux individus ainsi qu'aux organisations non gouvernementales (ONG) dotées du statut d'observateur auprès de la

64 *Dictionnaire juridique de la Cour internationale de justice* (2000) 201-202.

65 Art 53(2) du Règlement intérieur intérimaire.

66 Voir *Armand Guéhi c. Tanzanie*, demande d'intervention de la République de Côte d'Ivoire, Req. 001/2015; *Bernard Anbataaleya Mornah c. Bénin,* demandes d'intervention du Sahara occidental et de l'île Maurice, Req. 001/2020 et Req. 002/2020.

67 Pour une lecture approfondie sur la distinction entre l'intervention volontaire et l'intervention forcée, voir les développements de P Kenfack 'Introduction générale' 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) 1275-1276.

68 *Commission africaine des droits de l'homme et des peuples c. Kenya* (intervention) (2019) 3 RJCA 430 para 9.

69 Lire avec intérêt Kenfack (n 67) 1276-1277.

> Commission d'introduire des requêtes directement devant elle conformément à l'article 34(6) de ce Protocole.

Deux thèses s'opposèrent au sein de la Cour: la première (la thèse majoritaire) soutenait que si les rédacteurs du Protocole reconnaissaient un droit d'intervention aux entités ou personnes autres que les États, ils l'auraient expressément énoncé aux paragraphes 1 et 3 de l'article 5 précité, comme ils l'ont fait au paragraphe 2. La seconde thèse, bien plus souple, est celle de la juge Chafika Bensaoula. Elle a réfuté l'interprétation restrictive de l'article 5, en étendant la sienne au respect des principes défendus par la Charte, à l'essence du texte, à la jurisprudence de la Cour, et au droit comparé.[70] Au risque d'empiéter partiellement sur son raisonnement, nous nous étalerons respectivement sur la jurisprudence qu'elle a évoquée et sur l'argument relatif à l'essence du texte. Ainsi se fondant sur l'autorisation d'intervention en qualité d'*amicus curiae* faite par la Cour en faveur de l'Union panafricaine des avocats (PALU) dans l'affaire *Commission africaine des droits de l'homme et des peuples c. Grande Jamahiriya Arabe Libyenne Populaire et Socialiste*, l'honorable juge a estimé que la Cour avait déjà fait droit à la demande d'un tiers non-étatique dans le cadre d'une intervention. Selon la juge, «en faisant droit à la demande de PALU, la Cour reconnait explicitement le droit aux ONG et individus d'intervenir devant elle en qualité d'intervenant».[71] Or il nous importe de préciser qu'une distinction doit être établie entre l'intervention au titre de l'article 5 du Protocole de Ouagadougou et l'intervention en qualité d'*amicus curiae* devant la cour.[72] Ensuite s'agissant de l'essence même du texte, la juge Chafika Bensaoula a interprété le droit de «saisine» accordé aux individus et aux ONG comme étant un droit incluant la saisine aux fins d'intervention rendant non nécessaire toute précision relative au droit d'intervention de ces acteurs. À la juge d'ajouter que ce droit d'intervention «ne saurait être exclu» à ces acteurs qui auraient eux-aussi un intérêt à intervenir dans une instance pendante où des droits auraient été ou pourraient être bafoués.

La question qui peut se poser, à cet effet, est relative au sens attribué à la «saisine» de la Cour africaine des droits de l'homme et des peuples. L'expression «ont qualité pour saisir la Cour» dans l'article

70 Voir l'opinion dissidente de la juge Chafika Bensaoula dans l'affaire *Commission c. Kenya* relative aux demandes d'intervention de Wilson Bargetuny et autres et Peter Rono et autres para 3.

71 Opinion dissidente de la juge Chafika Bensaoula (n 70) para 4.

72 La recevabilité de l'intervention de certaines ONG dans les affaires *Commission africaine des droits de l'homme et des peuples c. Libye*, *Konaté c. Burkina Faso*, et *Umuhoza c. Rwanda* s'inscrivait en effet dans l'optique de les considérer comme des *amis de la Cour (amicus curiae)* et non comme des tiers-intervenants au titre des instruments de procédure de la Cour. Les systèmes européen (Art 36(2) de la Convention européenne des droits de l'homme) et interaméricain (Art 48 du Règlement de la Cour interaméricaine des droits de l'homme) tendent à relier les deux notions d'*amicus curiae* et de tierce-intervention en raison du fait que la tierce intervention est *mutatis mutandis* permise à toute personne y compris les *amici curie*. Cette simplicité s'étendra sans doute au système de la Cour africaine vu l'extension de la saisine de la Cour en qualité de tiers-intervenant à 'toute personne' y compris les *amici curiae*.

5(1) du Protocole ne se réfère-t-elle pas à l'action en justice principale plutôt qu'à l'action en justice *lato sensu*? Les termes combinés des paragraphes 1 et 3 de l'article 5 du Protocole jalonnent notre analyse. Dans un premier temps, quelques entités sont énumérées sur le fondement de leur «qualité» à pouvoir «saisir la Cour». Ce sont la Commission, les États et les organisations intergouvernementales. La lecture du paragraphe 3 permet de déduire de l'idée précédente le mode de saisine auquel fait référence le paragraphe 1. En réalité, s'il est fait précision dans le paragraphe 3 de quelques exigences incontournables permettant aux individus et aux ONG de saisir «directement» la Cour, c'est parce que les termes du paragraphe 1 traduisent la «saisine directe». Et il nous semble inopportun de croire que cette saisine directe de la Cour s'étend à l'intervention , auquel cas les rédacteurs du Protocole n'auraient pas pris soin de citer à nouveau les États dans le paragraphe 2 relatif à l'intervention – les États ayant été auparavant cités au paragraphe 1. Il serait en effet indéniable qu'un État «dont le ressortissant est victime d'une violation des droits de l'homme» dans une affaire ait à tous coups un intérêt à y intervenir.

En définitive, le texte de l'article 5 du Protocole et les termes du Règlement intérieur intérimaire de la Cour, ces derniers tels qu'ils étaient formulés, ne permettaient pas, à notre sens, d'affirmer que l'intervention pouvait s'étendre à une entité ou une personne autre que l'État. Cela étant, on peut reprocher à la combinaison de ces textes un manque de précisions sur le droit à l'intervention. C'est à notre avis pour pallier cette imperfection qu'en 2020 le Règlement intérieur nouveau (le Règlement) de la Cour a modifié les termes du texte intérimaire. En plus de rappeler la règle relative au droit à l'intervention étatique,[73] le Règlement indique en sa règle 61(2): «[l]a Cour peut, dans l'intérêt de la justice, autoriser toute personne ayant un intérêt dans une affaire à intervenir». Une clarification qui permettra désormais aux individus et aux ONG de saisir la Cour aux fins d'une intervention,[74] quitte à prouver au fond qu'ils ont un intérêt à le faire.

Cette position de la Cour se conforte dans sa jurisprudence récente, dans la mesure où dès lors que la procédure relative à l'intérêt juridique en cause est établie, il faut en connaître la nature. Telle fut la question à résoudre dans l'affaire *Morna*h, eu égard aux demandes d'intervention du Sahara occidental et de l'île Maurice. Dans ses ordonnances relatives à cette affaire, la Cour a considéré que, pour apprécier l'intérêt d'un intervenant dans une affaire, il fallait se préoccuper de «la nature des questions soulevées dans l'affaire, de l'identité de l'intervenant et de l'incidence potentielle des décisions de la Cour sur l'intervenant et les tierces parties».[75] La requête portant sur

73 Règle 61(1) du Règlement intérieur de la Cour.

74 Comme le souligne le juge Blaise Tchikaya dans son opinion individuelle relative aux demandes d'interventions du Sahara occidental et de l'île Maurice dans l'affaire *Mornah* para 23. Toutefois ce dernier, à juste titre, s'interroge sur l'utilité de cette extension du droit d'intervention aux sujets de droit si l'on veut s'en tenir à l'esprit du Protocole para 35.

75 Voir par exemple *Mornah* Ordonnance, 002/2020, Requête de l'île Maurice, para 16.

des questions relatives aux droits et libertés du Peuple de la RASD, la Cour a logiquement conclu que les Sahraouis avaient un intérêt légal à protéger en l'espèce.[76] La complexité de la cause revenait en revanche à la demande d'intervention de l'île Maurice. Pour justifier son intérêt en cause dans l'affaire, l'île Maurice s'est appuyée sur son appartenance à l'Union africaine (UA), en second lieu sur son processus de décolonisation inachevé qui, en vertu – prétendait-elle – du caractère *erga omnes* du droit à l'autodétermination devrait l'autoriser à intervenir dans la requête.[77] Sur le premier argument de l'intervenant, la Cour a démontré que la requête du demandeur initial pouvait conduire à rendre une décision dont l'impact sur l'île Maurice et son peuple pouvait être certain.[78] Statuant en second lieu sur l'argument relatif à l'appartenance à l'UA, la Cour s'est une nouvelle fois appuyée sur la requête du demandeur initial. Selon la Cour, cette requête, pour le fait de porter sur la contestation d'une décision de l'UA de réintégrer le Maroc encore «colonisateur» du Sahara en son sein – une telle attitude portant atteinte aux principes et valeurs de l'UA – tous les États membres de l'UA pouvaient intervenir dans l'affaire.[79] En somme, la Cour a conclu que l'île Maurice avait, au même titre que le Sahara occidental, un intérêt juridique dans l'affaire.[80] Si bien qu'au bout du compte, la nature de l'intérêt «pour intervenir» relève de l'appréciation faite par la Cour du cas d'espèce soumis. On peut énumérer à ce titre le critère de l'appartenance à une cause. Un État ou [désormais] toute personne peut intervenir dans une affaire, dans l'intérêt de la justice, si un ou plusieurs intérêts en cause lui appartiennent.

Ce faisant, sans préciser au préalable le contenu exact à attribuer à la «nature de l'affaire», la position de la Cour visant à faire dépendre l'intérêt pour intervenir de la nature de l'affaire peut constituer à bien des égards une «fondamentalisation» dangereuse de l'interêt pour intervenir.

Au terme de cette section, les «parties» s'opposent les unes contre les autres en confrontant leurs intérêts respectifs. De manière plus avancée, dans l'hypothèse où la requête est portée par une personne/entité au nom d'une ou de plusieurs victimes, l'intérêt de la personne/entité, même s'il n'est pas recherché, naît de celui des victimes. De la sorte, la victime se présente comme une «partie» fusionnée à la partie

76 La même réflexion guide la Cour dans *Armand Guéhi c. Tanzanie* (fond et réparations) (2018) para 12; Voir à ce propos A Oulepo 'l'affaire Armand Guéhi 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' (2019) 3 *Annuaire africain des droits de l'homme* 487-489. C Anyangwe 'Le pouvoir normatif du droit à l'autodétermination en vertu de la charte africaine et du principe d'intégrité territoriale: Valeurs concurrentes de la dignité humaine et de la stabilité du système' (2018) 2 *Annuaire africain des droits de l'homme* 70-71;

77 *Mornah* (n 75) para 17.

78 *Mornah* (n 75) paras 18-19.

79 *Mornah* (n 75) paras 20-21; Lire aussi avec intérêt TM Makunya 'Decisions of the African Court on Human ans Peoples' Rights during 2020: Trends and lessons (2021) 21 *African Human Rights Law Journal* 1251-1253.

80 *Mornah* (n 75) para 22.

qui porte son intérêt devant la Cour. Tel fut partiellement l'argument soulevé par l'État défendeur dans l'affaire *Commission c. Kenya*.[81] De manière différenciée, la Cour avait estimé que les requérants initiaux qui avaient saisi la commission en qualité de «victimes» n'étaient pas «parties» au procès intenté par la Commission (en leur nom) devant la Cour.[82] Toutefois dans la prise en compte de l'intérêt, il est certain que les victimes et les plaignants agissant au nom des victimes soutiennent une cause commune.

3 LES CATÉGORIES D'INTÉRÊT RELATIVES AUX «NON-PARTIES» À LA PROCÉDURE

Le bon déroulement d'une procédure devant une juridiction requiert que l'intérêt n'engendre pas de conflits. Autant l'intérêt incite à une action ou à une intervention, le conflit d'intérêt doit entrainer une abstention anticipée (abstention avant l'affaire) ou une récusation[83] (abstention au moment de l'affaire) des personnes intervenant dans la procédure sans en être parties. Constitue un conflit d'intérêts «toute situation d'interférence entre un intérêt public et des intérêts publics ou privés qui est de nature à influencer ou à paraître influencer l'exercice indépendant, impartial et objectif d'une fonction»,[84] en l'occurrence, la fonction du juge au sein de la Cour. Si l'influence de l'exercice indépendant et impartial du juge peut entraîner sa récusation,[85] voire son abstention anticipée, l'influence de l'exercice objectif du juge, en plus d'entraîner sa propre récusation,[86] peut conduire à la récusation des témoins et experts.

3.1 L'intérêt dans l'abstention anticipée et la récusation des juges

En ce qui concerne la récusation du juge, l'article 22 du Protocole dispose qu' «[a]u cas où un juge possède la nationalité d'un État partie à une affaire, il se récuse».[87] Cette attitude s'apparente à une «abstention volontaire du juge»[88] qui exclut toute demande de

81 *Commission africaine des droits de l'homme et des peuples* (n 21) para 56; *Commission africaine des droits de l'homme et des peuples c. Kenya* (fond) (2022) para 33.

82 *Commission africaine des droits de l'homme et des peuples* (n 81) para 35.

83 Selon le dictionnaire de droit international public de Jean Salmon, constitue une récusation toute possibilité offerte lors d'un procès d'écarter un juge, un témoin ou un expert (2001) 954.

84 https://www.courdecassation.fr/publications/actes-de-colloque/la-deontologie-des-magistrats-de-lordre-judiciaire-la-declaration/la-definition-du-conflit-dinterets (source consultée le 23 septembre 2022).

85 J Kom 'introduction générale' 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) 1415-1416.

86 Kom (n 85).

récusation de la part des parties. A ce titre, le lien de nationalité intervient comme étant la traduction de l'intérêt en cause. En effet, la nationalité peut créer entre le juge et les parties un lien dont la conséquence pourra être pour le juge de favoriser l'État défendeur. De plus, le Règlement prévoit qu'un juge doit s'abstenir de siéger dans une affaire si l'État qui l'a nominé pour l'élection des juges y est partie.[89] Ainsi, conscient qu'il a un intérêt dans une affaire, le juge se récuse. Ces dispositions évoquent des critères essentiellement liés à l'appartenance à une cause liant le juge à l'État défendeur. En effet, l'État de nationalité ou l'État qui nomine un juge à la Commission de l'Union africaine peut exercer sur ce juge, une fois élu, une influence de nature à enfreindre la garantie d'indépendance et d'impartialité de la Cour. Le juge lui-même est susceptible, en raison de sa nationalité, de son patriotisme, ou des liens officiels avec tout État, de considérer les intérêts nationaux au fond de l'affaire, au détriment de la nécessité objective de garantir l'indépendance et l'impartialité de la Cour. Il convient de reconnaître toutefois que cette présomption est sans préjudice de l'intégrité et de l'honnêteté du juge. C'est d'ailleurs, de notre point de vue, pour cette énième raison que le Protocole ne prévoit que la récusation volontaire du juge.

Outre ces critères d'exclusion liant le juge à l'État défendeur, d'autres critères établis par le Règlement de la Cour s'intéressent aux rapports entre le juge et toute personne agissant pour le compte d'une des parties. En effet:[90]

> Aucun juge ne peut participer à l'examen d'une affaire:
>
> (a) s'il est intervenu antérieurement dans celle-ci, comme agent, conseil, ou avocat de l'une des parties, membre d'un tribunal national ou international, d'une commission d'enquête, ou à tout autre titre;
>
> (b) s'il a un intérêt personnel dans cette affaire, du fait par exemple d'un lien conjugal ou parental, d'un autre lien de proche parenté, d'un lien personnel ou professionnel étroit, ou d'un lien de subordination avec l'une quelconque des parties;
>
> (c) s'il a exprimé en public, par le truchement des médias, par écrit, par des actions publiques ou par tout autre moyen, des opinions qui sont objectivement de nature à nuire à son impartialité;
>
> (d) si, pour quelque autre raison que ce soit, son indépendance ou son impartialité peut légitimement être mises en doute.

L'intérêt du juge dans une affaire s'étend donc à tout rapport officiel de ce dernier avec une des parties, du fait de son action, du lien naturel ou établi qu'il peut avoir avec une personne appartenant à une partie, ou de tout autre élément pouvant entraver son indépendance ou son impartialité.

87 L'idée étant de rendre une justice équitable et puisant probablement sa source dans l'article 10 de la Déclaration des droits de l'homme: '*Toute personne a droit en pleine égalité à ce que sa cause soit entendue équitablement et publiquement par un Tribunal indépendant et impartial qui décidera soit de ses droits et obligations, soit du bien-fondé de toute accusation en matière pénale dirigée contre elle*'.

88 Kom (n 85) 1414.

89 Règle 9 du Règlement intérieur de la Cour.

90 Règle 9(4) du Règlement intérieur de la Cour.

Il convient enfin de noter que l'intention d'éviter tout conflit d'intérêts relatif à la fonction du juge s'analyse également en amont d'une affaire. L'abstention anticipée s'ajoute en toute logique à la récusation en tant qu'attitude du juge liée au conflit d'intérêt. La règle 5 du Règlement, notamment, prévoit des incompatibilités absolues de nature à atteindre l'exigence d'indépendance et d'impartialité du juge. En effet les juges de la Cour ne peuvent exercer des fonctions politiques, administratives ou de conseiller juridique de tout gouvernement.[91] Ils ont par ailleurs l'obligation de déclarer à la Cour toute activité pouvant constituer une source d'incompatibilité.[92] C'est ainsi à juste titre que démissionnait le juge Rafââ Ben Achour de son poste de conseiller à la Présidence de la République de Tunisie dès sa nomination en tant que juge de la Cour.[93]

En conséquence, l'abstention anticipée et la récusation des juges de la Cour apparaissent comme des garanties d'indépendance et d'impartialité. L'indépendance et l'impartialité du juge doivent être des conditions cumulatives en vue de dégager tout conflit d'intérêt à lui relatifs dans la procédure. Tout bien considéré, un juge peut être indépendant mais partial, et inversement. Dans l'affaire *Actions pour la Protection des Droits de l'Homme c. Côte d'Ivoire*, une nette distinction fut établie entre l'indépendance et l'impartialité d'un point de vue général[94] et d'un point de vue particulier relativement aux juges.[95] Un juge est indépendant s'il ne dépend «d'aucune autre autorité que la sienne propre»[96] et impartial s'il n'a pas de «partis pris, de préjugés ou de conflit d'intérêts».[97] À tel point que l'indépendance du juge relève des incompatibilités susmentionnées prévues à la règle 5(2) du Règlement, tandis que l'impartialité du juge lui interdit, comme le dispose la règle 9(4) du Règlement, de siéger dans des affaires où il pourrait exister un conflit d'intérêt d'ordre personnel, matériel ou autre.[98] On retiendra de ce qui précède que l'abstention anticipée et la récusation du juge sont des actions volontaires de ce dernier, en présence de situations mettant en péril son indépendance et son impartialité.

91 Règle 5(2) du Règlement intérieur de la Cour.

92 Règle 5(3) du Règlement intérieur de la Cour.

93 *Hassen* (n 43) para 25.

94 *Actions pour la Protection des Droits de l'Homme* (n 23) para 117.

95 *Actions pour la Protection des Droits de l'Homme* (Opinion dissidente du juge Fatsah Ouguergouz) paras 15-24.

96 *Actions pour la Protection des Droits de l'Homme* (Opinion dissidente du juge Fatsah Ouguergouz) para 16.

97 *Actions pour la Protection des Droits de l'Homme* (Opinion dissidente du juge Fatsah Ouguergouz) para 16.

98 *Actions pour la Protection des Droits de l'Homme* (Opinion dissidente du juge Fatsah Ouguergouz) para 16.

99 Selon la règle 56(5) du Règlement, [l]a Cour se prononce sur toute contestation née à l'occasion de la récusation d'un témoin ou d'un expert. La règle 55(1) du Règlement quant à elle prévoit sur l'intervention des témoins et experts, que la Cour peut, soit *proprio motu* soit à la demande d'une partie, se procurer tous les

3.2 L'intérêt dans la récusation des témoins et experts

En ce qui concerne la récusation des témoins et experts *a contrario*, le déclenchement de l'action dépend de l'une des parties,[99] quoique l'importance des conditions tenant à l'indépendance et à l'impartialité demeure partiellement. Dans l'affaire *Peter Joseph Chacha c. Tanzanie*, il avait été posé le problème de la récusation d'un témoin-expert du requérant. Cette demande de récusation faite par le défendeur, d'un point de vue de l'intérêt, soulevait à notre avis deux difficultés: la première porte sur l'intérêt même du témoin-expert dans l'affaire, et la seconde tient à la double qualité de l'individu présenté à la fois comme témoin et expert. Au sujet de la première difficulté, pour s'opposer à l'exception préliminaire du défendeur qui estimait que le témoin-expert avait un intérêt direct dans l'affaire, le requérant avait soutenu qu'aucune preuve n'avait été établie que ledit témoin-expert avait une relation d'intérêt dans l'affaire.[100] La Cour, dans sa décision sur la demande de récusation, et s'appuyant principalement sur la qualité d'expert du témoin-expert, avait souligné qu'elle attendait de tout expert des principales qualités dont l'indépendance et l'impartialité.[101] Elle a dû conclure, sans revenir sur ces qualités, qu'elle n'avait aucune obligation d'accueillir le témoin-expert. Relativement à la seconde difficulté, l'opinion dissidente des juges Sophia Akuffo, Nwanwuri Thompson et Ben Kioko a rappelé que l'individu proposé par la partie requérante était à la fois expert et témoin. En conséquence l'analyse sur sa seule qualité d'expert ne suffisait pas pour se prononcer sur la récusation. Ainsi fallait-il se pencher sur sa qualité de témoin.[102] Pour ce faire, selon les juges dissidents, la Cour aurait dû entendre le «témoignage» de l'expert au fond.[103] Par ailleurs, à l'occasion d'un raisonnement sur d'autres témoins appelés dans l'espèce, les juges dissidents ont considéré que l'intérêt direct du témoin dans une affaire est un critère essentiel au bon déroulement de la procédure.[104] Pour cause, ce dernier fournit davantage d'éléments sur les violations alléguées et leurs conséquences. C'est à ce propos que les juges dissidents citent la Cour interaméricaine des droits de l'homme qui crée un lien étroit entre les qualités de victime et de témoin, en ce sens que le «témoignage de la victime» a «une portée unique, la victime étant la seule personne qui peut fournir les informations nécessaires».[105]

Cela dit, le Règlement de la Cour est venu apporter des corrections au Règlement intérimaire avec la confirmation du fait que l'intérêt dans

99 éléments de preuve qu'elle estime aptes à l'éclairer sur les faits de la cause. Une lecture combinée de ces deux dispositions permet d'en dégager le caractère forcé de la récusation, pouvant émaner des parties.

100 *Chacha* (n 26) para 79.

101 *Chacha* (n 26) para 88.

102 *Chacha* (n 26) (Opinion dissidente conjointe des juges Sophia Akuffo, Nwanwuri Thompson, et Ben Kioko) paras 44-49.

103 Opinion (n 102) para 49.

104 *Chacha* (recevabilité), Opinion des juges Sophia Akuffo, Nwanwuri Thompson et Ben Kiokio, para 54.

une affaire est une source de disqualification de l'expert, ladite règle ne s'appliquant pas au témoin. En effet, la règle 56 du Règlement ajoute les mentions «en toute indépendance et en toute impartialité»[106] uniquement au sujet de la qualité requise pour l'expert; là où le Règlement intérimaire, pour la même cause, ne faisait aucune distinction.[107] En définitive, l'intérêt de l'expert dans une affaire est plus susceptible de créer des conflits d'intérêt. En revanche l'intérêt du témoin doit être davantage recherché.

4 REMARQUES CONCLUSIVES SUR L'ATTITUDE SINGULIÈRE DE LA COUR DANS LA PRISE EN COMPTE DE L'INTÉRÊT DANS LA PROCÉDURE

Au terme de cette étude, la Cour africaine des droits de l'homme et des peuples est «assujettie» à la Charte, au Protocole, et au Règlement. En vue d'affirmer sa compétence matérielle, la Cour s'évertue à appliquer termes pour termes ses instruments de procédure. Cette attitude se matérialise au même degré quand il s'agit d'apprécier sa compétence personnelle et la recevabilité des affaires. Comme le montre sa jurisprudence, la Cour traduit fidèlement les exigences des instruments relatifs aux règles de procédure. Tout d'abord elle écarte l'intérêt personnel à agir comme le lui proposent implicitement le Protocole et le Règlement. À cet égard, elle ne pose aucun critère à remplir pour atteindre cet intérêt. Autrement dit, la qualité de victime présumée n'est pas requise pour saisir la Cour en ouverture d'instance.[108] Il s'agit là d'une attitude volontaire de la Cour qui consiste à se limiter aux termes des instruments de procédure. Pourtant, plusieurs auteurs s'accordent à dire que l'intérêt à agir possède un rôle fondamental en droit procédural[109] comme l'exprime d'ailleurs l'adage «pas d'intérêt, pas d'action». Pour ainsi dire, la Cour adopte une démarche toute

105 *Suarez Rosero c. Equateur* (fond), Cour interaméricaine des droits de l'homme, 12 novembre 1997, Série C, No 35, para 32; Voir aussi *Loayza Tamayo c. Peru* (Réparations, 1998), para 73.

106 Règle 56(3) du Règlement intérieur de la Cour.

107 Art 46 du Règlement intérimaire.

108 En ce sens, la Cour rejoint la Commission africaine des droits de l'homme et des peuples qui dans sa communication *Malawi African association c. Mauritanie affirmait*: '*Les auteurs d'une communication ne doivent pas forcément être les victimes ou des membres de leurs familles. Cette caractéristique reflète une sensibilité aux difficultés pratiques que peuvent rencontrer les individus dans les pays où les droits de l'homme sont violés. Les voies de recours nationales ou internationales peuvent ne pas être accessibles aux victimes elles-mêmes ou peuvent s'avérer dangereuses à suivre*'; Voir aussi M Namountougou 'La saisine du juge international africain des droits de l'homme' (2011) 86 *Revue trimestrielle des droits de l'homme* 261, 287 ; A-K Diop 'La Cour africaine des droits de l'homme et des peuples ou le miroir stendhalien du système africain de protection des droits de l'homme' (2014) *Les cahiers du droit* 55, 530-555, 538; F Ouguergouz 'La Cour africaine des droits de l'homme et des peuples – Gros plan sur le premier organe judiciaire africain à vocation continentale' (2006) 52 *Annuaire français de droit international* 213-240, 229-230.

particulière et originale dans la prise en compte de l'intérêt en ce qui concerne l'action en justice principale. Sur ce, «en dépit de quelques éléments de base classique qui les réunit»,[110] la Cour se montre différente de la Cour interaméricaine des droits de l'homme[111] et de la Cour européenne des droits de l'homme,[112] même si cette dernière commence de plus en plus à reconnaître la qualité pour agir aux entités non-victimes dans certaines circonstances [très] exceptionnelles.[113] En effet, si dans les trois systèmes «la procédure des requêtes étatiques fonctionne à la manière d'une actio popularis»,[114] l'intérêt public des communautés recherché à travers les requêtes non étatiques dans le système de la Cour africaine se diffère de l'intérêt personnel non étatique recherché dans les deux autres systèmes.

Néanmoins, l'évolution à venir de la jurisprudence de la Cour implicitement annoncée par la règle 61(2) de son Règlement intérieur agrée le rapprochement de la Cour vers la doctrine des Cours sœurs.[115] Cette singularité «partagée» tient en sus au caractère volontaire retenu parmi les critères de l'intérêt pour intervenir. De même, l'intérêt pris en compte à propos des juges, témoins et experts, relevant des critères cumulatifs d'indépendance et d'impartialité à atteindre ou non, épouse celui des autres juridictions internationales.[116] À la différence près, la récusation des juges et des experts pour conflits d'intérêt est davantage affirmée par la Cour africaine en ce sens qu'elle pose formellement les critères (l'indépendance et l'impartialité) que les autres Cours n'identifient pas expressément.

In fine la singularité de la Cour africaine des droits de l'homme et des peuples dans la prise en compte de l'intérêt est essentiellement marquée par l'inexistence de l'intérêt personnel à agir en ouverture d'instance.

109 Barbé, (n 18) 24; Lire avec intérêt C Chainais et al *Procédure civile* (2016) 141-142.

110 L-B Larsen *Les 3 Cours régionales des droits de l'homme in context: la justice qui n'allait pas de soi* (2020) 18.

111 Notamment dans le fait que les individus n'aient pas d'accès direct à la Cour interaméricaine bien que l'intérêt à agir ne leur soit pas imposé par la Commission interaméricaine qui peut recevoir leurs plaintes.

112 Art 34 de la Convention européenne des droits de l'homme; Voir aussi *Ilhan c. Turquie,* Cour européenne des droits de l'homme, Grande chambre, 27 juin 2000, 22277/93 para 52 et *Aksu c. Turquie*, Cour européenne des droits de l'homme, grande Chambre, 15 mars 2012, 4149/04 et 41029/04, para 51; *Le Mailloux c. France*, Cour européenne des droits de l'homme, 5 novembre 2020, paras 10-11.

113 Voir par exemple *Lonel Garcea c. Roumanie*, Cour européenne des droits de l'homme, 24 mars 2015, 2959/11, para 43-45; *Kondrulin c. Russie*, Cour européenne des droits de l'homme, 20 septembre 2016, 12987/15, paras 31-33.

114 F Voeffray *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationale*, disponible sur https://books-openedition-org.faraway.parisnanterre.fr/iheid/1206 (source consultée le 24 septembre 2022) paras 53 et 85.

115 Voir art 36(2) de la Convention européenne des droits de l'homme; art 2(3) et 44 du Règlement intérieur de la Cour interaméricaine des droits de l'homme.

116 Voir art 48 du Règlement de la Cour interaméricaine des droits de l'homme; art A7 du Règlement de la Cour européenne du 16 septembre 2022.

A proibição e repressão da tortura no sistema africano dos direitos humanos: utopia ou má-fé dos Estados?*

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RESUMO: Embora o sistema africano de proteção dos direitos humanos tenha consagrado como absoluto o direito de não sofrer atos de tortura ou penas ou tratamentos cruéis, desumanos ou degradantes, estas práticas, que desprezam a dignidade inerente à pessoa humana, continuam a prosperar no continente. Assim sendo, serão a proibição e a repressão da tortura pura utopia ou evidência da má-fé dos Estados? O presente estudo procura fornecer elementos de resposta a esta questão. Expõe, em primeiro lugar, os instrumentos jurídicos pertinentes na matéria, bem como o mandato do Comité para a Prevenção da Tortura em África, responsável pela promoção da implementação das Linhas Diretrizes de Robben Island. Traça, em seguida, um panorama da situação através do estudo das ratificações e das queixas submetidas às instâncias supranacionais africanas, apresenta as deficiências nacionais, tanto na adoção de legislações e na criação de órgãos específicos como na complacência na fase da repressão, e termina com a proposta de recomendações para melhorar a eficácia da luta contra a tortura.

TITRE ET RÉSUMÉ EN FRANÇAIS

L'interdiction et la répression de la torture dans le système africain des droits de l'homme: utopie ou mauvaise foi des États?

RÉSUMÉ: Bien que le système africain de protection des droits humains ait consacré comme absolu le droit de ne pas subir d'actes de torture et de peines ou traitements cruels, inhumains ou dégradants, ces pratiques méprisant la dignité inhérente à la personne humaine continuent de prospérer sur le continent. Dès lors, l'interdiction et la répression de la torture relèvent-elles d'une pure utopie ou mettent-elles en évidence la mauvaise foi des États? La présente étude s'attache à apporter des éléments de réponse à ce questionnement. Elle expose, tout d'abord, les instruments

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juridiques pertinents en la matière, ainsi que le mandat du Comité pour la prévention de la torture en Afrique, chargé de promouvoir l'application des Lignes directrices de Robben Island. Elle dresse, ensuite, un panorama de la situation à travers l'étude des ratifications et des plaintes soumises aux instances supranationales africaines, présente également les défaillances nationales tant dans l'adoption de législations et la création d'organes spécifiques que dans la complaisance au stade de la répression, et termine par la proposition de recommandations pour améliorer l'efficacité de la lutte contre la torture.

TITLE AND ABSTRACT IN ENGLISH

The prohibition and punishment of torture in the African human rights system: utopia or bad faith of states?

ABSTRACT: Although the African human rights protection system has enshrined as absolute the right not to be subjected to acts of torture or cruel, inhuman or degrading punishment or treatment, these practices, which disregard the inherent dignity of the human person, continue to thrive on the continent. This state of affairs begs the question whether the prohibition and repression of torture are pure utopia or evidence of the bad faith of states. This study aims to answer this question. It sets out, first, the relevant legal instruments in this area, as well as the mandate of the Committee for the Prevention of Torture in Africa, responsible for promoting the implementation of the Robben Island Guidelines. It then provides an overview of the situation by studying the ratifications and complaints submitted to African supranational bodies. It also presents national shortcomings both in the adoption of legislation and in the creation of specific bodies, as well as in complacency at the repression stage. It ends with the proposal of recommendations to improve the effectiveness of the fight against torture.

PALAVRAS-CHAVE: tortura, penas ou tratamentos cruéis, desumanos ou degradantes, Linhas Diretrizes de Robben Island, Comité para a Prevenção da Tortura em África, Tribunal Africano dos Direitos Humanos e dos Povos, Comissão Africana dos Direitos Humanos e dos Povos

ÍNDICE

1 INTRODUÇÃO

Considerados um dos piores atentados à integridade e à dignidade do ser humano, a tortura e as outras penas ou tratamentos cruéis, desumanos ou degradantes são proibidos de forma universal e absoluta. Desde o fim da Segunda Guerra Mundial, os Estados consagraram a interdição da tortura tanto a nível internacional[1] quanto a nível dos sistemas regionais dos direitos humanos,[2] o que reflete o profundo apego da comunidade internacional à salvaguarda da dignidade humana.[3] Esta proscrição aplica-se em todas as circunstâncias, ou seja, tanto em tempos de paz como em tempos de guerra,[4] sem que seja aceite qualquer derrogação, quer se trate da invocação do interesse geral e da segurança nacional ou da perigosidade da vítima e da gravidade dos seus crimes.

Embora a tortura esteja, muitas vezes, associada a penas ou tratamentos desumanos ou degradantes, estes últimos não são definidos com precisão nos instrumentos internacionais.[5] Da jurisprudência, é possível deduzir, por um lado, que as penas ou tratamentos degradantes envolvem uma humilhação ou degradação. Referem-se a um leque de práticas suscetíveis de despertar na vítima sentimentos de medo, angústia e inferioridade capazes de humilhá-la e degradá-la ou que visam romper a resistência física ou moral da vítima[6] ou levá-la a comportar-se de forma contrária à sua vontade ou consciência.[7] Por outro lado, as penas ou tratamentos desumanos devem atingir um mínimo de gravidade, causando lesões corporais ou sofrimentos mentais intensos, sem serem necessariamente deliberados ou infligidos para um propósito específico.[8]

1 Ver em particular: Declaração Universal dos Direitos Humanos de 1948, artigo 5; Pacto Internacional sobre os Direitos Civis e Políticos de 1966, artigo 7; Declaração sobre a Proteção de Todas as Pessoas Contra a Tortura e Outras Penas ou Tratamentos Cruéis, Desumanos ou Degradantes de 1975; Convenção contra a Tortura e Outras Penas ou Tratamentos Cruéis, Desumanos ou Degradantes de 1984.

2 Ver em particular: Carta Africana dos Direitos Humanos e dos Povos, artigo 5; Convenção Europeia dos Direitos Humanos, artigo 3; Convenção Americana dos Direitos Humanos, artigo 5(2); Carta Árabe dos Direitos Humanos, artigo 8.

3 Ver E Delaplace 'L'interdiction de la torture: un impératif juridique à défendre' in *Rapport ACAT 2014. Un monde tortionnaire* (2014) 282.

4 Ver as Convenções de Genebra de 1949 e os seus Protocolos Adicionais de 1977, especificamente o artigo 3 comum às Convenções de Genebra, os artigos 12 e 50 da 1ª Convenção, os artigos 12 e 51 da 2ª Convenção, os artigos 17, 87, 130 da 3ª Convenção, os artigos 32 e 147 da 4ª Convenção, o artigo 75(2), alíneas (a) e (e), do 1º Protocolo e o artigo 4 do 2º Protocolo. Ver também o Estatuto de Roma de 1998 do Tribunal Penal Internacional, artigos 7(1)(f), 8(2)(a)(ii) e 8(2)(c)(i).

5 Ver F Sudre 'Commentaire de l'article 3 de la Convention' in L-E Pettiti, E Decaux & P-H Imbert (dir) *La Convention européenne des droits de l'homme: commentaire article par article* (1995) 156.

6 Tribunal EDH, *Irlanda c. Reino Unido*, queixa No. 5310/71, acórdão de 18 de janeiro de 1978, parágrafo 167.

7 *Relatório da Comissão EDH no caso grego*, 18 de novembro de 1969, capítulo IV, 186.

8 Tribunal EDH, *Selmouni c. França*, queixa No. 25803/94, acórdão de 28 de julho de 1999, parágrafo 99.

No caso da tortura, esta traduz a forma mais grave destas práticas, infligidas de forma deliberada e intencional. De acordo com o artigo 1 da Convenção contra a Tortura e Outras Penas ou Tratamentos Cruéis, Desumanos ou Degradantes de 1984 – que continua a ser o principal tratado internacional nesta área – o termo tortura designa:

> qualquer ato por meio do qual uma dor ou sofrimentos agudos, físicos ou mentais, são intencionalmente causados a uma pessoa com os fins de, nomeadamente, obter dela ou de uma terceira pessoa informações ou confissões, a punir por um ato que ela ou uma terceira pessoa cometeu ou se suspeita que tenha cometido, intimidar ou pressionar essa ou uma terceira pessoa, ou por qualquer outro motivo baseado numa forma de discriminação, desde que essa dor ou esses sofrimentos sejam infligidos por um agente público ou qualquer outra pessoa agindo a título oficial, a sua instigação ou com o seu consentimento expresso ou tácito. Este termo não compreende a dor ou os sofrimentos resultantes unicamente de sanções legítimas, inerentes a essas sanções ou por elas ocasionados.

De acordo com essa definição, quatro critérios cumulativos são essenciais para qualificar um ato de tortura: um alto grau de dor ou de sofrimento físico ou mental; um carácter intencional excluindo a mera negligência; a procura de um propósito específico, como obter informações ou confissões, punir ou intimidar; e o envolvimento de um agente da função pública ou de qualquer outra pessoa agindo no exercício das suas funções oficiais, por sua instigação ou com o seu consentimento expresso ou implícito, estando a vítima sob a sua custódia ou sob o seu controlo.[9] Nesse sentido, a Comissão Africana dos Direitos Humanos e dos Povos (Comissão ADHP) afirmou que, apesar da ausência de uma definição do conceito de tortura na Carta Africana dos Direitos Humanos e dos Povos (Carta ADHP, também conhecida como Carta de Banjul) de 1981, a tortura envolve graves sofrimentos físicos e/ou psicológicos destinados a humilhar o indivíduo ou forçá-lo a agir contra a sua vontade ou consciência,[10] tendo de ser tidos em conta tanto elementos objetivos como subjetivos.[11]

9 O Estatuto de Roma do TPI, no artigo 7(2)(e), não inclui o requisito do envolvimento de um agente público, mas apenas especifica que a vítima deve estar sob a custódia ou sob o controlo da pessoa que inflige a tortura. Nesse sentido, as Câmaras Africanas Extraordinárias proclamaram que 'o direito costumeiro internacional não exige que os atos ou omissões que constituem o crime de tortura sejam cometidos 'por um funcionário público ou outra pessoa no exercício de funções públicas, ou por sua instigação, ou com o seu consentimento ou aquiescência" (*Procurador-Geral c. Hissène Habré*, julgamento de 30 de maio de 2016, parágrafo 1546). Este tribunal penal *ad hoc* foi criado em 2013 por um acordo entre a União Africana e o Senegal, com vista a julgar os principais responsáveis de crimes internacionais, incluindo a tortura, cometidos no Chade de 7 de junho de 1982 a 1 de dezembro de 1990.

10 Ver, em particular, Comissão ADHP: *Spilg e Mack & Ditshwanelo (em nome de Lehlohonolo Bernard Kobedi) c. Botswana*, comunicação 277/2003, dezembro de 2011, parágrafo 163; *International PEN e Outros c. Nigéria*, comunicações 137/94, 139/94, 154/96 e 161/97, 31 de outubro de 1998, parágrafo 79.

11 Ver Câmaras Africanas Extraordinárias, *Procurador-Geral c. Hissène Habré*, julgamento de 30 de maio de 2016, parágrafo 1551: 'Para avaliar a gravidade do mau trato, deve-se avaliar a gravidade objetiva dos sofrimentos e das dores infligidos e, em particular, a natureza, finalidade e persistência dos atos cometidos. São também considerados critérios mais subjetivos, como o estado de saúde mental e física da vítima, as consequências do tratamento a que foi submetida, a idade, o sexo ou o estado de saúde da vítima, ou mesmo a sua situação de inferioridade'.

A importância dessa interdição levou ao seu reconhecimento[12] como norma imperativa ou de *jus cogens*[13] de direito internacional geral. Por outras palavras, todos os Estados, tenham ou não ratificado os tratados relevantes, são obrigados a respeitar a proibição da tortura e dos tratamentos cruéis, desumanos ou degradantes. Nesse sentido, no caso *Furundžija*, o Tribunal Penal Internacional para a ex-Jugoslávia (TPIJ) proclamou em 1998 que, 'devido à importância dos valores que protege, este princípio tornou-se uma norma imperativa ou de *jus cogens*, ou seja, uma norma que ocupa uma posição mais elevada na hierarquia internacional do que o direito convencional e até mesmo do que as regras do direito consuetudinário 'ordinário'.[14] Daí deduziu que 'o valor de *jus cogens* da interdição da tortura reflete a ideia de que ela é hoje uma das normas mais fundamentais da comunidade internacional'.[15]

Seguindo os passos do TPIJ, esta consagração foi confirmada pelo Tribunal Europeu dos Direitos Humanos (Tribunal EDH) que em 2001, no caso *Al-Adsani c. Reino Unido*, reconheceu que 'a proibição da tortura tornou-se uma regra imperativa de direito internacional',[16] bem como pelo Tribunal Interamericano dos Direitos Humanos (Tribunal IDH) que em 2003, no caso *Maritza Urrutia c. Guatemala*, esclareceu que todas as formas de tortura, tanto físicas quanto psicológicas, estão sujeitas a uma proibição absoluta e inderrogável pertencente hoje ao domínio do *jus cogens*, de modo que não pode ser suspensa mesmo nas circunstâncias mais difíceis, como a guerra, a luta contra o terrorismo,

12 Sobre a consagração jurisprudencial das normas imperativas, ver em particular C Maia 'Consagração de direitos humanos imperativos: reavivar o diálogo entre os tribunais internacional e regionais' (2020) 20 *Revista do Instituto Brasileiro de Direitos Humanos* 81-96.

13 De acordo com a definição dada no artigo 53 da Convenção de Viena sobre o Direito dos Tratados de 1969, uma norma imperativa de direito internacional geral (*jus cogens*) é 'uma norma aceite e reconhecida pela comunidade internacional dos Estados no seu todo como norma cuja derrogação não é permitida e que só pode ser modificada por uma nova norma de direito internacional geral com a mesma natureza'.

14 TPIJ, Câmara de Primeira Instância II, *Procurador c. Anto Furundzija*, processo No. IT-95-17/1-T, julgamento de 10 de dezembro de 1998, parágrafo 153. Neste caso, o Tribunal declarou: 'É de notar que a proibição da tortura ao abrigo dos tratados de direitos humanos consagra um direito absoluto que não pode ser derrogado, mesmo numa situação de crise (daí decorre que a proibição se aplica igualmente em tempos de conflito armado)' (parágrafo 144). Declarações semelhantes podem ser encontradas nos julgamentos proferidos nos casos *Procurador c. Zejnil Delalić e Outros* (processo No. TI-96-21-T, 16 de novembro de 1998, parágrafo 454) e *Procurador c. Dragoljub e Outros* (processo No. TI 96-23-T e TI-96-23/1, 22 de fevereiro de 2001, parágrafo 466).

15 TPIJ, Câmara de Primeira Instância II, *Procurador c. Anto Furundzija*, processo No. IT-95-17/1-T, julgamento de 10 de dezembro de 1998, parágrafo 154.

16 Tribunal EDH, *Al-Adsani c. Reino Unido*, queixa No. 35763/97, acórdão de 21 de novembro de 2001, parágrafo 61. Ver também no mesmo sentido Tribunal EDH: *Othman (Abu Qatada) c. Reino Unido*, queixa No. 8139/09, acórdão de 17 de janeiro de 2012, parágrafo 266; *Naït-Liman c. Suíça*, queixa No. 51357/07, acórdão de 15 de março de 2018, parágrafo 129; *Volodina c. Rússia*, queixa No. 41261/17, acórdão de 9 de julho de 2019, parágrafo 8.

o estado de sítio ou de emergência ou outras calamidades nacionais.[17] Da mesma forma, o Tribunal Internacional de Justiça (TIJ) reconheceu em 2012, no caso das *Questões relativas à obrigação de processar ou extraditar*, que 'a proibição da tortura faz parte do direito internacional consuetudinário e adquiriu o carácter de norma imperativa (*jus cogens*). Esta proibição baseia-se numa ampla prática internacional e na *opinio juris* dos Estados. Aparece em numerosos instrumentos internacionais com vocação universal (...), e foi introduzida no direito interno de quase todos os Estados; finalmente, os atos de tortura são regularmente denunciados nos órgãos nacionais e internacionais'.[18] É na mesma linha que as Câmaras Africanas Extraordinárias, no caso *Hissène Habré*, também proclamaram em 2016 que 'esta proibição absoluta, que em nenhum caso pode ser derrogada, está consagrada em numerosos instrumentos internacionais', sendo hoje uma norma costumeira e de *jus cogens*.[19]

No sistema africano dos direitos humanos, se a interdição da tortura não foi explicitamente consagrada como norma imperativa,[20] está, no entanto, inserida como norma absoluta[21] num quadro normativo e institucional que contrasta fortemente com a escala das violações observadas. Diante de tal contraste, e verificando-se o recurso, por parte dos Estados, a práticas de tortura e outros tratamentos cruéis, cabe perguntar se a proibição e repressão da tortura traduz uma utopia ou se reflete uma má-fé dos Estados em não cumprir as suas obrigações internacionais. Este questionamento vai levar-nos a expor o quadro normativo e institucional que visa combater o recurso a esta prática em África, para depois apresentar um panorama da situação no continente africano e apontar as falhas dos Estados na sua implementação. O artigo termina com a proposta de recomendações.

17 Tribunal IDH, *Maritza Urrutia c. Guatemala*, acórdão de 27 de novembro de 2003, Série C No. 103, parágrafos 89 e 92. Ver também no mesmo sentido Tribunal IDH: *Valenzuela Ávila c. Guatemala*, acórdão de 11 de outubro de 2019, Série C No. 386, parágrafo 180; *Azul Rojas Marin e Outra c. Peru*, Série C No. 402, acórdão de 12 de março de 2020, parágrafo 140.

18 TIJ, *Questões relativas à obrigação de processar ou extraditar (Bélgica c. Senegal)*, acórdão de 20 de julho de 2012, *ICJ Reports 2012*, parágrafo 99.

19 Câmaras Africanas Extraordinárias, *Procurador-Geral c. Hissène Habré*, julgamento de 30 de maio de 2016, parágrafo 1541.

20 Em 2011, no caso *Egyptian Initiative for Personal Rights e Interights c. Egipto*, a Comissão ADHP limitou-se a expor o argumento dos queixosos de que a proibição da tortura é uma norma imperativa, sem, todavia, adotar essa qualificação por conta própria (comunicação 334/06, 1 de março de 2011, parágrafo 110).

21 Neste sentido, ver: Tribunal ADHP, *Armand Guehi c. Tanzânia*, mérito e reparações, acórdão de 7 de dezembro de 2018, parágrafo 131; Tribunal ADHP, *Lucien Ikili Rashidi c. Tanzânia*, mérito e reparações, acórdão de 28 de março de 2019, parágrafo 88; Comissão ADHP, *Huri-Laws c. Nigéria*, comunicação 225/98, 6 de novembro de 2000, parágrafo 41; Comissão ADHP, *Abdel Hadi, Ali Radi & Outros c. Sudão*, comunicação 368/09, 5 de novembro de 2013, parágrafo 69. Ver também a Convenção contra a tortura, artigo 2(2) e as Linhas Diretrizes de Robben Island, parágrafo 9.

2 QUADRO NORMATIVO E INSTITUCIONAL DA PROIBIÇÃO DA TORTURA EM ÁFRICA

A Convenção contra a Tortura de 1984 lançou os alicerces que enquadram a proibição e punição da tortura a nível internacional. Nessa senda, o sistema africano dos direitos humanos assumiu esses fundamentos a nível regional ao consagrar as obrigações que incumbem aos Estados no que diz respeito à prevenção e punição dos atos de tortura e das penas ou tratamentos cruéis, desumanos ou degradantes.

2.1 Instrumentos relativos à tortura no sistema africano dos direitos humanos

Tal como outros instrumentos internacionais e regionais de direitos humanos, a Carta ADHP consagra a proibição da tortura no seu artigo 5, que dispõe:

> Todo indivíduo tem direito ao respeito da dignidade inerente à pessoa humana e ao reconhecimento da sua personalidade jurídica. Todas as formas de exploração e de aviltamento do homem, nomeadamente a escravatura, o tráfico de pessoas, a tortura física ou moral e as penas ou tratamentos cruéis, desumanos ou degradantes, são proibidos.[22]

Além deste texto basilar do sistema africano dos direitos humanos, a proscrição da tortura também está consagrada em vários outros tratados africanos de direitos humanos, os quais protegem certas categorias de pessoas.

Assim, a Carta Africana dos Direitos e do Bem-Estar da Criança de 1990, no seu artigo 16 dedicado à proteção contra abusos e maus-tratos, declara que:

> Os Estados Partes da presente Carta tomarão medidas legislativas, administrativas, sociais e educativas específicas para proteger a criança contra qualquer forma de tortura, tratamentos desumanos e degradantes e, em particular, qualquer forma de atentado ou de abuso físico ou mental, negligência ou maus-tratos, incluindo sevícia sexual, enquanto estiverem sob a responsabilidade de um parente, de um tutor legal, da autoridade escolar ou de qualquer outra pessoa a quem tenha sido confiado a guarda da criança (parágrafo 1).

Nos termos deste artigo, cabe aos Estados Partes instituir medidas de proteção, incluindo

> procedimentos efetivos para a criação de organismos especiais de vigilância encarregados de fornecer à criança e àqueles que os têm a seu cargo, o apoio necessário bem como outras formas de medidas preventivas, e para detetar e assinalar os casos de negligência ou de maus-tratos infringidos a uma criança,

22 Este artigo 5 pode ser relacionado com o artigo 4 da Carta ADHP sobre o direito ao respeito pela integridade física e moral. Para um comentário do artigo 5, ver: 'Article 5: Prohibition of slavery and torture and other forms of ill-treatment' in R Murray *The African Charter on Human and Peoples' Rights: A Commentary* (2020) 132-183; Benedita Mac Crorie 'Artigo 5' in P Jerónimo, R Garrido & M de Assunção do Vale Pereira (coord) *Comentário Lusófono à Carta Africana dos Direitos Humanos e dos Povos* (2018) 79-85.

> mover uma ação judiciária e promover inquérito a esse respeito, o tratamento do caso e o seu seguimento (parágrafo 2).

Além disso, o Protocolo à Carta ADHP relativo aos Direitos da Mulher em África de 2003,[23] no seu artigo 4, garante a cada mulher o 'direito ao respeito pela sua vida, à integridade física e à segurança', acrescentando que '[t]odas as formas de exploração, de punição e de tratamento desumano ou degradante devem ser proibidas' (parágrafo 1).[24]

Por outro lado, o Protocolo à Carta ADHP relativo aos Direitos dos Idosos em África, adotado em 2016, refere-se à interdição da tortura no seu preâmbulo, remetendo para a Convenção das Nações Unidas de 1984. No seu articulado, o artigo 8 exige que os Estados Partes proíbam e criminalizem as práticas tradicionais nocivas que afetam o bem-estar, saúde, vida e dignidade dos idosos. De igual forma, o Protocolo à Carta ADHP relativo aos Direitos das Pessoas com Deficiência em África, adotado em 2018, proíbe no seu artigo 10 que pessoas portadoras de deficiência sejam objeto de tortura e penas ou tratamentos cruéis, desumanos ou degradantes, bem como impõe aos Estados Partes a obrigação de tomarem medidas no combate destas práticas e a obrigação de investigar e julgar os perpetradores desses atos. O artigo 11 proíbe ainda as práticas nocivas perpetradas contra pessoas com deficiência. Muito embora estes dois Protocolos não tenham entrado ainda em vigor, demonstram uma consciência da União Africana na necessidade de proibir a tortura nas pessoas mais vulneráveis e em todas as suas formas.

Finalmente, como parte da sua missão de promover e proteger os direitos humanos, e de reforçar a implementação do artigo 5 da Carta ADHP e dos outros instrumentos contra a tortura, a Comissão ADHP decidiu adotar, em 2002, as Diretrizes e Medidas para a Proibição e Prevenção da Tortura, Tratamentos e Punições Cruéis, Desumanos ou Degradantes em África, conhecidas como as 'Linhas Diretrizes de Robben Island'.[25] O documento de 50 artigos está dividido em três partes principais relacionadas com a proibição da tortura, a prevenção da tortura e a reabilitação das vítimas.

23 Protocolo de Maputo adotado sob a égide da União Africana em 11 de julho de 2003 e que entrou em vigor em 25 de novembro de 2005.

24 No mesmo artigo 4, um longo parágrafo 2 prevê que os Estados se comprometem a tomar uma série de 'medidas apropriadas e efetivas' com vista, *inter alia*, a adotar ou reforçar as leis que proíbem as violências contra as mulheres, prevenir e eliminar as causas dessas violências, ou ainda punir os autores de tais violências.

25 Formalmente, as Linhas Diretrizes de Robben Island foram adotadas pela Comissão ADHP na sua 32ª sessão ordinária em outubro de 2002 (Resolução CADHP/Res.61(XXXII)02), e subsequentemente aprovadas pela Conferência dos chefes de Estado e de governo da União Africana, realizada em Maputo, em Moçambique, em julho de 2003. Geograficamente, a localização da adoção do texto na ilha de Robben é altamente simbólica, pois foi na prisão construída nesta ilha que Nelson Mandela foi detido durante vários anos, juntamente com outros opositores da política de apartheid da África do Sul.

2.2 Mandato do Comité para a Prevenção da Tortura em África

No sistema africano de proteção dos direitos humanos, o cumprimento das disposições convencionais que proíbem a tortura é assegurado, respetivamente, pela Comissão ADHP, pelo Tribunal ADHP, bem como pelo Comité Africano de Peritos sobre os Direitos e o Bem-Estar da Criança (CAEDBE). Além disso, durante a 35ª sessão ordinária de maio-junho de 2004, a Comissão ADHP decidiu criar um Comité de monitorização como órgão específico para divulgar e promover as Linhas Diretrizes de Robben Island e, de um modo mais geral, para a auxiliar a encarar eficazmente a questão da tortura em África. Na sequência da 46ª sessão ordinária da Comissão, realizada em novembro de 2009, este Comité de monitorização tornou-se o Comité para a Prevenção da Tortura em África (CPTA).[26]

O CPTA tem o seguinte mandato: organizar, com o apoio de outros parceiros interessados, seminários para divulgar as Linhas Diretrizes de Robben Island junto dos atores nacionais e internacionais; desenvolver e propor à Comissão ADHP estratégias para a promoção e implementação das Linhas Diretrizes de Robben Island aos níveis nacional e regional; promover e facilitar a aplicação das Linhas Diretrizes de Robben Island nos Estados-Membros; e apresentar um relatório à Comissão ADHP, em cada sessão ordinária, sobre o estado de implementação das Linhas Diretrizes de Robben Island.[27] Neste mandato, duas missões aparecem centrais: a proibição e a prevenção da tortura, que constituem respetivamente a primeira e a segunda parte do documento.[28]

2.2.1 Na vertente da proibição da tortura

As recomendações relativas à proibição da tortura nas Linhas Diretrizes de Robben Island fornecem orientações aos Estados sobre a implementação das suas obrigações positivas e negativas.

Em termos de obrigações positivas, as Linhas Diretrizes de Robben Island convidam os Estados, antes de mais, a ratificar os vários instrumentos internacionais e regionais relevantes para a proibição dos atos de tortura. Entre estes, é particularmente recomendada a ratificação do Protocolo à Carta ADHP que estabelece o Tribunal ADHP, da Convenção das Nações Unidas contra a Tortura, cujos Estados devem aceitar a competência do Comité contra a Tortura, bem como do Estatuto de Roma que institui o Tribunal Penal Internacional.

26 Esta mudança de nome, que teve lugar com a adoção da Resolução CADHP/Res.158(XLVI)09 na 46ª sessão ordinária da Comissão Africana em 2009, foi motivada pelas dificuldades que as partes interessadas tiveram em associar o nome do Comité ao seu mandato de luta contra a tortura.

27 Comissão ADHP, Resolução CADHP/Res.61(XXXII)02, 2002.

28 Uma terceira e última parte, mais curta, visa atender às necessidades das vítimas, o que implica que os Estados tomem medidas para assegurar a sua proteção e para conceder-lhes reparação.

Os Estados são igualmente instados a promover e apoiar a cooperação internacional com os vários mecanismos que trabalham em prol da proibição da tortura, quer a nível africano com a Comissão ADHP, o Relator Especial sobre Prisões e Condições de Detenção em África, o Relator Especial sobre Execuções Extrajudiciais, Sumárias ou Arbitrárias em África[29] e o Relator Especial sobre os Direitos da Mulher em África, quer a nível das Nações Unidas com os órgãos dos tratados de direitos humanos, os mecanismos específicos do Conselho dos Direitos Humanos, incluindo o Relator Especial sobre a Tortura. Esta cooperação, que visa fortalecer as sinergias e a dinâmica de complementaridade entre os mecanismos existentes, foi concretizada em diversas ocasiões pelo CPTA, que trabalha com outros organismos internacionais e regionais de combate à tortura. A declaração conjunta de 26 de junho de 2018, adotada por ocasião do Dia Internacional de Apoio às Vítimas de Tortura, é uma ilustração dessa cooperação.[30]

Para além disso, os Estados são chamados a adotar medidas legislativas para criminalizar os atos de tortura, tal como definidos no artigo 1 da Convenção contra a Tortura de 1984. Em termos concretos, isto implica adotar leis que criminalizam os atos de tortura e atribuir competência aos tribunais nacionais para julgar os casos de supostas violações. Sendo a proibição da tortura absoluta, não é suscetível de ponderação com outros direitos e nenhuma circunstância excecional pode ser invocada para justificar um ato de tortura.[31] Além do mais, esta infração deveria ser passível de extradição[32] e o julgamento ou extradição de qualquer pessoa suspeita de atos de tortura deveria ocorrer o mais rapidamente possível.[33] A este respeito, o Comité contra a Tortura, com base na Convenção contra a Tortura de 1984,[34] teve a oportunidade de recordar a obrigação dos Estados de punir os atos de tortura, mesmo que os perpetradores não sejam os seus próprios cidadãos ou que não tenham cometido esses atos no seu território. Isto

29 As ligações entre a tortura e as execuções extrajudiciais foram destacadas em várias decisões da Comissão ADHP. Ver em particular: *Organização Mundial contra a Tortura e Outros c. Ruanda*, comunicações 27/89, 46/91, 49/91, 99/93, outubro de 1996; *Spilg e Mack & Ditshwanelo (Kobedi) c. Botswana*, comunicação 277/03, dezembro de 2011, parágrafo 167 (as execuções extrajudiciais podem constituir penas ou tratamentos cruéis, desumanos e degradantes).

30 Nesta ocasião, foi feita uma declaração conjunta entre, por um lado, o Comité das Nações Unidas contra a Tortura, o Subcomité das Nações Unidas para a Prevenção da Tortura, o Fundo Voluntário das Nações Unidas para as Vítimas da Tortura e o Relator Especial das Nações Unidas sobre a Tortura, por outro lado, o Comité para a Prevenção da Tortura em África, a Comissão Interamericana dos Direitos Humanos e o Comité Europeu para a Prevenção da Tortura e das Penas ou Tratamentos Desumanos ou Degradantes.

31 Linhas Diretrizes de Robben Island, parágrafo 9: 'Nenhuma circunstância excecional, tais como o estado de guerra, ameaça de guerra, instabilidade política interna ou qualquer outra situação de emergência pública, não pode ser invocada como justificação para a tortura, penas ou tratamentos cruéis, desumanos ou degradantes'.

32 Parágrafo 7.

33 Parágrafo 8.

34 Convenção contra a Tortura, artigo 5.

implica que o Estado julgue o perpetrador com base na competência universal ou o extradite.[35]

Ainda entre as obrigações positivas, com o objetivo de combater a impunidade, é feita uma série de recomendações aos Estados, incluindo a adoção de disposições a fim de assegurar que os autores de atos de tortura sejam processados, que não beneficiem de imunidade de ação penal quando se trata de nacionais e que esta imunidade seja tão restrita quanto possível quando se trata de cidadãos estrangeiros com direito a ela.

Finalmente, em termos de obrigações negativas, longe da abundância que caracteriza as obrigações positivas, existe apenas uma. A única obrigação negativa relacionada com a proibição da tortura diz respeito ao princípio do *non-refoulement*. A proibição da tortura a que os Estados estão vinculados implica também que eles não expulsem ou extraditem uma pessoa para um Estado em cujo território exista um risco sério de que ela seja submetida à prática de tortura.[36]

2.2.2 Na vertente da prevenção da tortura

Outra missão importante do CPTA é a prevenção da tortura. Conforme reconhecido pelo Comité dos Direitos Humanos, esta vertente preventiva é essencial na medida em que complementa a vertente da proibição.[37] Todos os sistemas de proteção dos direitos humanos, seja a nível internacional ou regional, contêm esta componente preventiva, que também foi reconhecida pela jurisprudência.[38]

As prescrições para a prevenção da tortura impõem que os Estados garantam que os indivíduos sejam respeitados em sua integridade física, sejam pessoas privadas de liberdade ou pessoas em prisão preventiva.

35 Ver a decisão do Comité contra a Tortura a propósito do julgamento de Hissène Habré no Senegal, *Suleymane Guengueng e Outros c. Senegal*, comunicação 181/2001, ONU doc. CAT/C/36/D/181/2001, 19 de maio de 2006.

36 Linhas Diretrizes de Robben Island, parágrafo 15.

37 Neste sentido, no seu Comentário Geral No. 20 (1992), o Comité dos Direitos Humanos afirmou, relativamente ao artigo 7 do Pacto Internacional sobre os Direitos Civis e Políticos que proíbe experiências médicas ou científicas realizadas sem o livre consentimento do interessado, que 'é necessária uma proteção especial contra tais experiências no caso de pessoas incapazes de dar um consentimento válido, em particular aquelas que estão sujeitas a uma forma qualquer de detenção ou prisão' (parágrafo 7). Acrescentou que: 'Não basta, para cumprir o artigo 7, proibir tais penas ou tratamentos, ou declarar que a sua aplicação constitui uma infração. Os Estados partes devem informar o Comité das medidas legislativas, administrativas, judiciais e outras que estão a tomar para prevenir e reprimir os atos de tortura' (parágrafo 8).

38 A respeito da obrigação de prevenir a tortura, ver em particular: Tribunal ADHP, *Alex Thomas c. Tanzânia*, mérito, acórdão de 20 de novembro de 2015, parágrafo 144; Tribunal EDH, *A. c. Reino Unido*, queixa No. 100/1997/884/1096, acórdão de 23 de setembro de 1998, parágrafo 22.

A respeito das pessoas privadas de liberdade, as Linhas Diretrizes de Robben Island apelam aos Estados para que prevejam garantias para evitar qualquer arbitrariedade e qualquer marginalização.[39] Em particular, recomendam que qualquer detenção seja sujeita a regulamentação, a fim de respeitar o princípio da legalidade dos delitos e das penas. A regulamentação em causa deve incluir salvaguardas, nomeadamente: o direito a que um membro da família ou outra pessoa apropriada seja informada, o direito a ser examinado por um médico, o direito a ter um advogado, bem como o direito a ser informado dos seus direitos num idioma que seja compreendido.

A respeito das pessoas em situação de prisão preventiva, cabe aos Estados instituir determinadas garantias,[40] começando pela adoção de regulamentações sobre o tratamento das pessoas privadas de liberdade que cumpram os padrões estabelecidos no Conjunto de Princípios para a Proteção de Todas as Pessoas sob Qualquer Forma de Detenção ou Prisão (1988). Além disso, os Estados deveriam combater a existência de locais de detenção secretos ou não oficiais, o que implica a criação de registos oficiais de todas as pessoas privadas de liberdade. Qualquer depoimento que seja obtido através do recurso à tortura deveria ser excluído como elemento de prova num processo. Qualquer pessoa detida deveria ser imediatamente informada das acusações contra ela e ter a oportunidade de contestar a legalidade das mesmas perante um juiz. Da mesma forma, deveria ter acesso a assistência jurídica e a serviços médicos.

Além disso, os Estados deveriam tomar as medidas necessárias para assegurar condições dignas de detenção.[41] A este respeito, as Linhas Diretrizes de Robben Island especificam que os Estados deveriam tratar as pessoas privadas de liberdade de acordo com as normas internacionais contidas nas Regras Mínimas das Nações Unidas para o Tratamento de Presos ou Regras de Mandela (1955, revistas em 2015). São diretrizes mínimas a serem observadas por todos os Estados partes da Carta ADHP. Portanto, onde as condições de detenção não cumprem as normas internacionais, os Estados deveriam agir para melhorá-las.

Um dos pontos-chave das Linhas Diretrizes de Robben Island relativamente às condições de detenção é a recomendação de que as pessoas em prisão preventiva não deveriam estar nos mesmos espaços que aquelas que cumprem pena efetiva.[42] Não deveria existir esta situação, uma vez que a pessoa condenada, ao contrário da pessoa em prisão preventiva, foi julgada e reconhecida como culpada. Do mesmo

39 Linhas Diretrizes de Robben Island, parágrafo 20.
40 Parágrafos 21-32.
41 Parágrafos 33-44.
42 Parágrafo 35.

modo, as crianças,[43] mulheres e pessoas vulneráveis deveriam ser distinguidas dos restantes indivíduos detidos, a fim de os manter em instalações separadas e apropriadas, como forma de garantir a sua segurança.[44]

A componente preventiva das Linhas Diretrizes de Robben Island implica também a existência de mecanismos de monitorização e capacitação da sociedade civil. No que diz respeito aos mecanismos de fiscalização,[45] os Estados são chamados a garantir a independência e imparcialidade da magistratura, tomando medidas inspiradas nos Princípios Básicos relativos à Independência do Poder Judicial (1985), com o objetivo de impedir qualquer interferência nos processos judiciais e promover mecanismos de reclamação eficazes, acessíveis e independentes. As visitas aos locais de detenção deveriam ser encorajadas e facilitadas para as instituições nacionais independentes, tais como as comissões de direitos humanos, os provedores de justiça ou as comissões parlamentares, mas também para as organizações não governamentais (ONG) e para o Subcomité contra a Tortura. No que diz respeito ao fortalecimento das capacidades nacionais,[46] recomenda-se que os Estados proporcionem programas de formação e campanhas de sensibilização sobre as normas de direitos humanos, especialmente sobre a proibição e prevenção da tortura, mas também que promovam códigos de conduta e de ética para o pessoal encarregado da segurança e da aplicação da lei.

3 PANORAMA DA SITUAÇÃO DA TORTURA EM ÁFRICA

Além dos relatórios que os Estados partes na Carta Africana devem submeter para expor os progressos alcançados na implementação das disposições da referida Carta,[47] bem como dos relatórios alternativos e complementares das ONG e das instituições nacionais de direitos humanos, pode ser elaborada uma panorâmica da situação da tortura em África com base, por um lado, no nível das ratificações dos instrumentos relevantes pelos Estados, por outro lado, nas queixas apresentadas junto das instâncias supranacionais africanas.

43 A privação de liberdade das crianças deve ser uma medida de último recurso, um conjunto de medidas alternativas devendo estar disponível para garantir o seu bem-estar. Nos casos em que a detenção de crianças seja absolutamente necessária, deverá ser aplicada pelo período de tempo mais breve possível e visar a sua reabilitação e a reinserção na sociedade. Ver, nesse sentido, o artigo 37 da Convenção sobre os Direitos da Criança de 1989.

44 Linhas Diretrizes de Robben Island, parágrafo 36.

45 Parágrafos 38-44.

46 Parágrafos 47-48.

47 Carta ADHP, artigo 62.

3.1 Através do nível das ratificações dos instrumentos relevantes

As Linhas Diretrizes de Robben Island convidam os Estados africanos a serem partes nos vários instrumentos internacionais e regionais relevantes em matéria de direitos humanos e a criarem os mecanismos necessários para a sua implementação efetiva.[48] É, portanto, útil apresentar o estado das ratificações pelos Estados africanos dos textos pertinentes relativos à tortura, uma vez que este nível de ratificações é um dos vetores de análise da situação da tortura em África.

O número de Estados africanos que ratificaram a Convenção contra a Tortura de 1984 é particularmente notável. Na data da 71ª sessão ordinária da Comissão Africana, realizada de 21 de abril a 13 de maio de 2022, 52 Estados africanos haviam ratificado esta Convenção, ou seja, todos os Estados do continente, com a exceção da Tanzânia e do Zimbabué.[49]

Esta Convenção contra a Tortura de 1984 foi complementada por um Protocolo Facultativo, que foi adotado pela Assembleia Geral das Nações Unidas a 18 de dezembro de 2002 e entrou em vigor a 22 de junho de 2006. 'Convencidos de que a proteção das pessoas privadas de liberdade contra a tortura e outras penas ou tratamentos cruéis, desumanos ou degradantes pode ser reforçada através de meios não judiciais, de carácter preventivo, baseados em visitas regulares a locais de detenção',[50] os Estados Partes acordaram em adotar o presente Protocolo, cujo objetivo é 'estabelecer um sistema de visitas regulares, efetuadas por organismos internacionais e nacionais independentes, aos locais onde se encontram pessoas privadas de liberdade, a fim de prevenir a tortura e outras penas ou tratamentos cruéis, desumanos ou degradantes'.[51] O papel central deste sistema é confiado, por um lado, aos mecanismos nacionais de prevenção independentes a nível interno,[52] por outro lado, ao Subcomité para a Prevenção da Tortura e Outras Penas ou Tratamentos Cruéis, Desumanos ou Degradantes a nível internacional.[53]

Cabe aqui fazer duas observações. Em primeiro lugar, apenas 23 Estados africanos ratificaram o Protocolo Facultativo, o que reflete um nível bastante baixo de adesão comparado com a ratificação da Convenção contra a Tortura.[54] Em segundo lugar, mesmo entre os

48 Linhas Diretrizes de Robben Island, parágrafo 1.

49 Fonte: ONU, Coleção dos Tratados (https://treaties.un.org).

50 Protocolo Facultativo à Convenção contra a Tortura e Outras Penas ou Tratamentos Cruéis, Desumanos ou Degradantes, preâmbulo.

51 Artigo 1.

52 Artigo 17.

53 Artigo 2.

54 Trata-se dos seguintes Estados: África do Sul, Benim, Burkina Faso, Burundi, Cabo Verde, Gabão, Gana, Libéria, Madagáscar, Marrocos, Mali, Maurícia, Mauritânia, Moçambique, Níger, Nigéria, República Centro-Africana, República Democrática do Congo, Ruanda, Senegal, Sudão, Togo, Tunísia. Fonte: ONU, Coleção dos Tratados (https://treaties.un.org).

Estados africanos partes no Protocolo Facultativo, nem todos estabeleceram um mecanismo nacional de prevenção no prazo de um ano após a sua ratificação ou adesão,[55] embora esta seja uma recomendação que também se encontra nas Linhas Diretrizes de Robben Island. Esta dupla constatação realça uma flagrante má-fé por parte dos Estados africanos para se empenharem resolutamente no caminho da luta contra a tortura. Assim, a Comissão ADHP, durante as suas visitas destinadas a promover os direitos humanos, nunca deixa de questionar os Estados sobre os progressos realizados, particularmente sobre os avanços em matéria de luta contra a tortura. Embora, geralmente, os Estados que ainda não adotaram um mecanismo de prevenção nacional prometam fazê-lo, observa-se um imobilismo.

3.2 Através das queixas encaminhadas às instâncias africanas supranacionais

As denúncias submetidas às instâncias supranacionais africanas também são úteis para desenvolver uma visão geral da situação da tortura no continente. A este respeito, podem ser apresentadas queixas relativas a alegações de atos de tortura à Comissão ADHP, um órgão quase judicial com competência *ratione materiae* sobre a Carta ADHP,[56] e ao Tribunal ADHP, um órgão judicial com competência *ratione materiae* sobre a Carta ADHP e o seu Protocolo. Até à data, ambos têm sido chamados a pronunciar-se sobre alegações de tortura e tratamentos cruéis, desumanos ou degradantes e ambos aliviaram o ónus da prova para os queixosos, especialmente em contextos sensíveis em que estes se encontravam detidos ou sob controlo policial.[57]

3.2.1 Perante a Comissão ADHP

A Comissão ADHP tem competência *ratione personae* para examinar as comunicações que lhe são submetidas pelos Estados Partes na Carta

55 Em 2022, 14 Estados africanos dispunham de tais mecanismos: África do Sul, Burkina Faso, Cabo Verde, Mali, Marrocos, Maurícias, Mauritânia, Moçambique, Níger, Nigéria, Ruanda, Senegal, Togo, Tunísia. Fonte: Associação para a Prevenção da Tortura (https://www.apt.ch).

56 Em 1 de julho de 2022, dos 55 Estados-Membros da UA, apenas o Marrocos não ratificou a Carta ADHP. Fonte: União Africana (https://au.int/en/treaties).

57 Ver, em particular, Comissão ADHP, comunicação 334/06, *Egyptian Initiative for Personal Rights e Interights c. Egipto*, 3 de março de 2011, parágrafos 168-169 ('É um princípio bem estabelecido do Direito Internacional dos Direitos Humanos que, quando uma pessoa é ferida em detenção ou sob o controlo das forças de segurança, existe uma forte presunção de que essa pessoa tenha sido sujeita a tortura ou a maus-tratos'; 'As circunstâncias da detenção incomunicável e dos interrogatórios das vítimas são tais que as provas são necessariamente limitadas', de modo que o ónus da prova recai sobre o Estado demandado); Tribunal ADHP, *Léon Mugesera c. Ruanda*, mérito, acórdão de 27 de novembro de 2020, parágrafo 84 (o ónus da prova para alegações de maus-tratos pode ser invertido se o requerente fornecer elementos de prova *prima facie* em apoio das suas alegações).

ADHP e por indivíduos cujos direitos ao abrigo da Carta ADHP tenham sido violados.

A Comissão ADHP pode receber comunicações submetidas por um Estado Parte que considere que outro Estado Parte violou uma ou mais disposições da Carta ADHP.[58] Recursos interestaduais podem assim ser submetidos por um Estado cujo nacional tenha sido vítima de tortura ou tratamento cruel, desumano ou degradante pelas autoridades e no território de outro Estado. Recursos interestaduais podem também ser submetidos por um Estado Parte na Carta ADHP que entende que outro Estado Parte violou a proibição da tortura consagrada no artigo 5 da mesma Carta, sendo tal proibição uma obrigação *erga omnes*.[59]

Tanto quanto sabemos, a Comissão ADHP já teve, pelo menos, um caso de recurso interestadual nesta matéria, no caso *República Democrática do Congo c. Burundi, Ruanda e Uganda*. Neste caso, a República Democrática do Congo fez alegações de violações graves e maciças dos direitos humanos cometidas pelas forças armadas dos três Estados demandados nas províncias congolesas afetadas por um movimento de rebelião desde agosto de 1998 e que atribuía a esses mesmos Estados. Nesta ocasião, a Comissão lembrou que o artigo 75(2) do Primeiro Protocolo às Convenções de Genebra proíbe uma série de atos, em qualquer momento e em qualquer lugar, cometidos por agentes civis ou militares, incluindo 'tortura sob todas as suas formas, seja física ou mental'.[60]

Para além das comunicações interestaduais, a Comissão ADHP pode receber comunicações de indivíduos ou de ONG, desde que se trate de uma alegada violação de uma ou mais disposições da Carta ADHP por um Estado Parte e sempre após o esgotamento dos mecanismos nacionais.[61] No decorrer dos primeiros 25 anos da sua existência, a Comissão ADHP recebeu 67 comunicações que alegavam a violação do direito de não ser sujeito a tortura e outras formas de maus-tratos.[62]

Ao longo da sua jurisprudência, a Comissão ADHP forneceu esclarecimentos úteis sobre a interpretação do artigo 5 da Carta ADHP. Em particular, considerou que o facto de deter pessoas sem lhes permitir comunicar com as suas famílias e se recusar a informar as mesmas quanto à detenção dos seus familiares constitui um tratamento

58 Carta ADHP, artigos 48-49.

59 As obrigações *erga omnes* decorrem de normas que protegem interesses essenciais da comunidade internacional, pelo que todos os Estados têm um interesse jurídico na sua observância. Ver TIJ, *Barcelona Traction, Light and Power Company, Limited (Bélgica c. Espanha)*, acórdão de 5 de fevereiro de 1970, parágrafos 33-34.

60 Comissão ADHP, *República Democrática do Congo c. Burundi, Ruanda e Uganda*, comunicação 227/99, 29 de maio de 2003, parágrafo 71.

61 Carta ADHP, artigo 55.

62 Comissão ADHP, *Relatório de Atividades do 25º Aniversário da Comissão Africana dos Direitos Humanos e dos Povos*, 52ª sessão ordinária, Yamoussoukro (Costa do Marfim), 9-22 de outubro de 2012, 97.

desumano, tanto para os próprios detidos como para as suas famílias.[63] Considerou também que condições de detenção que possam derivar numa violação da integridade física e psicológica dos detidos[64] são contrárias ao artigo 5 da Carta ADHP, do mesmo modo que qualquer ato que conduza a um desaparecimento forçado que 'subtraia a vítima deste ato à proteção da lei e cause graves sofrimentos à própria vítima, bem como à sua família'.[65]

A Comissão proclamou ainda que: 'O artigo 5 proíbe não só a tortura, mas também o tratamento cruel, desumano ou degradante. Isto inclui não apenas os atos que causam graves sofrimentos físicos ou psicológicos, mas também aqueles que humilham a pessoa ou a forçam a agir contra a sua vontade ou consciência'.[66] Vários casos foram avaliados neste sentido pela Comissão ADHP, quer se tratem de comunicações sobre violações da dignidade humana,[67] as condições de detenção e de prisão preventiva,[68] o caso de detidos que sofrem de distúrbios psicológicos,[69] ou ainda castigos corporais,[70] tais como o facto de permanecer com os braços e as pernas acorrentados e de ser

63 Ver, em particular, Comissão ADHP: *John K. Modise c. Botswana*, comunicação 97/93, abril de 1997, parágrafo 32 (a Comissão inferiu dos factos do caso um tratamento desumano e degradante: 'O queixoso foi deportado para a África do Sul e foi forçado a viver durante oito anos no Bantustão de Bophutatswana e depois por mais sete anos num '*no man's land*' entre o antigo Bantustão sul-africano de Bophuthatswana e o Botswana. Ele não só foi exposto ao sofrimento pessoal, mas também foi privado da sua família, sendo esta também privada do seu apoio'); *Huri-Laws c. Nigéria*, comunicação 225/98, 6 de novembro de 2000, parágrafo 40 (a recusa a uma pessoa detida de estar em contato com o mundo exterior e de ter acesso a cuidados médicos constitui um tratamento cruel, desumano e degradante).

64 Comissão ADHP, *Organização Mundial contra a Tortura e Outros c. Ruanda*, comunicações 27/89, 49/91, 99/93, outubro de 1996, parágrafos 24-25.

65 Comissão ADHP, *Movimento Burquinense pelos Direitos Humanos e dos Povos c. Burkina Faso*, comunicação 204/97, abril-maio de 2001, parágrafo 44.

66 Comissão ADHP, *International PEN e Outros*, comunicações 137/94, 139/94, 154/96 e 161/97, 31 de outubro de 1998, parágrafo 79.

67 Comissão ADHP, *Purohit e Moore c. Gâmbia*, comunicação 241/2001, 15 maio de 2003, parágrafo 57.

68 As violações alegadas dizem respeito tanto à má conduta de agentes oficiais quanto às condições físicas ou psicológicas, tais como o acesso a alimentos ou a cuidados médicos. Ver, entre outros, Comissão ADHP: *International PEN e Outros c. Nigéria*, comunicações 137/94, 139/94, 154/96 e 161/97, 31 de outubro de 1998, parágrafos 79-81 (relativamente a um detido e outros codetidos espancados, amarrados às paredes das celas e privados de cuidados médicos); *Huri-Laws c. Nigéria*, comunicação 225/98, 6 de novembro de 2000, parágrafo 41 (negação de assistência médica).

69 Comissão ADHP, *Purohit e Moore c. Gâmbia*, comunicação 241/2001, 15 maio de 2003, parágrafo 59 (relativamente a doentes internados em unidades psiquiátricas, o facto de rotular 'as pessoas que sofrem de doença mental como 'dementes' e 'idiotas', termos que, indubitavelmente, as desumanizam e lhes negam qualquer forma de dignidade' é uma violação do artigo 5).

70 Ver Comissão ADHP, *Curtis Francis Doebber c. Sudão*, comunicação 236/2000, 29 maio de 2003, parágrafo 42 ('Não há nenhum direito que permita que indivíduos, e em particular o governo de um país, inflijam violência física a pessoas por delitos menores. Tal direito equivaleria a autorizar a tortura apoiada pelo Estado ao abrigo da Carta e seria contrário à própria natureza deste tratado de direitos humanos').

submetido a maus-tratos, incluindo espancamentos e detenção em celas sujas e mal ventiladas, sem ter acesso a cuidados médicos.[71]

Para além da jurisprudência desenvolvida pela Comissão ADHP, algumas linhas devem igualmente ser dedicadas aos apelos urgentes. Este procedimento funciona como mecanismo preventivo quando o CPTA – enquanto mecanismo especial da Comissão Africana – recebe por parte desta informações credíveis e pertinentes de indivíduos ou ONG sobre situações urgentes de violações graves ou maciças dos direitos humanos, as quais podem causar danos irreparáveis.[72] Todos os anos, o CPTA recebe inúmeras interpelações de indivíduos ou ONG que denunciam situações graves de alegadas violações da interdição da tortura e dos tratamentos ou penas cruéis, desumanos ou degradantes.

A prática do CPTA, quando recebe alegações de atos de tortura ou de maus-tratos, consiste em redigir uma carta de apelo urgente às autoridades do Estado, pedindo para pôr termo ou prevenir as violações e para fornecer num prazo razoável uma resposta substantiva sobre as referidas alegações. As respostas recebidas, quando existem,[73] são então incluídas nos relatórios das atividades que a Comissão apresenta aos órgãos deliberativos da UA.

3.2.2 Perante o Tribunal ADHP

Vários casos foram submetidos ao Tribunal ADHP com base no artigo 5 da Carta Africana. Todavia, até à data, nunca chegou à conclusão de que atos de tortura tenham sido comprovados. A este respeito, é de notar que o número de recursos não reflete a realidade dos casos de tortura a nível dos Estados no continente. De facto, devido ao obstáculo colocado pela competência facultativa do Tribunal ADHP,[74] é de salientar que este apenas pode apreciar petições contra Estados que ratificaram o Protocolo. Por outro lado, dentro desses Estados, apenas os que depositaram a declaração destinada a reconhecer a competência do Tribunal ADHP aceitam que ONG dotadas do estatuto de

71 Comissão ADHP, *International PEN e Outros*, comunicações 137/94, 139/94, 154/96 e 161/97, 31 de outubro de 1998, parágrafos 79-80.

72 O mecanismo dos apelos urgentes está previsto pela regra 85 do Regulamento Interno da Comissão ADHP. Ver, a este respeito, S Joseph *et al. Quel recours pour les victimes de la torture? Guide sur les mécanismes de communications individuelles des organes de traités des Nations Unies* (2014) 150-151.

73 Ocorre, por vezes, que os Estados permaneçam inertes após a correspondência que lhes é dirigida. Foi o caso, por exemplo, do Zimbabué, que não respondeu em 2020 à correspondência que lhe foi enviada na sequência de um apelo urgente relativo a alegações de maus-tratos sofridos por mulheres defensoras dos direitos humanos no país.

74 De acordo com o artigo 5 do Protocolo relativo ao Tribunal ADHP: 'Poderão submeter casos ao Tribunal: a) a Comissão; b) o Estado Parte que tiver apresentado uma queixa à Comissão; c) o Estado Parte contra o qual foi apresentado uma queixa na Comissão; d) o Estado Parte cujo cidadão é vítima de violação dos direitos humanos; e) organizações intergovernamentais africanas'.

observador junto da Comissão e indivíduos sob a sua jurisdição submetam queixas diretamente ao mesmo Tribunal.[75]

Entre os casos mais significativos da jurisprudência que se desenvolveu desde a instalação do Tribunal ADHP,[76] destaca-se o caso *Comissão Africana dos Direitos Humanos e dos Povos c. Líbia* (2016). Este é o primeiro caso apresentado ao Tribunal pela Comissão com base em comunicações recebidas por ONG. É também o primeiro caso apresentado pela Comissão com base em alegações de violações dos direitos humanos, *inter alia*, da proibição da tortura e das penas ou tratamentos cruéis, desumanos ou degradantes consagrada no artigo 5 da Carta ADHP. Neste caso, o Tribunal reconheceu a existência de 'direitos não derrogáveis qualquer que seja a situação que prevalece',[77] inclusive, portanto, na situação política e de segurança excecional que tem prevalecido na Líbia desde 2011. Especificou ainda que, entre estes direitos inderrogáveis, está 'o direito de não ser submetido à tortura ou a penas ou tratamentos cruéis, desumanos e degradantes'.[78] Recordando as decisões da Comissão Africana e do Comité dos Direitos Humanos sobre o assunto,[79] o Tribunal confirmou que: 'A detenção incomunicável constitui (...) uma grave violação dos direitos humanos que pode levar a outras violações, tais como tortura, maus-tratos ou interrogatórios sem as devidas medidas de proteção'.[80]

No caso *Alex Thomas c. Tanzânia* (2015), levou em consideração as Linhas Diretrizes de Robben Island, que se referem à definição da tortura tal como estabelecida na Convenção contra a Tortura de 1984,

75 Em 1 de julho de 2022, 33 Estados-Membros da União Africana ratificaram o Protocolo que institui o Tribunal Africano, dos quais apenas oito submeteram a declaração referida no parágrafo 6 do artigo 34 do Protocolo, através da qual aceitam a competência do Tribunal, a saber: Burkina Faso, Gâmbia, Gana, Guiné-Bissau, Mali, Malawi, Níger, Tunísia. Fonte: Tribunal ADHP (https://www.african-court.org).

76 Sem pretensões de exaustividade, entre outros casos relevantes em que o Tribunal ADHP teve de se pronunciar sobre o cumprimento do artigo 5 da Carta Africana, ver: *Nguza Viking (Babu Seya) e Johnson Nguza (Papi Kocha) c. Tanzânia*, mérito, acórdão de 23 de março de 2018, parágrafos 66 e seguintes; *Armand Guehi c. Tanzânia*, mérito e reparações, acórdão de 7 de dezembro de 2018, parágrafos 126 e seguintes (recordando, no parágrafo 131, a natureza absoluta da proibição estabelecida pelo artigo 5, o Tribunal conclui, no parágrafo 136, que 'o Estado requerido violou o direito do requerente de não ser sujeito a um tratamento desumano e degradante protegido pelo artigo 5 da Carta em relação à privação de alimentação'); *Léon Mugesera c. Ruanda*, mérito e reparações, acórdão de 27 de novembro de 2020, parágrafos 74 e seguintes (o Tribunal declara, no parágrafo 92, que o Estado 'tem a obrigação de exercer uma supervisão sistemática sobre as regras, instruções, métodos e práticas de interrogatório e sobre as modalidades de detenção e de tratamento das pessoas presas, detidas ou encarceradas de qualquer forma em qualquer território sob a sua jurisdição', o que o Ruanda não fez neste caso).

77 Tribunal ADHP, *Comissão Africana dos Direitos Humanos e dos Povos c. Líbia*, mérito, acórdão de 3 de junho de 2016, parágrafo 76.

78 Parágrafo 77.

79 Respetivamente parágrafos 79 e 84.

80 Parágrafo 84.

para recordar que a tortura envolve um 'sofrimento mental ou físico agudo (...) infligido intencionalmente para um propósito específico'.[81]

No caso *Ally Rajabu e Outros c. Tanzânia* (2019), o Tribunal ADHP associou a proibição da tortura ao respeito pela dignidade humana no contexto de condenações à pena de morte por enforcamento. Sustentou que, embora não tivesse havido qualquer vício processual, a imposição obrigatória da pena de morte e do enforcamento como método de execução violava a Carta ADHP:

> O Tribunal observa que muitos métodos utilizados para a aplicação da pena de morte têm o potencial de equivaler à tortura, bem como a tratamentos cruéis, desumanos e degradantes, dado o sofrimento inerente à mesma. Em consonância com a própria lógica da proibição de métodos de execução que equivalem à tortura ou a tratamentos cruéis, desumanos e degradantes, a prescrição deve, portanto, ser que, nos casos em que a pena de morte é admitida, os métodos de execução devem excluir o sofrimento ou envolver o menor sofrimento possível.
>
> O Tribunal observa que enforcar uma pessoa é um desses métodos e, portanto, é intrinsecamente degradante. Além disso, tendo verificado que a imposição obrigatória da pena de morte viola o direito à vida, devido à sua natureza arbitrária, este Tribunal considera que, como método de execução dessa sentença, o enforcamento viola inevitavelmente a dignidade, no que diz respeito à proibição da tortura e de tratamentos cruéis, desumanos e degradantes.[82]

No caso *Lucien Ikili Rashidi c. Tanzânia* (2019), no qual estava em causa a legalidade de uma inspeção anal executada por guardas prisionais ao requerente na presença dos seus filhos, o Tribunal ADHP considerou que 'a inspeção anal efetuada ao requerente constitui uma violação do seu direito ao respeito pela sua dignidade e a não ser submetido a tratamentos degradantes'.[83] Concluiu que o Estado demandado tinha violado o artigo 5 da Carta africana.

81 Tribunal ADHP, *Alex Thomas c. Tanzânia*, mérito, acórdão de 20 de novembro de 2015, parágrafo 145. Neste caso, o Tribunal considera que 'o requerente não apresentou a prova de que o atraso na tramitação do seu recurso em apelação equivale à tortura. Isto porque não forneceu a prova de que o atraso lhe causou um sofrimento mental ou físico agudo que lhe foi intencionalmente infligido para um determinado fim. Além disso, está a cumprir uma pena de acordo com as sanções legais que lhe foram impostas. Por esta razão, o Tribunal conclui, portanto, que não houve violação do artigo 5 da Carta' (parágrafo 145).

82 Tribunal ADHP, *Ally Rajabu e Outros c. Tanzânia*, mérito e reparações, acórdão de 28 de novembro de 2019, parágrafos 118-119. Neste sentido, ver igualmente *Amini Juma c. Tanzânia*, mérito, acórdão de 30 de setembro de 2021, parágrafo 136.

83 Tribunal ADHP, *Lucien Ikili Rashidi c. Tanzânia*, mérito e reparações, acórdão de 28 de março de 2019, parágrafo 96. Neste caso, o Tribunal Africano cita a jurisprudência dos Tribunais Europeu e Interamericano dos Direitos Humanos em casos semelhantes. Recorda igualmente os critérios estabelecidos pela Comissão Africana quanto ao artigo 5 da Carta: 'O Tribunal observa que a Comissão Africana, para apreciar de modo geral se o direito ao respeito da dignidade inscrito no artigo 5 da Carta foi violado, levou em conta três fatores principais. O primeiro é que o artigo 5 não contém qualquer cláusula restritiva. A proibição da violação da dignidade através de um tratamento cruel, desumano e degradante é, portanto, absoluta. O segundo fator quer que esta proibição seja

4 FALHAS NACIONAIS NA IMPLEMENTAÇÃO DAS LINHAS DIRETRIZES DE ROBBEN ISLAND

Diversas falhas nacionais são detetáveis através de deficiências na adoção de leis ou mecanismos nacionais de prevenção ou ainda através da complacência ou do silêncio na repressão. Estas falhas podem indicar uma má-fé ou falta de vontade dos Estados africanos relativamente aos seus compromissos internacionais, em especial quanto aos princípios de interdição e repressão da tortura estabelecidos pelas Linhas Diretrizes de Robben Island.

4.1 No plano da adoção de leis e da criação de órgãos específicos

As dificuldades sentidas pelas autoridades nacionais na aplicação das Linhas Diretrizes de Robben Island explicam-se amplamente pelo ambiente social, jurídico e político que prevalece em diversos países africanos. Este é, por vezes, um ambiente tenso, marcado por crises ou até conflitos, onde a formação das forças de segurança e dos funcionários depositários da autoridade pública é rudimentar a não ser inexistente, onde a má governação, a corrupção e a violação das leis são comuns, e onde as decisões dos órgãos supranacionais são dificilmente cumpridas pelos Estados. Quer se trate da adoção de uma legislação específica ou do estabelecimento de um mecanismo próprio de prevenção da tortura, tal como preconizados pelas Linhas Diretrizes de Robben Island, há mais promessas vagas por parte dos Estados do que realizações concretas, o que se nota nos relatórios periódicos apresentados ao longo dos anos, onde se encontra a vontade reiterada das autoridades nacionais de melhorar o sistema dos direitos humanos.

A necessidade de uma legislação específica é clara.[84] Em virtude do princípio da legalidade criminal, não pode haver crime sem lei anterior, nem pode haver pena sem prévia cominação legal, pelo que a tortura não pode ser punida sem ter sido incriminada a montante. No entanto,

interpretada como visando a proteção, a mais ampla possível, contra os abusos físicos ou psicológicos. Finalmente, o sofrimento pessoal e o atentado à dignidade podem assumir diversas formas e a sua apreciação depende das circunstâncias de cada caso' (parágrafo 88). No mesmo sentido, ver Comissão ADHP: *Media Rights Agenda c. Nigéria*, comunicação 224/98, outubro-novembro de 2000, parágrafo 71; *Curtis Francis Doebbler c. Soudan*, comunicação 236/00, 4 maio de 2003, parágrafo 37; *Institute for Human Rights and Development in Africa (em nome de Esmaila Connateh e 13 Outros) c. Angola*, comunicação 292/04, 22 maio de 2008, parágrafo 52.

84 Ver, a este respeito, os parágrafos 1 e 4 das Linhas Diretrizes de Robben Island, assim como o artigo 2 da Convenção contra a Tortura.

poucos Estados adotaram leis nesta área,[85] alguns contentando-se com uma simples alusão à proibição da tortura na sua Constituição. A este respeito, como a Comissão ADHP teve a oportunidade de recordar em várias ocasiões nas suas questões abordadas quer durante o exame dos relatórios periódicos dos Estados[86] quer durante as suas missões de promoção nos territórios nacionais,[87] embora tal alusão seja importante, é insuficiente em si mesma. Consequentemente, é essencial criminalizar esta proscrição na legislação nacional e definir com precisão o regime de proibição e repressão, de modo a permitir que as vítimas apresentem queixas, que sejam realizadas investigações e que os atos alegados de tortura sejam levados a julgamento.

As visitas aos locais de detenção – sejam prisões, centros de detenção de menores, esquadras de polícia ou centros de retenção para estrangeiros – são igualmente essenciais, a fim de avaliar a forma como as pessoas privadas de liberdade são tratadas. Todavia, mais uma vez, poucos Estados estabeleceram um ou mais mecanismos nacionais de prevenção da tortura e outras penas ou tratamentos cruéis, desumanos ou degradantes, tal como recomendado pelas Linhas Diretrizes de Robben Island.[88] Do mesmo modo, embora esses locais fechados possam ser propícios a abusos, poucos Estados instituíram programas de formação sobre a questão da prevenção e interdição da tortura e maus-tratos dirigidos aos membros das forças armadas e da polícia, bem como aos funcionários prisionais.

4.2 No plano da repressão das violações

Apesar de a proscrição da tortura e das penas e tratamentos cruéis, desumanos e degradantes ter sido consagrada como norma internacional e regional, aliás absoluta, não só as violações são generalizadas em múltiplos contextos (maus-tratos a pessoas sob custódia policial, condições de detenção desumanas ou degradantes, expulsão expondo a pessoa em causa a um tratamento desumano no país terceiro de destino, etc.), mas também existem deficiências na repressão, o que é suscetível de enfraquecer esta norma.

85 Este dado provém das nossas discussões junto do CPTA, que toma conhecimento da existência de tais leis quando os Estados respondem às alegações de tortura ou incluem esta informação nos seus relatórios periódicos. Embora não existam estatísticas oficiais sobre este ponto, é possível identificar alguns países que adotaram uma legislação específica: Burkina Faso (Lei No. 022-2014/AN de 27 de maio de 2014 sobre a prevenção e repressão da tortura e práticas afins), República Democrática do Congo (Lei No. 11/008 de 9 de julho de 2011 sobre a criminalização da tortura), Mauritânia (Lei No. 2015-033 de 23 de janeiro de 2013 sobre a luta contra a tortura), África do Sul (*Act No. 13 of 2013: Prevention of Combating and Torture of Persons Act*, 29 de julho de 2013).

86 Ver, em particular, Comissão ADHP, *Relatório de Atividades do 25º Aniversário da Comissão Africana dos Direitos Humanos e dos Povos* (n 62) 98.

87 Durante a sua missão de promoção no Botswana em 2018, a Comissão Africana exortou o Estado a adotar um mecanismo nacional de prevenção, embora a sua Constituição proíba a tortura no artigo 7.

88 Ver, a este respeito, o parágrafo 17 das Linhas Diretrizes de Robben Island, bem como o artigo 3 do Protocolo Facultativo à Convenção contra a Tortura.

A especificidade dos atos de tortura – muitas vezes praticados por funcionários públicos ou com o seu consentimento ou aquiescência – pode explicar a razão por que certos países não adotam medidas para criminalizar a tortura ou para criar mecanismos especiais para fiscalizar os locais de detenção. Sendo o Estado o agente repressor, menos vontade há de sancionar a tortura, especialmente quando esta é utilizada como instrumento contra opositores políticos ou contra qualquer veleidade de contestação, ou mesmo em certas circunstâncias consideradas difíceis, tais como a luta contra o terrorismo ou o crime organizado.

Por isto mesmo, muitas vezes existe uma falta de vontade na aplicação de sanções. A este respeito, é extremamente raro que os Estados tomem medidas contra estabelecimentos prisionais ou outros locais de detenção que praticam tortura. Do mesmo modo, é extremamente raro que os Estados tomem medidas para acabar com os locais de detenção secretos e para instaurar processos judiciais. A qualidade de agentes oficiais de que gozam os autores dos atos em causa faz-lhes beneficiar da complacência, se não do acordo das autoridades que deveriam sancionar os seus atos. Existem, assim, vários casos em que os perpetradores nunca são investigados e julgados,[89] ou casos em que os tribunais carecem de independência em relação ao poder político e permanecem sob a influência do poder em vigor.[90] Tais situações geram um estado de terror generalizado entre a população e um sentimento de impunidade entre as vítimas. Estas não só raramente beneficiam de apoio judiciário para poderem ser assistidas nos seus procedimentos por um advogado, como muitas vezes encontram-se privadas de vias de ação eficazes a nível nacional para pedirem reparação, enquanto as queixas aos órgãos judiciais ou quase judiciais dependem da aceitação da competência desses órgãos por parte dos Estados.

Além disso, outro aspeto que destaca outra faceta da má-fé do Estado é o facto de que, mesmo quando as vítimas conseguem que os autores de tortura sejam condenados em tribunal, são escassas as medidas de acompanhamento postas em prática para elas.

89 No caso da Tunísia, por exemplo, foi observado que: 'Os tribunais sob o antigo regime recusavam-se geralmente a registar queixas de tortura, exceto nos raros casos em que tinha havido pressão da sociedade civil e insistência por parte de advogados bem conhecidos por sua defesa dos direitos humanos. Esses casos alistados não deram origem a investigações sérias e eficazes' (*Tunísia. Relatório alternativo ao Comité contra a Tortura das Nações Unidas*, 57ª sessão, 18 de abril-13 de maio de 2016, página 9). 'Após a revolução de [2011], o obstáculo para levar casos à justiça foi levantado e centenas de queixas por tortura foram registadas nos tribunais. Infelizmente, até à data, nenhum desses casos teve como resultado uma resposta judicial satisfatória. A maior parte destes casos não deu lugar aos atos de instrução mais elementares tendentes à procura da verdade' (página 10).

90 No caso do Burundi, por exemplo, num contexto de contestação a um terceiro mandato do falecido presidente Pierre Nkurunziza, a queixa submetida à Comissão ADHP contra o Estado burundiano alegava a impossibilidade de fazer julgar atos de tortura e tratamentos desumanos devido à influência do regime no poder sobre o poder judicial. Ver Comissão ADHP, comunicação 587/15, *Rádio Pública Africana c. Burundi*, fevereiro de 2016.

5 CONSIDERAÇÕES FINAIS: RECOMENDAÇÕES PARA UM MAIOR DINAMISMO NA LUTA CONTRA A TORTURA EM ÁFRICA

Longe de ser uma prática antiga agora erradicada, a tortura continua a prosperar, essencialmente nos locais onde as pessoas são privadas da sua liberdade. Para que a proibição da tortura não permaneça uma utopia, é urgente que ações mais efetivas sejam tomadas, tanto por parte dos Estados cuja má-fé é frequentemente flagrante nesta matéria, como por parte das instituições nacionais de direitos humanos e das organizações da sociedade civil.

A nível dos Estados, é necessário adotar rapidamente leis que criminalizem a tortura. Estas leis deverão prever o desmantelamento dos centros de detenção ilícitos, investigações aprofundadas, sanções adequadas, assim como um quadro para a indemnização e reabilitação das vítimas. É também essencial que seja prestada formação em direitos humanos ao pessoal nos principais locais de privação de liberdade – especialmente prisões, esquadras de polícia, centros de retenção dos migrantes – e aos magistrados encarregados de processar os atos de tortura.

A nível das instituições nacionais de direitos humanos e das organizações da sociedade civil, a fim de contrariar a má-fé dos Estados, é desejável que estas acompanhem mais as ações do CPTA na prevenção e proibição da tortura, bem como as atividades do CAEDBE no que diz respeito à categoria específica das crianças. Devido à sua proximidade com a população, elas têm um papel crucial a desempenhar,[91] trabalhando pela adoção de mecanismos nacionais de prevenção, pela criminalização dos atos de tortura na legislação nacional e pela sensibilização para este flagelo, divulgando a existência dos apelos urgentes que podem ser lançados quando estão em curso casos de tortura e informando sobre a disponibilidade de recursos supranacionais.

91 Ver F Viljoen & C Odinkalu *La prohibition de la torture et des mauvais traitements dans le système africain des droits de l'homme. Guide pratique juridique à l'intention des victimes et de leurs défenseurs* (2014) 125.

Les vaccinations obligatoires et les droits de l'homme en Afrique: l'urgence d'un encadrement juridique efficace au sein de l'Union africaine

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RÉSUMÉ: Depuis plusieurs décennies, la vaccination est le mécanisme de prévention le plus répandu des maladies infectieuses. Les vaccins sont des médicaments destinés à prévenir de nombreux risques, afin de permettre à la personne humaine de jouir d'un meilleur état de santé. Dans cette logique de promotion de la santé individuelle et surtout collective, des vaccins sont imposés aux nourrissons, ou aux personnes de tout âge. Dans la quasi-totalité des pays de l'Union africaine, on retrouve des vaccins obligatoires. Pourtant, en vue de la protection du droit à la vie, du droit à l'intégrité physique consacrés par l'article 4 de la Charte africaine des droits de l'homme et des peuples et la Charte africaine des droits et du bien-être de l'enfant, le corps humain est inviolable. Toute personne, tout patient, devrait avoir le droit de consentir de manière éclairée, personnellement ou par son représentant, à un médicament, à une thérapie, qu'elle soit préventive ou curative. Dès lors, ces vaccinations obligatoires sont-elles conformes au système de protection des droits humains de l'Union africaine? Avec la persistance de la COVID-19 devenue pandémie mondiale et les nombreux débats controversés au sujet des vaccins proposés contre cette maladie, la question des vaccins obligatoires mérite d'être profondément prise en compte par l'Union africaine, pour une protection optimale des droits humains en Afrique. Si les vaccinations obligatoires constituent des atteintes légitimes mais implicites dans le système de protection des droits humains de l'Union africaine, il est urgent de procéder à un meilleur encadrement juridique de cette pratique, pour une protection plus efficace des droits humains en Afrique. Cette étude s'est appuyée sur la dogmatique juridique, c'est-à-dire l'analyse minutieuse des normes juridiques de l'Union africaine et la casuistique qui permet d'appréhender la mise en œuvre de ces normes pour aboutir à cette conclusion.

TITLE AND ABSTRACT IN ENGLISH:

Mandatory vaccinations and human Rights in Africa: the urgent need for an effective legal framework within the African Union

ABSTRACT: For several decades, vaccination has been the most widely used prevention mechanism for infectious diseases. Vaccines are medicines designed to prevent many risks, to enable the human being to enjoy a better state of health. In this logic of

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promoting individual and especially collective health, vaccines are imposed on infants, or on people of all ages. In almost all the countries of the African Union, vaccines are compulsory. However, in view of the protection of the right to life and the right to physical integrity enshrined in Article 4 of the African Charter on Human and Peoples' Rights and the African Charter on the Rights and Welfare of the Child, the human body is inviolable. Every person, every patient, should have the right to give informed consent, personally or through their representative, to a medicine or therapy, whether preventive or curative. This situation begs the question whether these compulsory vaccinations are consistent with the African Union's human rights protection system. With the persistence of COVID-19, which has become a global pandemic, and the many controversial debates about the proposed vaccines against this disease, the issue of mandatory vaccinations deserves to be deeply considered by the African Union, for the optimal protection of human rights in Africa. While compulsory vaccinations are legitimate but implicit infringements of the African Union's human rights protection system, there is an urgent need for a better legal framework for this practice, for a more effective protection of human rights in Africa. This study relied on doctrinal legal approach based on which it meticulously analysed the legal norms of the African Union, and on a case-by-case analytical approach which allowed it to evaluate the implementation of these norms.

MOTS CLÉS: vaccinations obligatoires, système africain, droits de l'homme, urgence, encadrement juridique efficace, Union africaine

SOMMAIRE:

1 INTRODUCTION

Depuis l'invention de la vaccination en 1796,[1] le vaccin[2] est le mécanisme le plus répandu de prévention des maladies infectieuses. La vaccination est un procédé consistant à inoculer dans un organisme vivant un agent (le vaccin) capable de produire une réaction immunitaire positive contre une maladie infectieuse, qu'elle soit bactérienne ou plus souvent virale.[3] Les vaccins sont des produits destinés à protéger l'être humain ou l'animal des maladies graves et

1 C'est au Dr Edouard Jenner que l'on attribue l'invention de la vaccination. En 1796 ce médecin inocule pour la toute première fois à un enfant de huit ans du pus prélevé sur une trayeuse de vache atteinte d'une maladie infectieuse des bovidés, la vaccine (voir à ce sujet: P Segur 'Sur la licéité d'une obligation vaccinale anti-covid' (2021) 20 *Revue des droits et des libertés fondamentaux* 6. Dr Edouard Jenner découvrait ainsi que l'on pouvait protéger les êtres humains contre la variole en leur inoculant la vaccine, une maladie habituellement rencontrée chez les bovins et identique à la variole et pourtant bénigne chez l'homme.

2 Le vaccin a été inventé par Louis Pasteur en 1877.

3 C Thomsen *Encyclopédie, Vocabulaire médical* (2018) 'Vaccin/Vaccination/ Vaccine'.

souvent mortelles.[4] Selon la définition de l'Organisation mondiale de la santé (OMS), un vaccin est une préparation administrée pour provoquer l'immunité contre une maladie stimulant la production d'un anticorps; les vaccins stimulent le système immunitaire pour créer des anticorps, de la même manière que si ce système immunitaire était exposé à la maladie.[5] Toutefois, les vaccins ne sont pas en principe sensés provoquer la maladie ou exposer le sujet à des risques de complications, parce qu'ils ne renferment que des formes tuées ou atténuées des germes, virus ou bactéries.[6] On distingue les vaccins préventifs et les vaccins thérapeutiques. Alors que les vaccins préventifs permettent de prévenir l'apparition d'une maladie d'origine infectieuse, les vaccins thérapeutiques permettent quant à eux d'aider le patient à lutter contre une maladie en cours, notamment un cancer.[7] Ainsi, la vaccination, dans la logique du vaccin préventif, est un moyen simple, sûr et efficace de se protéger des maladies dangereuses avant d'être en contact avec ces affections (maladies), car elle utilise les défenses naturelles de l'organisme pour créer une résistance à des infections spécifiques et renforcer le système immunitaire.[8]

En vue de promouvoir la santé individuelle et surtout collective, des vaccins sont imposés aux nourrissons, ou aux personnes de tout âge. Dans la quasi-totalité des pays de l'Union africaine, il est difficile de ne pas retrouver un vaccin obligatoire. Se soumettre à l'obligation vaccinale (pour des vaccins obligatoires) est devenu une attitude citoyenne.[9] Au Cameroun notamment, les vaccins contre la diphtérie, la poliomyélite et le tétanos sont imposés aux nourrissons, et celui contre la fièvre jaune est imposé à toutes les personnes qui désirent entrer et sortir du pays. Le caractère obligatoire de ces vaccinations implique que le consentement du patient ne soit pas requis pour cet acte médical; celui-ci est tenu de se faire vacciner s'il veut bénéficier des avantages dont l'accès est conditionné par ces vaccinations.[10] La liberté relative au choix de se faire vacciner ou pas, n'est donc plus reconnue à tous ceux qui veulent se prévaloir des avantages conditionnés par la vaccination. C'est en cela que la vaccination obligatoire se distingue de la vaccination forcée. Cette dernière hypothèse correspond à la situation dans laquelle un vaccin non obligatoire est inoculé à une personne sans son consentement. Pourtant, l'inviolabilité du corps humain est consacrée dans l'optique de la protection du droit à la vie et du droit à l'intégrité physique consacrés par l'article 4 de la Charte africaine des droits de l'homme et des peuples (Charte africaine) du 27 juin 1981, et l'article 5 de la Charte africaine des droits et du bien-être de l'enfant de

4 Unicef 'Tout ce que vous devez savoir sur les vaccins, les principales questions que se posent les parents sur la vaccination' https://www.unicef.org/fr/vaccination/foire-aux-questions-parents-vaccins (consulté le 8 juin 2022).

5 OMS 'Vaccins et vaccination: qu'est-ce que la vaccination' https://www.who.int/fr/health-topics/vaccines-and-immunization (consulté le 8 juin 2022).

6 OMS (n 6).

7 Psychomédia *Lexique: psychologie et santé* (2020).

8 OMS (n 6) 3.

9 Segur (n 1) 2.

10 Il s'agit notamment de l'inscription dans des écoles maternelles pour les enfants.

juillet 1990. Toute personne, tout patient, devrait avoir le droit de consentir de manière éclairée, personnellement ou par son représentant, à un médicament, à une thérapie, qu'elle soit préventive ou curative. Dès lors, ces vaccinations obligatoires sont-elles conformes au système africain des droits de l'homme? Car en effet, avec la persistance de la Covid-19 devenue pandémie mondiale et les nombreux débats controversés au sujet des vaccins proposés contre cette maladie, la question des vaccins obligatoires mérite d'être profondément prise en compte par l'Union africaine, pour une protection optimale des droits humains en Afrique.

Ainsi, à travers la dogmatique juridique, c'est-à-dire l'analyse minutieuse des normes juridiques de l'Union africaine, et la casuistique qui permet d'appréhender la mise en œuvre de ces normes, l'on peut constater que si les vaccinations obligatoires constituent des atteintes légitimes mais implicites aux droits humains dans le système africain des droits de l'homme (2), il est urgent de procéder à un meilleur encadrement juridique de cette pratique, pour une protection plus efficace des droits humains en Afrique (3).

2 L'ADMISSION IMPLICITE DES VACCINATIONS OBLIGATOIRES COMME ATTEINTES LÉGITIMES AUX DROITS HUMAINS AU SEIN DE L'UNION AFRICAINE

Au plan international, la possibilité pour l'État de porter atteinte au droit au consentement du patient, dans le seul but de protéger la vie d'un individu ou d'un groupe d'individus, est clairement consacrée par le Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC) du 16 décembre 1966. Selon ledit pacte, «les Etats devront prendre les mesures nécessaires pour assurer la prophylaxie et le traitement des maladies épidémiques», afin de garantir le droit à la santé individuelle.[11] La prophylaxie c'est la prévention de la maladie.[12] Dans l'expression «mesures nécessaires», l'on peut bien ranger les vaccinations obligatoires.

Dans le système africain des droits de l'homme, une telle affirmation se devine seulement, parce qu'elle est juste sous-entendue. Malgré l'absence du caractère explicite de cette consécration, l'on peut affirmer que les vaccinations obligatoires dans le système de l'UA sont envisagées et admises comme des atteintes non arbitraires au principe de l'inviolabilité du corps humain. Elles sont également envisagées comme des instruments de protection de la santé des populations.

11 Art 12.

12 Thomsen (n 3) 3.

2.1 Les vaccinations obligatoires comme atteintes non arbitraires au principe de l'inviolabilité du corps humain

«La personne humaine est inviolable. Tout être humain a droit au respect de sa vie et à l'intégrité physique et morale de sa personne. Nul ne peut être privé arbitrairement de ce droit», dispose l'article 4 de la Charte africaine. La Charte africaine des droits et du bien-être de l'enfant précise quant à elle que: «dans toute action concernant un enfant, entreprise par une quelconque personne ou autorité, l'intérêt supérieur de l'enfant sera la considération primordiale»;[13] «tout enfant a droit à la vie…»;[14] «les États parties à la présente Charte assurent, dans toute la mesure du possible, la survie, la protection et le développement de l'enfant».[15] Ces différentes dispositions nous donnent de comprendre que l'UA ne s'oppose pas aux vaccinations obligatoires aussi longtemps qu'elles constituent des atteintes «non arbitraires» c'est-à-dire des atteintes justifiées à l'inviolabilité du corps humain. De même lorsque ces vaccinations sont justifiées par «l'intérêt supérieur de l'enfant», lorsqu'elles ont pour objectif d'assurer «la survie, la protection et le développement» de l'enfant, les vaccinations obligatoires sont admises. L'on peut ainsi se trouver en toute légalité en présence d'une vaccination en l'absence du consentement du patient; à condition que celle-ci soit faite dans l'intérêt de celui-ci.

2.1.1 Une vaccination en l'absence du seul consentement du patient

L'intérêt des vaccinations obligatoires réside dans le fait que le consentement du patient ou de son représentant, relatif au choix de se faire vacciner ou pas, n'est pas requis avant que l'acte médical soit posé. La vaccination en tant qu'acte de prévention, est un acte médical car, l'acte médical est «l'ensemble des activités humaines, techniques et scientifiques exercées par une personne qui réunit les conditions d'exercice de la médecine et ayant pour but, la prévention, la guérison ou le soulagement des maladies et des infirmités qui atteignent l'être humain».[16] Bien que l'on puisse convenir avec Amnesty International que: «toute règle de vaccination obligatoire doit être conforme aux droits humains»,[17] l'absence de consentement préalable dans le cadre d'une vaccination obligatoire n'est pas synonyme de violation totale des

13 Art 4(1).

14 Art 5(1).

15 Art 5(2).

16 B Glorion 'Qu'est-ce qu'un acte médical?' in *Médecine relation malade-patient*, https://www.universalis.fr/encyclopedie/medecine-relation-malade-medecin/1-qu-est-ce-qu-un-acte-medical/ (consulté le 8 juin 2022).

17 Amnesty international 'Maurice: toute règle de vaccination obligatoire doit être conforme aux droits humains', Déclaration publique, 1 septembre 2021, 1, https://www.amnesty.org/fr/wp-content/uploads/sites/8/2021/09 (consulté le 10 juin 2022).

droits humains des patients. Le patient, comme le malade[18] jouit des autres droits fondamentaux qui lui sont reconnus. Ainsi, il a droit au respect de sa dignité notamment au respect de sa vie privée, la protection de son secret médical, d'être traité avec humanité pendant l'accomplissement de l'acte de vaccination, d'obtenir des informations relatives au vaccin qui lui est imposé. Le patient a le droit de connaître l'affection c'est-à-dire la maladie que l'on entend prévenir à travers le vaccin, la durée du vaccin, le nombre de doses, les éventuels effets indésirables, les contre-indications. Toutefois, ces informations ne sont pas sensées permettre au patient de fournir un consentement éclairé, mais de lui permettre juste de comprendre l'acte médical posé sur sa personne. Si elles avaient pour objectif de permettre au patient de donner un consentement éclairé, cela voudrait dire que la vaccination dont il est question n'est plus obligatoire, mais qu'elle est conditionnée par l'accord préalable du patient. Par conséquent, dès lors que les conditions d'un consentement éclairé ne sont pas réunies, le patient peut choisir de ne pas se faire vacciner et toujours prétendre aux services dont l'accès est conditionné par cette vaccination.

De même, le respect de la dignité du patient dont le consentement ou celui de son représentant, relatif au choix de se faire vacciner ou pas, n'est pas requis pour un acte médical donné en l'occurrence la vaccination, ne saurait justifier qu'il subisse des douleurs injustifiées à l'occasion de l'inoculation du vaccin du fait, par exemple, de l'incompétence du professionnel de santé. L'absence de consentement ne s'applique qu'au vaccin et rien qu'au vaccin concerné. A titre d'exemple, l'on ne saurait profiter du caractère obligatoire d'un vaccin, pour inoculer plusieurs autres vaccins non obligatoires à un patient.

Mais il convient de noter que cette absence de consentement peut constituer une porte ouverte à tous les abus, portant de ce fait atteinte à l'intégrité physique et même morale du patient. C'est la raison pour laquelle l'article 4 de la Charte africaine précise qu'il s'agit seulement des limites non arbitraires qui sont admises à l'intégrité physique. L'on doit rester dans l'étendue de la limite consacrée par la loi, au cas contraire cette action deviendra arbitraire et par conséquent, illégale. La responsabilité de l'État peut bien évidemment être engagée du seul fait du caractère arbitraire d'une atteinte à un droit fondamental. La Cour africaine des droits de l'homme et des peuples, lorsqu'elle est saisie, n'hésite pas à retenir la responsabilité de l'État et octroyer même une réparation aux victimes de restriction arbitraire, c'est-à-dire injustifiée. Elle a déjà eu l'occasion de le faire en cas d'atteinte au droit

18 En effet, le malade est celui qui souffre d'une affection et séjourne dans une structure sanitaire pour retrouver la guérison. Le patient quant à lui, est celui qui, ne souffrant pas d'une quelconque affection, se retrouve dans une structure sanitaire pour bénéficier d'un acte médical, notamment un acte de prévention de la maladie tel que la vaccination.

au procès équitable,[19] ou encore à la liberté d'expression.[20] Elle n'hésitera certainement pas à le faire lorsqu'il s'agira d'une atteinte à la vie du fait d'une vaccination obligatoire.

C'est le lieu de rappeler que la Cour africaine des droits de l'homme et des peuples est investie entre autres du mandat de faire respecter l'ensemble des textes relevant du droit africain des droits de l'homme.[21] La violation des dispositions de l'article 4 de la Charte africaine est une cause de saisine valable de cette juridiction. Cette saisine peut être faite directement par les États ou les organisations internationales, mais également par les individus et les organisations non-gouvernementales (ONG) ayant qualité d'observateur auprès de la Commission africaine des droits de l'homme et des peuples, à condition bien-sûr, dans ce dernier cas, que l'État partie ait souscrit à la déclaration prévue par l'article 34(6) du 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 du 10 juin 1998 (protocole de Ouagadougou).[22]

Par conséquent, quand bien même il s'agira d'une atteinte non arbitraire, en l'occurrence une vaccination imposée mais justifiée, le patient dont l'État aura fait la déclaration aux termes de l'article 34(6) du Protocole de Ouagadougou, pourra saisir la Cour dès lors qu'il parvient à démontrer à celle-ci dès sa saisine, le préjudice subi du fait de cette vaccination obligatoire. Il pourra également le faire lorsqu'il estime que la vaccination faite sans le consentement préalable du patient, ne concourt pas à la protection de ses intérêts.

2.1.2 Une vaccination dans l'intérêt du patient

Le caractère obligatoire d'un vaccin est apprécié en fonction du «bénéfice» qu'il procure au patient. C'est ce rapport risque-bénéfice qui permet d'apprécier l'efficacité d'un vaccin et le cas échéant, permet de légitimer son caractère obligatoire. Un acte médical doit pouvoir se

19 Voir à ce sujet: *Commission africaine des droits de l'homme et des peuples c. Libye* (fond) (3 juin 2016) 1 RJCA 158; *Ayants droit feus Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo et Blaise Ilboudo et Mouvement Burkinabé des droits de l'homme et des peuples c. Burkina Faso* (fond) (28 mars 2014) 1 RJCA 226.

20 *Lohe Issa Konaté c. Burkina Faso* (fond) (5 décembre 2014) 1 RJCA 324; *Lohe Issa Konaté c. Burkina Faso* (réparation) (3 juin 2016) 1 RJCA 358.

21 Selon l'article 3(1) du 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 du 10 juin 1998: '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 Etats concernés'.

22 Aux termes de l'article 34(6) du Protocole de Ouagadougou: 'A tout moment à partir de la ratification du présent Protocole, l'État doit faire une déclaration acceptant la compétence de la Cour pour recevoir les requêtes énoncées à l'article 5(3) du présent protocole (requêtes des individus et des ONG)'. La Cour ne reçoit aucune requête en application de cette disposition intéressant un État partie qui n'a fait une telle déclaration.

justifier par son utilité thérapeutique.[23] La déclaration d'Helsinki de l'Association médicale mondiale (AMM relative aux principes éthiques applicables aux recherches médicales sur des sujets humains) dispose ainsi au sujet de la recherche médicale, que: «dans la recherche médicale sur les sujets humains, les intérêts de la science et de la société ne doivent jamais prévaloir sur le bien-être du sujet».[24] Le bien-être du sujet, du patient, doit pouvoir primer sur les autres intérêts; c'est dans le même sens que la Charte africaine des droits et du bien-être de l'enfant, consacre la notion d'intérêt supérieur de l'enfant, lorsqu'elle dispose en son article 4(1) que: «dans toute action concernant un enfant, entreprise par une quelconque personne ou autorité, l'intérêt supérieur de l'enfant sera la considération primordiale».

La notion «d'intérêt supérieur de l'enfant» est d'une grande portée dans l'analyse des vaccinations obligatoires dans le système africain des droits de l'homme. Les nombreux vaccins imposés aux enfants en bas âge dans plusieurs pays de l'UA, trouvent nécessairement leur fondement dans la préservation de l'intérêt supérieur de l'enfant. Qu'il s'agisse des vaccins contre la diphtérie, le tétanos, la coqueluche, ou encore celui de la tuberculose, la poliomyélite, tous ces vaccins ont pour rôle de protéger la santé infantile en Afrique. A titre d'illustration, l'UNICEF affirme qu'au cours de ces dernières décennies, les vaccins ont contribué à réduire considérablement la charge de la morbidité des maladies de l'enfance à l'échelle mondiale.[25] Grâce à la vaccination continue-t-il, «plus d'enfants que jamais mènent à présent une vie dépourvue de maladies évitables par la vaccination».[26] L'on peut ainsi comprendre pourquoi, à titre de droit comparé, la Cour européenne des droits de l'homme (CrEDH) a pu affirmer que l'obligation de vacciner les tout petits enfants relevait d'une obligation légale, dans la mesure où ces vaccinations concourent à la protection de l'intérêt supérieur de l'enfant, en l'occurrence son droit à la santé, son droit à la vie.[27] Dans cette affaire, les «enfants requérants» de la République Tchèque ont saisi la CrEDH aux fins de constater la violation de leur droit fondamental à l'instruction, et surtout de leur droit au respect de la vie privée (article 8 de la Convention européenne des droits de l'homme (CEDH)). Ces derniers contestaient l'annulation de leur inscription à l'école maternelle, faute d'avoir satisfait à l'obligation légale de vaccination, ou de ne l'avoir pas fait selon le calendrier prévu par la loi tchèque. L'école maternelle leur exigeait de se faire vacciner contre la diphtérie, le tétanos, la coqueluche, les

23 JP Demarez 'Déclaration d'Helsinki, origine, contenu et perspectives', La lettre du pharmacologue (2000) 14(8) 163 https://www.edimark.fr/Front/frontpost/getfiles/4389 (consulté le 12 juin 2022).

24 Déclaration d'Helsinki de l'AMM relative aux principes éthiques applicables aux recherches médicales sur des sujets humains de juin 1864, principe 5.

25 Unicef (en français: Fonds des nations unies pour l'enfance), 'Conférence ministérielle sur la vaccination en Afrique, tenir la promesse: assurer la vaccination pour tous en Afrique', obtenu sur le site https://www.afro.who.int/sites/default/files/2017-06/Immunization (consulté le 22 juin 2022) 5.

26 UNICEF (n 25).

27 CEDH No. 47621/13 du 08 avril 2021, *Vavricka et autres c. République tchèque*, *inédit*.

infections à *Haemophilus influenzae* de type b, la poliomyélite, l'hépatite B, la rougeole, les oreillons et la rubéole et – pour les enfants présentant des indications spécifiques – les infections à pneumocoque comme le prévoit le droit positif de la République Tchèque.[28] Les cinq requérants souhaitaient obtenir de la Cour, le constat de la violation des droits humains par la loi tchèque ayant rendu tous ces vaccins obligatoires. Mais la CrEDH a jugé que les mesures dont se plaignaient les requérants, évaluées dans le contexte du régime national, se situent dans un rapport de proportionnalité raisonnable avec les buts légitimes poursuivis par l'État tchèque à travers l'obligation vaccinale.[29] Les mesures prises par l'État tchèque concouraient donc à la protection de l'intérêt supérieur de l'enfant. Rappelons à toutes fins utiles que cette notion trouve ses origines dans la convention des Nations Unies relative aux droits de l'enfant.[30] En l'espèce, la CrEDH a pris le soin de rappeler que l'intérêt supérieur des enfants doit primer dans toutes les décisions qui les concernent. En matière de vaccination notamment, l'objectif doit être de veiller à ce que tout enfant soit protégé contre les maladies graves par la vaccination ou par l'immunité de groupe.[31] La politique de l'État tchèque est par conséquent conforme à l'intérieur supérieur de l'enfant, cela d'autant plus que la vaccination concernant ces différentes maladies sont estimées sûres et efficaces par la communauté scientifique.[32] Mieux encore, la CrEDH a jugé à la majorité, 16 voix contre une, que cette atteinte au droit à la vie privée, ou encore au droit à l'instruction, était proportionnelle aux intérêts protégés. Elle note ainsi que l'amende administrative infligée aux requérants (parents des enfants) du fait du refus de la vaccination, n'était pas excessive et que, «bien que la non admission des enfants requérants à l'école maternelle ait impliqué pour eux la perte d'une occasion cruciale de développer leur personnalité, il s'agissait d'une mesure préventive plutôt que punitive dont les effets ont été limités dans le temps, le statut vaccinal des enfants n'ayant pas eu d'incidence sur leur admission à l'école élémentaire lorsqu'ils ont atteint l'âge de la scolarité obligatoire».[33] La proportionnalité de cette atteinte légitime aux droits fondamentaux de ces enfants, s'illustre également par le fait que, cette obligation vaccinale n'est pas imposée aux enfants présentant des indications médicales spécifiques.[34]

Si la question des vaccinations obligatoires n'a pas encore été soumise à la Cour africaine des droits de l'homme et des peuples, il n'en

28 CEDH 'Questions-réponses sur l'arrêt Vavricka et autres c. République Tchèque', *Service de Presse*, 4 août 2021.

29 CEDH (n 28).

30 Voir également à ce sujet: *CEDH, Rapport annuel 2021, Conseil d'Europe-CEDH*, 2022, 32, obtenu sur le site: https://www.echr.coe.int/Documents/Annual_report_2021_FRA, consulté le 14 juin 2022.

31 CEDH, Grande Chambre, 'Arrêt relatif au refus de la vaccination infantile obligatoire: Vavricka et autres c. République Tchèque', jurisprudences, obtenu sur le site: https://juridique.defenseurdesdroits.fr/index.php, (consulté le 11 octobre 2022).

32 CEDH (n 32), para 7.

33 *Vavricka*, para 10.

34 *Vavricka*, para 9.

demeure pas moins que ce raisonnement de la CrEDH puisse être également celui de celle-ci. Les vaccins obligatoires exigés aux parents pour leurs enfants, admis au sein des pays de l'UA, témoignent à suffisance de la validité du raisonnement de la CrEDH au sein de l'UA. Parce que ces vaccins protègent la vie, l'on ne saurait permettre qu'ils dépendent essentiellement de la volonté des patients, au risque de se trouver dans une situation où, le droit à la vie auquel concourent ces vaccins, est mis à mal par la liberté de se faire vacciner ou pas. La liberté individuelle de se faire vacciner ou pas n'étant pas une liberté absolue; elle ne saurait être source d'atteinte au droit à la vie de son titulaire, ou encore justifier une atteinte au droit à la santé de l'ensemble de la société. Contrairement à l'État tchèque qui prévoit une amende afin de contraindre les parents à faire vacciner leurs enfants, dans l'UA une telle pratique est très peu courante. La proportionnalité de l'atteinte aux droits fondamentaux due aux vaccinations obligatoires des enfants en bas âge, est véritablement proportionnelle à l'intérêt que l'on voudrait préserver, à savoir l'intérêt général à travers une immunité collective.

2.2 Les vaccinations obligatoires comme instrument de protection de la santé des populations

Après avoir affirmé que toute personne a le droit de jouir du meilleur état de santé physique et mentale qu'elle est capable d'atteindre,[35] la Charte africaine des droits de l'homme et des peuples dispose en son article 16(2) que: «Les Etats parties à la présente Charte s'engagent à prendre les mesures nécessaires en vue de protéger la santé de leurs populations et de leur assurer l'assistance médicale en cas de maladie». Dans un arrêt interprétatif,[36] la Cour africaine des droits de l'homme et des peuples a donné un contenu à une formule similaire, qu'elle avait précédemment utilisée dans l'un de ses arrêts.[37] En effet, il était question pour la Cour africaine de donner la signification des termes: «toutes les mesures nécessaires», qu'elle exigeait de la Tanzanie qui s'était rendue coupable de la violation du droit au procès équitable du sieur Thomas. En l'espèce, la Cour africaine affirme que:[38]

> La forme la plus appropriée de redressement pour une violation du droit à un procès équitable consiste à faire en sorte que la victime se retrouve dans la situation qui aurait été sienne, si les violations constatées n'avaient pas été commises. Pour y parvenir, la République-Unie de Tanzanie a deux possibilités: soit réexaminer l'affaire dans le respect des règles du procès équitable, soit prendre toutes les mesures requises pour s'assurer que le sieur Thomas se retrouve dans la situation qui était sienne avant lesdites violations.

Ce raisonnement de la Cour africaine s'inspire de l'article 27(1) du Protocole de Ouagadougou, qu'elle a pris le soin de citer. Au terme de

35 Art 16(1) de la Charte africaine.

36 *Thomas c. République-Unie de Tanzanie* (arrêt interprétatif) (2017) 2 RJCA 131.

37 *Thomas c. République-Unie de Tanzanie* (fond) (2015) 1 RJCA 482.

38 *Thomas c. République-Unie de Tanzanie* (n 37). La Cour africaine a donné la même interprétation dans un autre arrêt *Aboubakari c. Tanzanie* (arrêt interprétatif) (2017) 2 RJCA 140.

cette disposition: «Lorsqu'elle estime qu'il y a eu une 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» Autrement-dit, l'expression «mesures nécessaires» s'apprécie *in concreto*, cependant elle renvoie aux stratégies efficaces permettant l'atteinte de l'objectif escompté.

Ces «mesures nécessaires» attendues des États en vue de protéger la santé publique peuvent être des vaccinations obligatoires. Celles-ci s'inscrivent en effet, dans le cadre des obligations minimales essentielles des États relatives à l'effectivité du droit à la santé des populations, telles que le précisent les principes et lignes directrices sur la mise en œuvre des droits économiques sociaux et culturels consacrés dans la Charte africaine des droits de l'homme et des peuples. Selon lesdits principes, les obligations de l'Etat consistent en la matière à «assurer l'immunisation universelle contre les maladies infectieuses majeures, prendre des mesures pour prévenir, traiter et contrôler les maladies épidémiques et endémiques».[39] Les vaccinations obligatoires consacrent et réitèrent ainsi la primauté de l'intérêt général sur l'intérêt individuel, et attestent que les vaccinations obligatoires constituent des instruments efficaces dans la prévention des atteintes à la santé publique.

2.2.1 La primauté de l'intérêt général sur les intérêts individuels

La notion d'intérêt général est régulièrement utilisée en droit, sans que l'on puisse en donner une véritable définition. Désignée sous les vocables «intérêt public», «utilité publique», «utilité générale», la notion d'intérêt général peut être définie comme l'ensemble des besoins de la population.[40] Il ne s'agit donc pas d'une notion exclusivement juridique, car les besoins de la population ne relèvent pas seulement des sciences juridiques. Cette notion se veut ambivalente dans la mesure où, elle fait appel à la fois à la politique et au droit.[41] En fonction de la délimitation géographique de la population, l'intérêt général peut être local, national, régional ou communautaire.[42] C'est une notion transversale qui a le mérite d'être un instrument efficace pour la protection des droits fondamentaux.[43] La protection de l'intérêt général est le fondement de la légalité et de la légitimité des atteintes aux droits fondamentaux. Le législateur doit pouvoir justifier la restriction apportée aux droits fondamentaux d'un ou de plusieurs individus par la poursuite d'un objectif d'intérêt général.[44] C'est la

39 Paragraphe 67(1) & (d).

40 D Truchet 'La notion d'intérêt général: le point de vue d'un professeur de droit', (2017) 58(1) *Legicom* 5 -11.

41 G Merland 'L'intérêt général, instrument efficace de protection des droits fondamentaux ?' (2004) 16 *Cahiers du Conseil Constitutionnel* 1.

42 Truchet (n 40) 1.

43 Merland (n 42).

44 Merland (n 42) 3.

raison pour laquelle la notion d'intérêt général est censée désigner l'ordre public, «l'intérêt du peuple, ou bien la priorité des décisions administratives sur les intérêts privés, sectoriels, les droits individuels et les contrats entre particuliers».[45] La Commission africaine des droits de l'homme et des peuples de l'UA, dans les Principes et lignes directrices sur la mise en œuvre des droits économiques, sociaux et culturels dans la Charte africaine, désigne l'intérêt général par la notion «d'intérêt public», qu'elle définit comme «le bien-être commun ou le bien-être général de la population».[46]

En consacrant l'obligation positive mise au passif des États dans la protection de la santé des populations, la Charte africaine consacre la primauté des droits fondamentaux de la collectivité sur ceux de l'individu à plus d'un titre. Le bien-être du peuple, qu'il s'agisse du «peuple-État», «peuple-population» ou du «peuple-dominé»,[47] est prioritaire par rapport à celui des individus. La santé des populations prime sur la santé individuelle. En vue de protéger la santé des populations, certains droits fondamentaux peuvent légitimement faire l'objet de violation notamment le choix de se faire vacciner ou pas, avec pour conséquence la perte de tous les avantages conditionnés par ladite vaccination. La Charte africaine dispose clairement à cet effet en son article 27(2) que: «Les droits et les libertés de chaque personne s'exercent dans le respect du droit d'autrui, de la sécurité collective, de la morale et de l'intérêt commun». La sécurité collective, ou encore l'intérêt commun, l'intérêt général deviennent des fondements, qui ont le mérite de justifier l'existence des vaccinations obligatoires dans le système africain des droits de l'homme.

Si l'occasion n'a pas encore été offerte à la Cour africaine des droits de l'homme et des peuples de réitérer la suprématie de l'intérêt général sur les intérêts individuels, en l'état actuel du droit africain des droits de l'homme et des peuples, l'on peut valablement affirmer cela en prenant appui sur l'article 27(2) de la Charte africaine sus cité. Cette primauté de l'intérêt général est valable tant au sein des États membres qu'au niveau communautaire. La Commission africaine des droits de l'homme et des peuples traduit cette réalité par le contenu qu'elle donne au principe de proportionnalité dans la mise en œuvre des droits sociaux et culturels en Afrique. Selon ce principe, il est question «de trouver un juste équilibre entre les exigences de l'intérêt général de la communauté et les besoins de protection des droits fondamentaux des individus».[48]

La Commission africaine peut valablement adopter des résolutions pour clarifier la nature et/ou la portée des droits et obligations, et ces

45 P Cretois & S Roza 'De l'intérêt général: introduction' *Astérion, Philosophie, histoires des idées, pensée politique*, No 17/2017, mis en ligne le 20 novembre 2017 (consulté le 12 juillet 2022).

46 Principes et lignes directrices sur la mise en œuvre des droits économiques, sociaux et culturels dans la Charte africaine des droits de l'homme et des peuples, confère première partie (Interprétation (h)).

47 AB Fall 'Charte africaine des droits de l'homme et des peuples: entre universalisme et régionalisme' (2009) 129(2) *Pouvoirs* 77-100.

48 Principes et lignes directrices (n 46); confère première partie (Interprétation (g)).

résolutions peuvent porter atteinte aux droits fondamentaux de certains individus, parce qu'elles concourent à l'atteinte d'un objectif d'intérêt général. C'est ce qu'illustre la *Résolution sur les droits de l'homme et des peuples en tant que pilier central d'une réponse réussie au Covid-19 et du redressement de ses impacts sociopolitiques*.[49] Le port obligatoire du masque est retenu par la Commission africaine, comme l'une des principales mesures de prévention de la maladie en cette période de pandémie. Selon cette résolution, les États parties sont appelés à veiller au respect du droit à la vie et à la santé de leurs populations, notamment en veillant à ce que la priorité soit accordée

> ... à des interventions mesurées en matière de santé publique, notamment le port obligatoire du masque, l'installation des postes de lavage et de désinfection des mains dans des lieux publics, la désinfection des lieux publics, l'organisation de rassemblement dans les espaces ouverts, l'observation des règles de distanciation physiques dans le cadre des activités économiques.[50]

Au-delà du seul port du masque, l'obligation de lavage de mains dans les espaces publics ou encore celle de distanciation physique, sont autant de restrictions apportées aux libertés fondamentales individuelles, qui se justifient pourtant par la nécessité de préserver l'intérêt général, la nécessité de préserver la santé publique. Bien que cette résolution ne consacre pas les vaccinations obligatoires comme moyens de prévention de la Covid-19 en Afrique, il n'en demeure pas moins que le mécanisme de la vaccination obligatoire est un outil très important dans la prévention des atteintes à la santé publique.

2.2.2 Les vaccinations obligatoires, instrument efficace de prévention des atteintes à la santé publique

La Résolution 449 de la Commission africaine des droits de l'homme sus citée n'avait pas besoin de consacrer la vaccination obligatoire comme mesure de prévention de la Covid-19 en Afrique, pour que l'on puisse attester de la légitimité de ladite vaccination, comme solution à cette pandémie. En effet, selon ladite Commission, les États ont comme obligations essentielles minimales dans la mise en œuvre du droit à la santé en leur sein d'«assurer l'immunisation universelle contre les maladies infectieuses majeures; prendre des mesures pour prévenir, traiter et contrôler les maladies épidémiques et endémiques».[51] Les dispositions de l'article 16(2) de la Charte africaine qui autorisent et exigent même aux Etats le recours aux «mesures nécessaires» afin de prévenir les atteintes à la santé des populations, intègrent déjà le mécanisme de la vaccination obligatoire. Mais il ne s'agit pas d'un mécanisme de prévention passe-partout. Dans l'expression «mesures nécessaires» l'on perçoit l'idée selon laquelle, ces mesures doivent être proportionnelles au risque sanitaire auquel sont exposées les populations, conformément au principe de proportionnalité dans la mise en œuvre des droits économiques sociaux et culturels en Afrique. Cela étant, la Charte africaine des droits de l'homme et des peuples

49 Commission africaine, Res. 449 (LXVI) 2020.

50 Art 1(a) de la Charte africaine, Res. 449 (LXVI) 2020.

51 Principes et lignes directrices (n 46); confère quatrième partie (droit à la santé).

laisse ainsi implicitement à l'appréciation de la Cour africaine des droits de l'homme et des peuples, ainsi qu'à la Commission africaine, à l'occasion d'un probable contentieux relatif à la validité des mesures instituant la vaccination obligatoire, l'appréciation de la vaccination obligatoire en tant que mesure nécessaire dans la prévention de la Covid-19 ou de toute maladie constituant une menace pour la santé publique.

Il n'en demeure pas moins que la vaccination obligatoire se veut très efficace dans la prévention des atteintes à la santé publique. Parce qu'elle a le mérite de créer une immunité collective, la vaccination obligatoire peut permettre à toute la population de résister à une maladie pourtant infectieuse. Les vaccins imposés dans le cadre de la circulation des hommes et des femmes d'un pays à un autre, ont également le mérite de protéger les pays d'accueil de certaines maladies très peu connues par leur climat et par conséquent, certainement dangereuses pour leur population. A titre d'illustration, le vaccin contre la fièvre jaune, encore appelé vaccin antiamarile, exigé à toute personne qui part du Cameroun ou qui désire séjourner en terre camerounaise, se veut obligatoire dans l'intérêt non seulement de l'étranger qui séjourne au Cameroun, mais également pour la population du pays étranger dans lequel un résidant camerounais est appelé à séjourner. Ce résident camerounais ne pourra pas leur transmettre la maladie, et les étrangers séjournant au Cameroun, ne pourront pas contracter la maladie. La fièvre jaune est une maladie virale qui se transmet notamment par les piqures de moustiques. Il s'agit d'une infection extrêmement mortelle présente dans les pays tropicaux d'Afrique et d'Amérique du Nord. Le vaccin doit être pris au moins 10 jours avant le voyage, pour que l'immunité soit acquise.[52]

L'Etat du Cameroun recommande aussi plusieurs autres vaccins aux étrangers désirant séjourner sur son territoire. Il s'agit du vaccin contre l'hépatite A, le paludisme, la rage, la typhoïde.[53] De même les nombreux vaccins exigés aux enfants en bas âge avant leur admission à la crèche ou à l'école maternelle permettent de prévenir les infections entre nourrissons, ou entre des jeunes enfants. Si l'on se limite à la protection de la liberté individuelle de se faire vacciner ou pas, cela voudrait dire que la santé des autres jeunes enfants est sacrifiée au profit du droit d'un seul ou de certains individus, comme l'a constaté à juste titre la Cour européenne des droits de l'homme dans *l'affaire Vavricka* susmentionnée. Or, l'exigence de ces vaccins à tous les autres enfants crée un environnement sain à la crèche ou à l'école maternelle. On parvient ainsi à concilier parfaitement le droit à l'éducation et le droit à la santé; le droit à l'éducation en toute sécurité sanitaire.

La nécessité des vaccinations obligatoires n'est donc plus à démontrer. Le système africain des droits de l'homme en a tenu compte, même si l'on attend que la Cour africaine le réitère cela dans sa

52 Toutes ces informations sont obtenues sur le site https://www.rapidevisa.fr/Cameroun/vaccin-voyage-cameroun.html, consulté le 12 juillet 2022. ('Voir les formalités Cameroun et commander un visa').

53 Confère n 52.

jurisprudence. Toutefois, il faut reconnaître que la consécration des vaccinations obligatoires comme atteintes justifiées aux droits de l'homme en Afrique, se veut sommaire et implicite; il devient donc urgent de procéder à un meilleur encadrement juridique desdites vaccinations en Afrique.

3 L'URGENCE D'UN MEILLEUR ENCADREMENT JURIDIQUE DES VACCINATIONS OBLIGATOIRES AU SEIN DE L'UNION AFRICAINE

La conformité implicite des mesures de vaccination obligatoire à la Charte africaine pourrait ne pas encourager les États membres de l'UA à légiférer de manière claire et précise sur la question des vaccinations obligatoires. Elle pourrait ne pas également encourager les populations des États à se soumettre aux obligations vaccinales en vigueur en leur sein. La forte réticence à l'endroit des différents vaccins contre la Covid-19 en Afrique pourrait trouver certaines de ses raisons dans l'absence de précisions relatives aux vaccinations obligatoires dans le système de protection des droits humains de l'UA. L'urgence de la définition du régime juridique des vaccinations obligatoires en Afrique constitue un réel défi pour l'UA. Ce régime juridique devra d'une part définir de manière claire et précise le contexte justifiant le recours aux vaccinations obligatoires, les exigences relatives aux vaccins et au suivi de la vaccination devront également faire l'objet d'une véritable précision, d'autre part.

3.1 La stricte détermination du contexte du recours aux vaccinations obligatoires

Parce qu'elles constituent une exception au principe du consentement du patient à tout acte médical, le recours aux vaccinations obligatoires ne devrait pas être la règle, mais l'exception. La préservation de ce caractère d'exception exige que le contexte sanitaire justifie aisément l'obligation vaccinale envisagée. En outre, il faudra absolument que les populations cibles aient été suffisamment édifiées sur la nécessité de la vaccination obligatoire.

3.1.1 Les périodes de nécessité et d'urgence sanitaires

Bien que la situation d'urgence sanitaire ne figure pas dans les dispositions de la Charte africaine,[54] ce que nous qualifions de «nécessité» ou «d'urgence sanitaire» n'échappe pas en réalité à l'esprit

54 OB Bahoze 'Le système africain des droits de l'homme face à l'état d'urgence sanitaire due à la Covid-19' (2020) 4 *Annuaire africain des droits de l'homme* 60-82.

des dispositions de la Charte africaine. En effet, ces expressions renvoient aux situations dans lesquelles l'on ne se trouve pas dans un état d'urgence sanitaire, mais pendant lesquelles, il est indispensable de recourir aux vaccinations obligatoires, le cas échéant, pour protéger l'intérêt général. Cela peut être assimilé à un ordre public sanitaire en période classique, c'est-à-dire en l'absence de toute épidémie ou pandémie. La «nécessité sanitaire» s'inscrit dans une logique de prévention des affections connues. Ainsi, des vaccins obligatoires peuvent être exigés aux nourrissons sur le fondement de la nécessité sanitaire lorsqu'il est démontré qu'en l'absence de ce vaccin, le risque de contracter une maladie donnée est très élevé chez les nourrissons ou les enfants en bas âges. Une ou plusieurs vaccinations peuvent être imposées également à des personnes fortement prédisposées à contracter une maladie pouvant leur ôter la vie, au cas où elles ne se feraient pas vacciner. C'est le cas notamment des professionnels de santé. Par exemple, les personnes résidant en occident et désirant séjourner dans les zones tropicales africaines, devraient ainsi, au nom de la «nécessité sanitaire», se faire vacciner contre des maladies tropicales particulièrement dangereuses telles que la fièvre jaune.[55] L'OMS s'est évertuée à prendre en considération cette réalité en mettant sur pied un carnet de vaccination exigé de la part de chaque voyageur. Ledit carnet ne devrait pas contenir les mêmes vaccins, mais devrait contenir obligatoirement seulement les vaccins contre des maladies jugées particulièrement néfastes pour les organismes humains n'ayant pas l'habitude de vivre dans le lieu de séjour envisagé. Au sein d'un pays, des vaccins peuvent être obligatoires pour certains adultes, notamment aux femmes enceintes lorsqu'il est prouvé qu'en l'absence de ce vaccin, sa vie ou celle du fœtus/embryon est sérieusement mise en danger. Tout dépend des spécificités du contexte sanitaire du pays concerné. Dans cette hypothèse, la nécessité sanitaire concourt ainsi à la préservation de la santé du patient, mais également à celle du reste de la société lorsqu'il s'agit d'une maladie contagieuse. Généralement, ces vaccinations sont présentées comme «systématiques recommandées» pour emprunter l'expression de l'OMS,[56] mais l'on s'aperçoit de leur caractère obligatoire lorsqu'on constate que l'accès à l'école, aux frontières est soumis au fait d'avoir satisfait à l'obligation vaccinale y relative. Cependant nous n'approuvons pas cette formulation implicite du caractère obligatoire de certaines vaccinations. L'UA devrait définir clairement les vaccinations obligatoires, les présenter comme telles et inviter les États membres à en faire autant en leur sein.

Toutefois en période de crise sanitaire, c'est-à-dire en présence d'évènements qui affectent la santé d'un grand nombre,[57] l'on peut se trouver dans une situation d'état d'urgence sanitaire. C'est une

55 Institut Pasteur 'La fièvre jaune' https://www.pasteur.fr/fr/centre-medical/preparer-son-voyage/cameroun (consulté le 6 octobre 2022).

56 Confère OMS *Vaccination systématiques recommandées*, novembre 2021, 12, obtenu sur le site: https://cdn.who.int/media/docs/default-source/immunization/tables/immunization-routine-table1-fr., consulté le 6 octobre 2022.

57 Les crises sanitaires se traduisent toujours par une augmentation des indicateurs de mortalité ou de morbidité.

situation d'exception dans laquelle le gouvernement est autorisé à mettre à mal certains droits et libertés en vue de préserver la paix et la sécurité des populations et de leurs biens, ceci en accordant aux autorités civiles des pouvoirs étendus.[58] L'état d'urgence sanitaire est donc une situation d'exception qui exige de la part de l'État de restreindre et/ou de déroger à certains droits et libertés de la personne en vue de protéger la santé publique. L'état d'urgence sanitaire peut s'appliquer à seulement une partie du territoire national lorsque l'épidémie est contenue dans un espace géographique précis. Parmi ces mesures restrictives des droits et libertés fondamentaux, l'État peut imposer des vaccinations comme ce fut le cas dans plusieurs pays européens pendant la pandémie de la Covid-19.[59] L'urgence sanitaire n'est pas que nationale, elle peut être également internationale, c'est le cas notamment lorsque l'OMS déclare une situation d'urgence sanitaire comme ce fut le cas avec la Covid 19 le 31 décembre 2019.

Qu'il s'agisse de l'état d'urgence sanitaire ou d'une situation d'urgence sanitaire internationale, étant donné qu'il s'agit des cas d'exception, il faut que l'on se trouve dans une véritable situation dans laquelle la population est exposée à un ou plusieurs risques sanitaires ne faisant l'objet d'aucun doute. C'est pourquoi, les populations cibles de la vaccination obligatoire envisagée méritent d'être informées de la situation qui prévaut et de l'opportunité des mesures prises par l'État pour y faire face.

3.1.2 L'information claire et précise des populations cibles sur la nécessité et/ou l'urgence de la vaccination envisagée

La situation d'urgence sanitaire ne saurait justifier l'atteinte à tous les droits fondamentaux des populations. Si leur droit de consentir à la vaccination est aliéné au profit de la protection de la santé publique, elles jouissent toujours du droit fondamental d'être informées de manière claire et précise sur le contexte qui impose le recours à la vaccination obligatoire, et même sur le contenu de ladite vaccination. Amnesty international martèle ainsi que toute règle de vaccination obligatoire doit être conforme aux droits humains.[60] Une règle de vaccination obligatoire doit, soutient-elle, poursuivre un but spécifique, fondée sur des données scientifiques avérées et les groupes humains concernés doivent être consultés. L'obligation vaccinale doit être nécessaire, proportionnée et raisonnable pour atteindre ce but, la règle de vaccination doit avoir un champ et une durée d'application limités pour atteindre ce but spécifique et légitime. Cette règle ne doit pas avoir d'effet discriminatoire en particulier sur les groupes ayant déjà subi une discrimination historique et structurelle. La règle d'obligation vaccinale doit être soumise à un examen après une certaine

58 S Guinchard & T Debard (dirs) *Lexique des termes juridiques* (2017-2018), voir 'Etat d'urgence'.

59 Il s'agit notamment de l'Autriche, le Vatican, l'Allemagne, et la Grèce.

60 Amnesty International (Déclaration publique) (n 18).

périodicité, afin d'en évaluer l'efficacité et le cas échéant, afin de permettre que l'obligation vaccinale soit levée. Cette règle doit enfin être élaborée de manière à être suffisamment claire et précise.[61] Ces différentes recommandations protectrices des droits humains exigent ainsi que l'État soit tenu à une obligation d'information spécifique à l'endroit des personnes ou des catégories de personnes, astreintes à l'obligation vaccinale humaine.

L'information ainsi requise doit être claire, précise et continue. La clarté attendue exige que l'information soit accessible, c'est-à-dire qu'elle doit être transmise dans une langue parfaitement comprise par la cible et dans un registre de langue adapté au niveau de compréhension de celle-ci. Si la population cible ne s'exprime pas dans une langue officielle, l'on ne doit pas hésiter à recourir à un interprète. Les modes de transmission doivent également tenir compte des difficultés auxquelles sont confrontés les malvoyants, les malentendants. La précision qui doit caractériser cette information exige que l'on fasse comprendre aux populations cibles en quoi la vaccination est la solution la plus efficace contre la maladie combattue; tous les risques connus inhérents à la maladie pour les personnes non vaccinées, le nombre de doses de vaccin à prendre pour être immunisé, le canal d'administration du vaccin, tous les effets indésirables connus du vaccin. Le caractère continu de l'information voudrait que toute nouvelle information obtenue au sujet du vaccin après son administration soit portée à la connaissance de la population cible, lorsque cette information est susceptible de les intéresser d'une quelconque façon. Il peut s'agir d'un nouvel effet indésirable, d'une maladie découlant de ce vaccin. Cette dernière information doit être donnée aux populations cibles même si elle peut être source d'une indemnisation/réparation intégrale lorsqu'il est prouvé le lien de causalité entre le vaccin concerné et ladite maladie. L'État doit pouvoir compléter l'information transmise aux populations cibles en leur garantissant la réparation de tout préjudice dû à cette vaccination. Lorsque les cibles d'un vaccin ou des vaccins obligatoires sont des mineurs ou des majeurs incapables, ces informations doivent être transmises à leurs représentants légaux.

La garantie de réparation offerte par l'État a pour effet d'encourager les populations cibles ou les individus à adhérer en toute quiétude à la vaccination obligatoire. La réticence des populations à l'endroit des vaccinations obligatoires est généralement due à la crainte des préjudices médicaux (affections iatrogènes) qui peuvent en découler. La garantie de réparation de ces préjudices doit être exigée par l'UA, afin qu'elle figure de manière explicite dans les législations des États membres, sur les vaccinations obligatoires. Satisfaire à toutes ces exigences a le double effet d'exiger de l'État une attitude responsable; celui-ci ne pourra recourir aux vaccinations obligatoires que de manière ultime, au regard de toutes les obligations mises à son passif dans ce sillage. Le second effet est de faciliter le contrôle de l'opportunité du recours aux vaccinations obligatoires par les

61 Amnesty International (Déclaration publique) (n 18) 2. Toutes ces recommandations y sont contenues.

juridictions de l'État membre et même par la Cour africaine des droits de l'homme et des peuples.

Certes toutes ces informations requises peuvent avoir l'effet contraire de dissuader les populations à accepter la vaccination imposée, cependant, si l'État a pu leur fournir toutes ces informations, les réticences à l'endroit de ces vaccinations réduiront considérablement.

Pour plus de garantie de réparation des préjudices médicaux pouvant découler de ces vaccinations, l'on peut exiger de la part de chaque État de mettre sur pied un régime d'indemnisation, et non un régime de responsabilité relativement aux vaccinations obligatoires. Le régime d'indemnisation se veut plus avantageux dans la mesure où, à travers la création d'un fonds de garantie/d'indemnisation destiné à la réparation intégrale des préjudices issus des vaccinations imposées, les victimes des effets indésirables des vaccins imposés seront épargnées des péripéties liées au procès, qu'impose le régime de responsabilité.[62] Nous nous inspirons ainsi du Code de santé publique français, qui prévoit en son article L3111-9 que l'Office National d'Indemnisation des Accidents Médicaux, des affections iatrogènes et des infections nosocomiales (ONIAM) est l'organe compétent pour indemniser les victimes des vaccinations obligatoires pour les préjudices subis de ce fait.[63] Après avoir procédé à toute investigation nécessaire sans qu'on puisse lui opposer le secret professionnel, le directeur de l'ONIAM procède à l'offre d'indemnisation adressée à la victime ou, en cas de décès, à ses ayants droit.[64] Cette offre indique l'évaluation retenue pour chaque chef de préjudice nonobstant l'absence de consolidation desdits préjudices, ainsi que le montant des indemnités qui reviennent à la victime ou à ses ayants droit.[65] L'acceptation d'office de l'offre d'indemnisation par la victime vaut transaction au sens de l'article 2044 du Code civil français.[66]

La transposition de ce mécanisme au sein des États membres de l'UA est tout à fait possible étant donné que l'ONIAM en France, est financé par la solidarité nationale. Les États africains peuvent par conséquent instituer chacun en leur sein un mécanisme de solidarité nationale qui est chargé d'indemniser les victimes des préjudices issus des vaccinations obligatoires. Toutefois, il est important de préciser que la procédure d'indemnisation devra être allégée pour les victimes tant dans sa durée que dans les actes de procédures à accomplir.

62 Voir à ce sujet: G Viney 'L'avenir des régimes d'indemnisation sans égard à la responsabilité' (1998) 39 (2/3) *Les cahiers du droit* 287-301.

63 Ledit article dispose que: 'Sans préjudice des actions qui pourraient être exercées conformément au droit commun, la réparation intégrale des préjudices directement imputables à une vaccination obligatoire pratiquée dans les conditions pratiquées au présent chapitre, est assurée par l'Office National d'Indemnisation des Accident Médicaux, des affections iatrogènes nosocomiales … au titre de la solidarité nationale'.

64 Art L3111 (1 et 2) du Code de santé publique français.

65 Art L3111(3) du Code de santé publique français.

66 Art L3111(4) du Code de santé publique français.

Mais au-delà de cette garantie d'indemnisation, le vaccin à administrer doit au préalable réunir des qualités nécessaires de son efficacité, et la vaccination doit toujours être perçue comme un acte médical devant absolument faire l'objet d'un suivi.

3.2 Les exigences propres aux vaccins obligatoires et au suivi de la vaccination

Le vaccin est un produit de santé; à ce titre, il doit appartenir à la grande famille des données acquises de la science. Mais cela n'exclut pas le fait que la ou les personnes ayant reçu le vaccin obligatoire doivent obligatoirement bénéficier d'un suivi post vaccinal.

3.2.1 Un vaccin de qualité scientifique incontestée

La vaccination n'est pas un essai clinique; selon la loi-type de l'UA sur la réglementation des produits médicaux, un essai clinique est: «toute étude systématique des produits pharmaceutiques sur des sujets humains, que ce soit chez les patients ou d'autres volontaires, afin de découvrir ou de vérifier les effets des, et/ou d'identifier tout effet indésirable des produits de recherche et/ou d'étudier l'absorption, la distribution, le métabolisme et l'excrétion des produits dans le but de s'assurer de leur efficacité et de leur sécurité».[67] Dès lors, il est indispensable que le vaccin, fut-il obligatoire, recommandé ou simplement suggéré, soit suffisamment éprouvé selon les techniques scientifiques conventionnelles, avant d'être administré à un être humain. Comme le dispose la loi-type de l'UA sur la réglementation des produits médicaux: «toute demande d'autorisation de commercialisation des produits médicaux doit être soumise au chef de l'Agence/Autorité à l'aide d'un formulaire réglementaire et doit être accompagnée des renseignements prescrits, des échantillons des produits médicaux pertinents, des renseignements sur une personne technique qualifiée et les frais de dossier prescrits».[68] «L'Agence/Autorité donne son approbation pour un produit médical si elle est convaincue; a) qu'il est approprié pour le but recherché en termes de qualité, de sécurité et d'efficacité; et b) que l'autorisation de mise sur le marché est d'utilité publique».[69]

Les notions de sécurité et d'efficacité permettent de réitérer l'idée selon laquelle, l'on ne devrait pas se fonder sur le motif d'une vaccination obligatoire pour procéder à des essais cliniques déguisés. En outre, la sécurité de la personne et l'efficacité du vaccin ne doivent jamais être sacrifiés, même en période d'urgence sanitaire. Toute précipitation dans l'octroi de l'autorisation de commercialisation ou de mise en circulation d'un vaccin fut-il obligatoire doit être fortement

67 Cette loi-type est l'œuvre du Nouveau partenariat pour le développement de l'Afrique et de l'AMRH (African Medicines Regulatory Harmonisation).

68 Art 13(1).

69 Art 13(4).

condamnée par l'UA afin de contraindre les États africains à plus de rigueur dans le recours aux vaccinations obligatoires même en période d'urgence sanitaire nationale. Toute vaccination obligatoire faite lorsque le ou les vaccins n'ont pas suffisamment été éprouvés par les protocoles établis à cet effet, doit être qualifiée d'essai clinique déguisé et donner lieu à des sanctions.

Nous ne perdons pas de vue que l'on peut se trouver dans une situation d'extrême urgence sanitaire, comme ce fut le cas pour la Covid-19 courant l'année 2020 et 2021. A titre exceptionnel des vaccins aux effets avérés mais non suffisamment éprouvés peuvent être mis à la disposition des populations, non pas de manière obligatoire, mais volontaire. Une information de qualité devra leur être fournie afin de leur permettre de donner un consentement intègre ou non à ce vaccin. Nous serons ainsi très loin du mécanisme des vaccinations obligatoires, et la responsabilité de l'État ne pourra pas être engagée en cas de préjudices médicaux issus de cette vaccination, parce que le consentement donné en connaissance de cause, légalise et légitime l'atteinte à l'intégrité physique du patient. Ce raisonnement s'inspire des dispositions de la déclaration d'Helsinki relative à l'expérimentation thérapeutique[70] à la seule différence que nous préconisons ici que le consentement du patient doit absolument être au préalable obtenu. Le suivi post vaccinal se veut également une exigence absolue.

3.2.2 Un suivi médical obligatoire des populations vaccinées

Au regard des éventuelles affections iatrogènes pouvant découler du vaccin, le système de vaccination de manière général, et le système de vaccination obligatoire de l'UA doit faire du suivi post vaccinal, une exigence absolue. La loi-type de l'UA sur la réglementation des produits médicaux en son article 16, consacre cette obligation mise au passif des États membres, en exigeant de leur part de procéder à une pharmacovigilance. Elle consiste à exiger de la part de l'institution en charge de la mise en circulation des médicaments de fournir des rapports périodiques portant sur le suivi et l'analyse des effets ou des événements indésirables issus de ces vaccins.[71] Cette pharmacovigilance permettra au-delà des autres sanctions administratives, de procéder au retrait du vaccin dont les effets indésirables sont de plus en plus connus et par conséquent permettra aussi la prise en charge des victimes de ces préjudices médicaux. Mais ce que nous préconisons va bien au-delà de la pharmacovigilance ; elle est commune à tout produit de santé. La pharmacovigilance peut s'avérer suffisante pour les vaccinations purement volontaires, mais insuffisante pour les vaccinations obligatoires.

Lorsque la vaccination est obligatoire ou recommandée, le suivi post vaccinal doit être une obligation. Le patient ayant reçu le vaccin

70 Demarez (n 23) 163.

71 Alinéa 1(b).

doit pouvoir obtenir une date de rendez-vous le jour même de la vaccination. Ce rendez-vous devra intervenir après un délai considérable qui permettra d'apprécier la réception du vaccin par l'organisme du patient; ce sera l'occasion pour le professionnel de santé qui reçoit le patient de l'ausculter et de l'aider à découvrir les affections iatrogènes découlant du vaccin, le cas échéant. Cela aura le mérite de faciliter la prise en charge de ces affections iatrogènes par l'État, et de permettre l'indemnisation systématique, pour les préjudices médicaux subis. L'importance de rendez-vous post vaccinal devra clairement être donnée aux patients; et pour les y contraindre, le respect de ce rendez-vous post-vaccinal doit constituer la condition préalable de la prise en charge des affections iatrogènes issues de la vaccination et de l'indemnisation de la ou des victimes. Il est important de préciser que cette prise en charge se veut très importante parce que les patients peuvent développer de graves affections iatrogènes exigeant des soins médicaux très coûteux, pouvant s'étendre sur une longue durée, ou durant toute la vie. Le vaccin étant un produit santé qui n'échappe pas à l'omniprésence de l'aléa thérapeutique.[72] Une vaccination obligatoire ou recommandée dont le vaccin a été suffisamment éprouvé, peut toujours donner lieu à des affections iatrogènes. Les populations cibles doivent être fortement encouragées à comprendre cette triste réalité afin d'adopter une attitude conséquente.

4 CONCLUSION

Il est possible de régir de manière efficiente les vaccinations obligatoires au sein de l'UA. C'est une urgence qui n'est plus à démontrer lorsqu'on sait que le système actuel de consécration quasi implicite de la possibilité de recourir aux vaccinations obligatoire en Afrique, peut être source d'une grande insécurité juridique. La crise sanitaire due à la Covid-19 nous a donné de nous apercevoir que la question des vaccinations obligatoires devrait aussi intéresser les dirigeants africains. Les vaccinations obligatoires ne méritent pas d'être combattues au nom du respect des droits humains, mais elles devraient être minutieusement encadrées afin qu'elles ne soient pas ou plus instrumentalisées, dans la mesure où elles concourent parfaitement à la justiciabilité du droit à la santé en Afrique, en période exceptionnelle. Cela étant, l'exception ne saurait devenir la règle. Le recours aux vaccinations obligatoires doit demeurer une exception, dans la mesure où le principe en la matière demeure la vaccination soumise au consentement éclairé du patient. Les États africains sont ainsi appelés à s'approprier le débat autour des vaccinations obligatoires, à s'inspirer des avancées recensées dans ce sillage sous d'autres cieux, pour développer un régime juridique applicable à la vaccination obligatoire adapté à leur contexte socioéconomique.

Ces États ne devront toutefois pas perdre de vue leur responsabilité inhérente à toute vaccination imposée; ce qui leur permettra

72 WN Mkamwa *La réparation du préjudice médical à l'aune de droits fondamentaux* (2016) Thèse de doctorat, Université de Yaoundé II Soa 6.

d'apprécier la profondeur de la question des vaccinations obligatoires, et de ne pas se laisser être la proie d'un phénomène de suivisme. L'UA semble l'institution la plus indiquée pour mener cette réflexion, afin que la promotion et la protection des droits de l'homme en général et du droit à la santé en Afrique, soit une réalité incontestée, tant en période normale, qu'en période de crise sanitaire.

What counts as a 'reasonable period'? an analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications

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ABSTRACT: Applications filed before the African Court on Human and Peoples' Rights (Court) must fulfil all the admissibility requirements listed in article 56 of the African Charter on Human and Peoples' Rights (Charter). The requirements in article 56 are all replicated in Rule 50(2) of the Rules of Court (Rules). One of these requirements is that applications must be filed within a reasonable period from the time local remedies have been exhausted or from the date set by the Court. The Court's jurisprudence confirms that it takes a case-by-case approach in assessing the admissibility of cases while paying attention to the individual facts of each case. Notably, the Court, similar to the African Commission on Human and Peoples' Rights (Commission), has refused to set a fixed time limit that can universally be accepted as reasonable for purposes of article 56(6). This article conducts an analytical survey of the Court's article 56(6) jurisprudence. The analysis reveals that while the Court has, at least conceptually, been clear about its general approach for applying article 56(6), its decisions demonstrate an ambivalence about the factors that are considered for determining the reasonableness of time as well as the baseline for computing time.

TITRE ET RÉSUMÉ EN FRANCAIS:

Qu'est-ce qu'un «délai raisonnable»? une étude analytique de la jurisprudence de la Cour africaine des droits de l'homme et des peuples sur le délai raisonnable pour introduire une requete

RÉSUMÉ: Les requêtes introduites devant la Cour africaine des droits de l'homme et des peuples (Cour) doivent remplir toutes les conditions de recevabilité énumérées à l'article 56 de la Charte africaine des droits de l'homme et des peuples (Charte). Les exigences de l'article 56 sont toutes reprises à la règle 50(2) du Règlement intérieur de la Cour (Règlement). L'une de ces exigences est que les requêtes doivent être introduites dans un délai raisonnable à partir du moment où les recours internes ont été épuisés ou à partir de la date fixée par la Cour. La jurisprudence de la Cour confirme qu'elle adopte une approche au cas par cas pour évaluer la recevabilité des requêtes tout en prêtant attention aux circonstances individuelles de chaque affaire. Notamment, la Cour, comme la Commission africaine des droits de l'homme et des peuples (Commission), s'est refusée à fixer un délai spécifique qui puisse être universellement accepté comme raisonnable aux fins de l'article 56(6). Cet article effectue une étude analytique de la jurisprudence de la Cour sur l'article 56(6). L'analyse révèle que si la Cour a, au moins sur le plan conceptuel, été certaine de son approche générale de l'application de l'article 56(6), ses décisions démontrent une ambivalence quant aux facteurs qui sont pris en compte pour déterminer le caractère raisonnable du délai ainsi que la base de calcul du délai.

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CONTENT:

1 INTRODUCTION

Article 56 of the African Charter on Human and Peoples' Rights (Charter) outlines the admissibility requirements that must be fulfilled before an application is considered by either the African Commission on Human and Peoples Rights (Commission) or the African Court on Human and Peoples' Rights (Court). In total, seven requirements are spelt out. The Rules of Procedure of the Commission, as well as the Rules of Court, both expressly incorporate the seven admissibility requirements contained in article 56 of the Charter.[1] More explicitly, article 6 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol) directs the Court to take into account the provisions of article 56 of the Charter in ruling on admissibility of cases. Just as is the case with many supranational judicial, or even quasi-judicial bodies, admissibility, together with jurisdiction, are important prerequisites for the consideration of any case.[2] The application of admissibility requirements, in practice, entails that even if a supranational judicial body establishes that it has jurisdiction, it will nevertheless decline to exercise its jurisdiction if an applicant has failed to fulfil the admissibility requirements. Admissibility requirements, therefore, although often considered as being only procedural, carry significant consequences for litigation before supra-national bodies.[3] By way of illustration, the Court has reiterated the fact that the

1 See, Rule 118 of the Rules of Procedure of the Commission, https://www.achpr.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf (accessed 5 July 2022) and Rule 50 of the Rules of Court https://www.african-court.org/en/images/Basic%20Documents/Rules_of_Court_-_25_September_2020.pdf (accessed 5 July 2022).

2 MJ Nkhata 'Res judicata and the admissibility of applications before the African Court on Human and Peoples' Rights: A fresh look at *Dexter Eddie Johnson v Republic of Ghana*' (2020) 19 *The Law and Practice of International Tribunals* 470-479.

3 As above.

admissibility requirements in article 56 of the Charter are cumulative such that any application that fails to fulfil one of the seven requirements is automatically inadmissible.[4]

Although article 56 of the Charter outlines seven admissibility requirements, the focus of this article is on article 56(6) which addresses the question of reasonable time for filing applications. The central objective of this article is to analyse the jurisprudence of the Court dealing with article 56(6) in order to discern what the Court has established as being reasonable time for filing applications. In terms of organisation, the next section of the article conducts a brief comparative analysis, as among the three major regional human rights systems, to highlight how the requirement for filing applications within a reasonable time is applied. The section following therefrom interrogates, firstly, the general rationale for the rule on filing applications within a reasonable time and, secondly, the application of the rule within the African human rights system. The penultimate section of the article surveys the jurisprudence of the Court to flesh out the application of the requirement in article 56(6) of the Charter. Among other things, the article interrogates the Court's interpretation of the conditions contained in article 56(6); the factors that the Court has considered in determining whether the time taken by an applicant to file an application is reasonable or not; and also the overall propriety of the Court's major findings on reasonableness of time for filing applications. A conclusion wraps up the discussion.

It is worth pointing out that given that both the Commission and the Court operate within the same regional human rights system and, on admissibility, apply the same criteria, although the discussion herein is focused on the Court's jurisprudence, wherever necessary reference shall also be made to the Commission's jurisprudence. Aside from the similarity of the admissibility criteria that the two institutions apply, recourse to the Commission's jurisprudence is also justifiable because the Commission has had a longer history of applying article 56 of the Charter as compared to the Court.

2 THE THREE REGIONAL HUMAN RIGHTS SYSTEMS AND REASONABLE TIME FOR FILING APPLICATIONS

Globally, three regional human rights systems are recognised and these are, the Inter-American system, the European system and the African system. In each of these systems, standard setting instruments have been adopted and institutions have been established to support the protection and promotion of human rights. All the three systems apply a variation of the rule on reasonable time for filing applications. The application of this rule in these three regional human rights systems

4 *Jean-Claude Roger Gombert v Côte d'Ivoire* (jurisdiction and admissibility) (2018) 2 AfCLR 270 para 61 and *Dexter Eddie Johnson v Ghana* (jurisdiction and admissibility) (2019) 3 AfCLR 99 para 57.

will now be briefly explored beginning with the Inter American system, followed by the European system and concluding with the African system. This expose should, hopefully, confirm the general applicability of a rule on reasonable time for filing applications, and the general parameters thereof, while also serving to highlight the nuances in the application of the rule across the three systems.

2.1 The Inter-American human rights system

The Inter-American human rights system permits individuals and groups to submit applications alleging violation, by member states of the Organization of American States, of rights protected by the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other regional human rights treaties.[5] Procedurally, such applications are first filed before the Inter-American Commission on Human Rights (Inter-American Commission) and, in some circumstances, may be referred to the Inter-American Court of Human Rights (Inter-American Court). All applications must satisfy the admissibility requirements set out in article 46 of the American Convention on Human Rights (American Convention).[6]

Among the admissibility requirements set out in article 46 of the American Convention is one that requires an application to be lodged within six months from when domestic remedies are exhausted.[7] This requirement is reiterated in article 32 of the Rules of Procedure of the Inter-American Commission.[8] For purposes of computing the six months, time begins to run when the petitioner is first notified of the final domestic judgment.[9] However, if exceptions to exhaustion of domestic remedies apply or if the violation is continuing the rule is not applicable.[10] The six-months is also inapplicable if it is impossible for an applicant to exhaust domestic remedies because of a lack of due process, denial of access to remedies, or unwarranted delay in issuing a

5 International Justice Centre 'Exhaustion of domestic remedies in the Inter American Human Rights System' https://ijrcenter.org/wp-content/uploads/2018/04/9.-Exhaustion-of-Domestic-Remedies-Inter-American-System.pdf (accessed 17 August 2022).

6 For a text of the Convention, see, https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf (accessed 17 August 2022).

7 IACHR, Admissibility Report 26/08, Petition 270-02, *Cesar Alberto Mendoza and Others v Argentina*, 14 March 2008, para 76, http://cidh.org/annualrep/2008eng/Argentina270.02eng.htm (accessed 18 August 2022).

8 See, http://www.oas.org/en/iachr/mandate/Basics/rulesiachr2013.pdf (accessed 17 August 2022).

9 IACHR, Admissibility Report 35/09, Petition 466-99, *Ramon Nicolas Guarino v Argentina*, 19 March 2009, para 33, http://www.cidh.oas.org/annualrep/2009eng/Argentina466.99eng.htm (accessed 17 August 2022).

10 IACHR, Admissibility Report 51/03, Petition 11.819, *Christian Daniel Domínguez Domenichetti v Argentina*, 24 October 2003, para 48, http://cidh.org/annualrep/2003eng/Argentina.11819.htm (accessed 18 August 2022).

final decision at the domestic level.[11] Where the six-month period is inapplicable, article 32(2) of the Rules of Procedure of the Inter-American Commission stipulates that the deadline for filing an application shall be 'within a reasonable period of time, as determined by the Commission' considering the circumstances of each specific case. To determine the reasonableness of the deadline, the Inter-American Commission considers the date on which the alleged violation of the rights occurred and the circumstances of each particular case.[12] For example, in *Garcia Linera v Bolivia*, the Inter-American Commission concluded that the lapse of 13 years, between the occurrence of the facts giving rise to the case and the filing of the application, was reasonable since the victims had taken procedural steps in good faith to resolve the situation and it was the state that had failed to timeously issue a final decision on the judicial proceedings.[13]

2.2 The European human rights system

Article 34 of the European Convention on Human Rights (European Convention) mandates the European Court of Human Rights (European Court) to receive individual applications alleging violations of the European Convention or any of its protocols. Before 1 February 2022, applications before the European Court needed to be filed within six months for them to be deemed to have been filed within a reasonable time. This has since been revised and set at four months.[14] As formulated in article 35 of the European Convention, cases before the European Court, to be admissible, must be filed after domestic remedies have been exhausted and within four months from the date on which the final decision was taken.

11 As above. See also, art 32(2) Rules of Procedure of the Inter-American Commission on Human Rights.

12 IACHR, Admissibility, Report No 86/06, Petition 499-04, *Marino Lopez and Others v Colombia*, 21 October 2006, para 53, http://cidh.org/annualrep/2006eng/COLOMBIA.499.04eng.htm (accessed 16 August 2022).

13 IACHR, Admissibility Report No 54/05, Petition 150/01, *Raúl García Linera, and Others v Bolivia*, 12 October 2005, para 45, http://cidh.org/annualrep/2005eng/Bolivia.150.01eng.htm (accessed 16 August 2022).

14 See, art 35(1) ECHR. Protocol 15 to the Convention reduces from six to four months the time-limit for lodging an application before the Court. This four-month time-limit came into force on 1 February 2022. However, it only applies to applications in which the final domestic decision in question was taken on or after 1 February 2022, https://www.echr.coe.int/Pages/home.aspx?p=applicants&c (accessed 16 August 2022). This revision followed from recommendations in the Brighton Declaration which, among other things, urged the Court to develop practical tools for facilitating focus on cases warranting its consideration, https://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf (accessed 25 October 2022). The need to control the Court's case-load was also cited as justification for introduction of the four month time frame, https://www.echrblog.com/2021/06/blog-symposium-on-protocol-15-echr-what.html (accessed 26 October 2022).

According to the European Court, the four-month rule is a public policy rule and that, consequently, the Court has the jurisdiction to apply it 'of its own motion'.[15] This means that the European Court can invoke the four-month rule even if the respondent has not raised an objection relating to the time of filing a case. It is also argued that the rule affords a prospective applicant time to consider whether or not to lodge an application with the European Court and, if so, to decide on the specific complaints and arguments to be raised.[16] Given the mandatory nature of this rule, it is not open for respondents to unilaterally waive compliance with the rule.[17] The four-month rule, however, does not require an applicant to lodge their complaint with the Court before their position in connection with the matter has been finally settled at the domestic level.[18] The four-month period runs as from the day of the final decision in the process of exhaustion of domestic remedies.[19] For the period to start running, the applicant must have made use of normal domestic remedies which are likely to be effective and sufficient.[20] Only remedies which are normal and effective will be taken into account in computing the four-month period. Resultantly, an applicant cannot purport to extend the time limit by seeking to make inappropriate or misconceived applications to bodies or institutions which have no power or competence to offer effective redress for the complaint in issue.[21] Also excluded from consideration, as a result, are remedies the use of which depends on the discretionary powers of public officials.[22] On the whole 'determining whether a domestic procedure constitutes an effective remedy, which an applicant must exhaust and which should therefore be taken into account for the purposes of the four-month time-limit, depends on a number of factors, notably the applicant's complaint, the scope of the obligations of the state under that particular Convention provision, the available remedies in the respondent state and the specific circumstances of the case'.[23]

15 *Case of Sabri Güneş v Turkey* Application 27396/06 https://hudoc.echr.coe.int/eng (accessed 16 August 2022) para 29.

16 *O'Loughlin and Others v the United Kingdom* Application 23274/04 https://www.stradalex.com/en/sl_src_publ_jur_int/document/echr_23274-04 (accessed 24 August 2022).

17 *Case of Sabri Güneş v Turkey* (n 15) para 29.

18 *Varnava and Others v Turkey*, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Varnava%20and%20Others%20v.%20Turkey%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-94162%22]} (accessed 24 August 2022) para 157.

19 *Case of Mago and Others v Bosnia and Herzegovina* https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22fernie%20v%20united%20kingdom%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-110719%22]} (accessed 16 August 2022) paras 80-81.

20 *Moreira Barbosa v Portugal* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-66550%22]} (accessed 16 August 2022).

21 *Case of Lopes de Sousa Fernandes v Portugal* https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-179556%22]} (accessed 25 October 2022) para 132.

22 European Court of Human Rights 'Practical guide on admissibility criteria' https://www.echr.coe.int/documents/admissibility_guide_eng.pdf (accessed 17 August 2022) para 93.

23 As above, para 132.

2.3 The African human rights system

The African human rights system has two principal human rights supervisory mechanisms being the Commission and the Court. In so far as admissibility is concerned, both institutions apply the requirements contained in article 56 of the Charter. Akin to the situation that obtains both in the Inter-American system and the European system, the admissibility requirements before the Commission and the Court contain a requirement directing that applications must be filed within a reasonable period. Unlike the situation obtaining in the Inter-American and the European systems, the governing law in the African human rights system does not stipulate the amount of time that qualifies as 'reasonable' for purposes of admissibility.[24] Article 56(6) of the Charter simply provides that 'communications relating to human and peoples' rights … shall be considered if they are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter.'

Due to the lack of specific prescription in article 56(6) of the Charter, both the Commission and the Court have adopted a flexible approach in determining what counts as 'reasonable time'. In the practice of both the Commission and the Court, therefore, 'reasonable time' is determined on a case-by-case basis.[25] According to the Commission, the flexible case-by-case approach is justifiable due to 'the challenges of the communications system in Africa' and of securing representation for international cases.[26] It is Viljoen, however, who offers a more comprehensive justification as to why the framers of the Charter deliberately departed from the approach in the European System and Inter-American system. According to Viljoen, the following reasons justify the position taken by article 56(6):[27]

> … the general low level of awareness of the Charter, even among lawyers on the continent, linked to the relative invisibility of the Commission with its seat in Banjul; the material conditions in which complainants may find themselves; and the slow pace of judicial proceedings in the domestic courts of most African countries … In addition, the rationale for the stringent admissibility criteria in the other two regional systems – the seemingly incessant stream of applications … – is hardly an issue in Africa …

24 Communication 288/04 *Gabriel Shumba v Zimbabwe* https://www.achpr. org/public/Document/file/English/288_04_gabriel_shumba_v_zimbabwe.pdf (accessed 15 August 2022) para 44.

25 *Gabriel Shumba v Zimbabwe* (as above) and *Mohamed Abubakari v Tanzania* (merits) (2016) 1 AfCLR 599 para 91 and *Peter Joseph Chacha v Tanzania* (2014) 1 AfCLR 398 para 155.

26 Communication 334/06 *Egyptian Initiative for Personal Rights and Interights v Egypt*, https://www.achpr.org/sessions/descions?id=201 (accessed 15 August 2022) para 99.

27 F Viljoen *International human rights law in Africa* (2012) 320.

The provisions of article 56(6) notwithstanding, the Commission has held that where there is a good and compelling reason for why an applicant did not submit a communication within a reasonable time, it may nevertheless consider the communication to ensure fairness and justice.[28] The next section of the article explores the justification for a rule on filing applications within a 'reasonable time' as discerned from the jurisprudence of the three major regional human rights systems.

3 WHAT JUSTIFIES THE REQUIREMENT TO FILE APPLICATIONS WITHIN A 'REASONABLE' PERIOD?

Notwithstanding the different formulations of the rule relating to the time for filing applications, a common justification is discernible. According to the Inter-American Court, the purpose of the rule is to prevent decisions from being subject to challenge long after they have been delivered, in the interests of legal stability and certainty.[29] The European Court has stated that the primary purpose of the rule is to maintain legal certainty by ensuring that cases are examined within a reasonable time, and to prevent the authorities and other persons concerned from being kept in a state of uncertainty for a long period of time.[30] In the same vein, the Commission has stated that the purpose of the rule is to require complainants to 'be vigilant and to discourage tardiness'.[31] Overall, therefore, the rule serves the interests of all litigants in ensuring that proceedings are initiated promptly while at the same time not unduly exposing respondents to the perpetual possibility of legal action.

Across the three regional systems, the application of the requirement to file within a reasonable period is related to the rule on exhaustion of domestic remedies, especially in so far as establishing when time must start running for purposes of determining 'reasonableness'.[32] Resultantly, this requirement is applied when remedies are in fact exhausted – not when an exception to the exhaustion rule is invoked.[33] Where an exception to exhaustion is invoked it is inappropriate to employ a rigid delimitation of the

28 Communication 386/10 *Dr Farouk Mohamed Ibrahim (represented by REDRESS) v Sudan*, https://www.achpr.org/sessions/descions?id=208 (accessed 15 August 2022) para 75 and Communication 308/05 *Michael Majuru v Zimbabwe* https://www.achpr.org/sessions/descions?id=188 (accessed 15 August 2022) para 109.

29 *Plan de Sánchez Massacre v Guatemala*, Application 11, 763 IACHR para 29.

30 European Court of Human Rights (n 22) para 87.

31 Communication 310/05 *Darfur Relief and Documentation Centre v Sudan* https://www.achpr.org/sessions/descions?id=194 (accessed 24 August 2022) para 78.

32 See, for example, *Ramadhani Issa Malengo v Tanzania* (jurisdiction and admissibility) (2019) 3 AfCLR 356 para 38.

33 FIDH 'Admissibility of complaints before the African Court: A practical guide' https://www.refworld.org/pdfid/577cd89d4.pdf (accessed 24 August 2022) 26-2726.

timeliness for filing an application.[34] This is because, among other reasons, there will often not be a sharp date to which the violation may be traced, as violations often consist of fact patterns extended in time and also because the effects of the violation will often impact negatively on victims' lives so as to make immediate recourse to legal redress impossible.[35] The Court's decision in *Beneficiaries of Late Norbert Zongo and Others v Burkina Faso* (*Zongo)* confirms that the rule in article 56(6) will not apply when an exception to article 56(5) of the Charter has been established.[36] In *Zongo,* although a substantial period had passed between dismissal of the case at the national level and the filing before the Court, this was held to be irrelevant, presumably, on the basis that national level proceedings had been unduly prolonged such that appropriate remedies for exhaustion were never provided to applicants.

Seemingly, the rule for filing an application within a reasonable time applies relative to negative judgments.[37] This entails that if the judgment is positive, but is not complied with, a more gracious period may be called for in determining 'reasonableness'.[38] Similarly, if the domestic judgment calls on a government institution to take action, potential litigants may be justified in waiting to see if action is taken before filing their case with a supranational tribunal. This would then justify a longer period between the domestic decision and the submission to a supranational body. The requirement to file an application within a reasonable time, therefore, marks out the temporal limit of the supervision offered by a supranational body and operates to prevent past decisions from being litigated in perpetuity.[39]

4 EXPLORING 'REASONABLE TIME' FOR FILING APPLICATIONS BEFORE THE COURT

A range of factors have influenced the Court's determination of what amounts to reasonable time within which an application must be filed. The Court's application of the requirements in article 56(6) results in a binary outcome, either the matter is admissible or inadmissible. In this section of the article, some of the factors that the Court has considered are highlighted as well as the periods that have been accepted as being reasonable. In an attempt to provide a structured discussion, the article, first, discusses cases where the question of reasonable time arose but which were found to be admissible before discussing cases

34 FIDH (n 33) 26-27.

35 FIDH (n 33) 27.

36 (preliminary objections) (2013) 1 AfCLR 197 paras 121-124.

37 FIDH (n 33) 27.

38 As above.

39 *Idalov v Russia* https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-110986&filename=001-110986.pdf (accessed 24 August 2022) para 128 and *Sabri Gunes v Turkey* (n 15) para 40.

that were found inadmissible due to a failure to file within a reasonable time.

4.1 Cases found admissible for being filed within a reasonable time

In the joined application between *Tanganyika Law Society and Another v Tanzania* (*TLS*),[40] the domestic decision which was the subject of the applicants' action was a judgment of the respondent state's Court of Appeal delivered on 17 June 2010. The first of the two applicants filed their application on 2 June 2011 while the other filed on 10 June 2011. The Court determined that there had been a lapse of about 360 days between the Court of Appeal's decision and the filing of the application. It then concluded that the applicants were not guilty of '…inordinate delay in filing the Applications; because after the judgment of the Court of Appeal [they] were entitled to wait for the reaction of Parliament to the judgment.'[41] In this decision, the Court rooted its reasoning in the fact that the Court of Appeal had determined that the case before it required a political solution and that, subsequently, the respondent state's Parliament had initiated a national consultative process for the purpose of obtaining views on the constitutional provisions that had been the subject of the applicants' challenge.[42] Given the nature of the Court of Appeal's pronouncement, which envisaged that political interventions would be undertaken by Parliament to resolve the applicants' grievances, the Court was correct in holding that the applicants were justified in biding their time before filing the applications. In any event, the period of 360 days suggests that the applicants should indeed have benefited from the flexibility in article 56(6) of the Charter. Three hundred and sixty days does not seem to be objectively unduly prolonged given the challenges that, as earlier argued, prompted the framers of the Charter to eschew the incorporation of a fixed time limit in article 56(6) of the Charter. Additionally, and although not mentioned in *TLS*, it should not be forgotten that in 2010, when the *TLS* application was filed, the Court and its procedures were still very much unknown across Africa. From this perspective, therefore, some 'delay' on the part of applicants ought to have automatically been excused.

The decision in *Zongo* also required the Court, among other things, to determine if the application had been filed within a reasonable time. In this matter, the application was filed on 11 December 2011 but the genesis of the action was the murder of Norbert Zongo and his colleagues on 13 December 1998. To determine whether the application had been filed within a reasonable time, the Court held that it had to first establish the date from which time should be calculated. It began by noting that 'article 56(6) provides that reasonable time … begins

40 *Tanganyika Law Society and Another v Tanzania* (*TLS*)(merits) (2013) 1 AfCLR 34.

41 As above para 83.

42 As above para 74.

from the time local remedies are exhausted or from the date the [Court] is seized with the matter.'[43] It then noted that in cases where domestic remedies have not been exhausted, on the ground that they are unduly prolonged, the date from which reasonable time must be computed is the date of the expiry of the right to appeal under national law. Accordingly, since the applicants' right to appeal under Burkinabe law would have expired five days after the delivery of the Court of Appeal's decision – which was on 16 August 2006 – the Court held that 'the date of commencement of the seizure of the African Court would be 22 August 2006.'[44] Interestingly, having determined the date of commencement of seizure, the Court noted that since it did not immediately start its judicial activities, after its establishment in July 2006, it would have been improper to hold that time for filing an application started to run before it had become operational. Specifically, the Court pointed to the fact that its Rules of Court were only adopted on 20 June 2008 whereupon potential litigants were finally able to trigger its jurisdiction. Resultantly, the Court concluded that the appropriate date for computing reasonable time would be 20 June 2008.

Having established the date of commencement, for purposes of computing reasonable time, the Court still had to resolve whether the time lapse, in *Zongo,* was reasonable. The period at issue was three years and five months. The Court confirmed that the 'reasonableness of a time limit of seizure will depend on the particular circumstances of each case and should be determined on a case-by-case basis'.[45] It then, again, highlighted the fact that, at the time, it was still a relatively new judicial body and that any consequences as a result thereof should work in the favour of applicants in the assessment of the reasonableness of time for filing an application. It also pointed out that given the nature of the case, the applicants 'may have needed more time to reflect on the suitability of submitting an Application and specifying the complaints and arguments to be raised with the Court.'[46] The Court also took the position that given that the facts of the application were largely uncontested, as between the parties, the period of three years and five months would not affect its ability to effectively dispose of the case. It thus concluded that three years and five months was reasonable within the meaning of article 56(6) of the Charter.[47]

The Court's approach in *Zongo*, firstly, invites an immediate contrast with that adopted in *TLS*. The ruling on the preliminary objections in *Zongo* was delivered on 25 June 2013 while the judgment in *TLS* was delivered on 14 June 2013. In *Zongo*, the Court correctly pointed out that its recent establishment was a relevant factor in determining the reasonableness of time for seizure. No similar concession was made in *TLS* even though both cases, coming very early

43 *Zongo* (n 36) para 117.
44 *Zongo* (n 36) para 118.
45 *Zongo* (n 36) para 121.
46 *Zongo* (n 36) para 123.
47 *Zongo* (n 36) para 124.

in the life of the Court, were affected by this fact. However, given that the Court found both cases admissible, perhaps this point is relevant only to the extent that it demonstrates some inconsistency in approach on the part of the Court. Secondly, it is a bit strange that in *Zongo* the Court, partly, found that the period of three years and five months was reasonable because the facts of the case were not in serious contest between the parties. Given that the admissibility stage of proceedings is akin to a preliminary inquiry, it is open to question how much influence the merits of the case must have on resolving admissibility. It is arguable that *Zongo*, on its own unique facts, was admissible even without the Court having to allude to the absence of contest on the facts. The allusion to the nature of the facts suggests that the Court may have jumped the gun to peep at the merits of the case while still engaged with the preliminary issue of admissibility. While article 56 of the Charter does not provide explicit guidance on how far the Court can look to the merits of an application in resolving admissibility, the reference to the absence of contest on the facts, as partly justifying the admissibility of the case, was unnecessary and pointless.

The respondent state objected to the admissibility of the application in *Alex Thomas v Tanzania* (*Thomas*) [48] on the ground that the Applicant had not filed the same within a reasonable time, as envisaged by article 56(6) of the Charter. The application was filed on 2 August 2013 but it is the sequence of steps taken by the applicant before domestic courts that seem to have had a significant bearing on the Court's finding on admissibility. The applicant's case before the Court of Appeal was dismissed on 21 September 2005. At the time his appeal was being dismissed, the applicant had yet to be furnished with a copy of the record of the High Court notwithstanding his several requests for the same.[49] Between 2005 and 2011 the applicant took steps to file his appeal out of time; had his appeal dismissed again; requested the Chief Justice to provide him with *pro bono* counsel; and applied for a review of the Court of Appeal's decision dismissing his appeal, among other things.[50] In its decision, the Court held that reasonable time, from the time local remedies were exhausted, was supposed to run from 29 May 2009, being the date when the Court of Appeal dismissed his appeal. However, noting that Tanzania had deposited its declaration under article 34(6) of the Protocol – permitting individuals and non-governmental organisation to bring cases directly against it before the Court – on 19 March 2010, the Court held that this ought to be the date for reckoning of time for purposes of article 56(6) of the Charter. The time lapse at issue, therefore, was computed as three years and five months. The Court concluded that three years and five months was reasonable because:[51]

> Considering the Applicant's situation, that he is a lay, indigent, incarcerated person, compounded by the delay in providing him with Court records, and his attempt to use extraordinary measures, that is, the Application for review of the Court of

48 *Thomas* (merits) (2015) 1AfCLR 465.
49 *Thomas* (n 48) para 29.
50 *Thomas* (n 48) paras 30-36.
51 *Thomas* (n 48) para 74.

> Appeal's decision, we find that these constitute sufficient grounds to explain why he filed the Application before this Court on 2 August 2013 ...

The approach adopted by the Court in *Thomas* is true to the principle enunciated in *Zongo,* which is that reasonableness of the time limit for seizure will depend on the circumstances of each case and will be determined on a case-by-case basis. The conclusions on admissibility in *Thomas*, however, are probably down to the application's unique facts. In scrutinising the Court's narration of the history of the domestic proceedings, one is immediately struck by the level of industry shown by the applicant in, repeatedly, attempting to engage with the Tanzanian criminal justice system, which was, however, rather unresponsive.[52] It is particularly notable that the applicant's engagement was, for the large part, without the assistance of counsel. In the circumstances, it is submitted, it would have been inequitable for the respondent state to rely on its own inefficiencies, which caused delay to the applicant, to dismiss the application for being filed out of a reasonable period of time. However, in so far as the determination of when time must begin to run is concerned, the Court correctly held that this must be from the date when Tanzania filed its declaration under article 34(6) of the Protocol since it would have been impossible to commence cases against it before that date.

It should be noted though that in *Thomas,* the Court introduced the relevance of 'extraordinary measures' in determining the reasonableness of time for filing. As earlier pointed out, part of the Court's justification for holding that the application was filed within a reasonable time was that the applicant had attempted to 'use extraordinary measures, that is, the Application for review of the Court of Appeal's decision ...'.[53] Strangely, particularly given that this was the first time that the Court alluded to the relevance of extraordinary remedies during consideration of admissibility, the Court's decision does not offer any clarification as to why the application for review is/ was an extraordinary remedy. As a matter of fact, while reference to the relevance of extraordinary remedies in determining reasonableness of time for filing applications has continued to appear in the Court's decisions, regrettably, there has not been much by way of clarification. There thus remains a lack of clarity as to what makes an application for review of a decision of a country's apex court, following a procedure established by law, an extraordinary remedy. As demonstrated later in this article, a further source of lack of clarity relates to whether recourse to the so-called extraordinary remedies extends time which should be considered for purposes of determining reasonableness or whether this is simply one among the factors that the Court ought to consider in using its case-by-case approach.

By the time the Court delivered its judgment in *Mohamed Abubakari v Tanzania* (*Abubakari),*[54] a pattern had begun to emerge in terms of how article 56(6) of the Charter was being applied. In a way,

52 *Thomas* (n 48) paras 23-36.

53 *Thomas* (n 48) para 74.

54 n 25.

Abubakari combined the reasoning from *TLC*, *Zongo* and *Thomas* to find that the period of three years and three months was reasonable. According to the Court:[55]

> In the instant case, the fact that the Applicant is in prison; the fact that he is indigent; that he is not able to pay a lawyer; the fact that he did not have the free assistance of a lawyer since 14 July 1997; that he is illiterate; the fact that he could not be aware of the existence of this Court because of its relatively recent establishment; all these circumstances justify some flexibility in assessing the reasonableness of the timeline for seizure of the Court.

The above line of reasoning is replicated in several decisions of the Court subsequent to *Abubakari*. For example, in *Kennedy Owino Onyachi and Charles John Njoka v Tanzania* (*Onyachi and Njoka*),[56] the Court established that the decision of the Court of Appeal, in the applicants' domestic case, was delivered on 24 November 2009 but the applicants only received copies of the judgment on 2 November 2011. It thus determined that for the first applicant reasonable time was to run from 2 November 2011, being the day when both applicants first accessed copies of the judgment of the Court of Appeal. Since the application before the Court was filed on 7 January 2015, the Court found that the first applicant had filed his application three years and two months after exhaustion of domestic remedies. As for the second applicant, the Court noted that he had filed an application for review of the Court of Appeal's decision which was dismissed on 9 June 2014. In his case, therefore, the Court held that the time lapse before filing the application was seven months. In assessing the two periods of time, the Court held that, for the second applicant, the period of seven months was not unreasonable given that 'he is lay, incarcerated and indigent person with no legal assistance.'[57] As for the first applicant, the Court held that while 'three years and two months is relatively long to bring an Application … he is also lay, incarcerated and indigent person without the benefit of legal education and legal assistance … the time in which the Application was filed is reasonable.'[58]

The decision in *Onyachi and Njoka* confirms that the determination of reasonable time under article 56(6) remains in the discretion of the Court. Notably in this case, the Court held that time did not begin running, for the applicants, from the date of the judgment of the Court of Appeal but from the date when they first accessed copies of their judgment. It is also notable that, for the second applicant, the Court found that time would begin running as from the date of the Court of Appeal's decision on his application for review. Curiously, the Court does not allude to the fact that it had earlier, in *Thomas*, classified the application for review of the Court of Appeal's decision as an extraordinary measure. The reasoning in *Onyachi and Njoka* and *Thomas* does not offer clarity as to how the Court understood the effect

55 *Thomas* (n 48) para 92.

56 *Onyachi and Njoka* (merits)(2017) 2 AfCLR 65.

57 *Onyachi and Njoka* (n 56) para 67.

58 *Onyachi and Njoka* (n 56) para 68. Similar reasoning was also employed in *Majid Goa alias Vedastus v Tanzania* (2019) 3 AfCLR 498 para 41-42 (application filed after one year and 20 days) and *Ally Rajabu and Others v Tanzania* (2019) 3 AfCLR 539 (application filed after two years and four days).

of having recourse to an application for review of an apex court's decision and what, specifically, makes this remedy extraordinary.

Another decision that follows the reasoning in *Abubakari* is *Christopher Jonas v Tanzania* (*Jonas*).[59] In this case the Court established that five years and one month had lapsed between the exhaustion of domestic remedies and the filing of the application. The Court reasoned, however, that this period was reasonable given that the applicant was in a similar position to *Abubakari* i.e. he was incarcerated, indigent, did not have the benefit of free legal assistance during domestic proceedings, he was illiterate and was unaware of the existence of the Court.[60] Yet another decision that employs similar reasoning is *Kijiji Isiaga v Tanzania*.[61] The period at issue in this case was two years and 11 months. The Court held that this period was reasonable since the 'respondent state did not dispute that the Applicant is a lay, indigent and incarcerated person without the benefit of legal education or assistance [which] makes it plausible that [he] may not have been aware of the Court's existence and how to access it.'[62]

The *Abubakari* line of reasoning was also employed to find admissible the case of *Nguza Viking and Johnson Nguza v Tanzania* (*Nguza and Another*),[63] which was filed one year and three months after the exhaustion of domestic remedies. Equally, in *Thobias Mango and Another v Tanzania* (*Mango*),[64] the Court found a filing made four years and eight months after local remedies were exhausted as being reasonable. In *Minani Evarist v Tanzania* (*Evarist*) a period of three years seven months was also found to be reasonable based on reasoning similar to that in *Abubakari*.[65] Notably, all these decisions make reference to the applicants' efforts at using 'extraordinary remedies' as offering justification for finding the various time periods as reasonable.[66] By way of illustration, in *Nguza and Another*, the Court reasoned that the applicants' efforts to 'use extraordinary remedies through the Application for Review of the Court of Appeal's Decision' constitute sufficient justification for filing the application one year three months 'after the Court of Appeal's decision on the request for review.'[67] In *Mango*, the Court cemented its finding that the application was filed within a reasonable time by reasoning that the applicants 'should also not be penalised for attempting to use an

59 *Jonas* (merits) (2017) 2 AfCLR 101. Other decisions following the same reasoning include: *Amiri Ramdhani v Tanzania* (2018) 2 AfCLR 344 para 50 (application filed after five years and one month); *Diocles William v Tanzania* (2018) 2 AfCLR 426 para 52 (application filed after one year and 13 days); *Kennedy Ivan v Tanzania* (2019) 3 AfCLR 48 para 53 (application filed after four years and 36 days).

60 *Jonas* (n 59) para 54.

61 *Kijiji Isiaga* (merits) (2018) 2 AfCLR 218.

62 *Kijiji Isiaga* (n 61) para 54.

63 *Nguza and Another* (2018) 2 AfCLR 287

64 *Nguza and Another* (n 63) 314

65 (merits) (2018) 2 AfCLR 402.

66 See, also, *Bunyerere v Tanzania* (merits and reparations) (2019) 3 AfCLR 702 para 47.

67 *Nguza and Another* (n 63) para 61.

extraordinary remedy, that is, the Application for Review of the Court of Appeal's Judgment ...'[68] The applicant's 'attempt to use extraordinary measures, that is the application for review of the Court of Appeal's decision' was also part of the grounds justifying the filing of the application after three years and seven months in *Evarist*.[69]

The Court's reference to recourse to an extraordinary remedy/ measure, particularly for justifying the reasonableness of time for filing an application deserves further interrogation. As earlier pointed out, the Court's first references to extraordinary remedies, especially their effect on the assessment of reasonableness of time for filing applications came without any clear clarification or justification.[70] Arguably, the Court's first attempt at explaining the role of extraordinary remedies, in determining reasonableness of time for filing applications, came in *Armand Guehi v Tanzania* (*Guehi*).[71] The 'explanation', however, is rather oblique but it suggests that recourse to an extraordinary remedy is a factor that must be taken into account in computing reasonableness of time. According to *Guehi*, the period of 11 months and nine days was reasonable because:[72]

> ...following the judgment of the Court of Appeal, the Applicant tried to have that judgment reviewed. In the Court's view, he was therefore at liberty to wait for some time before submitting the present application. As the Court [has held] even if the review process is an extraordinary remedy, the time spent by the Applicant in attempting to exhaust the said remedy should be taken into account while assessing reasonableness within the meaning of article 56(6) of the Charter.

Similarly, in *Werema Wangoko Werema and Another v Tanzania* (*Werema and Another*)[73] the Court noted that the applicants had offered no particular reasons for taking five years and five months to seize it. Nevertheless, it concluded that 'it is evident from the file that the five (5) years and five (5) months delay in filing the Application was due to the fact the Applicants were awaiting the outcome of this review procedure ...'.[74] The Court reached a similar conclusion in *Alfred Agbes Woyome v Ghana* by holding that the applicant was entitled to wait for the outcome of processes post the final decision of the highest appellate court in Ghana.[75] According to the Court, this waiting justified the filing of the *Woyome* application two years and five months after the decision of the Supreme Court of Ghana.

As earlier alluded to, this far, the Court's case law has not clarified or justified why and how an application for review of the Court of Appeal's decision, for cases involving Tanzania, or any apex court's decision, for other countries, qualifies as an extraordinary remedy. For example, the decision in *Guehi* simply referred to *Nguza* to presumptively conclude that the question of an application for review

68 *Mango* (n 64) para 55.
69 *Evarist* (n 65) para 45.
70 See, *Thomas* (n 48) and *Abubakari* (n 25 above) and the discussion herein earlier.
71 (merits and reparations) (2018) 2 AfCLR 477.
72 As above para 56.
73 (merits) (2018) 2 AfCLR 520 para 49.
74 As above.
75 (merits and reparations) (2019) 3 AfCLR 235 paras 85-86.

being an extraordinary remedy had already been decided. In *Werema and Another*, like many other decisions by the Court, no attempt was made to unpack the extraordinary nature of an application for review of an apex court's decision. What seems to be clear though is that an applicant who files for review of an apex court's decision may be justified in waiting for the outcome thereof before filing with the Court. This suggests that an application for review 'freezes' time for purposes of computing reasonable time under article 56(6) of the Charter. If the preceding is correct, the question then becomes, ought the Court compute reasonable time from the date of the final appellate decision or from the date of the decision on review by the final appellate court? *Guehi* suggests that the time spent in exhausting an extraordinary remedy 'should be taken into account' in assessing the reasonableness of time for filing. This further suggests that the correct time for reckoning remains the date of the decision by the final appellate court – on this score *Guehi* aligns with the decision in *Jean Claude Gombert v Côte d'Ivoire (Gombert)*[76] where the Court took note and considered the applicant's recourse to a regional court but still used the date of the decision of the Supreme Court of Côte d'Ivoire to determine reasonableness. Unlike *Guehi*, however, the Court's analysis in *Werema and Another* does not suggest that the recourse to an 'extraordinary remedy' is simply a factor to be considered in assessing reasonableness but that the baseline for computing time remains the date of the decision by the final appellate court.[77] This far, therefore, the Court's jurisprudence diverges in terms of when exactly the computation of time should begin for purposes of establishing reasonable time and this divergence, to a large part, stems from the Court's approach in classifying certain remedies as extraordinary.

In so far as the 'extraordinary' nature of the application for review of an apex court's decision is concerned, the Court's remarks in *Rajabu v Tanzania* (*Rajabu*), arguably, cultivate further uncertainty.[78] In this case, the Court concluded that the time spent in pursuing an application for review of the Court of Appeal's decision must be taken into account in assessing reasonableness under article 56(6) of the Charter. In the same decision, however, the Court concluded that an application for review 'is a legal entitlement, the applicants cannot be penalised for exercising that remedy'.[79] If recourse to an application for review is a legal entitlement for any litigant, what then makes it an extraordinary remedy? In the absence of clarification from the Court it is hard to determine where exactly the 'extraordinariness' of this remedy lies. It is fair to conclude, therefore, that the Court's recourse to

76 *Gombert* (n 4) paras 36-37.

77 *Werema* (n 73) paras 47-49. In this case the period considered by the Court was the five years and five months from the date of the respondent state's deposit of the art 34(6) declaration. Although the Court refers to the six months between the dismissal of the application for review and the filing of the application, the effect of the six months is not at all discussed.

78 n 58.

79 As above para 51. The fact that an applicant should not be penalized for having recourse to the application for review also comes out in *Mussa and Mangaya v Tanzania* (2019) 3 AfCLR 629 paras 49-51.

the notion of extraordinary remedies or measures, for purposes of determining the reasonableness of time for filing applications, lacks clarity and is in need of further clarification.

4.2. Cases found inadmissible for having been filed outside of a reasonable period

In *Godfred Anthony and Ifunda Kisite v Tanzania (Anthony and Kisite),*[80] the Court established that the application had been filed five years and four months after Tanzania deposited its declaration under article 34(6) of the Protocol (the decision of the Court of Appeal was on 21 May 2004 and predated the deposit of the declaration). After recalling its previous findings in *Zongo, Ramadhani, Jonas*, and *Werema and Another*, the Court concluded that:

> ... although the Applicants are also incarcerated and thus restricted in their movement, they have not asserted or provided any proof that they are illiterate, lay, or had no knowledge of the existence of the Court. The Applicants have simply described themselves as "indigent".[81]

The Court thus proceeded to dismiss the application for not complying with article 56(6) of the Charter. It noted that the applicants had the help of counsel during their domestic proceedings yet they never filed an application for review of the Court of Appeal's decision. The Court also reasoned that although it always considered the personal circumstances of a litigant, in determining reasonable time, the applicants had 'not provided [it] with any material evidence on the basis of which [it could] conclude that the period of five (5) years and four (4) months was a reasonable period of time taken to file their application before this Court.'[82]

The approach in *Anthony and Kisite* was applied in *Livinus Daudi Manyuka v Tanzania (Manyuka)*.[83] In *Manyuka,* the time lapse before the filing of the application was five years and six months. The Court enumerated a non-exhaustive list of circumstances that influences its determination of the reasonableness of time including: imprisonment, being lay without the benefit of legal assistance, indigence, illiteracy, lack of awareness of the existence of the Court, intimidation and fear of reprisals and the use of extraordinary remedies.[84] It then concluded that:[85]

> ... the Applicant has indicated that he is 'an indigent person operating without legal assistance or legal representation ...'. ... he has also stated that he is a peasant. ... however, aside from the blanket assertion of indigence the Applicant has not attempted to adduce evidence explaining why it took him five (5) years and six (6) months to file his Application.

80 (Jurisdiction and admissibility) (2019) 3 AfCLR 470
81 As above para 48.
82 As above para 49.
83 (jurisdiction and admissibility) (2019) 3 AfCLR 689.
84 As above para 50.
85 As above para 54.

The Court then distinguished *Ramadhani* and *Jonas* on the ground that the applicant in *Manyuka* had legal representation during the domestic proceedings. It then concluded that 'in the absence of any clear and compelling justification for the lapse of five years and six months ...[the] Application was not filed within a reasonable time within the meaning of article 56(6) of the Charter.'[86]

The reasoning in *Anthony and Kisite* and *Manyuka* is also evident in *Chananja Luchagula v Tanzania (Luchagula)*;[87] *Hamad Lyambaka v Tanzania (Lyambaka);*[88] *Layford Makene v Tanzania (Makene)*[89] and *Rajabu Yusuph v Tanzania (Yusuph)*.[90] In *Luchagula,* the time lapse was six years and three months which the Court found unacceptable because 'while it emerges from the record that the Applicant was incarcerated at the time of filing the Application, he has not provided evidence to support his claim of indigence and that he was subject to restrictions.'[91] In *Lyambaka* the time lapse was five years and eleven months. In considering the facts of the case, the Court concluded that:[92]

> the Applicant does not aver that the delay was owing to him being lay, illiterate, indigent or having pursued an extraordinary remedy. He only submits that he used the available opportunity in a timely manner to file the Application...the Court observes that while it emerges from the record that the Applicant was incarcerated, there is no proof that his incarceration constituted an impediment to the timely filing of the Application.

The Court's reasoning in *Makene* offers a bit of clarity in terms of the approach employed to determine reasonableness of time for filing applications. At issue in *Makene* was whether the period of six years and two months was reasonable. In assessing this period, and dismissing the application, the Court stated that

> ... it is not enough for an applicant to simply plead that he/she was incarcerated, is lay or indigent, for example, to justify his/her failure to file an Application within a reasonable period of time ... even for lay, incarcerated or indigent litigants there is a duty to demonstrate how their personal situation prevented them from filing their Applications timeously. Although the Applicant was, at the material time, incarcerated he has provided the Court with neither evidence nor cogent arguments to demonstrate that his personal situation prevented him from filing the Application timeously.[93]

Strikingly, the cases that the Court has found inadmissible, for being filed outside of a reasonable period after exhaustion of domestic remedies, if analysed critically, are not factually very different from those that have been found admissible. The bulk of these cases, especially those from Tanzania, involved serving prisoners who challenged various aspects of their trials. Many of the applicants pleaded indigence, incarceration, illiteracy, being lay and lack of access

86 As above para 55.
87 Application 39/2016 (Judgment of 25 September 2020).
88 Application 10/2016 (Judgment of 25 September 2020).
89 Application 28/2017 (Judgment of 2 December 2021).
90 Application 36/2017 (Judgment of 24 March 2022).
91 *Luchagula* (n 87) para 59.
92 *Lyambaka* (n 88) paras 49-50.
93 *Makene* (n 89) paras 48 & 50.

to free legal services, among other things, as being factors that had hindered them from approaching the Court promptly.

Given that the Court has been arriving at different conclusions from seemingly factually identical cases, it is important to try and understand the possible source of the difference. A useful starting point is to put in one group the line of decisions including *Thomas*, *Abubakari*, *Onyachi* and *Njoka* – which were found to be admissible – and to put in another group the line of decisions represented by *Anthony* and *Kisite*, *Manyuka* and *Luchagula* – which were found inadmissible. Once this is done the possible source of the difference, in the Court's reasoning, begins to emerge. Conceptually, the Court has maintained a uniform standard in treating admissibility decisions on a case-by-case basis having regard to the facts of each case. However, a close look at the line of authorities to which *Thomas, Abubakari, Onyachi and Njoka* belong reveals that the Court did not specifically interrogate the applicants' claims related to indigence, lack of free legal services, illiteracy, being a lay person or being incarcerated. It is almost as if the Court accepted, at face value, that an applicant who was a lay person, incarcerated, illiterate and so on, was automatically inhibited from accessing it within a reasonable time.

In the *Anthony and Kisite, Manyuka and Luchagula* line of decisions the Court began to question whether being a lay person, incarcerated or indigent, among others, of themselves are sufficient factors to justify delay in filing an application. As demonstrated earlier, in following this approach, the Court has asked applicants to demonstrate how being incarcerated, lay or indigent materially affected their ability to file the application within a reasonable period. In principle, this approach is commendable, and it aligns with the general principle that the burden of proof always lies with the one who alleges. A potential pitfall this far, however, is that it remains unclear what type of evidence the Court will accept as proof of indigence or of how one's incarceration affected his/her ability to file his application timeously. None of the Court's decisions, this far, offer any clarity on this matter.

Notwithstanding the Court's approach of demanding specific proof of the factors that affected the time taken by a litigant in filing his/her application, uncertainty has not been completely eliminated. For example, the decision in *Mlama and Others v Tanzania* (*Mlama*)[94] was delivered on the same day – 25 September 2020 –as were the decisions in *Luchagula* and *Lyambaka*. Notably, the decision in *Mlama*, partly, revolved around the question of whether the application had been filed timeously or not, which was also the same point on which *Luchagula* and *Lyambaka* were disposed of. The Court, however, found *Mlama* admissible while *Luchagula* and *Lyambaka* were inadmissible. According to the Court in *Mlama*:[95]

> ... the Applicants are incarcerated, restricted in their movements and with limited access to information and they have also submitted that they were unaware of the court until late in the year 2015. Ultimately, the above-mentioned circumstances

94 Application 19/2016 (Judgment of 25 September 2020).

95 As above para 51.

> delayed the Applicants in filing their claim to this court. Thus, the court finds that the two (2) years and eight (8) months and (10) days taken to file the Application before this court is reasonable.

What is striking about the decision in *Mlama* is that the Court did not ask the same questions it asked of the applicants in *Luchagula* and *Lyambaka*.[96] For example, no inquiry was made as to how exactly the applicants' incarceration and access to limited information affected the time it took them to file their application. In *Mlama,* therefore, the Court reverted to its earlier approach which is manifested by decisions such as *Thomas, Abubakari, Onyachi and Njoka*. As earlier pointed out, in this latter approach the Court does not take the initiative to further interrogate the impact of the alleged indigence, incarceration or lack of access to legal services on an applicant's ability to file within a reasonable time. What is worrisome though is that *Mlama*, though delivered on the same day with *Luchagula* and *Lyambaka*, seems oblivious of the reasoning and approach in the latter two cases. Overall, therefore, it seems to be the case that the Court may not have decided with finality whether all applicants alleging indigence, lack of counsel, illiteracy etc will be required to specifically prove the same for their applications to be admissible. As matters stand it is unclear how the Court decides whether or not to ask for specific proof of the personal circumstances alleged by an applicant.[97]

4.3 Exceptions and other factors affecting computation of reasonable time

Article 56(6) of the Charter does not stipulate any exceptions to the rule that it postulates. This can be contrasted with article 56(5), on exhaustion of local remedies, which incorporates an exception i.e. an applicant need not exhaust local remedies if the procedure is unduly prolonged. It bears pointing out, however, that there is a relationship between articles 56(6) and 56(5) of the Charter. This relationship comes out clearly to the extent that the computation of reasonable time for filing applications runs from the date of exhaustion of domestic remedies.[98]

Notwithstanding the formulation of article 56(6) of the Charter, the jurisprudence of the Court, and even of the Commission, has

96 The judgment in Application 13/2016 *Stephen Rutakikirwa v Tanzania* (judgment of 24 March 2022) para 48, however, aligns with the approach in *Mlama* even though it also came after *Luchagula* and *Lyambaka*. This suggests that the threshold approach is yet to be entrenched in the Court's practice.

97 The rulings in Application 5/2017 *Fidele Mulindahabi v Rwanda* (ruling of 26 June 2020) para 47 and Application 10/2017 *Fidele Mulindahabi v Rwanda* (ruling of 26 June 2020) para 52 suggest that if an applicant is not in prison, he is not indigent and has a decent level of education he is more likely to be aware of the existence of the Court and hence a shorter period may be found to be reasonable for them to file their application. This reasoning suffers from the same flaw earlier pointed out in that there is no clarity in the evidence or means that the Court uses, for example, to prove better knowledge of the Court for those not in prison or to establish the level of education of an applicant.

98 *Ramadhani Issa Malengo* (n 32).

recognised exceptions to the rule on filing within a reasonable period. Arguably, however, in some instances the jurisprudence does not recognise full exceptions to the rule but simply conditions that may affect the computation of time under article 56(6). The clearest exception seems to be where the case involves continuing violations.[99] Continuing violations are contrasted from violations occasioned by an instantaneous act. Notably, however, the fact that an event has significant consequences over time does not mean that the event has produced continuing violations. [100] For cases involving continuing violations, it is only when the situation ends that time, for purposes of determining reasonableness, can be computed. In *Kambole v Tanzania*, the Court held that where there are no domestic remedies to exhaust, the question of reasonableness of time within which to file an application does not arise.[101] It also held that the essence of continuing violations is that they renew themselves every day as long as the state fails to take steps to remedy them.[102] The Court thus found that the period of eight years and four months that it took the applicant to file his application was reasonable given the lack of domestic remedies as well as the continuing character of the violations. Similar reasoning was employed in *Harold Mbalanda Munthali v Malawi* to find an application filed eight years and 10 months after exhaustion of domestic remedies admissible.[103]

In other cases, the Court has merely recognised circumstances that affect its computation of the reasonableness of time for filing an application rather than crafting explicit exceptions. For example, in *APDF and IHRDA v Mali*, the Court held that the period of four years and six months was reasonable taking into account 'first, that the Applicants needed time to properly study the compatibility of the law with the many relevant international human rights instruments to which the Respondent state is a Party; and secondly, given the climate of fear, intimidation and threats'.[104] The Court also found a period of about one year to be reasonable because 'the applicants were entitled to wait for the reaction of Parliament to the judgment.'[105] Where an applicant was deported within a week of a high court judgment declaring him to be a prohibited immigrant, the Court held that a period of one year and 26 days was reasonable within the meaning of article 56(6) since he 'lacked the proximity necessary to follow up on his requests to the domestic authorities'.[106] Equally, in *Anudo v Tanzania*, the Court found that the application was filed within a reasonable time

99 E Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (1996) 65-66.

100 *Sabri Günes, v Turkey* (n 15) para 54.

101 Application 18/2018 (judgment of 15 July 2020) para 50.

102 As above para 52.

103 Application 22/2017 (Judgment of 23 June 2022).

104 (merits) (2018) 2 AfCLR 380 para 54.

105 *TLS* (n 40) para 83.

106 *Lucien Rashidi v Tanzania* (2019) 3 AfCLR 13 para 55.

'considering in particular the fact that the Applicant was outside the country'.[107] The Court has also held that the fact that an applicant had access to a regional court is a factor that may be taken into consideration in assessing reasonableness of the period mentioned under article 56(6) of the Charter.[108] Additionally, as demonstrated earlier, for cases arising before the particular respondent made the declaration under article 34(6) of the Protocol, time, for purposes of computing reasonableness, only began to run from the date the declaration was deposited. Overall, given the case-by-case approach favoured by the Court, it is arguable that the factors that will be considered in determining reasonable time will remain an open category.

5 WHAT HAS 'REASONABLENESS' TRANSLATED TO IN THE COURT'S JURISPRUDENCE?

As earlier alluded to, barring the Court's shift in approach, factually, there seems to be little difference between the cases found to be admissible and those declared inadmissible on account of the reasonableness of the time it took the applicants to start the process. In sticking true to the terms of article 56(6) of the Charter, the Court has not set a fixed time by which it determines whether the time taken by an applicant is reasonable or not. A careful consideration of the Court's jurisprudence, however, reveals two things. First, a trend has emerged which reveals how the Court will, likely, assess the reasonableness of the time taken by an applicant to file an application. As earlier demonstrated, the Court, these days, is unlikely to accept a blanket claim of indigence, for example, as justifying delay in filing an application. Secondly, although the Court has not come out openly, one can hazard a period beyond which an application will be admissible only on proof of exceptional circumstances. According to this article's assessment, and based on the extant case law, the line of reasonableness of time for filing seems to be hovering somewhere around five years post the exhaustion of domestic remedies. Unfortunately, there is a split in terms of the baseline for the computation of time particularly in cases involving recourse to the so-called 'extraordinary remedies/procedures'.

The above hypothesis may, perhaps, explain the difference in approach between *Mlama*, on the one hand, and *Luchagula* and *Lyambaka*, on the other hand. As may be recalled, the period at issue in *Mlama* was two years and eight months while in *Luchagula* it was six years and three months while in *Lyambaka* it was five years and 11 months. It is arguable, therefore, that *Mlama* may have been found admissible simply because a shorter period was at stake as compared to both *Lyambaka* and *Luchagula* where periods in excess of five years

107 *Anudo Ochieng Anudo v Tanzania* (2018) 2 AfCLR 237 para 58.
108 *Gombert* (n 4) para 37.

were at stake. This suggests that it is applications filed five years after exhaustion of domestic remedies that require special justification to be admissible.

A final point in relation to the determination of reasonable time concerns the argument that has been made that the Court should adopt the six-month rule that was previously applied by the European Court, and which is still applied by the Inter-American Court.[109] Articles 60 and 61 of the Charter permit the Court to draw inspiration, and take consideration, of general international law in interpreting and applying the Charter.[110] However, given the very clear formulation of article 56(6) of the Charter, it would be absurd for the Court, and even the Commission, to impose a fixed time limit when the Charter patently eschews the same. The Court has thus done well to reject the entreaties to adopt the six-month rule.[111] In this article's assessment, however, the Commission, while not departing from the terms of article 56(6), may have been tacitly swayed by the jurisprudence of the European Court or the Inter-American Court with the result that it may have improperly constrained its flexibility in assessing reasonable time for filing applications.[112] Comparatively, therefore, the Court may, generally, seem to be more generous in its assessment of reasonable time as compared to the Commission. A full analysis of this latter issue, however, is beyond the realms of the current article.

6 CONCLUSION

The admissibility requirements as provided for in article 56 of the Charter are cumulative and must all be complied with before an application is declared admissible. Given the framing of article 56, it is arguable that the requirements listed therein constitute a complete category which must always be applied in all cases. It is not open for the Court, or even the Commission, to use a requirement not listed in article 56 for purposes of resolving the admissibility of an application. In so far as the requirement for filing applications within a reasonable time is concerned, the jurisprudence of both the Court and the Commission suggests that Africa's supranational adjudicatory mechanisms have striven to maintain a balance between facilitating access to justice while not unduly exposing states in perpetuity to the possibility of litigation. This approach has allowed both the Court and the Commission, in their own distinct ways, to maintain a flexibility in assessing admissibility of cases while paying attention to the specific facts of each case. The Court's jurisprudence addressing reasonable time is expansive and not all its decisions could have been analysed in

109 The Republic of Tanzania seems to have consistently made this argument. See, for example, *Jonas* (n 59 above) para 47 and *Isiaga* (n 61) para 50.

110 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 743.

111 *Rashidi* (n 100) para 54 and *Mulindahabi v Rwanda* (n 97) para 40.

112 A good illustration of the Commission's approach can be had from *Majuru v Zimbabwe* (n 28) and *Darfur Relief and Documentation Centre v Sudan* (n 31).

this article, nevertheless the analysis herein has shown that while the general approach is clear and consistent, the specific cases demonstrate inconsistencies that require clarification.

Towards a more effective and coordinated response by the African Union on children's privacy online in Africa

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ABSTRACT: The development and expansion of digital technologies in Africa have brought invaluable opportunities for the realisation of children's rights. However, the significant growth of internet connectivity and ICT access has also raised concerns about children's online safety and privacy. With growing concerns on children's privacy and personal data protection, there is a need for robust harmonised standards and regulatory frameworks to address all aspects of children's privacy online. Through desk review, this article assesses the extent to which children's right to privacy online and personal data is protected and integrated in the standards and regulatory frameworks of the African Union. An assessment of the applicable instruments and jurisprudence of the key human rights bodies indicates that children's privacy online and data protection are not adequately addressed as there is limited or no focus on the protection of children's personal data online. In most instruments related to cybersecurity, there are no explicit provisions relating to the protection of children's personal data and children are only mentioned in provisions on child pornography. The article argues that children deserve specific protection as a vulnerable group hence the urgent need to explicitly protect children's personal data and privacy in the human rights instruments adopted at the African Union level as it is the approach in the European Union's General Data Protection. The article further argues that there is a need to adopt more effective measures by the African Union and its organs to ensure that children's privacy in all its aspects is protected in the digital sphere.

TITRE ET RÉSUMÉ EN FRANCAIS:

Vers une réponse plus efficace et coordonnée de l'Union africaine sur la vie privée des enfants sur internet en Afrique

RÉSUMÉ: Le développement et l'expansion des technologies numériques en Afrique ont apporté des opportunités inestimables pour la réalisation des droits de l'enfant. Cependant, la croissance significative de la connectivité Internet et de l'accès aux TIC a également suscité des inquiétudes quant à la sécurité et à la vie privée des enfants en ligne. Face aux croissantes préoccupations concernant la vie privée des enfants et la protection des données personnelles, il est nécessaire d'établir des normes harmonisées et des cadres juridiques robustes pour réglementer tous les aspects de la vie privée des enfants en ligne. Grâce à une approche documentaire, cette contribution évalue la mesure dans laquelle le droit des enfants à la vie privée en ligne et aux données personnelles est protégé et intégré dans le cadre juridique mis en place au sein de l'Union africaine. Une évaluation des instruments applicables et de la jurisprudence des principaux organes des droits de l'homme indique que la protection de la vie privée en ligne et des données des enfants n'est pas abordée de manière

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adéquate, car la protection des données personnelles des enfants en ligne est peu ou pas du tout prise en compte. Dans la plupart des instruments relatifs à la cybersécurité, il n'y a pas de dispositions explicites relatives à la protection des données personnelles des enfants et les enfants ne sont mentionnés que dans les dispositions relatives à la pornographie enfantine. La contribution fait valoir que les enfants méritent une protection spécifique en tant que groupe vulnérable, d'où la nécessité urgente de protéger explicitement les données personnelles et la vie privée des enfants dans les instruments des droits de l'homme adoptés au niveau de l'UA, comme c'est le cas dans l'approche de la protection générale des données de l'UE. Elle conclut en réitérant la nécessité pour l'Union africaine et ses organes d'adopter de mesures plus efficaces afin de garantir la protection de la vie privée des enfants dans tous ses aspects dans la sphère numérique.

KEY WORDS: African Union, children's rights, privacy, personal data, online, Africa

CONTENT:

1 INTRODUCTION

The world has witnessed an increase in internet usage in the past few years and the cyberspace has become crucial due to its potential to connect individuals and businesses as well as to facilitate service delivery and economic growth.[1] Furthermore, internet usage was impacted by the COVID-19 pandemic as governments, schools, institutions and families shifted to the digital environment to ensure continuity in children's activities such as education, leisure, play and communication.[2] The International Telecommunications Union (ITU) estimates that approximately 66% of the world's population are using the internet in 2022.[3] These figures include children, who represent a third of all internet users in the world,[4] and are increasingly exposed to the virtual environment.

1 J Bryne & P Burton 'Children as internet users: how can evidence better inform policy debate?' (2017) 2 *Journal of Cyber Policy* 39.

2 UNICEF 'Covid-19 and its implications for protecting children online https://www.unicef.org/sites/default/files/2020-04/COVID-19-and-Its-Implications-for-Protecting-Children-Online.pdf (accessed 11 July 2022).

3 ITU https://www.itu.int/en/ITU-D/Statistics/Pages/stat/default.aspx (accessed 24 October 2022).

4 S Livingstone and others 'One in three: internet governance and children's rights' (2016) 7.

The continued rapid expansion in internet connectivity and usage in Africa has presented benefits to some children in the region as they can enjoy their fundamental rights and freedoms such as the right to education, child participation, freedom of association, as well as their mental health through the provision of psychosocial support online. It is however noted that the benefits presented by the internet are not equally enjoyed by all children. According to a UNICEF report published in 2017, Africa is one of the continents where nearly nine out of ten children are not using the internet.[5] According to the report, Africa has the highest share of non-users. Another report by UNICEF and the ITU published in 2020 reveals that only five percent of children and young people aged 25 years or less and just 13% in Eastern and Southern Africa have internet access at home, compared to 59% in Eastern Europe and Central Asia.[6] These digital divides mirror broader socio-economic divides – between rich and poor, men and women, cities and rural areas, and between those with education and those without.[7] Further, children with disabilities have also been left out due to lack of access to digital technologies and assistive technologies.[8] Such lack of access to the internet by some groups of children impedes on their rights that have been already mentioned.

While the increased access to the internet and technology has created these opportunities for children, the benefits present other growing dangers for children's rights online.[9] Among the most critical threats to children online is the violation of children's right to privacy. Just like adults, going online on various online platforms can put children's right to privacy at greater risk of interference,[10] hence the need to protect children's privacy in the digital sphere in Africa. This position has been affirmed by the African Committee of Experts on the Rights and Welfare of the Child (Committee) General Comment 7 on article 27 (sexual exploitation) which stresses that 'legal and policy frameworks should be reviewed and where necessary adapted to rapidly changing realities concomitant with developments in the digital world.'[11] The United Nations Committee on the Rights of the Child (UN CRC) has also affirmed this position in its General Comment 25 in relation to children's rights in the digital environment, noting that

5 UNICEF 'The state of the world's children' (2017) 43.

6 UNICEF & ITU 'How many children and young people have internet access at home? Estimating digital connectivity during the COVID-19 pandemic' (2020) 2, 4.

7 UNICEF 2017 (n 5).

8 African Union DA-NEPAD 'Leveraging new technologies in education for children with disabilities in Africa' https://www.nepad.org/blog/leveraging-new-technologies-education-children-disabilities-africa (accessed 24 October 2022).

9 Council of Europe Commissioner for Human Rights 'Protecting children's rights in the digital age: An ever growing challenge' 29 April 2014 https://www.coe.int/en/web/commissioner/-/protecting-children-s-rights-in-the-digital-world-an-ever-growing-challen-1 (accessed 11 July 2022).

10 UNICEF Industry Toolkit 'Children's online privacy and freedom of expression' (2018) 4.

11 Committee General Comment No 7 on article 27 of the Children's Charter 'Sexual Exploitation' 2021 para 132.

'children's rights shall be respected, protected, and fulfilled in the digital environment.'[12]

In the past few years, there have been efforts to adopt treaty and soft law standards (general and child-specific) to address human rights in cyberspace, including the right to privacy by some organs of the African Union. Whilst the African Charter on the Rights and Welfare of the Child (Children's Charter)[13] provides for the protection of children's privacy, the adoption of the Charter did not anticipate the surge of internet usage and its implications on children's rights in Africa and thus does not have explicit provisions on children's privacy online. In recognition of the need for cyber security and protection from cybercrime, the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention)[14] was adopted in 2014. The Malabo Convention which is not yet in force as of July 2022 aims to harmonise cyber security in the member states of the African Union and to establish mechanisms capable of addressing violations of privacy that may be a result of personal data collection, processing, transmission, storage, and use.[15] The Protocol to the African Charter on Human and Peoples' Rights on the rights of persons with disabilities[16] is also worth mentioning as it has a section on the rights of children with disabilities. Other soft law standards have been adopted by the African Union organs to safeguard privacy and other rights online such as the Committee's General Comment 7, the Declaration of Principles on Freedom of Expression and Access to Information,[17] and the Personal Data Protection Guidelines for Africa.[18] The question that arises therefore is whether there is sufficient protection of children's privacy online in the normative framework and standards of the African Union.

Through desk review, this article analyses the extent to which the protection of children's privacy online is addressed in the norms and standards of the African Union. This is done through an assessment of the sufficiency of the primary instruments such as the Children's

12 UN CRC General Comment 25 on children's rights in relation to the digital environment para 4.

13 African Charter on the Rights and Welfare of the Child 1990 https://www.Committee.africa/acrwc-full-text/ (accessed 24 October 2022).

14 African Union Convention on Cyber Security and Personal Data Protection 2014 https://au.int/en/treaties/african-union-convention-cyber-security-and-personal-data-protection (accessed 24 October 2022).

15 Preamble of the African Union Convention on Cyber Security and Personal Data Protection.

16 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa 2019 https://au.int/sites/default/files/treaties/36440-treaty-protocol_to_the_achpr_on_the_rights_of_persons_with_disabilities_in_africa_e.pdf (accessed 26 October 2022).

17 African Commission on Human and Peoples' Rights Declaration of Principles on Freedom of Expression in Africa 2019) https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf (accessed 24 October 2022).

18 Internet Society & African Union Personal Data Protection Guidelines for Africa 2018 https://www.internetsociety.org/wp-content/uploads/2018/05/AfricanUnionCPrivacyGuidelines_2018508_EN.pdf (accessed 24 October 2022).

Charter, the Malabo Convention, the African Disability Protocol and other instruments related to cybersecurity and personal data protection at the regional level in protecting children's rights online.

2 THE NOTION OF CHILDREN'S PRIVACY ONLINE

The African Charter on Human and Peoples' Rights does not provide for the protection of the right to privacy but only provides for the protection of dignity in article 5. The right to privacy is provided for in article 10 of the Children's Charter. However, children's right to privacy online has not yet been the subject of interpretative guidance from the Committee. Originally, children's right to privacy focused on protections against arbitrary or unlawful interference with privacy, family home or correspondence, or attacks upon honour or reputation.[19] It is however noted that privacy now has a much wider remit as the digital sphere has innovated privacy norms.[20] Discussions on children's privacy online have intensified over the past years, with many scholars trying to explain what privacy online entails and to unpack the various ways in which children's privacy is threatened in the online environment.

Livingstone and others note that privacy in the online environment is under scrutiny as there are concerns about people's loss of control over their personal information, their awareness about what information is public or private online and the various privacy violations that occur online as a result of their actions or the actions of state and non-state actors as well as criminals.[21] The same sentiments can be shared regarding children who are increasingly using the internet and there are growing concerns on how children can lose control of their personal information, their lack of appreciation as to what information is private online and the threats to their privacy online resulting from their actions and those of other players.

Privacy online is often linked to the concept of harm and the major harm contexts that are the subject of most privacy discussions include the solicitation or grooming of young people for sexual activities; receiving inappropriate sexual images; cyberbullying; computer hacking; manipulation by technology companies or commercial enterprises; spying; and damage of reputation.[22]

19 Children's Charter art 10.

20 Centre for Human Rights 'A study on children's right to privacy in the digital sphere in the African region' (2022) 3 https://www.chr.up.ac.za/childrens-right-unit-publications (accessed 24 October 2022).

21 S Livingstone and others 'Children's data and privacy online: growing up in a digital age: An evidence review' (2019) 6.

22 Centre for Human Rights (n 20).

The United Nations Children's Fund (UNICEF) industry toolkit on children's online privacy and freedom of expression also explains the notion of children's privacy online as follows:[23]

> Children's right to privacy is multifaceted, and the physical, communications, informational and decisional aspects of children's privacy are all relevant in the digital world. Children's physical privacy is affected by technologies that track, monitor and broadcast children's live images, behaviour or locations. Children's communications privacy is threatened where their posts, chats, messages or calls are intercepted by governments or other actors, and children's informational privacy can be put at risk when children's personal data are collected, stored or processed. Children's decisional privacy may be affected by measures that restrict access to beneficial information, inhibiting children's ability to make independent decisions in line with their developing capacities.

The UN CRC notes that threats to children's privacy may also emanate from the activities of other individuals, for instance the sharing of children's information and photos by parents, caregivers, relatives, teachers, friends or strangers.[24] The UN CRC also notes that children's identity can be revealed by biometric data and digital practices such as automated data processing, profiling, behavioral targeting, mandatory identity verification, information filtering and mass surveillance which are becoming routine.[25] Undoubtedly, these practices may result in the arbitrary and unlawful interference with children's fundamental right to privacy and may have negative impacts on children. These impacts can affect children in their future, considering that information in the internet can stay for a long period.[26]

What can be noted from above is that children's right to privacy online is also closely linked to the protection of personal data or information. There are a number of reasons as to why personal data is needed and this includes public service delivery and advertising, media reporting and legal investigations. The online environment has however created new challenges for the creation and control of personal information.[27] Generation, collection, publication, storage, retention or analysis of data has implications on the protection of personal data.[28] Failure to protect personal data leads to the violation of the right to privacy, hence the link between privacy and protection of personal information. Of importance to note further is that the right to privacy is linked to online surveillance as surveillance strategies may have distinct implications on children's privacy.[29]

Also linked to privacy is the protection of reputation. International human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political

23 UNICEF (n 10) 8.

24 UN CRC General Comment 25 para 67.

25 As above.

26 As above, para 68.

27 UNICEF 'Privacy, Protection of personal information and reputation' Discussion Paper Series: Children's Rights and Business in a Digital World (2017) 8.

28 As above.

29 S Feldstein 'State surveillance and implications for children' https://www.unicef.org/globalinsight/media/1101/file/UNICEF-Global-Insight-data-governance-surveillance-issue-brief-2020.pdf (accessed 12 July 2022).

Rights guarantee individuals the right to be protected from unlawful attacks on their honour and reputation.[30] The same protection is guaranteed to children in the Children's Charter which shall be discussed in detail in the next section. Due to the increasing number of information available on online platforms, 'the developing right to reputation will undoubtedly have serious implications for privacy'.[31] UNICEF notes as follows:[32]

> The protection of reputation online is an increasingly contentious legal and political question, and the Internet has transformed the concept of managing reputation by dramatically increasing the scale, scope and reach of information. For instance, inaccurate or revealing news items that would traditionally have been rectified with a retraction are now duplicated innumerable times and effectively stored in perpetuity. Similarly, as Internet users publish personal information about themselves and others at progressively greater rates, antisocial attacks on reputation have proliferated and been memorialized in the public domain.

Children are particularly challenged by the concerns about reputation online, especially when considering the lasting impact of damaging information.[33] Issues of specific importance to children with regards to reputation online are the unauthorised use of children's images, bullying and harassment, and the perpetuity of information shared by children or other individuals about children.[34]

Threats to children's privacy online may negatively impact children's well-being and mental health. For instance, while taking online child safety measures, educational institutions may inadvertently collect or utilise children's data in ways that may present a threat to children's mental health and well-being. An example would be the identification and discussion of children's behavior (unintentional shaming) through digital technologies that are meant to enhance communication with parents. [35] On the other hand, the digital environment can present significant opportunities for enhancing child health and well-being through the provision of psychosocial support, mental health services and information to children, especially in areas where there are limited physical resources or services or in instances where children may feel uncomfortable seeking such services physically.[36]

It is therefore important to ensure that children's privacy is protected online, with a focus on all the aspects of privacy. As stated by Singh and Power, the right to privacy is important both a right and an

30 UDHR art 12 & ICCPR art 17.

31 UNICEF (n 27).

32 UNICEF (n 27) 17.

33 UNICEF (n 27) 17-18.

34 As above.

35 R Desai & P Burton 'Child and adolescent mental health and the digital world: a double edged sword' 116 http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/2022/digital%20worlds.pdf (accessed 24 October 2022).

36 Desai & Burton (n 35) 113.

enabler of other rights such as freedom of expression, access to information, and freedom of association among other rights.[37] The right is equally important to children both offline and online and the full realisation of children's privacy on and offline enables children to 'fully self-actualise and self-identify in a manner of their own choosing, without undue intrusion or influences that may wish to steer their path in a particular social or cultural direction'.[38] As was held by the South African Constitutional Court in the case of *Centre for Child Law and Others v Media Limited & Others*,[39] when dealing with children, the right to privacy is crucial as it is key to a child's self-identity which is still developing and it fosters respect for dignity, personal integrity and autonomy of young persons.

3 THE AFRICAN UNION NORMATIVE FRAMEWORK ON CHILDREN'S RIGHT TO PRIVACY ONLINE

This section reviews the responses to safeguarding children's privacy online in the normative framework of the African Union. Focus is on the Children's Charter, which is a comprehensive regional instrument that sets out rights and defines universal principles and norms for children within the African region, as well as the Malabo Convention which imposes obligations on Member states to establish legal, policy and regulatory measures to promote cybersecurity governance and control cybercrime.[40] The section also reviews cybersecurity and data protection instruments adopted by the African Union organs, analysing the extent to which they protect children's privacy and personal data online.

3.1 The African Charter on the Rights and Welfare of the Child

Before discussing the provisions of the Charter on privacy, it is imperative to highlight that the four guiding principles enshrined in articles 3 – non-discrimination; article 4-best interests of the child; article 5 – survival and development; and article 7 – freedom of expression are of paramount importance to children's privacy in the digital environment. As such, these principles should be taken into consideration in all actions that have a potential impact on children's privacy online.

37 A Singh & T Power 'Understanding the privacy rights of the African Child' (2021) 21 *African Human Rights Law Journal* 101.

38 As above.

39 *Centre for Child Law & Others v Media 24 Limited & Others* 2020 3 BCLR 245 (CC).

40 Y Turianskyi 'Africa and Europe: cyber governance lessons' (2020) 2 https://www.africaportal.org/publications/africa-and-europe-cyber-governance-lessons/ (accessed 14 July 2022).

The Children's Charter provides for the protection of the right to privacy in article 10 as follows:

> No child shall be subjected to arbitrary or unlawful interference with his privacy, family home or correspondence, or 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.

The interpretation of the Convention on the Rights of the Child (CRC)'s provisions on privacy by UNICEF also applies in relation to the Children's Charter. The inclusion of 'correspondence' is of significance in the digital context as it implies that children's forms of communications, including through the internet, should not be interfered with unlawfully. This implies that any instances permitting interference with a child's correspondence should be prescribed by law.[41] Regarding 'unlawful attacks on honour and reputation', the provision implies that there should be laws in place to protect children from conduct either verbally, orally, or through the media which may have negative impacts on their reputation.[42] This provision, therefore, implies that state parties to the Children's Charter should ensure that internet service providers (ISPs), online platforms, and internet café owners protect children's privacy as internet users. An obligation is placed on internet service providers (ISPs) to ensure that children have adequate information and guidance to enable them to be in a position to protect their privacy online.[43]

The role of parents and caregivers in article 10 is worth mentioning in respect of children's privacy online. In terms of article 10 of the Children's Charter, parents or legal guardians have a right to exercise reasonable supervision over their children's conduct. This is a reinforcement of article 20(1) of the Children's Charter which provides that parents or other persons responsible for the child shall have the primary responsibility for the upbringing and development of the child. Parents and caregivers thus can provide guidance to children as they explore the internet and also control children's activities online. This is usually done through setting up parental controls which are defined as settings that enable parents to control the type of content children can access.[44] However, it has been argued that whilst the goal of parental supervision can help protect children online, parental controls also present a clear interference with children's privacy,[45] freedom of

41 R Hodgkin & P Newell *Implementation handbook for the convention on the rights of the Child* (2007) 210.

42 Hodgkin & Newell (n 41) 211.

43 As above.

44 Internetmatters.org 'Parental controls' https://www.internetmatters.org/parental-controls/#:~:text=What%20are%20parental%20controls%3F,t%20see%20or%20experience%20online (accessed 14 July 2022).

45 UNICEF 'Privacy, protection of personal information and reputation: Children's rights and business in a digital World' (2017) 17 https://www.unicef.org/csr/css/UNICEF_CRB_Digital_World_Series_PRIVACY.pdf (accessed 14 July 2022).

expression, access to information, participation, and development of digital literacy.[46] Parental controls can result in children failing to use technologies freely and confidentially, thereby hampering their right to freedom of expression and child participation. On the other hand, 'applications installed to track children online may generate even more data about children's internet use'.[47] Further, parental controls may also make it difficult for children to seek outside help or advice with problems at home, thereby limiting their right to access to information.[48] This includes access to information on sexual and reproductive health services as some parents may block content related to sexuality in adolescents.

Jasmontaite and De Hert argue that consideration has not been made to the fact that some children are aware of the threats to their privacy online, just like their parents.[49] There is also evidence to the fact that most African parents and caregivers are ill-equipped to intervene in matters related to the cyberspace, due to generational divide.[50] In some instance, parents' activities online may also be a threat to children's privacy, particularly the sharing of children's information online considering that some children have no say or control on what their parents share online about them.[51] In this regard, there have been different views amongst scholars as to whether there should be reliance on parental guidance to limit children's fundamental freedoms such as privacy and freedom of expression and whether it is akin to positive African traditions.[52] There is therefore a need to strike a balance between the authority exerted by parents and access to fundamental rights by children. The Committee's General Comment No 7 stipulates that a child exploring the online environment is similar to a child offline and his or her rights to access certain online services without parental consent may well be allowed before the child turns 18. Although children are entitled to special protection, this must necessarily be balanced against their right to information and to freely express their views when using the internet and also in the context of the evolving capacity of the child.[53] In addressing the tension between parental supervision and children's right to privacy and engagement with cyberspace, due deliberation needs to be given to the importance of the internet as a resource and a means of increasing and strengthening children's capacities, and their evolving capacities.[54]

46 MV Cunha 'Child privacy in the age of web 2.0 and 3.0: challenges and opportunities for policy' 2017 14.

47 UNICEF (n 45) 9.

48 UNICEF (n 45) 17.

49 L Jasmontaite & P De Hert 'The EU, children under 13 years, and parental consent: a human rights analysis of a new, age-based bright-line for the protection of children on the internet' (2015) 5 *International Data Privacy* 7.

50 Committee General Comment 7 (n 11) para 62.

51 Cunha (n 46) 14-15.

52 Singh & Power (n 37) 104.

53 Committee General Comment 7 (n 11) para 55.

54 UNICEF 'Child safety online global challenges and strategies' (2012) 53 https://www.unicef-irc.org/publications/652-child-safety-online-global-challenges-and-strategies-technical-report.html (accessed 16 July 2022).

Further, there is a need to strengthen the capacity of parents to educate children about online safety, as opposed to hindering children from using the internet.[55] Parents should be supported to fulfill their responsibilities through educational programs and parental guides.[56]

Whilst the provisions of the Children's Charter on privacy are notable and they can also apply in the online context, it is argued that the Children's Charter does not sufficiently protect children's right to privacy in the digital environment despite the growing evidence that children are increasingly using the internet. It is only implied that the right to privacy in the Children's Charter also applies to children in the online sphere, but the Children's Charter does not mention the digital environment in article 10. Implying that this right applies in the digital context might pose challenges as it might be subject to different interpretations. In as much as there are growing uncertainties over how to interpret and implement the CRC in relation to the digital environment,[57] there are also uncertainties over how to interpret and implement the provisions of the Children's Charter in relation to children's privacy in the digital environment. The Children's Charter does not consider the new forms of Information and Communication Technologies (ICTs) and the new privacy-related offences presented by the internet and thereby falls short in the protection of children's privacy online. As highlighted in the introduction of this paper, this is attributed to the fact that the Children's Charter was adopted in 1990, when the drafters did not anticipate the surge of internet usage and its implications on children's rights, including the right to privacy online.

3.2 The African Union Convention on Cybersecurity and Personal Data Protection (Malabo Convention)

The Malabo Convention is premised on the understanding that the protection of personal data and private life constitute a major challenge to the information society, and that such protection requires that a balance be struck between the use of computer technologies and the protection of citizens in their daily or professional life, while guaranteeing the free flow of information.[58] The Malabo Convention provides a personal data protection framework which African countries may adopt in their national legislation and calls upon member states to 'recognise the need for protecting personal data and promoting the free

55 Committee General Comment (n 11) para 61.

56 As above.

57 S Livingstone 'Rethinking the rights of children for the internet age' (2019) https://blogs.lse.ac.uk/medialse/2019/03/18/rethinking-the-rights-of-children-for-the-internet-age/ (accessed 16 July 2022).

58 Preamble of the Malabo Convention.

flow of such personal data, taking global digitalisation and trade into account'.[59]

Chapter two of the Convention deals with the protection of personal data. In terms of section nine, the Convention is applicable to any collection, processing, transmission, storage or use of personal data by a natural person, the state, local communities, and public or private corporate entities. It further applies to any automated or non-automated processing of data contained in or meant to be a part of a file. In terms of article 11 and 12, state parties have an obligation to establish an authority in charge of protecting personal data whose duties among other things are to ensure that ICTs do not constitute a threat to public freedoms and the private life of citizens. Article 13 provides for the basic principles governing the processing of personal data and these are consent and legitimacy, lawfulness and fairness, purpose and relevance, accuracy, transparency, and confidentiality and security of personal data protection. Articles 16 to 19 provide for the rights of data subjects and these are the right to information, right of access, right to object and the right of rectification or erasure. The Malabo Convention also has provisions on offences specific to ICTs. In terms of article 29(2)(e), states should criminalise the processing of personal data without complying with the preliminary formalities for the processing. Children are specifically mentioned in article 29(3) which requires state parties to criminalise various offences related to child pornography. This is noteworthy considering that child pornography is an attack on children's honour or reputation and it results in the infringement of children's privacy online. It should however be noted that there are other forms of abuses online which might infringe children's right to privacy and protection of their honour and reputation such as cyberbullying and grooming but these are however not covered in the Malabo Convention. There is therefore a need for more robust legal frameworks in the continent to address these issues, instead of focusing on child pornography only.[60]

Interestingly, the provisions on personal data protection do not mention children at all. The author believes that this might jeopardise children's privacy online as there is no guidance to Member states on how to protect children's personal data. As will be discussed fully in section 4, children are the most vulnerable group of internet users hence legal frameworks should have specific provisions related to children.

59 The IBA African Regional Forum Data Protection/ Privacy Guide for Lawyers in Africa (2021) 14 https://www.lssa.org.za/wp-content/uploads/2021/07/Data-Protection-Privacy-Guide-Africa.pdf (accessed 16 July 2022).

60 J Kaberi and others 'A case for the Malabo Convention: child protection online' 22 April 2021 https://mtotonewz.medium.com/a-case-for-the-malabo-convention-child-protection-online-a9372840e449 (accessed 24 October 2022).

As of July 2022, the Convention is not yet in force as it has been only ratified by 13 countries,[61] and it will come into force upon ratification by 15 countries. African Union member states are encouraged to ratify the Malabo Convention in order to unify implementations of cybersecurity and data protection regulations in the continent.[62]

3.3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities

The Protocol which is not yet in force, was adopted in 2018 noting the lack of a substantive binding African normative and institutional framework for ensuring, promoting and protecting the rights of persons with disabilities. Article 28 provides for the protection of the rights of children with disabilities. Whilst this is applauded, it is noted that the Protocol does not have any provisions on children's privacy. Article 28(3) only mentions that children with disabilities have the right to enjoy a full and decent life in conditions that ensure dignity. These shortcomings jeopardise children's rights to privacy online as some children with disabilities use technology devices for assistance and there is no guidance on how their rights online, including the right to privacy should be protected.

3.4 Safeguarding children's privacy online efforts by the African Union human rights institutions and other organs with potential child protection roles

Organs within the African Union that can impact the protection of children's rights including children's privacy online include the African Union Commission, the Committee, the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. This section reviews the responses of these African Union organs in the protection of children's privacy online in Africa. The Committee would be a good starting point considering its mandate of monitoring the implementation of the Children's Charter.

61 List of countries which have signed, ratified/acceded to the Malabo Convention https://au.int/sites/default/files/treaties/29560-sl-AFRICAN_UNION_CONVENTION_ON_CYBER_SECURITY_AND_PERSONAL_DATA_PROTECTION.pdf (accessed 18 July 2022).

62 TS Nlar 'Why is it important for African states to ratify the Malabo Convention' 31 July 2018 https://aanoip.org/why-it-is-important-for-african-states-to-ratify-the-malabo-convention/ (accessed 18 July 2022).

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

The Committee was established in 2002 and its mandate is to promote and protect the rights enshrined in the Children's Charter.[63] The Committee thus has both a promotion and protection mandate. Children's privacy online did not explicitly feature much in the activities of the Committee until in 2019 when the Committee held a Day of General Discussion (DGD) on Online Child Sexual Exploitation (OCSE) during its 33rd ordinary session which was held from 18 to 28 March 2019. During the DGD, it was noted that OCSE was not known during the drafting of the Children's Charter hence the provisions of the Charter do not specifically address OCSE.[64]

The Committee's jurisprudence on children's privacy online can be derived from various aspects of its mandate such as General Comments and Concluding Observations on state reports among others. No communications have been received on the violation of children's privacy in the digital environment so far.

In 2021, the Committee adopted General Comment 7 on sexual exploitation. The general comment is based on the African Union Executive Council Decision which places an obligation on the Committee to broaden its work in 'safeguarding and promoting the rights and welfare of children in the cyberspace, namely the protection of children's information, rights to safety, informed choices and digital literacy.'[65] The General Comment elaborates the legislative, administrative and other measures that should be taken by state parties to protect children from all forms of sexual exploitation and abuse both offline and online. Most importantly, General Comment 7 stresses that legal and policy frameworks should be reviewed and where necessary adapted to rapidly changing realities concomitant with developments in the digital world. Legislation should address online grooming and provide a mandatory reporting obligation for internet service providers.[66]

The General Comment also addresses issues of sexual abuse online such as online grooming and child pornography. An obligation is placed on states parties to criminalise all offences related to child pornography.[67] The General Comment also has a section on extraterritoriality and international mutual legal assistance and cooperation, noting that perpetrators will constantly adapt their behaviours to exploit gaps in law and in enforcement methods. Technology on the other hand is permitting offender communities to attain unprecedented levels of organisation, which in turn creates new and persistent threats as these individuals and groups exploit online

63 Children's Charter art 42(a).

64 African Union '33rd Session of the Committee' (2019) 14 https://www.Committee.africa/sessions/ (accessed 18 July 2022).

65 Committee General Comment (n 11) 2.

66 Para 132.

67 Para 78.

'safe havens' and 'on-demand' access to victims.[68] Legislation must give national courts jurisdiction to prosecute alleged offenders for all offences committed on the territory of the state, and also allow the state to investigate and prosecute all these offences regardless of whether the alleged perpetrator or the victim is a national of that state.[69] States parties are encouraged to collect data on children's online practices and their impact on children's lives and safety, and on factors that affect children's resilience as they access and use ICT.[70] Due respect should be given to children's privacy when collecting data. Whilst the general comment does not make reference to the impact of OCSEA on children's privacy, the provisions of the general comment also protect children's privacy online, considering that online sexual exploitation and abuse such as online grooming and child pornography have an impact on children's privacy, honour and reputation.

The Committee also executes its mandate through state party reporting, wherein member states submit reports to the Committee on measures they have taken to give effect to the provisions of the Children's Charter.[71] A review of the state party reports and concluding observations and recommendations of the Committee reveals that the issue of children's privacy online is not yet being highlighted by most state parties and the Committee's concluding observations. In relation to privacy, focus has been on the privacy of children in the justice system as well as other physical settings such as schools and homes. It is however noteworthy to mention that in some of the Committee's concluding observations, the Committee has made reference to protection of children's privacy in the media. Although there is no explicit mention of 'privacy online', these recommendations also apply in relation to the online environment considering that the media can be described as 'the main ways that large numbers of people receive information and entertainment, that is television, radio, newspapers, and the internet'.[72] In the concluding observations and recommendations to the Republic of Namibia, the Committee raised concerns over the violation of children's privacy by the media due to lack of supervision and monitoring mechanisms. The Committee recommended the government of Namibia to strengthen the Media Ombudsman to ensure that children's right to privacy is respected and promoted.[73] In 2016, the Committee also raised concerns with regards to Ghana on the frequent media coverage on accusations of child witchcraft due to its impact on the child's dignity and privacy. The Committee recommended that the state party apply media laws strictly

68 Para 91.

69 Para 92.

70 Para 166.

71 Children's Charter art 43.

72 Oxford Learner's Dictionaries https://www.oxfordlearnersdictionaries.com/definition/american_english/media (accessed 24 October 2022).

73 Concluding observations and recommendations on the initial report of Namibia, Committee (2015) 7.

to protect the identity of children when portrayed by the media.[74] The Committee further noted during the consideration of Zimbabwe's state report that there are instances whereby the media violates the rights of children due to lack of supervision and monitoring mechanisms. The government of Zimbabwe was recommended to take measures against the media houses that violate children's right to privacy and to put in place monitoring mechanisms to ensure that children's right to privacy is respected and promoted.[75] Recently, in the concluding observations and recommendations to the government of Seychelles, the Committee raised concerns about the unauthorised portrayal of a protected child living in a children's home in the media. The Committee encouraged the state party to adopt policies and put in place strategies to address this issue including training journalists and media practitioners about the necessity to consider the sensitivities related to children's rights issues in general, and protecting children in this case while processing information.[76] Further, the Committee encouraged the state to intensify efforts in order to stop the rising number of cases of sexual exploitation in Seychelles including online sexual exploitation and sexual exploitation of children in tourism.[77] These developments are an indication that the Committee is gradually moving towards ensuring that children's privacy is protected in the digital sphere, although there is a need for the Committee to explicitly address the issue, as opposed to just referring to the 'media.'

In 2016, the Committee adopted a 25-year plan entitled Agenda 2040: Africa's Agenda for Children: Fostering an Africa Fit for Children. The Agenda provides for the protection of children's privacy online in Aspiration 7 which among other things states that by 2040, no child should be used for child pornography and calls upon states to prohibit child pornography and ensure the effective implementation of the laws prohibiting child pornography.[78] As mentioned before, child pornography infringes upon children's privacy as well, hence provisions on the prohibition of child pornography are remarkable as they ensure the protection of children's rights to privacy.

It is also important to highlight that the Committee established a Working Group on Children's Rights and Business during its 35th Ordinary Session held from 31 August to 8 September 2020.[79] The working group was established pursuant to rule 58 of the Committee's Rules of Procedure that allows the Committee to establish special mechanisms and 'assign specific tasks or mandates to either an individual member or group of members concerning the preparation of

74 Concluding observations and recommendations on the initial report of Ghana, Committee (2016) 6.

75 Concluding observations and recommendations on the initial report Zimbabwe, Committee (2015) 7.

76 Concluding observations and recommendations on the initial report of Seychelles, Committee (2022) 8.

77 As above 11.

78 Aspiration 7.

79 African Union 35th Session of the Committee Report Committee/RPT (XXXIIII) 33 https://www.Committee.africa/sessions/ (accessed 20 July 2022).

its periods of sessions or the execution of special programs, studies and projects.'[80] The goal of the working group is to promote the integration of a child rights based approach to business practices with a view to addressing business-related rights in Africa. The working group has the potential to advance the protection of children's privacy in the digital environment, considering that the business sector also affects children's privacy online. Notably, the Committee, through this working group, adopted a resolution on the protection and promotion of children's rights in the digital sphere in 2022. The resolution notes that globalisation, technological innovations and industrial growth has resulted in increased connectivity among different groups in the continent which contributes to children's increased access to information but makes them vulnerable to perpetrators of exploitation and abuse.[81] The resolution calls upon member states to report to the Committee through state party reporting procedures, the extent to which a state is placing the necessary measures to protect children in the digital sphere, to ratify the Malabo Convention and enact Cyber Security and Data Protection legislation.[82] This shows commitment of the Committee to advance children's rights in the digital sphere and the author believes this will go a long way in protecting children's privacy as they explore the internet. For instance, through reporting by state parties on the measures to ensure children's privacy and personal data protection online, the Committee will be in a better position to provide informed guidance to member states on how the measures can be improved.

3.4.2 African Commission on Human and Peoples' Rights

The Commission which was inaugurated in 1987 is established in terms of article 30 of the African Charter on Human and Peoples' Rights to promote human and peoples' rights and ensure their protection in Africa. The Commission is charged with three major functions, that is, protection of human and peoples' rights, promotion of human and peoples' rights and interpretation of the Charter.[83] Currently, most of the initiatives of the Commission have been less focused on children's privacy online and efforts to promote privacy online have occurred to a lesser extent. During the Commission's 62nd Ordinary Session held from 25 April to 9 May 2018, a draft resolution on the right to privacy was introduced and forwarded to the Commission for consideration by the Legal Resources Centre, supported by Privacy International and the International Network of Civil Liberties Organizations (INCLO). The draft resolution which was adopted by the NGO forum but not adopted by the African Commission has noteworthy provisions on privacy in the

80 Committee Revised Rules of Procedure (2020).

81 Resolution 17 of 2022 of the Committee Working Group on Children's Rights and Business on the Protection and Promotion of Children's Rights in the Digital Sphere in Africa https://www.Committee.africa/working-groups/ (accessed 20 July 2022).

82 As above.

83 African Commission on Human and Peoples' Rights https://www.achpr.org/ (accessed 21 July 2022).

digital sphere, although it does not mention children. It calls upon the African Commission to resolve inter alia that the mandate of the Special Rapporteur on Freedom of Expression and Access to Information should include privacy and digital rights concerns including issues related to unlawful surveillance and the collection and processing of personal data.[84]

Furthermore, the African Commission adopted the Declaration of Principles on Freedom of Expression and Access to Information in Africa in 2019.[85] Notably, the principles mention children and thus can be used to safeguard children's privacy online. The noteworthy provisions of the principles are discussed below.

To begin with, principle eight calls for the recognition and respect of children's evolving capacities. States are encouraged to adopt measures that enable children to exercise their rights to freedom of expression and access to information, ensuring that the best interests of the child shall be the primary consideration. Principle 37(5) places an obligation on states to adopt laws, policies and other measures to promote affordable access to the internet for children that equips them with digital literacy skills for online education and safety, protects them from online harm and safeguards their privacy and identity. In terms of Principle 39(5), internet intermediaries may be requested by law enforcement agencies to expeditiously remove online content that poses danger or may be harmful to a person or a child.

Principle 40 provides for privacy and the protection of personal information. Although it does not specifically mention children, the principle stipulates that 'everyone has the right to privacy, including the confidentiality of their communications and the protection of their personal information'. Further, the principle provides for everyone's right to 'communicate anonymously or use pseudonyms online and to secure the confidentiality of their communications and personal information from access by third parties through the aid of digital technologies.'[86] States are obliged to adopt laws for the protection of personal information of individuals in accordance with international human rights law and standards in terms of Principle 42(1).

Principle 42(6) provides that the harmful sharing of personal information, such as child sexual abuse or the non-consensual sharing of intimate images, shall be established as offences punishable by law. In terms of Principle 42(7), individuals shall have legal recourse to effective remedies in relation to the violation of their privacy and the unlawful processing of their personal information. As noted by Singh and Power, the adoption of the principles is a landmark development in

84 Privacy International at the 62nd Session of the African Commission on Human and Peoples' Rights https://privacyinternational.org/news-analysis/2227/privacy-international-62nd-session-african-commission-human-and-peoples-rights (accessed 21 July 2022).

85 ACHPR Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019 https://www.achpr.org/legalinstruments/detail?id=69#:~:text=The%20Declaration%20of%20Principles%20of,2019%20in%20Banjul%2C%20The%20Gambia (accessed 21 July 2022).

86 Principle 40(1).

the recognition of the right to privacy in Africa.[87] The specific provisions of children's privacy are also significant as children's privacy in the digital sphere is important.

There are already avenues for collaboration between the Commission and the Committee, especially in the development of general comments in which the two organs interpret the provisions of the Children's Charter and the Protocol on Women's Rights. The Commission can also respond to violations of children's privacy online through various mechanisms such as onsite investigations and studies.

3.4.3 The African Court on Human and Peoples' Rights

The African Court on Human and Peoples' Rights was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights.[88] Among other human rights issues, the court has jurisdiction over issues concerning children's rights and welfare in the region. However, currently there is no record of judicial processes concerning child protection or children's privacy brought before the Court.

3.4.4 The African Union Commission

The African Union Commission (the AU Commission) is the African Union's secretariat and undertakes the day to day activities of the Union.[89] Through its various departments, the AU Commission has undertaken a number of initiatives on children's rights online. For instance, the AU Commission is implementing a project titled 'Strengthening Regional and National Capacity and Action against Online Child Sexual Exploitation (OCSE) in Africa. The African Union also conducted a Continental Consultation on combatting OCSE in 2019 under the theme 'Protecting Children from Abuse in the Digital world.' The principal objective of the continental consultation was to raise awareness among African Union member states on the dangers of OCSE as an emerging cybercrime, and to encourage member states to commit to address OCSE.[90] The African Union also hosted a Global Summit on online child sexual exploitation in December 2019, in collaboration with We Protect Global Alliance to raise attention and enhance understanding of online child sexual exploitation amongst high-level decision makers, among other objectives.[91] The Commission

87 A Singh & M Power 'The privacy awakening: the urgent need to harmonise the right to privacy in Africa' (2019) 3 *African Human Rights Yearbook* 210-211.

88 Art 1.

89 African Union https://au.int/en/commission (accessed 22 July 2022).

90 African Union 'Continental consultation on combatting online child sexual exploitation' 2019 https://au.int/en/pressreleases/20190306/african-union-continental-consultation-combatting-online-child-sexual (accessed 22 July 2022).

91 African Union 'Global summit to tackle online child sexual exploitation' https://au.int/en/newsevents/20191211/global-summit-tackle-online-child-sexual-exploitation (accessed 22 July 2022.

also has a Strategy and Action Plan against Online Child Sexual Exploitation and Abuse (OCSEA) in Africa (2020-2025). A combination of factors has necessitated the need for a protective online strategy for children including the rapidly increasing connectivity, limited regulation, and limited awareness.[92] It is expected that the strategy will result in a number of initiatives to end OCSEA by African Union Member states,[93] thereby safeguarding children's rights online including the right to privacy.

It should also be noted that the AU Commission in collaboration with the Internet Society (ISOC) adopted Data Protection Guidelines in order to facilitate implementation of the Malabo Convention.[94] The guidelines set out recommendations including two foundational principles to create trust, privacy and responsible use of personal data; recommendations for action by duty bearers (states, policy makers, data protection authorities and data controllers and processors) and recommendations on multi stakeholder solutions, wellbeing of digital citizens, and enabling and sustaining measures.[95] While the Data Protection Guidelines are a welcome development, they are silent on issues related to the protection of children's personal data.

4 AN ASSESSMENT OF THE RESPONSES TO SAFEGUARDING CHILDREN'S PRIVACY ONLINE IN AFRICA

An analysis of the instruments and jurisprudence at the African Union level indicates that children's privacy online is still an evolving issue and children's privacy online is not adequately protected. Although the provisions of the Children's Charter can be used in relation to children's privacy online, the Charter does not have explicit provisions governing children's rights in the online environment. Therefore, there is inadequate guidance to member states on how to protect children's privacy online, considering the emerging forms of violations of children's privacy online which are not referred to in the Children's Charter. The Protocol on the rights of persons with disabilities on the other hand is silent on the rights of children with disabilities online, yet there are potential privacy violation aspects related to children with disabilities online.

The Malabo Convention is a noteworthy development as it can be used to cover the gaps in the Charter relating to children's privacy

92 The African Union Commission Strategy and Action Plan against online children sexual exploitation and abuse in Africa 2020-2025 https://www.aucecma.org/en/campaign/the-african-union-commission-strategy-and-action-plan-against-online-children-sexual-exploitation-and-abuse-in-africa-ocsea-2020-%E2%80%93-2025.html (accessed 22 July 2022).

93 As above.

94 African Union & Internet Society Personal Data Protection Guidelines for Africa (2018) https://iapp.org/resources/article/personal-data-protection-guidelines-for-africa/ (accessed 18 July 2022).

95 As above.

online. Whilst the Convention has a comprehensive section on personal data protection, there is no reference to the protection of children's personal data, thereby impeding the realisation of children's privacy online. Whilst the author agrees that the principle of universality of human rights can be implored to argue that the provisions of the Malabo Convention equally apply to children even if they are not explicitly mentioned, the author argues that children are vulnerable internet users hence their rights deserve specific protection and hence specific mention. A specific section governing the protection of children's personal data would have addressed the special vulnerabilities of children by providing clear guidance to data controllers on how to collect and process children's data.

Best practices can be drawn from the European Union General Data Protection Regulation (GDPR) which explicitly provides for the protection of children's data and introduces new requirements for the protection of children's personal data online.[96] Recital 38 states that children deserve 'specific protection with regards to their personal data, as they may be less aware of the risks, consequences and their rights in relation to the processing of personal data.' Among other provisions, the GDPR provides for conditions applicable to the processing of children's personal data.[97] Article 8 for instance provides for the conditions applicable to children's consent and places an obligation on controllers to take reasonable measures to ensure that consent is given by a parent or guardian. In this regard, the author argues that having a specific section dealing with children's personal data in the Malabo Convention would have strengthened the protection of children's personal data, thereby ensuring the protection of children's privacy online. It is further noted that the Malabo Convention is not yet in force hence the African Union should continue with its efforts in encouraging Member states to ratify the Malabo Convention.

Other best practices to be drawn from Europe include the Council of Europe Strategy for the Rights of the Child (2022-2027),[98] which includes a focus on children's rights in the digital environment and is reinforced by the Recommendation of the Committee of Ministers to member states on Guidelines to respect, protect and fulfil the rights of the child in the digital environment, which is also available in a child friendly version. Notably, the Guidelines calls for the respect, protection and fulfillment of children's right to privacy and data protection.[99] Further, a new handbook for policy makers on the rights of the child in the digital environment was developed to complement these guidelines, by supporting policy makers in dealing concretely

96 Information Commissioner's Office (ICO) 'Children and the GDPR' (2018) https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/children-and-the-uk-gdpr/ (accessed 28 July 2022).

97 GDPR art 8(1).

98 Council of Europe Strategy for the Rights of the Child (2022-2027) https://rm.coe.int/council-of-europe-strategy-for-the-rights-of-the-child-2022-2027-child/1680a5ef27 (accessed 24 October 2022).

99 Para 27.

with the online rights and protection of children. It assists the formulation of national frameworks and policies, and provides interpretative and practical guidance to ensure the respect of children's rights online.[100]

A further analysis of the jurisprudence of the African Union human rights organs further reveals that children's privacy online is not safeguarded to a large extent. To begin with, the Committee which is the principal organ promoting children's rights has not undertaken initiatives or developed instruments to sufficiently address children's privacy online, especially the protection of children's personal data. General Comment 7 addresses children's rights online but focus is only on online child sexual exploitation and abuse. In addition, the concluding observations and recommendations to Member states do not reflect on children's privacy online, except for a few. This can be attributed to the fact that when it was established, the Committee did not anticipate the increase in internet usage by children which could have a potential impact on children's privacy online. As highlighted previously, the Committee is gradually moving towards ensuring that children's privacy is protected in both the offline and online environment. The Committee's Resolution 17 of 2022 comes in handy at this point as it calls upon states to highlight in their state party reports how they are protecting children's rights in the digital environment in their state reports. It is thus hoped that this will assist the Committee in identifying gaps related to the protection of children's privacy online and to come up with concrete recommendations to states on how to ensure the realisation of the right to privacy online. It is also important to note that during its 39th Ordinary Session held from 21 March to 1 April 2022, the Committee decided to hold a DGD on Children's Rights in the Digital World during its next 40th Ordinary Session. Further, the Committee decided to commemorate the Day of the African Child 2023 on the same theme. The author believes this will go a long way in accelerating the Committee's efforts in advancing children's rights online, including the right to privacy.

It is further noted that children's privacy online has not featured in the other organs of the African Union. The African Commission is an exception as the Declaration of principles on Freedom of Expression and Access to Information notably has provisions on the protection of children's privacy online. Besides the principles, the African Commission does not address children's privacy online elsewhere. On the other hand, the African Court and the African Commission do not have any jurisprudence on privacy online and personal data protection in general In comparison, although not specific to children, the European Court of Human Rights (ECtHR) has dealt with some cases relating to personal data protection, interpreting the concept of privacy. In its case *of S and Marper v The United Kingdom*,[101] the ECtHR emphasized that personal data protection is crucial to an individual's

100 Council of Europe *Handbook for policy makers on the rights of the child in the digital environment* (2020) https://rm.coe.int/publication-it-handbook-for-policy-makers-final-eng/1680a069f8 (accessed 24 October 2022).

101 *S and Marper v the United Kingdom ECHR* (4 December 2008) Ser A 30.

enjoyment of his or her right to respect for private life and family life as guaranteed by article 8 of the Convention. The Court further stressed that safeguards are needed where the protection of personal data undergoing automatic processing is concerned.

In the case of *Axel Springer AG v Germany*,[102] the ECtHR held as follows:

> The concept of 'private life' is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image... . It covers personal information which individuals can legitimately expect should not be published without their consent.

The European Court has therefore made notable efforts to ensure the protection of privacy and personal data online and these have an effect on the protection of children's data and privacy.

Regarding the AU Commission, efforts in addressing children's rights online do not cover all aspects of children's privacy online as much focus has been directed towards tackling online child sexual exploitation and abuse and little or no attention is paid to the protection of children's personal data in the digital sphere. Further, little or no attention has been paid to the rights of children with disabilities online. As indicated in section 2 of this article, threats to children's privacy also emanate from other aspects such as data collection and processing as well as sharing of children's images online. The African Union and its organs should therefore ensure that all aspects of children's privacy are adequately protected in its frameworks.

In that regard, the African Union and its organs, with the Committee taking the lead should encourage member states to ratify the Malabo Convention as this will enhance cooperation between African Union member states on the protection of personal data.

There is also a need for engagement with state parties during reporting procedures on the extent to which a state is placing the necessary measures to ensure protection of children's privacy and personal data online. This will enable organs such as the Committee to identify gaps in the protection of children's privacy online and thereby give informed guidance to member states.

There is a need to develop a guidance note for member states on children's rights to privacy online in the context of the Children's Charter and the Malabo Convention. As done by the Council of Europe, guidelines for policy makers on children's rights online should be developed as these will support policy makers in concretely addressing children's rights online and protection of their rights, including their right to privacy. The guidelines will also assist in the formulation of national frameworks and policies, and provide interpretative and practical guidance to ensure the respect of children's privacy online. The guidelines should cover all aspects of privacy online including data collection and processing, interception of communications, surveillance and the unauthorised sharing of children's personal

102 *Axel Springer AG v Germany* (2012) EHRR 227.

information in online platforms. Most importantly, the privacy and personal data protection related to children with disabilities should be clearly addressed in the guidelines. The guidelines should also be available in child friendly formats and accessible for children with disabilities.

Guidelines on the process of child rights due diligence by companies and businesses should be developed. The guidelines should provide corporate responsibilities to private sector digital service providers on protection of children's privacy and personal data, and putting systems in place to address violations on children's privacy online. Guidelines on child rights due diligence by state institutions and schools should also be developed as their activities such as data collection also pose a threat to children's privacy online.

The African Union organs should cooperate and engage in dialogue with the private sector, National Human Rights Institutions, relevant intergovernmental organizations, and civil society organisations to create awareness with children, parents, and teachers on digital literacy, children's safety and responsible use of digital technology. Tools to assist teachers, parents and children on how to ensure privacy online should be developed.

5 CONCLUSION

The aim of this article was to assess the extent to which children's privacy online is protected in the normative framework of the African Union. An assessment of the applicable instruments and jurisprudence of the key human rights bodies and reveals that children's privacy online has not featured to a large extent in the agenda of the African Union and its organs. Most instruments adopted and initiatives undertaken on cybersecurity have paid more attention to online child sexual exploitation and there is limited focus on aspects of children's privacy such as personal data protection, surveillance and the unauthorised sharing of children's information online, among other things. Regarding the instruments adopted on data protection, there is no reference to the protection of children's privacy and personal data except for the provisions of the Declaration of principles on Freedom of Expression and Access to Information in Africa. Nevertheless, such provisions are not comprehensive and there is no guidance to member states and businesses on the conditions applicable to the collection and processing of children's data and conditions related to parental consent. Furthermore, the rights of children with disabilities online, including the right to privacy has not been given attention in the frameworks and standards of the African Union. These gaps have implications on the protection of children's fundamental right to privacy in the digital sphere in Africa as the protection granted to children is inadequate.

The article concludes that children deserve specific attention as a vulnerable group hence the explicit protection of children's personal data and privacy as in the approach of the EU General Data Protection Regulation is necessary to ensure the protection of children's privacy in

the digital environment in Africa. The article further concludes that cybersecurity initiatives at the African Union level should not only focus on online child sexual exploitation but on other aspects of children's privacy such as data collection and processing, interception of communications, surveillance and the unauthorised sharing of children's personal information in online platforms, including children's images. The rights of children with disabilities should be clearly addressed in the responses.

Le droit humain à l'eau: un droit dans l'ombre d'autres droits de l'homme dans le système africain de protection des droits de l'homme?

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RÉSUMÉ: Cet article questionne l'existence d'un droit humain à l'eau dans le système africain de protection des droits de l'homme. L'exégèse révèle que sur le plan régional, les conventions ne concourent qu'indirectement à la reconnaissance d'un droit de l'homme à l'eau, alors que ce dernier est expressément consacré par certains textes en vigueur sur le plan sous-régional ; ceux-ci lui accordant une base juridique distincte de celle d'autres droits de l'homme. La casuistique révèle pour sa part les occasions manquées par le juge régional de consacrer ce droit de l'homme afin de lui garantir une véritable protection par les États. L'auteur souligne cependant la contribution du droit mou de la Commission africaine des droits de l'homme et des peuples à la consécration explicite d'un droit humain à l'eau et les différentes obligations étatiques qui en découlent afin d'assurer son effectivité. Ceci constitue donc une avancée notable en matière de protection des droits de l'homme. Il propose que les organes de contrôle puissent se référer à ce droit mou pour consacrer un droit humain à l'eau dans le développement subséquent de leur jurisprudence, de même qu'il peut servir de boussole pour stimuler et guider des réformes juridiques internes visant une véritable garantie de ce droit.

TITLE AND ABSTRACT IN ENGLISH:

The right to water: a right in the shadow of other human rights in the African human rights system?

ABSTRACT: This article questions the existence of a human right to water in the African human rights system. The doctrinal analysis reveals that at the regional level, treaties only indirectly contribute to the recognition of a human right to water, whereas the latter is clearly enshrined in certain texts in force at the sub-regional level. These provide a legal basis distinct from that of other human rights. The case-law analysis underscores the missed opportunities for the regional judge to enshrine this human right to guarantee its real protection by the states. Nonetheless, the article highlights the contribution of the African Commission on Human and Peoples' Rights' soft law to the explicit consecration of a human right to water and the various state obligations that ensue to ensure its effectiveness. This constitutes a significant progress in the protection of human rights. The author proposes that monitoring bodies can refer to this soft law to enshrine a human right to water in the subsequent development of their jurisprudence as it can serve as a compass to stimulate and guide domestic legal reforms aimed at a genuine guarantee of this right.

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SOMMAIRE:

1 INTRODUCTION

Les premiers plaidoyers en faveur d'une reconnaissance explicite d'un droit humain à l'eau ont été menés dans les années 1970 lors de diverses conférences mondiales environnementales. Unanimement, les participants y admettaient «le droit qu'ont tous les peuples d'accéder, quel que soit leur niveau de développement et leur condition socio-économique, à l'eau potable en quantités suffisantes et de qualité, nécessaire pour subvenir à leurs besoins élémentaires».[1] C'est également la quintessence des déclarations et résolutions adoptées en dehors du cadre onusien, à l'issue de quelques rencontres scientifiques internationales sur les questions liées à l'eau tenues au début du XXIe siècle, où il y est solennellement confirmé que «l'eau est un bien public» et que «l'accès à une quantité minimum d'eau potable est un droit humain étroitement lié à la dignité humaine».[2]

Ce n'est pourtant qu'en 2010 que l'ONU, par une résolution adoptée par son Assemblée générale, reconnut solennellement que «le droit à l'eau et à l'assainissement est un droit de l'homme, essentiel à la pleine jouissance de la vie et à l'exercice de tous les droits de l'homme».[3] Toutefois, en l'état actuel du droit conventionnel du système onusien de protection des droits de l'homme, aucune disposition normative ne le consacre explicitement, même si certains instruments font référence à la nécessité de fournir de l'eau potable mais seulement comme un

1 PH Gleick 'The human right to water' (1998) 1 *Water Policy* 493, https://stuff.mit.edu/afs/athena/course/12/12.000/www/m2017/pdfs/huright.pdf (consulté le 25 mai 2022). La Conférence Mar del Plata tenue à New York en 1977, la Conférence régionale sur la session méditerranéenne du 5ème Forum de l'eau du 15 janvier 2009 à Tunis, par exemple.

2 Une telle affirmation découle du 5ème Forum mondial de l'eau tenu en 2009 à Tunis. Pour des déclarations et résolutions similaires militant pour la consécration d'un droit humain à l'eau et à l'assainissement; lire B Clémenceau 'Où en est le droit des êtres humains à l'eau et à l'assainissement depuis l'adoption de la Résolution No. 64/292 de l'Assemblée Générale des Nations Unies du 28 juillet 2010 ?' (2018) 13 *Revue des droits de l'homme* (2018) notes 37 et 38, https://doi.org/10.4000/revdh.3561 (consulté le 1 avril 2022)

3 Voir la Résolution A/RES/64/292 du 28 juillet 2010, para 1.

élément déterminant pour la réalisation d'autres droits fondamentaux clairement garantis tels que le droit à la santé, le droit à une alimentation saine, le droit à un niveau de vie suffisant, le droit à la vie ou encore le droit à la dignité humaine.[4] Le droit humain à l'eau est un droit implicite, qui n'existe qu'à l'aune d'autres droits humains.[5]

Néanmoins, le Comité des droits sociaux, économiques et culturels (CoDESC) adopte en 2002 (donc avant la résolution onusienne de 2010) son Observation générale 15 sur le droit à l'eau (concernant spécifiquement la mise en œuvre des articles 11 et 12 du Pacte international relatif aux droits économiques, sociaux et culturels (PIDESC)). Cette dernière comble le vide juridique de certains instruments internationaux relatifs aux droits de l'homme et plus spécifiquement le PIDESC qui ne le reconnaît pas comme un droit humain autonome, en consacrant sans ambiguïté le droit à l'eau, et en posant ses fondements juridiques.[6] L'adoption de cette observation générale constitue un pas décisif dans la protection normative du droit de l'homme à l'eau, dans la mesure où elle en définit le contenu et explique les obligations étatiques d'assurer l'accès à l'eau à toutes les couches sociales sans discrimination aucune; reconnaît l'interdépendance de ce droit avec d'autres droits fondamentaux en soulignant que «le droit à l'eau fait clairement partie des garanties fondamentales pour assurer un niveau de vie suffisant, d'autant plus que l'eau est un droit fondamental visé par le paragraphe 1 de l'article 11». Elle poursuit en précisant que le «droit à l'eau est aussi inextricablement lié au meilleur état de santé susceptible d'être atteint [...], et aux droits à une nourriture et à un logement suffisant [...], à la vie et à la dignité humaine».[7] Ainsi, le CoDESC reconnaît non seulement un droit humain à l'eau à part entière et distinct d'autres droits de l'homme, mais aussi que l'effectivité de ces derniers dépend de la mise en œuvre du droit à l'eau.

Qu'elle soit implicite ou explicite, la reconnaissance du droit à l'eau n'améliore pas l'accès à ce précieux sésame dans certaines régions du monde; la preuve étant que, environ 2,1 milliards de personnes n'y ont pas accès dans le monde et disponible à domicile, tandis que 4,5

4 Par exemple, l'art 14(2)(f) de la Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes (CEDEF) (1979/1981) dispose que: 'Les États parties prennent toutes les mesures appropriées pour éliminer la discrimination à l'égard des femmes dans les zones rurales afin d'assurer sur la base de l'égalité de l'homme et de la femme, leur participation au développement rural [...], ils leur assurent le droit de [...] de bénéficier des conditions de vie convenables, [...] l'approvisionnement en électricité et en eau [...]'; l'art 24 de la Convention relative aux droits de l'enfant (CDE) (1989/1990) dispose que 'Les États parties reconnaissent le droit de l'enfant de jouir du meilleur état de santé possible [...],et prennent les mesures appropriées pour: c) lutter contre la maladie et la malnutrition [...] grâce à [...] et à la fourniture d'eau potable, [...]'.

5 Clémenceau (n 2) 4. Lire aussi à ce sujet, Gleick (n 1) 492.

6 Pour le CoDESC, le droit à l'eau consiste en 'approvisionnement suffisant, physiquement accessible et à coût abordable, d'une eau salubre et de qualité acceptable pour les usages personnels domestiques de chacun [...]'. Voir Comité des droits sociaux, économiques et culturels, Observation générale 15 (2002) para 2.

7 Comité des droits économiques, sociaux et culturels (n 6) para 3.

milliards ne disposent pas d'un assainissement géré de manière adéquate.[8] En Afrique, la pénurie d'eau sans cesse croissante creuse davantage le fossé d'inégalités.[9] Face aux sources d'approvisionnement en eau potable et la récurrence des maladies hydriques qui mettent en péril la santé humaine,[10] il est urgent d'ériger le droit à l'eau en droit fondamental avec comme corollaire la création d'obligations étatiques d'assurer l'approvisionnement en eau potable et d'engager, en cas de violation de ce droit, leur responsabilité nationale ou internationale le cas échéant.[11]

Le bilan peu reluisant en matière d'approvisionnement en eau potable dans la région africaine soulève le constat de la gestion déplorable des ressources hydriques probablement dû au déficit de bonnes politiques publiques visant à assurer une fourniture en eau potable de qualité, suffisante, à moindre coût et sans discrimination. Il semble opportun de s'interroger sur l'existence d'un droit humain à l'eau dans le système africain de protection des droits de l'homme. Un bref survol de son exégèse et de sa casuistique permet de constater le caractère encore diffus du statut et du contenu du droit de l'homme à l'eau et partant, de la nature des obligations minimales des États en vue de sa mise en œuvre (2). Toutefois, on note une avancée sur ces aspects par la consécration claire d'un droit humain à l'eau par le droit mou de la Commission africaine des droits de l'homme et des peuples (3).

2 LE DROIT HUMAIN À L'EAU: UNE CONSÉCRATION TEXTUELLE ET JURISPRUDENTIELLE INACHEVÉE

On pourra observer à l'analyse du droit positif régional africain relatif à la garantie des droits humains, le mimétisme dont ont fait preuve les rédacteurs de certains instruments africains de protection des droits de l'homme en omettant tout comme ceux des textes universels de portée générale, de consacrer un droit humain à l'eau à part entière. Omission tout de même curieuse au regard des nombreux défis auxquels sont

8 HCDH 'Le HCDH et les droits à l'eau et à l'assainissement', https://www.ohchr.org/fr/water-and-sanitation (consulté le 1 avril 2022)

9 Ces inégalités sont majoritairement basées sur le genre. Ce sont principalement les filles et les femmes qui supportent l'essentiel de la charge liée à la collecte d'eau, à laquelle elles consacrent plus d'une demi-heure par jour, au détriment de leur droit à l'éducation

10 Un africain sur quatre a accès à une source sûre d'eau potable, et en Afrique subsaharienne, seulement 24% de la population y accède et les installations sanitaires de base – non partagées avec d'autres foyers – sont réservées à 28% de la population. En outre, des disparités persistent entre les couches défavorisées et celles nanties: en ville, les pauvres vivent dans la promiscuité et ne sont pas connectés au système d'eau courante, ou encore paient souvent l'eau plus cher. Lire ONU 'L'accès à l'eau potable: plus de 2 milliards de personnes toujours privées de ce droit fondamental', du 19 mars 2019, disponible sur https://www.un.org/developpement/desa/fr/news/sustainable/new-un-water-development-report.html (consulté le 1 avril 2022).

11 Pour les diverses raisons de garantir un droit humain à l'eau, lire Gleick (n 1) 489.

confrontés les États africains dans leur rôle de garant principal de l'approvisionnement en eau courante, dont la rareté est causée par les changements climatiques et la désertification croissante, entre autres facteurs.

2.1 Un droit au contenu diffus sur le plan conventionnel

Le silence de la Charte africaine des droits de l'homme et des peuples (Charte), adoptée en 1981, quant à l'existence d'un droit humain à l'eau est plus ou moins comblé par la Charte africaine des droits et du bien-être de l'enfant adoptée en 1990 (Charte africaine de l'enfant). Cette dernière dispose que les États parties s'engagent à poursuivre l'exercice du droit de l'enfant à jouir du meilleur état de santé physique, mental et spirituel possible en «assurant la fourniture d'une alimentation adéquate et d'eau potable».[12] Le Protocole à la Charte africaine des droits de l'homme et des peuples, relatif aux droits de la femme en Afrique (le Protocole de Maputo) adopté en 2003, exige des États parties l'adoption des mesures en vue «d'assurer aux femmes l'accès à l'eau potable[…]» afin de leur assurer la jouissance du droit à une alimentation saine et adéquate.[13] Enfin, dans la Convention de l'Union africaine sur la protection et l'assistance aux personnes déplacées en Afrique (Convention de Kampala) adoptée en 2009, il est interdit aux membres des groupes armés de «nier aux personnes déplacées le droit de vivre dans des conditions satisfaisantes de dignité, de sécurité[…], d'eau […]».[14]

La lecture des dispositions sus évoquées révèlent l'ambiguïté du statut juridique du droit à l'eau. Il n'en ressort en fait aucune base juridique d'un droit à l'eau indépendant d'autres droits fondamentaux, encore moins un contenu normatif.[15] Bulto le constate d'ailleurs par ces propos '*The normative content and legal basis of a free standing and comprehensive right to water are ambiguously situated in the mainstream regional human rights instruments*'. L'accès à l'eau n'est qu'un déterminant du droit à la santé selon la lettre de la Charte africaine de l'enfant; ou encore une composante du droit à une alimentation saine et adéquate en vertu du Protocole de Maputo, et du droit à la vie dans la Convention de Kampala. Les conventions sus évoquées ne concourent qu'indirectement à la reconnaissance d'un droit à l'eau tout comme les instruments juridiques internationaux, ce qui est insuffisant pour consolider sa justiciabilité devant les juridictions nationales.

Par ailleurs, quoique ne consacrant pas nommément le droit humain à l'eau, la Convention africaine révisée sur la conservation de la

12 Art 14(2)(c).

13 Art 15(a).

14 Art 7(5)(c).

15 TS Bulto 'The human right to water in the corpus and jurisprudence of the African human rights system' (2011) 11 *African Human Rights Law Journal* 345.

nature et des ressources naturelles, impose tout de même l'obligation étatique de garantir un approvisionnement suffisant et continu en eaux appropriés, et de qualité.[16] Elle exige des États parties de prendre des mesures destinées à maintenir la quantité et la qualité d'eau procurée aux populations aux plus hauts niveaux possibles.[17] Elle se démarque donc des conventions régionales sus évoquées dans le sens où, des obligations qu'elles imposent aux États parties, transparaît l'un de ses objectifs qui est celui d'assurer la réalisation du droit humain à l'eau.

Certains instruments juridiques adoptés sur le plan sous régional consacrent explicitement un droit humain à l'eau. À cet effet, la Charte de l'eau du Bassin du Lac Tchad (2012) et la Charte des Eaux du Sénégal (2002) reconnaissent le droit à l'eau «en tant que droit fondamental de la personne humaine et nécessaire pour sa dignité».[18] La Charte des eaux du Niger (2008) s'inscrit dans la même logique que les deux précédents textes en reconnaissant dans son préambule «le droit à l'eau comme fondamental à tout être humain, et considère l'eau comme un bien écologique, social, économique dont la préservation est d'intérêt général».[19] De manière générale, prendre toutes les mesures nécessaires pour la mise en œuvre du droit d'accès à l'eau et assurer une coopération fondée sur la solidarité pour une utilisation durable, équitable et coordonnée de la ressource en eau sont comptés parmi les objectifs principaux de ces différents cadres normatifs.[20]

Le Comité africain d'experts sur les droits et le bien-être des enfants (Comité), la Commission africaine des droits de l'homme et des peuples (Commission ou CADHP) et la Cour africaine des droits de l'homme et des peuples (Cour), organes chargés de contrôler l'application par les États parties des dispositions des textes juridiques relatifs aux droits humains, et d'interpréter leur contenu, ont donc indéniablement un rôle important à jouer dans le processus de consécration et de protection d'un droit humain à l'eau.[21]

16 Art VII(2). La version révisée de cette convention fût adoptée en juillet 2013 et entrée en vigueur en 2016.

17 Art VII(1).

18 Art 72(1) de la Charte de l'eau du Bassin du Lac Tchad du 30 avril 2012 ratifiée en 2017 par le Cameroun, le Tchad, le Niger et le Nigeria. Seules la Libye et la République centrafricaine ne l'ont pas encore fait. Il en de même de l'article 4 de la Charte des Eaux du Sénégal qui disposent que les principes directeurs de toute répartition des eaux du Fleuve visent à assurer […] la pleine jouissance de la ressource dans le respect […] du droit fondamental de l'homme à une eau salubre […]». Cette Charte est adoptée le 28 mai 2002 avec pour pays signataires le Mali, la Mauritanie et le Sénégal. Elle n'est pas encore entrée en vigueur.

19 La Charte a été adoptée en 2008 par le Burkina-Faso, la Côte-d'Ivoire, la Guinée, le Mali, le Niger, le Tchad, le Nigéria et le Cameroun. Elle n'est pas encore entrée en vigueur.

20 Voir par exemple les arts 2 et 32(1) de la Charte de l'eau du Bassin du Lac Tchad.

21 L'art 42 de la Charte africaine de l'enfant confère au comité comme mission de: e) promouvoir et protéger les droits protégés dans ladite Charte notamment: v) d'élaborer et formuler des principes visant à protéger les droits et le bien-être de l'enfant en Afrique; g) d'interpréter les dispositions de la présente Charte […]. L'art 45 de la Charte donne une mission similaire à la Commission dans ses alinéas 1(b) et 3. La Cour en vertu de l'art 3 du Protocole la créant (1998/2004), est compétente pour connaître de toutes les affaires et de tous les différends dont elle est saisie concernant l'interprétation et l'application de la Charte.

Cependant, les deux premiers organes suscités saisis pour des allégations de violations des droits économiques et sociaux où la question de l'accès à l'eau potable a été soulevée, ont manqué à chaque fois l'occasion de consacrer clairement un droit humain à l'eau, en dépit des outils juridiques qu'ils possèdent et qui leur donnent un mandat à cet effet (dont la nature sera évoquée dans les prochaines lignes).

2.2 Un apport jurisprudentiel encore peu satisfaisant

D'entrée de jeu, il faut observer que dans la jurisprudence des organes de contrôle du système africain de garantie des droits de l'homme, le droit humain à l'eau fait l'objet d'une attention indirecte et incomplète dans le cadre de l'examen de communications relatives à des violations des droits à la santé, à un environnement sain, à la dignité humaine et à la vie.[22]

Dans l'affaire *Centre pour les droits de l'homme et RADDHO c. Sénégal*, face aux allégations d'atteintes au droit à la santé et aux services médicaux (art 14 de la Charte africaine de l'enfant) des *talibés* (enfants) par les instructeurs des écoles coraniques «*daaras*», le Comité soutint que les efforts déployés dans la réalisation de ce droit devraient être orientés vers la prévention des maladies et des problèmes de santé, et la prestation de services de soins de santé nécessaires. S'agissant de garantir une nutrition adéquate et de l'eau potable à tous les enfants, le Comité souligna que les programmes d'alimentation scolaire, et la fourniture d'eau potable salubre et propre sont essentiels pour lutter contre la maladie et la malnutrition. Il précisa que le défaut de fournir des quantités sûres d'eau potable équivalait à «une violation du droit à la meilleure santé possible en vertu de la Charte».[23] Ici, le Comité ne fait allusion qu'à la qualité de l'eau à pourvoir pour une alimentation saine des enfants, et ne considère l'eau qu'uniquement en termes de déterminant du droit à la santé. De même, dans un litige portant des allégations similaires – *IHRDA & Open Society Justice Initiative (OSJI) (au nom d'enfants d'ascendance nubienne au Kenya) c. Kenya* – le Comité soutint que la faillite de l'État kenyan à son devoir d'approvisionnement en alimentation saine et en eau potable de qualité en vertu de l'article 14(2)(c) de la Charte africaine de l'enfant, en soins de santé et en assistance médicale nécessaire conformément à l'alinéa 2(b) du même article, constituait une atteinte au droit à la santé.[24]

Le Comité s'inspira dans le cas suscité de la décision de la Commission dans l'affaire *Free Legal Assistance Group et autres c. Zaïre* dans laquelle, suite à des accusations de violations des articles 4,

22 Arts 16, 24, 5 et 4 de la Charte, respectivement.

23 *Centre pour les droits de l'homme (Université de Pretoria) et la Rencontre africaine pour la défense des droits de l'homme (Sénégal) c. Le gouvernement de Sénégal*, décision No. 3/Com/001/2012 para 52.

24 *IHRDA & Open Society Justice Initiative (OSJI) (au nom d'enfants d'ascendance nubienne au Kenya) c. Kenya* (2011) AHRLR 181 (ACERWC 2011) paras 59-60.

5, 6, 7, 8, 16 et 17 de la Charte, elle souligna que l'incapacité du gouvernement [zaïrois] à fournir les services essentiels tels que l'approvisionnement en eau potable et électricité, et le manque de médicaments comme l'allègue la Communication 100/93, était une violation du droit à la santé (article 16 de la Charte).[25]

Par ailleurs, dans une affaire opposant le Soudan au *Sudan Human Rights Organisation et al*, la Commission, en s'appuyant sur l'Observation générale 14 (2000) du CoDESC sur le droit à la santé soutint que la destruction, l'empoisonnement et la pollution des sources d'eau tels que les puits, exposaient les victimes à de sérieux risques de santé et équivalaient à une violation de l'article 16 de la Charte.[26] L'Observation générale stipule, en effet, que les États doivent «s'abstenir de polluer de façon illicite l'eau, l'air et sol […]».[27] Elle parvint à une décision semblable dans l'affaire *SERAC c. Nigéria* (affaire qui précéda le litige soudanais sus-cité), à la suite d'allégations de contamination de l'air, de l'eau et du sol par le gouvernement nigérian de connivence avec un consortium de sociétés d'exploitation pétrolière, causant de graves dommages à l'environnement et des problèmes de santé aux communautés de l'Ogoniland.[28]

Sur le plan de la reconnaissance d'un droit humain à l'eau, on peut observer les opportunités manquées par la Commission et le Comité de le consacrer explicitement, et pire encore, lorsque la perche lui aura été tendue par un des plaignants (notamment dans le cas opposant le Soudan au *Sudan Human Rights Organisation et al* de 2009), qui sollicitait une claire consécration d'un droit humain à l'eau.[29] On peut par exemple et à juste titre, s'interroger sur les raisons qui ont motivé la Commission à éluder cette requête pourtant pertinente et dont la réponse aurait comblé le vide normatif existant sur la question. Curieusement, elle a opéré dans le cas d'espèce, une rupture avec la démarche interprétative entreprise dans l'affaire *SERAC*, dans laquelle elle a consacré à travers d'autres droits fondamentaux garantis par la Charte, les droits à un logement décent et à une alimentation saine, qui y sont pourtant absents, et a constaté leur violation par le gouvernement nigérian.

Pour parvenir à cette fin, la Commission opte pour l'approche téléologique, méthode interprétative destinée à interpréter une loi en fonction de son but, de son objet et de sa finalité.[30] Ces derniers peuvent ressortir de certains éléments tels que les travaux

25 *Free Legal Assistance Group & autres c. Zaïre* (2000) AHRLR 74 (ACHPR 1995) para 62.

26 *Sudan Human Rights Organisation and Another c Sudan* (2009) AHRLR 153 (ACHPR 2009) para 212.

27 Comité des droits sociaux, économiques et culturels, *Observation générale 14* (2000) para 34.

28 *Social and Economic Rights Action Centre (SERAC) and Another c. Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 49, 50 et 70.

29 Bulto (n 15) 346.

30 M Samson & C Béranger 'La méthode téléologique' du 9 novembre 2016, https://www.redactionjuridique.chaire.ulaval.ca/sites/redactionjuridique.chaire.ulaval.ca/files/capsule-methode-teleologique-vf.pdf (consulté le 3 juin 2022).

préparatoires relatifs à l'élaboration d'un traité ou d'une loi, la conduite des États dans l'application d'un instrument juridique, ou encore les conditions qui prévalent au moment de l'interprétation d'une norme juridique.[31] La portée de cette approche est de contribuer à combler les insuffisances ou les limites d'un ordre juridique donné. Ainsi s'agissant du droit à un logement décent dans l'affaire *SERAC*, la Commission note[32]

> Bien que le droit au logement ne soit explicitement prévu par la Charte africaine, le corollaire de la combinaison des dispositions protégeant le droit de jouir du meilleur état de santé physique et mentale qu'une personne soit capable d'atteindre, énoncées aux termes de l'article 16 susvisé, le droit à la propriété et la protection accordée à la famille empêche la destruction gratuite d'abri car, lorsqu'une maison est détruite, la propriété, la santé et la vie de famille sont négativement affectées en conséquence. Il est [...] noté que les effets combinés des articles 14, 16 et 18(1) prévoient dans la Charte africaine un droit à l'abri ou au logement que le gouvernement nigérian a apparemment violé.

De même, le droit à une alimentation saine est implicitement contenu dans la Charte à travers le droit à la vie, le droit à la santé et celui relatif au développement économique, social et culturel. En violant ces droits, la Commission conclut que le Nigéria bafoue les droits protégés explicitement mais aussi le droit implicite à l'alimentation.[33] L'organe de contrôle poursuit son argumentaire en relevant que le traitement infligé au peuple Ogoni par l'État mis en cause transgresse trois devoirs minimum du droit à l'alimentation, engageant ainsi la responsabilité du Nigérian pour violation du droit à l'alimentation: par la destruction des sources d'alimentation à travers ses forces de sécurité et les compagnies pétrolières d'État; par les compagnies pétrolières privées; et par la propagation de la terreur qui crée des obstacles aux communautés ogoni dans la recherche de leur nourriture.[34]

On peut déplorer cependant que le même zèle pour la protection des droits humains n'ait pas dévoré la Commission pour les litiges subséquents (à l'instar de l'affaire *Sudan Human Rights Organisation and Another c. Soudan*, susévoquée) où la garantie du droit humain à l'eau était en jeu et particulièrement où la question de la pollution des ressources hydriques fut évoquée. La Commission manqua de donner une suite à son approche innovante d'interprétation de la Charte. Bulto relève en effet ce qu'aurait été le sort réservé au droit à l'eau si elle avait été constante en vertu du mandat d'interpréter les instruments africains des droits de l'homme, qui lui est conféré

> [...] *Considered against the backdrop of the merging trend of the ACHPR's case-law in which the Commission read implicit rights into those who are explicitly guaranteed. It would have been expected that the Commission would follow the same route in future case and declare the existence of a free-standing human right to water under the Charter*.[35]

31 A Amin 'The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 25.

32 *SERAC* (n 28) para 60.

33 *SERAC* (n 28) para 64.

34 *SERAC* (n 28) para 66.

35 Bulto (n 15) 350.

Ce reproche peut être également fait à l'endroit du Comité qui pourtant s'est inspiré de certaines décisions de la Commission, dans des cas d'atteintes aux droits des enfants, notamment le droit à la santé.[36] Partant, il aurait pu par exemple recourir à l'outil interprétatif utilisé dans l'affaire *SERAC* qui a permis de consacrer les droits à une alimentation saine et au logement, pour consacrer un droit humain à l'eau dans l'affaire opposant le *Centre pour les droits de l'homme et RADDHO* au Sénégal et celle des enfants d'ascendance nubienne au Kenya. [37]

Ainsi, en l'état actuel de la jurisprudence africaine, ni le Comité, ni la Commission, encore moins la Cour, n'a statué clairement sur l'existence d'un droit humain à l'eau. Ce dernier est considéré comme un droit latent qui n'est mis en exergue que lorsque survient la transgression d'un droit conventionnellement garanti. La protection du droit à l'eau dépend donc de celle d'autres droits fondamentaux. Pour illustrer ce statut juridique ambigu et précaire du droit à l'eau ressortant de ce bilan jurisprudentiel, Bulto relève ce qui suit:[38]

> *Because the human right to water is protected through other rights, the human right to water is a derivative or subordinate right, the violation of which can only be complained of when the parents' rights are violated. In this sense, the relationship between the human right to water and its source (parent right) is such that the former is a small subset of the latter. Its violation thus arises only when the parent right is violated in situations that involve the victim's access to adequate quantity and quality of water. Consequently, the right to water can only be guaranteed to the extent of its utility to and overlapping with the source from its springs.*

Pourtant, l'une des raisons de consacrer le droit humain à l'eau indépendamment des autres droits est justifiée par le fait qu'il peut avoir des hypothèses où seul un élément constitutif de ce droit n'est pas mis en œuvre par un État, et permet toutefois d'engager la responsabilité étatique pour violation du droit à l'eau sans pour autant qu'il soit porté atteinte à un droit fondamental dont l'effectivité dépend de la garantie du droit humain à l'eau, et vice versa.

Les organes de contrôle auraient gagné dans les affaires qui leur ont été soumises, et gagneraient dans des prochains litiges qui soulèveraient éventuellement des questions relatives à l'accès à l'eau potable, à s'inspirer des approches interprétatives utilisées par le CoDESC dans son observation générale 15 (2002). Ceci permettra non seulement de dégager un droit humain à l'eau d'autres droits de l'homme, mais également de mettre en exergue l'interdépendance et la complémentarité entre le premier et le second. En effet, le CoDESC recourt à l'argument téléologique pour faire une interprétation

36 Dans l'affaire *IHRDA & Open Society Justice Initiative (OSJI) (au nom d'enfants d'ascendance nubienne au Kenya) c. Kenya* (2011) AHRLR 181 (ACERWC 2011), afin de constater la violation du droit à la santé des enfants nubiens par le gouvernement kenyan, le Comité s'appuie sur la décision de la Commission dans le cas *Purohit c. Gambie (*2003) AHRLR 96 (ACHPR 2003) où celle-ci reconnaît que le droit à la santé garanti par la Charte comprend 'l'accès aux installations de soins, l'accès aux marchandises et aux services qui doivent être garantis pour tous sans discrimination d'aucune sorte'. Voir para 59.

37 Pour l'affaire concernant les enfants d'ascendance nubienne, voir note 24.

38 Bulto (n 15) 350.

extensive de l'article 11(1) du PIDESC qui dispose que «les États parties [...] reconnaissent le droit de toute personne à un niveau de vie suffisant pour elle-même et sa famille, y compris une nourriture, un vêtement et un logement suffisants [...]». En interprétant cette disposition, le CoDESC relève que l'expression «y compris» «indique que le catalogue de droits n'entendait pas être exhaustif». Par conséquent, «le droit à l'eau fait clairement partie des garanties fondamentales pour assurer un niveau de vie suffisant, d'autant plus que l'eau est l'un des éléments les plus essentiels à la survie [...]».[39] Le droit humain à l'eau fait partie des droits qui concourent à l'effectivité du droit à un logement décent, et est en droite ligne avec le but et l'objet de l'article 11(1). La seconde méthode interprétative est l'approche dérivée qui a permis au CoDESC de consacrer un droit de l'homme à l'eau sous le prisme du droit à la santé garanti à l'article 12(1) du PIDESC qui dispose que «Les États parties reconnaissent [...] le droit qu'a toute personne de jouir du meilleur état de santé physique et mentale qu'elle soit capable d'atteindre [...]». Par le biais de cet outil interprétatif, le CoDESC a pu mettre en exergue l'interdépendance entre le droit humain à l'eau, le droit à la santé et les droits à une nourriture saine et à un logement suffisant, et sa complémentarité avec d'autres droits de l'homme: «le droit à l'eau est inextricablement lié au meilleur état de santé susceptible d'être atteint [...] et aux droits à une nourriture et à un logement suffisant [...]. Il devait être également considéré conjointement avec les autres droits consacrés dans la Charte internationale des droits de l'homme, et d'abord le droit à la vie et à la dignité».[40]

Ainsi, que ce soit pour le Comité ou la Commission, le recours à l'observation générale 15 aurait contribué à la détermination claire et sans équivoque d'un droit humain à l'eau, dans leur fonction quasi-juridictionnelle. En effet, en vertu du mandat que leur confèrent la Charte africaine de l'enfant, [41] la Charte[42] et le Protocole relatif à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples,[43] le Comité, la Commission et la Cour respectivement sont chargés non seulement d'interpréter toute disposition de l'instrument dont ils sont chargés de surveiller le respect par les États parties, mais également de formuler et d'élaborer des principes et des règles, en vue de permettre aux parties d'adopter des textes juridiques visant la pleine jouissance sur le plan interne des droits de l'homme qu'ils ont librement acceptés de respecter et de protéger. Mieux encore, le droit régional africain des droits de l'homme leur donne la latitude de s'appuyer sur le droit international des droits de l'homme pour invoquer des droits qui ne seraient éventuellement pas conventionnellement garantis. Ceci peut transparaître des dispositions de la Charte qui stipule que la Commission peut s'inspirer «du droit international relatif aux droits de

39 Comité des droits sociaux, économiques et culturels (n 6) para 3.
40 (n 6) para 3.
41 Art 42(e) (v) et (g).
42 Art 45(1)(b) et 3.
43 Art 3.

l'homme et des peuples [...] des dispositions des autres instruments adoptés par les Nations Unies et par les pays africains dans le domaine des droits de l'homme et des peuples, ainsi que des dispositions de divers instruments adoptés au sein d'institutions spécialisées des Nations Unies dont sont membres les parties à la [...] Charte [africaine]».[44] C'est donc à juste titre qu'elle s'appuya sur l'observation générale 15 pour consacrer le droit humain à l'eau et élaborer des instruments juridiques qui relèvent du droit mou pour attirer l'attention des États parties à la Charte sur les droits économiques, sociaux et culturels, et les aider à s'acquitter de leurs obligations de les réaliser et de les protéger, et particulièrement le droit de l'homme à l'eau. De même, le droit international africain des droits de l'homme confère des pouvoirs similaires au Comité et à la Cour, qui peuvent s'en référer dans le but de promouvoir mais surtout de protéger les droits de l'homme de toutes atteintes, tant par les acteurs étatiques que non étatiques.

En outre, la Charte autorise la Commission à considérer comme moyens auxiliaires de détermination des règles de droit, toute convention universelle relative aux droits de l'homme qu'elle soit de portée générale ou spéciale, reconnue par les membres de l'UA, la doctrine, la jurisprudence, les principes généraux de droit, *etc.*[45] Elle se trouve donc dotée d'armes supplémentaires et pertinentes lui permettant de déployer son potentiel novateur en matière de protection de droits humains indispensables pour le respect de la dignité humaine.

Par ailleurs, les principes directeurs et les lignes directrices de la Commission sur la mise en œuvre des droits économiques, sociaux et culturels dans la Charte de 2011,[46] la Résolution sur l'obligation de garantir le droit à l'eau de 2015[47] et les lignes directrices sur le droit à l'eau en Afrique de 2019,[48] s'inscrivent dans la continuité de l'observation générale 15 du CoDESC, et reconnaissent l'existence d'un droit humain à l'eau doté d'un statut juridique similaire et d'égale importance que les droits conventionnellement protégés. Ils précisent aussi bien son contenu que les obligations étatiques pour sa mise en œuvre, entre autres orientations données aux gouvernements pour remplir leur obligation de protéger ce droit, tout en tenant compte du

44 Art 60 de la Charte.

45 Art 61 de la Charte

46 Les principes et les lignes directrices de la Commission sur la mise en œuvre des droits économiques, sociaux et culturels «Lignes directrices de Nairobi» ont été adoptés le 24 octobre 2011 par la Commission africaine des droits de l'homme et des peuples (CADHP).

47 CADHP Résolution sur l'obligation de garantir le droit à l'eau-CADHP/Res.300 (EXT.OS/XVII) 2015, https://www.achpr.org/fr_sessions/resolutions?id=149 (consulté le 8 juin 2022).

48 Adoptées lors de la 26ème session extraordinaire de la CADHP, en juillet 2019. Disponible sur https://www.achpr.org/fr_legalinstruments/detail?id=71 (consulté le 8 juin 2022).

contexte socio-économique et culturel africain.[49] Ce sont donc des instruments sur lesquels doivent s'appuyer le Comité, la Commission et la Cour dans le développement de leur jurisprudence, en vue de consacrer un droit humain à l'eau, et de déclencher sur le plan normatif aussi bien régional qu'interne, des réformes indispensables pour une véritable protection juridique du droit humain à l'eau.

3 LA CONSÉCRATION CLAIRE D'UN DROIT HUMAIN À L'EAU PAR LE DROIT MOU DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

Le constat de la méconnaissance par la plupart des États africains de la justiciabilité et du caractère exécutoire des droits économiques, sociaux et culturels (DESC) dont le droit à l'eau fait partie[50] justifie la définition du contenu normatif de ce dernier, de même que l'élucidation des obligations imputées aux États pour son effectivité. Le Rapporteur spécial sur les droits humains à l'eau et à l'assainissement de l'ONU (Rapporteur spécial) relevait en effet que les obligations fondamentales minimales du PIDESC devaient comprendre des efforts visant à rendre ces droits justiciables, en les reconnaissant explicitement dans leur système juridique interne.[51]

3.1 La substance du droit humain à l'eau

Si l'eau est indispensable à des fins diverses, toutes ne sont cependant pas prises en compte par le droit international comme faisant partie du noyau dur («*minimum core content*») du droit humain à l'eau. Tandis que le CoDESC reconnaît l'usage de l'eau pour la réalisation des droits à une nourriture suffisante et à la santé, mais accorde la priorité aux usages personnels et domestiques, à la prévention de la faim et des

49 Les lignes directrices sur le droit à l'eau en Afrique (2019) stipulent que tous les droits, y compris le droit à l'eau, sont d'application immédiate après ratification de la Charte. Les États doivent donc respecter, protéger, promouvoir et mettre en œuvre le droit à l'eau exercé individuellement ou groupe. Elles précisent l'absence de hiérarchie entre tous les droits de l'homme qui doivent être protégés au moyen de recours administratifs et judiciaires. Voir para 3.

50 CADHP (n 48) para 3.3.2.

51 Rapporteur Spécial, Rapport sur la réalisation progressive des droits humains à l'eau et à l'assainissement, A/HRC/45/10 disponible sur https://www.ohchr.org/sites/default/files/Documents/Issues/Water/10anniversary/Progressive_Realization_FR.pdf (consulté le 7 avril 2022).

maladies, et au respect des obligations fondamentales découlant du PIDESC,[52] la Commission demande aux États de mettre l'accent sur l'usage personnel, domestique et agricole.[53] Selon elle, le «droit à l'eau autorise donc chacun à [avoir accès à] une eau suffisante, salubre, acceptable, physiquement accessible et abordable pour l'usage personnel, domestique et agricole [...]».

Outre l'exigence d'être fournie en quantité suffisante[54] cette eau doit être de bonne qualité pour couvrir les besoins des populations quel que soit leur lieu de résidence, et en tenant compte des besoins particuliers des catégories vulnérables.[55] De ce qui précède, on peut résumer que le droit humain à l'eau dans le contexte africain, garantit le droit de chacun de disposer d'une eau potable, salubre c'est-à-dire exempte de substances dangereuses (par exemple, micro-organismes, substances chimiques et risques radiologiques) susceptibles de mettre en danger la santé humaine; en quantité suffisante nécessaire à la satisfaction des besoins personnels, domestiques et agricoles qu'ils soient individuels ou communautaires. De plus, cette eau doit être physiquement accessible par toutes les couches sociales, notamment les groupes marginalisés,[56] et doit être abordable.[57]

Reprenant les éléments constitutifs du droit humain à l'eau contenus dans l'observation générale 15, la Commission s'en démarque toutefois en incluant dans la définition de la notion d' «usage domestique et personnel», l'utilisation d'une eau salubre et propre à des fins de boisson, d'hygiène personnelle et domestique et d'assainissement, mais «aussi religieuses et culturelles»,[58] ce que le CoDESC a pris le soin d'exclure du concept «d'usage personnel et domestique». Selon l'institution spécialisée onusienne, l'usage personnel et domestique renvoie à la consommation, l'assainissement individuel, le lavage du linge, la préparation des aliments ainsi que

52 Comité des droits économiques, sociaux et culturels (n 6) para 6: 'L'eau est nécessaire à des fins diverses, outre les usages personnels et domestiques, pour la réalisation de nombreux droits énoncés dans le Pacte [...]. La priorité devrait aussi être donnée à la prévention de la faim et des maladies [...]'.

53 CADHP (n 48) para 88.

54 Selon l'OMS, fournir une eau en quantité suffisante renvoie à un approvisionnement par l'État d'un minimal de 20l/pers/jr. Pour la réalisation du droit à l'eau, il doit fournir au moins 50 à 100 l d'eau/hbt/jr. Voir CADHP (n 49) notes 6 & 27. Elle fait également référence selon la Commission, à la quantité d'eau nécessaire pour satisfaire les besoins personnels et domestiques de l'individu.

55 CADHP (n 48) 10 et paras 13.1 & 13.2. Un groupe vulnérable est constitué de personnes particulièrement exposées au risque de ne pas recevoir suffisamment d'eau ou ne pas en recevoir du tout, en raison d'une situation de dépendance vis-à-vis d'un établissement public ou d'une condition pouvant être liée à leur âge, situation économique, état de santé, travail, lieu de résidence, sexe, handicap ou autre.

56 Selon la Commission, ce sont ceux qui n'ont pas accès ou un accès insuffisant à l'eau.

57 Une eau abordable signifie que le coût du service de l'eau ne constitue pas une menace, ni un obstacle à la capacité de la personne à satisfaire d'autres besoins essentiels, comme la nourriture, le logement et les soins de santé. Lire CADHP (n 48) 9.

58 CADHP (n 49) 10. Voir aussi CADHP (n 48) para 89.

l'hygiène corporelle et domestique.[59] De même qu'il exclut l'usage de l'eau à des fins religieuses et culturelles comme faisant partie du contenu normatif du droit à l'eau, il en fait de même pour l'eau destinée à l'agriculture de subsistance et autres moyens de subsistance. Ces derniers, par contre, sont un besoin humain ou une priorité prise en compte dans la définition du contenu normatif du droit humain à l'eau par la Commission.

Le noyau dur du droit à l'eau comprend l'exigence de la disponibilité de l'eau qui consiste en un approvisionnement constant et régulier qui permette de répondre aux besoins personnels et domestiques, à l'agriculture de subsistance et aux autres moyens de subsistance.[60] Les individus doivent avoir accès équitablement à une eau salubre, en quantité suffisante, qui permette de vivre dignement. La réponse aux besoins humains exige des États qu'ils veillent à une utilisation raisonnable et équitable de l'eau, ainsi que sa répartition, permettant de faire bénéficier aux groupes vulnérables et marginalisés d'un traitement plus favorable adapté à leurs besoins hydriques particuliers que leurs conditions socio-économiques et même physiologiques engendrent.[61]

La qualité de l'eau fournie aux individus pour jouir de leur droit humain à l'eau s'apprécie au niveau de la couleur, de l'odeur et du goût de celle-ci, qui doivent être acceptables.[62] Il incombe aux États la responsabilité de prévenir la pollution de l'approvisionnement en eau aussi bien par les activités agricoles et industrielles que par les eaux usées. Ils ont également l'obligation de contrôler la qualité de l'eau de boisson fournie aux consommateurs, laquelle doit être conforme aux normes internationales et à la réglementation interne.[63]

Quant à l'accessibilité, élément constitutif du noyau dur de ce droit, elle suppose que l'eau, les installations et les services doivent être accessibles à tous, sans discrimination. L'accessibilité physique, l'accessibilité économique, la non-discrimination et l'accessibilité de l'information sont les quatre éléments constitutifs de ce critère.[64] Le premier élément exige la mise en place d'installations ou de services d'approvisionnement en eau, physiques accessibles à tous, en toute sécurité. Ces points d'eau doivent être en nombre suffisant pour éviter des attentes excessives et doivent être disponibles dans les foyers, les établissements d'enseignement; les hôpitaux, les prisons, les camps des réfugiés, les zones rurales, les zones urbaines défavorisées, etc.[65] En outre, ces installations doivent considérer particulièrement les cas des catégories vulnérables et marginalisées, en particulier les personnes

59 Comité des droits économiques, sociaux et culturels (n 6) para 12(a)
60 CADHP (n 48) paras 13.1 & 13.4
61 CADHP (n 48) para 13.3
62 CADHP (n 48) para 16.1.
63 CADHP (n 48) para 16.2
64 Comité des droits économiques, sociaux et culturels (n 6) para 12(c).
65 CAHDP (n 48) para 14.1.

handicapées, et doivent être culturellement adaptées et respectueuse de l'égalité des sexes, de l'âge et de l'intimité.[66]

L'accessibilité économique renvoie au coût abordable de l'eau. Cette dernière doit être économiquement accessible à toute personne de sorte que la réalisation d'autres droits humains n'en soit pas préjudiciée. De même, la fourniture gratuite d'eau salubre est un moyen de rendre l'eau abordable.[67] Afin de garantir l'accessibilité à l'eau sur une base égalitaire, la Commission demande aux États d'assurer une fourniture ininterrompue de l'eau aux groupes marginalisés et aux populations ayant un niveau de vie très bas.[68] La rupture d'approvisionnement en eau ne sera légale que lorsqu'une personne qui a pourtant les moyens financiers de payer ses factures, refuse de le faire, et ceci après notification au moins un mois à l'avance de la coupure envisagée.[69] Par ailleurs, respecter le principe de non-discrimination qui fait partie de l'obligation étatique de garantir le droit humain à l'eau, ne sera effectif que si les groupes marginalisés et vulnérables qui requièrent une attention particulière, auront un accès à l'eau avec des moyens adaptés à leurs conditions spécifiques.[70] Enfin l'accessibilité à l'information correspond au droit de rechercher, de recevoir et de répandre les informations concernant les questions relatives à l'eau.[71] À cet effet, la Commission demande aux gouvernements de «renforcer les capacités des populations dans la connaissance des droits de l'homme, y compris du droit humain à l'eau, ainsi que les mécanismes de protection.[72]

3.2 Les obligations minimales étatiques de respecter, protéger et de mettre en œuvre le droit humain à l'eau

À l'instar des droits conventionnellement protégés, le droit humain à l'eau impose trois niveaux d'obligations étatiques que sont celles de le respecter, de le protéger, et de le mettre en œuvre.[73] La Commission a souligné dans ses lignes directrices sur le droit à l'eau en Afrique,

66 CADHP (n 48) para 14.2.

67 CADHP (n 48) para 15.1.

68 CADHP (n 48) paras 15.4 & 15.5: 'Les groupes marginalisés ne doivent jamais être déconnectés du réseau d'approvisionnement en eau. La coupure complète par défaut de paiement ne peut être autorisée que si la personne incapable de payer a accès à une autre source d'approvisionnement garantissant ainsi son droit à l'eau tel que défini dans les présentes Lignes directrices'.

69 CADHP (n 48) para 15.6.

70 Voir la partie 4 des Lignes directrices sur le droit à l'eau en Afrique de 2019 qui détaille les individus faisant partie des groupes concernés par le principe de non-discrimination ; la Résolution de la CADHP sur l'obligation de garantir le Droit à l'Eau – CADHP/Res.300(EXT.OS/XVII) de 2015 para vii; et *l'observation générale No15* (2002) sur le droit à l'eau du CoDESC, para 12(c)(iii).

71 Comité des droits économiques, sociaux et culturels (n 6) para 12(c)(iv).

72 CADHP (n 48) para vi.

73 Comité des droits économiques, sociaux et culturels, observation générale (n 6) para 20. Voir également CADHP (n 48) paras 4-12.

l'absence de hiérarchie entre ce dernier et les autres droits humains[74] (qui dès lors est d'application immédiate par les gouvernements), afin d'éviter que les États ne s'appuient sur le prétexte de la réalisation progressive des DESC pour justifier une éventuelle ineffectivité de ce droit dans leur ordre juridique. La réalisation progressive des DESC, concept consacré par le PIDESC,[75] signifie que les États parties à la Charte doivent mettre en œuvre, dans un plan raisonnable, en posant des jalons et des délais réalisables, la jouissance progressive des DESC, dans les limites de leurs ressources disponibles.[76] En ce qui concerne le droit humain à l'eau, ces mesures doivent être concrètes et ciblées pour progresser vers l'objectif de la pleine réalisation de ce droit.[77]

L'obligation de respecter le droit à l'eau impose aux États un devoir d'abstention ou encore d'obligations négatives d'application immédiate.[78] Ces dernières renvoient à l'interdiction de toute ingérence directe ou indirecte dans la jouissance de ce droit par les individus ou les communautés. Le CoDESC précise que le devoir de respecter le droit humain à l'eau consiste entre autres à s'abstenir d'exercer une activité susceptible de restreindre ou de refuser l'accès en toute égalité à un approvisionnement adéquat en eau; de s'immiscer dans les arrangements traditionnels et coutumiers de partage de l'eau; de limiter la quantité d'eau ou de la polluer illicitement; de restreindre l'accès aux services et infrastructures ou de les détruire à titre punitif, etc.[79]

L'obligation de protéger le droit humain à l'eau exige des États l'adoption et l'exécution de mesures positives, c'est-à-dire celles dont l'objectif est d'empêcher toute personne, ou des entités étatiques et non étatiques d'entraver l'exercice de ce droit. La protection passe par l'adoption de lois et règlements garantissant l'accès à une eau salubre, suffisante et sur une base non discriminatoire, et par l'instauration de recours administratifs et juridictionnels disponibles et adéquats assortis d'un mécanisme de réparations en cas d'atteinte au droit humain à l'eau. Si le CoDESC établit que le Pacte ne contient pas de vagues objectifs, intraduisibles en droit interne et insusceptibles de recours, mais de véritables droits subjectifs dont les individus peuvent se prévaloir à l'égard des tiers,[80] La Commission s'inscrit dans une logique similaire. Tout en soulignant et déplorant la méconnaissance par la plupart des droits internes africains du caractère justiciable du droit humain à l'eau, l'organe de contrôle de la Charte demande aux parties de protéger ce droit par des mécanismes judiciaires et administratifs.[81] Il est toutefois important de relever que bien avant les

74 CADHP (n 48) para 3.2.
75 PIDESC art 2(1).
76 CADHP (n 48) para 14.
77 Rapporteur spécial (n 52) 2
78 D Roman 'La justiciabilité des droits sociaux ou les enjeux de l'édification d'un État de droit social' (2012) 1 *La Revue des droits de l'homme* 17 disponible sur https://revdh.revues.org/635 (consulté le 23 juin 2022).
79 Comité des droits économiques, sociaux et culturels (n 6) para 21.
80 Roman (n 79) 17.
81 CADHP (n 48) para 3.2.

lignes directrices de 2019, la Commission exhortait déjà les gouvernements concernant leur obligation de protéger le droit humain à l'eau, à mettre l'accent sur sa justiciabilité, c'est-à-dire sur la possibilité de son invocabilité devant le juge.[82]

Ce dernier est, comme le souligne Roman, «un acteur efficace pour garantir l'effectivité des droits universellement proclamés mais inégalement respectés»; son rôle dans le concept d'effectivité des droits sociaux étant «d'en garantir l'accomplissement».[83] L'expérience sud-africaine – où le droit humain à l'eau a été reconnu et consacré bien avant l'ONU – constitue une avancée en matière de garantie de ce droit, dont pourraient s'inspirer d'autres États africains pour d'éventuelles réformes légales destinées à mieux le protéger. La Constitution sud-africaine de 1996 attribue en effet aux tribunaux un large pouvoir discrétionnaire de sanctions et de réparations[84] des atteintes aux DESC en reconnaissant la légitimité pour les juges de rendre toute ordonnance pour donner effet aux DESC qu'ils estiment juste et convenable suivant les faits de chaque affaire.[85] Il peut aussi assortir ses décisions d'ordonnances de «reddition de compte» qui lui permettent de superviser la conformité des actions étatiques avec un jugement rendu, et d'avoir ainsi un droit de regard sur un dossier en cours.[86]

En droit sud-africain, le droit humain à l'eau est doté d'une valeur constitutionnelle[87] revêtant donc un caractère fondamental, et invocable devant toute juridiction compétente. C'est donc à juste titre

82 CADHP (n 47) para v.

83 Roman (n 79) notes 143 et 182.

84 Dans l'affaire *Ministère de la santé et autres c. Organisation Treatment Action Campaign et autres*, Cour Constitutionnelle d'Afrique du Sud CCT 8 février 2002, la Cour constitutionnelle ordonna la levée immédiate des restrictions gouvernementales à la fourniture des médicaments antirétroviraux dans les hôpitaux extérieurs aux sites pilotes, et d'élaborer un programme complet visant la réduction des risques de transmission du VIH de la mère à l'enfant. Pour les détails sur les faits de cette espèce et le jugement de la Cour, lire ONUSIDA 'La poursuite des droits: Études de cas sur le traitement judiciaire des droits fondamentaux des personnes vivant avec le VIH' (2006) 83-86 disponible sur https://www.unaids.org/sites/default/files/media_asset/jc1189-courtingrights_fr_0.pdf (consulté le 01 juillet 2022).

85 D Robitaille 'La justiciabilité des droits sociaux en Inde et en Afrique du Sud' (2012) 1 *La Revue des droits de l'homme* 174, https://journal.openedition.org/revdh/pdf/127 (consulté le 1 juillet 2022).

86 Robitaille (n 85) 258.

87 L'Afrique du Sud est le premier pays africain à consacrer un droit humain à l'eau. Sa Constitution de 1996, en son art 27(1)(b) dispose: 'Everyone has the right to have access to [...] sufficient food and water [...]'. Elle reconnaît également le concept de la réalisation progressive des droits économiques et sociaux: 'The state assumes an obligation to take reasonable legislative or other measures, within its available resources, to achieve the progressive realisation of each of these rights' (Chap II, sect 27(2)). Le Burkina-Faso est le premier pays ouest africain à s'investir dans la protection du droit humain à l'eau en le constitutionnalisant en 2015. A la faveur de la révision constitutionnelle du 05 novembre 2015 par la loi n° 072-2015/CNT, l'eau potable et l'assainissement ont été ajoutés comme droit sociaux: '[...] l'eau potable et l'assainissement [...] constituent des droits sociaux [...] reconnus par la présente Constitution qui vise à les promouvoir ' (art 18 de la Constitution du Burkina-Faso du 2 juin 1991)

que dans l'affaire *Grootboom*,[88] la Cour constitutionnelle a eu l'occasion, en s'appuyant sur l'observation générale 15 du CoDESC, d'expliciter le contenu normatif du droit à l'eau et les obligations étatiques liées à l'effectivité de ce droit. Il serait néanmoins important, avant d'aborder la question de la protection du droit de l'homme à l'eau particulièrement, de faire un bref résumé de l'affaire: Irène Grootboom et d'autres plaignants contestaient, en s'appuyant sur l'article 26 de la Constitution sud-africaine, la constitutionnalité d'un programme gouvernemental de logement qui écartait les besoins en abri, en eau, en électricité et en équipements sanitaires des plus démunis. En appel, la Cour constitutionnelle conclut que la réalisation progressive des DESC est une «obligation indérogeable» étatique, et que «l'obligation est de fournir un accès au logement [...], à une nourriture et à une eau suffisante [...] pour ceux qui ne parviennent pas à assurer leurs conditions d'existence et celles des personnes qui dépendent d'eux [...]». Elle décida que les mesures prises par le gouvernement sud-africain ne pouvaient être considérées comme adéquates ou raisonnables si elles ne bénéficiaient pas aux démunis, et ne répondaient pas à l'obligation de «prendre toutes les mesures raisonnables dans la limite des ressources disponibles».[89] La Cour ordonna aux autorités municipales et nationales de «concevoir, financer, et mettre en œuvre et superviser des mesures pour fournir un secours à ceux qui en ont besoin», ainsi que des mesures conservatoires telles que la fourniture des points d'eau, en toilette, etc.[90]

S'agissant spécifiquement du droit humain à l'eau, le juge dans le cas d'espèce estima que sa réalisation supposait un niveau minimum d'eau nécessaire pour la survie, sur lequel un système de tarification progressif serait imputé pour le recouvrement des coûts.[91]

Le département sud-africain des affaires de l'eau et de la foresterie, sur la base de cette décision, institua en décembre 2000, un tel programme pour les besoins basiques en eau; ce qui a contribué à réduire les disparités dans l'approvisionnement en eau potable, entre 1996, année de la consécration constitutionnelle du droit humain à l'eau, et 2002. Ainsi, à l'exemple du cas *Grootboom*, l'intervention du juge peut modeler et améliorer l'action politique et économique pour la protection non seulement du droit humain à l'eau, mais des DESC en particulier. En Afrique du Sud, même si la jouissance du droit à l'eau s'opère encore sur une base discriminatoire dans certains cas, au moins

88 *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC*)*.

89 V Roufiol 'La justiciabilité des obligations positives en matière de DESCE: l'affaire *Grootboom* (Afrique du Sud, 2001)' du 20 avril 2005 https://www.rinoceros.org/article1129.html (consulté le 1 juillet 2022).

90 Roufiol (n 89). Lire cet article pour les points saillants de la décision de la Cour constitutionnelle.

91 Erik B Bluemel 'The implications of formulating a human right to water' (2009) 31 *Ecology Quarterly* 958 disponible sur https://www.internationawaterlaw.org/bibliography/articles/general/Erik_Bluemel/-Right_to_water. pdf (consulté le 25 mai 2022).

le juge a eu le mérite de contribuer à la réalisation progressive de ce droit.[92]

> *On a whole, it appears that South Africa has […] genuinely attempted to achieve a progressive realization of its right to water, though the costs of realizing this right have not been equitably distributed among various segments of the population, with the poor disproportionately burdened by connection fees and tariff schedules designed to achieve full cost recovery.*

Une décennie après l'affaire *Grootboom,* la Cour constitutionnelle sud-africaine précisa davantage les obligations étatiques relatives à la réalisation du droit humain à l'eau et le rôle du juge dans sa mise en œuvre dans le cas *Mazibuko*. En l'espèce, les plaignants, résidents pauvres du district de Pirhi contestaient la constitutionnalité d'une décision gouvernementale de limiter l'accès gratuit à l'eau à six kilolitres par famille et mensuellement. Ils exigeaient la fourniture gratuite et quotidienne de 50 litres pour chaque résident du district.[93] La Haute Cour et la *Supreme Court of Appeal* confirmèrent l'obligation constitutionnelle du gouvernement de fournir gratuitement la quantité demandée par les plaignants en fondant leurs décisions sur l'observation générale du CoDESC de 2002.[94]

La Cour constitutionnelle souligna, s'agissant des obligations étatiques relatives au droit humain à l'eau, que le droit humain à l'eau exigeait plutôt de l'État qu'il prenne des mesures législatives et autres raisonnables pour réaliser progressivement la réalisation du droit d'accès à une eau suffisante, dans les limites de ressources raisonnables. Le rôle du juge est de servir de forum de responsabilisation ou de reddition de compte. La mise en œuvre des obligations positives en matière de DESC n'est exigée des États que lorsque ceux-ci ne prendraient aucune mesure pour réaliser ces droits ou lorsque les mesures prises par l'État étaient déraisonnables.[95]

Enfin, l'obligation de mettre en œuvre consiste en l'exécution d'actions positives pour avancer sa réalisation. La Commission énumère des obligations étatiques essentielles minimales contribuant à l'effectivité du droit humain à l'eau. Elles renvoient à assurer l'accès à une quantité essentielle minimale d'eau, suffisante et salubre pour l'usage personnel et domestique, y compris pour la prévention des maladies, ainsi qu'à l'accès à un système sanitaire adéquat.

La seconde exigence minimale consiste à assurer un accès physique sûr à des installations ou des services fournissant une eau suffisante salubre et régulière disposant d'un nombre adéquat de sorties d'eau pour éviter les longues files d'attente, et situés à une distance raisonnable des habitations, des établissements éducatifs, des lieux de travail ou des établissements de santé.[96]

92 Bluemel (n 91) 980.

93 T Humby & M Grandbois 'The human right to water in South Africa and the *Mazibuko* decisions' (2010) 51 *Les cahiers de droit* 531, https://www.erudit.org/en/journals/cd1/2010-v51-n3-4-cd4010/045722ar.pdf (consulté le 17 novembre 2022).

94 Humby & Grandbois (n 93) 533-535.

95 Humby & Grandbois (n 93) 536-537.

96 CADHP (n 48) para 92(a)(b)(c)

Par ailleurs, en vertu du principe de non-discrimination et d'égalité d'accès, la Commission accentue la nécessité de satisfaire prioritairement les besoins essentiels des groupes vulnérables, dans l'allocation des ressources disponibles qui sont d'ordre financier, technique et humain.[97] La précarité des ressources ne justifie pas, à l'exception de quelques situations d'urgence prévues dans les lignes directrices de 2019, la prise de mesures régressives qui peuvent entraîner des reculs dans l'exercice du droit à l'eau.[98] De telles mesures peuvent consister en des hausses injustifiées des coûts de l'eau qui excluent systématiquement les populations pauvres. L'insuffisance des investissements dans les ressources humaines, dans l'exploitation et dans l'entretien des services et installations d'approvisionnement en eau potable, contribuent également à la régression dans l'exercice du droit de l'homme à l'eau, en contradiction avec les exigences du droit international et du droit international africain des droits de l'homme.

4 CONCLUSION

L'analyse de la jurisprudence de la Commission et du Comité révèle les occasions manquées de consacrer un droit humain à l'eau autonome d'autres droits de l'homme, sous l'aune desquels il est invoqué. Aucun de ces organes de contrôle n'a pu combler le vide juridique ou encore le silence des instruments régionaux africains de protection des droits humains et particulièrement du texte pionnier en la matière qu'est la Charte, sur l'existence d'un tel droit pourtant fondamental au respect du droit à la vie et à la dignité humaine. Cette insuffisante protection normative pourrait expliquer la considération minimisée que lui accordent la plupart des États africains dans leurs ordres juridiques internes, à quelques exceptions près. Toutefois, on note une avancée à travers le droit mou développé par la Commission africaine des droits de l'homme et des peuples, qui comble cette lacune du système africain de protection des droits humains en consacrant explicitement un droit humain à l'eau distinct des droits conventionnellement consacrés, et entre lesquels n'existe aucune hiérarchie. En s'inspirant du droit international et en tenant compte du contexte socio-économique et culturel africain, l'organe de contrôle de la Charte en définit le contenu normatif et précise les obligations essentielles étatiques que ce droit engendre, en précisant son caractère justiciable très souvent ignoré dans les droits internes africains. Les lignes directrices de Nairobi, la Résolution 300 sur l'obligation de garantir le droit à l'eau et les lignes directrices sur le droit à l'eau en Afrique donnent l'occasion aux organes de contrôle dans des litiges subséquents où des questions d'ordre hydrique seraient évoquées, de confirmer l'existence d'un droit humain à l'eau d'application immédiate et invocable devant les juridictions internes. De même, ce droit mou peut guider les États désireux d'introduire le droit humain à l'eau dans leurs ordres juridiques dans le processus de détermination de son contenu normatif et des

97 CADHP (n 48) para 14.
98 CADHP (n 47) para 16 et CADHP (n 48) para 6.1.

responsabilités qui incombent aux pouvoirs publics pour sa mise en œuvre. Cette consécration juridique et surtout constitutionnelle donnera la possibilité pour tout individu d'invoquer devant toute juridiction compétente la violation de son droit d'accès à une eau potable, en quantité suffisante et sur une base non-discriminatoire lorsqu'il est établi que l'insuffisance ou les difficultés d'accès sont dues à l'inaction du gouvernement. Dès lors, elle autorise le juge à participer à sa réelle protection contre atteinte du fait des individus ou des entités étatiques et non-étatiques chargées de sa mise en œuvre.

Les réformes du système judiciaire de l'Union africaine: enjeux juridico-institutionnels sur la Cour africaine des droits de l'homme et des peuples

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RÉSUMÉ: Cette contribution étudie et démontre les raisons pour lesquelles les différents systèmes et modèles de justice – expérimentés, initialement, par l'Organisation de l'Unité africaine (OUA) et, actuellement, par l'Union africaine (UA) – sont fluctuants et instables. En effet, la Charte de l'OUA n'avait pas créé une Cour de justice, mais une Commission de médiation, de conciliation et d'arbitrage, chargée d'arbitrer les différends. Analogiquement, la Charte africaine des droits de l'homme et des peuples de 1981 n'avait pas, non plus, institué une Cour, mais la Commission africaine des droits de l'homme et des peuples dont les recommandations ne sont pas contraignantes. Pour combler les lacunes de cette Commission, l'OUA adopta, en 1998, à Ouagadougou, le Protocole instituant la Cour africaine des droits de l'homme et des peuples dont les décisions sont, quant à elles, contraignantes. Cependant, entre-temps, l'OUA disparut avant l'entrée en vigueur de cette Cour. De son côté, l'Acte constitutif de l'Union africaine (UA), qui remplaça la Charte de l'OUA en 2000, a prévu sa propre Cour de justice, qui sera instituée, trois ans plus tard, par un protocole adopté à Maputo en 2003. Ainsi, deux cours séparées et spécialisées devaient, parallèlement, exister à l'échelle continentale. Toutefois, pour des raisons de rationalisation, les deux protocoles, instituant respectivement ces deux cours, ont été fusionnés et substitués par le Protocole de Sharm El-Sheikh de 2008, qui crée la Cour africaine de justice et des droits de l'homme. Mais la structure interne et les compétences de cette future et unique Cour ont finalement été révisées et amendées par le Protocole adopté à Malabo en 2014: une section pénale, compétente pour 14 catégories de crimes, a été insérée au sein de la Cour projetée. Instable et aléatoire, le système judiciaire de l'UA est, à ce jour, incertain dans son ensemble, d'autant plus que les réformes de 2008 et celles de 2014, moins réalistes, suscitent plus de questions qu'elles n'en résolvent. Les méthodes exégétique, positiviste, analytique et historique ont permis de démontrer que ces deux derniers Protocoles réformateurs – respectivement de 2008 et de 2014 – risquent de ne pas entrer en vigueur à cause des incidences et des conséquences normatives et procédurales tant sur le statut, les compétences et la composition de la Cour initiale que sur la protection juridictionnelle des droits de l'homme à l'échelle du continent africain.

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TITLE AND ABSTRACT IN ENGLISH:

Reforms of the African Union's judicial system: legal and institutional challenges facing the African Court on Human and Peoples' Rights

ABSTRACT: This paper explores and demonstrates why the different systems and models of justice which the Organisation of African Unity (OAU) and the African Union (AU) respectively established are unstable. The OAU Charter did not create a court of justice, but a Mediation, Conciliation and Arbitration Commission to arbitrate disputes. Similarly, the African Charter on Human and Peoples' Rights did not establish a court of law, but the African Commission on Human and Peoples' Rights, whose recommendations are not binding. To address issues arising from the non-binding nature of the Commission recommendations, the OAU adopted the Protocol Establishing the African Court on Human and Peoples' Rights in Ouagadougou in 1998, whose decisions are binding. However, in the meantime, the OAU was replaced by the AU before the Court effective establishment. For its part, the Constitutive Act of the African Union (AU), which replaced the OAU Charter in 2000, provided for its own Court of Justice, which was established three years later by a protocol adopted in Maputo in 2003. Thus, two separate and specialised courts were to exist in parallel at the continental level. For reasons of rationalisation, the two protocols establishing these two courts were merged and replaced by the 2008 Sharm El-Sheikh Protocol, which created the African Court of Justice and Human Rights. The internal structure and competences of this future and unique Court were finally revised and amended by the Protocol adopted in Malabo in 2014: a criminal section, competent for 14 categories of crimes, was inserted within the projected Court. The AU's judicial system is, to date, unstable and uncertain, especially as the 2008 and less realistic 2014 reforms raise more questions than they resolve. The doctrinal, analytical, and historical methods of legal research have shown that the latter two reforming Protocols – that of 2008 and 2014 respectively – may not enter into force because of the normative and procedural implications and consequences for both the status, competences and composition of the original Court and the judicial protection of human rights across the African continent.

MOTS CLÉS: système judiciaire de l'Union africaine, Cour de justice de l'Union africaine, Cour africaine de justice et des droits de l'homme, protection juridique des droits de l'homme, protection juridictionnelle des droits de l'homme, Commission africaine des droits de l'homme et des peuples

SOMMAIRE:

1 INTRODUCTION

> *Fiat justitia ne pereat mundus*: «si la justice n'est pas rendue, le monde périra»; alors, *sol justitia illutrae nos*: «que le soleil de la justice nous illumine».[1]

Selon un dicton, «qui trop embrasse, mal étreint». Dans la perspective des réformes de la Cour de justice de l'Union africaine (UA), le Protocole de Sharm El-Sheikh, du 1er juillet 2008, portant Statut de la Cour africaine de justice et des droits de l'homme, et celui du 27 juin 2014, portant amendements au Protocole relatif au Statut de la Cour africaine de justice et des droits de l'homme (Protocole de Malabo), ont tellement embrassé au point d'étreindre la Cour africaine des droits de l'homme et des peuples (Cour africaine).

En effet, l'Afrique est souvent accusée en matière de violation des droits humains.[2] Pourtant, l'Organisation de l'Unité africaine (OUA) s'en était, très tôt, préoccupée en précisant que «la liberté, l'égalité, la justice et la dignité sont des objectifs essentiels à la réalisation des aspirations légitimes des peuples africains».[3] L'UA aussi, s'inspirant des principes et valeurs de sa devancière, s'est montrée résolue «à promouvoir et à protéger les droits de l'homme et des peuples, à consolider les institutions et la culture démocratiques, à promouvoir la bonne gouvernance et l'Etat de droit».[4]

L'Afrique, à l'instar des autres continents, a prévu une protection à la fois juridique et juridictionnelle des «droits humains».[5] La protection juridique consiste à élaborer des normes juridiques reconnaissant et/ou consacrant des droits humains. Elle s'est manifestée, à l'échelle continentale, par l'adoption d'un ensemble «d'instruments juridiques»[6] dont la Charte africaine des droits l'homme et des peuples du 27 juin 1981 qui en est le pivot.[7]

Conséquence de la protection juridique des droits humains, la protection juridictionnelle de ces droits, quant à elle, renvoie à l'ensemble des juridictions et aux mécanismes quasi-juridictionnels qui veillent au respect des droits et libertés juridiquement reconnus et/ou

1 Cette maxime latine '*sol justitia illutrae nos*' est mentionnée sur le sol à l'entrée de la Cour internationale de Justice. Nous l'avons découverte, aimée et mémorisée en 2018 – lors de notre visite au sein de cette juridiction mondiale – parce que nous souhaitons 'que le soleil de la justice illumine' le monde, y compris l'Afrique, confrontée à beaucoup de problèmes en matière de justice.

2 SN Tall *Droit du contentieux international africain: jurisprudences et théorie générale des différends africains* (2018) 281.

3 Charte de l'OUA du 25 mai 1963, Préambule, para 2.

4 Acte constitutif de l'UA adopté à Lomé le 11 juillet 2000, Préambule.

5 Dans notre entendement, les expressions 'droits humains' et 'droits de l'homme' sont interchangeables.

6 Ce sont, entre autres, la Charte africaine des droits de l'homme et des peuples de 1981, la Charte africaine des droits et du bien-être de l'enfant de 1990, le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme de 2003, la Charte africaine de la démocratie, des élections et de la gouvernance de 2007.

7 R Murray *The African Charter on Human and Peoples' Rights: a commentary* (2019) 2-3.

consacrés en sanctionnant leur violation. Au plan interne, la protection juridictionnelle des droits humains est essentiellement assurée par les juges constitutionnels, judiciaires et administratifs,[8] tandis qu'au plan supranational, la sanction des violations des droits humains est confiée aux juridictions communautaires, continentales et universelles. La Cour de Justice de la Communauté des États de l'Afrique de l'Ouest (CEDEAO)[9] et le Tribunal de la *Southern African Development Community* (SADC),[10] par exemple, se sont distingués, en la matière, dans leurs espaces communautaires respectifs. À l'échelle du continent africain, ce sont la Commission africaine des droits de l'homme et des peoples (Commission africaine) et la Cour africaine des droits de l'homme et des peuples qui garantissent ces droits. La protection juridique étant insuffisante et inefficace sans la protection juridictionnelle des droits humains, et vu que les deux sont complémentaires, les rédacteurs de la Charte ont institué, dans un premier temps, la Commission africaine,[11] qui siège à Banjul (Gambie).[12] Même si les recommandations de cette Commission ne sont pas contraignantes, sa création prouve néanmoins qu'un système de protection des droits humains doit prévoir «la possibilité pour tout individu de soumettre une réclamation et éventuellement de provoquer une mesure tendant à faire cesser la ou les violations ou à assurer aux victimes une réparation jugée équitable».[13]

Au cours de l'élaboration de la Charte africaine des droits de l'homme et des peuples en 1981, différentes suggestions ont été faites concernant ses organes de contrôle: d'aucuns voulaient une pluralité de commissions au sein de l'OUA dont une servirait de mécanisme de contrôle de la Charte, tandis que d'autres tenaient, depuis 1961, à la création d'un organe judiciaire.[14] Le choix final porta sur la création d'une commission séparée des autres organes de l'OUA. Cependant, la principale lacune matricielle de celle-ci réside dans le caractère non obligatoire de ses recommandations. Ainsi, l'intérêt à la fois judiciaire et social de cette contribution est qu'au-delà du fait qu'elle analyse l'évolution et l'actualité de la juridictionnalisation de la protection des droits humains en Afrique, elle permet également de savoir comment la création de la Cour africaine a pu combler les lacunes de la Commission africaine des droits de l'homme et des peuples.

8 T Holo 'Leçon inaugurale: la Constitution' in O Narey (dir) *La Constitution. Actes du Séminaire scientifique tenu à Niamey du 24 au 26 octobre 2018* (2018) 41.

9 Article 10(d) du Protocole additionnel (A/SP.1/01/05), adopté à Accra le 19 janvier 2005, portant amendement du préambule, des articles 1er, 2, 9, 22 et 30 du protocole (A/P1/7/91) relatif à la Cour de justice de la CEDEAO.

10 *Affaire Mike Campbell (Pvt) Ltd et autres c. Zimbabwe SADC (T)* (affaire no 2/2007, 28-11-2008).

11 R Murray *The African Charter on Human and Peoples' Rights. A commentary* (2019) 1: 'the African Commission on Human and Peoples' Rights (African Commission), created under the 1981 African Charter on Human and Peoples' Rights, began operating in 1987.'

12 Charte africaine des droits de l'homme et des peuples du 27 juin 1981, art. 30.

13 Holo (n 8) 41.

14 L'idée de créer un organe judiciaire remonte à la 'Loi dite de Lagos': une déclaration adoptée à la suite de la Conférence des Juristes africains réunis à Lagos du 3 au 7 janvier 1961 sur le thème de la 'Primauté du droit'.

Pour corriger les lacunes de la Commission et rigidifier le contrôle de la Charte en vue d'une meilleure protection des droits humains, il a été envisagé de créer la Cour africaine dont les décisions seront contraignantes à l'égard des Etats parties.[15] Toutefois, la création de cette Cour a rencontré et rencontre encore de nombreux obstacles: certains États sont sceptiques à son égard,[16] tandis que d'autres la voit comme une menace contre leur souveraineté.[17] D'ailleurs, ceux-ci considèrent le concept des «droits de l'homme» comme un héritage de la domination coloniale. Raison pour laquelle l'institutionnalisation d'une Cour chargée du contrôle juridictionnel des droits humains fut reléguée au second plan voire rejetée pendant longtemps. Le contentieux des droits humains, selon Christof Heyns, était « regardé comme contraire à la mentalité africaine». De plus, la notion de souveraineté joue encore un rôle important sur le continent – «souvent comme écran de protection pour les dirigeants ayant peu de considération pour les droits de l'homme».[18]

La création de la Cour africaine n'avait pas prospéré lors de l'écriture de la Charte en 1981: seule la Commission africaine a été prévue.[19] C'est seulement en 1998 que le Protocole de Ougadougou, issu d'un processus initié depuis 1993, concrétisa la création de la Cour africaine des droits de l'homme et des peuples,[20] dotée de compétences contentieuse et consultative.[21] Cependant, depuis sa création en 1998, cette Cour évolue en dents de scie dans une incertitude totale. Avec les différentes réformes dont elle a fait l'objet respectivement en 2008 et en 2014, la Cour africaine ne cesse de changer, théoriquement, de couleur et de configuration à l'image d'un caméléon. Gardons à l'esprit que les réformes du système judiciaire de l'UA désignent l'ensemble des

15 C Heyns 'Le rôle de la future Cour africaine des droits de l'homme et des peuples' in JF Flauss & E Lambert-Abdelgawad (dirs) *L'application nationale de la Charte africaine des droits de l'homme et des peuples* (2004) 239.

16 Il s'agit surtout des Etats qui n'ont pas déposé leur déclaration facultative de compétence afin de 'permettre aux individus ainsi qu'aux organisations non gouvernementales (ONG) dotées du statut d'observateur auprès de la Commission d'introduire des requêtes directement devant la Cour conformément à l'article 34(6) de ce Protocole. En effet, l'article 34(6) du Protocole de Ouagadougou de 1998 dispose qu' '[à] tout moment à partir de la ratification du présent Protocole, l'État doit faire une déclaration acceptant la compétence de la Cour pour recevoir les requêtes énoncées à l'article 5(3) du présent Protocole. La Cour ne reçoit aucune requête en application de l'article 5(3) intéressant un Etat partie qui n'a pas fait une telle déclaration'. Sur les 33 États parties au Protocole de Ouagadougou, seuls huit États (le Burkina Faso, la Gambie, le Ghana, la Guinée-Bissau, le Mali, le Malawi, le Niger et la Tunisie) ont fait cette déclaration d'acceptation de la compétence de la Cour: la grande majorité est encore réticente à cet égard.

17 Les États qui ont retiré leur déclaration facultative de compétence verraient la Cour comme une menace contre leur souveraineté: le Rwanda, la Tanzanie, la Côte d'Ivoire et le Bénin.

18 Heyns (n 15) 236.

19 Heyns (n 15) 238.

20 La création de la Cour est prévue par le Protocole additionnel à la Charte africaine des droits de l'homme et des peuples du 9 juin 1998, adopté lors du Sommet de l'OUA tenu à Ouagadougou du 8 au 10 juin 1998.

21 Protocole additionnel à la Charte africaine des droits de l'homme et des peuples du 9 juin 1998, art 3 et 4.

mesures et des conventions internationales adoptées par ses Etats membres pour restructurer et remodeler la Cour africaine instituée par le Protocole de Ouagadougou de 1998 et la Cour de justice de l'UA créée par le Protocole de Maputo de 2003.

En juillet 2004, pour des raisons d'ordre humain et financier, le Sommet de l'UA adopta une résolution relative à la fusion de la Cour africaine et de la Cour de justice de l'UA en une seule juridiction.[22] C'est ainsi que le Protocole de Sharm El-Sheikh (Egypte) a été adopté, le 1er juillet 2008, pour créer la Cour africaine de Justice et des droits de l'homme (Cour africaine de justice).[23] Un peu plus tard, le Protocole de Malabo du 27 juin 2014 aussi y a apporté une plus-value en élargissant les compétences de cette unique cour à la matière pénale.

Ces deux réformes sont tellement préoccupantes pour le devenir et l'avenir de la Cour africaine que certains auteurs et juges, dont Rafâa Ben Achour, souhaitent que les deux Protocoles réformateurs n'entrent jamais en vigueur.[24] Dès lors, quel est l'impact réel et/ou potentiel des deux réformes sur la Cour africaine et quels sont les obstacles à la fusion des deux Cours?

Concernant les réformes de l'UA, en général, et celles de la Cour africaine, en particulier, deux visions, non contradictoires, émergent sur le continent: la rationalisation et la spécialisation. La finalité de la doctrine de la rationalisation, prônée, entre autres, par l'ancien président nigérian, Olusegun Obasanjo, et l'actuel président du Rwanda, Paul Kagamé, vise l'autonomie financière et l'efficacité du système de l'UA. Quant à la doctrine de la spécialisation à laquelle nous adhérons, soutenue entre autres, par Rafâa Ben Achour, elle consiste à rendre l'UA efficace en évitant l'engorgement et la paralysie de ses organes centraux. Dans l'un et l'autre cas, il faut une gestion rationnelle des ressources humaines et financières et, surtout, une volonté politique ferme des États aux services des citoyens et des peuples africains.

Pour présenter l'impact réel et/ou potentiel des deux réformes susmentionnées, il serait judicieux d'analyser – dans une approche critique – leurs implications juridiques (2) et juridictionnelles (3) en vue de savoir si elles protègent mieux ou moins les droits humains en Afrique.

22 L'idée de fusionner ces deux Cours fut émise par les Chefs d'Etat et de Gouvernement de l'UA sur l'initiative de l'ex-président nigérian, Olusegun Obasanjo, lors du Sommet d'Addis Abeba (Ethiopie) en juillet 2004.

23 Protocole portant Statut de la Cour africaine de Justice et des droits de l'homme de 2008.

24 Le juge Rafâa Ben Achour a exprimé ce souhait lors de la conférence organisée en 2021 (en ligne), par l'Académie africaine de la pratique du droit international, à l'occasion de la présentation du livre *Les 3 Cours régionales des droits de l'homme* de Laurence Burgorgue-Larsen.

2 LES INCIDENCES NORMATIVES DES DEUX RÉFORMES

Le Protocole de Sharm El-Sheikh (Egypte) du 1er juillet 2008 et celui de Malabo (Guinée équatoriale) du 27 juin 2014 produiraient non seulement un impact important sur des normes voire sur l'«ordre juridique international africain»[25] antérieurement établi, mais aussi, ils provoqueraient un *imbroglio* (une confusion) autour du Statut des juridictions chargées de faire respecter cet ordre. Le premier, le Protocole de Sharm El-Sheikh, à lui seul, a abrogé et remplacé le Protocole de Ouagadougou de 1998 relatif à la Cour africaine des droits de l'homme et des peuples, et le Protocole de Maputo (Mozambique) fixant le Statut de la Cour de Justice de l'UA ainsi que les dispositions de l'Acte constitutif de l'UA relatives à la Cour de Justice (2.1).[26] Le second, le Protocole de Malabo de 2014, quant à lui, a amendé le Protocole de Sharm El-Sheikh de 2008 en élargissant la compétence *ratione materiae* de la Cour africaine de justice: la pénalisation du droit international africain (2.2).

2.1 L'imbroglio autour du Statut de la Cour africaine de justice: incertitude jusqu'à quand?

La Charte de l'OUA n'avait pas créé une cour de justice parmi ses quatre principaux organes qui sont: la Conférence des Chefs d'Etat et de Gouvernement, le Conseil des ministres, le Secrétariat général et la Commission de médiation, de conciliation et d'arbitrage.[27] C'est cette Commission qui était chargée d'arbitrer les différends qui opposaient les États membres de l'OUA.[28] Entre temps, l'OUA engage, en 1993, un processus de mise en place d'une cour africaine des droits de l'homme et des peuples. Cette Cour a vu le jour en 1998 avec à l'adoption du Protocole de Ouagadougou, mais sa matérialisation a pris du temps, car elle n'a rendu sa première décision qu'en 2009.[29] En se substituant à la Charte de l'OUA en 2000, l'Acte constitutif de l'UA a, quant à lui, prévu une cour de justice parmi ses principaux organes.[30] Les statuts,

25 Nous entendons par ordre juridique international africain, l'ensemble des règles juridiques applicables à l'échelle du continent africain, à la fois dans le cadre du droit de l'UA et du droit des droits de l'homme.

26 Les références faites à la 'Cour de Justice' dans l'Acte constitutif de l'Union africaine se lisent désormais comme des références à la Cour africaine de Justice et des droits de l'homme instituée par l'article 2 du Protocole de Sharm El-Sheikh (Egypte) du 1er juillet 2008. Voir l'article 3 dudit Protocole.

27 Charte de l'OUA du 25 mai 1963, art VII.

28 Charte de l'OUA du 25 mai 1963, art XIX.

29 *Michelot Yogogombaye c. Sénégal* (compétence) (15 décembre 2009) 1 RJCA 1.

30 Les organes de l'UA sont: la Conférence de l'Union, le Conseil exécutif, le Parlement panafricain, la Cour de justice, la Commission, le Comité des Représentant permanents, les Comités techniques spécialisés, le Conseil économique, social et culturel, les institutions financières. Voir l'Acte constitutif de l'UA adopté à Lomé le 11 juillet 2000.

la composition et les pouvoirs de ladite Cour ont été définis dans le Protocole y afférent,[31] adopté à Maputo en 2003.[32] Un an plus tard, et parallèlement, le Protocole de Ouagadougou relatif à la Cour africaine entra en vigueur le 25 janvier 2004.[33] Celle-ci avait uniquement pour objet de renforcer le mécanisme de supervision de la Charte africaine des droits de l'homme et des peuples.[34] *A contrario*, le Sommet de l'UA, tenu à la même année (2004), proposa de fusionner les deux cours parallèles.[35] Ce qui fut fait en 2008, car le Protocole de Sharm El-Sheikh abrogea à la fois le Protocole créant la Cour africaine des droits de l'homme et des peuples et le Protocole de Maputo relatif à la Cour de Justice de l'UA.[36]

Cette fusion enclenche naturellement une période de transition qui s'étend jusqu'à l'entrée en vigueur du Protocole de Sharm El-Sheikh de 2008. Cette transition devait prendre fin à la date de l'élection des juges de la Cour africaine de justice et les anciens juges, notamment ceux de la Cour africaine, devaient rester en fonction jusqu'à la prestation de serment des juges nouvellement élus de la Cour africaine de justice.[37] Les affaires pendantes devant la Cour africaine, dont l'examen n'est pas encore achevé à la date d'entrée en vigueur du Protocole de 2008, seraient transmises à la Section des droits de l'homme de la Cour africaine de justice.[38] Ces affaires devraient être examinées conformément aux dispositions du Protocole qui créa la Cour africaine.[39] Quatorze ans après, la période de transition n'est toujours pas arrivée à son terme. Ce qui fait que la perplexité reste de mise concernant le Statut de la Cour africaine qui ne connait que des vicissitudes.[40] Jusqu'à présent, le Protocole de Sharm El-Sheikh n'est pas opérationnel à cause du nombre insuffisant de «ratification»[41]

31 Protocole portant Cour de Justice de l'UA adopté par la deuxième session ordinaire de la Conférence de l'Union tenue à Maputo le 11 juillet 2003, art 18.

32 Protocole portant Cour de Justice de l'UA adopté par la deuxième session ordinaire de la Conférence de l'Union tenue à Maputo le 11 juillet 2003.

33 Heyns (n 15) 235.

34 Selon l'article 2 du Protocole de Ouagadougou de 1998, la Cour africaine des droits de l'homme et des peuples complète la Commission africaine des droits de l'homme et des peuples dans ses fonctions de protection de la Charte africaine des droits de l'homme et des peuples.

35 BK Tsibo *An Assessment of the Malabo Protocol on Impunity in Africa* (2018) 5.

36 Protocole de Sharm El-Sheikh (Egypte) de 2008, art 1: '[l]e 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, adopté le 10 juin 1998 à Ouagadougou (Burkina Faso) et entré en vigueur le 25 janvier 2004, et le Protocole de la Cour de justice de l'Union africaine, adopté le 11 juillet 2003 à Maputo (Mozambique), sont remplacés par le présent Protocole et le Statut y annexé qui en fait partie intégrante, sous réserve des dispositions des articles 5, 7 et 9 du présent Protocole'.

37 Art 4.

38 Art 5.

39 Art 5.

40 A Sall *L'émotion et la raison. L'Afrique face à la justice internationale* (2020) 133.

41 L'expression 'ratification s'entend de l'acte international [...] par lequel un Etat établit sur le plan international son consentement à être lié par un traité'. Convention de Vienne sur le droit des traités entre Etats de 1969, art 2, 1(b).

exigé pour son entrée en vigueur. D'ailleurs, ce Protocole, non en vigueur, a été amendé, à son tour, par le Protocole de Malabo de 2014.[42]

Certes un traité peut être amendé par accord entre les parties.[43] On sait que le terme «amender» signifie modifier un texte ou un propos en vue de l'améliorer,[44] mais à quel moment intervient le processus d'amendement d'un texte international? L'amendement des traités multilatéraux est régi par la Convention de Vienne sur le droit des traités entre Etats du 23 mai 1969 qui dispose en ces termes:

> [t]oute proposition tendant à amender un traité multilatéral dans les relations entre toutes les parties doit être notifiée à tous les Etats contractants, et chacun d'eux est en droit de prendre part: a) A la décision sur la suite à donner à cette proposition; b) A la négociation et à la conclusion de tout accord ayant pour objet d'amender le traité. 3. Tout Etat ayant qualité pour devenir partie au traité a également qualité pour devenir partie au traité tel qu'il est amendé. 4. L'accord portant amendement ne lie pas les Etats qui sont déjà parties au traité et qui ne deviennent pas parties à cet accord; l'alinéa b du paragraphe 4 de l'article 30 s'applique à l'égard de ces Etats. 5. Tout Etat qui devient partie au traité après l'entrée en vigueur de l'accord portant amendement est, faute d'avoir exprimé une intention différente, considéré comme étant: a) Partie au traité tel qu'il est amendé; et b) Partie au traité non amendé au regard de toute partie au traité qui n'est pas liée par l'accord portant amendement.[45]

La question qui nous intrigue désormais est de savoir si on peut amender, réviser ou modifier un projet de traité conformément à la Convention de Vienne ou bien les dispositions de cette Convention, applicables en la matière, ne concernent que les traités déjà en vigueur. En droit constitutionnel, c'est le pouvoir constituant dérivé qui est habilité à amender, modifier ou réviser la Constitution. Cette procédure ne peut être enclenchée qu'après l'entrée en vigueur de la Constitution. En ce sens, on peut dire que l'écriture d'un texte juridique obéit à deux étapes. Ce sont la phase de l'écriture du projet de texte initial et celle de sa révision ou de son amendement: la première phase est antérieure à la seconde et, inversement, la seconde est postérieure à la première. En d'autres termes, l'étape de l'élaboration d'un projet de texte – se situant en amont – intervient *a priori*, tandis que l'étape de sa révision, de sa modification ou de son amendement est censée intervenir en aval ou *a posteriori*. Tel est l'esprit et la logique de la Convention de Vienne sur le droit des traités, qui prévoit trois catégories d'Etats parties. D'abord, ce sont les «Etats parties»[46] au texte initial qui constituent la première

42 La question est de savoir si on peut parler de 'révision' ou d''amendement' concernant un texte international non encore en vigueur. La réponse serait négative parce qu'avant son entrée en vigueur un texte 'juridique' reste en état de projet. En l'espèce, le Protocole de Sharm El-Sheikh de 2008 exige une quinzaine de ratifications pour son entrée en vigueur. Etant donné que ce quorum n'avait pas été atteint en 2014, on pourrait dire que c'est le projet de Protocole de 2008 qui a été retravaillé et ajusté en 2014: Protocole de Malabo.

43 Convention de Vienne sur le droit des traités entre Etats du 23 mai 1969, art 39.

44 Un propos, par exemple, n'est amendé qu'après être exprimé – à l'oral ou sur papier – par son auteur: il ne peut l'être *a priori*.

45 Convention de Vienne sur le droit des traités entre Etats du 23 mai 1969, Partie IV: Amendement et modification des traités.

46 Convention de Vienne sur le droit des traités entre Etats du 23 mai 1969, art 2, 1(g): l'expression 'État partie' 's'entend d'un État qui a consenti à être lié par le traité et à l'égard duquel le traité est en vigueur'.

catégorie, parce qu'ils ont ratifié le traité en forme solennelle.[47] Ensuite, les Etats parties au texte amendé, après son entrée en vigueur, représentent la deuxième catégorie. Enfin, les Etats parties à la fois au texte initial ainsi qu'au texte amendé forment la troisième catégorie de ce triptyque.[48]

En l'espèce, on peut affirmer que l'amendement du Protocole de Sharm El-Sheikh de 2008 (qui a fusionné la Cour de justice de l'UA et la Cour africaine) par le Protocole de Malabo de 2014, ne respecte pas, à ce stade, les deux phases de l'écriture d'un texte juridique à savoir la phase de l'élaboration du texte initial et la phase de la révision de celui-ci. Deux raisons peuvent être avancées à cet effet. La première se focalise sur la non-entrée en vigueur du Protocole de 2008 amendé en 2014. La seconde raison est que le Protocole de Malabo – qui a amendé celui de 2008 – aussi n'est toujours pas entrée en vigueur. Donc, dans l'un et l'autre cas, de nos jours, on se trouve encore dans la phase initiale qui concerne l'écriture ou l'élaboration du projet de texte appelé à devenir un traité, car le quorum requis pour l'entrée en vigueur de chacun des deux Protocoles n'est pas atteint. Il est prévu que ce dernier Protocole entrera en vigueur 30 jours après que 15 États aient déposé leurs instruments de ratification.[49] Ainsi, à ce stade, l'objectif est d'avoir le nombre de ratifications nécessaire à l'entrée en vigueur du Protocole de 2014. Ce qui signifie qu'on n'a pas encore la première catégorie d'Etats parties. En conséquence, l'amendement «proprement dit» n'est censé intervenir qu'*a posteriori,* c'est-à-dire après la ratification du Protocole par, au moins, 15 Etats.[50]

Trois hypothèses découlent de ce processus d'amendement de 2014. La première consiste à soutenir que la Convention de Vienne sur le droit des traités entre Etats ne régit pas l'amendement, *a priori,* d'un projet de traité, c'est-à-dire avant son entrée en vigueur (le cas du Protocole de 2008 non en vigueur). La deuxième hypothèse pourrait conduire certains à penser que l'amendement du projet de Protocole de 2008 par le Projet de Protocole de 2014 est contraire à l'esprit et à la logique de la Convention de Vienne sur le droit des traités entre États. La troisième hypothèse signifierait qu'il y a un vide juridique sur l'amendement et la révision des projets de textes internationaux avant leur entrée en vigueur.

Depuis l'adoption du Protocole de Malabo de 2014, il est, dorénavant, question de créer une cour africaine de justice et des droits de l'homme et des peuples (Cour africaine de justice et des droits de

47 Les États qui ont simplement participé et paraphé le projet de traité initial mais ne l'ont pas ratifié sont appelés 'États contractants'. Cette expression 'Etat contractant' s'entend d'un Etat qui a consenti à être lié par le traité, que le traité soit entré en vigueur ou non'. Voir l'article 2, 1(f) de la Convention de Vienne sur le droit des traités entre Etats du 23 mai 1969.

48 Convention de Vienne sur le droit des traités entre Etats du 23 mai 1969, Partie IV: Amendement et modification des traités.

49 Protocole de Malabo de 2014, art 11.

50 Il est à préciser que sur les 55 États du continent africain, seulement 15 ont signé le Protocole de Malabo de 2014 amendant le Protocole de 2008 et aucune ratification à ce jour.

l'homme)[51] dotée de compétences importantes en matière pénale,[52] même si de nombreuses incertitudes subsistent relativement à une future entrée en vigueur du texte en question.

2.2 La pénalisation du droit international africain: le verre à moitié plein et à moitié vide

Deux raisons essentielles ont conduit à l'élargissement de la compétence *ratione materiae* de la Cour africaine de justice et des droits de l'homme à la matière pénale.[53] La première est relative au bras de fer qui exista, à un moment donné, entre l'Afrique et la Cour pénale internationale (CPI) qui a poursuivi, au moins, quatre chefs d'Etats africains.[54] La seconde est liée au refus de l'UA d'extrader l'ancien président tchadien, Hissène Habré, vers la Belgique[55] et, surtout, son désir de fonder une alternative juridiction pénale africaine. Lors de cette affaire (Hissène Habré), l'UA a posé le principe de compétence régionale avant de confier le dossier Hissène Habré au Sénégal.[56] Les difficultés rencontrées par le Sénégal pour juger Hissène Habré – accusé d'avoir commis de crimes internationaux pendant qu'il était au pouvoir au Tchad de 1982 à 1990 – ont conduit à la mise en place d'une juridiction pénale mixte: les chambres extraordinaires africaines.[57]

Cependant, pour ne pas continuer à créer de juridictions pénales *ad hoc* et, surtout, pour éviter la CPI, les Africains ont commencé à réfléchir à la création d'une section pénale permanente au sein de la Cour africaine de justice.[58] La Conférence des Chefs d'État et de Gouvernement de l'UA a pris la décision 213 (XII) de 2009 demandant à la Commission de ladite Union d'étudier la possibilité d'étendre la compétence de la Cour africaine de justice à la matière pénale. La Commission de l'UA (CUA) a, à son tour, sollicité l'Union panafricaine des avocats à cet effet. Sur la base du rapport de cette Union

51 Protocole de Malabo du 27 juin 2014, art 1(5) et art 8.

52 Protocole de Malabo, art 16.

53 La pénalisation du droit international africain, selon Mutoy Mubiala, 'est le résultat d'un processus laborieux, en rapport étroit avec les conflits qui ont surgi, d'une part, entre l'Union africaine et la CPI à propos de sa focalisation sur l'Afrique et, d'autre part, entre l'Union africaine et l'Union européenne, sur l'usage abusif de la compétence universelle par les tribunaux de certains Etats membres de cette dernière à l'égards des Africains, en général, et de leurs leaders en particuliers'. M. Mubiala 'Chronique de droit pénal de l'Union africaine: l'élargissement du mandat de la Cour africaine de Justice et des droits de l'homme aux affaires de droit international pénal' (2014) 85(3/4) *Revue internationale de droit pénal* 750.

54 Il s'agit du président Uhuru Kenyatta du Kenya et son vice-président William Ruto, du président Omar El Bechir du Soudan, du président Kadafi de la Libye et du président Laurent Gbagbo de la Côte d'Ivoire.

55 *Questions concernant l'obligation de poursuivre ou d'extrader* (*Belgique c. Sénégal*), CIJ, arrêt du 20 juillet 2012, Rec. 2012.

56 Mubiala (n 53) 749.

57 Mubiala (n 53) 749

58 Voir le Protocole de Malabo du 27 juin 2014.

panafricaine des avocats,[59] la Commission organisa une série de rencontres respectivement en 2010 et en 2012. La première (rencontre), qui eut lieu en août 2010 à Midrand (Afrique du Sud), proposa d'amender le Protocole de Sharm El-Sheikh de 2008 relatif à la Cour africaine de justice. Ce projet d'amendement fut étudié en mai 2012 par des experts gouvernementaux à Addis-Abéba. L'adoption de cet amendement, initialement prévue en juillet 2012, fut retardée à cause du veto de l'Egypte qui voulait avoir une définition claire sur la notion de «changement anticonstitutionnel de gouvernement».[60] Il a fallu attendre le Sommet de l'UA de Malabo de 2014 pour que le Projet d'amendement soit adopté en l'absence de l'Egypte, suspendue à cause du coup d'état orchestré par le président Abdel Fattah -Al- Sissi en juillet 2013.

Dès lors, la nouvelle Cour africaine de justice et des droits de l'homme et des peuples est composée de trois sections:[61] la section des affaires générales, la section des droits de l'homme et des peuples et la section du droit international pénal».[62] Sur le plan *ratione temporis*, la section du droit international pénal – qui ne sera opérationnelle qu'après l'entrée en vigueur du Protocole de Malabo de 2014 incorporant le Statut de la Cour africaine de justice et des droits de l'homme[63] – est composée, à son tour, de trois chambres[64] (la chambre préliminaire, la chambre de première instance et la chambre d'appel):[65] d'où la pénalisation du droit international africain qui s'explique par l'adoption des normes internationales africaines incriminant des comportements et prévoyant des mécanismes de répression de ces incriminations. Elle peut être perçue comme un verre à moitié plein et à moitié vide, c'est-à-dire qu'elle suscite à la fois optimisme et pessimisme.

59 Union africaine 'Rapport de l'étude sur les implications de l'élargissement du mandat de la Cour africaine de Justice et des droits de l'homme pour juger les crimes graves de portée internationale (préparée par l'Union Panafricaine des Avocats)', Doc. Legal/ACHPR-PAP/2 (2010) 33-34

60 En effet, issu d'une révolution populaire, le Gouvernement egyptien dirigé par le président Mohamed Morsi ne voulait pas que la définition de la notion de 'changement anticonstitutionnel de gouvernement' intègre les révolutions populaires débouchant sur un changement de régime.

61 Protocole portant amendement au Protocole portant Statut de la Cour africaine de justice et des droits de l'homme de 2014, Statut de la Cour africaine de justice et des droits de l'homme et des peuples, art. 16: Structure de la Cour, point 1.

62 Protocole portant amendement au Protocole portant Statut de la Cour africaine de justice et des droits de l'homme de 2014, Statut de la Cour africaine de justice et des droits de l'homme et des peuples, art 1: définitions.

63 Art 46E.

64 Art 1(2).

65 Les pouvoirs et attributions de ces trois chambres sont définis à l'article 19 bis du Statut de la Cour de 2014.

La compétence «*ratione materiae*»[66] de la Section du droit international pénal couvre 14 infractions pénales à savoir:[67] le «génocide»,[68] les «crimes contre l'humanité»,[69] les «crimes de guerre»,[70] le «crime relatif aux changements anticonstitutionnels de gouvernement»,[71] la «piraterie»,[72] le «terrorisme»,[73] le «mercenariat»,[74] la «corruption»,[75] le «blanchiment d'argent»,[76] la «traite des personnes»,[77] le «trafic de drogues»,[78] le «trafic illicite de déchets dangereux»,[79] l'«exploitation illicite des ressources naturelles»[80] et le «crime d'agression».[81] De plus, la compétence *ratione personae* de la Section pénale s'étend à la fois aux «individus»[82] et aux personnes morales (à l'exception des États). Ce qui signifie que la Section peut, pénalement, poursuivre des entreprises impliquées dans la commission de crimes internationaux. Mieux encore, la responsabilité des personnes morales n'exclut pas celle des personnes physiques qui sont les auteurs ou les complices des mêmes crimes.[83] Ces nombreuses incriminations et l'élargissement du champ de la compétence personnelle de la Section pénale de la Cour africaine de justice et des droits de l'homme aux personnes morales donnent l'impression que les présumés auteurs et complices de ces infractions et crimes internationaux n'échapperont plus à la justice internationale pénale africaine.

Par contre, l'espoir suscité par ces multiples incriminations s'estompe et se transforme en pessimisme avec la clause d'immunité selon laquelle aucune procédure pénale ne doit être engagée contre un chef d'État ou de gouvernement de l'UA en fonction, ainsi que «toute personne agissant ou habilitée à agir en cette qualité ou tout autre haut responsable public en raison de ses fonctions».[84] Ainsi, si l'immunité

66 H Gueldich 'La future Cour de justice et des droits de l'homme: de la pertinence normative aux considérations pratiques' in J-B Harelimana & C Maia (dirs) *20 ans du Statut de la CPI: l'œuvre africaine dans la pénalisation du droit international* (2018).

67 Protocole de Malabo de 2014, Statut de la Cour africaine de justice, art 28A.

68 Protocole de Malabo, art 28B.

69 Art 28C.

70 Art 28D.

71 Art 28E.

72 Art 28F.

73 Art 28G.

74 Art 28H.

75 Art 28I.

76 Art 28I bis.

77 Art 28J.

78 Art 28K.

79 Art 28L.

80 Art 28L bis.

81 Art 28M.

82 Toute personne qui commet un crime prévu par le Statut de la Cour africaine de justice en sera tenue personnellement responsable. Le Protocole de Malabo de 2014, Statut de la Cour africaine de justice, art 46B: Responsabilité Individuelle.

83 Art 46C.

84 Art 46A bis.

est non invocable devant la CPI,[85] elle reste une règle d'or devant la Section pénale de la Cour. Cette clause d'immunité est un couteau à double tranchant. D'un côté, elle constitue un message tacite adressé à la CPI qui ne cesse de lancer des mandats d'arrêts contre des dirigeants africains. De l'autre côté, au-delà de l'impunité qu'elle pourrait entrainer, la clause d'immunité risque de générer des dictateurs en Afrique. En effet, pour éviter d'être pénalement poursuivis par la Section pénale de la Cour, les dirigeants présumés responsables de crimes internationaux pourraient se maintenir, aussi longtemps que possible, au pouvoir. De plus, bien que les changements anticonstitutionnels de gouvernement soient désormais incriminés, on se demande néanmoins à quel moment les auteurs de tels crimes peuvent être poursuivis? Une fois devenus *de facto* ou *de jure* de hauts dignitaires de leurs Etats, les putchistes seront-ils couverts par la clause d'immunité pendant qu'ils exercent des fonctions étatiques? Doit-on poursuivre un président ayant pris le pouvoir de manière anticonstitutionnelle juste après la fin de son mandat ou la passation du pouvoir aux autorités civiles? Si oui, un tel président accepterait-il de rendre le pouvoir en sachant qu'il sera juste poursuivi?

Un autre élément, qui pourrait générer du scepticisme, concerne la définition élastique de la notion de «changement anticonstitutionnel de gouvernement».[86] Selon le Statut de la Cour africaine de justice et des droits de l'homme et des peuples, la notion désigne (1) tout *putsch* contre un gouvernement démocratiquement élu; (2) le refus d'un gouvernement en place de remettre le pouvoir au parti politique ou au candidat vainqueur des élections (présidentielles et /ou législatives) libres, justes et régulières; (3) tout amendement ou toute révision de la Constitution non conformes aux principes démocratiques, (4) toute modification des lois électorales durant les six mois précédents les élections sans le consentement de la majorité des acteurs politiques, (5) tout recours au mercenariat et (6) toute intervention de dissidents rebelles pour renverser un régime démocratique élu.[87] En réalité, quand on applique ces six volets de la définition du «changement anticonstitutionnel de gouvernement», on se demande quels États sur le continent africain seront exemptés. A partir du moment où la révision des «intangibilités constitutionnelles» est devenue une pratique répandue en Afrique, quelles dispositions de la Constitution seront à l'abri. Étant donné que les États africains sont peu orthodoxes en la matière, notre principale préoccupation est de savoir si les

85 Statut de Rome de 1998, art 27(1) et (2): '1. Le présent Statut s'applique à tous de manière égale, sans aucune distinction fondée sur la qualité officielle. En particulier, la qualité officielle de chef d'État ou de gouvernement, de membre d'un gouvernement ou d'un parlement, de représentant élu ou d'agent d'un État, n'exonère en aucun cas de la responsabilité pénale au regard du présent Statut, pas plus qu'elle ne constitue en tant que telle un motif de réduction de la peine. 2. Les immunités ou règles de procédure spéciales qui peuvent s'attacher à la qualité officielle d'une personne, en vertu du droit interne ou du droit international, n'empêchent pas la Cour d'exercer sa compétence à l'égard de cette personne'.

86 Protocole de Malabo du 27 juin 2014, Statut de la Cour africaine de justice, art 28E.

87 Art 28E.

dirigeants, qui se retrouvent dans cette définition, accepteraient de ratifier le Protocole de Malabo de 2014.[88]

À ce stade, tout porte à croire que l'incrimination des coups d'états pourrait impacter voire retarder la ratification et l'entrée en vigueur du Protocole de Malabo.[89] Et si ce Protocole entre en vigueur dans un futur proche, la question des changements anticonstitutionnels de gouvernement et la clause d'immunité pourraient paralyser, partiellement et temporairement, les activités de la Section pénale qui risque de poursuivre uniquement des personnes appartenant soit aux groupes rebelles ou soit aux partis politiques d'opposition. Ce qui revient à dire que les incidences du Protocole, sur le plan judiciaire ou juridictionnel, sont inévitables.

3 LES INCIDENCES JURIDICTIONNELLES ET PROCÉDURALES DES DEUX RÉFORMES

Le Protocole de Sharm El-Sheikh de 2008 fusionnant la Cour africaine des droits de l'homme et des peuples et la Cour de Justice de l'«UA»[90] au sein de la Cour africaine de justice[91] et le Protocole de Malabo du 27 juin 2014 élargissant la compétence de cette nouvelle Cour aux affaires «pénales»[92] ont également réformé l'ordre juridictionnel africain antérieur.[93] Si le Protocole de Malabo de 2014 entre en vigueur, la Cour africaine des droits de l'homme et des peuples correspondrait, désormais, à la Section des droits de l'homme de la Cour africaine de justice,[94] tandis que la Cour de justice de l'UA se transformerait en Section des affaires générales. Le remplacement de cette dernière juridiction par la Section des affaires générales signifie deux choses: soit l'UA ne prend pas beaucoup d'actes juridiques pouvant générer du contentieux administratif de l'UA, du contentieux de la constitutionalité/conventionalité de l'Acte constitutif de l'UA ou, par extension, le contentieux en rapport avec d'autres textes internationaux intra-africains; soit l'État de droit (continental) n'est pas garanti au sein

88 Il est quasiment devenu une coutume pour les organisations internationales, comme l'UA et la CEDEAO, de condamner toutes les prises de pouvoirs anticonstitutionnelles.

89 Le Mali, le Tchad, la République de Guinée, l'Egypte, le Soudan, l'Algérie et autres, ayant des gouvernements issus de coups d'État ou des situations controversées, risquent de ne pas ratifier le Protocole de Malabo à court terme.

90 Report on the Proposed Recommendations for the Institutional Reform of the African Union (29 January 2021) 12: '[t]he African Union is a complex organisation comprising dozens of entities. For example, there are eight Commission Directories and 31 departments and offices, alongside 11 African Union organs, 31 specialised technical agencies (STAs), and some 20 high-level committees'.

91 Protocole de Sharm El-Sheikh de 2008, articles 1, 2 et 3.

92 Protocole de Malabo du 27 juin 2014, art 28.

93 Initialement, l'ordre juridictionnel, à l'échelle du continent, était fondé la dualité et la spécialité juridictionnelles: d'une part, il y a la Commission et la Cour africaines des droits de l'homme et des peuples et, d'autre part, il y a la Cour de Justice de l'UA.

94 Protocole de Malabo du 27 juin 2014, art 7.

de l'UA. Pourtant, une juridiction à part entière, constituant un des organes principaux de l'UA, aurait pu s'en occuper de manière séparée et indépendante.

Deux autres situations restent plus inquiétantes. D'un côté, la réduction de la Cour africaine des droits de l'homme et des peuples – pour une rationalité de la gestion des ressources humaines et financières – à une simple «section de la Cour africaine de justice»[95] peut être perçue comme une avancée pour les économistes et rationalistes. Quant à ceux qui se soucient du sort et du respect des droits de l'homme sur le continent, ils considèrent, à juste titre, cette transformation de la Cour africaine comme un recul en matière de protection juridictionnelle des droits humains en Afrique (3.1). De l'autre côté, la création de la Section pénale provoquerait un sérieux problème d'articulation (*intra et extra* muros) avec d'autres structures et/ou juridictions partageant ses domaines de compétences (3.2).

3.1 De la Cour africaine des droits de l'homme et des peuples à la Section des droits de l'homme: deux éléments de régression

En 2008, le Protocole de Sharm El-Sheikh a prévu 16 juges (ressortissants des Etats parties)[96] devant siéger au sein de la Cour africaine de justice, composée de deux sections ayant chacune le même nombre de juges: la Section des affaires générales était constituée de huit juges et la Section des droits de l'homme devait, également, avoir huit juges.[97] La première est saisie de toute affaire introduite en vertu de l'article 28 du Statut de la Cour,[98] à l'exception des questions de droits de l'homme et/ou des peuples qui relèvent de la compétence de la seconde Section.[99] Ce passage de la Cour africaine des droits de

95 Art 7.

96 Protocole de Sharm El-Sheikh du 1er juillet 2008 portant Statut de la Cour africaine de justice et des droits de l'homme, art 3.

97 *Ibid*, art. 16.

98 Cet article 28 est relatif à la compétence *ratione materiae* de la Section des affaires générales de la Cour africaine de justice de 2008: '[l]a compétence de la Cour s'étend à toutes les affaires et à tous les différends d'ordre juridique qui lui seront soumis conformément au présent Statut et ayant pour objet: a) l'interprétation et l'application de l'Acte Constitutif; b) l'interprétation, l'application ou la validité des autres traités de l'Union et de tous les instruments juridiques dérivés adoptés dans le cadre de l'Union ou de l'Organisation de l'unité africaine; c) l'interprétation et l'application de la Charte africaine des droits de l'homme et des peuples, de la Charte africaine des droits et du bien-être de l'enfant, du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme ou de tout autre instrument juridique relatif aux droits de l'homme, auxquels sont parties les Etats concernés; d) toute question de droit international; e) tous actes, décisions, règlements et directives des organes de l'Union; f) toutes questions prévues dans tout autre accord que les Etats parties pourraient conclure entre eux, ou avec l'Union et qui donne compétence à la Cour; g) l'existence de tout fait qui, s'il est établi, constituerait la violation d'une obligation envers un Etat partie ou l'Union; h) la nature ou l'étendue de la réparation due pour la rupture d'un engagement international'.

99 Art 17.

l'homme et des peuples à la Section des droits de l'homme laisse entrevoir, au moins, deux éléments de régression concernant la protection des droits humains en Afrique.

En effet, la dénomination de l'«ancienne» Cour africaine des droits de l'homme et des peuples était fidèle au contenu binaire (droits de l'homme/droits des peuples) de la Charte africaine des droits de l'homme et des peuples de 1981.[100] Mais le Protocole de Sharm El-Sheikh de 2008 avait omis la partie relative aux droits des «peuples»,[101] car le titre dudit Protocole se limite, simplement, aux droits de l'homme. L'intitulé de la Section des droits de l'homme aussi ne l'avait pas repris non plus.[102] Or, la consécration des «droits des peuples», dans le titre et dans le corps de la Charte africaine de 1981, est le fruit d'une longue lutte panafricaine. Outre son originalité, elle reflète la pensée des pères des indépendances africaines. Au demeurant, la dénomination de la Section «des droits de l'homme» pouvait donner l'impression qu'elle n'était plus compétente en ce qui concerne les «droits des peuples» ou que ceux-ci ne pouvaient plus être invoqués devant cette section. D'aucuns auraient pu se demander s'il s'agissait là d'une révision déguisée voire tacite de la Charte africaine des droits de l'homme et «des peuples» ou une désapprobation «des droits des peuples africains». Cependant, si la notion «droits des peuples» a été omise en la forme, elle rentre, quand même, dans la compétence *ratione materiae* de la Section des droits de l'homme qui devait se prononcée sur:

> l'interprétation et l'application de la Charte africaine des droits de l'homme et des peuples, de la Charte africaine des droits et du bien-être de l'enfant, du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits de la femme ou de tout autre instrument juridique relatif aux droits de l'homme, auxquels sont parties les Etats concernés; d) toute question de droit international.[103]

D'ailleurs, cette omission a été corrigée, à juste titre, car la nomenclature de la Cour africaine de justice a changé, à nouveau, en 2014, avec l'adoption du Protocole de Malabo qui dispose en ces termes: la «Cour africaine de Justice et des droits de l'homme » de 2008 est supprimée et remplacée par la «Cour africaine de justice et des droits de l'homme et des peuples».[104] La Section des droits de l'homme de 2008 a également été mise en harmonie avec cette dernière

100 En 2018, lors de son cours, à l'Académie de droit international de La Haye, sur le droit international africain, le juge Fatsah Ouguergouz affirma qu'on doit la partie «droits des peuples» inscrite dans la Charte de 1981 au président guinéen Ahmed Sekou Touré qui tenait beaucoup à cette notion, d'autant plus que c'est sur le fondement du droit des peuples à disposer d'eux-mêmes que les peuples coloniaux accédèrent à l'indépendance. Donc, c'est probablement, la raison pour laquelle le Président Ahmed Sekou Touré, de la République de Guinée, avait conditionné la signature de la Charte africaine des droits de l'homme à la prise en compte, par les rédacteurs de la Charte, des droits des peuples.

101 Ce Protocole est intitulé comme suit: 'Protocole portant Statut de la Cour africaine de Justice et des droits de l'homme'.

102 Protocole de Sharm El-Sheikh du 1er juillet 2008, Statut de la Cour africaine de justice, art 16.

103 Statut de la Cour africaine de justice, article 17 et article 28C.

104 Protocole de Malabo du 27 juin 2014, art 8(1).

dénomination de la Cour, dans la mesure où son appellation – «Section des droits de l'homme et des peuples»[105] – prend en compte le contenu binaire de la Charte. Étant donné que l'originalité de Charte africaine de 1981, par rapport aux autres instruments régionaux de protection des droits de l'homme, réside dans le fait qu'elle a consacré, de manière contraignante, les droits des peuples, alors, ceux-ci doivent constituer la marque du droit international africain des droits de l'homme. Cette marque, étant le signe distinctif de ce droit africain, est à préserver.

Le deuxième élément de régression porte sur le nombre insuffisant de juges qui siégeront au sein des différentes sections de ladite Cour. La Cour africaine instituée par le Protocole de Ouagadougou de 1998 est composée de 11 juges, encore en fonction. Par contre, ce nombre s'est manifestement et progressivement rétréci. D'abord, le Protocole de 2008 a été le premier texte à réduire, *expressis verbis*, le nombre des juges devant siéger au sein de la Section des droits de l'homme à huit.[106] Au lieu de maintenir ces huit juges, déjà insuffisants, le Protocole de Malabo de 2014 n'a prévu que cinq juges pour la Section des droits de l'homme et des peuples. Il s'agit là d'un manifeste nivellement vers le bas, dans la mesure où on se demande si l'énorme travail des 11 juges, initialement prévus par le Protocole de Ouagadougou, peut être effectué par les cinq juges prévus par le Protocole de Malabo de 2014. En effet, tout porte à croire que cette Section des droits de l'homme et des peuples sera débordée par le nombre des requêtes qu'elle aura à traiter. On n'a qu'à voir le volume des quatre recueils de jurisprudence de la Cour africaine pour s'en convaincre,[107] sans oublier le nombre d'affaires pendantes ou en cours de traitement. De 2008 à 2021, les statistiques montrent que la Cour africaine a reçu 334 requêtes et rendu 257 décisions dont 131 arrêts, 15 avis consultatifs et 26 ordonnances.[108]

Il ressort de ce qui précède que si on maintient la Section des droits de l'homme avec sa composition actuelle (cinq juges), les conséquences seront lourdes pour la section en particulier et pour les droits de l'homme en Afrique en général. Dans un premier temps, outre l'augmentation des requêtes qui alourdit l'énorme tâche des juges, le délai de traitement des requêtes risque d'être trop long et, dans un second temps, les justiciables risquent d'abandonner la procédure et de bouder la section qui sera finalement décriée. Restreindre la saisine de la Cour ne constitue pas la solution idéale. D'ailleurs, la Fédération internationale des droits de l'homme (FIDH) regrette «que le Statut de la nouvelle Cour africaine de justice et des droits de l'homme n'autorise les ONGs et les individus à saisir directement la Cour que moyennant autorisation préalable des États. Cette condition restreint

105 Art 17(2).

106 L'article 16 du Statut de la Cour africaine de justice, annexé au Protocole de Sharm El-Sheikh du 1er juillet 2008, dispose en ces termes: '[l]a Cour siège en deux (2) Sections: la Section des Affaires générales composée de huit (8) juges et la Section des droits de l'homme composée de huit (8) juges'.

107 Voir les recueils de jurisprudence de la Cour africaine, volumes 1, 2, 3 et 4.

108 Toutes ces données sont disponibles et consultables sur le site de la Cour africaine des droits de l'homme et des peuples.

considérablement la portée de la protection accordée et empêche de lutter efficacement contre l'impunité sur le continent africain».[109] Or il n'y a pas d'Etat de droit au plan national ni d'«état de droit» supranational sans une protection juridictionnelle efficace des droits humains. Donc, l'Afrique a besoin d'une cour en mesure de garantir les droits humains sur le continent en assurant leur protection juridictionnelle à l'image de la Cour européenne des droits de l'homme et de la Cour interaméricaine des droits de l'homme. Si l'institutionnalisation de l'Etat vise la protection des personnes et leurs biens, alors toute institutionnalisation d'un collège d'Etats, telle que l'UA, doit garder cela à l'esprit.

Force est de constater que ce recul programmé de la protection des droits humains à l'échelle du continent africain est la conséquence de la création, en 2014, de la Section du droit international pénal à laquelle on a affecté six juges sur les 16 prévus par le Protocole de Malabo. Ce nombre aussi est lamentablement insuffisant et paradoxal.[110] D'un côté, le Protocole de 2014 trouve nécessaire de juger 14 différents crimes internationaux, et, de l'autre côté, il ne met que six juges à la disposition de la Section pénale pour faire face à cette large pénalisation du droit international africain que certains qualifient d'«outrancière».[111] Là aussi, une autre boîte de Pandore s'ouvre ne serait-ce qu'en se posant la question de savoir comment la Section du droit international pénal va-t-elle s'articuler avec les autres juridictions pénales étatiques et internationales à compétence universelles?

3.2 L'articulation de la Section pénale de la Cour africaine de justice avec d'autres juridictions pénales

Cette question sera examinée sous un angle purement procédural, car la création de la Section du droit international pénal, au sein de la Cour africaine de justice et des droits de l'homme, «pose le problème de coexistence avec des instances de justice pénale créées avant elle».[112] *Prima faciae*, la question semble être réglée dans la mesure où la Section pénale n'exerce qu'une «compétence complémentaire»[113] à celle des juridictions pénales nationales et, éventuellement, à celle des

109 FIDH 'L'UA adopte le Protocole sur la Cour africaine de justice et des droits de l'homme' (28 juillet 2008) https://www.fidh.org/fr/plaidoyer-international/union-africaine/cour-africaine-des-droits-de-l-homme-et-des-peuples/L-UA-adopte-le-Protocole-sur-la (consulté le 11 janvier 2022).

110 Amnesty International *Protocole de Malabo: incidences juridiques et institutionnelles de la Cour africaine issue d'une fusion et à compétence élargie* (2016) 28.

111 Sall (n 40) 134.

112 Sall (n 40) 134.

113 Selon le *Dictionnaire de droit international* publié en 2001, sous la direction de George Abi-Saab, la 'complémentarité', terme purement procédural, est le 'caractère accessoire d'un tribunal pénal international par rapport à celle des juridictions pénales nationales'. La compétence de complémentarité n'intervient que lorsque les juridictions nationales sont défaillantes dans l'exercice de leur

juridictions des communautés économiques quand cela est prévu, expressément, par ces communautés.[114] Ce qui signifie que la Section pénale (ou la Cour) est incompétente tant qu'une affaire est sous investigation, enquête ou a déjà fait l'objet de poursuite d'un Etat compétent en la matière.[115] Par contre, quand le(s) État(s) compétent(s) refuse(nt) d'engager des poursuites ou lorsqu'il(s) est/sont incapable(s) de le faire, la Section pénale peut mettre sa juridiction en œuvre à cet effet. Dans ce cas, le principe «*non bis in idem*»[116] doit être respecté.

A contrario, la question du conflit de compétence n'est pas totalement réglée en ce sens que, sur le plan *ratione materiae*, la Section pénale et la CPI sont toutes les deux compétentes pour traiter d'au moins quatre catégories de crimes internationaux: le «génocide»,[117] l'«agression»,[118] les «crimes de guerre»[119] et les «crimes contre l'humanité».[120] Elles ne sont pas des juridictions *ad hoc* étant donné qu'elles sont instituées pour fonctionner de manière permanente. Le Protocole de Malabo de 2014 n'a rien prévu sur la future relation de ces deux juridictions. La CPI a une compétence universelle tandis que la Section pénale africaine a une compétence régionale. La compétence universelle de la CPI se justifie par trois choses. D'abord cette juridiction n'est pas réservée à une seule région du monde comme c'est le cas de la Section pénale de la Cour africaine de justice et des droits de l'homme. Ensuite, sa compétence universelle est consacrée, *expressis verbis*, par le Statut de Rome de 1998. Les Etats parties étaient déterminés «dans l'intérêt des générations présentes et futures, à créer une cour pénale internationale permanente et indépendante reliée au système des Nations Unies, ayant compétence à l'égard des crimes les plus graves qui touchent l'ensemble de la communauté internationale».[121] Enfin, l'interdiction de la commission de crimes internationaux, qui entrent dans le champ matériel de la CPI, relève du *jus cogens*. Donc, même si la philosophie qui sous-tend la création de la Section pénale de la Cour africaine de justice et des droits de l'homme est d'éviter que les présumés criminels internationaux africains,[122] notamment les chefs d'Etat et de

compétence ou lorsque le 'délai raisonnable' est dépassé. Cependant, l'une des lacunes du droit international pénal réside dans le fait qu'il n'a pas prévu et défini la notion de 'délai raisonnable'. Ce qui fait que certains procès en rapport avec les crimes internationaux trainent anormalement dans certains États.

114 Protocole de Malabo du 27 juin 2014, Statut de la Cour africaine de justice, art 46H(1).

115 Art 46H(2).

116 Art 46I.

117 Statut de la CPI du 17 juillet 1998, art 6.

118 M Ouedraogo *Le crime d'agression en droit international contemporain*, Thèse de doctorat soutenue le 23 juillet 2021 devant les Université Thomas Sankara (Burkina Faso) et l'Université de Séville (Espagne).

119 Statut de la CPI du 17 juillet 1998, art. 8.

120 Statut de Rome relatif à la CPI du 17 juillet 1998, art 5.

121 Statut de la Cour pénale internationale du 17 juillet 1998, préambule.

122 *Questions concernant l'obligation de poursuivre ou d'extrader* (*Belgique c. Sénégal*), CIJ, arrêt du 20 juillet 2012, *Rec.* 2012.

gouvernement, soient traduits devant la CPI, rien n'empêche celle-ci de les poursuivre, surtout quand ces poursuites sont exigées par le Conseil de sécurité de l'ONU.

De surcroît, sur le plan *ratione personae*, plusieurs Etats africains ont déjà ratifié le Statut de Rome, texte fondateur de la CPI. Ces mêmes Etats sont également concernés par la ratification du Protocole de Malabo de 2014. Ainsi, dans la mise en œuvre de leurs compétences complémentaires respectives, la Section pénale et la CPI risquent, potentiellement, d'être confrontées à un conflit positif de compétence.[123] Ce conflit ne se limite pas à la relation entre la CPI et la Section pénale de la Cour africaine de justice et des droits de l'homme parce qu'un État (non africain), partie au Statut de Rome, peut, en vertu de sa compétence universelle et sur le fondement du principe *aut judicare aut dedere*, se saisir des crimes internationaux commis en Afrique.[124] En effet, les crimes internationaux – qualifiés de crimes graves – font partie des normes impératives du droit international qui s'appliquent, en théorie, à tous ses sujets internationaux. En contrepartie, la violation de ces normes devrait générer un intérêt pour agir «*erga omnes*»[125] en faveur de chacun d'eux.[126] C'est dans cette optique que la République démocratique du Congo soutenait en 2006 «que l'article 66 de la Convention de Vienne sur le droit des traités du 23 mai 1969 prévoit la compétence de la Cour pour régler les différends nés de la violation de normes impératives (*jus cogens*) en matière de droits de l'homme, telles que reflétées dans un certain nombre d'instruments internationaux».[127] Pour notre part, le *jus cogens*, pour garder sa teneur juridique,[128] doit produire ses effets tant sur le fond que sur la forme.[129] La juridiction universelle des États habilite chacun d'eux à engager des poursuites pénales à l'encontre des personnes

123 On parle de conflit positif de compétence lorsque deux ou plusieurs juridictions se déclarent compétentes pour connaître d'une même affaire.

124 *Questions concernant l'obligation de poursuivre ou d'extrader* (*Belgique c. Sénégal*), CIJ, arrêt du 20 juillet 2012, *Rec.* 2012.

125 Le *jus cogens* et l'*erga omnes* génèrent des 'obligations [...] envers la communauté internationale dans son ensemble [...]. Par leur nature même, [ces obligations] concernent tous les Etats. Vu l'importance des droits en cause, tous les Etats peuvent être considérés comme ayant un intérêt juridique à ce que ces droits soient protégés; les obligations dont il s'agit sont des obligations *erga omnes*. Ces obligations découlent par exemple, dans le droit international contemporain, de la mise hors la loi des actes d'agression et du génocide mais aussi des principes et des règles concernant les droits fondamentaux de la personne humaine, y compris la protection contre la pratique de l'esclavage et la discrimination raciale'. Voir *Affaire Barcelona Traction* (*Belgique c. Espagne*), CIJ, arrêt du 5 février 1970, *Rec.* 1970, para 33-34.

126 A Sylla 'La constitutionnalisation du droit international pénal' (2018) https://www.sfdi.org/wpcontent/uploads/2018/03/RJC-2017-SYLLA.pdf (consulté le 11 janvier 2023).

127 *Affaire des Activités armées sur le territoire du Congo* (*République démocratique du Congo c. Rwanda*), compétence et recevabilité, arrêt du 3 février 2006, Rec. 2006, para 1.

128 Le premier effet juridique du *jus cogens* réside dans son applicabilité *erga omnes*. Vouloir l'assujettir au respect des règles de formes, c'est ouvrir une échappatoire pour certains sujets de droit prônant la doctrine volontariste.

129 Sylla (n 126).

soupçonnées d'avoir commis des crimes dont la nature est réputée toucher l'ensemble de la communauté internationale, et aucun consentement n'est requis de la part d'aucun autre État ou juridiction internationale. C'est en ce sens que la répression universelle ou l'universalité du droit de punir est défini comme faculté accordée aux tribunaux répressifs de tous les États pour connaître d'un crime commis par un individu quelconque, en quelque pays que ce soit.

On comprend qu'au total, quatre catégories de juridictions pénales pourraient poursuivre le génocide, l'agression, les crimes de guerre et les crimes contre l'humanité commis en Afrique à savoir: les juridictions pénales de l'Etat territorial ou celle de l'Etat de nationalité des victimes et/ou des présumés criminels internationaux, la Section pénale de la Cour africaine de justice et des droits de l'homme en vertu de sa compétence de complémentarité, la CPI sur le fondement de sa compétence complémentaire et les juridictions d'un autre Etat partie au Statut de Rome et/ou au Protocole de Malabo de 2014 (compétence universelle des Etats parties au Statut de Rome de 1998 et/ou au Protocole de Malabo de 2014). On sait que la mise en œuvre de la compétence universelle revient aux États et à la CPI. Donc, la poursuite des criminels internationaux africains par la Section pénale de la Cour africaine de justice et des droits de l'homme empêchera-t-il la CPI et les autres Etats non africains de mettre leur compétence universelle en œuvre à l'égard de ces mêmes criminels?

Un autre problème auquel la Section pénal risque d'être sérieusement confrontée concerne les «amnisties». Le terme «amnistie» est une sorte de pardon légal qui éteint l'action publique, efface les peines déjà prononcées et empêche des éventuelles poursuites contre les présumés coupables de crimes nationaux et/ou internationaux. Au Mali, par exemple, le fondement du pouvoir réside dans la Constitution. Ainsi, «[t]out coup d'état ou putsch est un crime imprescriptible contre le peuple malien».[130] Cependant, pour se mettre à l'abri des poursuites judiciaires, les différents et successifs putschistes maliens ont toujours proposé ou adopté des lois d'amnisties. Dans une telle situation, quelle doit être l'attitude de la Section internationale pénale: sera-t-elle liée par les lois d'amnisties ou bien doit-elle poursuivre les crimes internationaux qui ont été effacés au plan national?

Cette question est très délicate. Si pour les autorités nationales, les crimes en cause ont été amnistiés ou réglés par le mécanisme de la «justice transitionnelle»,[131] elles pourraient refuser de coopérer avec la justice pénale internationale. Alors que pour la justice internationale, si les crimes internationaux ne sont pas sévèrement punis, ils risquent d'être perpétrés par d'autres criminels au sein ou en dehors de l'État concerné. Selon Paolo Benvenuti, la question d'amnistie avait été

130 Constitution malienne du 25 février 1992, para 3.

131 Voir A Barahona de Brito, P Aguilar, C González-Enríquez *The politics of memory: transitional justice in democratizing societies* (2001); K Ambos, J Large, M Wierda *Building a future on peace and justice: studies on transitional justice, peace and development. The Nuremberg Declaration on Peace and Justice* (2009).

soulevée lors de la Conférence de Rome de 1998 relative à la CPI, mais elle a été délibérément éludée (esquivée).[132] Selon lui, si une juridiction pénale nationale ne fonctionne pas en raison d'une amnistie liée à des crimes relevant de la compétence de la CPI, ces crimes doivent être traités conformément aux règles ordinaires concernant la recevabilité des affaires devant la juridiction de la CPI. Par conséquent, les crimes relevant de la compétence de la Cour appellent le Procureur à agir par le biais d'enquêtes et de poursuites.[133]

Par contre, le non-respect des «amnisties» par le juge international pénal pourrait être incompatible avec la justice transitionnelle – perçue comme l'ensemble des processus et des mécanismes associés à la tentative d'une société de faire face à l'héritage d'abus passés à grande échelle, afin d'engager la responsabilité des présumés coupables, de servir la justice et de parvenir à la réconciliation – car cela suppose que la justice transitionnelle ne doit pas accepter les amnisties qui sont liées aux principaux crimes relevant du droit international. Cette conception est confirmée par certains documents de l'ONU publiés dans le domaine de la justice transitionnelle. En effet, l'ONU soutient aussi bien la justice internationale pénale que la justice transitionnelle. Mais dans les deux rapports soumis par le Secrétaire général, à la demande du Conseil de sécurité, sur l'État de droit et la justice transitionnelle dans les sociétés en conflit ou post-conflits (2004 et 2011), il existe un rejet clair des amnisties liées au génocide, aux crimes de guerre, aux crimes contre l'humanité. Ainsi, dans la conclusion et les recommandations du rapport de 2011, par exemple, il est souligné la nécessité de «s'assurer que les accords de paix, les résolutions et les mandats du Conseil de sécurité [...] ont rejeté toute approbation de l'amnistie pour le génocide, les crimes de guerre, ou les crimes de droit international contenus dans certaines conventions internationales très importantes: la Convention sur le génocide (1948), les quatre Conventions de Genève (1949), la Convention des Nations Unies sur la torture (1984)».

Le Comité international de la Croix Rouge (CICR), quant à lui, soutient qu'aujourd'hui la poursuite des crimes les plus graves a acquis la valeur d'une obligation de droit international coutumier. C'est-à-dire que la pratique des États, établie comme norme de droit international coutumier applicable tant dans les conflits armés internationaux que non internationaux, oblige les États d'enquêter sur les crimes de guerre qui auraient été commis par leurs ressortissants ou leurs forces armées, ou sur leur territoire et, le cas échéant, de poursuivre les suspects. Ce qui revient à dire que les amnisties sont interdites en ce qui concerne les crimes internationaux. En conséquence, les États doivent poursuivre les criminels internationaux ou les extrader, ils ne peuvent pas se soustraire à cette obligation internationale en adoptant des lois d'amnistie quelle que soit la justification. Luis Miguel Gutiérrez Ramirez a bien résumé cette thèse en ces termes: «compte tenu de l'influence du droit international pénal et du droit international des

132 P Benvenuti 'Transitional justice and impunity' (2014) *International Studies Journal* 120.

133 Benvenuti (n 132) 120.

droits de l'homme, la justice transitionnelle est passée d'un modèle dans lequel les lois d'amnisties étaient privilégiées, ayant comme conséquence directe l'impunité, à un modèle dans lequel les sociétés doivent garantir les droits des victimes».[134]

Pour notre part, le conflit de compétence entre la Section pénale de la Cour africaine de justice et des droits de l'homme et les juridictions pénales nationales peut être tranché de deux façons. La première solution consiste à régler la question en amont, c'est-à-dire *a priori,* avant même qu'un tribunal ou une cour n'exerce sa compétence sur une affaire donnée. Pour ce faire, il s'agira d'insérer dans le Protocole de Malabo de 2014, à travers un amendement ou une révision, qu'au cas où la Section internationale pénale se saisit d'une affaire, les tribunaux pénaux nationaux doivent se dessaisir de cette affaire au profit la juridiction supranationale. Ce qui correspond, en quelque sorte, au principe de la primauté du droit international sur le droit interne. C'est cette solution que les rédacteurs des Statuts des Tribunaux pénaux internationaux respectivement pour l'ex-Yougoslavie et le Rwanda ont adopté en prévoyant la primauté de la compétence de ces deux juridictions sur celle des juridictions nationales.[135]

L'autre façon de résoudre cet éventuel conflit de compétence, qui pourrait intervenir entre la juridiction pénale continentale et ses homologues nationales, se passe en aval, après qu'une procédure pénale ait été enclenchée. Le juge international pénal pourrait opposer où évoquer le caractère impératif et intangible du «*jus cogens*»[136] contre les autorités ou juridictions nationales, parce qu'il est établi que la plupart des crimes internationaux (universels) entrent dans le champ du *jus cogens*. Or les normes de *jus cogens* universelles doivent être respectées *erga omnes*, en tout temps et en tout lieu. Donc, la Section internationale pénale africaine est censée, si le Protocole entre en vigueur, poursuivre les crimes internationaux (amnistiés ou non) commis en Afrique ou par des Africains, car il s'agit de normes impératives et transcendantales.[137] Par contre, si un État ne ratifie pas le Protocole de Malabo de 2014, peut-il être lié par le contenu de ce futur texte international africain. On sait qu'au plan universel, le Conseil de sécurité des Nations Unies peut demander au Procureur de

134 LM Gutiérrez Ramirez 'La constitutionnalisation de la justice transitionnelle' (2015) 34 *Revista Derecho del Estado* (2015) 119.

135 Voir les Statuts respectifs de ces deux juridictions *ad hoc*, art 8.

136 Selon l'article 53 de la Convention de Vienne sur le droit des traités du 23 mai 1969, le *jus cogens* est 'une norme impérative du droit international général acceptée et reconnue par la communauté internationale [...] dans son ensemble en tant que norme à laquelle aucune dérogation n'est permise et qui ne peut être modifiée que par une nouvelle norme du droit international général du même caractère'. Ainsi, tout traité ou toute loi contraire au *jus cogens* est nul.

137 Malheureusement, certains crimes internationaux sont punis parce qu'ils constituent des normes de *jus cogens*, tandis que d'autres crimes dorment tranquillement dans le nid de l'impunité.

la CPI d'ouvrir une enquête contre les ressortissants d'un État non-partie au Statut de Rome de 1998.[138] Est-il nécessaire de prévoir un tel mécanisme en Afrique en vue de lutter contre l'impunité? Dans l'affirmative, quel organe jouerait un tel rôle?[139]

4 CONCLUSION

L'avenir et le devenir de la Cour africaine sont en question parce qu'une incertitude quasi-totale plane sur le Statut de cette juridiction. D'un côté, les États africains tiennent coûte que coûte à modifier son texte fondateur initial, en l'occurrence le Protocole de Ouagadougou de 1998, en vue de mettre en place une et unique juridiction continentale à compétence générale dénommée Cour africaine de justice et des droits de l'homme et des peuples. De l'autre côté et, paradoxalement, aucun des deux Protocoles – qu'ils ont adoptés, à cet effet, respectivement en 2008 et en 2014 – n'a recueilli le nombre de ratifications requis pour entrer en vigueur. On se retrouve ainsi avec un verre à moitié plein (espoir) et à moitié vide (pessimisme), dans la mesure où en dépit de l'abrogation du Protocole de Ouagadougou de 1998 par le Protocole de Sharm El-Sheikh de 2008, la Cour africaine continue toujours de fonctionner.

Théoriquement, après avoir analysé les deux protocoles réformateurs, l'on se rend compte qu'ils créent plus de problèmes qu'ils n'en résolvent. Sur le plan de la composition de la Cour ainsi que de la protection des droits humains, par exemple, on est passé de 11 juges en 1998 à huit en 2008, puis à cinq juges en 2014. Au lieu qu'on avance avec l'amendement qui consiste à améliorer le texte, on a plutôt reculé. Quant à la Section du droit international pénal – à cause de laquelle tout cet imbroglio est arrivé, malgré sa création dans l'intention d'échapper à la CPI, elle n'est cependant pas opérationnelle pour le moment. Et même si elle l'était, les présumés criminels africains ne sauraient se mettre à l'abri de la compétence «universelle» et complémentaire de la CPI, sauf si les États parties au Statut de Rome acceptent de faire valoir leur compétence universelle en la matière. Enfin, la Section des affaires générales aussi, censée assurer la relève de la Cour de Justice de l'UA, se trouve dans la même situation de statuquo car elle attend – à son tour et tout comme les deux autres Sections – l'entrée en vigueur du Protocole de Malabo de 2014 qui amenda celui de 2008.

138 Ce cas de figure n'arrive que 'si une situation dans laquelle un ou plusieurs de ces crimes paraissent avoir été commis est déférée au Procureur par le Conseil de sécurité agissant en vertu du chapitre VII de la Charte des Nations Unies'. Voir Statut de Rome de 1998, art 13(b).

139 En réalité, plusieurs questions restent à régler pour avoir une juridiction ou un système juridictionnel fiable en Afrique. Si ce projet de création d'une juridiction pénale africaine est perçue, par certains, comme une avancée, les questions qu'il suscite – et non encore réglées – laissent d'autres personnes dubitatives.

Donc, la principale question qui reste en suspens est de savoir si la Cour africaine va survivre aux réformes successives intervenues avec l'adoption du Protocole de Sharm El-Sheikh et celui de Malabo?

Holding corporations liable for human rights abuses committed in Africa: the need for strengthening domestic remedies

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ABSTRACT: It has been two decades since the African Commission on Human and Peoples' Rights (Commission) rendered its landmark decision in *SERAC and CESR v Nigeria*. In this landmark judgment, and later in *IHRDA and Others v DRC,* the Commission explicitly affirmed states' obligation to investigate, prosecute and redress corporate human right abuses as part of the obligation 'to adopt legislative or other measures' under article 1 of the African Charter on Human and Peoples Rights (African Charter). Similarly, states' obligation to ensure a remedy for corporate human rights abuses is also one of the issues clarified under the 'Third Pillar' of the UN Guiding Principles on Business and Human Rights. However, as this obligation is not adequately translated into practice at the national level, corporate human rights abuses committed in Africa continue to be met with impunity and lack of access to effective remedy. Over the last several years, African victims who are denied justice in their domestic jurisdictions have increasingly been turning to home states of corporations to seek remedies. Victims' access to home state remedies has, however, been significantly restricted in recent years due to various legal barriers, particularly jurisdictional challenges. The article therefore aims to highlight the increasing restriction on African victims' access to home state remedies and show the need for strengthening domestic remedies in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Tenir les entreprises responsables des violations des droits de l'homme commises en Afrique: la nécessité de renforcer les voies de recours internes

RÉSUMÉ: Deux décennies se sont écoulées depuis que la Commission africaine des droits de l'homme et des peuples (Commission africaine) a rendu sa communication historique dans *SERAC et CESR c. Nigeria*. Dans cette communication, et plus tard dans celle intervenue en l'affaire *IHRDA et autres c. RDC*, la Commission a explicitement affirmé l'obligation des États d'enquêter, de poursuivre et de réparer les violations des droits de l'homme commises par les entreprises, en lien avec l'obligation 'd'adopter des mesures législatives ou autres' en vertu de l'article 1 de la Charte africaine des droits de l'homme et des peuples. De même, l'obligation des États de garantir la réparation des atteintes aux droits de l'homme commises par les entreprises est l'une des questions clarifiées dans le cadre du 'troisième pilier' des Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme. Cependant, comme cette obligation n'est pas suffisamment traduite dans la pratique au niveau national, les violations des droits de l'homme commises par les entreprises en Afrique continuent de bénéficier de l'impunité et d'un manque d'accès à un recours effectif. Au cours des dernières années, les victimes africaines qui se voient refuser l'accès à la justice dans leurs juridictions nationales se tournent de plus

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en plus vers les États d'origine des entreprises pour obtenir réparation. L'accès des victimes aux recours dans l'État d'origine est cependant considérablement limité ces dernières années en raison de divers obstacles juridiques, en particulier les défis juridictionnels. Cette contribution vise donc à mettre en évidence la restriction croissante de l'accès des victimes africaines aux recours de l'État d'origine et à montrer la nécessité de renforcer les recours internes en Afrique.

KEY WORDS: Africa, corporations, home states, remedy, UN Guiding Principles on Business and Human Rights

CONTENT:

1 INTRODUCTION

The involvement of corporations in human rights abuses in Africa has not started with the advent of economic globalisation in the1990s. Its genesis can be traced back to the colonial era. One of the legacies of colonialism include the exploitation of African natural and human resources by European companies.[1] However, the advent of economic globalisation in the 1990s has created a more permissive environment for corporate human rights abuses in Africa, by creating what John Ruggie called 'governance gap'.[2] On the one hand, following economic globalisation – the process of trade and investment liberalisation, privatisation, and deregulation[3] – corporations have become more global in their operations and more powerful economically.[4] On the other hand, the ability and willingness of states to manage the adverse impacts of corporations is continually waning.[5] This imbalance between the huge global impact of corporations and the limited capacity of states has created a 'governance gap' in preventing, investigating, prosecuting and redressing human rights abuses by corporations.[6]

Over the last thirty years, Africa has become one of the most preferred investment destinations, mainly for extractive and other

1 S Ratner 'Corporations and human rights: a theory of legal responsibility' (2001) 111 *Yale Law Journal* 443 at 545.

2 J Ruggie *Just business: multinational corporations and human rights* (2013) 70

3 H Ward 'Securing transnational corporate accountability through national courts: implications and policy options' (2001) 24 *Hastings International and Comparative Law Review* 451 at 452; Guiding principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Human Rights Council (21 March 2011) A/HRC/17/31(2011).

4 A McBeth *International economic actors and human rights* (2009) 245.

5 A Clapham *Human rights obligations of non-state actors* (2006) 8.

6 LC Backer 'Regulating multinational corporations: trends, challenges, and opportunities for multinational corporations' (2016) 22 *Brown Journal of World Affairs* 153 at 156.

labour-intensive manufacturing companies.[7] Indeed, the flow of foreign direct investments and the operation of corporations have hugely contributed for economic development, poverty reduction, and job creation in Africa. However, by taking advantage of lower labour and environment standards and weak systems of governance, and at times by colluding with repressive governments, corporations are directly and indirectly involved in wide-ranging human rights abuses in Africa. In an ongoing case in Canada, for example, Nevsun resources Ltd is accused of violating freedom from torture and cruel, inhuman, or degrading treatment; and freedom from forced or slave labour in Eritrea.[8] Shell's oil extraction in Ogoniland, Nigeria, also resulted in the violation of the right to health, the right to clean environment, and the right to dispose of wealth and natural resources.[9] In a recent lawsuit brought in the US, Nestle and Cargill, the world's biggest chocolate companies, are also accused of being indirectly involved in child slavery in cocoa farms in Ivory Coast.[10]

The concern is not just that corporations are widely and increasingly involved in human rights abuses in Africa, but also that abuses are often met with impunity and lack of access to remedy. On the one hand, as explained in the recent study on extractive industries, which is prepared by the Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI), states within whose territory abuses have been committed are often unable and/or unwilling to hold corporations accountable and provide remedies for victims.[11] On the other hand, judicial remedies in home states of corporations are becoming increasingly inaccessible due to various legal barriers. The article therefore argues that, unless domestic remedies are accorded due attention and strengthened, reliance on home state remedies will leave victims without remedy. In doing so, following this introductory section, Part 2 of the article discusses the duty of state parties to the African Charter to protect human rights from business activities. Part 3 highlights how domestic corporate accountability and remedy are currently rare in Africa. By discussing recent claims brought by African victims in different home states of

7 Ruggie (n 2) 15. John Ruggie rightly noted that 'extractive industries, such as oil, gas and mining, have always had to go where the resources were found, but by the 1990s they were pushing into ever more-remote areas, often inhabited by indigenous peoples who resisted their incursion, or operating in host countries engulfed by civil wars and other serious forms of social strife that marred that decade, particularly in Africa and parts of Latin America'.

8 *Araya v Nevsun Resources Ltd*, 2016 BCSC 1856.

9 *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria*, communication 155/96, Africa Commission on Human and Peoples' Rights (2002) (*SERAC v Nigeria*).

10 *Nestle USA, Inc. v Doe and Others*, 593 US (2021).

11 Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI) 'Background study on the operations of the extractive industries sector in Africa and its impacts on the realisation of human and peoples' rights under the African Charter on Human and Peoples' Rights' July 2021 https://www.achpr.org/public/Document/file/English/Extractive%20Studies%20&%20Human%20Rights%20Background%20Study%20Report_ENG.pdf (accessed 12 June 2022).

corporations, Part 4 seeks to highlight the increasing restriction on victims' access to home state remedies. Part 5 recommends how the UNGPs can be used as a guidance regarding what steps need to be taken by states to strengthen domestic remedies.

2 STATES' DUTY TO PROTECT HUMAN RIGHTS FROM BUSINESS ACTIVITIES

The African human rights system offers a unique legal basis to respond to human rights impacts of business activities. First, the African Charter, unlike other universal and regional human rights instruments that exclusively allocate human right obligations among states, provides the duties of individuals under article 27 to 29. In elaborating what this means regarding the responsibilities of business entities, the Commission indicated that 'if this obligation can be imposed on individuals, there is an even stronger moral and legal basis for attributing these obligations to corporations and companies'.[12] Second, the Malabo Protocol, although not yet entered into force, allows the African Court of Justice and Human Rights to assert criminal jurisdiction over corporations relating to a wide range of crimes.[13]

However, the Commission has neither articulated the responsibilities of corporations nor made explicit reference to UNGPs in its case laws and General Comments, despite these peculiarities and recent developments at the international level.[14] Instead, the Commission responded by comprehensively developing states' duty to protect human rights from business activities. Like the practice of other universal and regional treaty bodies, every right recognised under the African Charter gives rise to various interdependent correlative state

12 African Commission on Human & Peoples' Rights 'Advisory note to the African group in Geneva on the legally binding instrument to regulate in international human rights law, the activities of transnational corporations and other business enterprises (legally binding instrument)', https://www.achpr.org/public/Document/file/English/Advisory%20note%20Africa%20Group%20UN%20Treaty.ENG.pdf (accessed 15 June 2011).

13 See art 46 C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 27 June 2014.

14 This is without affecting attempts made by the Working Group on Extractive Industries, Environment and Human Rights Violations (WGEI) to articulate the human rights obligations of corporations, particularly in its explanatory note to State Reporting Guideline relating to Extractive industries, Human Rights and the Environment. In the section dealing with 'obligations of companies', the WGEI highlighted that 'while states are the primary obligation bearers under the African Charter, it is also legally recognised that corporations, particularly multinational ones, have obligations towards right holders. This obligation arises from the recognition that lack of such obligations may result in the creation of a human rights vacuum in which such entities operate without observing human rights.' See 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' https://www.achpr.org/public/Document/file/English/State%20reporting%20guidelines%20and%20principles%20on%20articles%2021%20and%2024_ENG.pdf (accessed 6 June 20220).

obligations: the duty to respect, protect and fulfill.[15] States' duty to protect human rights, which is also articulated under the first pillar of the UNGPs, requires states not only to prevent abuses committed by private actors, including corporations, but also to ensure legal accountability of business enterprises and access to effective remedy whenever abuses occur.[16]

The duty to protect human rights is often derived from article 1 of the African Charter on Human and Peoples' Rights (African Charter).[17] Under article 1 of the Charter, state parties undertake to 'adopt legislative or other measures to give effect' to rights recognised in the charter. The positive obligations of state parties', including the duty to protect, are considered to be embedded in state parties' explicit obligation to 'adopt legislative or other measures to give effect to [rights]' under article 1 of the Charter. By relying on the duty to protect human rights, the Commission, in several instances, held states responsible for failing to prevent and provide remedy for human rights abuse committed by private actors, including corporations.[18]

The obligation of state parties regarding corporate activities was directly and comprehensively addressed in the Commission's landmark decision in *SERAC and CESR v Nigeria*.[19] This communication was brought against the Nigerian government regarding human right violations committed by Nigerian National Petroleum Company (NNPC), owned by the government of Nigeria), and Shell Petroleum Development Corporation (Shell) in the process of production of petroleum in Ogoniland, Nigeria.[20] The complainants alleged that Nigeria is responsible for the abuses committed by these oil

15 South African Institute for Advanced Constitutional, Public, Human Rights and International Law 'The State Duty to Protect, Corporate Obligations and Extra-territorial Application in the African Regional Human Rights System' 17 January 2010 https://media.business-humanrights.org/media/documents/f6d9723bf8058ce0ee910577a969a61d3fc88b90.pdf (accessed 25 June 2022).

16 A Nolan 'Addressing economic and social rights violations by non-state actors through the role of the state: a comparison of regional approaches to the 'obligation to protect' (2009) 9 *Human Rights Law Review* 225 at 236.

17 In addition to art 1 of the African Charter, the duty to protect can also be derived from other substantive rights recognised in the Charter. For instance, Aoife Nolan argues that the obligation to protect can also be extrapolated from the requirements that states parties 'guarantee' the right to property (art 14), 'protect' the right to 'enjoy' the best attainable state of physical and mental health (art 16), and that the family 'shall be protected' (art 18(1)). See Nolan (n 19).

18 *Social and Economic Rights Action Center (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria*, communication 155/96, Africa Commission on Human and Peoples' Rights (2002); *IHRDA, ACIDH & RAID v DR Congo*, Communication 393/10, Africa Commission on Human and Peoples' Rights (2016). While *SERAC & CESR v Nigeria* and *IHRDA & Others v DRC* directly address states' obligation with regard to corporate activities, there are also other cases where the Commission addressed states' obligation to protect human rights from activities of other non-state actors. See *Nationale des Droits de l'Homme et des Libertes v Chad*, Communication 74/92, Africa Commission on Human and Peoples' Rights (1995). *Amnesty International & others v Sudan*, Communication 48/90-50/91-52/91-89/93, Africa Commission on Human and Peoples' Rights (1999).

19 *SERAC v Nigeria* (n 18).

20 *SERAC v Nigeria* (n 18) para 1.

corporations not only because it is directly involved by 'placing the legal and military powers of the state at the disposal of the oil companies', but also due to its failure to protect the Ogoni population from the harm caused by the activities of these oil corporations.[21]

One of the main issues that the Commission had to address was whether the African Charter requires Nigeria to take positive steps to protect human rights from corporate activities. In addressing this issue, the Commission first underlined that every right recognised in the Charter entails four layers of obligations: the duty to respect, protect, promote, and fulfill these rights.[22] Although all of these layers of obligations are relevant for the case in question, the duty to protect is particularly important. The Commission articulated what the duty to protect entails as follows:[23]

> The state is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realise their rights and freedoms.

In clarifying the content of the duty to protect, the Commission drew inspiration from *Vela'squez-Rodrguez* case of Inter-American Court of Human Rights and *X and Y v The Netherlands* of the European Court of Human Rights.[24] In *Velasquez Rodriguez v Honduras,* the Inter-American Court of Human Rights articulated how human right abuses by private actors could give rise to international state responsibility.[25] The Court stated:[26]

> An illegal act which violates human rights and which is initially not directly imputable to a state (for example, because it is the act of private person or because the person responsible has not been identified) can lead to international responsibility of the state, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.

By relying on these decisions, the *SERAC* jurisprudence pointed out that states are required to take positive steps to prevent abuses by corporations and ensure the provision of effective remedies.[27] Finally, the Commission found Nigeria in violation of the right to health (article 16), the right to dispose of wealth and natural resources (article 21), the right to a clean environment (article 24) and family rights (article 18(1)), including for its failure to take steps to prevent and remedy abuses committed by Shell.[28] The Commission appealed to the government of Nigeria, among others, to conduct an investigation and

21 *SERAC v Nigeria* (n 18) para 4-9.
22 *SERAC v Nigeria* (n 18) para 44.
23 *SERAC v Nigeria* (n 18) para 46.
24 *SERAC v Nigeria* (n 18) para 57.
25 *Velasquez Rodriguez v Honduras* (29 July 1988) Series C No 4.
26 *Velasquez Rodriguez v Honduras* (n 25) para 172.
27 *SERAC v Nigeria* (n 18) para 58.
28 *SERAC v Nigeria* (n 18) paras 59-69.

prosecute all those involved in the violation and ensure that remedy is provided to the victims of the human right violations.[29]

The state obligation to prevent and remedy corporate human rights abuses under the African Charter is similarly affirmed in *IHRDA and Others v DRC*.[30] Indeed, this communication was mainly related to human rights violations committed by the Congolese army while trying to prevent armed rebels from taking control of the town of Kilwa.[31] However, the complainants also alleged that DRC failed to investigate and prosecute Anvil Mining Company, a copper and silver mine operating 50 km away from Kilwa, for providing logistical support for the Congolese Army.[32] Accordingly, the Commission had to address whether DRC discharged its duty to protect Charter rights under article 1 of the African Charter. The Commission, by particularly relying on its earlier jurisprudence in *SERAC*,[33] found DRC in violation of article 1 of the Charter for failing to investigate, punish and redress the abuses committed by Anvil mining company. In this regard, the Commission stated that

> [the duty to protect] implies that the state takes all necessary measures to ensure protection against human rights violations by third parties, including corporations, the adoption of measures to prevent, investigate, punish, and provide reparations to victims.[34]

The state obligation to ensure remedy for corporate human right abuses is also affirmed in General Comments adopted by the Commission. Under General Comment 3 on the right to life, for instance, the Commission stated as follows:[35]

> The state also has an obligation to protect individuals from violations or threats at the hands of other private individuals or entities, including corporations. ...
>
> The state is responsible for killings by private individuals which are not adequately prevented, investigated or prosecuted by the authorities.[36]

General Comment 4 on the right to redress of torture victims also states that '[a]rticle 1 of the African Charter requires state parties to uphold the positive obligation to diligently prevent, investigate, prosecute and punish non-state actors who commit acts of torture and other ill treatment and to redress the harm suffered'.[37] In this General Comment, the Commission also reminded state parties to address legal and other practical challenges that stand in the way of punishing and

29 *SERAC v Nigeria* (n 18) the holding of the Commission.

30 *IHRDA v DR Congo* (n 18) para 3.

31 *IHRDA v DR Congo* (n 18) paras 3-14.

32 *IHRDA v DR Congo* (n 18) para 6.

33 *IHRDA v DR Congo* (n 18) para 101.

34 As above.

35 Africa Commission on Human and Peoples Rights, General Comment 3 (2015) on the Right to Life, para 38 https://www.achpr.org/public/Document/file/English/general_comment_no_3_english.pdf (accessed 26 June 2022).

36 General Comment 3 (n 35) para 39.

37 Africa Commission on Human and Peoples' Rights, General Comment 4 (2017) on the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment, para 73 https://www.achpr.org/public/Document/file/English/achpr_general_comment_no._4_english.pdf (accessed 26 June 2022).

remedying abuses committed by non-state actors.[38] Similarly, the Niamey Declaration, after reiterating that the primary responsibility to prevent and redress human rights abuses rests with states, requested states parties to put in place all necessary legislative and regulatory frameworks to prevent abuses by extractive industries, and ensure corporate accountability and remedy whenever human rights abuses occur.[39]

The obligation of states with regard to corporate activities is also addressed at sub-regional level by the ECOWAS Court of Justice in *SERAP v Nigeria*.[40] The plaintiff, Socio-Economic Rights and Accountability Project (SERAP), alleged the violations of various substantive rights by Nigeria and Oil companies because of the impact of oil-related pollution and environmental damage in the Niger Delta region.[41] In its analysis, the Court underscored that Nigeria is required to take 'concrete measures aimed at preventing the occurrence of damage or ensuring accountability, with the effective reparation of the environmental damage suffered'[42] as part of its obligation under article 1 of the Charter in conjunction with other substantive rights. However, due to its 'omission to act, to prevent damage to the environment and to make accountable the offenders, who feel free to carry on their harmful activities, with clear expectation of impunity',[43] Nigeria was found to have violated its obligation. While the Court articulated states' obligation with sufficient detail, it ruled that its jurisdiction does not extend to corporate defendants.

In summary, state parties to the African Charter assume an obligation to take all necessary steps to prevent, investigate, punish and redress corporate related human right abuses as part of their duty to protect human rights under article 1 of the African Charter. Put differently, failure to take all necessary steps, including having effective laws and regulations, to prevent and address business-related human rights abuses and ensure access to effective remedy for those whose rights have been abused constitutes a breach of states' obligations under article 1 of the African Charter.

3 LACK OF DOMESTIC CORPORATE ACCOUNTABILITY AND REMEDY

Having effective laws and regulations is an essential first step to prevent business-related human rights abuses and ensure effective remedy

38 General Comment 4 (n 37) para 75.

39 Africa Commission on Human and Peoples Rights, Resolution on the Niamey Declaration on Ensuring the Upholding of the African Charter in the Extractive Industries Sector - ACHPR/Res. 367 (LX) 2017.

40 *SERAP v Nigeria*, ECW/CCJ/APP/07/10, ECOWAS Court of Justice (10 December 2010).

41 *SERAP v Nigeria* (n 40) para 13.

42 *SERAP v Nigeria* (n 40) para 105.

43 *SERAP v Nigeria* (n 40) para 111.

whenever abuses occur. However, legislative efforts at the national level are currently inadequate. No African state has adopted or attempted to adopt specifically designed laws, either in the form of mandatory due diligence law or disclosure law, to respond to abuses committed by corporations. In recent years, mandatory due diligence laws which require companies to identify, prevent and mitigate human rights abuses, and non-observance of which entails legal liability, are considered to be an effective means of ensuring accountability and remedy in the realm of business and human rights.[44] Kenya and Uganda are the only African states that have so far adopted National Action Plans (NAPs) on business and human rights, which, although does not guarantee accountability and remedy, set out strategies to prevent and protect against human rights abuses by business enterprises.[45] Indeed, other African countries, such as Ghana, Nigeria, South Africa and Tanzania, have already begun the process of developing National Action Plans on Business and Human Rights.[46]

This does not, however, mean that there is no means to hold corporations accountable and provide remedy for victims. Human rights impacts caused or contributed by business activities give rise to causes of action in conventional tort law, labour law and common law duty of negligence in many jurisdictions.[47] The South African Constitution, for instance, not only allows the horizontal application of the bill of rights against non-state actors, including corporations, but also allows victims to bring human rights claims directly against private entities.[48] However, as the report of the first African Regional Forum on Business and Human Rights highlighted, private claims against corporations in Africa are rarely successful owing to various challenges, including lack of recognition of collective litigation; lack of financial support and legal assistance to victims and lack of well-functioning and

44 The concept of human rights due diligence is introduced in the UN Guiding Principles as means by which companies can discharge their responsibility to respect human rights. With a view to implement this responsibility of businesses to respect human rights, several states, particularly in Europe, are adopting binding domestic due diligence laws. France, for instance, has adopted a law on duty of vigilance that is a legally binding due vigilance obligation on companies. See LOI N° 2017-399 Du 27 Mars 2017 Relative Au Devoir de Vigilance Des Sociétés Mères et Des Entreprises Donneuses d'ordre, 2017-399 § (2017). Germany also adopted its Supply Chain Duty of Care Act in June 2021; Norway passed its Transparency Act in summer 2021. The Dutch adopted a Child Labour Due Diligence Law in 2020.

45 Relating to states who have already adopted NAPs and those who are in the process, see 'National Action Plans' https://www.ohchr.org/en/special-procedures/wg-business/national-action-plans-business-and-human-rights (accessed 14 June 2022).

46 As above.

47 J Ghai 'Kenya: Constitution, common law and statute in vindication of rights' in E Aristova & U Grusic (eds) *Civil remedies and human rights in flux: key legal developments in selected jurisdictions* (2022) 225*;* A Price 'South Africa: civil liability for Constitutional wrongs' in E Aristova & U Grusic (eds) *Civil remedies and human rights in flux: key legal developments in selected jurisdictions* (2022) 289.

48 'The Constitution of the Republic of South Africa, 1996' (as set out in sec 1(1) of the Citation of Constitutional Laws Act 5 of 2005).

independent legal machinery.[49] The report also indicated that companies are rarely subject to criminal law enforcement although causing or contributing to severe human rights abuses would amount to a crime in many jurisdictions. In effect, thousands of victims of corporate human rights abuses are often left without an effective remedy, and corporations are operating with impunity.

The prevailing remedy and accountability gap is mainly attributed to unwillingness or inability of states to enforce human rights against corporations. The unwillingness states may stem from the fear that corporations would withdraw or relocate their investments to another country where human rights enforcement is lenient.[50] As relocation or withdrawal of corporations means loss of capital, jobs, and technical expertise, developing states, whose main source of capital is foreign direct investment, could turn a blind eye to corporate human rights abuses.[51] The risk of being dragged to international arbitration could also be another reason behind host states' unwillingness to ensure remedy for corporate human rights abuses. Domestic litigation could lead to international arbitration against the host states based on bilateral investment treaties. Shell, for instance, recently brought an arbitration claim against Nigeria at ICSID after its appeal against a court order to pay compensation to a community for polluting land was rejected by Nigeria's Supreme Court.[52]

It should also be noted that corporate human rights abuses in Africa are often committed in complicity with respective governments.[53] One cannot plausibly expect that the state would investigate and prosecute a crime in which the state itself is implicated with.[54] Surya Deva noted that '... complicity makes the concerned state an interested party in enforcement of human rights, a fact which seriously hampers the possibility of making the involved MNC liable under the national regulatory mechanism'.[55] The experiences of the Ogoni people in Nigeria tells us that seeking redress and accountability in such situations is not only futile but even dangerous.

49 Report on the First African Regional Forum on Business and Human Rights, UN Human Rights Council (2 April 2015) A/HRC/29/28/Add.2 (2015).

50 Ratner (n 1) 543.

51 M Wescheka 'Human rights and multinational enterprises: how can multinational enterprises be held responsible for human rights violations committed abroad' (2006) 66 *Heidelberg Journal of International Law* 625 at 628.

52 *Shell Petroleum N.V. and The Shell Petroleum Development Company of Nigeria Limited v Federal Republic of Nigeria,* ICSID Case No. ARB/21/7 (10 February 2021).

53 S Joseph *Corporations and transnational human rights litigation* (2004) 3.

54 LJ McConnell 'Establishing liability for multinational corporations: lessons from Akpan' (2014) 56 *International Journal of Law and Management* 88 at 90.

55 S Deva 'Human rights violations by multinational corporations and international law: where from here' (2003) 19 *Connecticut Journal of International Law* 1 at 8.

Besides, corporate human rights abuses, including in Africa, are sometimes committed in the context of armed conflict and other forms of instability.[56] As noted by the SRSG, '[t]he most egregious business-related human rights abuses take place in conflict affected areas and other situations of widespread violence'.[57] Ensuring '[a] peaceful and secure Africa' is one of the seven aspirations that the AU Agenda 2063 seeks to deliver. With a view to achieve this aspiration, the AU, through 'Silencing the Guns in Africa by 2020' campaign, has been working to end all wars, conflict and gender-based violence, and to prevent genocide. However, save for the overall improvements in the peace and security situation in Africa compared to the 1990s, several countries continue to experience armed conflict and other various forms of violence. As the commentary to principle 7 of the UNGPs indicated, states in such conflict-affected situations cannot adequately protect human rights due to lack of effective control.[58] Successive reports of the SRSG similarly highlighted states' inability to protect and remedy abuses committed in conflict-affected areas. In the 2008 report, for instance, it was noted that '[t]he human rights regime cannot function as intended in the unique circumstances of sporadic or sustained violence, governance breakdown, and absence of the rule of law'.[59]

No matter what lies behind, the duty to protect human rights from business activities is not adequately implemented at the domestic level. On the one hand, states lack effective legal and institutional framework necessary to ensure victims' access to civil remedies and to hold corporations accountable for abuses resulting from their activities. On the other hand, there is a lack of capacity and political will to enforce the existing laws against corporations.

56 R Mares 'Corporate and state responsibilities in conflict-affected areas' (2014) 83 *Nordic Journal of International Law* 293 at 345; Radu Mares reminds us that emblematic cases of corporate unaccountability in Africa have appeared in unstable and violence-ridden zones: Talisman in a Sudan gripped by civil war; Shell in Nigeria during a military dictatorship which committed gross human rights violations.

57 Report of SRSG on Business and human rights in conflict-affected regions: challenges and options towards state responses, UN Human Rights Council (27 May 2011) A/HRC/17/32(2011).

58 UNGPs (n 3) Commentary to principle 7; See also V Bernard & M Nikolova 'Interview with John G Ruggie' (2012) 94 *International Review of the Red Cross* 891 at 892, In this interview, John Ruggie highlighted that 'Conflict zones are particularly problematic because nobody can claim that the human rights regime, as it is designed, can possibly function in a situation of extreme duress for the host state. Though it technically has the primary obligation to protect human rights, in times of armed conflict the host state is typically either not functioning, does not control a particular part of a country, or is itself engaged in human rights violations'.

59 Report of the SRSG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Human Rights Council (7 April 2008) A/HRC/8/5/ (2008) para 47.

4 INCREASING RESTRICTIONS ON ACCESS TO HOME STATE REMEDIES

Unable to seek and obtain remedy in their domestic jurisdictions, African victims of corporate human rights abuses are increasingly turning to home states of corporations.[60] *Association canadienne contre l'impunité v Anvil Mining* and *Araya v Nevsun Resources Ltd* in Canada, *Kiobel v Royal Dutch Petroleum* in the US, *Lungowe v Vedanta* and *Okpabi v Royal Dutch Shell plc* in the UK are among the recent claims brought by African victims in the respective home states of corporations. Indeed, home states of corporations, often developed nations with independent, efficient, and better equipped judicial mechanisms, can bridge the prevailing remedy and accountability gap by serving as a potential venue for victims to seek and obtain remedy for corporate human rights abuses committed abroad, including in Africa.

However, in recent years, the ability of victims to access and seek remedies in home states of corporations are increasingly restricted, mainly due to legal barriers. Claims brought by African victims in home states of corporations rarely reach the merit stage of the trial. As recent cases demonstrate, claims involving overseas corporate human rights abuses, including those brought by African victims, are routinely dismissed for lack of jurisdiction. Even when the jurisdiction of the court is successfully established, home states courts could also decline jurisdiction on the ground of *forum non conveniens*. How claims brought by African victims in home states of corporations are increasingly dismissed is a testament how home states remedies have become inaccessible.

Kiobel v Royal Dutch Petroleum Co best explains how the ability of victims of corporate human rights abuses to bring claims is significantly restricted in the US. In this case, a group of Nigerian nationals filed a suit in federal court under the Alien Tort Statute (ATS), alleging that the respondent corporations aided and abetted the Nigerian Government in committing violations of the law of nations in Nigeria. ATS grants jurisdiction to federal district courts over claims brought by foreign plaintiffs alleging the violation of the law of nations, regardless of where the violation occurred.[61] The central question that the Supreme Court had to answer was 'whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States'.[62] In answering this, the Supreme Court held that ATS applies only to claims that 'touch and concern the territory' of the United States 'with sufficient force'.[63] As all the relevant conduct in this

60 The term 'home state' is intended to refer to the state within whose territory the parent company is domiciled. A company is considered to be domiciled in a state where it is incorporated or has its principal place of business or central administration.

61 Alien Tort Statute 28.

62 *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013).

63 *Kiobel v Royal Dutch Petroleum Co* (n 62) p.1669.

case took place outside of the United State, the Supreme Court dismissed victims' claim. More recently, the Supreme Court, by relying on its decision on *Kiobel v Royal Dutch Petroleum Co*., similarly dismissed a lawsuit brought against Nestlé USA, Inc, and Cargill, Inc, the biggest chocolate companies, by Six Malian en who were trafficked and forced to work on cocoa farms in Ivory Coast.[64]

Kiobel v Royal Dutch Petroleum Co, in effect, restricted federal courts' jurisdiction over claims alleging the violations of the law of nations committed outside of the United States. Before *Kiobel,* federal courts were able to assert jurisdiction regardless of where the act giving rise to the claim occurred, as long as victims' claims relate to the violation of the law of nations. However, in *Kiobel*, the Supreme Court limited the jurisdiction of courts under ATS only to those claims which have sufficient ties with the US. In consequence, victims can no longer bring claims involving overseas corporate human right abuses under ATS unless it 'touch and concern the territory of the United States … with sufficient force.' Although the court failed to delineate factors that could meet the 'touch and concern' test, it nevertheless made one thing clear; the 'mere presence' of a business in the United States would not be enough to meet the 'touch and concern' test.[65] Accordingly, by restricting the jurisdiction of courts under ATS, the Supreme Court's decision in *Kiobel* presented insurmountable barriers to victims seeking to access remedies in the US through ATS.

Association canadienne contre l'impunité v Anvil Mining is a claim brought in Canada against Anvil Mining relating to its alleged role in facilitating and supporting the military repression of an uprising in the town of Kilwa, DRC, which is located 50 kilometres from Anvil's mining operations.[66] However, the claim brought against Anvil mining in Canada had no connection with Canada, except that Anvil had an office in Quebec. Accordingly, Anvil had argued that the Court of Quebec lacks jurisdiction to hear the claim. It also alternatively submitted that, if the court concluded that it has jurisdiction over the claim, it should nevertheless decline jurisdiction on the ground of *forum non conveniens*. Hence, the court had to determine whether Anvil's activities from its Quebec office were enough to establish jurisdiction over a claim relating to abuse committed in Congo.

Initially, the Superior Court of Quebec had decided that it has jurisdiction to hear the case. In its analysis, the Court stated that it could exercise jurisdiction as far as the activities that Anvil undertook in Quebec are related to the underlying dispute. This implies that Anvil's activities in Canada do not need to directly cause the underlying dispute for the Court to assert jurisdiction. The Court noted that, as the mining operation in the DRC is the main, if not the only activity of

64 *Nestle USA, Inc v Doe and Others* (n 10).

65 *Kiobel v Royal Dutch Petroleum Co* (n 62) 1669.

66 *Canadian Association Against Impunity (CAAI) v Anvil Mining Ltd* 2011 QCCS, 500-06-000530-101.

Anvil, activities it undertook from its Quebec office is necessarily connected with its mining operation in DRC.[67] Accordingly, the court concluded that it could assert jurisdiction over a claim brought against Anvil regarding abuse committed in DRC.

However, the decision was later overturned by the Quebec Court of Appeal.[68] The Court of Appeal stated that although Anvil had an establishment in Quebec, its activities were limited to investor relations, it had nothing to do with the underlying dispute.[69] According to the analysis of the Quebec Court of Appeal, that Anvil's activities in Canada were related to the dispute is not enough to establish the 'real and substantial connection' test. For the Court Appeal, the 'real and substantial connection' test cannot be satisfied unless Anvil's activities in Canada directly caused the underlying dispute. Hence, according to the Court of Appeal, there was no real and substantial connection since Anvil's Quebec office was not involved in the decision that led to the abuse.[70] In sum, the narrow interpretation employed by the Court of Appeal restricted victims' access to Canadian courts and to seek remedies.

Indeed, the recent landmark decision of the Supreme Court of Canada on *Nevsun Resources Ltd v Araya* would to some extent open Canadian courts to claims involving overseas human rights abuses of Canadian corporations. This claim was brought against Nevsun Resources Ltd, a mining company headquartered in Vancouver, by Eritrean nationals who alleged that they were indefinitely conscripted under Eritrea's National Service Program into working at the Bisha Mine in Eritrea, 60% of it is owned by Nevsun, where they faced cruel, inhuman, and degrading treatment.[71] As there is no law comparable to ATS in Canada, the claim was brought based on customary international law 'as incorporated into the law of Canada,' and domestic torts of battery and unlawful confinement.[72]

Nevsun had motioned to strike out the claim on several grounds.[73] However, the Supreme Court allowed the claim to proceed by dismissing Nevsun's motion. Particularly important is that the Supreme Court recognised the possibility that corporations could be held liable for violations of human rights norms recognised in customary international law.[74] This does not, however, mean that the Supreme Court cleared all legal hurdles. First, the Supreme Court did not definitively say that corporations can be held liable for violations of human rights norms recognised in customary international law. Instead, it allowed the case to proceed so that the trial judge could

67 *CAAI v Anvil Mining Ltd* (n 69) para 29.
68 *Anvil Mining Ltd. v Association canadienne contre l'impunité,* [2012] QCCA 117.
69 *Anvil Mining Ltd. v Association canadienne contre l'impunité* (n 68) para 83.
70 *Anvil Mining Ltd. v Association canadienne contre l'impunité* (n 68) para 93.
71 *Araya v Nevsun* (n 8) paras 1-2.
72 *Araya v Nevsun* (n 8) para 42.
73 *Nevsun Resources Ltd. v Araya,* 2020 SCC 5 (CanLII).
74 *Nevsun v Araya* (n 73) para 104-113.

decide on the issue. Second, victims would still face other hurdles, including challenges based on the principle of limited liability.

The situation in the UK is not any different. Indeed, UK Supreme Court recently decided that UK courts cold assert jurisdiction over *Lungowe v Vedanta*[75] and *Okpabi v Shell*.[76] However, these two cases explain how in exceptional cases that UK courts are open for claims involving overseas human rights abuses. *Lungowe v Vedanta,* for example, is an action brought by Zambian victims against UK-domiciled mining corporation Vedanta Resources Plc (Vedanta) and its Zambian subsidiary Konkola Copper Mines (KCM) regarding environmental pollution committed in Zambia.[77] According to article 4 of the Brussels Regulation, which still governs the jurisdiction of UK courts regarding cross border cases filed before Brexit, UK courts are competent to adjudicate claims brought against parent companies domiciled within the territory of the UK, regardless of where the abuses had been committed. Accordingly, victims' claims against parent companies face no jurisdictional challenge in both *Lungowe v Vedanta* and *Okpabi v Shell*.

The problem, however, is when victims bring claims against foreign subsidiary companies instead of or in addition to the parent companies, as is the case with *Lungowe v Vedanta* and *Okpabi v Shell*. UK courts cannot exercise jurisdiction over claims brought against foreign subsidiary corporations unless it is a 'necessary or proper party' to the claim brought against a UK-domiciled parent company.[78] This aims to ensure that related claims are jointly adjudicated so as to avoid conflicting judgments. However, whenever victims attempt to establish jurisdiction through a 'necessary or proper party', defendants often argue that the claim against the parent company in the UK is used as an illegitimate hook to permit action against subsidiary companies to be heard in the UK. In *Lungowe v Vedanta,* for example, defendants argued that the claim brought against the parent company (Vedanta) is illegitimately used as 'a device in order to ensure that the real claim, against KCM, is litigated in the United Kingdom rather than in Zambia'.[79]

Accordingly, claimants need to establish that they have an arguable claim against the parent company and that the subsidiary company is a 'necessary or proper party' to the claim brought against the parent company, which is often difficult to establish at the early stage of the proceeding. Indeed, in *Lungowe v Vedanta* and *Okpabi v Royal Dutch Shell*, the Supreme Court has decided that jurisdiction could be asserted over claims brought against foreign subsidiary companies since claimants managed to establish that they have arguable related claims against the UK domiciled parent company. Save these exceptional cases, UK courts are not open for victims claims brought

75 *Okpabi & others v Royal Dutch Shell Plc and Another* [2021] UKSC 3

76 *Vedanta Resources Plc & Another v Lungowe and Others* [2019] UKSC 20.

77 *Vedanta v Lungowe* (n 76) para 1.

78 *Vedanta v Lungowe* (n 76) para 20.

79 *Vedanta v Lungowe* (n 76) para 51.

against subsidiary companies operating and committing human rights abuses in Africa.

As the preceding discussion explains, jurisdictional barriers are the main legal hurdles that make home states' courts inaccessible or leave Africa victims of corporate human rights abuses without remedy even after long litigations. However, victims also face other legal barriers, including challenges on the ground of the principle limited liability, particularly regarding their claim brought against the parent companies based in home states. These legal barriers coupled with other practical barriers, including high financial cost to travel to attend proceedings, translate documents, and transport witnesses and evidence to another country, render home state remedies highly inaccessible and inconvenient for victims of corporate human rights abuses committed in Africa.

This does not, however, mean that there are no legislative and judicial developments in some jurisdictions that have the purpose and/or effect of facilitating victims' access to home states remedies. The Hague Court of Appeals decision in *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc* is, for instance, an important judicial development in improving the ability of victims', particularly those who are affected by the operation of subsidiary companies in Africa, to seek and obtain remedy from parent companies in home states.[80] Victims cannot automatically hold parent companies liable for abuses committed by their subsidiary companies because of the principle of limited liability, a corporate law principle recognised in almost all states. One of the ways of circumventing the barrier of the principle of limited liability is bringing claims against parent companies based on breach of the duty of care.

In this case, claimants argued that Royal Dutch Shell (RDS), headquartered in The Hague, Netherlands, failed to take due care to prevent and mitigate oil spill by its subsidiary company, SPDC, in Nigeria.[81] So, the main issue addressed in the judgment is whether RDS owed a duty of care to victims of its subsidiary company, SPDC. By applying Nigerian common law, the law of a state in which a damage occurred, the court decided that RDS owed a duty of care to the victims affected by the Oil spill by its subsidiary company, SPDC.[82] In effect, by recognising and enforcing parent companies' duty of care, the judgment enabled victims to circumvent the principle of limited liability and claim redress from parent companies.

Particularly notable legislative development is the adoption of the French law on duty of vigilance in 2017.[83] Companies falling within the scope of the law are required to conduct due vigilance relating to risks arising not only from their own activities but also the activities of other companies which it directly or indirectly exercises control as well as

80 *Four Nigerian Farmers and Stichting Milieudefensie v Royal Dutch Shell plc*, ECLI:NL: GHDHA: 2021 :132 :133.

81 *Milieudefensie v Royal Dutch Shell plc* (n 80) 2.1.

82 *Milieudefensie v Royal Dutch Shell plc* (n 80) 7.24.

83 *Au Devoir de Vigilance* (n 44).

subcontractors and suppliers.[84] Besides, companies will incur civil liability for human right abuses committed by their activities, subsidiaries and business partners if it is caused or contributed by a breach of the duty of vigilance. This means the law enables victims to hold French based companies, falling within the scope of the law on duty of vigilance, liable for business related human rights abuses committed anywhere in the world, including in Africa, as far as the damage has a causal link with the breach of the duty of vigilance. However, the law is criticised for failing to allow third parties to bring civil actions against the parent companies on behalf of victims. Only the victims themselves have the standing to sue the French based parent companies. This presents a barrier to victims', particularly overseas victims', to access French courts.[85]

5 THE NEED FOR STRENGTHENING DOMESTIC REMEDIES

No doubt that seeking remedies in states within whose territory the abuse has been committed is more convenient and less expensive. Besides, as noted in the EU's intervention in *Kiobel*, '[a]as opposed to 'remote justice', such 'in-country justice' may be more likely to inspire accountability in the afflicted nation, and, where needed, to generate remedial reforms'.[86] However, despite the inconvenience and the cost involved, victims of corporate human rights committed in Africa will continue to turn to the home states of corporations unless effective remedies are made available in their domestic jurisdictions.[87] Asked what drives their attempt to hold Shell accountable in the UK, King Emere Godwin Bebe Okpabi, plaintiff in *Okpabi v Royal Dutch Shell* representing the Ogale Community, once told the AFP that 'Shell is Nigeria and Nigeria is Shell … You can never, never defeat Shell in a Nigerian court. The truth is that the Nigerian legal system is corrupt.'[88]

84 *Au Devoir de Vigilance (*n 44) article 1.

85 S Brabant & E Savourey 'France's corporate duty of vigilance law: a closer look at the penalties faced by companies' (2017) 50 *Revue Internationale De La Compliance Et De L'éthique des Affaires*.

86 'Brief of the European Commission on Behalf of the European Union as Amicus Curiae in Support of Neither Party in *Esther Kiobel v Royal Dutch Petroleum co*., et al', 13 June 2012 https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf (accessed 14 June 2022).

87 JP Mujyambere 'The status of access to effective remedies by victims of human rights violations committed by multinational corporations in the African Union Member State' (2017) 5 *Groningen Journal of International Law* 255 at 259.

88 'A Nigerian King is taking Shell to court in London over oil pollution' 22 November 2016, https://www.businessinsider.com/afp-polluted-water-in-hand-nigerian-king-takes-shell-to-court-in-london-2016-11?r=US&IR=T (accessed 6 July 2022).

It should also be noted that the primary responsibility to prevent and remedy corporate human rights rests on states within whose territory the abuse has been committed.[89] While home states have an essential role to play, whether they assume obligation with regard to overseas operations of their corporate nationals remains contentious under international human rights law.[90] The UNGPs, for instance, adopted a position that '[s]tates are not generally required under international human rights law to regulate the extra-territorial activities of business domiciled in their territory or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis'.[91] According to the UNGPs, unless home states take necessary steps to prevent and remedy overseas corporate human rights abuses out of domestic policy considerations, they are not required as a matter of obligation under international human rights law.

Thus, instead of relying on home states remedies, which are proved to be inaccessible in many cases, and whose availability is dependent on states' domestic policy considerations, it is time to look inwards and focus on strengthening domestic remedies. As discussed in section 2, states duty to protect human rights from business activities, including the duty to provide remedy, has been clearly articulated in the Commission's jurisprudence and General Comments. However, no guidance has been provided as to the content of the obligation and how states should discharge their obligation within domestic legal order.

Strengthening domestic remedies depends on a range of practical steps that aim to address the existing deficiencies in implementing the obligation to provide remedy for corporate human rights abuse. In this regard, the UNGPs provides important guidance as to how states can strengthen domestic remedial and accountability mechanisms. The UNGPs, for instance, highlighted that remedy and accountability cannot be effectively provided unless procedural, legal, and other related barriers are removed or reduced. Accordingly, under principle 26, states are called on to 'reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.'[92] It also states that procedural and practical barriers that prevent cases from being brought to the court include, among others, court fees, restrictive standing rules, absence of reasonable accommodation, lack of need-based legal aid, and inadequate options for aggregating claims or

89 It should be noted that international human rights law, as a system underpinned by the Westphalian paradigm, mainly relies on the role of states to protect, respect and ensure rights within their respective territories. In this regard, The Kigali Declaration, the 1st African Union (AU) Ministerial Conference on Human Rights in Africa, also expressly stated that the primary responsibility for the promotion and protection of human rights rests with member states.

90 T Thabane 'Weak extraterritorial remedies: the achilles heel of ruggie's protect, respect and remedy' framework and guiding principles' (2014) 14 *African Human Rights Law Journal* 43 at 50.

91 UNGPs (n 3) Commentary to principle 2.

92 UNGPs (n 3) Principle 26.

enabling representative proceedings (such as class actions and other collective action procedures).[93] Addressing these issues are paramount to improve victims' access to remedy considering the uneven levels of legal protection and inequalities in the ability of victims to access justice against corporations.[94]

Besides, states also need to take steps to improve the functioning of judicial and law enforcement mechanisms. One of the main challenges in ensuring corporate remedy and accountability is lack of independent and well-functioning judicial and prosecution mechanisms.[95] In this regard, the UNGPS reminds states of the need to equip prosecutors and the judiciary with adequate resources, expertise, and other relevant support to meet the obligations to investigate and prosecute individual and business involvement in human rights-related crimes.[96] It also highlights the need to ensure that corporate accountability and remedy is not prevented by corruption and political pressures from other state agents.[97] Similarly, the State Reporting Guidelines and Principles relating Extractive Industries also indicates that the obligation to provide remedy 'entails that judicial and non-judicial grievance mechanisms are put in place and that such mechanisms are adequately equipped and resourced for handling cases involving extractive industries'.[98] One of the recommendations of the Working Group on business and human rights to the African states, following the first African Regional Forum on Business and Human Rights, was also 'to meet their duty to ensure access to effective remedy, through judicial and non-judicial mechanisms, including by addressing barriers to access to justice and strengthening the independence and capacity of the judiciary'.[99]

It is also worth stressing that ensuring a remedy for victims of business-related human right abuses is the primary impetus behind the ongoing effort to adopt a binding treaty on business and human rights. During the first two sessions of Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIGWG),[100] which were dedicated to hold broad discussions on the content and scope of the prospective treaty, the issue of access to remedy was a central theme of

93 UNGPs (n 3) Commentary to principle 26.
94 Report on the First African Regional Forum (n 50) para 32.
95 Study on Extractive Industries (n 14) 44.
96 UNGPs (n 3) Commentary to principle 26.
97 UNGPs (n 3) Commentary to principle 26.
98 Reporting Guidelines (n 14) para 24.
99 Report on the First African Regional Forum (n 50) section X (J).
100 Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', UN Human Rights Council (14 July 2014) /HRC/RES/26/9(2014).

discussion.[101] Various provisions that aimed to ensure remedy for business related human rights abuses are included in successive versions, including the latest version, of the draft legally binding treaty.[102] Indeed, whether the ongoing treaty process could yield a viable binding instrument is very much doubted due to the absence of consensus among stakeholders. However, the attention accorded to the issue of access to remedy in the ongoing treaty process could give impetus and guidance for domestic efforts in strengthening remedies for corporate human rights abuses.

6 CONCLUSION

No doubt that home states of corporations have an important role to play in ensuring remedy and accountability for human rights abuses committed in Africa. However, due to various legal and practical barriers, home state remedies have become increasingly inaccessible in recent years. Accordingly, unless state parties to the African Charter translate their obligation in practice and strengthen domestic remedies, victims of corporations will be left without remedy and corporations will continue to operate with impunity. Addressing the existing deficiencies and ensuring remedy and accountability mainly depends on various concerted practical steps at the national level. However, at the regional level, the Commission and other entities should take the lead and accord due attention to corporate remedy and accountability in their works, including in the ongoing work related to the African Union policy framework on business and human rights. This could be done by issuing guidance, including by drawing inspiration from the UNGPs and OHCHR guidance,[103] as to what practical steps states need to take to implement their obligation and ensure corporate remedy and accountability.

101 About the first and the second session of the OEIGWG, see C Lopez & S Ben 'Negotiating a Treaty on Business and Human Rights: a Review of the First Intergovernmental Session' (2016) 1 *Business and Human Rights Journal* 111–116; C Lopez 'Struggling to take off?: the second session of intergovernmental negotiations on a treaty on business and human rights' (2017) 2 *Business and Human Rights Journal* 365-70.

102 'Third Revised Draft of Legally Binding Instrument to Regulate the Activities of Transnational Corporations and Other Business Enterprise', 17 August 2021 https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf (accessed 25 July 2022).

103 Report of the United Nations High Commissioner for Human Rights: Improving accountability and access to remedy for victims of business-related human rights abuse, UN Human Rights Council (10 May 2016) A/HRC/32/19 (2016).

II

SPECIAL FOCUS ON THE AFRICAN UNION'S THEME FOR 2022: STRENGTHENING RESILIENCE IN NUTRITION AND FOOD SECURITY ON THE AFRICAN CONTINENT: STRENGTHENING AGRO-FOOD SYSTEMS, HEALTH AND SOCIAL PROTECTION SYSTEMS FOR THE ACCELERATION OF HUMAN, SOCIAL AND ECONOMIC CAPITAL DEVELOPMENT

FOCUS SPÉCIAL SUR LE THEME DE L'UNION AFRICAINE POUR L'ANNEE 2022: RENFORCER LA RÉSILIENCE EN MATIÈRE DE NUTRITION SUR LE CONTINENT AFRICAIN: ACCÉLÉRER LE DÉVELOPPEMENT DU CAPITAL HUMAIN ET DE L'ÉCONOMIE SOCIALE

Poverty, policies, and politics: a rights-based approach to food insecurity in Africa

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ABSTRACT: Food and nutrition insecurity remain serious African concerns, reflecting government failure to meet global and regional human rights obligations to assure food availability, accessibility, utilisation, stability, sustainability, and agency. According to recent data, more than one-third of people facing severe food insecurity around the world live in Africa. The numbers may continue to rise in the absence of deliberate and human rights-centred solutions. The second biennial review report of the African Union on the Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods conceded that the continent is not on track to meet the targets set out in the Declaration to end food insecurity and improve nutrition. This article investigates and advocates for a human rights-based approach to food and nutrition security. It highlights the critical links between the six main elements of food security, namely, availability, access, utilisation, stability, agency, and sustainability, and the normative obligations of states on the right to food and its interdependence with other fundamental human rights. It critically analyses the available legal frameworks on addressing food insecurity and its challenges, and proposes a human rights-based approach.

TITRE ET RÉSUMÉ EN FRANCAIS:

Pauvreté, programmation, et politique: une approche de l'insécurité alimentaire en Afrique basée sur les droits de l'homme

RÉSUMÉ: L'insécurité alimentaire et nutritionnelle demeure une préoccupation importante en Afrique, reflétant l'incapacité des gouvernements à respecter les obligations internationales et régionales en matière de droits de l'homme pour assurer la disponibilité, l'accessibilité, l'utilisation, la stabilité, la durabilité et la responsabilité alimentaires. Selon des données récentes, plus d'un tiers des personnes confrontées à une grave insécurité alimentaire dans le monde vivent en Afrique. Ces chiffres pourraient continuer à augmenter en l'absence de solutions délibérées et axées sur les droits de l'homme. Le deuxième rapport d'examen biennal de l'Union africaine sur la Déclaration de Malabo sur la croissance agricole accélérée et la transformation pour une prospérité partagée et l'amélioration des moyens de subsistance a indiqué que le continent n'est pas sur la bonne voie pour atteindre les objectifs fixés dans la Déclaration en vue de mettre fin à l'insécurité alimentaire et améliorer la nutrition. Cette contribution étudie et plaide pour une approche de la sécurité alimentaire et nutritionnelle fondée sur les droits de l'homme. Il souligne les liens essentiels entre les six principaux éléments de la sécurité alimentaire, à savoir la disponibilité, l'accès, l'utilisation, la stabilité, la responsabilité et la durabilité, et les obligations normatives

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des États en matière de droit à l'alimentation et son interdépendance avec d'autres droits humains fondamentaux. Il analyse de manière critique les cadres juridiques disponibles pour faire face à l'insécurité alimentaire et à ses défis, et propose une approche fondée sur les droits de l'homme.

KEY WORDS: food security, human rights interdependence, right to food and nutrition, 2014 Malabo Declaration

CONTENT:

1 INTRODUCTION

There is a growing recognition that food system challenges, embedded in political-economic challenges, are key drivers of the global burden of food insecurity and malnutrition.[1] The African reality remains of dire concern. Africa as a whole is dealing with structural food insecurity, which is mostly caused by widespread poverty, unemployment, and the absence of enduring social protection systems against megatrends such as international market trends, conflict, and the COVID-19 pandemic.[2] In reacting to food and nutrition insecurity, international and regional human rights instruments may play a key role in guiding African states that are striving to maintain the living standards of their citizens, particularly among the most vulnerable groups, in order to attain the aspirations of global and regional sustainable development agendas.[3] One such agenda at the regional level is the 2014 Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods, which outlines seven distinct

1 FAO, IFAD, UNICEF, WFP & WHO *The state of food security and nutrition in the world 2022: repurposing food and agricultural policies to make healthy diets more affordable* (2022) at 2.

2 FAO 2022 (n 1) at 16, 17 & 18.

3 OHCHR 'The right to adequate food: fact sheet no 34' https://www.ohchr.org/Documents/Publications/FactSheet34en.pdf (accessed 25 July 2022).

commitments to promote agricultural transformation and growth for shared prosperity and better livelihoods for all Africans.[4] The recently adopted Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security is another significant African legal instrument. In article 19, state parties are obligated to ensure food security.

This article investigates and advocates for a human rights-based approach to food and nutrition security, finding legal frameworks framed for the political prioritisation of key global and regional human rights norms in national policies. This article highlights the critical links between the six main elements of food security, namely, availability, access, utilisation, stability, agency, and sustainability, and the normative attributes of the right to health and the right to food, namely availability, accessibility, affordability, and quality, critically analysing available legal frameworks towards addressing food insecurity and its challenges, and proposing a novel human rights-based approach. This article interprets and articulates the normative obligations of national governments, specifically on the paradigm of the right to food and its interdependence with other human rights, in the face of food and nutrition insecurity by drawing on the evolution of international and regional human rights instruments, analysis of regional initiatives related to food security, and past scholarship.

Through this analysis, the article offers a diagnosis of the food security situation in Africa, noting the grim reality of failure to meet up with continental pledges, highlighting the available legal frameworks and their inadequacies, and finally making a prescription for policy imperatives for action on the right to food, in order to realise the Malabo Declaration's premise of the right to food and overall sustainable development. The article is organised into five sections, of which the introduction is the first. The second section gives an overview of the food security situation in Africa, followed by a review of the available legal frameworks as the third section. The fourth section discusses the normative obligations of the states and continental initiatives, while the fifth section is on conclusion and recommendations.

2 THEORETICAL FRAMEWORK

2.1 Situational analysis of the food crisis in Africa

Goal 1 of the African Union's Agenda 2063 and Goal 2 of the Sustainable Development Goals (SDGs) share the priorities of eradicating hunger and ensuring food security for all at all times. These goals seek to ensure physical, social, and economic access to enough

4 AU 'Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods' https://au.int/sites/default/files/documents/31247-doc-malabo_declaration_2014_11_26.pdf (accessed 25 July 2022).

safe and nutritious food.[5] African countries, on the other hand, are falling short of these targets. According to the Food and Agriculture Organization (FAO) of the United Nations (UN), more than 322 million Africans were severely food insecure in 2021, and this figure was rising. Due to economic recessions, rising unemployment, and income losses, as well as the COVID-19 pandemic, the African continent's food security situation has deteriorated.[6] Food security can be defined and measured in a variety of ways. Food security was defined by the World Food Summit in 1996 as existing 'when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life'.[7] Food security is commonly conceptualised as both physical and economic access to food that meets people's dietary needs as well as their food preferences.[8] Food security exists when all members of the household have constant access to enough food to live an active, healthy life. Food security is a measure of resilience to potential disruptions or shortfalls of essential food supplies triggered by a wide range of risks such as extreme weather events, transportation disruptions like those seen during the COVID-19 pandemic, energy shortages like those occasioned by Russia-Ukraine conflicts, economic instability, and wars.[9] Neoliberalism is viewed as a globalisation of the economic liberalism ideology, which holds that free markets and free trade, unrestricted by any form of state regulation, foster entrepreneurship and encourage economic growth. However, neoliberal economic policies have increased the cost of agriculture, slowed the growth of agricultural production, and diverted agricultural products and arable land to the production of biofuels, all of which have increased food insecurity.[10]

Food security, like poverty, is a multidimensional issue requiring multi-criteria analysis. In an attempt to give an overview of the food security situation in Africa, this article highlights the FAO's Prevalence of Undernutrition (PoU) and Food Insecurity Experience Scale (FIES)-based prevalence of moderate or severe food insecurity.[11] Malnutrition is a severe complication of food insecurity, and it can appear as either undernutrition, which manifests as stunting, wasting, and being underweight, or over-nutrition, which progresses to overweight and obesity.[12] The FAO's PoU index is calculated using official country statistics on food supply, food consumption, and energy needs, as well

5 AU 'Linking agenda 2063 and the SDGs' https://au.int/en/agenda2063/sdgs (accessed 25 July 2022).

6 FAO 2022 (n 1) at 24.

7 FAO 'Food security: concept and measurement' https://www.fao.org/3/y4671e/y4671e06.htm (accessed 10 July 2022).

8 As above.

9 FAO 2022 (n 1).

10 TK Sundari-Ravindran 'Poverty, food security and universal access to sexual and reproductive health services: a call for cross-movement advocacy against neoliberal globalisation' (2014) 22 *Reproductive Health Matters* 14-27.

11 FAO (n 7).

12 FAO (n 1).

as demographic parameters such as age, gender, and physical activity levels.[13]

2.2 Prevalence of undernutrition

The PoU is intended to capture a year's worth of energy deprivation and does not reflect the short-term impacts of brief crises or an inadequate intake of key nutrients. In 2021, 278 million Africans were undernourished, an 88.1 million rise from 2005. Eastern Africa accounts for 136.4 million of the total number of undernourished individuals, followed by Central Africa with an estimated 60.7 million; 57.3 million in Western Africa; 17.4 million in Northern Africa; and Southern Africa accounting for 6.3 million.[14] These alarming statistics illustrate how severely Africans are deprived of their fundamental rights to food security. Available country-level evidence reveals many countries across the African continent have a high prevalence of food undernutrition. More than half of the population in countries such as Burkina Faso, Central African Republic, Guinea, Mali, Niger, Somalia, and South Sudan is malnourished.[15] A common denominator among these countries is that they have experienced either conflicts or political instability in the preceding decade.[16] There is a reciprocal relationship between extreme food insecurity and conflict, as well as the indiscretion of the political class and military junta.

Malnutrition continues to affect a considerable proportion of Africa's population, particularly young children under the age of five. Stunting, which happens when children are too short for their age, is the most frequent form of malnutrition in Africa. In Africa, 32.4 percent of children under the age of five were estimated to be stunted in 2020.[17] This corresponds to around 57.3 million stunted African children who face both short-term and long-term consequences of stunting. Projections show that another 7 million African children were underweight around the same time in 2020.[18] Other prevalent manifestations of malnutrition that affect children and women of reproductive age include nutritional deficiencies such as vitamin A and iron deficiencies, which develop as a result of inadequate consumption and absorption of essential micronutrients.[19] Malnutrition has a detrimental influence on human development that is not limited to health; deficiencies can have a severe impact on cognitive and motor development in later life. Long-term consequences of malnutrition

13 FAO (n 1).

14 FAO 2022 (n 1) at 15.

15 UN 'Policy brief: Africa and food security' https://www.un.org/osaa/sites/www.un.org.osaa/files/2113589-policy_brief_on_food_security-draft1-forclient-15oct21-kmk_0.pdf (accessed 25 July 2022) at 15.

16 As above.

17 UN (n 14) at 9.

18 As above.

19 WHO 'Malnutrition' https://www.who.int/news-room/fact-sheets/detail/malnutrition (accessed 10 July 2022).

include lower adult productivity, which affects employment and income generation. Malnutrition thus leads to the vicious cycle of poverty in low-income households, contributing in part to food insecurity.[20]

2.3 The double burden of malnutrition

While the image of under-nutrition remains stark on the African continent, the World Health Organisation (WHO) warns that the other edge of the malnutrition sword is also wreaking havoc.[21] If no strong actions are implemented to reverse the trends, one in every five adults and one in every 10 adolescents and teens in African nations at high risk of obesity will be obese by the end of 2023.[22] According to the WHO assessment, the prevalence of obesity among adults in 10 high-burden African countries would vary from 13.6 percent to 31 percent, while it would range from 5 percent to 16.5 percent among children and adolescents.[23] Africa is also dealing with an increase in the number of overweight children. In 2019, the continent was home to 24 percent of the world's overweight children under the age of 5.[24] The over-nutrition burden of malnutrition in Africa is partly due to dietary changes brought about by reliance on energy-dense foods and a lack of access to and cost of healthy food alternatives.

2.4 Food insecurity experience scale

The prevalence of moderate or severe food insecurity based on the Food Insecurity Experience Scale (FIES) is an estimate of the proportion of the population encountering moderate or severe limitations in their capacity to access sufficient food over the course of a year.[25] In addition to availability, sustainability, and agency, people experience significant food insecurity when they are unsure of their capacity to access food and have been compelled to lower the quality or amount of food they consume at times during the year due to a lack of money or other resources.[26] Individuals in severe food insecurity are those who have run out of food, experienced hunger, and, in the worst-case scenario, have gone for days without eating, putting their health and well-being at risk.[27] As reported by the FAO, the incidence of severe food insecurity is highest in Central Africa, at 37.7 percent, whereas the

20 As above.

21 WHO 'Obesity rising in Africa, WHO analysis finds' https://www.afro.who.int/news/obesity-rising-africa-who-analysis-finds (accessed 25 July 2022).

22 As above.

23 As above.

24 As above.

25 FAO (n 1) at 202.

26 FAO '2021 Africa regional overview of food security and nutrition: statistics and trends' https://www.fao.org/3/cb7496en/cb7496en.pdf (accessed 10 July 2022).

27 As above.

prevalence of moderate food insecurity is almost similar in Eastern and Central Africa, at 66.9 and 75.3 percent, respectively.[28]

Africa is home to more than one-third of the 2.3 billion people who experience food insecurity globally. About 322 million Africans, mostly living in the Central, Eastern, and Western African regions, suffer from severe food insecurity. Another 57.9 percent, 794.7 million African people, are moderately food insecure.[29] The high prevalence of food insecurity among African countries is attributable to a variety of challenges, including weak governance systems.

2.5 Lived experiences of hunger

In terms of consumption, poorer purchasing power owing to lower income levels or rises in food costs has contributed to increasing levels of hunger recorded across the continent, which has been exacerbated by the COVID-19-related economic effects. For example, food costs spiked in the early months of the epidemic, and these increases have been sustained in many countries. In West Africa, Nigeria's annual inflation rate rose for the fifth consecutive month in June 2022, reaching 18.6 percent, the highest rate since January 2017, and compared to 17.7 percent in May 2022.[30] Bread and cereals, potatoes, yams, meat, fish, oil, and fat all contributed to an increase in food inflation to 20.6 percent from 19.5 percent. The sub-index of food and non-alcoholic beverages was by far the most significant, accounting for about half of the total weight. [31]

In May 2022, food inflation in Eastern Africa's Kenya reached 13.8 percent year on year, the highest level recorded during the period. Food costs in the country have been rising since March 2022. In comparison, the rate of food inflation increased by 0.9 percent between May and June 2022.[32] According to the Bureau for Food and Agricultural Policy's Food Inflation Brief, South African food and non-alcoholic beverage inflation rose 8.6 percent year on year in June 2022,[33] owing primarily to higher prices for meat, bread and cereals, and oil and fats. Food and non-alcoholic inflation increased by 1.2 percent month on month in June 2022. This inflation increased the reported consumer price index inflation rate of 7.4 percent in June 2022 by 1.5 percentage points.[34]

28 FAO (n 1) at 25.

29 FAO (n 1) at 26.

30 National Bureau of Statistics Consumer price index: June 2022 (2022).

31 As above.

32 Kenya National Bureau of Statistics 'Consumer price indices and inflation rates for June 2022' file:///C:/Users/user/Downloads/June%202022%20-%20CPI%20.pdf (accessed 30 July 2022).

33 Bureau for Food and Agricultural Policy 'Food inflation brief' https://www.bfap.co.za/wp-content/uploads/2022/07/Food-Inflation-brief_June-2022.pdf (accessed 30 July 2022).

34 As above.

The consequences of exorbitant food costs and restricted availability include changes in diet structure, which have a detrimental impact on the amount and quality of foods consumed. Due to their pre-existing vulnerabilities, low-income households residing in rural regions and urban informal settlements are disproportionately affected by food insecurity. Gender inequality is also evident in the fact that women are disproportionately affected by negative socioeconomic repercussions such as job loss and food insecurity. Because of the lack of robust social protection systems, as well as high levels of vulnerability and low levels of resilience, many African households remain at risk of food insecurity. Therefore, innovative and multifaceted rights-based approaches are imperative to mitigate the negative trend.

2.6 The relationship between poverty and food insecurity

Poverty is a prevalent problem in Africa. In 2018, around 433 million people in the continent were living below the extreme poverty level of USD 1.90 per day.[35] Almost one-third of Africa's population was living in extreme poverty 2022. More than 40 percent of the African people lived on less than USD 1.90 per day in 2018.[36] Poverty is caused by multidimensional factors. Countries in conflict with significant crises in employment, education, and health tend to have larger socio-economically disadvantaged populations. As a result, poverty is more frequent in less-developed countries. When disaggregated by location, rural households experience greater levels of poverty.

Poverty and food insecurity are strongly intertwined since poverty may have a negative impact on the social determinants of health and create tough circumstances for individuals to have an unpredictable food supply. According to data from African nations, food is a key household expense for impoverished households; close to half of family income is spent on food.[37] In Nigeria, food accounts for approximately 56.4 percent of households' earnings.[38] Even if they spend a considerable percentage of their household income on food, many poor households remain food insecure due to low, irregular, and variable earnings. Similarly, individuals living in poverty frequently encounter financial constraints that limit their capacity to get sufficient, safe, and nutritious food. The inability to meet the caloric requirements for

35 World Bank Blogs 'The number of poor people continues to rise in Sub-Saharan Africa, despite a slow decline in the poverty rate' https://blogs.worldbank.org/opendata/number-poor-people-continues-rise-sub-saharan-africa-despite-slow-decline-poverty-rate (accessed 10 July 2022).

36 As above.

37 World Economic Forum 'Food security: which countries spend the most on food? This map will show you' https://www.weforum.org/agenda/2016/12/this-map-shows-how-much-each-country-spends-on-food/ (accessed 10 July 2022).

38 As above.

development and healthy life perpetuates a vicious cycle of poor productivity, resulting in lower earnings and a lack of food access.

3 THE OBLIGATION TO COMBAT FOOD INSECURITY UNDER INTERNATIONAL LAW

Given the international, regional, and national imperatives for ensuring food security, African governments have made promises to eradicate hunger and encourage access to sufficient, safe, and nutritious food. Binding treaties, such as the CESCR and the African Charter on Human and Peoples' Rights, as well as soft law instruments, such as the SDGs, the AU Agenda 2063, and the Malabo Declaration of 2014, are important tools that, when effectively domesticated contextually through national policies, can help the continent respect, protect, and fulfill the right to food for African populations.

3.1 Global and regional frameworks

Universal Declaration of Human Rights (Universal Declaration)

The Universal Declaration expressly recognised the right to food under international law. By implying the interdependence of rights covering a wide range of rights, including those to adequate food, water, sanitation, clothing, housing, and medical care, as well as social protection covering unforeseen occurrences, such as widowhood, unemployment, and old age, article 25 of the Universal Declaration lays a progressive foundation for the rights-based approach to food security. The language of the Universal Declaration in article 25 amplifies the imperatives of the right to food as it states: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family' and then mentions 'food' inclusive, implying that access to adequate food access in a safe and sufficient quantity enhances the envisaged standard of living, wellbeing, and health.[39]

The International Covenant on Economic, Social and Cultural Rights (CESCR)

Article 11 of the CESCR acknowledges the right to adequate food as a vital component of the right to a decent standard of life. It also works to guarantee that 'everyone is free from hunger' as a fundamental right.[40] This right to adequate food is defined by the UN Special Rapporteur on the Right to Food as 'the right to regular, permanent, and unrestricted access – either directly or through financial purchases – to

39 Art 25 Universal Declaration.
40 Art 11 CESCR.

quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective, fulfilling and dignified life free of fear'.[41]

According to article 2(1) of the CESCR, a state party should take steps to the maximum of its available resources for the progressive realisation of the rights contained within the treaty.[42] In this regard, the Committee on Economic, Social and Cultural Rights in General Comment 12 also defined the obligations that states must fulfill in order to implement the right to adequate food at the national level. To respect existing access to adequate food requires states parties not to take any measures that result in preventing such access; to protect requires measures by the state to ensure that enterprises or individuals do not deprive individuals of their access to adequate food; to fulfill (facilitate) or pro-actively engage in activities intended to strengthen people's access to and utilisation of resources and means to ensure their livelihood, including food security; to fulfill (provide) the right directly when an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal.[43]

The African Charter on Human and Peoples' Rights (African Charter)

The African Charter tacitly acknowledges the right to food as a jurisprudential precedent established by the African Commission on Human and Peoples' Rights in *SERAC & CESR v Nigeria*.[44] In its interpretation of the African Charter, the African Commission stated that the right to food is inherent in the rights to life, health, and economic, social, and cultural development; and that this right is realised when everyone, alone or in community with others, has physical and economic access to adequate food or means of procuring it at all times, and is free from hunger even during natural or other disasters.[45]

In its resolution 431 on the right to food and nutrition in Africa,[46] the African Commission called on state parties to: Take appropriate policy, institutional and legislative measures to ensure the full enjoyment of the right to food which includes constantly accessible and quality food that meets the requirement of nutrition and cultural acceptability; promote and strengthen multi-sector and gender

41 UN 'About the right to food and human rights' https://www.ohchr.org/en/special-procedures/sr-food/about-right-food-and-human-rights (accessed 25 July 2022).

42 Art 2(1) CESCR.

43 CESCR General Comment 12 UN Doc E/C.12/1999/5.

44 *Social and Economic Rights Action Centre (SERAC) & Center for Economic and Social Rights (CESR) v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

45 As above.

46 ACHPR 'Resolution 431 on the Right to Food and Nutrition in Africa - ACHPR/Res.431(LXV)2019' https://www.achpr.org/sessions/resolutions?id=462 (accessed 25 July 2022).

inclusive platforms at the national level, with the full and meaningful participation of small-scale food producers, farmers, livestock farmers and fishermen to develop, implement, and monitor policies towards the realisation of the right to food and nutrition; design policy responses and interventions in situations of protracted crisis, conflicts and natural disasters to protect vulnerable, disadvantaged and marginalised groups in order to realise their right to food and nutrition; end the practice of resource grabbing affecting farming, fisheries, forests, and pastoralist communities, and move towards an equitable management of these resources (natural, material and financial) by strengthening community rights, benefit sharing policies, and enacting strong and binding legislations; ensure that prisoners have access to adequate food for them to fully enjoy their fundamental rights to physical and mental health; foster local and organic food production and consumption, including by banning the use of genetically modified organisms; and strictly regulate the importation of foreign food items as well as the promotion and marketing of industrialised and highly processed foods. The presence of highly processed foods in markets hampers food security, particularly in the dimensions of utilisation and agency.

3.2 Interdependency of the right to food and other human rights

The right to food reflects human rights' interdependence. Many aspects of the right to food are interrelated with other fundamental human rights, and a lack of appropriate access to food precludes enjoyment of those other fundamental rights. The following are some of the inherent rights that are connected to the right to food:

3.2.1 The rights to life, liberty and security of the person

At all stages of life, access to enough safe and nutritious food is crucial. When a person does not have access to food that matches their caloric needs, they risk the cascading effects of famine, malnutrition,[47] and even death, thereby depriving themselves of their right to life, of which food is an important component. Similarly, liberty and security of the person are critical in access to the agricultural value chain for individuals to be able to participate in farming for subsistence of their immediate needs or commercial purposes, adding to the overall physical access to food.

3.2.2 The right to health

Access to sufficient, safe, and nutritious food has a correlation with the right to health across the spectrum of life. Nutrition during pregnancy determines the health outcomes of both the mother and her baby.

47 WHO (n 18).

Moving from infancy to childhood, nutrition is a determinant of health, seen in how malnutrition manifests in stunting, which results in poor cognitive development and a lack of the highest attainable standard of health in adulthood.[48] Other implicit links between the right to food and the right to health can be deduced from how a lack of access to treatment of acute and chronic diseases denies the full enjoyment of adequate nutrition;[49] for an adult suffering from acquired immunodeficiency syndrome (AIDS) without access to treatment or a child suffering from acute diarrhoea without proper treatment, their bodies may not use food consumed properly even when available until adequate healthcare is achieved, resulting in denial.

3.2.3 The right to water

Everyone has the right to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic use under the right to water. Access to clean, dependable, and inexpensive drinking water and for food preparation is critical to realising the right to food. Waterborne illnesses account for approximately 80 percent of all diseases;[50] the right to food cannot be achieved if individuals do not have access to an adequate and continuous supply of water for personal and household functions, including drinking and food preparation.

3.2.4 The right to education and information

A child may be excluded from school owing to hunger or malnutrition. Hunger and malnutrition have been shown to degrade children's cognitive capacities,[51] forcing them out of school and depriving them their right to an education. Given that education includes life and vocational skills, to ensure the achievement of the right to food, people must know how to maintain a nutritious diet and have the skills and capacity to produce and procure food that satisfies their nutritional requirements.

Information is crucial to realising the right to food. Correct and evidence-based information, as well as the capacity to appreciate the foundations of resource allocation and market trends in agriculture, food supply, and consumer preferences, are essential for making healthy food decisions. One example of how the right to information influences consumer decisions is the marketing misinformation of harmful processed foods, which is partly a result of globalisation at the expense of homegrown organic and healthier alternatives.[52]

48 WHO (n 18).

49 CD Bourke and others 'Immune dysfunction as a cause and consequence of malnutrition' (2016) 37(6) *Trends in Immunology* at 389.

50 UN https://press.un.org/en/2003/sgsm8707.doc.htm (accessed 10 July 2022).

51 WHO (n 18).

52 UNICEF 'Marketing of unhealthy foods and non-alcoholic beverages to children' https://www.unicef.org/media/116691/file/Marketing%20restrictions.pdf (accessed 15 July 2022).

3.2.5 The right to social security

Given that the ability to pay is a barrier to food access, the presence of social safety nets is critical to achieving the right to food. Subsistence, mostly food, consumes a sizable portion of household earnings.[53] In the absence of social protection floors that take into account market trends for essential foods, poor populations may be denied their entitlement to social protection with regard to food.

3.2.6 The right to food for specific populations

Children: Article 24 of the Convention on the Rights of the Child implicitly speaks to the right to food by seeking to encourage international cooperation for the progressive full realisation of children's rights, particularly considering the needs of developing countries like those on the African continent.[54] The letters of article 24(2) obligate state parties to pursue full implementation of the child's right and, in particular, to take appropriate measures to: combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution; to ensure that all segments of society, in particular parents and children, are informed, have access to education, and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation, and the prevention of accidents.[55] The lack of access to sufficient, safe, and nutritious food negatively impacts the physical, mental, and social wellbeing of children.[56] Near half of all child deaths below the age of five years are traceable to undernutrition.[57] The negative effect of malnutrition takes its toll on children even before their birth, should their mother suffer malnutrition during pregnancy.[58] Children born to malnourished mothers may have low birth weight, life-threatening birth defects, or those that might reduce the quality of life. Such children, when they survive, suffer long-lasting consequences, including physical and mental impairments.[59] Other social consequences of not protecting the child's right to food might push children into dreaded forms of child labour and school dropout, partly due to impaired mental capacity, starvation, or forced labour to access the means to food.

53 World Economic Forum (n 38).

54 Art 24 CRC.

55 Art 24(2) CRC.

56 WHO (n 18).

57 WHO 'Children: improving survival and well-being' https://www.who.int/news-room/fact-sheets/detail/children-reducing-mortality (accessed 15 July 2022).

58 UNICEF 'Maternal nutrition: preventing malnutrition in pregnant and breastfeeding women' https://www.unicef.org/nutrition/maternal (accessed 25 July 2022).

59 As above.

Women: Women are crucial to securing food security. Women, on the other hand, are disproportionately affected by hunger, food insecurity, and poverty as a result of gender inequality and a lack of social, economic, civic, and political rights.[60] The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) safeguards women's equal access to labour, farmland, credit, wages, and social protection, which are all necessary for women to enjoy their right to food equally. Article 14, for example, proposes a series of specific steps to reduce gender discrimination toward rural women, creating an enabling environment for women to exercise their right to food.[61] Article 11 of the CEDAW safeguards women's equal enjoyment of labour rights,[62] while article 13(b) protects their access to financial resources.[63] Women have unique nutritional requirements, particularly in terms of reproductive health, and a denial of such specific dietary needs could result in poor pregnancy and puerperal outcomes.[64] More so, a malnourished mother would end up birthing a child with complications, leading to physical and mental disability in later life.[65] Article 12 of the CEDAW stipulates that mothers shall be provided with appropriate nourishment throughout pregnancy and breastfeeding.[66] However, the nutritional condition of a girl-child transcends into her adulthood; hence, nutrition of women and girls is equally crucial for a good living standard and wellbeing beyond childbearing.

Persons living with disabilities: The right of persons with disabilities to an adequate standard of living, including adequate food, is recognised in article 28 of the Convention on the Rights of Persons with Disabilities (CRPD). As a result, article 28 establishes the right to food as a component of a decent quality of life.[67] Because the majority of persons with disabilities are among the most vulnerable to hunger and malnutrition, the UN Committee overseeing the International Covenant on Economic, Social and Cultural Rights (CESCR) has emphasised that the right to non-discrimination for people with disabilities entails taking affirmative action to address the underlying disadvantage faced by the disabled.[68] Hunger and malnutrition are primarily the outcome of a long history of social, political, and economic exclusion among the disabled. The fulfillment of persons with disabilities' right to food is critically dependent on their access to farmlands, finance facilities, and physical access to food. As a result of their dual disadvantage in terms of price and physical access, it is critical to give persons with disabilities special attention.

60 FAO (n 1).
61 Art 14 CEDAW.
62 Art 11 CEDAW.
63 Art 13(b) CEDAW.
64 UNICEF (n 62).
65 UNICEF (n 62).
66 Art 12 CEDAW.
67 Art 28 CRPD.
68 CESCR General Comment 5 UN Doc E/1995/22.

Persons with disabilities may have special dietary and water needs, and disabled farmers may need assistance planting and marketing their own food products. This necessity was emphasised in General Comment 5, where the CESCR enjoined state parties to guarantee that, besides ensuring that persons with disabilities have access to sufficient food, accessible shelter, and other basic material necessitates, support systems, such as adaptive equipment, are available to help them in enhancing their degree of independence in everyday living and exercising their rights.[69] Furthermore, the CESCR urges in General Comment 15 that groups having challenges with physical access to water, such as older persons or individuals with disabilities,[70] should be provided with safe and adequate water. Implicitly recognising the right to food as the right to water, given access to sufficient water entails availability for food preparation.

3.3 Duties of states

The states' duties stem from the binding international and regional treaties that they have ratified. Upon ratifying an instrument, the state must assure its successful implementation at the national level. According to article 2(1) of the CESCR,[71] a state party should use all available resources to ensure the progressive realisation of the rights guaranteed by the CESCR, including the adoption of legislative measures and partnerships. States hold three duties, namely to respect, to protect, and to fulfil an individual's right to food. States must respect people's access to and sources of food. This implies that any action that prevents any individual or group from having access to food is prohibited. States have a responsibility to guarantee that state agents do not harm people's access to food in any way, such as through the destruction of farmlands or the unsustainable conversion of water bodies to dams. State policies should guarantee that equality of access to food is respected.

States must protect people's realisation of the right to food against third-party infractions. States should prohibit third parties from harming food supplies, such as contaminating land or water with harmful industrial waste. Furthermore, states must formulate and enforce food safety and quality regulations, including processes that safeguard individuals from unwholesome marketing of highly processed foods. Ensure informed healthy food choices, including exclusive breastfeeding promotion through regulation of breast milk substitute advertising. The commitment to fulfill requires states to be proactive in improving people's access to and utilisation of resources and methods of securing food. States should also carry out and strengthen food and nutrition programs, such as those outlined in the Malabo Declaration of 2014.[72]

69 CESCR General Comment 5 (n 72).
70 CESCR General Comment 15 UN Doc E/C.12/2002/11.
71 Art 2(1) CESCR.
72 AU (n 4).

Progressive national level laws: Impressively, some national constitutions in Africa explicitly or implicitly recognise the right to food. Article 43(1)(c) of the Constitution of the Republic of Kenya speaking on Economic and Social Rights states that 'every person has the right to be free from hunger, and to have adequate food of acceptable quality,'[73] thus protecting the right to food directly. In a broader human rights context, article 9(4) of the Federal Republic of Ethiopia's Constitution states that '[a]ll international agreements ratified by Ethiopia are an integral part of the law of the land,'[74] implying that having ratified the CESCR, the Ethiopian Constitution recognises the right to food.[75] Furthermore, as a goal of the state of Ethiopia, the Ethiopian Constitution alluded to the right to food by providing that policies shall be implemented to the extent that the country's resources permit to provide all Ethiopians access to food.[76]

In Western Africa, the Nigerien Constitution provides for the right to food in explicit terms, by affirming that public policies must promote food supply and that each person has the right to a sufficient food supply.[77] On the other hand, in the Nigerian Constitution, the right to food can be implied given Chapter II of the Constitution that stipulates the fundamental objectives and directive principles of state policy, in that the state shall direct its policies to ensure 'that suitable and adequate shelter, suitable and adequate food, reasonable national minimum living wage, old age care and pensions, and unemployment, sick benefits, and welfare of the disabled are provided for all citizens.'[78] In Southern Africa, the Constitution of the Republic of South Africa affirms that everyone has the right to have access to sufficient food and water, and children have the right to basic nutrition.[79] The Constitution further stipulates that the state must take reasonable legislative and other measures within available resources to see to the progressive realisation of the rights.[80]

Explicit constitutional provision for the right to food is imperative, but not a silver bullet. The CESCR, in its General Comment 12, provides a direction as to going beyond letters in the constitution to the enactment of frameworks to facilitate progressive realisation of the right to food.[81] Article 2(1) of the CESCR recognises that economic, social, and cultural rights are not always immediately realisable, thus the concept of 'progressive realisation'[82] of states' obligations in

73 Art 43(1)(c) Constitution of the Republic of Kenya 2010.

74 Art 9(4) Constitution of the Federal Republic of Ethiopia.

75 https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en.

76 Art 90(1) Constitution of the Federal Republic of Ethiopia.

77 Art 12 Constitution of the Republic of Niger.

78 Chapter 2 Constitution of the Federal Republic of Nigeria 1999.

79 Art 27(1)(b) Constitution of the Republic of South Africa 1996; art 28(1)(c) Constitution of the Republic of South Africa 1996.

80 Art 27(2) Constitution of the Republic of South Africa 1996.

81 CESCR General Comment 12 UN Doc E/C.12/1999/5.

82 Art 2(1) CESCR.

connection with economic, social, and cultural rights under international law.

The CESCR direction provided that 'States should consider the adoption of a framework law as a major instrument in the implementation of the national strategy concerning the right to food'.[83] 'The framework law should include provisions on its purpose; the targets or goals to be achieved and the time-frame to be set for the achievement of those targets; the means by which the purpose could be achieved described in broad terms, in particular the intended collaboration with civil society and the private sector and with international organizations; institutional responsibility for the process; and the national mechanisms for its monitoring, as well as possible recourse procedures.'[84] The CESCR further advised access to effective remediation for any violation of the right to food; in essence the advisory seeks the protection of the right to food through national courts and beyond.[85]

In the spirit of the CESCR recommendation, explicit and detailed recognition of the right to food can provide a significant contribution through establishing procedures, such as implementation frameworks on food security, adequate and inclusive budgets, and frameworks empowering national courts with jurisdiction to enforce the right to food. The clear, explicit, and detailed constitutional recognition of the right to food will assist countries in implementing an appropriate legal framework that prioritises the right to food, provides protections against denial of such a right, and promotes knowledge and awareness of food and nutrition as a human right principle, as directed by the CESCR.

4 THE YEAR OF NUTRITION AND CONTINENTAL INITIATIVES ON FOOD SECURITY

The African Union Heads of State and Government proclaimed 2022 as 'the year of nutrition' with the theme 'Building Resilience in Nutrition on the African Continent: Accelerate Human Capital, Social and Economic Development' in recognition of the role that nutrition and food security play in advancing the goals of Agenda 2063 goals for achieving sustainable economic growth and development.[86] The Declaration reiterated the sustained symbolic importance of nutrition as a crucial component in the attainment of adequate living standards as provided for by international and regional treaties and in the spirit of the Agenda 2063. This strong political agenda by the AU leaders enjoins all member states to give nutrition top priority in national

83 CESCR General Comment 12 (n 85) para 29.

84 As above.

85 CESCR General Comment 12 (n 85) para 32.

86 AU '2022 declared as the year of nutrition' https://au.int/en/articles/2022-declared-year-nutrition (accessed 25 July 2022).

policy framing. For the purposes of this paper, a few noteworthy continental frameworks are discussed.

4.1 Agenda 2063 and the New Partnership for Africa's Development (NEPAD)

The Agenda 2063's first aspiration envisages 'a prosperous Africa based on inclusive growth and sustainable development.'[87] The aspiration envisions a high standard of living, which may be attained through the prioritisation of eradicating hunger and poverty, as well as ensuring social security, gender equality, and social inclusion. The development of agriculture with the necessary technology, climate resilience, water security, health, and nutrition are other key priorities that are related to food security outlined in the Agenda's first aspiration.[88]

In order to address Africa's development issues within a new paradigm, African Heads of State and Government created the New Partnership for Africa's Development (NEPAD) in 2001, and the AU ratified it in 2002.[89] The fundamental goals of NEPAD are to end Africa's marginalisation, alleviate poverty, and put Africa on a sustainable development path.[90] NEPAD, an African Union strategic framework for pan-African socioeconomic development, addresses the major issues that the continent is currently facing, including poverty, hunger, and sustainable development. It also gives African nations exceptional opportunities to fully own their development agendas, to collaborate more closely, and to work more effectively with other nations beyond the continent. NEPAD oversees several programmes and initiatives through six thematic areas, the top of which is agriculture and food security.[91]

4.2 Comprehensive Africa Agriculture Development Programme (CAADP)

The Comprehensive Africa Agriculture Development Programme (CAADP),[92] one of NEPAD's sectoral goals, was created as a response to the emergent need for continental food security. It is an effort for sustainable agricultural growth and poverty reduction. In 2003, in Maputo, Mozambique, the Heads of State and Government of the AU

87 Aspiration 1 Agenda 2063.

88 As above.

89 African Union Development Agency 'NEPAD in brief' https://www.nepad.org/publication/nepad-brief (accessed 10 July 2022).

90 As above.

91 As above.

92 AU 'The comprehensive African agricultural development programme' https://au.int/en/articles/comprehensive-african-agricultural-development-programme (accessed 25 July 2022).

adopted the CAADP, which was intended to serve as a strategic framework for the reform of the agricultural sector.[93] Since then, it has had a significant impact on regional and national agricultural policies. CAADP has four priority areas namely: extending the area under sustainable land management and reliable water control systems; improving rural infrastructure and trade-related capacities for market access; increasing food supply, reducing hunger, and improving responses to food emergency crises; and improving agriculture research, technology dissemination and adoption.[94]

African nations committed through the CAADP to achieving agricultural growth rates of at least 6 percent annually and allocating at least 10 percent of their national budgets to agriculture and rural development.[95] Targets for decreasing poverty and hunger, raising farm productivity and incomes, and enhancing the sustainability of agricultural output and resource use serve as the foundation for these investment commitments.[96] In 2020, Makombe and colleagues conducted a study to evaluate how the CAADP had affected the results of food security.[97] They conclude that, while modest progress has been made in implementing the CAADP, the continent urgently needs to consolidate efforts on the CAADP indicators.[98] Similarly, on undernutrition as an indicator of CAADP, Makombe and colleagues found a modest overall decline in Africa as a whole; the prevalence steadily declined from an annual average of 39.9 percent in the 1995 to 2003 cycle to 34.4 percent and 31.8 percent in the 2008 to 2014 and 2014 to 2019 cycles, respectively.[99] Adding to the importance of the CAADP, they discovered that the highest prevalence rates, above 37 percent, in the 2014 to 2019 review cycle were observed in countries that had not implemented the CAADP.[100] Despite the mixed observations, they also discovered that the CAADP had a notable influence on increasing agricultural public investment and growth, eradicating poverty, and enhancing mutual accountability.[101]

4.3 Year of Agriculture, 2014: Malabo Declaration

The AU Heads of State and Government proclaimed 2014 to be the Year of Agriculture and Food Security to commemorate the 10th anniversary

93 NEPAD CAADP country implementation under the Malabo declaration (2016).

94 AU (n 92).

95 AU (n 92).

96 NEPAD (n 93).

97 T Makombe and others 'Tracking key CAADP indicators and implementation processes' in DD Xinshen & T Getaw (eds) *2020 Annual trends and outlook report: sustaining Africa's agrifood system transformation: The role of public policies* (2020).

98 Makombe and others in Xinshen & Getaw (n 97) 212.

99 Makombe and others in Xinshen & Getaw (n 97) 201.

100 As above.

101 Makombe and others in Xinshen & Getaw (n 97) 196.

of the CAADP.[102] The event was a chance to reflect on the successes and experience gained from the first 10 years of the CAADP as well as to focus on the future and what the program needs to accomplish in the upcoming decade until 2025. The 2014 Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods was the high point of the commemoration.[103]

The 2014 Malabo Declaration outlined seven distinct commitments to promote agricultural transformation and growth for shared prosperity and better livelihoods. Reaffirming the CAADP process' guiding principles and values; enhancing agricultural investment financing; reaffirming the goal of eradicating hunger and halving global poverty by 2025; boosting intra-African trade in agricultural goods and services; enhancing the resilience of livelihoods and production systems to climate variability and other shocks; and fostering shared accountability for actions and results. A special commitment was made to conduct biennial reviews of progress through the processes of tracking, monitoring, and reporting; multi-sectoral coordination of peer reviews; mutual learning and mutual accountability processes; and strengthening institutional capacity and data generation for evidence-based planning, implementation, and monitoring.[104]

In February, 2020, the AU released the second Biennial Review Report on the implementation of the 2014 Malabo Declaration.[105] Only four member states, Ghana, Mali, Morocco, and Rwanda, according to the report, were on track to meet the Malabo obligations by 2025 out of the 49 member states that reported on implementation of the Malabo Declaration progress during the time under review (2019 biannual review cycle).[106] Clinging to hope, about 36 countries have significantly improved their review scores in the second cycle as compared to the first, even though the number of countries on par with the Declaration's 2025 target is significantly lower than the 20 Member States that were on-track in 2017 during the inaugural biennial review cycle.[107]

The report, which gave the continent an overall score of 4.03 as opposed to the benchmark of 6.66 to be on track, is rather sobering,

102 AU 'Concept note: 2014 year of agriculture and food security in Africa, marking 10th anniversary of CAADP' https://au.int/en/documents/20140115/concept-note-2014-year-agriculture-and-food-security-africa-marking-10th (accessed 10 July 2022).

103 As above.

104 As above.

105 AU 'African Union launches the second biennial review report detailing Africa's agricultural implementation status – 36 countries have made tremendous progress from the first cycle' https://au.int/en/pressreleases/20200210/au-launches-2e-biennial-report-detailing-africas-agricultural-implementation (accessed 10 July 2022).

106 As above.

107 AU 'Second biennial review report of the African Union Commission on the implementation of the Malabo Declaration on accelerated agricultural growth and transformation for shared prosperity and improved livelihoods' https://au.int/sites/default/files/documents/38119-doc-2019_biennial_review-en.pdf (accessed 10 July 2022).

suggesting that the continent continues to be off-track in reaching the overall Malabo Declaration goals.[108] In terms of recommitting to the CAADP process and eradicating hunger, the continent lost momentum. Only four countries – Burkina Faso, Burundi, Mali, and Mauritania – reached the goal of allocating at least 10 percent of their total national budgets on agriculture, even though around 29 countries exceeded the minimal bar for commitment to boosting intra-African trade in agricultural goods.[109]

4.4 Rights-based approach: availability, access, utilisation, stability, sustainability, and agency

The High Level Panel of Experts on Food Security and Nutrition highlights six dimensions – availability, access, utilisation, stability, sustainability, and agency – that should be taken into consideration when formulating policies related to the right to food.[110] A population, household, or individual must always have access to enough food if they are to be considered food secure. They should not run the danger of being without food because of unforeseen events, such changes in the economy or the weather. Malnutrition and food insecurity are more likely to occur in areas where the agriculture season is reliant on the rainy season. Significant seasonal food price changes are an important determinant of child malnutrition, according to Cornia and colleagues, who discovered this in Malawi and Niger.[111] In order to prevent anyone from being food insecure due to purchasing capacity and physical access, it is crucial to guarantee the availability and affordability of food year to year.

Food utilisation has two separate dimensions: anthropometric indicators impacted by under-nutrition, such as stunting burden, which was previously described; and input indicators that represent food quality, health, and hygiene conditions, influencing how well available food may be utilised.[112] It is critical to understand that the availability of appropriate food sources does not ensure optimal nutritional results, as utilisation by the body is equally imperative. Nutritious and hygienic food contributes in the maintenance of a healthy body, much as being healthy is required to utilise the food consumed.[113] Having access to clean water is essential for preparing healthy meals and sustaining a healthy body. Improving access to safe drinking water and sanitation is a key component of food utilisation and influences nutrition outcomes. This reinforces the

108 As above.

109 As above.

110 FAO 'Food security' https://www.fao.org/fileadmin/templates/faoitaly/documents/pdf/pdf_Food_Security_Cocept_Note.pdf (accessed 15 July 2022).

111 GA Cornia et al 'Sources of food price volatility and child malnutrition in Niger and Malawi' (2016) 60 *Food Policy Elsevier*.

112 FAO (n 1).

113 Bourke and others (n 49).

interdependence of the right to food on other rights previously mentioned.

When a number of relevant indicators are considered, many African countries face a high degree of risk from production and price instability.[114] The availability of irrigation facilities, for instance, is an indicator of the extent of a possible collapse in supply due to climatic shocks such as droughts.[115] The extent a country depends on imports to meet cereal demand indicates vulnerability to international market fluctuations.[116] The share of food imports in total exports reflects potential exposure to international price shocks.[117] Given the many interconnected predispositions to food instability, developing policies and interventions that prevent instability in availability and access to food requires a multi-factorial approach, including promotion of peaceful coexistence, conflict resolution, and violence prevention.

Today, agency is viewed as a key component of addressing the growing inequities within food systems, including the power imbalances among those systems' actors.[118] Agency refers to the ability of individuals and groups to exert some control over their own circumstances and to meaningfully contribute to governance processes. Focusing on agency also acknowledges that structural injustices and power disparities in society, whether they be based on gender, race, literacy, or other factors that are frequently outside of an individual's control, can be obstacles to exercising one's right to voice and participation in both individual and group decisions about food systems, which can jeopardize food security.[119] Sustainable food system practices ensure that the current generation's food needs are met without jeopardising the needs of future generations while also promoting the long-term regeneration of natural, social, and economic systems. In order to maintain food systems and support food security into the foreseeable future, sustainability emphasises the connections between ecosystems, livelihoods, society, and political economy.[120]

5 CONCLUSION

The primary goal of this chapter has been to contribute to the rising conversation about the human rights approach to food insecurity in Africa, in light of the AU's increased continental political focus of food security by designating 2022 as the year of nutrition. Given the continent's medium and long-term aspirations, the diagnoses of the current state of food security and the double burden of malnutrition in

114 Makombe and others in Xinshen & Getaw (n 97).

115 FAO (n 26).

116 FAO (n 26).

117 FAO (n 26).

118 J Clapp and others 'Viewpoint: the case for a six-dimensional food security framework' (2022) 106 *Food Policy* at 3.

119 Clapp (n 118) at 4.

120 Clapp (n 118) at 5.

Africa leave a lot to be desired. To put it simply, a large majority of African countries are food insecure. This is because, as previously noted, food insecurity and its consequences are a multidimensional issue. Food-related issues, such as access, availability, utilisation, and stability – citizenry's socio-economic status and capacity to pay, agricultural development, and storage and supply facilities, continue to drive food insecurity in Africa. Other correlates of food insecurity mentioned include suboptimal living standards as a result of poor access to universal healthcare, as well as weak governance and institutional capacity due to gaps in the legal framework. In addition to the previously discussed national issues, there are megatrends impeding the fulfillment of food security on the African continent, such as climate change, rising insecurity, and the socioeconomic consequences of the COVID-19 epidemic.

Furthermore, the chapter acknowledged that, with the exception of limitations in evidence-based policy efficacy, continental frameworks such as the CAADP, and the Malabo Declaration provided some hopeful political prescriptions for Africa's food crisis, but the majority of African countries have not kept pace with the continental pledges. In addition to national-level issues such as poor agricultural public investment, contemporary challenges such as climate change and its consequences, such as violence and displacement, have left many African countries food insecure. As a result, many African nations are moving slowly, if at all, to realise the goals of regional and international agendas, as noted in the Malabo Declaration's 2019 review. From the review, the mean ratings of nations in the race to food security are improving, yet they remain below the acceptable benchmark. This gives some optimism in the midst of despair that renewed initiatives like the '2022: Year of nutrition' may help the continent fare better.

Given the multidimensional nature of food insecurity, in order for Africa to break free from the shackles of hunger and malnutrition and achieve the shared prosperity envisaged by Agenda 2063 and the 2030 development objectives, member states must take the lead with the necessary political will. Political will is essential. The member states must face the grim reality of the Malabo Declaration review and consolidate effort as the clock ticks on the way to 2025. That is, African governments require inclusive policies for shared prosperity that assure food availability, access, utilisation, and stability, as well as adequate social protection standards to ensure that no one goes hungry, regardless of gender, age, socioeconomic class, or location. Domestic production is crucial to food supply stability; thus, Africa requires technologically driven agricultural development. African farmers should be provided with the necessary modern facilities. In addition to research and development for mechanised farming, credit and insurance schemes for farmers should be integral in policy framing. Innovative and sustainable financing strategies will create robust financial resilience that will protect the states' food systems from shocks and uncertainties such as those occasioned by the COVID-19 pandemic and global market trends. In Africa, food insecurity drives poverty much like poverty also exacerbates food insecurity. There is a compelling case for making a concerted effort to establish social

protection programmes whose sole goal should be to promote food security. Such social safety nets should be implemented alongside human rights-responsive market regulations safeguarding against food price hikes as well as unwholesome advertisement of highly processed foods to the detriment of healthy alternatives.

Countries should make efforts to institutionalise food security through the inclusion of explicit provision for the right to food in national constitutions and back it up through the justiciability of socio economic rights. Through constitutional clarity on rights and obligations with regard to food security, national governments will provide an avenue for oversight by national human rights institutions and remediation by national courts. Aside from explicit constitutional provisions, countries should develop implementation frameworks that are evidence-based through research and development, based on normative obligations of the state on the right to food and in compliance with human rights principles such as accountability, transparency, and participation. Similarly, implementation frameworks should be inclusive, addressing particular needs of marginalised populations and holistic in addressing all the aspects of the food system and its interconnected rights. While countries develop strategies at the national level, they should strive to align with the regional frameworks in line with the aspirations of Agenda 2063 for a prosperous Africa based on unity and shared prosperity.

The right to health in Nigeria and South Africa: the need for effective integration of food safety

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ABSTRACT: Food safety is a public health issue. The World Health Organisation reports that almost 1 in 10 people in the world fall ill after consuming contaminated food and 420,000 die every year. In Africa, more than 91 million people fall ill and 137,000 die each year of foodborne diseases. Several legal instruments recognise the right to health in Nigeria and South Africa. In Nigeria, the right to health is non-justiciable under chapter 2 of the 1999 Constitution. The National Health Act is the main law that regulates, develops and manages the health system. In South Africa, the right to health is recognised as a fundamental right. While these steps are commendable, food safety is yet to be effectively incorporated in these instruments. Nigeria and South Africa are state parties to treaties such as the International Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights. However, these treaties fail to accommodate food safety as one of their essential attributes. This article contends that foodborne diseases have a significant impact on the recognition and enforcement of the right to health. Relying primarily on analytical methods of research, the article assesses the efficacy of legal machinery in recognising food safety as a crucial component of the right to health in the jurisdictions under study. It is important for Nigeria and South Africa to achieve effective integration of food safety as an indispensable component of the right to health in Africa.

TITRE ET RÉSUMÉ EN FRANCAIS:

Le droit à la santé au Nigeria et en Afrique du Sud: la nécessité d'une intégration effective de la sécurité alimentaire

RÉSUMÉ: La sécurité alimentaire est une question de santé publique. Selon l'Organisation mondiale de la santé, près d'une personne sur 10 dans le monde tombe malade après avoir consommé des aliments contaminés et 420 000 personnes en meurent chaque année. En Afrique, plus de 91 millions de personnes tombent malades et 137 000 meurent chaque année de maladies d'origine alimentaire. Plusieurs instruments juridiques reconnaissent le droit à la santé au Nigeria et en Afrique du Sud. Au Nigeria, le droit à la santé, contenu dans le chapitre 2 de la Constitution du 1999, n'est pas justiciable. La loi nationale sur la santé publique est la principale législation qui gouverne le système de santé. En Afrique du Sud, le droit à la santé est reconnu comme un droit fondamental. Bien que cette avancée soit louable, la sécurité alimentaire doit encore être effectivement intégrée dans ces instruments. Le Nigeria et l'Afrique du Sud sont des États parties à des traités tels que le Pacte international relatif aux droits économiques, sociaux et culturels et la Charte africaine des droits de l'homme et des peuples. Cependant, ces traités ne font pas de la sécurité alimentaire l'un de leurs attributs essentiels. Cet article soutient que les maladies d'origine

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alimentaire ont un impact significatif sur la reconnaissance et l'application du droit à la santé. S'appuyant principalement sur la dogmatique juridique, cette contribution évalue l'efficacité des mécanismes juridiques à reconnaître la sécurité alimentaire comme une composante essentielle du droit à la santé dans les pays couverts par cette étude. Il est important pour le Nigeria et l'Afrique du Sud de parvenir à une intégration effective de la sécurité alimentaire en tant que composante indispensable du droit à la santé en Afrique.

KEY WORDS: food, food safety, health and law, right to health, Nigeria, South Africa

CONTENT:

1 INTRODUCTION

The World Health Organisation reports that about 600 million; almost 1 in 10 people in the world fall ill after consuming contaminated food and 420,000 die every year.[1] In Africa, 'more than 91 million people fall ill and 137,000 die each year of foodborne diseases'.[2] Treatment and management of these diseases place pressure on existing health facilities, particularly in developing countries and also affects economic development.[3] Today, unsafe food consumption is an issue that appears to be expanding due to consumers' increasing exposure to food safety hazards as a result of changing lifestyles.[4] Being of significant public health concern, food safety draws a strong linkage with the lives and health of people.[5] Accordingly, the ability of every person to exercise their rights to life and good health are directly dependent on the level of

1 World Health Organisation, 'Food safety' https://www.who.int/health-topics/food-safety (accessed 14 July 2022); In Nigeria, the Minister of Health reiterated this position on the World Food Safety Day, 2022 which had the theme: 'Safer food and better health' C Muanya & N Onyedika-Ugoeze '600 Million persons fall ill, 420,000 others die globally from toxic foods' *The Guardian* 8 June 2022.

2 World Health Organisation 'WHO's first ever global estimates of foodborne diseases find children under account for almost one third of deaths' https://www.who.int/news/item/03-12-2015-who-s-first-ever-global-estimates-of-foodborne-diseases-find-children-under-5-account-for-almost-one-third-of-deaths (accessed 17 July 2022.)

3 KL Newman et al 'The impact of socioeconomic status on foodborne illness in high-income countries: a systematic review' (2015) 143(12) *Epidemology and Infection* 2473.

4 Uçar et al 'Food safety – problems and solutions' in H Makun significance, prevention and control of food related diseases (2016).

food safety.[6] Food safety is one of the main indicators of sustainable food security. At the World Food Summit in 1996, food security was said to exist at all levels when 'all people, at all times, have physical and economic access to sufficient, *safe* and nutritious food to meet their dietary needs and food preferences for an active and healthy life'.[7] Unsafe food comprising harmful pathogens or chemical substances causes more than 200 diseases.[8] Thus, there is a need for food safety control to address related health problems through the lens of the right to health approach.[9] However, available research suggests that food safety has not been fully incorporated in the right to health in Nigeria and South Africa.

Generally, in Africa, many food producers are unable to guarantee food safety.[10] Governments are responsible to ensure safe food, not only through effective food safety laws, but also recognition of the right to health. South Africa has taken a bold step by ensuring that the right to health is enshrined and justiciable under its Constitution. In Nigeria, the right to health is non-justiciable. Notwithstanding, the right to health may be enforced through the provisions of the African Charter on Human and Peoples' Rights[11] and the National Health Insurance Act, 2014, which are laws in Nigeria. While these measures are commendable, this paper explores the perspective of enhancing food safety through the right to health in Nigeria and South Africa. This article is divided into six parts. The first is this introduction. The second part is the conceptualisation of key terms such as Food, Food Safety and Right to Health. The third part delves into the legal framework on food safety in Nigeria and South Africa. The fourth part draws a link between food safety and the right to health in Nigeria and South Africa. The fifth part deals with resolving health implications of food safety through a human rights-based approach. The final segment is recommendations and conclusion.

5 A Okoruwa et al 'Overview of Nigerian food safety legislation' (2022) *Advances in Nutrition and Food Science* 2.

6 TV Kurman, OV Kurman & OM Tuieva 'The legal foundations of food safety as a means of providing public health in globalization' https://pubmed.ncbi.nlm.nih.gov/32124797/ (accessed 27 August 2022).

7 Cited in W Peng & EM Berry *The concept of food security* (2018); see also Mark Gibson 'Food security- a commentary:what is it and why is it so complicated?' (2012) 1 *National Institutes of Health* 18–27.

8 WHO: Food safety https://www.who.int/news-room/fact-sheets/detail/food-safety (accessed 14 July 2022).

9 Food safety in the protection of the right to health F N Damayantil & E Wahyati 'International conference on food science & technology Series' (2019) 292 *Earth and Environmental Science* 012047.

10 'Food safety status in African countries' https://www.qassurance.com/food-saffety-in-africa/(accessed 16 July 2022).

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

2 CONCEPTUAL CLARIFICATION OF KEY TERMS

In this segment, key terms shall be defined: food, food safety and the right to health.

2.1 Meaning of food

Several authorities have defined food safety. The term 'food' is perceived as 'any nutritious substance that people or animals eat or drink or plants absorb in order to maintain life and growth'.[12] According to the Black's Law Dictionary,[13] 'food is a substance that is edible and has nutrition in it to sustain life and make energy ... It helps promote health.' In Nigeria, The Food and Drug Act defines food as 'any article manufactured, processed, packaged, sold or advertised for use as food or drink for human consumption; chewing gum and any ingredient that may be mixed with food for any purpose whatever ...'.[14] This definition excludes live animals, birds, fish, and articles or substances used as drugs. The National Agency for Food, Drug Administration and Control Act extends the above definition to 'include drinking water and supplements for the survival of all persons and animals.'[15] This definition does not seem helpful in providing an apt, yet inclusive meaning of food because it is designed for a highly contextual situation. This is in view of the fact that the definition of food for the purpose of regulation is different from the definition of food ordinarily.

Ezerigwe argues that the definition of 'food' given by the food laws in Nigeria restricts the regime of food safety.[16] For instance, the provision of the Food and Drug Act, which excludes raw food like plants, live animals and poultry, presents a conceptual problem that impacts heavily on the food safety system. By excluding unprocessed food, effective regulation of the whole gamut of the food chain becomes difficult to achieve. This is because it is essential to regulate practices such as indiscriminate application of pesticides, herbicides and fertilisers to plants and drugs to animals since they can affect human health when consumed. In the light of the foregoing, the definition of food given by the Food Safety Standards Act of India is worthy of emulation,[17] since it captures food as 'any substance, whether processed, partially processed or unprocessed, which is intended for human consumption.[18] This is broad enough to cover primary food,

12 Lexico UK Dictionary https://www.lexico.com/definition/food (accessed 14 September 2022).

13 Black's Law Dictionary, 10th edition.

14 Sec 20, 1974.

15 Sec 22(f), 1993.

16 J Ezerigwe 'Much ado about food safety regulation in Nigeria' (2018) 9(1) *Journal of Sustainable Development Law and* Policy 16.

17 Sec 3(1)(j) Food Safety and Standards Act of India 2006.

genetically modified or engineered food or food 'containing ingredients, infant food, packaged drinking water, alcoholic drink, chewing gum, and any substance'.[19]

This article agrees with Uzoamaka who gives a nod to the above definition.[20] The definition settles the issue of whether the perception of food should extend to unprocessed foods. The Indian provision captures technologically innovative foods like genetically modified foods unlike the laws under the legal framework in Nigeria.[21] Consequently, in the light of various definitions proffered by different authorities, this article proposes the adoption of a comprehensive definition that embraces the entire food chain. Food, therefore, is any edible substance, processed or unprocessed which is scientifically proven to contain required nutrients needed for the survival and sustenance of human life.

2.2 Meaning of food safety

There is no universally accepted definition of food safety. Several authors have advocated for enhanced food safety, yet none of them provides a concise definition of the term.[22] This obvious conceptual deficiency leaves one in doubt as to what constitutes food safety and the specific measures that would guarantee food safety at all levels of the food chain. Hassauer and Roosen hold the opinion that food safety is a 'complex social issue.'[23] The concept, though intensively used, yet scientific literature in natural sciences and consumer research and even regulators do not define it. This makes it quite challenging for regulators to determine food safety because different societal groups appear to have a different understanding of what is meant by safety.[24]

18 As above.

19 As above.

20 G Uzoamaka 'A survey of the criminal jurisprudence for combating food adulteration in Nigeria and India' (2019) 4 *African Journal of Criminal Law and Jurisprudence* 55.

21 The World Health Organisation defines genetically modified food as 'food derived from organisms whose genetic material (DNA) has been modified in a way that does not occur naturally, e.g. through the introduction of a gene from a different organism. which contains artificially altered genes, removed from any other organism (animals, plants, viruses, bacteria) in order to give it new characteristics, ...' WHO https://www.who.int/health-topics/food-genetically-modified#tab=tab_1 (accessed 10 May 2022).

22 For instance, FJ Critzer wrote about reducing the contamination of food through proactive adoption of management practices that are based upon scientifically valid food safety principles: FJ Critzer 'An introduction to microorganisms that can impact products sold at farmers markets' in J Harrison (ed) *Food safety for farmers markets: a guide to enhancing safety of local* foods (2017) 201; E Eghosa 'Legal and theoretical assessment of the right to food in Nigeria' in RT Ako & D Olawuyi (eds) *Food and agricultural law: readings on sustainable agriculture and the law in Nigeria* (2015) 122-139.

23 C Hassauer & J Roosen 'Towards a conceptual framework for food safety criteria: analysing evidence practices using the case of plant protection products' (2020) 127 *Safety Science* 1046.

24 As above.

According to Khalid, food safety relates to prevention, reduction or elimination of the risk of ill health, or death as a result of consumption of foods, whether fresh or processed, obtained through domestic market, or by international trade.[25] It is contended that food safety is not a legal terminology. Indeed, most of the existing statutes related to food safety do not define the term. The only legal instrument that defines food safety in Nigeria is the Food Safety Bill.[26] This bill defines food safety as 'all measures to ensure that food does not cause harm to the consumer when it is prepared'. This definition is too fleeting. It does not say anything about specific measures that ensure safety of food. The phrase 'when it is prepared' shows that the intention of the legislature is to focus on processing and preparing food thus ignoring the safety measures in the farm. This definition has the tendency of affecting effective regulation of food in the entire food chain continuum.

Food safety has been referred to as a 'scientific discipline describing the handling, preparation and storage of food in ways that prevent food borne illness'.[27] Chishti also adopted this line of thought but added that reducing foodborne illness can be achieved through a number of routines that should be followed to avoid potentially severe health hazards.'[28] Following this reasoning, Sadiku et al opined that food safety involves the concept that food will not cause harm to the consumer when it is eaten according to the intended use.[29] However, these definitions do not answer the question of how one can handle or store food to avoid illness through legal measures.

Uyttendaele et al perceived food safety as 'safeguarding the national food supply chain from the introduction, growth or survival of hazardous microbial and chemical agents.'[30] Different shades of consumers often hold that 'descriptions of safe food are generally practical and simple'.[31] Ugland and Veggeland[32] contended that food safety refers to potential risks to human health associated with the consumption of domestic and foreign food products. It is a key aspect of public health, and failure to adequately address this issue can result in food-borne illnesses, long-term disabilities, and even deaths. To Gizaw,[33] food safety deals with safeguarding the food supply chain

25 SMN Khalid 'Assessment of the current food safety regulatory system in Afghanistan and its future with a new independent regulatory structure' (2015) 5(2) *International Journal of Development Research* 3390.

26 National Food Safety and Quality Bill 2019.

27 https://www.definitions.net/definition/food+safety (accessed 12 July 2022).

28 M Zubair Chishti *Food safety: its problems and remedies* MSc thesis, University of Sargodha 2014.

29 MNO Sadiku and others 'Food Law' (2019) 3(2) *International Journal of Trend in Scientific Research and Development* 1.

30 M Uyttendaele E Franzand & O Schulter 'Food safety, a global challenge' (2015) *International Journal for Environmental Research and Public Health* 4.

31 M Elimi 'Food safety: current situation, unaddressed issues and the emerging priorities' (2004) 10(6) *Eastern Mediterranean Health Journal* 1.

32 T Ugland & F Veggeland 'Policy integration: food inspection reforms in Canada and the European Union', being a paper prepared for presentation at the Canadian Political Science Association Annual Conference, University of Western Ontario London 2-4 June 2005.

from the introduction, growth, or survival of hazardous microbial and chemical agents. In more specific terms, Fahmi Abu Al-Rub *et al* defined food safety as 'strategies and activities aimed to protect foods from biological, chemical, physical, and allergenic hazards that may occur during all stages of production, distribution, and consumption'.[34] From a strict consumer perspective, safe food should not be harmful. It refers to unadulterated food with a subsisting shelf life; food that does not contain deleterious substances.[35]

The above definitions deal with general measures that are channeled towards making food safe for consumption. However, these definitions do not address safety measures that should be taken on the farm since activities to protect food supply from hazards that may occur at any stage of the food chain.[36] For example, the application of fertilisers and pesticides in excessive doses may have grave implications on human health when consumed in food. In sum, a definition of food safety must capture food safety measures at all levels of the food chain.

2.3 Meaning of the right to health

Health is a fundamental human right which is crucial to the exercise of other human rights,[37] including the right to food.[38] Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity.[39] It should be noted that the right to health is not equivalent to the right to remain healthy since a person may have access to the best health facilities in the world and may still remain unhealthy.[40] The right to health 'refers to entitlement to the

33 Z Gizaw 'Public health risks related to food safety issues in the food market: a systematic literature review' (2019) 24 *Environmental Health and Preventive Medicine* 68.

34 FA Al-Rub et al *Food Safety Hazards* (2020).

35 T I Akomolede & P O Oladele 'Consumer protection in a deregulated economy: the Nigerian experience' (2006) 1(3) *Research Journal of International Studies* 13-23; See also, NA Inegbedion 'Consumerism, merchantability and Standard Organization of Nigeria' (1993) 2 *Edo State University Law Journal* 2; L Kwarghake 'Adulteration and faking of goods in a globalized economy: emerging issues for consumer redress in Nigeria' (2005) 4 *Benue State University Law Journal* 95.

36 Glossary of food safety related terms https://www1.agric.gov.ab.ca (accessed 18 September 2022).

37 Z Nampewo and others 'Respecting, protecting and fulfilling the human right to health' (2022) 21 *International Journal for Equity in Health* 36.

38 Icelandic Human Rights Centre 'What is right to health' https://www.humanrights.is/en/human-rights-education-project/comparative-analysis-of-selected-case-law-achpr-iachr-echr-hrc/the-right-to-health/what-is-the-right-to-health (accessed on 18 July, 2022).

39 CESCR General Comment 14: The right to the highest attainable standard of health (Art. 12) Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, on 11 August 2000 https://www.refworld.org/pdfid/4538838d0.pdf (accessed 14 July 2022).

40 O Nnamuchi 'Securing the right to health in Nigeria under the framework of the National Health Act' (2018) 37(3) *Medical Law* 477-532.

enjoyment of a variety of goods, facilities, services and conditions which are necessary to maintain or restore health'.[41] The phrase, 'variety of goods' as used in this context may cover food, but does not explicitly cover food safety. This paper maintains that the government owes an obligation to ensure that the entire food chain is safe for consumption as a measure of protecting citizens' right to health. The right to health may be realised through measures such as formulation of health policies, implementation of health programmes in line with international standards or through adoption of specific legal instruments.

3 LEGAL FRAMEWORK ON FOOD SAFETY IN NIGERIA AND SOUTH AFRICA

3.1 Nigeria

Food safety legislation is an important aspect of a national food control system that strives to ensure effective protection of consumers' health. Accordingly, national governments are vested with the task of developing, implementing and enforcing sound food safety legislation to protect public health and facilitate food trade within territorial boundaries. There are several laws geared towards enhancing food safety in the country. Okoruwa observes that there are some gaps in these laws.[42] These include lack of stiff penalties and poor enforcement provisions in the existing laws on food safety.[43] Apart from these challenges, one major issue which connects to the hub of this paper is that food safety laws in Nigeria are not directly in tandem with the right to health. They carry mainly criminal sanctions. It is important for food safety to be clearly embedded in every person's right to health. This would make the government and all actors in the food chain continuum to ensure that the food that gets to the consumer is safe for consumption. For the sake of space, only key of these legislations shall be discussed.

Nigeria operates a multiple agency food safety control system.[44] This implies that the existing laws are shared amongst the three tiers of government:[45] federal, state and local government area councils. The Criminal Code is the key penal statute in the southern part of the country. It criminalises the act of selling or being in possession or having intent to sell as food or drink articles which are noxious or unfit for food or drink.[46] It also punishes the act of selling adulterated food

41 As above.

42 A Okoruwa and others 'Overview of Nigerian food safety legislation' (2022) 2 *Advances in Nutrition and Food Science* 1.

43 As above.

44 J Omojokun 'Regulation and enforcement of legislation on food safety in Nigeria', https://www.intechopen.com/chapters/44083 (accessed 12 August 2022).

45 As above.

46 Sec 243(1).

or drinks or adulterating food and drinks with intent to sell noxious food or drinks.[47] It provides that any person who violates any of these provisions is liable to a term of imprisonment for one year. These provisions, though geared towards protecting human health, are not stiff enough to deter offenders. This justifies the need for food safety to be perceived using the lens of the right to health. The Penal Code is the criminal law applicable to the northern part of the country. It provides that any person who sells or is in possession with intent to sell as food or drink articles which are noxious or unfit for food or drink;[48] sells adulterated food or drinks, or adulterates with intent to sell noxious food or drinks;[49] shall be liable to imprisonment for two years or one year as the case may be.

The Food and Drugs Act is the chief law on food and drugs in Nigeria. It regulates the manufacture, importation, distribution, sale and advertisement of processed or packaged food, drugs, cosmetics and medical devices. The Act prohibits the sale, importation, manufacture or storage of articles of food which contain poisonous or harmful substance, or is 'unfit for human consumption or consists in whole or in part of any filthy, disgusting, rotten or diseased substance'.[50] It also prohibits the same acts with respect to any food which is adulterated as well as the manufacturing, storage or sale of food under insanitary conditions.[51] In addition, the Act prohibits various misleading practices relating to packaging, labeling, treatment, processing and advertisement of food and other regulated products.[52] Although the penalty for the breach of these provisions is a fine of not less than fifty thousand Naira or imprisonment for a term not exceeding two years or both,[53] the Act stands as an ineffective tool in enhancing food safety. The reality is that punishment of the offender who has sold unsafe food to the consumer threatens the health and life of citizens.

Another important legislation is the National Agency for Food and Drug Administration and Control Act.[54] This Act establishes the National Agency for Food and Drug Administration and Control which is vested with the task of 'regulating the manufacture, importation, advertisement, distribution and sale of food and other regulated products'.[55] The Act provides that any person who contravenes the provisions of any regulation made under the Act is guilty of an offence and liable on conviction to the penalties specified in the regulations. Where no penalty has been specified, the offender shall be liable to a fine of N50,000.00 or imprisonment for a term of one year or both.[56]

47 Sec 243(2).
48 Sec 187(1).
49 Sec 184(1).
50 Sec 1.
51 Sec 6.
52 Sec 5.
53 Sec 17(1).
54 1993 as Amended by Decree 1999 and now known as Act CAP N1 LFN 2004.
55 Sec 30 NAFDAC Act.
56 Sec 25(2) NAFDAC Act.

How then has this Act as an instrument of enhancing food safety helped to protect the right to health? Apart from prescribing penalties for offenders who produce and sell unsafe food remedies, the Act has not made specific provisions to protect the right to health.

The Standard Organisation Act[57] is yet another legislation on food safety. It establishes the organisation the Standards Council of Nigeria.[58] The Act is empowered with the task of prescribing and maintaining standards in quality and measurements of both locally manufactured and imported goods, including food products. [59] Despite the efforts of the Act in establishing compliance assessment programmes, an appraisal of the Act shows that it only regulates finished food products. Thus, it does not cover unprocessed food products. Other statutes include the Counterfeit and Fake Drugs and Unwholesome Processed Foods (Miscellaneous Provisions) Act,[60] Food and Drug Related Products (Registration, etc.) Act,[61] Animal Diseases (Control) Act,[62] Nigeria Agricultural Quarantine Service Establishment Act,[63] National Environmental Standards and Regulations Enforcement Age Act,[64] Federal Competition and Consumer Protection Act (FCCPA),[65] and National Biosafety Management Act.[66] These laws have several provisions that are geared towards enhancing food safety. However, they are imbued with pockets of defects which make implementation cumbersome. In addition, some laws overlap and this often creates confusion and difficulty in enforcement. What is more, they are not tied to the right to health of citizens.

The most recent attempted legislation in Nigeria is the National Food Safety and Quality Bill.[67] Its primary objective is to provide the regulatory framework to protect consumers from hazards which may be present in food and animal feed.[68] One of the innovations in the Bill is that it provides bedrock for effective food control through the integration of regulatory agencies. However, the Bill does not make provision for regulation of foods in farms, especially as it relates to the use of pesticides.[69]

57 Standard Organisation of Nigeria Act 2015.
58 Sec 3(1).
59 Sec 5(1).
60 No 17 of 1989, now Act 25 of 1999 now Act C 34 LFN 2004
61 1993 now known as Act CAP F33 LFN 2004.
62 Food and Drug Related Products Act 1988.
63 Nigeria Agricultural Quarantine Service Establishment Act 2018.
64 National Environmental Standards and Regulations Enforcement Age Act 2007.
65 Federal Competition and Consumer Protection Act 2018.
66 2015 as amended in 2019.
67 National Food Safety and Quality Bill 2019.
68 Sec 1(a).
69 A Okoruwa et al 'Overview of Nigerian Food Safety Legislation' available at https://kosmospublishers.com/wp-content/uploads/2022/07/Overview-of-Nigerian-Food-Safety-Legislation.pdf (accessed 24 January 2023).

3.2 South Africa

The importance of food safety in South Africa was highlighted by the listeriosis outbreak of 2018. President Cyril Ramaphosa disclosed the proposed plans to create a food safety agency or regulatory authority. Its chief mandate would be to ensure the highest levels of health and safety to protect consumers.[70] At present, South Africa's regulatory environment on food safety is fragmented. South Africa operates a multiple agency system of food control, just like Nigeria. The national departments responsible for food safety legislation are the Department of Agriculture, Forestry and Fisheries, the National Department of Health and the Department of Trade and Industry. There are several laws that deal with food safety in South Africa.

These are Agricultural Product Standards Act,[71] Animal Diseases Act,[72] Animal identification Act,[73] Animal Improvement Act,[74] Animals Protection Act,[75] Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act,[76] Meat Safety Act,[77] Performing Animals Protection Act,[78] and Veterinary and Para-Veterinary Professions Act.[79] The Meat Safety Act of 2000 seeks to reduce foodborne diseases from animal-sourced foods. The South African Department of Health imposes hygiene requirements for food premises and transport, with the focus on reducing food safety risks. Nevertheless, the government of South Africa places emphasis on food safety, with increased regulation of food handling and processing, sales, and food exports.

In 2014, the Department of Agriculture, Forestry and Fisheries gave special attention to food and nutrition security risk management. This department covers stability of the food supply and general food safety. The Director of Veterinary Services of South Africa presently controls the importation of meat products in line with the Meat Safety Act of 2000, but only approves meats processed in abattoirs approved by the Directorate.[80] In addition, the South African Bureau of Standards, the statutory body established in 1945, is regulated by the Standards Act 8 of 2008. The SABS is empowered to develop, promote and maintain

70 B Versfeld & ZN Webber Wentzel South Africa: Food safety in South Africa and the need for an appointed regulator 14 September 2021.

71 Act 119 of 1990.

72 Act 35 of 1984.

73 Act 6 of 2002.

74 Act 62 of 1998.

75 Act 71 of 1962.

76 Act 36 of 1984.

77 Act 40 of 2000.

78 Act 24 of 1935.

79 Act 19 of 1982.

80 Y Arias-Granada 'Foodborne diseases and food safety in Sub-Saharan Africa: current situation of three representative countries and policy recommendations for the region' (2021) 16(2) *African Journal of Agricultural and Resource Economics* 169-179.

South African National Standards, protecting the quality of commodities, products and services and rendering conformity assessment services.

4 FOOD SAFETY AND RIGHT TO HEALTH IN NIGERIA AND SOUTH AFRICA

Food safety relates to health because it deals with production, proper processing and handling of food in such a manner as to prevent foodborne diseases. The right to health covers different social-economy factors which promote people's healthy life and extends to the other health determinant factors such as food and nutrition, healthy workplace and healthy environment, housing and access to clean and adequate water, sanitation.[81] In Nigeria, the right to health is embedded in the Constitution which provides that the 'state shall direct its policy towards ensuring that there are adequate medical and health facilities for all persons'.[82] The use of the words 'shall' in this context suggests that it is mandatory for the state to provide health facilities for all persons. Despite the fact that this provision is couched in mandatory terms, they are non-justiciable rights or 'expressions of normative moral imperative'.[83] This is because the constitution provides that the courts shall not exercise jurisdiction in entertaining matters that are encapsulated in Chapter II of the constitution because they deal with socio-economic rights that are non-justiciable.[84]

Notwithstanding, the Constitution empowers the National Assembly with the task of making laws 'for the peace, order and good government of the Federation or any part thereof with respect to any matter included in the Exclusive Legislative List, Part I of the Second Schedule'. Precisely, by Part I of the Second Schedule to the Constitution which is the Exclusive Legislative List, item 60(a), the National Assembly is vested with the power, among others, to establish and regulate authorities for the Federation or any part thereof for the purpose of promoting and enforcing the observance of Fundamental Objectives and Directive Principles enshrined in the Constitution. Armed with this breath of power, the National Assembly enacted the National Health Act which is the key legislation that guarantees the rights of all persons to health. Accordingly, the right to health in Nigeria can be enforced by the enactment of legislation by the National

81 Healthy people' determinants of health' https://www.healthypeople.gov/2020/about/foundation-health-measures/Determinants-of-Health (accessed 12 June 2022).

82 O Nnamuchi 'Securing the right to health in Nigeria under the framework of the National Health Act' (2018) 37(3) *Medicine and Law* 477-532 at 482 (citing art 17(3)(b).

83 A Le Roux-Kemp 'The recognition of health rights in constitutions on the African continent: a systematic review' (2016) 24(1) *African Journal of International and Comparative Law* 142-157.

84 Sec 6(6)(c) 1999 Constitution.

Assembly or the domestication of existing treaties.[85] Judicial Credence has been given to the right to health in *Odafe & Others v Attorney-General and Others*.[86] In this case, the Court recognised the right to health in Nigeria. It held that prisoners who tested positive to HIV have the right to access medical care and that the breach of this right is a violation of article 16 of the African Charter.

In South Africa, unlike Nigeria, the right to health is guaranteed in the Constitution.[87] The Constitution provides that 'everyone has the right to have access to health care services including reproductive health care',[88] sufficient food and water,[89] and social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.[90] It further provides that no one can be denied emergency medical treatment.[91] Also, it makes provision for 'basic health care services' for children.[92] Therefore, the right to health is a justiciable right in South Africa.[93] These provisions are commendable because they show the crucial place of right to health in the country's fundamental law. More importantly, the right to health is perceived from a broad perspective; it encapsulates access to sufficient food and water and even in instances where persons do not have the means to do so. Elaborate as this provision is, it does not cover food safety; it merely mentions 'sufficient food.' The need for food safety to be subsumed as the right to health is justified on the ground that 'sufficient food' may be unsafe.

It is important to briefly examine the attitude of the court in enforcement of the right to health in South Africa. In *Soobramoney v Minister of Health*[94] the Constitutional Court had to examine the right to have access to health care services in emergency situations. The facts of the case are that the appellant, an old unemployed man, had suffered from heart disease, diabetes and cerebrovascular disease. He subsequently had a stroke due to his health complications. In 1996, the conditions of his kidney deteriorated and later failed hence the need for survival through regular renal dialysis. He had sought treatment from the renal unit of the Addington State Hospital in Durban, but due to limited health infrastructure, the hospital was unable to meet his demands. Aggrieved, the appellant instituted an action against the

85 Nnamuchi (n 82) at 483.

86 (2004) AHRLR 205, http://www.chr.up.ac.za/index.php/browseby-subject/419-nigeria-odafe-and-others-v-attorney-general-and-others-2004-ahrlr-205-nghc-2004.html (accessed 16 July 2022).

87 P Roger 'South Africa's right to health care: international and constitutional duties in relation to HIV/AIDS epidemic' (2004) 11(2) *Human Rights Brief* 9-12.

88 Sec 27(1)(a).

89 Sec 27(1)(b).

90 Sec 27(1)(c).

91 Sec 27(3).

92 Sec 28(1)(c).

93 L Forman 'Justice and justiciability: advancing solidarity and justice through South Africans' right to health jurisprudence' (2008) 27(3) *Medicine and Law* 661-83.

94 (Kwazulu-Natal) (CCT32/97)[1997] 17.

hospital for breach of his right to health. Justice Chaskalson held that the appellant's right had not been violated because the state had limited resources to provide a renal machine for his dialysis treatment.

In the light of the above decision, one wonders whether the right to health is enforceable in South Africa. An appraisal of this decision shows that the Court was careful in acknowledging the enforceability of the right to health, but remarked that the enjoyment of the right is subject to the availability of medical facilities. This rationale, though sound, is capable of providing shields for the state in instances where resources designed for purchase of health facilities may have been embezzled. Therefore, before the right to health can be limited, the right to accurate information on state resources should be respected.

At the regional level, Nigeria and South Africa are state parties to the African Charter on Human and Peoples' Rights, 1981,[95] Today, the Charter has been incorporated as the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act under the Nigerian laws.[96] The Act provides that provisions of the Charter shall 'have force of law in Nigeria and shall be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive or judicial powers in Nigeria'.[97] Interestingly, the African Commission on Human and Peoples' Right is the body vested with the power to interpret the African Charter and ensure that member states conform to their obligations enshrined in the Charter. Accordingly, in the famous case of *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria*,[98] the African Commission charged the Nigerian government to ensure protection of the environment including health and livelihood of the people. To do otherwise amounted to a violation of article 16 of the Charter. Other regional treaties are the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). Also, the enforcement of fundamental human rights, including the right to health is vested in the Community Court of Justice (ECOWAS) Court.[99] The Court is empowered to determine cases of violation of rights that may occur in any member state. The power of the Court is premised on the provisions of article 9(4) of the Supplementary Protocol 2005 of the Court which amended Protocol (A/P17/91).

At the international level, Nigeria and South Africa are signatories to the United Nations Charter, 1945. The Charter provides that the

95 African Charter on Human and Peoples' Rights: ratification table https://www.achpr.org/ratificationtable?id=49 (accessed 3 July 2022).

96 Cap A1 Laws of the Federation of Nigeria 2004.

97 Sec 1(1).

98 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (2001).

99 FC Nwoke Alternative platform for the protection of Human Rights in the West African Sub-Region: ECOWAS Court in perspective, being a lecture delivered at the 17TH Justice Idigbe memorial lecture held on 18 June, 2019 at the Akin Deko Main Auditorium, University of Benin, Benin-City.

United Nations shall promote 'solutions of international economic, social, health, and related problems; and international, cultural and educational cooperation'.[100] Another international instrument, binding on Nigeria and South Africa as state parties, that promotes the recognition and enforcement of the right to health is the Convention on the Rights of the Child. This Convention provides that state parties shall recognise the child's right to the enjoyment of the highest attainable standard of health. The Convention also provides that the child shall be entitled to facilities for treatment of illness and health rehabilitation. State parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.[101] The Convention places an obligation on state parties to 'combat disease and malnutrition, including within the framework of primary health care', through the application of technology provision of 'adequate nutritious food' and clean drinking-water, taking into consideration risks of environmental pollution. This provision captures the provision of adequate nutritious food, but this does not translate to incorporating food safety in right to health.

Nigeria is a state party to this Convention. Rose Nathan[102] strongly advocates for protection of the child's right to food but did not address the kind of food – whether safe, adequate or nutritious. The need for expansion of the literature on the right to health to accommodate food safety is imperative. It is important to provide adequate and safe nutrition early in life to avert irreparable damage to the developing brain and body. Again, food safety is of immense importance because unsafe food might impact a child's ability to learn.[103] In Nigeria, the government has taken steps to improve the health status of school children by providing at least one meal for them.[104] However, there appears to be a dearth of empirical evidence on the safety and quality of food consumed in school. There is a need for further research because foodborne illness may even lead to missed days of school.[105] True, providing at least one meal per day might not improve health status unless the meals are safe and sufficient in macro and micronutrients needed for a healthy and active life. In addition, there has been little evidence linking children's improved nutrition and health outcomes to school meals. Still, others are of the view that the main goal of many such programmes is to improve school attendance rates.

100 Art 55(b).

101 Art 24.

102 R Nathan 'Realising Children's rights to adequate nutrition through National legislative reform https://www.unicef.org/policyanalysis/files/Realising_Children_Rights_to_Adequate_Nutrition_through_National_Legislative_Reofrm.pdf (accessed 27 August 2020).

103 UC DAVIS Centre for Nutrition in Schools *Food safety for school nutrition programs participant manual* (Cal-Pro-NET Center, University of California, Davis In association with the California Department of Education, Nutrition Services Division, 2017), https://cns.ucdavis.edu/sites/g/files/dgvnsk416/files/inline-files/food_safety_participant.pdf (accessed 2 March 2022).

104 OS Falade 'School feeding programme in Nigeria: the nutritional status of pupils in a Public Primary School in Ile-Ife, Osun State, Nigeria'(2012) 3 *Food and Nutrition Sciences* 596-605.

105 UC DAVIS (n 103).

5 RESOLVING HEALTH IMPLICATIONS OF FOOD SAFETY THROUGH HUMAN RIGHTS APPROACH

As earlier noted in this article, there are health implications of food safety. The presence of pathogens such as Salmonella, Campylobacter in food often causes Foodborne illnesses which may be large and can be a serious public health issue.[106]

WHO Constitution provides that '... the highest attainable standard of health as a fundamental right of every human being'.[107] This suggests that health should be incorporated as a fundamental right places an obligation 'on states to ensure access to timely, acceptable, and affordable health care of appropriate quality as well as to providing for the underlying determinants of health'.[108] A state's obligation to support the right to health – including through the allocation of 'maximum available resources' to progressively realise this goal – is reviewed through various international human rights mechanisms including the Committee on Economic, Social and Cultural Rights.

The right to health includes some core components.[109] The first is availability. This refers to the need for a sufficient quantity of functioning public health and health care facilities, goods and services, as well as programmes for all. Accessibility requires that health facilities, goods, and services must be accessible to everyone. This covers non-discrimination, physical accessibility, economical accessibility and information accessibility. The third component is acceptability which deals with respect for medical ethics, culturally appropriate, and sensitivity to gender. Acceptability requires that health facilities, goods, services and programmes are people-centred and cater for the specific needs of diverse population groups in accordance with international standards of medical ethics for confidentiality and informed consent. The final component is quality which stipulates that facilities, goods, and services must be scientifically and medically approved. They must be safe, timely, effective and people-centred.[110] Having elucidated the components of the right to health, there is also a need for food safety to be clearly integrated in the right to health.

106 World Health Organization. WHO Global Strategy for Food Safety : Safer Food for Better Health (2002) https://apps.who.int/iris/bitstream/handle/10665/42559/9241545747.pdf (accessed 16 June 2022).

107 Constitution of the World Health Organisation 1946.

108 Sec 17(3)(d) of the Constitution of the Federal Republic of Nigeria 1999 (as amended in 2011).

109 WHO: 'Human rights and health' https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health (assessed 14 July 2022)

110 As above.

6 RECOMMENDATIONS AND CONCLUSION

6.1 Recommendations

6.1.1 Need for advancing the right to health

It has been noted that the right to health in South Africa is justiciable. This constitutional provision is commendable because it does not give room for ambiguity as to the enforceability of the right to health. However, it is desirable that the scope of the provisions be widened to embrace food safety. This would stimulate the government to ensure that the whole gamut of the food chain is safe for the consumer. In Nigeria, as earlier mentioned, the right to health, though non-justiciable, can be enforced through National Health Act 2014 and African Charter on Human and Peoples' Rights. This position paves way for escaping the consequences of violating the right to health. Indispensable as the right to health is, especially in its correlation with other rights, it should be embedded in the constitution as a fundamental right. Also, food safety should be included as its core ingredient.

6.1.2 Need for intersection of right to health and food safety law

If the right to health is entrenched in the Constitution in both jurisdictions, then it follows that all other laws must bow to it. Against this backdrop, it is suggested that the existing food safety laws in both jurisdictions recognise the right to health. In South Africa, the Constitution provides that 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. By implication, human rights embodied in the Constitution must guide every law in South Africa.[111] Therefore, food safety laws must reflect the right to health under the Constitution. Other recommendations are that governments in both jurisdictions should provide food testing laboratories in line with international standards to check cases of unsafe food in fulfillment of the right to health. At the regional level, Africa should develop a unifying and concise framework that would cater for enhancing food safety through the eyes of the right to health.

6.2 Conclusion

Unsafe food continues to pose a serious global challenge. Nigeria and South Africa are not left out as the media is often awash with cases of foodborne diseases. This reflects government shortcomings in meeting

111 A background to health law and human rights in South Africa' https://section27.org.za/wp-content/uploads/2010/04/Chapter1.pdf (accessed 19 July 2022).

international obligations to ensure that food that gets to the table of all citizens, from the farm through production, processing, transportation, storage and sale is safe for human consumption. The close interconnection between food safety and human health was established thus illustrating the need for the right to health to be expanded to clearly encompass food safety. It is not sufficient for the right to health to embrace normative attributes such as clean water, and safe food, it must extend to holding the government accountable for health issues that often arise due to its failure to effectively regulate the whole gamut of the food chain. Commendably, the right to health is unequivocally recognised as a fundamental right in South Africa, as opposed to what is obtainable in Nigeria where the right to health is non-justiciable. However, this is not enough; the components of the right to health must be clearly articulated to embrace food safety.

Green crimes: the impact of genetically modified organisms on promoting food security in Kenya

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ABSTRACT: Kenya's food insecurity hinders progress towards sustainable development. While the Kenyan Constitution guarantees every person the right to adequate food of acceptable quality, it also prohibits environmental and health endangerment. Whether and how to invest in genetically modified organism (GMO) technology as an alternative food production method is important. In this context, scientists should not be denied the opportunity of harmonising the tension between environmental safety and food security while upholding sustainable development. Scientifically, GMO crops are sustainable, notwithstanding the African Union's rigid social and political setting. However, each state's role in providing sufficient resources and law enforcement personnel is crucial. A GMO regulatory system addresses environmental safety and human health, explicitly adopting the developmental risk notion. Kenya's 2012 cabinet ban on GMO foods derived from the Séralini Report which erroneously claimed that GM maize causes cancer in rodents. The health ministry established a Task Force to review the country's readiness regarding GMO safety and adoption. Despite having been completed in 2014, its Report remains secret. In 2015, the High Court dismissed as premature demands for public participation on whether to unban GMOs. In 2022, President Ruto lifted the ban. Arguably, while permitting GMO experimentation, it is prudent to prescribe criminal sanctions. Beyond anthropocentric notions, green criminology provides a framework to analyse both *illegal* and *legal* environmental harms, and for appraising Kenya's evolving GMO policy. The Constitution provides a right to sustainable use and also establishes enforcement mechanisms to compel cessation and restoration. Yet without punitive consequences, GMO regulations may not deter offenders from environmental contamination.

TITRE ET RÉSUMÉ EN FRANCAIS:

Les crimes verts des organismes génétiquement modifiés et la promotion de la sécurité alimentaire au Kenya

RÉSUMÉ: L'insécurité alimentaire au Kenya entrave les progrès vers le développement durable. Si la Constitution kenyane garantit à toute personne le droit à une alimentation de qualité acceptable, elle interdit également la mise en danger de l'environnement et de la santé. Il est important de savoir dans quelle mesure et comment investir dans la technologie des organismes génétiquement modifiés (OGM) comme méthode alternative de production alimentaire. Dans ce contexte, les scientifiques ne devraient pas se voir refuser la possibilité d'harmoniser la tension entre la sécurité environnementale et la sécurité alimentaire tout en défendant le développement durable. D'un point de vue scientifique, les cultures d'OGM sont durables, malgré le cadre social et politique rigide de l'Union africaine. Cependant, le rôle de chaque État, qui doit fournir des ressources suffisantes et du personnel chargé

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de faire respecter la loi, est crucial. Un système de réglementation des OGM aborde la sécurité environnementale et la santé humaine, en adoptant explicitement la notion de risque de développement. Ceci dit, l'interdiction des aliments OGM par le gouvernement kényan en 2012 découle du rapport Séralini, qui affirmait à tort que le maïs génétiquement modifié provoquait le cancer chez les rongeurs. Le ministère de la santé a créé un groupe de travail chargé de déterminer si le pays était disposé à adopter les OGM. Bien que son mandat soit arrivé à terme en 2014, le rapport du groupe de travail n'a pas été rendu public. En 2015, la Haute cour a rejeté, comme étant prématurées, les demandes de participation publique sur l'opportunité de lever l'interdiction des OGM. En 2022, le président Ruto a levé l'interdiction. On peut soutenir que, tout en autorisant l'expérimentation des OGM, il est prudent de prescrire des sanctions pénales. Au-delà des notions anthropocentriques, la criminologie verte offre un cadre permettant d'analyser les dommages environnementaux légaux et illégaux et d'évaluer l'évolution de la politique kenyane en matière d'OGM. La Constitution prévoit un droit à l'utilisation durable et établit également des mécanismes d'application pour contraindre à la cessation et à la restauration. Pourtant, en l'absence de conséquences punitives, la réglementation sur les OGM risque de ne pas dissuader les contrevenants de contaminer l'environnement.

KEY WORDS: genetically modified organisms, food security, Kenya

CONTENT:

1 INTRODUCTION

1.1 Background

Proponents of the use of restricted technologies in genetically modified organisms (GMO) argue that fewer restrictions are needed because science can develop solutions for GMO harms,[1] and also promote food security to Africa's burgeoning populations.[2] The governments of developing countries reject GMOs for various reasons, including due to foreign ownership of the intellectual property in agricultural products, such as seeds. They claim that if farmers require permits from patent

owners, food sovereignty becomes problematic.[3] Worse still, GMOs pose environmental and health risks.[4] However, risk is a culturally-contingent notion. Africa's inclination to reject agricultural GMOs originally surfaced in 1996 under the Convention on Biodiversity (CBD),[5] during the negotiation of a 'biosafety protocol' to ensure that international trade in GMOs did nothing to compromise the safety of the biological environment.[6] Furthermore, early proposals for criminalisation often reflect anthropocentric notions of what is best. They treat 'nature' as a resource for human exploitation.[7] However, it is necessary to exceed liability under tort law allocated to the GMO manufacturer ('polluter pays'), only if the harm was foreseeable by a reasonable person.[8] Until 2022, Kenya officially banned, but informally permitted, GMO experiments. Consequently, using a responsive green crimes framework, this article critically examines its unbanning.

Kenya's food production falls short of its domestic demand.[9] This food deficit calls for a production system or importation to supplement. Biotechnology has the potential to create more nutritious crops, leading to lower healthcare costs and higher economic performance.[10] Thus for some, frankenfood can save the planet.[11] Biotechnological developments promise to enhance food security and eradicate hunger. Yet detractors propose an immediate moratorium on GM foods until their safety, in all phases, can be properly tested.[12] Prior to a 2012 cabinet ban,[13] Kenya was importing maize from predominantly GM producing countries due to the good quality of the GM maize in terms

1 C Juma & B Sihanya 'Policy options for scientific and technological capacity building' in WV Reid, SA Laird, CA Meyer, R Gámez, A Sittenfeld, DH Janzen, MA Gollin & C Juma (eds) *Biodiversity prospecting: using genetic resources for sustainable development* (1993) 199-221.

2 World Commission on Environment and Development *Report of the World Commission on Environment and Development: our common future* (1987) (Brundtland Commission Report) chapter 2 para 2.

3 V Shiva & R Holla-Bhar 'Piracy by patent: the case of the neem tree' in J Mander & E Goldsmith (eds) *The case against the global economy: and for a turn to the local* (1996) 146-159 at 147.

4 O Owino 'Scientists torn over Kenya's recent GM food ban government cites health concerns as it restricts imports' 3 December 2012 Nature/Sci Dev.Net.

5 UN Convention on Biological Diversity (1992).

6 R Paarlberg *Starved for science: how biotechnology is being kept out of Africa* (2009) 15.

7 R White 'What is to be done about environmental crime?' in BA Arrigo & H Bersot (eds) *The Routledge handbook of international crime and justice studies* (2014) 445-467 at 449.

8 *Overseas Trading (UK) Ltd v Miller Steamship Property Co Ltd (The Wagon Mound no 1)* [1961] AC 388.

9 African Agricultural Technology Foundation *Analysis of effects of ban on importation of GM foods on food security, research and training in Kenya* (2018) 1 https://www.aatf-africa.org/wp-content/uploads/2021/02/gmo-ban-study.pdf (accessed 8 July 2022).

10 C Juma *The new harvest: agricultural innovation in Africa* (2011) 35.

11 J Rauch 'Can frankenfood save the planet?' in LP Pojman & P Pojman *Environmental ethics: readings in theory and application* (2008) 476-483.

12 M-W Ho 'The unholy alliance' in Pojman & Pojman (n 11) 483-492.

of storage compared to maize imported from Tanzania and Uganda.[14] However, a strong anti-biotechnology culture has entrenched itself in African countries, introducing complications with regulation and approval of GM crops that make obtaining commercial licences to grow them difficult.[15] Many of the contemporary environmental harms are related to how the basic means of life of humans is being reconstituted and reorganised through global systems of production.[16] Nonetheless, the reason why GMO foods are pursued so relentlessly is that their introduction and establishment is extremely profitable for powerful corporations.[17] Until green crimes are controlled, these corporations might be working in a legal and political vacuum. Restrictive GMO policies are partly predicated on supposed harmfulness to health and the environment. However, GMO fears are actually attributable to uncertainty of risks of potentially catastrophic harms.[18] GMO detractors, including producers and marketers of organic foods, stand to lose their market shares and profits if alternative cheaper or more nutritious foodstuffs are produced and licensed to compete. To allay fears they espouse, scientific freedom must deepen human knowledge through activities and products that enhance everyone's well-being.

What follows conceptualises a green crimes framework, defines sustainable development, illustrates the tension between environmental safety and food security and sets out the need for green crimes. It deconstructs the tendency for elite interests to promote GMOs/GURTs by ignoring ecological protections. Section 2 shows why reliance on tort liability under civil laws to enforce environmental protection is futile. Rather, administrative regulation and criminal sanctions are imperative. Nonetheless, despite Kenya's law prescribing harsh punishments for GMO harms, they remain unenforced. Section 3 balances competing constitutional rights to life, a clean environment and food. Altogether, section 4 shows increasing political permissiveness towards GMO foods on relaxing Kenya's cabinet ban criminalising GMOs, given its misinformed basis on the Séralini Report. Section 5 makes comparative studies of GMO regulations in some African countries. Section 6 explores viable liability mechanisms for GMO environmental harm to reduce hunger in future. In conclusion, environmental politics determines GMO law enforcement and capacity-building.

13 Citizen TV *Banning of GMOs* video 2012. https://www.youtube.com/watch?v=2qV75NOjsuY (accessed 10 July 2022).

14 AATF (n 9).

15 Juma (n 10) 41.

16 R White *Crimes against nature, environmental criminology and ecological justice* (2008) 158.

17 White (n 16) 160.

18 JLDLC Arzamendi 'Environment protection and manipulation of microorganisms' in CMR Casabona (ed) *Biotechnology, law and bioethics: comparative perspectives* (1999) 299-330 at 300.

1.2 Criminal regulation of green crimes

Crimes are not brute facts, but social constructions of political realities. The 'social construction of environmental crime is dependent on power relations and the social inequality within society'.[19] According to White:

> Green criminology refers to the study by criminologists of environmental harms (that may incorporate wider definitions of crime than provided in strictly legal definitions), environmental laws (including enforcement prosecution and sentencing practices) and environmental regulation (systems of civil and criminal law that are designed to manage, protect and preserve specified environments and species, to manage the negative consequences of particular industrial processes).[20]

Green crimes are not given sufficient attention. Yet, environmental crimes are aggravated by their costs for future generations and the disastrous impact on the environment.[21] White says that 'harmful activities, such as the (over-) exploitation of natural resources, were and still are not criminalized and are therefore often ignored by criminologists'.[22] Notably, this meagre attention resonates with the fact that criminal law is mostly applicable to offenders from a socio-economically poor background 'instead of powerful and large corporations'.[23] Yet, green crimes are perpetrated by powerful actors in organisations which are neither subjected to fines nor warnings.[24]

Green crimes are a composure of a number of aspects: the political, social and economic interests and they almost always conflict with state, private and environmental interests. Consequently, the need for green crimes calls for harmonisation to recognise and appreciate that humans should not be perceived as the only central actors in a complex ecosystem, but the environment may be victimised in a similar way.[25] Thus 'green criminology takes the principle of harm ... not only to transgressions against humans, but also against the environment and non-human species'.[26] Although, such 'harmful activities are not limited to anthropocentric harm approaches but also include ecocentric and biocentric harms',[27] this article focuses on debunking alleged harms GMO foods pose to human health.

Criminalisation of GMOs through fines or imprisonment deters their production, importation and possession. That was the effect of the

19 DP van Uhm 'A green criminological perspective on environmental crime: the anthropocentric, ecocentric and biocentric impact of defaunation' in JLDL Cuesta, L Quackelbeen, N Persak & G Vermeulen (eds) *Protection of the environment through criminal law* (2018) 323-340 at 327.

20 White (n 16) cited in White (n 7) 446.

21 DP van Uhm & D Siegel 'Green criminology and organised crime' (2019) *Researchgate* 729-752 at 731. https://www.researchgate.net/publication/339145864_Green_Criminology_and_Organized_Crime (accessed 11 July 2022).

22 As above.

23 Van Uhm & Siegel (n 21) 732.

24 As above.

25 Van Uhm & Siegel (n 22) 735.

26 Van Uhm (n 19).

27 Van Uhm (n 19) 335.

Kenya cabinet's 2012 ban on GMOs. Arguably, the ban reflected the power relations among competing interests groups. Despite aiming to transform into a newly industrialising economy by 2030, independent Kenya remains an agrarian society with the bulk of Gross Domestic Product accruing from exporting tea, coffee, horticulture and other cash crops.[28] Maize is the staple diet. Given that GMO medicines are acceptable, it follows that the entry of GMO foods onto Kenya's market is not inherently wrongful. Neither does scientific evidence support suggestions that GMO foods are harmful. On the contrary, numerous Western countries produce and consume GMO foods without noticeable or recorded harms. This paper therefore argues that maintaining the ban without scientific justification operated to the detriment of the biotech community whose livelihoods suffered on account of being deprived of opportunities to produce GMO foods. Because 'coercion and corruption are generally unfettered by stable institutional controls',[29] developing countries cannot afford to enforce compliance with environmental laws. Thus, poor countries instead facilitate the corporate business climate.

1.3 Sustainable development

There is a need to satisfy society's current nutrition needs with respect to the need to protect future generations. Developing countries face a dilemma of whether to be extremely precautionary and fail to comply with global standards of competitive trade or to regulate GM production reasonably to secure its benefits for current and future survival. Because people need to assert the importance of living within ecological limits, but still want to include the idea of progress, the sustainable development concept arose.[30] It is 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.[31] GM production poses the risk of terminating wild crops or natural biodiversity and as such, in any release, states must be cautious of the environment.

Kenyans have been victims of perennial food shortages since colonial underdevelopment.[32] Solutions range from avoiding overreliance on maize as a staple food to encouraging other foods. GM food now emerges as a possible solution to food insecurity. Although lifting Kenya's ban on GMO or GURT presents a major economic, social

28 S Moyo 'Transformation in Africa and its decolonisation' in F Cheru & R Modi (eds) *Agricultural development and food security in Africa: the impact of Chinese, Indian and Brazilian investments* (2013) 38-56 at 41, 50; J Chege, D Ngui and P Kimuyu 'Scoping paper on Kenyan manufacturing' (UNU-WIDER 2014) 6. https://www.wider.unu.edu/sites/default/files/wp2014-136.pdf.

29 White (n 7) 454.

30 M Redclift 'Sustainable development: needs, values, rights' (1993) 2(1) *Environmental Values* 3-20.

31 Rio Declaration on Environment and Development (1992) principle 1.

32 Moyo (n 28) 39; see also NTV Kenya 'Are GMO crops the solution to ending food scarcity?' video 2018. https://www.youtube.com/watch?v=ncm0RvRmG2k (accessed 11 July 2022).

and environmental opportunity for innovation and food security,[33] developmental activities which in the past governed the race toward just economic superiority,[34] are now focusing on rationalisation.[35] They attempt to explain or justify the use of natural resources and hunger eradication. Nonetheless, development is sustainable in a physical sense if it can be pursued even in a rigid social and political setting.[36] However physical sustainability[37] cannot be secured unless state development policies pay attention to growing concerns, such as changes in access to food and in the distribution of costs and benefits.[38] Therefore, the environmental, cultural, social and economic considerations that contribute to the planning and implementation of development decisions, such as the GMO question, should not be left to market forces. It is the government's responsibility to control the environment by legislative reform and the implementation of national strategic plans for sustainable development and therefore abide by the principle of public environmental order.

The effectiveness of the liberal democratic state rests partly 'upon maintaining an illusion of neutrality, impartiality and plurality,' and sustaining this through *inter alia* implementation of human rights, including environmental protection.[39] However, where this illusion collapses, the result is dictatorship and more blatant self-serving activity on the part of the state and corporate elite. In this regard, irresponsible advancement of GMOs/GURTs harms the environment, privileges sectional class interests and the interests of state elites above universal human interests (such as for an ecological sustainable environment).[40] The World Commission on Environment and Development[41] thus posited the legality of sustainable development at the 1992 Rio de Janeiro UN Conference. Ultimately:

33 Juma & Sihanya (n 1) 200.

34 M Eid 'The ethical reasoning behind sustainable development: a paradoxical opportunity for the reform of developing countries' (2012) 4(2) *Sustainable Development Law Journal* 236-245.

35 United Nations Report on Millennium Development Goals (2015); United Nations, Sustainable Development Goals (2015).

36 J Cameron 'The history and contemporary significance of the precautionary principle' in T O'Riordan & J Cameron *Interpreting the precautionary principle* (1994) 17-18.

37 J Pezzey *Sustainability: an interdisciplinary guide* (1992) 5.

38 United Nations, Report Development and Environment (1971); United Nations, Declaration on the Human Environment (1972); United Nations, Declaration on Environment and Development (1974); United Nations, International Conference on Population and Development (1994); World Summit on Social Development (1995).

39 White (n 7) 450.

40 White (n 7) 449.

41 United Nations Conference on Environment and Development (Earth Summit) at Rio de Janeiro Brazil from 3-14 June 1992. https://www.un.org/en/conferences/environment/rio1992 (accessed 14 October 2022).

> [S]ustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.[42]

This study explores the tension between food security and health and environmental safety in Kenya. It supports the lifting of the GMO ban. The cabinet ban did not deter any real environmental or health threat. The article's objective is to evaluate Kenya's GMO legislative and policy framework and practices in order to understand whether there may exist more responsive regulation to risks posed by GMO foods. Previously, despite embracing formal environmental protections in international instruments, constitutional principles, statutory provisions and regulations, Kenya nonetheless informally relaxed its 2012 cabinet ban. Was the ban on GMOs empirically justified or politically expedient? Despite Africa's near 'uniform attitude' based on social and political rigidity embedded in the 2014 Malabo Declaration on Accelerated Agricultural Growth and Transformation for Shared Prosperity and Improved Livelihoods, and the precautionary principle in our national laws, is it possible for countries to independently create GMO production favourable laws to curb food shortages?

2 GREEN CRIMINOLOGY

2.1 Two models of state intervention

Traditional sentencing options for environmental crimes comprise fines or imprisonment. Their penal purposes were retribution and deterrence, respectively. However, without injunctions and *restitutio in integrum,* environmental protection is not achievable.[43] Hence the need to supplement punishment with civil law remedies aimed at ensuring prevention and restoration. Administrative regulations impose disclosure requirements on manufacturers which require them to incur expenses to prevent pollution by taking precautions (precautionary principle) and internalising the costs of their actions (polluter pays principle).

'These harms include a range of (criminal) activities such as forms of pollution (air, water and soil), deforestation (legal and illegal logging), species decline (poaching and overexploitation) and the abuse of animals (vivisection and intensive livestock farming)'.[44] Further specific types of harm as prescribed in law include illegal transport and dumping of toxic waste, the transportation of hazardous materials and the illegal trade in plants and animals.[45] Thus green criminology extends the harm principle not only to transgressions against humans,

42 *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Reports 7 (separate opinion of Vice-President Weeramantry) 88.

43 M Faure 'Limits and challenges of criminal justice systems in addressing environmental crime' in Cuesta and others (n 19) 11-36 at 23.

44 Van Uhm (n 19).

45 White (n 16).

but also to transgressions against the environment and non-human species.[46] Significantly, such harmful activities include ecocentric and biocentric harms and are not limited to anthropocentric harm approaches.[47]

Ayres and Braithwaite illustrated the advantages of using a regulatory pyramid of escalating sanctions commencing with administrative responses at the base, civil remedies midway, and criminalisation being reserved for the apex.[48] Accordingly the neo-liberalism tendency has been toward 'softer regulatory' approaches.[49] These approaches range from Environmental Impact Assessments (EIAs) and Environmental Management Systems (EMSs) to voluntary adoption of good environmental practices. Two outstanding models exist for environmental regulation. First, Ayres and Braithwaite's 'self-enforced regulation' is based on a pyramid of escalating responses, where the base emphasises persuasion rising to a peak of harsh punishments. For business transgressions, the sanctions rise as follows: 'persuasion, warning letter, a civil penalty, a criminal penalty, licence suspension, and licence revocation'. Second, to 'produce more efficient and effective policy outcomes', Gunningham and Grabosky's 'smart regulation' recruits 'a range of regulatory actors to implement complementary combinations of policy instruments tailored to specific environmental goals and circumstances'.[50]

Faure recalls that 'environmental crime was captured in environmental laws that had a primarily administrative character'[51] when environmental laws emerged in the 1970s. On breaching permit conditions, an operator would be subject to criminal sanctions. However, preferring green crimes, White complains that '[t]he continuing degradation of the enforcement today is linked to the dominant regulation and framework itself, one that puts stress on self-regulation rather than de-regulation'. He criticises the state's reluctance to impose directive legislation and active enforcement and prosecution, and its preference for education, promotion and self-regulation.[52] Instead of 'persistent and continuous inspections, accompanied by substantive operational powers (including criminal sanctions)' that 'can lead to rapid positive changes in polluting practices' governments 'shed regulatory functions and responsibilities to rely on rhetoric and savings afforded by self-regulation'.[53] Rarely do enforcement and compliance activities attract extensive government

46 Van Uhm (n 19).

47 As above 335.

48 I Ayres & J Braithwaite *Responsive regulation: transcending the deregulation debate* (1992); see also K Ligeti & A Marletta 'Smart enforcement strategies to counter environmental crime in the EU' in Cuesta and others (n 19) 113-149 at 133.

49 As above.

50 N Gunningham & P Grabosky *Smart regulation: designing environmental policy* (1998) cited in White (n 7).

51 Faure (n 43) 12.

52 White (n 16).

53 As above 453.

money, resources and personnel. Rather support is usually provided in the service of large corporations, as a form of state welfare designed to facilitate and enhance the business climate and specific corporate interests. Arguably, the fiscal crisis of the state at the onset of global economic depression 'also brings with it a crisis in the regulatory sector'.[54] Since 'the gravest attacks on determined legal assets – such as environmental – result from business activities and not strictly individual behaviour',[55] and because corporate criminalisation is inherently problematic, environmental protection agencies can be expected 'to struggle with inadequate monies and demoralized officers as departmental belts tighten and priorities are placed elsewhere'.[56]

2.2 The Cartagena Protocol on Biosafety and the precautionary principle

The 2000 Cartagena Protocol on Biodiversity (CPB) superseded the CBD as the desirable approach to environmental regulation. Prioritising the precautionary principle, it urges member states to enact environmental crimes. The precautionary principle was received in Africa to the detriment of GMO foods. Under various regulatory statutes, GMO offences have prevented GMO technology from taking root in the quest for food security. In Kenya, the Biosafety Act of 2009[57] expresses the Cartagena requirements. The precautionary principle aims to safeguard current and future generations in relation to sustainable development. Furthermore, anthropocentricity theory holds that human beings are the epicentre of the world and human interests with regard to sustainable development, are at the centre. Green victimology borrows anthropocentricity notions in that, instead of understanding ecosystems, environment or animals as victims, interpretations depict humans as victims.[58] The Rio Declaration provides that the

> [p]recautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.[59]

To buttress this, the CBD[60] states that 'where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such threat'. Instead, the CPB provides that parties are not restricted to take any action that is more protective of the

54 As above 454.
55 ALL Sá 'Criminal liability of corporate entities in Brazilian law' in Cuesta and others (n 19) 301-320 at 306.
56 White (n 16) 454.
57 Biosafety Act No 2 of 2009 Revised Edition 2018 [2009].
58 Van Uhm & Siegel (n 21) 732.
59 Rio Declaration (n 31) principle 15.
60 CBD (n 5) preamble.

conservation and sustainable use of biological diversity.[61] It 'empowers governments to restrict the release of products into the environment or their consumption even if there is no scientific evidence that they are harmful'.[62] Effectively, the CPD's precaution prioritises the 'need to protect human health and the environment from the possible adverse effects of the products of modern biotechnology'.[63] Nevertheless, the CBD acknowledges that biotechnology has potential to address many environmental and developmental problems, including enhancing food security.[64] Most African countries applying the precautionary principle aim at protecting the 'rights of local communities, farmers and breeders and for the regulation of access to biological resources, and the African Model Law on safety of biotechnology'.[65] This application of the precautionary principle however attracts criticism. It lacks the harmonisation created under article 21 of the CBD. Thus '[s]ome authors argued that this justification is based upon selective application of the principle ignoring the enormous benefits associated with GM technology'.[66]

The precautionary principle demonstrates a problem that lies in its application, rather than the principle itself. Because '[c]itizen dislike for GM foods is stronger in Europe than in the United States',[67] a conservative interpretation has led EU countries to GM restrictions. Consequently '[t]he precautionary principle has been generally integrated into the regulatory and legal frameworks of the EU, but has been less popular in the US. Internationally, the concept is being contested and has 'become a chess piece in the struggles over genetically modified foods, for example'.[68] 'The success or failure of efforts to implement the principle will depend upon the manner and extent to which scientific uncertainty is considered in the decision-making process, not the measures that are ultimately adopted'. Clearly, there is no 'one size fits all' expression of precaution that suits every instance.[69] Ecuru terms an uninformed application as an 'extreme interpretation of the precautionary principle'.[70]

61 Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) art 2.

62 Juma (n 10) 39.

63 CPB (n 61) 1.

64 CBD (n 5) art 21.

65 N Muzhinji & V Ntuli 'Genetically modified organisms and food security in Southern Africa: conundrum and discourse' (2020) https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7553747/ (accessed 13 July 2022).

66 As above.

67 Paarlberg (n 7) 24.

68 White (n 16) 65.

69 As above 67.

70 J Ecuru *A pathway for biosafety regulation of GMOs in Sub-Saharan Africa* (2018) https://www.cambridge.org/core.terms (accessed 10 July 2022) 290.

2.3 Capacity constraints for Africa biotech

To Rodgers, if the regulatory requirements have not been met, then civil law may have a role to play.[71] For example, where the authorisation was itself obtained without providing full information about the GMO in question, or where the farmer ignores the terms of the land management protocols when managing the GMO crop. By linking recovery of natural resource damage exclusively to legally protected habitats, the European Environmental Liability Directive has a narrower approach than the CBD which defines biodiversity in much broader terms.[72] The European Commission rejected a wide approach because the adoption of the variability concept in living organisms as a qualification to defining biodiversity damage would raise difficult questions of how damage would be quantified, and what would be the threshold of damage entailing liability. Similarly, the CPB regulates trade in living GMOs, including a mechanism for the development of a liability maxim.[73] Its design restores damaged natural resources, and resource services, rather than assessing the monetary value of the damage to the resource.

'The global picture with respect to agbiotech is trending toward one of adoption rather than rejection of the technology'.[74] However, on one hand, despite facing serious food insecurity, Africa 'continues to exhibit a cautious rhetoric that follows that of its major historical trade partner, the EU'.[75] On the other hand, 'developing trade and investment opportunities with major new adopters (such as Brazil, China and India) as well as the potential for inter-African trade in GM food and feed crops may affect this dynamic in the future and may catalyse much-needed regulatory harmonisation, but for the moment, attitudes in the EU appear to be the prevailing influence'.[76] The EU's restrictive GM approach seems to influence Africa's policy. This lack of independence was identified by the AU/NEPAD High-Level Panel on Biotechnology as follows: 'Africa needs to develop its own scientific capacity to assess biotechnology related risks through national, regional and continental institutions so that all biotechnology policy is informed by the best available research and knowledge.'[77]

Comprehensively, lack of technical capacity and political will, contradictory attitudes, weak framework of regulatory bodies, weak and inefficient regulatory frameworks, trade concerns, and public

71 CP Rodgers 'Agenda 2000, land use, and the environment: towards a theory of "environmental" property rights?' in J Holder & C Harrison (eds) *Law and geography* (2003) 239-258.

72 CBD (n 5) article 2.

73 As above article 27.

74 JA Chambers, P Zambrano, J Falck-Zepeda, G Gruère, D Sengupta & K Hokanson *GM Agricultural technologies for Africa:a state of affairs* (2014) 6. https://www.researchgate.net/publication/264008147_GM_Agricultural_Technologies_for_Africa_A_State_of_Affairs (accessed 10 July 2022).

75 As above.

76 As above; see generally Cheru & Modi (n 28).

77 As above 38.

misinformation or misperception are presenting a number of challenges that African countries have not been able to overcome.[78]

With an operational biosafety legal framework, and major progress in research, Kenya should be in a better position to compete globally. Kameri-Mbote opines that for Kenya, developing products and eventually placing them on markets is 'a logical investment in light of the fact that its viability as an agricultural country is threatened by limited arable land, increasing population and reduced production owing to unfavourable climatic conditions and pests and diseases'.[79]

Through the CPB's precautionary principle, Africa is ultra-cautious on GMOs. Yet GM foods pioneered into commercial agriculture in the mid-1990s. Since then, they have been planted in all continents except Antarctica.[80] Significantly, '[t]o date, there has been no scientifically documented evidence of human or environmental harm'.[81] In fact, '[a] large number of national and international scientific organisations around the world have attested to the safety of GM technologies'.[82]

Despite all these vindications of biotechnology and specifically GM, Africa applies the stringent precautionary principle. Yet 'there is no compelling evidence of harm from the consumption of approved foods and food products manufactured from biotechnology processes'.[83] The precautionary principle should be invoked in instances where there is uncertainty of harm. Instead, post-2012 permissions in Kenya applied *ad hoc* discretions. Executive orders can be draconian.

3 CONSTITUTIONAL AND POLICY FRAMEWORK FOR ENVIRONMENTAL PROTECTION AGAINST GMOS

Kenya's 2010 Constitution recognises the citizens' self-determination and requires public participation in all policy making and legislation. Moreover, responses to environmental harms must look beyond civil liability. Administrative regulation is necessary where liability cannot be attributed to any single tortfeasor. This is because, sometimes, there are circumstances where the incubation period for a tort (civil wrong) may be up to 20 years. For example, with GMOs the interim harm may not be measurable, hence monetary compensation becomes

78 As above 6.

79 P Kameri-Mbote *Regulation of GMO crops and foods: Kenya case study* (2012) 42. https://bch.cbd.int/en/database/103326 (accessed 10 July 2022).

80 Chambers and others (n 74) 36-37.

81 As above 37.

82 As above.

83 As above 38; see also C Juma & I Serageldin *Freedom to innovate: biotechnology in Africa's development: a report of the high-level African panel on modern biotechnology* (2007) 115. https://www.researchgate.net/publication/268685034_Freedom_to_Innovate_Biotechnology_in_Africa's_Development_Report_of_the_High-Level_African_Panel_on_Modern_Biotechnology (accessed 13 July 2022).

problematic. That is why rather than a liability rule based on the (*ex post*) polluter pays principle, administrators should impose the (*ex ante*) precautionary principle. Yet, ultra-cautious regulations are retrogressive and must be underpinned with criminal sanctions.

3.1 Kenya's 2010 Constitution

Prior to Kenya's 2010 Constitution, the country had accepted environmentally-sound technology limiting genetic engineering, from the global UN conferences embracing the human environment. The Constitution domesticates the general principles of international law and confirms that any law, including customary law, that is inconsistent with the Constitution, and any act or omission in contravention of the Constitution are void and invalid, respectively. As the *grundnorm*, the Republic's supreme law binds all state organs at both levels of government.[84]

The Bill of Rights simultaneously enshrines every person's rights to life,[85] and to a clean and healthy environment.[86] In reference to sustainable development, these two articles (life and environment) should be read in tandem. Additionally, the developmental goal introduces the food dimension. This is because our national values and principles of governance specifically include *sustainable* development.[87] Not only does every person have the right 'to be free from hunger, and to have adequate *food* of acceptable quality',[88] but also 'sustainability should be maintained in the exploitation, utilization, management and conservation of the environment and natural resources'.[89]

To balance these three rights to life, a clean environment, and food, the Constitution constrains state authorities when dealing with public finance to adhere to openness and accountability by embracing public participation.[90] Ultimately, the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations. Even national security is now guided by equitability, a tenet of sustainable development.[91] Although a second opinion was sought on the Cabinet policy initially banning GMOs, the ban remained in place for a decade. As noted below, a Task Force's Report was completed in 2014.

84 The Constitution of Kenya (2010) art 2(1).

85 As above art 26.

86 As above art 42.

87 As above art 10(2)(d).

88 As above art 43(1)(c).

89 As above art 69.

90 As above art 201.

91 CO Okidi 'Concept, function and structure of environmental law in environmental governance in Kenya' in CO Okidi, P Kameri-Mbote & M Akech (eds) *Environmental governance in Kenya: implementing the framework law* (2008) 1-6 at 3.

To achieve sustainable development, Kenya's Constitution[92] solidifies the precautionary approach strengthening the right to a clean and healthy environment.[93] As a result, a GMO regulatory system has emerged to address safety for the environment and human health in the context of GMOs and explicitly adopts the notion of developmental risk.[94] It advocates for a duty of care, or onus of proof on those who propose changes or introduce a new technology. This includes a proposed policy on biotechnology and biosafety, regulations and guidelines for hands-on work on GMOs. Kenya's Biosafety Act and regulations promulgate risk assessment and management procedures, mechanisms for monitoring and inspection and a system to provide information to stakeholders about the national biosafety framework and for public participation.[95] Nevertheless, 'Kenya has been carrying out trials on biotech maize and cotton engineered to deter pests in a bid to use less pesticides and fertilisers. Kenyan scientists are also conducting field trials with cassava, which is engineered to resist viruses that shrivel and rot the crop'.[96] None are ready for commercialisation.

3.2 Smart administrative regulation

Constitutionally, all persons, whether individuals or corporations, have a right to acquire and own intellectual property, and the state must recognise the role of science in national development.[97] Moreover, the potential of GMO foods to satisfy every person's right to adequate food of acceptable quality is clear and noble. Nonetheless, the right to a clean and healthy environment legitimately constrains manufacturers from pursuing profits at the expense of the public interest in environmental stewardship. However, under criminal law principles of legality, there is no crime without a law and no punishment without a law. Hence 'the state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description' unless doing so is for a public purpose and on prompt payment of compensation as determined by a court.[98] Moreover such compulsory acquisition laws should be enacted by competent institutions[99] and legitimised through public participation and sustainable development[100] and not by cabinet bans. Finally, Kenyan citizens, including scientists and the

92 Constitution (n 84) arts 69(e) & (g).

93 As above art 42.

94 BJ Preston 'The role of the judiciary in promoting sustainable development: the experience of Asia and the Pacific' (10-13 January 2006) A paper presented to the Kenya national judicial colloquium on environmental law, Mombasa, Kenya 40.

95 Constitution (n 84) arts 10(2)(a) & 118(1).

96 S Kedem 'GM foods: the battle for Africa' *African Business* 20 November 2019. https://african.business/2019/11/economy/gm-foods-the-battle-for-africa/ (accessed 23 July 2022).

97 Constitution (n 84) arts 40(5) & 11(2)(c).

98 As above arts 40(3) (b)(i) & (ii).

99 *Nullum juridicum sine lege*.

100 Constitution (n 84) art 10(2)(a) & (d).

biotech community, have a right to life and by extension to livelihood.[101] The cabinet ban constrained them from using their scientific creativity and industry to experiment with GMO technology. It was not subjected to public participation and that hindered sustainable development. In absence of demonstrable environmental and health harms, it served no public purpose. Conversely, it contravened their right to livelihood. To this extent, Kenya's 2012 cabinet ban on GMOs seemed unjustifiable. Yet its unbanning attracts judicial review to determine its constitutionality.

The Environmental and Land Court is established to adjudicate environmental harm matters. It is empowered to make cessation, prevention and compensatory orders.[102] The Environment and Management Coordination Act 1999 is the framework for environmental protection. It requires EIAs on testing of GMOs[103] and creates the National Environmental Management Authority (NEMA), charged with supervising all matters relating to environmental harm. These institutions are a worthy investment in protecting human health and environment welfare as well as interconnecting biotechnology and sustainable development. The legal framework should harness relevant institutions.

4 CABINET POLICIES, STATUTORY PROVISIONS AND JUDICIAL DECISIONS

4.1 The Séralini Report and the GMO Task Force Report

Until November 2012, Kenya was importing GM food and feed. Then the infamous Séralini Report was released.[104] The genesis of the 2012 GMO cabinet ban emanated from research by a team of French scientists led by Professor Gilles-Eric Séralini in September 2012 published in *Food and Chemical Toxicology*.[105] The research analysed a two-year study of rodents on herbicide (Roundup) and Roundup-tolerant GM maize (Roundup Ready).[106] The scientists found tumours

101 As above art 26(1).

102 As above art 162(2); see also section 4 of the Environment and Land Court Act No 19 of 2011 [revised 2012].

103 Open Forum on Agriculture Biotechnology in Africa 'Regulating genetically modified organisms (GMOs) in Kenya' https://africenter.isaaa.org/wp-content/uploads/2020/10/Overlap-between-EMCA-Act-and-Biosafety-Act.pdf (accessed 20 October 2022) 2.

104 Citizen (n 13).

105 AATF (n 9) 9 citing G-E Séralini and others 'Long term toxicity of a roundup herbicide and a roundup-tolerant genetically modified maize' (Nov 2012) 50, 11 *Food Chem Toxicol* 4221-31.

106 As above.

on the rodents caused by genetic modification and glyphosate in the herbicide.[107] The Séralini Report[108] influenced and prompted the Kenyan ban by the then Public Health and Sanitation Minister Beth Mugo. The Report was later retracted in another journal. However, it had already impacted on the trajectory Kenya has taken for the past decade regarding GMOs. The government, in October 2013, subsequently appointed a Task Force chaired by Professor Kihumbu Thairu to advise on GMO.[109] Its work was a prerequisite for possibly lifting the ban. The size and scope of its sample respondents are unknown. That Task Force recommended *inter alia*: adoption of requisite guidelines for testing of GMOs for safety in regard to human health,[110] development and strengthening of the regulatory framework for production, monitoring and marketing of GMOs in the country.[111] However, the Task Force merely elicited superficial debate about whether the ban on GMOs should remain. Following the cabinet decision, the ban on importation of GM crops was initially enforced.[112]

Substantively, 'the ban was not informed by any evidence from competent authorities, including the National Council of Science and Technology, which is mandated to advise the government on research and policy issues'.[113] Procedurally, the ban was not published in the Kenya Gazette as required.[114] Neither was the Biosafety Act invoked in making the decision to ban GMOs. Yet section 51 provides that '[t]he minister may in consultation with the authority, make regulations for the better carrying into effect the provisions of this Act, and in particular for prescribing (a) anything required by this Act to be prescribed; (b) procedure for conducting contained use activities involving genetically modified organisms'.[115]

The cabinet ban was meant to run until the country is able to certify that GMOs have no negative impact on people's health.[116] However, despite the government being pushed to lift the ban no certification has been done to date. Adding insult to injury, the Séralini Report was discredited by the EU, the AU and also the *Food and Chemical Toxicology* journal, on the basis that it lacked sufficient substance that would merit a total ban on GMOs. Séralini's conclusion that rats fed on GMO products developed cancerous tumors attracted criticism.

107 As above.

108 As above citing Séralini and others (2007).

109 As above through Gazette Notice No 13607.

110 As above the Taskforce Recommendations dated 15 November 2013 para 10.5.

111 As above paras 1-5.

112 M Mwaniki 'Experts petition GMO task force boss to quit' *Daily Nation* 2 May 2014 https://nation.africa/kenya/news/experts-petition-gmo-task-force-boss-to-quit-979356 (accessed 26 July 2022).

113 S Macmilan, 'Kenya ban on the import of gm food illegal, not backed by law–Romano Kiome' Blog *ILRI CLIPPINGS* 2013, https://clippings.ilri.org/2013/05/17/kenya-ban-on-the-import-of-gm-food-illegal-not-backed-by-law-romano-kiome/ (accessed 7 July 2022).

114 As above.

115 Biosafety Act (n 57) sec 51.

116 AATF (n 9) 10.

Apparently, his sample size was too small to definitively prove a link between GM foods and cancer, because the Sprague-Dawley rat they used was already cancer-prone. The Report was instantly falsified by formidable criticism. On 24 September 2012, the French government instructed the High Council for Biotechnology (HCB) to provide an opinion on Séralini's Report. HCB found the study failed to establish a nexus between GM foods and the tumours observed in the rats.[117] On 28 November 2013, it was retracted from Elsevier journal following some investigations on the findings by Séralini's team.[118] These investigations found that the Séralini Report was based on tainted data and inaccurate interpretations.[119] These series of events culminated in the Report being republished in May 2014.[120] Notably, in the republication, the journal released a caveat warning that the Report's republication was for purposes of retaining useful discussions from the paper and not to disseminate its contents at all.[121] Unsurprisingly, in 2015, Séralini conceded without duress.[122] In the *PLOS ONE* journal, he says that the tumours observed in the rodents were caused by environmental contaminants in the feeds used, and not from GMOs.[123] Despite this finding by the same scholar and similar findings by other experts, Kenya did not lift the GMO ban. Yet the ban affected food prices, undermined the fragile food security in Kenya, barred local developments of GM crops, and affected the efforts of research.[124] Nevertheless, the government has been permitting tests on certain crops. For example, in 2016, global agricultural producer Monsanto applied to conduct restricted national performance on GM *Bt* (*Bacillus thuringiensis*) or transgenic cotton.[125]

4.2 The Biosafety Act

Even though Kenya was the first country to sign the CPB in 2000, generally we have not enjoyed biotechnology's considerable benefits. In February 2009, the country enacted the Biosafety Act which provides

117 As above 10.

118 As above citing Séralini and others 'Retraction notice to: long term toxicity of a Roundup herbicide and a Roundup-tolerant genetically modified maize' (January 2014) 63, *Food and Chemical Toxicology* 244.

119 As above.

120 As above citing Séralini and others 'Republished study: long-term toxicity of a roundup herbicide and a roundup-tolerant genetically modified maize' (2014) 26, 14 *Environmental Sciences Europe* https://doi.org/10.1186/s12302-014-0014-5.

121 As above.

122 NTV Kenya (n 32).

123 AATF (n 9) 10 citing R Mesnage, N Defarge, L-M Rocque, JS de Vendômois, G-E Séralini, 'Laboratory rodent diets contain toxic levels of environmental contaminants: implications for regulatory tests' (2015) 10, 7, *PLoS ONE* https://doi.org/10.1371/journal.pone.0128429.

124 As above 23.

125 F Sunday 'Kenya to introduce GMO cassava' *Standard media* 18 May 2020. https://www.standardmedia.co.ke/business/news/article/2001371738/kenya-to-introduce-gmo-cassava (accessed 7 July 2022).

for supervision of GMO research and commercialisation activities[126] and established the National Biosafety Authority (NBA) in 2010. In 2011, regulations on the contained use, environmental release, import/export, and transit of agbiotech products were published. This Authority under section 7 of the Act, is tasked with general supervision and control over transfer, handling and use of GMOs.[127] Its two main objectives are couched as: safety of human and animal health and provision of an adequate protection of the environment.[128] Additionally, the Authority is mandated to 'advise the government on legislative and other measures relating to the safe transfer, handling and use of genetically modified organisms'.[129] It is expected to work closely with other regulatory agencies[130] like the NEMA, Kenya Plant Health Inspectorate Service, and Department of Public Health. Without the Authority's written approval, a person shall neither import a GMO into Kenya nor expose them to the environment.[131] Within this legal framework, Kenya's biotech was moving towards a progressive direction. In July 2011, GM maize was approved for importation to mitigate the dire food insecurity.[132] Institutionally, Kenya is abreast with the opening of biotechnology and biosafety facilities like the Kenya Agricultural Research Institute (KARI) and BecA-LRI biosciences hub. As stated earlier, the 2010 Constitution provides for competing rights: the right to clean environment and right to food. However, the former right seems to be informing decisions regarding food security in relation to GM predicated on the value of sustainability. Despite these legal and technological advances, in November 2012 a ban on imports of GM commodities was imposed, which created uncertainty among different stakeholders. Curiously, the ban has not been formally gazetted.[133] In Kenya, like many common law countries, liability is apportioned on the basis of tort law. The strict liability creature of the law has been prohibitive in nurturing Agbiotech innovations and research and a search for green crimes could be of assistance. Apart from restoring the environmental harm one has caused, there is no other consequence for unauthorised dealings in GMOs.

In June 2021, the *Business Daily* reported that 'Kenya has approved the release of genetically modified cassava for open cultivation, paving the way for commercialisation after five years of research'.[134] Consequently '[c]assava now becomes the first food crop

126 OFAB (n 103).

127 Biosafety Act (n 57) section 7.

128 As above sections 7(1)(a) & (b).

129 As above sec 7(2)(e).

130 As above sec 38.

131 As above secs 19 and 20.

132 Chambers (n 74) 79.

133 As above.

134 G Andae 'Kenya approves GMO cassava for farming after years of research' *Business Daily* 24 June 2021. https://www.businessdailyafrica.com/bd/news/kenya-approves-gmo-cassava-for-farming-after-years-of-research-3448024 (accessed 21 June 2022).

to be approved for field cultivation'.[135] Under the Biosafety Act,[136] the NBA has approved 'open field farming after years of confined trials'. Apparently, the NBA Board ignored the 2012 cabinet ban on GMOs, as the government turns to technology to address food insecurity. Alliance for Science hailed cassava for becoming 'Africa's fifth biotech crop approved for open cultivation after cotton, maize, soybean and cowpea' describing this breakthrough as 'another big win for its smallholder farmers'.[137] Its resistance to the destructive cassava brown streak disease was approved 'following a comprehensive safety assessment that showed cassava varieties containing event 4046 are unlikely to pose any risk to human and animal health or to the environment when consumed as food or feed or when cultivated in open fields'. Yet in 2006, the African Union resolved that GMOs were unwelcome on the continent.[138] On 8 November 2012, following a Kenya cabinet decision, the NBA banned their use.[139] Apparently, GMO cultivation became selectively permissible, until 3 October 2022 when the ban was lifted by President Ruto '[i]n accordance with the recommendation of the Task Force to Review Matters Relating to Genetically Modified Foods and Food Safety'.[140] The Report is yet to be made public.[141] This article proposes that polluters should face criminal prosecution. Upon infringing the right to a clean and healthy environment, the current civil liability regime only provides for restoration. Yet, GMO offences may cause harm by way of cross pollination, thus contaminating the environment.

4.3 Case law

4.3.1 High Court

In *Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others*,[142] the petitioners sought conservancy orders against a policy statement by the country's then Deputy President William Ruto in August 2015, threatening to lift

135 As above.

136 As above.

137 J Maina 'Kenya approves disease-resistant GMO cassava' *Alliance for Science* 23 June 2021. https://allianceforscience.cornell.edu/blog/2021/06/kenya-approves-disease-resistant-gmo-cassava/ (accessed 21 June 2022).

138 J Njiraini 'The state of GMOs in Kenya' *AgriBusiness Global* 31 March 2020. https://www.agribusinessglobal.com/genetics/the-state-of-gmos-in-kenya (accessed 14 July 2022).

139 National Biosafety Authority website https://www.biosafetykenya.go.ke/index.php?option=com_content&view=article&id=43&Itemid=134 (accessed 21 June 2022).

140 M Chelangat 'GMO food now legal in Kenya after cabinet lifts ban' *Daily Nation*, 3 October 2022 https://nation.africa/kenya/news/gmo-food-now-legal-in-kenya-after-cabinet-lifts-ban-3971466 (accessed 14 October 2022).

141 F Mwalia 'Demand for transparency in Kenya's adoption of GMOs' *Route to Food* 15 November 2018 https://routetofood.org/demand-for-transparency-in-kenyas-adoption-of-policy-positions-on-gm-technology/ (accessed 22 October 2022).

142 [2015] eKLR.

the cabinet ban on GMOs and foods. They were aggrieved by the government's intention to totally deregulate GMOs before there are sufficient notifications and wide public consultation, especially with farmers, particularly given the failure to release the report by the Task Force to review GMO matters. Interestingly, they cited various international reports that 'have all scientifically pointed to the fact that genetically modified foods and organisms are harmful and dangerous to both man and nature'.[143] The government's rebuttal insisted that the Biosafety Act and regulations provide a satisfactory statutory framework to ensure safety of both the environment as well as of each individual. Moreover, Ruto was merely expressing a personal view and no decision had been made to introduce GMOs into Kenya. Newspaper reports on 13 August 2015 quoted the then DP as saying: 'We are going to lift the ban on Genetically Modified Organisms (GMOs) shortly after the cabinet makes a decision'.[144] However the Court held that 'media reports, especially print media reports, have no probative value'.[145] Judge Onguto declined conservatory orders, given that there are in place various regulations touching on GMOs and food and because there is 'no consensus on the benefits, (dis)advantages, risks and effects of genetically modified organisms and foods generally'.[146] Since no decision to lift the ban had been made, the petitioners were merely apprehensive and their application was premature. This decision demonstrates that procedures of matters relating to banning GMO should strictly be followed such as public participation and gazettement as well as publicising the report and recommendations that form their basis. Both the Constitution and the Biosafety Act require public involvement in such decision making.[147] Accordingly 'we must be cognizant that section 54 of the Biosafety Act is in force. The public will have to be involved in the process and absent such consultation or participation the decision may be rendered void'.[148]

4.3.2 Complementarity of environmental criminality for civil liability

Prosecutions for environmental crimes are complex and expensive to undertake. They are only likely to be pursued in four limited circumstances.[149] These comprise situations where the harm is considered serious, where information is withheld or is deceptive, where perpetrators avoid regulations or are repeat offenders. First, prosecutions are likely if people either die or suffer serious harm; or if an act creates endangerment or death of animals; or if the clean-up costs are considerable. Second, if manufacturers withhold information

143 As above 3 para 11.
144 As above 6 para 33.
145 As above 7 para 36.
146 As above 8 para 43.
147 As above 6 para 32.
148 As above 7 para 41.
149 D Uhlmann 'Protection of the environment through criminal law: an American perspective' Cuesta and others (n 19) 63-82 at 71-72.

from authorities or disclose false information. Third, if people are negligent or reckless and avoid regulatory requirements. Fourth, if people are recidivists. While civil or administrative enforcement are suitable for isolated environmental crimes, unless they cause substantial harm, repetitive and prolonged violations require criminalisation.[150] Altogether, because detection, prosecution and conviction depend on expert scientific evidence therefore specialist courts are essential. GMO crimes are hard to prove. Regulation may alternatively proceed through forfeiting profits earned from polluting activities.

A green criminological framework recognises a limited role of liability mechanisms in relation to environmental damage and GMO releases. Where an effective *ex ante* regulatory framework exists, there is either: No need for *ex post* liability mechanisms, at all or, if there is, then their importance will be commensurately reduced, with the result that any serious long-term environmental impacts which emerge should have been unforeseeable at the time the authorisation was granted. Where the terms of the regulatory authorisation of an activity have been met, the allocation of the unforeseen risk will either lie with the authorities or remain unallocated, as civil law systems preclude relief where the damage in question is not reasonably foreseeable. The remoteness of damages principle was stated in the landmark English *Wagon Mound* case.[151] In that case, the defendant was not held liable for all the direct outcomes of their negligent behaviour. Rather, damage was only compensable where that damage could have been reasonably foreseen. Therefore:

> Part of the dilemma for green criminologists is how to sensibly move the debate beyond standard approaches to environmental crime, and how to shift policy and practice in ways that are more effective than conventional forms of environmental regulation. This involves making certain new claims about the nature of harm, and about the nature of human responsibility. The social construction of environmental problems, for green criminology, must incorporate ideas and practices that link together concerns with environmental justice, ecological justice and species justice.[152]

Consequently, we should be seeking green criminology and avoiding reliance on the tort liability system. This is because 'a number of regulatory frameworks have strict liability provisions and unwieldy risk assessment requirements that are not commensurate with the risk currently posed by the technology'.[153] Kameri-Mbote finds the same deficiency. She observes that

> [t]hree torts are relevant to liability and redress for biotechnology are negligence, nuisance and the rule in *Ryland v Fletcher*. Given that these laws predated biotechnology activities and may not cover all kinds of damage likely to arise from biotechnology activities, the issue of efficacy has been raised and the need to work out a sustainable liability and redress system for GMO intimated.[154]

150 As above 72.
151 *The Wagon Mound* (n 8).
152 White (n 16) 46.
153 Chambers and others (n 74) xvi.
154 Kameri-Mbote (n 79) 36.

The unreliability of tort law in regulating GMO offences compels search for criminal regulation sanctions. Loader and Sparks argue that 'the contours of criminological discourse that will comprise an intellectually serious and worldly criminology in the twenty-first century must begin to identify and engage with the emergent landscapes of crime to be found in socio-political analysis of governance, globalisation and risk'[155] such as biotechnology and GM food. Walters suggests that criminological knowledge must be invoked in order to regulate and understand the complexities of the multifaceted dimensions of biotechnology.[156] He concludes that the 'scientific biotech world of GM foods must be placed on the criminological agenda where reported harms, risks and inequalities are examined'.[157]

5 COMPARATIVE ANALYSIS OF REGIONAL JURISPRUDENCE ON LIABILITY MECHANISMS

5.1 Africa in general

Despite various misinterpretations of the CBD and CPB, both seem to have the spirit of acknowledging biotech. The CBD provides that state parties shall 'facilitate access and transfer of technologies (which include biotechnology) that are relevant to the conservation and sustainable use of biological diversity, or make use of genetic resources and do not cause significant damage to the environment'.[158] Similarly, the CPB stipulates that states should use GMOs in a way that is mindful and which reduces the risks to biological diversity and avoids risk to human health.[159]

Even with several successful experiences in 'countries adopting GMO crops and a number of studies estimating the potentially sizable gains from future adoption of GMO crops [...] the progress of research, development and commercialization of GMO crops in these countries have been considered slow'.[160] In Africa, only 'four countries (Burkina Faso, Egypt, South Africa, and Sudan) have planted GM crops commercially' only a few others like (Ghana, Malawi, Nigeria, Kenya,

155 I Loader & R Sparks 'Contemporary landscapes of crime, order, and control: governance, risk and globalization' in M Maguire, R Morgan & R Reiner (eds) *The Oxford handbook of criminology* 3rd edn (2002) 105.

156 R Walters 'Criminology and genetically modified food' (2004) 44 *British Journal Criminology* 151-167 at 165.

157 As above.

158 CBD (n 5) art 16.

159 CPD (n 61) art 2.2.

160 H Takeshima 'Pressure groups competition and GMO regulations in Sub-Sahara Africa: insights from the Becker model' (2011) 9(1) *Journal of Agricultural & Food Industrial Organisation* 1-17 at 1.

Tanzania, Uganda and Zimbabwe) are conducting restricted trials.[161] Apart from the Africa Law Model of precautionary principle, another cause of the few countries endorsing GM is that Africa's 'capacity to innovate, create, adapt, apply, and transform its agriculture sector using the new tools of biotechnology is, at this time, seriously deficient'.[162]

Technology is always in flux. So is the law, as dictated by societal changes at different ages, and material conditions.[163] Yet: 'A number of regulatory frameworks have strict liability provisions and unwieldy risk assessment requirements that are not commensurate with the risk currently posed by the technology'.[164] Economising with space constrains consideration of numerous African countries displaying different policies towards GMO foods, with varying levels of regulation. The AU may sponsor research into the benefits of harmonising national regulations. Some East African examples should bring the debate into relief.

5.2 Kenya

As explained above, GMO regulations in Kenya are not robust. Green criminology is still at its most abstract level. To regulate GMOs in criminological terms means addressing those harms against humanity and against the environment committed by both powerful organisations, for example governments and transnational corporations, and also by ordinary people.[165] Distinguishing this from ecocide ideologies, the causing or threatening to cause harm to the environment through GMO production should be illegal. Yet national biosafety laws are premised on the tort of negligence. The Biosafety Act provides for issuance of a restoration order or cessation order[166] of an approved activity.[167] These consequences seem insufficient to deter GMO importation. Suppose the harm is neither restorable nor reversible? Glaringly, the Act is silent on punishment.

5.3 Tanzania

Genetic modification in Tanzania is still in its fairly nascent age. In 2003, GM tobacco free of nicotine was initiated by a US based organisation. Nevertheless, it did not bear fruits as the trials were halted the same year due to lack of biosafety framework.[168] Institutionally, the country has the Tanzania Commission for Science

161 Chambers and others (n 74) xiv.
162 As above xv.
163 SG Venkata *Jurisprudence and legal theory* 9th ed (1997) 221.
164 Chambers and others (n 74) xvi.
165 Walters (156) 165.
166 Biosafety Act (n 57) sec 40.
167 As above secs 40, 42.
168 Chambers and others (n 74) 85.

and Technology (COSTECH), the National Biotechnology Advisory Committee, the Agricultural Biosafety Scientific Advisory Committee, and the Tropical pesticides Research Institute. Their regulations stem from the Environment Management Act of 2004. Amid these forward steps, '[s]trict liability and redress provisions in the law and regulations are currently a hindrance to advancing biotechnology R&D in the country'.[169]

5.4 Ethiopia

Ethiopia has one of the most prohibitive and precautious biosafety frameworks. For instance, it demands that 'an advanced informed agreement be obtained before a living or dead modified organism (MO) may enter Ethiopia'.[170] This regulation cuts across all other MOs such as food or feeds. Biotechnology is limited to molecular markers, biopesticides, biofertilizers and tissue culture only.[171] Nonetheless, Ethiopia's government recently approved various trials that will lead to the release and growing of GMOs.[172]

6 EXPLORING THE WAY FORWARD

It is discriminatory for policymakers to prevent biotech practitioners from making a living from practicing their science and using their investment in intellectual property to earn a livelihood. Not only does there appear to be lack of scientific evidence to support Kenya's 2012 GMO ban, but also without public participation in decision-making, the cabinet lacked jurisdiction to ban the production and importation of GMOs as doing so did not further the public interest in sustaining a clean environment or promoting public health, leave alone providing food security. It fettered the rights of biotechnologists to earn a livelihood.

Relying on the Thairu Task Force recommendations,[173] President Ruto lifted the GMO ban in October 2022. Yet, despite numerous demands by civil society and the opposition, this Report has not been made public. The opposition opposes its unbanning, principally because 'reintroduction of GMOs will expose farmers to draconian

169 As above.

170 As above 76.

171 As above.

172 D Teshome 'Providing Ethiopian farmers with GMO technology is lucrative option' *AATF* 13 July 2022 https://www.aatf-africa.org/providing-ethiopian-farmers-with-gmo-technology-is-lucrative-option/ (accessed 25 October 2022).

173 A Langat 'Kenya lifts ban on genetically modified foods despite strong opposition' *Inside Development Food Systems* 12 October 2022 https://www.devex.com/news/kenya-lifts-ban-on-genetically-modified-foods-despite-strong-opposition-104170 (accessed 23 October 2022).

intellectual property laws of multinational corporations fronting the system',[174] and the decision is tainted by lack of public participation and transparency. The rights to information and facilitation of public discourse[175] have thus been breached. Similarly, the requirement of a transparent, science-based and predictable process for reviewing and making decisions on transfer, handling and use of GMOs and related activities, is violated.[176] Just as the banning was, so also the unbanning is, procedurally irregular.

6.1 Towards a viable mechanism of liability for GMO environmental harm

Regulating GMO production relies on three principles, namely – the precautionary, polluter pays and preventative principles.[177] The criminal law discourse should harness both risks and rights. The rationale is to pose resistance 'against state and corporate activities that harm humans, non-humans and the natural environment'.[178] There is a need for responsive regulation in relation to potentially harmful GMOs. Tung, in assessing the liability mechanism in Mauritania regarding GMOs related damage, finds that '[o]ne can argue that the general civil liability regime based on fault or negligence would be applicable in such cases, but it may not be easy to prove the causal link between the activity using GMOs and the negative consequences of the respective GMO or GM product'.[179] The Minister responsible is granted the mandate to make regulations for civil liability where 'there is damage caused by activities involving GMOs'. Tung recommends that the GMO Act[180] should have provided that any person undertaking activities involving use or release of GMOs should be presumed liable and they should bear the onus to 'prove that their activity has not caused that prejudice'.[181] Inevitably, since there is 'increased circulation of GM products and increased development of GMO-related activities throughout the world [...], policies, action plans and legislation constantly need to be elaborated and updated to avoid the potential adverse effects of GMOs'.[182] This is precisely why Kenya needs to undertake a process of public participation on GMO foods and their regulation through escalating green crimes.

174 A Mwangi & G Kebaso 'Western MPs oppose lifting of GMO ban' *People Daily* 13 October 2022 https://www.pd.co.ke/news/western-mps-oppose-lifting-of-gmo-ban-153599/ (accessed 21 October 2022).

175 Art 35 Constitution (n 84).

176 Sec 4(c) (n 57).

177 R Walter *Eco crime and genetically modified food* (2011) 92.

178 As above 121.

179 OJL Tung 'The adequacy of the Mauritania biosafety framework' (2014) 58, 1 *Journal of African Law* 109-128 at 126. DOI:10.1017/S002185531300017X (accessed 13 July 2022)

180 Genetically Modified Organisms Act of Mauritius (No 3 of 2004).

181 Tung (n 179) 127.

182 As above 128.

6.2 Overcoming food insecurity by enforcing compliance with environmental law

Arguably, developing countries cannot afford to enforce compliance with environmental laws because 'coercion and corruption are generally unfettered by stable institutional controls'. Poor countries instead facilitate the corporate business climate. There is a need to enact and enforce green crimes to compel political goodwill and policies towards compliance.

'The dynamics of environmental harm cannot be understood apart from consideration of who has the power to make decisions, the kinds of decisions that are made, in whose interests they are made, and how social practices based on these decisions are materially organised'.[183] Crucially, these decisions must accommodate and appreciate global economic, social and political developments. Additionally 'part of the problem has been that the CPB arose from the CBD, hence ministries responsible for the environment frequently take the lead in biosafety; yet biosafety is a cross-cutting issue spanning many institutional mandates and priorities, including health and agriculture'.[184] In Kenya, premium is placed on health considerations. For instance, the 2012 GMO cabinet ban was imposed without consultation with the NBA and other stakeholders, such as agricultural and technology agencies. Ecuru notes that '[w]hile the CBD and CPB are clear on what the outcome of risk assessment should be, namely minimizing risk to biological diversity and human health, in most countries socio-economic, moral and other ethical issues with respect to GMOs appear to be more prominent'.[185] He concedes that '[h]owever, while the morality of using GMOs and questions about social and economic considerations are important societal concerns, they should, arguably, not be the basis for decision-making when one is following a risk-based approach'.[186] Ecuru distinguishes 'issues concerning risks to human health and the environment' which are different from 'socio-economic and moral value judgments, and therefore should be less emphasized in a biosafety regulation that follows a risk-based approach'.[187] Kenya exemplifies mixing of policy making issues. That is partly why an unjustifiable ban can be made without empirical evidence and enforced haphazardly. These two issues affect the commercialisation and embracement of GMO production. On one hand, 'markets would influence and dictate the adoption of GMOs' while, on the other hand, 'societal norms, traditions and beliefs would determine the acceptability of the technology'.[188] Biblically speaking, money changers

183 White (n 16) 56.
184 Ecuru (n 70) 292.
185 As above 290.
186 As above.
187 As above.
188 As above 291.

cannot sell cattle, sheep and pigeons inside God's temple, lest their tables be overturned and those buying and selling be forcibly ejected.[189]

In matters GMO, rather than display righteous anger while objectively confronting the relevant issues, Kenya seemed to be engaging in political doublespeak. While a ban was still entrenched, there was a permissive attitude towards accommodating and encouraging GMO experiments. Take the recent approval of GM cassava.[190] The government was in a 'state of denial',[191] refusing to clarify its set policies towards biotech. Most biosafety regulatory frameworks, including Kenya's 'were conveniently skewed towards socio-economic and moral considerations'[192] by the CPB. This moralist engraving – influenced by the CPB and the Africa Model Law on Kenya's laws has become an obstacle to GM development and use. Consequently, this indecision culminates into food insecurity. Ecuru suggests that the solution to policies that are influenced by a moralist view should be application of 'mechanisms for judicious assessment of risks to human and environment'.[193] If this were the case, a risk assessment test should have informed the policy direction before imposing the cabinet ban in Kenya.

6.3 Prospects of GMO foods in Kenya

Kenya's agrarian sector now has prospects for GMOs. The approval for commercialisation of genetically modified maize no longer lies with the cabinet after scientists concluded the field trials and handed the report to the Kenya Plant Health Inspectorate Service (Kephis) for registration.[194] This indicates that permitted scientists run contained GMOs trials albeit requiring approval for release into the fields.[195] Yet, no imports and no products have been approved by the NBA for placement in the market. Kenya's NBA advised the government to lift the ban to leverage benefits from GM technology.[196] This political permeability is interpreted optimistically.

The AU Model Law on Biosafety stands on par with EU directives influencing African states' decision-making regarding GMOs. Many African countries remain reluctant to defy the set Model Law (which strongly emphasises the precautionary principle). Others, like 'Ethiopia and Tanzania, have recently embarked on reviewing and amending

189 Mathew 21:12; John 2:15-17 *The Bible* https://biblehub.com/matthew/21-12.htm; https://www.biblestudytools.com/john/passage/?q=john+2:15-17 (accessed 13 July 2022).

190 Maina (n 137).

191 S Cohen *States of denial: knowing about atrocities and suffering* (2001).

192 Ecuru (n 70) 291.

193 As above.

194 G Andae 'Scientists in second GMO maize approval bid' *Business Daily* 23 February 2022. https://www.businessdailyafrica.com/bd/economy/scientists-in-second-gmo-maize-approval-bid-3725638 (accessed 26 July 2022).

195 Njiraini (n 138).

196 As above.

their Biosafety regulatory frameworks, making these frameworks a vital part of their gene technology and innovation'.[197]

7 CONCLUSION

Amid the biotechnology dilemma, there was an irrational GMO-phobia reflected in Kenya's cabinet ban which resulted in lost food sufficiency opportunities, wasted livelihoods and contributed to delayed resolution of the food deficit. Technically, having been predicated on the Séralini Report, upon the latter's withdrawal and concession by its author as being inaccurate, Kenya should have swiftly reversed the GMO ban. Decrying a decade's embargo, a new President lifted the ban, only for the High Court to restore it pending the determination of a lawsuit lodged to determine its merits. Social well-being can benefit from firm and clear laws on liability of environmental or health harm related to GM production or use. In biotech, relevant sectoral agencies should be harmonised to work towards sustainable development while still addressing food insecurity. This is achievable by engaging not only health and medical practitioners, but also food standards agencies, environmental protection stakeholders, regulatory authorities, and plant restriction scientists among other relevant stakeholders. In 2015, the High Court dismissed a challenge to the government's intended deregulation of GMO foods. Farmers sought conservatory orders under the Biosafety Act seeking to prevent the state from unbanning GMOs,[198] since there was no public participation before its decision. Indeed, public participation increases domestic capacity to deal with GMO risks and benefits. For enhanced environmental regulation and law enforcement, a common problem is the lack of political will and financial resources being directed to environmental protection.

Second, there is a need to respond to sustainable development challenges quickly enough to avert potential threats. Hence, long-sighted, cooperative interactions under the precautionary principle will be a crucial step to effecting the policy change. Environmental regulation emphasising regulatory strategies that might improve GMO performance include responsive and smart regulation use, non-state actors and private sector participation and resources in fostering regulatory compliance in relation to the goal of sustainable development.[199]

Third, comparative studies indicate that decisions should not be made without an assessment of potential risk and thorough examination to minimise any untold and undiscovered threats. Such case-by-case examination of species protects the risks to the environment, biodiversity, health and socio-economic conditions with an aim of attaining sustainable development and food security with minimal risks. Kenya has sufficient capacity to venture into contained

197 Ecuru (n 70) 287-288.
198 (n 142) 1 paras 2 and 3.
199 White (n 7) 451.

GM trials. Informally, certain scientists have launched restricted laboratory testing of GM crops in contained fields or spaces to avoid contamination of natural crops. This seems to be done discreetly or discriminatorily with an aim of releasing them and approving them for commercialisation once certified.

Therefore, fourth, criminal sanctions are recommendable on failure by manufacturers to conduct long-term field testing prior to commercialising GMO foods. This is because traditional tort mechanisms in liability have been shown not to accommodate GM harms to the environment as they predated the same.

It is therefore recommended, fifth, that the law should shift towards green crimes, with elaborate characterisation of the offences and fines or warnings.

Ultimately, sixth, the Kenya government should implement a standard way of ensuring that decision-making involving GM is preceded by adequate civic education and information before deliberation with all the relevant agencies and stakeholders. Public participation is an essential prerequisite to GMO policy or legislative reforms. For starters, the Thairu Report should be made public. Let's debate it.

III

CASE COMMENTARIES

COMMENTAIRES DE DECISIONS

Le retrait du consentement des États à l'office de la Cour africaine des droits de l'homme et des peuples: déni du droit d'accès des citoyens à la justice régionale? Le cas *Glory Cyriaque Hossou et un autre c. Bénin*

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RÉSUMÉ: Le présent commentaire est un examen de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Glory Cyriaque Hossou et un autre c. Bénin,* relative au retrait du consentement de l'État du Bénin à l'office de la Cour. Cet examen discute l'arrêt à l'aune du principe de droit acquis, droit fondamental au recours à la juridiction régionale africaine des droits de l'homme et des peuples. De façon pratique, il est question de la pertinence légistique de la règle du consentement de l'État et de son retrait. Le contrôle juridictionnel de l'application des droits fondamentaux consacrés par la Charte africaine des droits de l'homme et des peuples et les instruments juridiques additionnels ou autres instruments internationaux de droits humains auxquels les États parties ont adhéré est conditionné au consentement préalable des États à l'office de la Cour africaine des droits de l'homme et des peuples, aux termes de l'article 34(6) du Protocole de Ouagadougou. S'il est juridiquement licite que les États acceptent ou non l'office de la Cour, il n'en demeure pas moins que le retrait du consentement de l'État peut être interrogé quant aux effets sur le droit fondamental acquis au recours juridictionnel reconnu par la Charte africaine. Ainsi, il semble pertinent de s'interroger sur le sens et la portée juridique de la clause facultative d'acceptation de la compétence de la Cour. Peut-on envisager une interprétation alternative du droit de l'État de retirer son consentement à l'office de la Cour africaine des droits de l'homme et des peuples, au nom de l'effectivité du contrôle juridictionnel des droits humains en Afrique?

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TD Prince-Agbodjan, B Criss-Dess Dongar & NO Afogo 'Le retrait du consentement des États à l'office de la Cour africaine des droits de l'homme et des peuples: déni du droit d'accès des citoyens à la justice régionale? Le cas *Glory Cyriaque Hossou et un autre c. Bénin*'
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TITLE AND ABSTRACT IN ENGLISH:

The withdrawal of state consent to the optional jurisdiction of the African Court on Human and Peoples' Rights: a denial of citizens' right of access to regional justice? A review of the case *Glory Cyriaque Hossou and Another v Benin*

Abstract: This commentary reviews the judgment of the African Court on Human and Peoples' Rights in *Glory Cyriaque Hossou and Another v Benin*, concerning the withdrawal of Benin's declaration made under article 34(6) of the African Court's Protocol. The commentary discusses the judgment in the light of the principle of acquired right, a fundamental right to approach the African regional court on human and peoples' rights. In practical terms, it discusses the legal relevance of the state consent rule and its withdrawal under the Protocol. The exercise of the African Court's power to enforce fundamental rights enshrined in the African Charter on Human and Peoples' Rights and relevant legal instruments or international human rights instruments to which states are parties is subjected to their prior consent pursuant to article 34(6) of the African Court's Protocol. While it is legally permissible for states to accept or not the Court's jurisdiction, the withdrawal of state consent can be questioned due to its adverse effects on the acquired fundamental right to legal remedy recognised by the African Charter. It seems relevant to question the meaning and legal scope of the rule enshrined under article 34(6) of the Protocol. Can an alternative interpretation of the right of the state to withdraw its declaration 34(6) be envisaged, in the name of the effectiveness of continental protection of human rights in Africa?

MOTS CLÉS: Protocole de Ouagadougou, Bénin, retrait de consentement, droits acquis, accès au juge régional, éthique

SOMMAIRE:

1 INTRODUCTION

Fondamental dans sa dimension tant objective que subjective,[1] l'accès à la justice est «le premier des droits procéduraux»[2] dans la mesure où

1 MH Renaut 'L'accès à la justice dans la perspective de l'histoire du droit' (2000) 78(3) *Revue historique de droit français et étranger* (1922) 476-477.

2 J Andriantsimbazovina 'L'accès à la justice au sein des droits de l'homme' (2016) *Le droit d'accès à la justice en matière d'environnement* http://books.openedition.org/putc/1010 (consulté le 3 juillet 2022); la Commission africaine des droits de l'homme et des peuples le considère, à juste titre, comme une déclinaison du droit à un recours effectif. Voir para C-b(1) *Directives et principes sur le droit à un procès équitable et à l'assistance judiciaire en Afrique* (2003).

il confère à son titulaire le «pouvoir d'accomplir un acte juridique, la demande, qui obligera le juge à se prononcer sur le fond de la prétention qu'elle fait valoir [...]».[3] Cela étant, le consentement à la compétence contentieuse des cours et tribunaux internationaux est incontestablement une caractéristique essentielle de l'ordre juridique international.[4] Cette règle que d'aucuns érigent en «droit strictement personnel des États»[5] est l'une des nombreuses formes d'expression de la souveraineté des États. C'est sans doute dans le même ordre d'idées que Mubiala, dès l'entrée en fonction de la Cour africaine des droits de l'homme et des peuples (Cour d'Arusha),[6] soutenait que le consentement à la compétence de celle-ci constitue la condition *sine qua non* d'activation du contrôle juridictionnel des droits garantis par la Charte africaine des droits de l'homme et des peuples (Charte africaine) et les autres instruments pertinents de droits fondamentaux.[7] En réalité, dans le système africain de protection des droits fondamentaux, ce consentement est donné dès lors qu'un État ratifie le Protocole relatif à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples (Protocole de Ouagadougou), à la seule exception des requêtes individuelles et celles portées par les organisations non-gouvernementales (ONG) dotées du statut d'observateur auprès de la Commission africaine des droits de l'homme et des peuples (Commission africaine).[8] Dans ces deux cas de figure, les articles 5(3) et 34(6) du Protocole de Ouagadougou, tel un deuxième verrou,[9] conditionnent la saisine directe de la Cour à une déclaration spéciale des États établissant la compétence de cette dernière à

3 Renaut (n 1) 477.

4 Sur la notion d'ordre juridique international, lire PM Dupuy 'L'unité de l'ordre juridique international' (2003) 297 *Recueil des cours de l'Académie de droit international de La Haye* 9- 489; P Ziccardi 'Les caractères de l'ordre juridique international' (1958) 95 *Recueil des cours de l'Académie de droit international de La Haye* 263-405; E Tourme-Jouannet 'Le droit international comme ordre juridique' in E Tourme-Jouannet (dir) *Le droit international* (2016) 25-68; D Alland 'De l'ordre juridique international' (2002) 1(35) *Droits* 79-102.

5 C Marquet 'Le consentement étatique à la compétence des juridictions internationales' (2019), thèse de doctorat, Université de Genève 31.

6 A van der Mei 'The new African Court on Human and Peoples' Rights: towards an effective human rights protection mechanism for Africa?' (2005) 18(1) *Leiden Journal of International Law* 113-129; GJ Naldi 'Observations on the rules of the African Court on Human and Peoples' Rights' (2014) 14(2) *African Human Rights Law Journal* 367.

7 CVN Kemkeng 'La déclaration de l'article 34(6) du Protocole de Ouagadougou dans le système africain des droits de l'homme: entre régressions continentales et progressions régionales' (2018) 2 *Annuaire africain des droits de l'homme* 181; M Mubiala 'L'accès de l'individu à la Cour africaine des droits de l'homme et des peuples' in M Cohen (dir) *Promoting Justice, Human Rights and Conflict Resolution through International Law/La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international* (2007) 369-378.

8 *Demande d'avis consultatif par la Rencontre africaine pour la défense des droits de l'homme* (avis consultatif) (2017) 2 RJCA 615 para 25.

9 M Khamis *La Cour africaine des droits de l'homme: quelles restrictions à l'accès à la justice?* (2018) Mémoire de maîtrise en droit, Droit international public, Université de Montréal 5; SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 2.

examiner les différends qui les opposent à toute personne se trouvant sous leur juridiction nationale. De plus, un État peut, par convention ou par une déclaration spéciale, circonscrire son consentement, y compris à l'occasion d'une requête dirigée contre lui.[10]

En tout état de cause, si le caractère discrétionnaire de ladite déclaration n'est pas discuté, la possibilité pour les États de la retirer par la suite emporte des conséquences qui peuvent se révéler préjudiciables à la finalité protectrice des droits fondamentaux. Sachant que ladite déclaration a pour effet de créer pour le compte des individus des droits subjectifs et d'établir, à l'égard des États qui l'ont faite, la compétence *ratione personae* de la Cour, le caractère discrétionnaire de l'acte de retrait ne permet-il pas finalement de générer une insécurité juridique en matière d'effectivité du contrôle juridictionnel de la violation des droits humains? Telle est la question posée en substance dans la requête introduite au greffe de la Cour d'Arusha, le 7 mai 2020, par Glory Cyriaque Hossou et Landry Angelo Adelakoun contre la République du Bénin, État dont ils sont les nationaux.

Il résulte des faits de l'espèce que les requérants contestent la légalité de la décision du 25 mars 2020 par laquelle l'État défendeur notifiait au Président de la Commission de l'Union africaine, le retrait de sa déclaration de reconnaissance de la compétence de la Cour pour les requêtes individuelles et celles émanant des organisations non gouvernementales africaines dirigées contre lui, déclaration du 8 février 2016. Dans le cadre de la demande des mesures conservatoires à laquelle la Cour n'a pas fait droit, les requérants prétendent que l'État béninois, par l'acte de retrait, contrevient à la Charte africaine et aux instruments subséquents relatifs aux droits humains, en ce sens qu'il

> empêche ses citoyens d'accéder directement au système judiciaire régional pour y intenter une action en justice et demander réparation pour préjudice subi au sein de leur système interne, ce qui constitue une régression des droits.[11]

La question est donc posée de savoir si le retrait de la déclaration préalable de reconnaissance de la compétence de la Cour d'Arusha, par l'État défendeur, est ou non conforme à la Charte africaine, au Protocole de Ouagadougou et aux autres instruments relatifs aux droits humains ratifiés.

À l'issue de l'examen de l'affaire, au fond, la Cour, par 10 voix contre celle de la Juge Chafika Bensaoula, s'est déclarée incompétente au motif que les États sont en droit de retirer, à tout moment, la déclaration préalable de compétence en vertu de l'article 34(6) du Protocole de Ouagadougou.[12]

Rappelons que la Cour a déjà eu l'occasion de se prononcer, de manière incidente, sur cette question dans l'affaire *Ingabire Victoire*

10 Ce fut clairement l'intention de l'État défendeur dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda* (compétence) (2014) 1 RJCA 585. Voir également l'avis du juge Fatsah Ouguergouz dans son opinion individuelle dans l'affaire *Michelot Yogogombaye c. Sénégal* (compétence) (2009) 1 RJCA 1, para 29.

11 *Glory Cyriaque Hossou et un autre c. Bénin* (compétence) (2021) para 5.

12 Arrêt du 2 décembre 2021, Requête 016/2020.

Umuhoza c. Rwanda.[13] Dans cette affaire, le requérant et l'*amicus curiae* étaient d'avis qu'en l'absence de dispositions expresses prévoyant le retrait de la déclaration préalable à la compétence de la Cour, l'État défendeur était en droit de mettre fin à ses engagements en vertu de l'article 34(6) du Protocole de Ouagadougou, à la seule condition de respecter un «délai raisonnable» que la Cour avait fixé à 12 mois, à compter de la date de notification de l'acte de retrait.[14] Dans le cas d'espèce, l'argument supplémentaire avancé par l'*amicus curiae,* et qui constitue l'objet de l'arrêt ici commenté, n'est pas véritablement tranché par la Cour. En effet, la Coalition pour une Cour africaine efficace faisait observer que dès qu'elle est faite, la déclaration relative à l'acceptation de la compétence de la Cour crée à la charge de l'État des obligations internationales de portée juridique de telle sorte qu'il ne peut être admis des modifications ultérieures incompatibles avec l'objet et le but du Protocole de Ouagadougou.[15]

En considérant que l'acte de retrait prive les citoyens de l'exercice de leur droit acquis d'accès à la justice continentale, les requérants Glory Cyriaque Hossou et Landry Angelo Adelakoun sont persuadés que la dénonciation de la déclaration facultative établissant la compétence contentieuse de la Cour africaine est contraire au but et à l'objet du Protocole de Ouagadougou. Pour sa part, la Cour africaine a majoritairement réaffirmé une approche strictement volontariste[16] basée sur les caractères facultatif et unilatéral de la déclaration établissant sa compétence.[17]

Partant des vives controverses doctrinales suscitées par la faculté et l'unilatéralité de la déclaration de l'article 34(6) du Protocole de Ouagadougou,[18] force est de constater que la position de la Cour dans cette affaire relance à nouveaux frais le débat. Quoique la Cour réaffirme la licéité du retrait de ladite déclaration, sa démarche explicative semble s'apparenter à une banalisation du droit d'accès au juge continental (2). À cela, il faut ajouter le débat sur le bien-fondé juridique de la dénonciation par l'État de la déclaration de l'article

13 *Umuhoza* (n 10) para 585.

14 *Umuhoza* (n 10) aux paras 38-41. À la différence de l'affaire *Glory Cyriaque Hossou et un autre c. Bénin* dans laquelle la requête est directement dirigée contre la licéité de l'acte de retrait, dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda*, l'État défendeur avait retiré sa déclaration à la suite de la saisine de la Cour par le requérant, dans le but, prétendait-il, de réviser sa position. En conséquence, le Rwanda avait sollicité de la Cour, la suspension de la procédure en cours concernant la condamnation successive de la demanderesse à huit ans puis à 15 ans de prison par la Haute cour et la Cour suprême de l'État défendeur.

15 *Ingabire Victoire Umuhoza c. Rwanda* (compétence) (2014) 1 RJCA 585 paras 44-45.

16 K Kouame & JE Tiehi 'Le Civexit ou le retrait par la Côte d'Ivoire de sa déclaration d'acceptation de compétence de la Cour africaine des droits de l'homme et des peuples: un pas en avant, deux pas en arrière' (2022) *Revue des droits de l'homme* 4.

17 *Glory Cyriaque Hossou et un autre c. République du Bénin,* (compétence) (2021) para 33.

18 SH Adjolohoun (n 9) 18; Voir également, Kemkeng (n 7); W Hoeffner 'L'accès de l'individu à la Cour africaine des droits de l'homme et des peuples' (2016) 2 *Revista Juridica* 825-83.

34(6) du Protocole de Ouagadougou qui, en plus de menacer la «viabilité institutionnelle» de la Cour africaine, en appelle plus profondément à des considérations éthiques. En tout état de cause, dans un environnement de transitions démocratiques ardues, de coups d'État et de guerres civiles à répétition – des situations en tous points favorables à la violation systématique et/ou systémique, des droits fondamentaux – l'accès à la Cour africaine, en l'occurrence par les moyens prévus par l'article 34(6) du Protocole de Ouagadougou, ne devrait plus être apprécié seulement à l'aune du consensualisme étatique. Il doit davantage s'imprégner des nécessités sociales et des valeurs juridiques et éthiques qui, en réalité, sont consubstantielles à la fonction juridictionnelle de la Cour (3).

2 LA RÉAFFIRMATION DE LA LICÉITÉ DU RETRAIT DU CONSENTEMENT A LA COMPÉTENCE CONTENTIEUSE DE LA COUR AFRICAINE: ENTRE CONFORMITÉ AU DROIT ET BANALISATION DU DROIT D'ACCÈS AU JUGE

La réaffirmation du volontarisme étatique dans l'ouverture de la Cour africaine des droits de l'homme et des peuples aux acteurs non étatiques, précisément aux individus et aux organisations bénéficiant d'un statut d'observateur auprès de la Commission africaine, est la conséquence de l'adhésion des États au positivisme juridique. Cette doctrine invite le juge africain à statuer conformément au droit en vigueur, et ce, sans préjudice de la volonté de l'État en cause. Ainsi dit, aucun État ne peut se voir opposer une obligation à laquelle il n'a pas souscrit. C'est sans nul doute ce qui justifie la position volontariste du juge africain réaffirmée dans l'affaire *Glory Cyriaque Hossou* et *Landry Angelo Adelakoun c. Bénin* (2.1). Partant, la Cour a jugé que le retrait par le Bénin de sa déclaration au sens de l'article 34(6) du Protocole de Ouagadougou est conforme au droit y relatif (2.2).

2.1 La validité du retrait du consentement à l'office du juge régional africain en vertu du droit international général

La validité du retrait du consentement à la compétence de la Cour africaine, en vertu des articles 5(3) et 34(6) du Protocole de Ouagadougou, est appréciée à la lumière des règles de droit international qui régissent la reconnaissance de la compétence des juridictions internationales et celle de la souveraineté des États, notamment à travers la Convention de Vienne sur le droit des traités de 1969. La reconnaissance de la compétence des juridictions internationales est le prolongement de la reconnaissance de la souveraineté des États car, le consentement étatique à la compétence

des cours et tribunaux internationaux est l'une des formes d'expression de la souveraineté des États. De ce point de vue, le droit a toujours accordé une protection assez particulière aux États, comparés aux autres sujets et acteurs du droit international, en raison, d'une part, de la portée normative du principe de la souveraineté et, d'autre part, du volontarisme juridique dominant sur la scène de la société internationale.[19] En particulier, l'obsession des États africains pour la préservation de leur souveraineté est telle qu'ils ont longtemps été réticents à l'idée même d'instituer une Cour africaine[20] et, à plus forte raison, à celle d'en être les justiciables, surtout depuis que celle-ci est devenue opérationnelle.

Dans l'affaire ici commentée, l'État défendeur fait prévaloir son statut d'entité souveraine au regard du droit international et prétend, en s'appuyant sur l'opinion individuelle du Juge Fatsah Ouguergouz dans l'affaire *Michelot Yogogombaye c. Sénégal*,[21] qu'il ne peut, à ce titre, être indéfiniment lié par les obligations qui découlent de sa déclaration en vertu de l'article 34(6) du Protocole de Ouagadougou.[22] Aussi opportuniste qu'elle puisse paraître, cette stratégie de défense était incontestablement la plus indiquée, dans la mesure où elle repose sur la souveraineté des États, un principe fondateur du droit international, bien ancré dans la pratique des États et auquel juges et arbitres internationaux attachent une importance sans faille.[23] La Cour internationale de Justice, sans équivoque, a toujours considéré qu'elle ne peut statuer sur la licéité d'un comportement de l'État, y compris en cas de violation d'un droit opposable *erga omnes*, sans que celui-ci ait préalablement exprimé son consentement à sa juridiction, consentement assorti ou non de limites précises.[24] Il en est ainsi, car «les déclarations d'acceptation de la juridiction obligatoire de la Cour sont des engagements facultatifs, de caractère unilatéral, que les États

19 M Kamto 'La volonté de l'État en droit international' (2004) 310 *Recueil des cours de l'Académie de droit international de La Haye* 23; C Dominicé 'La société internationale à la recherche de son équilibre (2014) 370 *Recueil des cours de l'Académie de droit international de La Haye* 31.

20 J Matringe 'Les politiques juridiques des États africains à l'égard de la Cour africaine des droits de l'homme et des peuples' in F Couveinhes Matsumoto & R Nollez-Goldbach (dirs) *Les États face aux juridictions internationales: une analyse des politiques étatiques relatives aux juges internationaux* (2019) 192.

21 *Hossou* (n 17) para 19; Référence à l'Opinion individuelle du Juge Fatsah Ouguergouz dans l'affaire *Michelot Yogogombaye c. Sénégal* (compétence) (2009) 1 RJCA 1.

22 *Hossou* (n 17) aux paras 18 et suivants.

23 CF Amerasinghe *Jurisdiction of international tribunals* (2002) 70; M Kamto 'La volonté de l'État en droit international' (2004) 310 *Recueil des cours de l'Académie de droit international de La Haye* 384.

24 *Affaire de l'or monétaire pris* à *Rome en 1943* (question préliminaire), Arrêt du 15 juin 1954, CIJ Recueil (1954) 19; *Compétence en matière de pêcheries (Espagne c. Canada)*, compétence de la Cour, arrêt, CIJ Recueil (1998) 432, para 46; *Timor oriental (Portugal c. Australie)*, Arrêt, CIJ Recueil (1995) 90, paras 28-29, 34-35; *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, Arrêt, CIJ Recueil (2005) 168, para 197. Pour la portée juridique de ces affaires, voir B Tchikaya *Mémento de la jurisprudence: droit international public* (2017) 75.

ont toute liberté de souscrire ou de ne pas souscrire [...]».[25] La Cour d'Arusha a tenu le même raisonnement, entre autres, dans l'affaire *Amir Adam Timan c. République du Soudan*.[26] Elle rappelle dans la présente affaire concernant le Bénin que les caractères facultatif et unilatéral du retrait d'une telle déclaration dérivent du principe de la souveraineté des États.[27] Il faut croire que la Cour africaine ne pouvait, sur cette seule base, tenir le raisonnement contraire, au risque d'être en désaccord tant avec sa propre jurisprudence[28] qu'avec le droit international positif.

Ce qui est pour le moins superficiel, c'est que la juridiction africaine des droits humains considère que la déclaration préalable à sa compétence en vertu de l'article 34(6) du Protocole de Ouagadougou est similaire aux dispositions organisant la reconnaissance de la compétence des autres juridictions internationales, en l'occurrence la Cour internationale de Justice, la Cour européenne des droits de l'homme (avant l'entrée en vigueur du Protocole No. 11) et la Cour interaméricaine des droits de l'homme.[29] Un tel raisonnement semble occulter, ou du moins, minimiser le caractère particulier du mécanisme africain de protection des droits humains. En réalité, et nous convenons une fois encore avec l'opinion individuelle du Juge Fatsah Ouguergouz dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda*, que la déclaration, au sens de l'article 34(6) du Protocole de Ouagadougou, s'intéresse particulièrement à l'accès des individus et des organisations non gouvernementales à la Cour d'Arusha, contrairement à celle des autres juridictions auxquelles la Cour se réfère.[30] En ce qui concerne la Cour internationale de Justice, la déclaration prévue à l'article 36(2) de son Statut «ouvre la possibilité d'un rapport juridictionnel avec les autres États qui ont [consenti à la compétence de la Cour] et constitue, [à l'égard de ceux qui ne l'ont pas encore fait,] une offre permanente».[31] Par ailleurs, on pourrait penser, à première vue, que les déclarations à la compétence des juridictions européennes, avant l'adoption du Protocole No. 11, et interaméricaine sont similaires à celles du système judiciaire africain des droits humains. Il est vrai que les systèmes africain et interaméricain des droits humains instaurent un deuxième niveau de verrouillage en vue de permettre aux requêtes individuelles

25 *Compétence en matière de pêcheries (Espagne c. Canada),* compétence de la Cour, arrêt, CIJ Recueil (1998) 432, para 55; en référence à sa jurisprudence dans l'affaire *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique),* compétence et recevabilité, arrêt, CIJ Recueil (1984) 418, para 59.

26 *Amir Adam Timan c. Soudan* (compétence) (2012) 1 RJCA 114, para 9.

27 *Glory Cyriaque Hossou et un autre c. République du Bénin* (compétence) (2021) para 33; Sur l'identification des actes unilatéraux dans l'ordre juridique international, lire O Barsalou 'Les actes unilatéraux étatiques en droit international public: observations sur quelques incertitudes théoriques et pratiques' (2007) 44 *Canadian Yearbook of International Law/Annuaire canadien de droit international* 397.

28 *Umuhoza* (n 10) paras 54 et 59.

29 *Hossou* (n 17) para 31.

30 Ouguergouz (n 21) paras 5, 6.

31 *Compétence en matière de pêcheries (Espagne c. Canada),* compétence de la Cour, arrêt, CIJ Recueil 1998, 432, para 46.

d'accéder aux deux juridictions régionales. Toutefois, contrairement au système africain qui permet un accès direct des individus et des organisations non gouvernementales à la Cour africaine, la Cour interaméricaine n'est compétente qu'à l'égard des seules pétitions à elle transmises par la Commission interaméricaine et impliquant les États ayant préalablement reconnu la compétence de la Cour. De même, au niveau européen, avant l'adoption du Protocole No. 11,[32] les individus, les organisations non gouvernementales et les groupes de particuliers pouvaient saisir directement, non la Cour européenne des droits de l'homme, mais la désormais «défunte» Commission européenne. Du reste, comme le résume excellemment le Juge Ouguergouz,

> [e]n prévoyant un droit de saisine facultatif de la Cour africaine au bénéfice des individus et organisations non-gouvernementales, le système africain de protection des droits de l'homme se situe ainsi à mi-chemin entre le système interaméricain, où l'individu n'a pas le droit de saisir la Cour interaméricaine, et le système européen actuel dans lequel l'individu a un accès direct et automatique à la Cour européenne.[33]

Au total, l'analyse comparée avec les autres systèmes de protection des droits humains nous fait constater que le droit d'accès des individus et des ONGs à la Cour d'Arusha s'inscrit dans une particularité procédurale qui a manifestement été sous-estimée par la Cour, dans l'évaluation des effets du retrait de la déclaration du Protocole de Ouagadougou. Ainsi, s'est-elle gardée, en l'occurrence, de répondre très clairement à la question de savoir si l'acte en cause est ou non constitutif d'une régression des droits. Il est quelque peu regrettable que la Cour n'ait tiré aucune conséquence juridique dans ce sens. S'il est certainement illusoire d'espérer qu'elle parvienne à une égalité parfaite entre la portée normative du droit d'accès au système juridictionnel africain des droits de l'homme et l'importance en droit international du consentement des États à la compétence du juge africain, l'approche strictement volontariste adoptée par la voix majoritaire de la Cour est attentatoire au droit des individus et des ONGs d'accéder au système africain des droits de l'homme. Concrètement, une telle position est contradictoire avec les principes cardinaux de l'État de droit que sont la primauté du droit, une société démocratique, les limitations des droits fondamentaux conditionnées par la poursuite d'un but légitime et assorti de proportionnalité pour ne pas rendre les droits de l'homme et des peuples illusoires. Quoiqu'il en soit, la simple proclamation des droits serait illusoire, si on n'assure pas les conditions matérielles qui permettent à l'individu de jouir pleinement de ces droits.[34]

Enfin, par rapport aux dispositions de la Convention de Vienne sur le droit des traités de 1969, la Cour africaine rappelle que l'acte de retrait revêt un caractère unilatéral détachable du Protocole de

32 Art 34 du Protocole à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales portant restructuration du mécanisme de contrôle établi par la Convention.

33 Ouguergouz (n 21), para 12; Pour aller plus loin, lire L Hennebel & H Tigroudja *Traité du droit international des droits de l'homme* (2018) 315; 380.

34 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journa*l 1235-1237.

Ouagadougou dans la mesure où aucune disposition de celui-ci ne s'y réfère.[35] Par conséquent, en vertu du droit international positif, l'appréciation de la validité du retrait de la déclaration spéciale prévue à la disposition ci-dessus évoquée échappe aux mailles de la Convention de Vienne sur le droit des traités. Il nous paraît tout de même pertinent, eu égard à la particularité procédurale du droit d'accès à la justice régionale, d'apprécier l'acte de retrait par rapport au but et à l'objet du Protocole de Ouagadougou instituant la Cour d'Arusha.

2.2 La conformité du retrait du consentement de l'État béninois à l'objet et au but du Protocole de Ouagadougou

La conformité ou non du retrait de la Déclaration béninoise à l'objet et au but du Protocole de Ouagadougou peut s'analyser, aussi bien au regard de l'effectivité du droit d'accès au mécanisme de contrôle juridictionnel des droits fondamentaux qu'à la lumière des motifs justifiant l'acte de retrait. À cela, il faut ajouter les considérations relatives à la nature de l'obligation qui résulte de l'article 34(6) dudit Protocole.

Selon la Cour d'Arusha, la Déclaration béninoise est conforme au droit en vigueur. De l'avis du juge africain, «en tant qu'acte unilatéral, la déclaration est un acte détachable du Protocole et peut, de ce fait, être retirée, sans que cela entraîne un retrait ou une dénonciation du Protocole».[36] Cela suppose que le retrait par l'État défendeur de sa Déclaration faite au titre de l'article 34(6) du Protocole de Ouagadougou n'a aucune incidence sur les droits protégés dans la Charte africaine ainsi que dans les instruments additionnels. Concrètement, cela revient à dire que les États parties à la Charte africaine et aux protocoles additionnels sont libres de donner et de retirer leur consentement à la compétence contentieuse de la Cour africaine, l'exercice de la liberté de retrait ne portant pas atteinte à la substance des droits protégés dans les instruments juridiques concernés. À ce propos, Frumer soutient la thèse selon laquelle la situation de l'État qui retire sa Déclaration d'acceptation de la juridiction de la Cour est similaire à celle d'un État n'ayant jamais accepté ladite juridiction.[37] Tout de même, cette position est discutable. En réalité, une analyse conséquentialiste nous amène à considérer que la situation d'un État qui a retiré sa déclaration d'acceptation de la compétence contentieuse de la Cour est différente de celle d'un État qui n'a jamais accepté la compétence de la Cour. À la différence du premier qui, par l'acte de retrait, contribue incontestablement à une régression des droits fondamentaux, le

35 *Hossou* (n 17) para 29, 30.

36 *Hossou* (n 17) para 32.

37 P Frumer 'La dénonciation des traités régionaux de protection des droits de l'homme. Un état des lieux' in F Couveinhes Matsumoto & R Nollez-Goldbach (dirs) *Les États face aux juridictions internationales: une analyse des politiques étatiques relatives aux juges internationaux* (2022) 187.

second, n'ayant jamais fait la Déclaration visée à l'article 34(6) du Protocole de Ouagadougou, n'a fondamentalement créé aucun droit subjectif au profit des citoyens et des ONGs et ne peut donc être l'auteur d'une décision dont la substance porterait atteinte aux droits protégés dans la Charte.

Qu'en est-il de l'hypothèse où le caractère discrétionnaire de la décision d'accepter la compétence contentieuse de la Cour ou de celle de la révoquer a été exploité de manière abusive? S'il est vrai que ni la Charte africaine et moins encore le Protocole de Ouagadougou ne prévoient aucune clause de dénonciation, il n'en demeure pas moins que la Cour africaine a développé une jurisprudence constante sur la licéité du retrait de la Déclaration prévue à l'article 34(6) avec le droit régional africain.[38] La technique de la dénonciation, il faut le souligner avec Helfer, est employée dans des circonstances très variées qui manifestement ne sont pas liées à la politique généralisée de désengagement ou à une hostilité de principe à tout lien conventionnel.[39] En l'espèce, la révocation de la Déclaration du 8 février 2016 par laquelle le Bénin permettait aux individus et aux ONGs de saisir directement la Cour africaine[40] serait liée aux «immixtions et intrusions fâcheuses de la Cour africaine des droits de l'homme et des peuples» dans les affaires internes de l'État défendeur, occasionnant «une grave perturbation de l'ordre juridique interne et l'instauration d'une véritable insécurité juridique en tout point préjudiciable à la nécessaire attractivité économique des États parties».[41] Concrètement, l'État béninois reproche à la Cour d'avoir prononcé, le 14 février 2020, une ordonnance qui a pour effet

> [l]a suspension de l'exécution d'un jugement d'adjudication rendue par le tribunal de commerce de Cotonou, dans une affaire qui opposait des personnes privées, opérateurs économiques, dans le cadre d'une procédure ordinaire de recouvrement de créance par voie de saisie immobilière en application des dispositions du traité de l'Organisation pour l'harmonisation en Afrique du droit des affaires (OHADA) dont le Bénin est partie alors même que le débiteur a pu exercer les recours ouverts devant les juridictions nationale et communautaire que sont la Cour d'appel de Cotonou et la Cour commune de justice et d'arbitrage (CCJA).[42]

En comparaison avec les précédents ivoirien, rwandais et tanzanien, il y a lieu de souligner que l'acte de retrait de la déclaration béninoise est, pour le moins, plus élaboré, tout au moins dans sa forme et sans préjudice des critiques potentielles qui peuvent être formulées sur le

38 *Umuhoza* (n 10) para 53.

39 LR Helfer 'Exiting treaties' (2005) 91 *Virginia Law Review* 1602.

40 Pour lire la Déclaration du Bénin au titre de l'article 34(6), voir le lien suivant: https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Benin-Declaration.pdf (consulté le 24 septembre 2022).

41 Ministère des affaires étrangères et de la coopération, Correspondence 216/MAEC/AM/SP-C, 24 mars 2020. https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Benin.pdf (consulté le 24 septembre 2022).

42 Correspondence 216/MAEC/AM/SP-C.

caractère objectif des motifs qui le sous-tendent. En tout état de cause, le retrait est un acte de souveraineté, conforme au droit international.

Cela étant, on peut apprécier l'acte de retrait sous l'angle de la nature de l'obligation qui découle pour les États de ladite déclaration.[43] Étant donné qu'aucune disposition du Protocole de Ouagadougou ne définit les critères d'évaluation de la nature de l'obligation qui résulte de l'article 34(6), on ne peut se résoudre à la caractériser sans se livrer, en amont, aux commentaires qui s'imposent. Théoriquement, les obligations de comportement ou de moyens sont celles qui exigent du débiteur d'apporter ses soins et ses capacités en vue d'atteindre un but[44], contrairement aux obligations de résultat qui doivent être exécutées inconditionnellement. Selon Demaria, la distinction entre les deux résulte du fait que

> [l']objet de la violation de l'obligation de résultat réside dans la démonstration que le résultat avéré est différent de celui attendu [tandis que celui de l'obligation de comportement] réside dans la démonstration que le comportement de l'État se situe en dessous de ce qui était attendu de lui.[45]

Ainsi, par la première, «l'État s'engage à atteindre un résultat» alors que par la deuxième, l'État s'engage à «[…] apporter soins et diligence pour atteindre un but, mais sans le garantir»;[46] la distinction entre les deux pouvant s'avérer, en pratique, laborieuse.[47] À travers le préambule du Protocole de Ouagadougou, les États parties se disent être «fermement convaincus»[48] que la garantie de la promotion et de la protection «des droits de l'homme et des peuples, des libertés et des devoirs»[49] passe nécessairement par l'institution d'un mécanisme de contrôle juridictionnel, en l'occurrence la Cour africaine. Partant, la réalisation de ces buts et le caractère objectif des traités de droits de l'homme ne font-ils pas finalement peser sur les États une obligation de comportement et de résultat? En effet, si l'on prend appui sur la

43 SB Traoré 'Commentaire *Affaire Ingabire Victoire Umuhoza c. République du Rwanda*, Requête 003/2014' in A Soma & S Dabiré (dirs) *Commentaire des grands arrêts de la Cour africaine des droits de l'homme et des peuples* (2022) 39.

44 J Salmon *Dictionnaire de droit international public* (2001) 765.

45 T Demaria 'Obligations de comportement et obligations de résultat dans la jurisprudence de la Cour internationale de Justice' (2021) 58 *Canadian Yearbook of International Law/Annuaire canadien de droit international* 377.

46 T Demaria (n 45) 376; Voir également J Combacau 'Obligations de résultat et obligations de comportement: quelques questions et pas de réponse' in D Bardonnet et autres (dirs) *Le droit international, unité et diversité: mélanges offerts à Paul Reuter* (1981) 194.

47 T Demaria (n 45) 363; PM Dupuy 'Le fait générateur de la responsabilité internationale des États' (1984) 188 *Recueil des cours de l'Académie de droit international de La Haye* 47.

48 Para 8 du 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.

49 Protocole à la Charte (n 48) para 4.

substance même de l'article 34(6) du Protocole de Ouagadougou,[50] ce serait un non-sens que de ne pas y voir une obligation de comportement, précisément celle de rendre effectif l'accès direct des individus et des ONGs à la Cour. La seule marge de manœuvre laissée à l'appréciation des États est celle de choisir librement le moment approprié au dépôt de la déclaration. En outre, alors que ladite déclaration crée des droits subjectifs aux profits des particuliers et des ONGs, sa révocation constitue non seulement une régression de certains droits garantis par la Charte,[51] mais aussi un manquement à l'obligation de résultat, celle d'empêcher le déni de justice et l'impunité en cas de violation de droits considérés comme fondamentaux dans l'ordre juridique africain qui se veut culturellement spécifique. Mieux, le simple fait qu'un Protocole additionnel à la Charte africaine ait prévu une telle restriction constitue en soi une régression des droits fondamentaux; la Charte africaine n'ayant, à l'origine, conditionné l'accès direct des individus à l'office de la Commission que par la seule ratification du traité par les États africains. À ce propos, il est important de rappeler que la philosophie et les conceptions particulières revendiquées à l'adoption de la Charte et affichées dès son article 1er consacrent des obligations directes de reconnaissance et de protection.

Du reste, la Cour considère que le retrait du consentement des États à sa compétence est «un droit reconnu aux États».[52] Il va sans dire que le caractère abusif ou non de la décision de révocation de la Déclaration visée à l'article 34(6) du Protocole de Ouagadougou reste toujours latent dans la jurisprudence de la Cour africaine.[53] Eu égard à la neutralisation des libertés et droits fondamentaux indispensables au bon fonctionnement de la démocratie et à la recrudescence des régimes autoritaires et tyranniques sur le continent,[54] Il nous semble pour le moins urgent de s'interroger sur la pertinence opératoire de la clause contenue à l'article 34(6) du Protocole de Ouagadougou.

50 Aux termes de cette disposition, 'l'État *doit faire* une déclaration acceptant la compétence de la Cour pour recevoir les requêtes énoncées à l'article 5(3)' (nous soulignons). Le choix du verbe devoir par les rédacteurs du Protocole de Ouagadougou nous amène à conclure qu'il s'agit non pas d'une option, mais bien au contraire, d'une obligation ou à tout le moins, d'un objectif sans lequel, le Protocole n'aura aucun sens.

51 Pour aller plus loin sur l'obligation de comportement, lire T Demaria 'Obligations de comportement et obligations de résultat dans la jurisprudence de la Cour internationale de Justice' (2021) 58 *Canadian Yearbook of International Law/ Annuaire canadien de droit international* 362-381; Combacau (n 46) 181-204.

52 *Hossou* (n 17) para 34.

53 F Matsumoto 'De quoi les dénonciations contemporaines sont-elles de nom? Une approche démocratique des pratiques de dénonciation et de règles relatives à la dénonciation' in FC Matsumoto et R Nollez-Goldbach (dirs) *Les États face aux juridictions internationales: une analyse des politiques étatiques relatives aux juges internationaux* (2022) 9.

54 Matsumoto (n 53) 21.

3 LA PERTINENCE OPÉRATOIRE DE L'ARTICLE 34(6) DU PROTOCOLE DE OUAGADOUGOU POUR LA GARANTIE JURIDICTIONNELLE DES DROITS FONDAMENTAUX

Traiter de la pertinence légistique de l'article 34(6) du Protocole de Ouagadougou invite à se soustraire d'une approche théorique pure au profit d'une démarche pragmatique de l'accès au mécanisme juridictionnel de garantie des droits fondamentaux de portée continentale.[55] En effet, il semble évident que l'exigence d'effectivité du mécanisme de garantie collective s'oppose à toute possibilité de retrait pur et simple de la déclaration d'acceptation de compétence obligatoire de la Cour africaine.[56] En raison de la trajectoire jurisprudentielle de la Cour à ce propos, il serait judicieux d'évaluer les effets de cette disposition quant à la garantie juridictionnelle des droits fondamentaux. À cet effet, nous examinerons dans un premier temps, les effets des révocations cumulées de la Déclaration visée à l'article 34(6) du Protocole de Ouagadougou sur la «viabilité institutionnelle» de la Cour d'Arusha avant d'interroger les aspects éthiques du dispositif portant faculté de reconnaissance de l'office du juge par les États.

3.1 Les révocations cumulées du consentement à l'office du juge africain des droits de l'homme: menace à la «viabilité institutionnelle» de la Cour d'Arusha?

Dans l'affaire *Femi Falana c. Union africaine*, la clause facultative de reconnaissance de la compétence contentieuse de la Cour africaine a

55 Pour aller plus loin sur la théorie classique du droit international au sujet de l'accès de l'individu aux juridictions internationales, lire B Taxil *L'individu, entre ordre interne et ordre international: recherches sur la personnalité juridique internationale* (2005), thèse, Université de Paris I 785; M Kamto 'L'accès de l'individu à la justice internationale ou le droit international au service de l'homme' in M Kamto & Y Tyagi (dirs) *The access of individuals to international justice/L'accès de l'individu à la justice internationale* (2019) 3-53; J Spiropoulos 'L'individu et le droit international' (1929) 30 *Recueil des cours de l'Académie de droit international de La Haye* 195-269; P Reuter 'Quelques remarques sur la situation juridique des particuliers en droit international public' in C Rousseau (dir) *Mélanges Georges Scelle: la technique et les principes du droit public* (1950) 535-552; G Sperduti 'L'individu et le droit international' (1956) 90 *Recueil des cours de l'Académie de droit international de La Haye* 733-849; J Barberis 'Nouvelles questions concernant la personnalité juridique internationale' (1983) 179 *Recueil des cours de l'Académie de droit international de La Haye* 145-187; C Dominicé 'L'émergence de l'individu en droit international public' in J Belhumeur & L Condorelli (dirs) *L'ordre juridique international entre tradition et innovation* (1997) 109-124; PM Dupuy 'L'individu et le droit international, Théorie des droits de l'homme et fondements du droit international' (1987) 32 *Archives de philosophie du droit* 119-133.

56 Frumer (n 37) 186-187.

suscité une opinion dissidente des juges Akuffo, Ngoepe et Thompson. Ces derniers soutenaient que «la protection des droits de l'homme est trop importante pour être laissée aux caprices d'une telle solution théorique».[57] Les deux affaires ont pour point commun le fait d'aborder la question de la pertinence opératoire de la Déclaration visée à l'article 34(6) du Protocole de Ouagadougou. L'argument constant de la Cour, suivant lequel la décision de révocation de la compétence contentieuse à son office est un acte unilatéral qui échappe à l'application de la Convention de Vienne sur le droit des traités de 1969, relève d'un raisonnement logique. Il n'en demeure pas moins que la révocation revient inéluctablement à priver directement les personnes placées sous la juridiction de l'État béninois du principal mécanisme contentieux de protection des droits fondamentaux en Afrique. À juste titre, l'on ne saurait réfuter la thèse suivant laquelle l'objectif du Protocole de Ouagadougou est de «donner effet à la protection des droits de l'homme, y compris, naturellement, les droits des individus».[58] C'est pourquoi nous convenons avec Matsumoto que la Cour devrait

> se garder de suivre le discours des démagogues et des oligarques [certains dirigeants], et de confondre comme ils le souhaitent leur dérive autoritaire et l'aspiration démocratique réelle des citoyens, des associations et des syndicats.[59]

Le retrait de la Déclaration précitée n'affecte pas seulement la substance des droits et libertés,[60] mais aussi le mécanisme juridictionnel de contrôle des engagements substantiels de l'État.[61] D'ailleurs, la Cour d'Arusha a pleinement conscience que l'effectivité de son mandat judiciaire dépend, non seulement de la ratification du Protocole de Ouagadougou, mais surtout du dépôt de la déclaration spéciale prévue à l'article 34(6) dudit Protocole, permettant l'accès direct des individus et des ONGs à son office. Après les retraits du Rwanda en 2016, de la Tanzanie en 2019, du Bénin et de la Côte d'Ivoire en 2020, à présent, seuls huit États sur 32 parties au Protocole de Ouagadougou ont déposé leurs déclarations, dont le Niger et la Guinée Bissau qui ont déposé les leurs en 2021.[62] À ce rythme, affirmait déjà la Cour, il y a de cela une décennie, «c'est tout le système de protection

57 *Femi Falana c. Union africaine* (compétence) (2012) 1 RJCA 121, Opinion dissidente des juges Sophia AB Akuffo, Bernard M Ngoepe & Elsie N Thompson, para 8-4. Disponible en ligne:https://www.african-court.org/cpmt/storage/app/uploads/public/5f4/e32/d31/5f4e32d314edc690184636.pdf (consulté le 7 novembre 2022).

58 Akuffo, Ngoepe & Thompson (n 57) para 13.

59 Matsumoto (n 53) 21. Les crochets à l'intérieur de la citation sont de nous. Nous précisons [certains dirigeants].

60 Substance dont les différentes catégories sont indissociables, tant dans leur conception que dans leur mise en œuvre, par les principes d'indivisibilité et d'interdépendance des droits de l'homme; MJ Redor-Fichot 'L'indivisibilité des droits de l'homme' (2009) 7 *Cahiers de la recherche sur les droits fondamentaux* 75-86; E Decaux 'Universalité, indivisibilité et interdépendance des droits de l'homme: les principes et leur application' (2018) 17 *Droits fondamentaux* 2-12.

61 Frumer (n 37) 182.

62 EX.CL/1323(XL), *Rapport d'activité de la Cour africaine des droits de l'homme et des peuples,* 40e session ordinaire 20 janvier - 3 février 2022 Addis-Abeba,

judiciaire des droits de l'homme à l'échelle continentale, incarné par la Cour, qui serait gravement compromis».[63] La révocation du consentement à la compétence juridictionnelle de la Cour africaine, si elle s'inscrit dans un caractère opaque, serait un recours de confort au service négatif de la régression des libertés fondamentales, déjà fragiles et expliquerait le fait que les citoyens perdent chaque jour davantage la fragile confiance accordée aux autorités étatiques[64] et à l'Union africaine.[65] En effet, pour Matsumoto, «si les citoyens, la société civile et les parlementaires contestent la toute-puissance de l'exécutif en la matière, [c'est parce que] l'exécutif lui-même refuse presque toujours de partager son pouvoir de déterminer le contenu des traités et d'engager l'État, donc sa population, à le respecter».[66] Comme l'a si bien fait observer Lauterpacht, «the duties and rights of States are the duties and rights of men who comprise them».[67] D'ailleurs, dans l'affaire *Atabong Denis Atemnkeng c. Union africaine*, le requérant soutenait à bon droit que l'article 34(6) du Protocole de Ouagadougou est contraire à l'Acte constitutif de l'Union africaine et à la Charte africaine des droits de l'homme et des peuples et constitue de ce fait, une entrave à la justice et à l'état de droit, car il favorise l'impunité et empêche une frange de la population africaine d'accéder à la justice.[68]

De ce qui précède, nous sommes d'avis avec la doctrine africaine que le retrait de la Déclaration spéciale de l'article 34(6) du Protocole de Ouagadougou est une menace pour la «viabilité institutionnelle» de la Cour.[69] Non seulement l'acte de retrait limite davantage la juridiction de la Cour et l'empêche de déployer son plein potentiel, mais bien plus encore, le désengagement de l'État participe à l'abandon des victimes au bon vouloir des justices nationales, au risque de potentielles violations des droits de l'homme et peuples dans les contextes autres que ceux des États de droit.[70] Une objection acceptable serait de

Éthiopie, para 9. Pour un état des lieux des Déclarations d'acceptation de la compétence contentieuse de la Cour pour des requêtes introduites par les individus et les ONGs ayant un statut d'observateur auprès de la Commission africaine, voir https://www.african-court.org/wpafc/declarations/?lang=fr.

63 Cour africaine, Rapport annuel d'activité de la Cour pour l'exercice 2012, 24, para 119; pour en savoir plus, voir Khamis (n 9) 104.

64 Matsumoto (n 53) 67.

65 A propos, l'Organisation panafricaine est parfois perçue comme un syndicat des chefs d'États et de gouvernements qui se couvrent mutuellement au détriment des intérêts et droits fondamentaux des peuples africains. Alors qu'ils se montrent toujours incapables de défendre avec abnégation la cause des peuples africains, ils seraient, a contrario, prompts à tout pour défendre leurs propres intérêts, lorsque ceux-ci viennent à être menacés soit par un mouvement de contestation interne soit par une pression militaire. À titre illustratif, et sur le recours aux sanctions, notamment dans le cas des sanctions imposées contre la junte malienne dont les effets sont pour le moins graves sur la protection des droits fondamentaux, voir https://www.lesoir.be/247470/article/2019-09-13/lunion-africaine-est-un-syndicat-de-chefs-detat-qui-se-couvrent-mutuellement (consulté le 6 octobre 2022).

66 Matsumoto (n 53) 9.

67 Kamto (n 55) 9.

68 *Atabong Denis Atemnkeng c. Union africaine* (compétence) (2013) 1 RJCA 188 para 17-19.

69 Adjolohoun (n 9) 2.

70 Kemkeng (n 7) 188.

considérer que les citoyens béninois peuvent agir devant le juge sous-régional des droits de l'homme dans la même proximité régionale. Toutefois, cet argument manquerait de cohérence institutionnelle quant à l'ambition portée par l'Organisation continentale de construire une union panafricaine des citoyens et peuples africains, dimension collective et de solidarité inscrite dans les attendus majeurs de l'ensemble des instruments intergouvernementaux africains.

En tout état de cause, la révocation du consentement étatique à la compétence juridictionnelle d'un organe de contrôle de traité des droits de l'homme ne peut relever que du seul ressort du pouvoir exécutif eu égard au caractère objectif des traités de droit de l'homme. Toutefois, de la même manière que l'adhésion audit traité requiert un vote affirmatif de la représentation nationale, la décision d'un État de révoquer la Déclaration visée à l'article 34(6) devrait faire l'objet d'une plus large discussion au niveau interne, avec un avis qualifié ou peut-être une décision à une certaine majorité qualifiée. À défaut, la volonté des bénéficiaires pourrait être recueillie directement par voie de référendum. En effet, «un peuple ou une convention citoyenne a toujours le droit de changer d'avis sur l'ensemble des questions politiques et l'État, dans le cadre duquel un tel peuple ou une telle convention citoyenne s'exprime, doit [...] toujours avoir la possibilité de dénoncer ou de réviser un traité».[71]

Au-delà de la menace à la viabilité institutionnelle de la Cour, les décisions de retrait de la Déclaration spéciale de l'article 34(6) du Protocole de Ouagadougou et les impasses y relatives, interrogent les aspects éthiques du dispositif portant faculté de reconnaissance de l'office du juge par les États.

3.2 Analyse éthique des effets du retrait de consentement à l'office du juge régional africain

Le juge Fitzmaurice, pendant son office à la Cour européenne des droits de l'homme, avait écrit dans une opinion séparée que «la cour ne connait pas l'éthique, mais du droit», exprimant le point de vue positiviste que le juge trouve dans les textes juridiques, toutes les solutions aux problèmes juridiques sans avoir à se préoccuper d'éthique.[72] Or, Bonbled et Ringelheim font constater que les juges européens, dans leur œuvre interprétative, ont «recours à des arguments d'ordre éthique».[73] Ces derniers englobent, entre autres, des considérations d'ordre général, notamment des idéaux et des valeurs de la communauté qui permettent de «renforcer [...] la protection accordée par la Convention [européenne des droits de l'homme] aux individus»;[74] éclairant de ce fait le sens et la portée des

71 Matsumoto (n 53) 55-56.

72 N Bonbled & J Ringelheim 'La traduction des discours éthiques dans la jurisprudence de la Cour européenne des droits de l'homme' in A Bailleux, Y Cartuyvels, H Dumont & F Ost (dirs) *Traduction et droits européens: enjeux d'une rencontre. Hommage au recteur Michel Van de Kerchove* (2009) para 1-6.

73 Bonbled & Ringelheim (n 72) 26-32.

droits fondamentaux. Concrètement, ces idéaux et valeurs constituent des cadres référentiels d'interprétation supplémentaires aux sources conventionnelles relatives aux droits de l'homme. Les juges européens des droits de l'homme invoquent, d'après les analyses jurisprudentielle de Husson, les valeurs de dignité, liberté, justice, prééminence du droit, pluralisme et démocratie.[75] De façon générale, la Déclaration universelle des droits de l'homme, tirant les conséquences de la Seconde Guerre mondiale, consacre dans son préambule, la nécessité d'«un régime de droit»[76] pour la protection des droits de l'homme. Ce principe constitue un antécédent indispensable à toute société démocratique afin que les citoyens ne soient contraints de recourir, par défaut, «à la révolte contre la tyrannie et l'oppression».[77] En effet, l'État de droit recommande que la souveraineté de l'État, en démocratie, soit l'expression de la souveraineté des peuples, à travers l'exercice du droit des citoyens de participer à la gestion de la chose publique.[78] La participation est aussi gage d'équilibre entre les intérêts citoyens contradictoires et fonde le caractère transparent, éclairé et durable des décisions prises par les institutions publiques, ce qui renforce l'efficacité des actions publiques. La durabilité, engagement à long terme, permet de soutenir le caractère réel, non illusoire ou non opportuniste de la participation des citoyens et organisations de la société civile, ces dernières ayant un «rôle légitime et vital»[79] dans une société démocratique.

Fort de ce qui précède, il y a lieu de se poser des questions éthiques quant à la légitimité du retrait du consentement de l'État à l'office de la juridiction africaine des droits de l'homme. Le dilemme éthique à considérer est celui de la recherche d'équilibre entre la sécurité juridique liée au régime de droit et la gestion gouvernementale des affaires publiques, celle-ci pouvant être intéressée, opportuniste, voire arbitraire et, de toute façon, inscrite dans une certaine temporalité liée au moment gouvernemental. De plus, pour l'effectivité des droits de l'homme, face aux limites liées au caractère conjoncturel des majorités qui se font et se défont dans les péripéties politiques, il est nécessaire de disposer de garantie du droit de participer aux affaires publiques,

> en prenant les mesures nécessaires pour accéder aux instruments internationaux et régionaux pertinents relatifs aux droits de l'homme ou les ratifier, et accepter les procédures de communications individuelles qui y sont associées.[80]

74 Bonbled & Ringelheim (n 72) 26-32.

75 C Husson *Droit international des droits de l'homme et valeurs. Le recours aux valeurs dans la jurisprudence des organes spécialisés* (2012) 12

76 Préambule, Déclaration universelle des droits de l'homme.

77 Préambule, Déclaration universelle des droits de l'homme.

78 Pacte international relatif aux droits civils et politiques, 1966, art 25; Haut-Commissariat des Nations Unies aux droits de l'homme *Directives à l'intention des États sur la mise en œuvre effective du droit de participer aux affaires publiques*, 2018, GuidelinesRightParticipatePublicAffairs_web_FR.pdf (ohchr.org); Observation générale 25 (1996) du Comité des droits de l'Homme.

79 Para 19(e), Directives à l'intention des États sur la mise en œuvre effective du droit de participer aux affaires publiques.

80 Directive à l'intention des États (n 78) paras 19(a) et 21.

Le cadre juridique, témoin d'un régime de droit, comprend nécessairement le droit aux recours utiles, recours censés être disponibles et accessibles en cas de violation des droits indivisibles de l'homme. Le droit aux recours utiles s'étend aux recours disponibles aux niveaux régional et international[81] et c'est sur ce point que les requérants se heurtent à l'obstacle imposé aux citoyens par l'État, du fait du retrait de consentement, exercice unilatéral de la souveraineté d'un gouvernement. En effet, dans son opinion dissidente, la juge Bensaoula insiste sur le fait que l'acte de retrait de la déclaration de compétence n'a pas expressément été consacré par le Protocole de Ouagadougou et que, dans l'affaire *Ingabire Victoire Umuhoza c. Rwanda*, la Cour africaine avait déjà ouvert un précédent, en reconnaissant aux États ledit droit de retrait.

Le droit au retrait ne pourrait-il pas être concilié avec les droits subjectifs acquis d'accès au juge, par nécessité de sécurité juridique? La décision étudiée, dans sa pente positiviste, reste impuissante à offrir un certain recul par rapport au principe de la protection des droits acquis, en particulier en matière de droits fondamentaux et de droit de participer à la gestion des affaires publiques. Dans cette veine, la protection des droits acquis aurait permis, d'une part, de reconnaître la compétence matérielle du juge régional pour examiner en quoi le retrait, en l'espèce, par ses modalités d'exercice, porte, ou non, atteinte au droit de participer à la gestion des affaires publiques, à travers un cadre juridique propre à un régime de droit, cadre juridique censé permettre l'accès au recours régional utile en cas de violation de droits de l'homme. Le juge africain pourrait-il, dans une interprétation substantielle de la «dignité» des personnes et des peuples ou des «obligations positives» évoquées par la Charte africaine, assujettir la mise en œuvre du droit du retrait des États, à des conditions de sécurité juridique et de protection des droits fondamentaux acquis (tautologie de circonstance au demeurant!)? Si dans l'Affaire *Ingabire Victoire Umuhoza c. Rwanda*, la condition de préavis a été consacrée, à titre prétorien, aux fins de protéger les droits fondamentaux garantis, cette dynamique d'interprétation nous semble éthiquement constructive pour éviter que les droits fondamentaux ne soient arbitrairement limités, voire supprimés, par un acte unilatéral d'un gouvernement. Les droits fondamentaux étant conçus pour protéger les individus contre toutes interventions arbitraires de l'État, la Cour jouerait parfaitement son rôle de garantie, en établissant, de façon casuistique, des conditions, de forme et de fond, d'exercice et de mise en œuvre du droit des États à retirer la Déclaration de reconnaissance de l'office de la Cour régionale africaine des droits de l'homme et des peuples. Les conditions de fond pourraient, dans le cas présent, intéresser les indicateurs liés aux obligations fondamentales de comportement et/ou de résultat (ci-dessus évoqués). Elles peuvent porter sur les indices de diligence démocratique et raisonnable, les modes et conditions qualitatives de la prise de décision de retrait, y compris les modes d'adoption et/ou de vote (vote affirmatif de la représentation nationale, referendum ou autre), les modalités de participation et consultation des citoyens et des

81 Observation générale 25 (1996) du Comité des droits de l'homme.

organes de la société civile, avec les quorums et majorités requises, etc. Les conditions de fond seraient également à mettre en lien avec l'obligation fondamentale de non-régression, y compris du droit à la sécurité juridique et à l'accès au recours utile d'ordre juridictionnel et régional.

L'option de la dynamique interprétative, tout en étant intéressante à court terme, ne dispense pas de se poser la question structurelle et légistique de la provision juridique de la clause formelle d'acceptation de la compétence de la Cour (l'article 34(6) du Protocole de Ouagadougou). D'un point de vue légistique, cette clause appelle un réexamen général en lien avec la conception authentique du droit régional africain des droits de l'homme et des peuples, consacrant des obligations fondamentales positives explicites et directes de pleine reconnaissance et de garantie à la charge des États et au bénéfice des droits de l'homme et des peuples.[82]

4 CONCLUSION

L'interprétation littérale par la Cour de l'article 34(6) du Protocole de Ouagadougou provoque une régression du droit d'accès à la justice régionale et constitue, par ailleurs, une menace certaine pour l'effectivité globale de sa fonction juridictionnelle. L'affaire *Glory Cyriaque Hossou et un autre c. Bénin* révèle les insuffisances des garanties de sécurité juridique posées par la Cour dans sa jurisprudence antérieure, en l'occurrence l'entrée en vigueur de l'acte de retrait après l'expiration d'un délai de douze mois et la préservation des requêtes en cours avant la décision de retrait. Dans ce sens, l'opinion dissidente de la Juge Bensaoula a le mérite de relever que la démarche adoptée par la Cour d'Arusha dans cette affaire, quoique cohérente, n'intègre pas suffisamment les effets juridiques du droit fondamental acquis des citoyens d'accès à la justice africaine, dans une éthique communautaire de bien commun régional ou dans la perspective de la promotion d'un ordre public panafricain.

82 Charte africaine des droits de l'homme et des peuples, art 1, 25 et 26.

The judicial function of the African Court on Human and Peoples' Rights in default judgments: the developments set forth in the *Léon Mugesera* case

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ABSTRACT: This case discussion focuses on the judicial function of the African Court on Human and Peoples' Rights (Court) in default judgments. The discussion brings to the foreground the changes introduced by the Court in its recently revised Rules of Procedure and how these changes are put in practice in its case law. The revised provision on default judgments includes the extended power of the Court to decide on its own motion on whether to issue a default judgment and the introduction of a legal innovation in international dispute settlement, namely, a remedy for the defaulting party to set aside a default judgment. The recent default judgment in *Léon Mugesera v Rwanda* serves as a focal point in the analysis since it is the first instance that the revised Rules of Procedure were put into practice and since the *Mugesera* case illustrates the difficulties encountered by the Court in cases of non-appearance of the respondent state. The Court's Rules of Procedure and case law are also placed within the corpus of international (human rights) law and the jurisprudence of its two regional counterparts on matters pertaining to default judgments so as to shed light on different approaches. The analysis makes two main arguments. The first concerns the procedural requirements for rendering a judgment in default. Until the *Mugesera* decision, the Court was not consistent in meeting these requirements, and had been known to decide in default on its own motion without having a textual basis in the Protocol or the Rules of Procedure to do so. The recently revised Rule of Procedure grants the Court the power to decide on its own motion. Second, the analysis argues that the *Mugesera* decision cements an alarming trend in the case law, whereby in cases of non-appearance the Court does not satisfy itself that the applicant's submissions are well-founded.

TITRE ET RÉSUMÉ EN FRANCAIS:

La fonction juridictionnelle de la Cour africaine des droits de l'homme et des peuples en matière d'arrêt par défaut: évaluation des développements découlant de l'affaire *Léon Mugesera*

RÉSUMÉ: Cette contribution porte sur la fonction judiciaire de la Cour africaine des droits de l'homme et des peuples (Cour africaine ou Cour) en matière d'arrêt par défaut. La discussion met en évidence les changements introduits par la Cour dans son règlement intérieur récemment révisé et la manière dont ces changements sont mis en œuvre dans la jurisprudence. La disposition relative aux arrêts par défaut telle que révisée comprend le pouvoir étendu de la Cour de décider d'office de rendre un arrêt par défaut et l'introduction d'une innovation juridique dans le règlement des différends internationaux, à savoir un recours en annulation d'un arrêt rendu par défaut mu par la partie défaillante. Cette contribution analyse en particulier le récent arrêt rendu par défaut dans l'affaire *Léon Mugesera c. Rwanda* qui illustre pour la première fois la mise en œuvre du règlement intérieur de la Cour en matière d'arrêt

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par défaut depuis sa révision. L'affaire *Léon Mugesera* illustre globalement les difficultés rencontrées par la Cour africaine en cas de non-comparution de l'État défendeur. Le règlement intérieur et la jurisprudence de la Cour sont contextualisés partant du droit international (droits de l'homme) et de la jurisprudence de deux autres juridictions régionales en matière d'arrêt par défaut, afin de mettre en relief les différentes approches qu'elles adoptent. L'analyse s'articule sur deux arguments principaux. Le premier concerne les exigences procédurales pour rendre un arrêt par défaut. Avant l'affaire *Léon Mugesera*, la Cour n'était pas cohérente dans le respect de ces exigences, et était connue pour rendre des arrêts par défaut de sa propre initiative sans avoir de base textuelle dans le Protocole ou le Règlement intérieur. Le Règlement intérieur récemment révisé accorde à la Cour le pouvoir de statuer d'office. Par ailleurs, l'article soutient que l'affaire *Léon Mugesera* cristallise une tendance alarmante de la jurisprudence, selon laquelle, en cas de non-comparution, la Cour africaine ne s'assure pas que les arguments du requérant sont fondés en fait.

KEY WORDS: default judgment, non-appearance, African Court on Human and Peoples' Rights, *Léon Mugesera v Rwanda*, burden of proof, standard of evidence, prima facie evidence, well-founded claims

CONTENT:

1 INTRODUCTION

This article focuses on the judicial function of the African Court on Human and Peoples' Rights (African Court or Court) in default judgments.[1] The discussion brings to the foreground the changes introduced by the Court in its recently revised Rules of Procedure and how said changes are put in motion in the case law. The revised provision on default judgments includes the extended power of the Court to decide on its own motion on whether to issue a default judgment and the introduction of a legal innovation in international dispute settlement, namely a remedy for the defaulting party to set aside a default judgment. The recent default judgment in *Léon Mugesera v Rwanda*[2] serves as a focal point in the analysis since this is the first instance that the revised Rules of Procedure were put into practice and since *Léon Mugesera* overall illustrates the difficulties encountered by the African Court in cases of non-appearance of the respondent state. The Court's Rules of Procedure and case law are also placed within the corpus of international (human rights) law and the

1 *Léon Mugesera v Rwanda* (Merits and Reparations) Appl 12/2017, paras 9, 13–18 (*Léon Mugesera* case).

2 *Léon Mugesera* (n 1); See also *Prof Lèon Mugesera v Rwanda* (order for provisional measures) Appl 12/2017.

jurisprudence of its two regional counterparts on matters pertaining to default judgments so as to shed light on different approaches.

The article makes two main arguments. The first concerns the procedural requirements for rendering a judgment in default. Until *Léon Mugesera*, the African Court was not consistent in meeting these requirements, and had been known to decide in default on its own motion without having a textual basis in the Protocol nor the Rules of Procedure to do so. The recently revised Rule of Procedure grants the Court the power to decide on its own motion and, therefore, brings to an end this problematic position. Second, the analysis argues that *Léon Mugesera* cements an alarming trend in the case law, whereby in cases of non-appearance the African Court does not satisfy itself that the applicant's submissions are well-founded in fact. Although the Court allocates the standard of evidence and burden of proof soundly, it seems that it endorses applicants' claims as proven without duly assessing the evidence before it.

The discussion is structured as follows. The second section summarises the facts of the *Léon Mugesera* case and the third section explains the main points of the Court's judgment pertaining to the jurisdiction and merits of the application. Next, the analysis turns to assess the requirements for the Court to render a default judgment, according to its Rules of Procedure — both before and after the 2020 revision — and how the Court applied them in practice. The final section concludes.

2 BACKGROUND AND FACTS OF THE *LÉON MUGESERA* CASE

Léon Mugesera gave what came to be known as the 'Mugesera speech', an inflammatory anti-Tutsi speech broadcast on public radio in November 1993, a few months before the outbreak of the genocide in Rwanda.[3] In 2012, having fought deportation for sixteen years, he was deported from Canada to Kigali to face charges of inciting genocide and crimes against humanity.[4] In 2016, he was convicted by the High Court Chamber for International Crimes of incitement to genocide and sentenced to life in prison. A few months before the African Court rendered its judgment, the Supreme Court of Rwanda found the applicant guilty of inciting ethnic hatred and persecution as a crime against humanity, among other crimes, and upheld the life sentence imposed on him.[5]

Mugesera resorted to the African Court alleging violations of a series of rights under the African Charter on Human and Peoples' Rights (African Charter).[6] He claimed that during the judicial proceedings between 2012 and 2016 the High Court Chamber for

3 P Gourevitch *We wish to inform you that tomorrow we will be killed with our families* (2000).

4 Supreme Court of Canada, *Mugesera v Canada (Minister of Citizenship and Immigration)* 2005 SCC 39 (CanLII) [2005] 2 SCR 91.

International Crimes and the Supreme Court of Rwanda had committed several irregularities. He further submitted that his conditions of detention were in violation of the African Charter.[7] Mugesera alleged violations of the right to a fair trial, the right not to be subjected to cruel, inhuman or degrading treatment, the right to his physical and mental integrity and the right to family under the Court.

3 THE COURT'S JUDGMENT

3.1 Personal jurisdiction

On the matter of jurisdiction, the African Court had to ascertain whether it enjoyed personal jurisdiction with regard to the respondent state. In 2016, Rwanda withdrew its declaration under article 34(6) of the Protocol to the African Charter[8] accepting the African Court's jurisdiction to receive applications from individuals and non-governmental organisations (NGOs).[9] In line with *Ingabire Victoire Umuhoza v Republic of Rwanda*,[10] the African Court confirmed that the declaration would remain in effect until one year after the withdrawal. In this instance, the application was filed one day before this period expired and, therefore, the African Court proceeded with deciding the case.[11] In light of Rwanda's non-appearance, the African Court decided to render a judgment in default.[12]

3.2 Merits of the case

As far as the right to a fair trial is concerned, Mugesera claimed violations of the right to defence, the right to legal aid and the right to be heard by an independent and impartial court. The African Court dismissed most of these claims. The applicant complained that he had

5 The High Court Chamber for International Crimes is a specialised chamber set up to try international crimes. The Supreme Court of Rwanda acts as the appeal court to the judgments rendered by the High Court Chamber for International Crimes. See https://www.gov.rw/government/judiciary and https://www.justiceinfo.net/en/24222-160212-rwandajustice-rwanda-creates-special-chamber-for-international-crimes.html (accessed 30 October 2022).

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

7 *Léon Mugesera* (n 1) para 3.

8 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU/LEG/EXP/AFCHPRIPROT(III) (Protocol to the African Charter).

9 Republic of Rwanda, Ministry of Foreign Affairs and Cooperation, 24 February 2016, https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Rwanda.pdf (accessed 30 July 2022).

10 *Ingabire Victoire Umuhoza v Rwanda* (Merits) Appl 3/2014, paras 13, 25, 36, 39–47 (*Ingabire Victoire Umuhoza* case).

11 *Léon Mugesera* (n 1) para 22.

12 *Léon Mugesera* (n 1) paras 9, 13–18.

not been allowed to stand trial in a language of his choice, in violation of his right to defence under article 7(1)(a) of the African Charter. He argued that, although French is one of Rwanda's three official languages, the trial was held in Kinyarwanda, a language that his counsel did not speak. His complaint was dismissed since he had not demonstrated that an interpreter had been requested and a member of his team of counsels was a Rwandan national.[13] With respect to Mugesera's submission that his right to legal aid had been breached, the African Court held that the interests of justice did not require free legal representation in this instance. Mugesera may have been accused of a serious crime (genocide) which is punishable by life imprisonment, but he did not prove that he could not afford a lawyer of his choice. The Court noted that, in addition to one lawyer from Rwanda, the applicant was represented by two lawyers of foreign origin.[14]

Nonetheless, the African Court found that certain allegations pertaining to the right to a fair trial were substantiated. The applicant submitted that he was not fully informed of the charges brought against him. The public prosecutor had declined to provide him with the information necessary to prepare his defence and the High Court Chamber for International Crimes had refused to hear his arguments and witnesses. The African Court found that these allegations were proven by the applicant's letter addressed to the Attorney General, in which he highlighted the difficulties he faced in preparing his defence. A breach of article 7(1)(a) of the African Charter was declared, even though it is not entirely clear from the African Court's reasoning how this letter proved said allegations.[15]

Mugesera also raised a complaint concerning the right to be heard by an independent and impartial court. He alleged that the High Court Chamber for International Crimes was neither independent nor impartial, as per the requirements of articles 7(1)(d) & 26 of the African Charter. Two years after the beginning of the trial, when most of the evidence had already been presented, one of the members sitting in the High Court Chamber was replaced by a new judge. The applicant argued that this replacement was driven by political interference. In support of his claims, he invoked a statement by the former Minister of Justice that the applicant would not enjoy a fair trial and he cited reports by intergovernmental and non-governmental organisations raising concerns about the independence and impartiality of the Rwandan judiciary.[16] The African Court found that the submissions lacked substantiation; the replacement of a judge did not in itself constitute a violation of the independence or impartiality of a court.[17] Moreover, the reports that Mugesera submitted made general assessments about Rwandan courts without establishing evidence for the circumstances of his own trial.[18] However, Judge Ben Achour, in his

13 *Léon Mugesera* (n 1) para 44.
14 *Léon Mugesera* (n 1) paras 58-59.
15 *Léon Mugesera* (n 1) paras 41, 45-46.
16 *Léon Mugesera* (n 1) paras 62–66.
17 *Léon Mugesera* (n 1) paras 70–73.

dissenting opinion attached to the majority's judgment, expressed the view that the majority had not sufficiently examined the *appearance* of partiality in the Rwandan courts as a possible violation of the right to a fair trial.[19] The safeguard of the impartiality of courts concerns the perception of bias generated in the eyes not only of the party concerned but also of any reasonable observer.[20] Judge Ben Achour also submitted that the majority had not placed appropriate weight on the evidentiary value of international reports and views by inter-governmental and non-governmental organisations.[21]

The remainder of Mugesera's claims concerned his conditions of detention. The complaints pertained to the prohibition of torture, cruel, inhuman and degrading treatment (article 5 of the African Charter), the right to physical and mental integrity (article 4 of the African Charter) and the right to family (article 18(1) of the African Charter). The African Court held that Rwanda had violated article 5 of the African Charter concerning human dignity on account of death threats made by prison officials, limited access to a doctor and medication, no provision of an orthopaedic pillow, deprivation of adequate food (Mugesera's fruit-based and cholesterol-free diet was not respected) and obstacles to contact his family and lawyers. Other claims were dismissed as unfounded (for example, the prison's repeated broadcasting of his 1992 speech or the inclusion of his name on the list of persons to be executed).[22]

The Court also found that these detention conditions were not in line with Rwanda's obligations under article 4 of the African Charter concerning the right to physical and mental integrity. Unlike other human rights treaties, the African Charter establishes an explicit link between the right to life and the integrity of a human being. The right to life under article 4 is understood in its physical sense and as a right to a decent existence.[23] The Court's view was that Mugesera's detention circumstances had violated both its literal right to life, since they were likely to cause his death, and his right to a dignified life as a prisoner, especially given his vulnerable status (being elderly and ill).[24]

18 *Léon Mugesera* (n 1) paras 70, 72.

19 Similar concerns were raised in the *Alfred Agbesi Woyome v Republic of Ghana* (merits and reparations) Appl 1/2017; see Dissenting Opinion of Judge Gerard Niyungeko, para 7 and Dissenting Opinion of Judge Rafaa Ben Achour paras 7-16 (in French).

20 United Nations Office on Drugs and Crime, 'Commentary on the Bangalore Principles of Judicial Conduct', 2007, para 56.

21 Partial dissenting opinion of Judge Ben Achour in *Léon Mugesera* (n 1) (in French); *Léon Mugesera* (n 1) para 72.

22 *Léon Mugesera* (n 1) paras 77, 90.

23 R Murray, *The African Charter on Human and Peoples' Rights – A commentary* (2019) 101-132. Cf the development of the concept of *dignified life* in the case law of the Inter-American Court of Human Rights. See JM Pasqualucci 'The right to a dignified life (*vida digna*): the integration of economic and social rights with civil and political rights in the Inter-American human rights system' (2008) 31 *Hastings International & Comparative Law Review* 1.

24 *Léon Mugesera* (n 1) paras 100–101, 104.

Finally, the African Court declared a breach of the right to family under article 18(1) of the African Charter on account of the failure of the prison authorities to provide the applicant with the statutory means to communicate with his family. The Court noted that it was not apparent from the record why the maximum duration of communications between the applicant and his family was set at ten minutes.[25]

The violation of articles 4, 5 and 18(1) of the African Charter was substantiated on the basis of medical reports submitted by Mugesera and a series of letters that he had sent to state authorities.[26] The question of whether this evidence was sufficient to satisfy the Court that the allegations were well-founded will be discussed below.

4 THE AFRICAN COURT'S JUDICIAL FUNCTION IN DEFAULT JUDGMENTS

Although non-appearance is a phenomenon known in interstate dispute settlement,[27] it is not common before international human rights courts. There are no instances of non-appearing states at the European Court of Human Rights (ECtHR) thus far. The Inter-American Court of Human Rights (IACtHR) has issued a few default judgments.[28] Compared to its two regional counterparts, the African Court has a high(er) rate of default judgments, including the *African Commission on Human and Peoples' Rights v Libya* case,[29] multiple cases concerning Rwanda[30] and, as of recent, the *Yusuph Said v United Republic of Tanzania* judgment.[31]

In *Léon Mugesera*, Rwanda's choice not to participate in the proceedings before the African Court did not come as a surprise. Rwanda stopped appearing before the African Court in 2016, when it withdrew its declaration accepting the Court's jurisdiction to receive applications from individuals and NGOs. Although Tanzania, Benin

25 *Léon Mugesera* (n 1) para 121.

26 *Léon Mugesera* (n 1) paras 84-89, 94-107, 119-120.

27 China did not appear *In the Matter of the South China Sea Arbitration (The Republic of the Philippines v The Peoples' Republic of China)* Permanent Court of Arbitration (12 July 2016); Venezuela did not appear before the ICJ in *Arbitral Award of 3 October 1899 (Guyana v Venezuela)* ICJ (18 December 2020) (2020) ICJ Reports 455 (*Arbitral Award* case); and Russia abstained from appearing at the Permanent Court of Arbitration *In the Matter of the Arctic Sunrise Arbitration (The Kingdom of the Netherlands v The Russian Federation)* Permanent Court of Arbitration (14 August 2015). For commentary see M Goldmann 'International courts and tribunals, non-Appearance' (2006) *Max Planck Encyclopedia of Public International Law*, para 6; H von Mangoldt & A Zimmermann 'Article 53' in A Zimmermann and others (eds) *The statute of the International Court of Justice: a commentary* (2019) at 146.

28 See sources referred to in n 35-38.

29 *African Commission on Human and Peoples' Rights v Libya* (Merits) Appl 2/2013 (*African Commission on Human and Peoples' Rights* case).

30 Eg, *Léon Mugesera* (n 1); *Ingabire Victoire Umuhoza* (n 10) and further sources referred to in (n 49) 51, 54.

31 *Yusuph Said v Tanzania* (jurisdiction and admissibility) Appl 11/2019.

and Côte d'Ivoire followed Rwanda in withdrawing their optional declarations,[32] they continued appearing and making submissions before the Court.[33] Rwanda is not the only state that has failed to appear before the Court. Libya did not appear before the Court in the *African Commission on Human and Peoples'* case and neither did Tanzania in *Yusuph Said*. Yet, Rwanda is the only state that, following its withdrawal, effectively 'disappeared'.[34] With that being said, this 'disappearing act' is not unprecedented in international human rights law. The IACtHR rendered two judgments in default following Trinidad and Tobago's 1998 denunciation of the IACHR,[35] which did not have an immediate effect releasing it from its obligations under the IACHR.[36] Similarly, the IACtHR rendered two judgments in default in connection to Peru.[37] In 1999 Peru announced it was withdrawing its acceptance of the IACtHR's jurisdiction but this decision was reversed in 2001. Even if the IACtHR held that Peru's withdrawal of recognition of its contentious jurisdiction was only a partial withdrawal and hence did not take effect,[38] Peru did not participate in two cases.[39]

The ensuing discussion examines the African Court's judicial function when rendering default judgments by placing its function within the corpus of international human rights jurisprudence. The discussion makes the following points. First, until Léon Mugesera, the

32 For discussion see L Burgorgue-Larsen, *Les 3 cours régionales des droits de l' homme in context* (2020) 107-115; N de Silva & M Plagis, 'A court in crisis: African states' increasing resistance to Africa's human rights court' *Opinio Juris*, 19 May 2020, http://opiniojuris.org/2020/05/19/a-court-in-crisis-african-states-increasing-resistance-to-africas-human-rights-court/ (accessed 30 July 2022). But recently the Republic of Guinea Bissau and the Republic of Niger deposited respective declarations under art 34(6) of the Protocol allowing direct access to the African Court; see African Court, Press Release, 3 November 2021, https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/ (accessed 30 July 2022).

33 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1230 at 1249.

34 For discussion on the motivations and implication of non-appearance cf Separate Opinion of Judge Antonio A Cançado Trindade in *Caesar v Trinidad and Tobago* (Merits, Reparations and Costs) IACtHR (11 March 2005) Series C No 123, paras 69-84 (*Caesar* case) and S Yee 'Knowledge and strategy in international litigation: a review essay on Hugh Thirlway's The International Court of Justice, with some reference to non-appearance' (2020) 19 *Chinese Journal of International Law* 509.

35 *Caesar* case (n 34); *Hilaire, Constantine and Benjamin and Others v Trinidad and Tobago* (Merits, Reparations and Costs) IACtHR (21 June 2002) Series C No 94 (*Hilaire, Constantine and Benjamin and Others* case).

36 The IACtHR held in *Hilaire, Constantine and Benjamin and Others v Trinidad and Tobago* (Preliminary Objections) IACtHR (1 September 2001) Series C No 123 that the denunciation would become effective one year later.

37 *The Constitutional Court v Peru* (Merits, Reparations and Costs) IACtHR (31 January 2001) Series C No 71 (*Constitutional Court* case); *Ivcher-Bronstein v Peru* (Interpretation of the Judgment of the Merits) IACtHR (6 February 2001) Series C No 84.

38 *Ivcher-Bronstein v Peru* (Merits, Reparations and Costs) IACtHR (24 September 1999) Series C No 74, paras 51-55.

39 Since then, Peru appears regularly before the IACtHR.

African Court was not consistent in meeting the requirements for issuing a judgment in default, as prescribed by its Rules of Procedure. The Court had at times decided in default on its own motion without formally enjoying such discretion. The recently revised rule, which was put into practice for the first time in Léon Mugesera, grants the Court the power to decide on its own motion. The revised rule also introduces a legal innovation in dispute settlement, namely the remedy for the defaulting party to set aside a default judgment. Second, the analysis argues that in *Léon Mugesera* the African Court did not satisfy itself that the applicant's submissions were well-founded in fact, casting doubt on whether the Court duly fulfils its judicial function in cases of non-appearance. The Court's case law reveals a strong trend towards accepting applicants' claims as proven without properly assessing the evidence.[40]

4.1 Applying the requirements for default judgments: The African Court's practice until *Léon Mugesera*

In September 2020 the African Court revised its Rules of Procedure,[41] including the provision concerning the default process (rule 63).[42] However, the rule applicable to cases decided prior to *Léon Mugesera* was former rule 55. This subsection focuses on the requirements of former rule 55 so as to arrive at a critical assessment of the Court's practice until *Léon Mugesera* and thus shed light on the revised rule applied in this case in subsections 4.2 and 4.3.

According to former rule 55: 'Whenever a party does not appear before the Court, or fails to defend its case, the Court may, on the application of the other party, pass judgment in default'. Moreover, the Court 'shall satisfy itself that it has jurisdiction in the case, and that the application is admissible and well-founded in fact and in law'.[43] Consequently, the African Court could not decide on its own motion whether to render a judgment in default; the other party to the dispute

40 It is worthwhile mentioning that the Rules of Procedure of the African Commission on Human and Peoples' Rights do not raise similar issues. In the scenario of a non-appearing party '… the Commission shall proceed to adopt a decision by default based on the information before it'. This rule is applicable with regard to decisions on admissibility and on merits both in inter-state complaints and in other communications brought by natural or legal persons. See Rules 111(2), 114(2), 118(2) and 120(2), Rules of Procedure of the African Commission on Human and Peoples' Rights, 2020, https://www.African Charter.org/public/Document/file/English/Rules%20of%20Procedure%202020_ENG.pdf (accessed 30 October 2022).

41 Rules of the Court, updated 25 September 2020, https://www.african-court.org/wpafc/wp-content/uploads/2021/04/Rules-Final-Revised-adopted-Rules-eng-April-2021.pdf (accessed 30 July 2022). The new Rules of Procedure came into effect in September 2020.

42 For discussion see Makunya (n 33) 1248-1250.

43 Rules of the African Court, 2 June 2010, http://www.african-court.org/en/images/Basic%20Documents/Final_Rules_of_Court_for_Publication_after_Harmonization_-_Final__English_7_sept_1_.pdf (accessed 30 July 2022).

had to request it. It is interesting to note that this rule departed from equivalent provisions in the Rules of Procedure of the other two international human rights courts, the ECtHR and the IACtHR. In particular, the ECtHR and IACtHR can decide to render a judgment in default on their own motion, without a request from the other party.[44]

Rwanda's first instance of non-appearance was in *Ingabire Victoire Umuhoza*. In this case, Rwanda had already informed the Court of its response to the application before notifying it of its withdrawal from the African Court's jurisdiction. Following the notification, Rwanda submitted a preliminary objection arguing that its withdrawal was effective immediately and so the Court had no jurisdiction to decide the case. The Court held that the withdrawal could not be applied to the application retroactively and that therefore it had jurisdiction.[45] From this point on, Rwanda stopped participating in the proceedings of this case (and all subsequent cases).[46] Yet, the Court neither held that it would render a judgment in default nor applied former rule 55 as a basis to this effect.[47] Instead, it decided the case on its merits by relying, in many parts of its judgment, upon Rwanda's initial response to the application.[48]

In a series of subsequent rulings concerning Rwanda in 2019-2020, the African Court applied former rule 55 and gave judgments in default. However, in doing so, the Court disregarded the stipulation that it may pass judgment in default only upon the request of the other party. Instead, it followed the default procedure, despite the fact that the applicant had not made any such request.[49] Judge Bensaoula Chafika criticised the majority for ignoring the conditions of former rule 55 without any justification.[50] In subsequent cases, the Court acknowledged that 'it should, in principle, have given a judgment in default only at the request of the Applicant' but considered that 'in view of the proper administration of justice, the decision to rule by default falls within its judicial discretion'.[51] There was no explanation, however, of why the judgments served the interests of justice or how it

44 Art 29(1), Rules of Procedure of the Inter-American Court of Human Rights, approved by the Court during its LXXXV regular session, 16–28 November 2009, https://www.corteidh.or.cr/reglamento.cfm?lang=en (accessed 30 July 2022); Rule 65C, Rules of the European Court of Human Rights, updated 2 June 2021, https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (accessed 30 July 2022).

45 *Ingabire Victoire Umuhoza* (n 10) paras 41, 45.

46 *Ingabire Victoire Umuhoza* (n 10) paras 43, 46.

47 *Ingabire Victoire Umuhoza* (n 10) paras 57–58.

48 *Ingabire Victoire Umuhoza* (n 10) paras 50, 97.

49 *Mulindahabi Fidèle v Republic of Rwanda* (jurisdiction and admissibility) Appl 6/2017, paras 16–17; *Mulindahabi Fidèle v Republic of Rwanda* (admissibility) Appl 7/2017, paras 16–17; *Mulindahabi Fidèle v Republic of Rwanda* (admissibility) Appl 9/2017, para 15.

50 Separate opinion by Judge Bensaoula Chafika in *Mulindahabi Fidèle* Appl 6/2017 (n 49) paras 6, 7, 9.

51 *Mulindahabi Fidèle v Republic of Rwanda* Appl 4/2017, para 22; *Mulindahabi Fidèle v Republic of Rwanda* (Admissibility) Appl 5/2017, para 25; *Mulindahabi Fidèle v Republic of Rwanda* (Admissibility) Appl 10/2017, para 30; *Mulindahabi Fidèle v Republic of Rwanda* (Admissibility) Appl 11/2017, para 23.

was possible for the Court to exercise judicial discretion on a matter that it did not in fact enjoy unless the applicant had requested a default judgment.[52]

4.2 The 2020 revision of the requirements to give a default judgment and its application in *Léon Mugesera*

Against this background, in 2020 the Court revised former rule 55 by making three changes.[53] First, the now-revised rule 63 prescribes that the Court may enter a decision in default on its own motion. This amendment entails that an applicant's request to that effect is no longer a requirement aligning the African Court's Rules of Procedure with the respective rules of the ECtHR and IACtHR. The *Léon Mugesera* case was the first opportunity for the Court to apply new rule 63. The applicant had not requested a judgment in default but the revised rule granted the Court the power to decide on its own motion. The Court proceeded with deciding the case after confirming that the defaulting party (Rwanda) had been duly notified.[54]

Second, curiously, the Court decided to delete paragraph 2 of former rule 55, which provided the obligation to 'satisfy itself that it has jurisdiction in the case, and that the application is admissible and well-founded in fact and in law'. The rationale for purposefully omitting this provision from the text of revised rule 63 is unclear and raises the question of whether the Court is still under this obligation. It is argued that irrespective of whether this obligation is expressly incorporated in the statute or Rules of Procedure of an international court, it is still incumbent upon that court, pursuant to its judicial function, to determine whether claims are well-founded in fact and in law.[55] The obligation to ascertain whether a claim is well-founded in law, independently of the parties' submissions, stems from the principle *jura novit curia*. An international court is not solely dependent on the

52 Separate Opinion by Judge Bensaoula Chafika (n 50) para 13.

53 Rule 63 reads: '1. Whenever a party does not appear before the Court, or fails to defend its case within the period prescribed by the Court, the Court may, on the Application of the other party, or on its own motion, enter a decision in default after it has satisfied itself that the defaulting party has been duly served with the Application and all other documents pertinent to the proceedings. 2. The Court may, upon an Application from the defaulting party showing good cause, and within a period not exceeding one year from the date of notification of the decision, set aside a decision entered in default in accordance with sub-rule 1 of this Rule. 3. Prior to considering the Application for setting aside the said decision, the Court shall notify the Application to the other party giving the latter thirty (30) days within which to submit written observations'.

54 *Léon Mugesera* (n 1) para 16. See also the subsequent case *Laurent Munyandilikirwa v Republic of Rwanda* (jurisdiction and admissibility) Appl 23/2015, paras 40-46.

55 Separate opinion of Judge Fatsah Ouguergouz in *African Commission on Human and Peoples' Rights* case (n 29) para 26; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ (27 June 1986) (1986) ICJ Reports 14, paras 29–30 (*Nicaragua* case).

arguments of the parties before it with respect to the applicable law.[56] As to the facts of a case, in principle, an international court is not bound to confine its consideration to the material formally submitted to it by the parties (although it may not be possible for a court to examine the accuracy of the facts in all of their detail).

The norms governing the functioning of international courts and/or their respective judicial practice strengthen this argument. Article 53 of the statute of the International Court of Justice (ICJ) reads that it 'must … satisfy itself, not only that it has jurisdiction … but also that the claim is well-founded in fact and law'.[57] In contrast, international human rights courts have less concrete requirements on paper for rendering a judgment in default: as far as the ECtHR is concerned, the default procedure needs to be 'consistent with the proper administration of justice',[58] while the IACtHR needs to 'take the measures necessary to conduct the proceedings to their completion'.[59] Despite the unclarity of these provisions, the IACtHR specifically affirms in its case law that it must satisfy itself that claims are well-founded in fact and law.[60] Therefore, even if the African Court has removed the obligation from its Rules of Procedure, it is still under the obligation to ascertain whether the applicant's claims are well-founded. This was also confirmed in *Léon Mugesera*, when the Court restated that it needed to determine 'whether the Applicant's claims are founded in fact and in law'.[61]

The third change to the provision on default judgments was the introduction of a remedy for the defaulting party, which may now apply to set aside a decision entered in default. This is a novel provision in international dispute settlement.[62] It may be that it is an attempt by the Court to counterbalance its extended power to render a judgment in default on its own motion by providing a remedy to the defaulting party.[63] The defaulting party needs to 'show good reason' in its application for setting the judgment aside, although there are no criteria for what qualifies as good reason.[64] The application needs to be submitted within one year from the judgment notification date and the Court must notify the other party, giving it thirty days to submit written

56 Separate opinion of Judge Fatsah Ouguergouz (n 55) paras 5–6; *Nicaragua* case (n 55) para 29.

57 Art 53, Statute of the International Court of Justice (adopted 18 April 1946) 33 UNTS 993.

58 Rule 65C, Rules of the ECtHR (n 44).

59 Art 29(1), Rules of Procedure of the IACtHR (n 44).

60 *Caesar* (n 34) para 38; *Constitutional Court* (n 37) paras 58–62.

61 *Léon Mugesera* (n 1) para 18.

62 Rule 63(2) reads: 'The Court may, upon an application from the defaulting party showing good cause, and within a period not exceeding one year from the date of notification of the decision, set aside a decision entered in default in accordance with sub-rule 1 of this Rule.' For general discussion see CF Amerasinghe *Evidence in international litigation* (2005) 252–253.

63 Amerasinghe (n 62); Separate opinion by Judge Bensaoula Chafika (n 50) paras 6, 7, 9.

64 Cf rule 78 of the African Court's Rules of Procedure, which sets out specific criteria regarding a request for a review of a judgment.

observations. It remains to be seen whether non-appearing parties will use this remedy in the future.

4.3 Were Mugesera's claims well-founded in fact? The problematic assessment of evidence

The non-appearance of a party has an adverse impact on the sound administration of justice and creates challenges for an international court in fulfilling its judicial function.[65] Such challenges manifest themselves prominently when establishing disputed facts, since the non-appearing party forfeits the opportunity to submit evidence and arguments in support of its own case.[66]

Difficulties concerning evidence and the establishment of facts were also present in *Léon Mugesera*. The African Court declared a violation of articles 4, 5, 7 and 18(1) of the African Charter on the basis of medical reports concerning the applicant's health and a series of letters that he had sent to state authorities complaining of the circumstances of his trial and detention.[67] This is arguably circumstantial evidence raising the issue of whether it should have been deemed sufficient to satisfy the Court that the allegations were well-founded in fact.[68] This is for two reasons. First, it is doubtful whether the material submitted by the applicant constituted convincing *prima facie* evidence meeting the standard of proof. Second, the evidentiary weight placed upon certain inferences appears to be misguided. It is also to be regretted that the Court missed the opportunity to explore, on its own motion, the possibility of gaining evidence by other means.

One should start by clarifying how the African Court allocated the standard of proof and burden of evidence. The African Court's (revised) Rules of Procedure remain silent on whether a different standard of proof is to be applied in cases of non-appearance. In the absence of prescribing a different standard, the regular standard of proof applies. In contrast, the ECtHR and the IACtHR enjoy discretion to apply a lower standard of proof by introducing a presumption against the non-appearing party.[69] The ECtHR 'may draw such inferences as it deems appropriate',[70] and the IACtHR 'may consider those facts that have not been expressly denied and those claims that have not been expressly controverted [by the state] as accepted'.[71] Given the absence of a specific provision in the African Court's (revised) Rules of Procedure on

65 Separate opinion of Judge Fatsah Ouguergouz (n 55) para 26; *Nicaragua* (n 55) paras 27, 31; *Arbitral Award* (n 27) para 25.

66 *Arbitral Award* (n 27) para 25; Amerasinghe (n 62) 144.

67 *Léon Mugesera* (n 1) paras 41, 45–46, 84–89, 94–107, 119–120.

68 Evidence may be distinguished into direct (eg, objective testimonial or documentary evidence) and circumstantial (eg, indicia, presumptions). Circumstantial evidence may be considered as long as it leads to conclusions consistent with the facts. See Amerasinghe (n 62) 223.

69 *Constitutional Court* (n 37) para 60; *Caesar* (n 34) para 37.

70 Rule 44C(1), Rules of the ECtHR (n 44).

71 Art 41(3), Rules of Procedure of the IACtHR (n 44).

whether a different standard of proof is to be applied in cases of non-appearance, it is reasonable to conclude that the regular standard of proof applies. Consequently, the African Court, pursuant to its Rules of Procedure, does not enjoy the discretion that the IACtHR or the ECtHR enjoy. Moreover, the fact that this point was not included in the recent revision of the rule on default judgments strongly suggests that the Court did not find it necessary to set out a deviating from the regular standard of proof position in a way similar to the rules of procedures of the ECtHR and IACtHR. Yet one may ask whether the Court may elucidate such a deviating position in its case law. In the view of the present author, the answer to this question is in the negative. Even if it were the Court's intention in *Mugesera* to do so, there is nothing in the Court's reasoning to suggest this. Turning to the burden of proof, that still fell to the applicant. However, given the fact that Mugesera remained under state control (in prison), the African Court correctly held that the applicant needed to provide *prima facie* evidence in support of his allegations and, if he did so, the burden of evidence would shift to the respondent state.[72] The *prima facie* evidence rule has the effect of shifting the burden of evidence from the proponent of the burden of proof to the other party.[73] This is an evidentiary practice followed regularly in international jurisprudence.[74]

Notwithstanding that the Court allocated the standard of proof and burden of evidence soundly, the assessment and weighing of evidence present shortcomings. Admittedly, international courts enjoy considerable freedom on how to apply rules of evidence. The practice is that judges determine the weight to be accorded to the evidence submitted.[75] The weighing of said evidence many times depends on the special circumstances of a case and the nature of allegation made. With that being said, it is expected of international courts to satisfy themselves that a claim is well argued and proven and to respectively explain so in their judicial reasoning. Turning now to the African Court, it considered that letters and medical reports submitted by the applicant successfully provided *prima facie* evidence in support of his allegations and that 'in the absence of contrary information … these allegations … [we]re well-founded'.[76] Although international courts often find that claims are proven if *prima facie* evidence remains unrebutted, certain conditions need to be met to this effect.[77] The Court failed to address these conditions. First, it did not examine whether the evidence did constitute cogent *prima facie* evidence. Mere allegations or unconvincing evidence are not considered *prima facie* evidence.[78] In this case, the only evidence that the Court relied upon was the

72 *Léon Mugesera* (n 1) paras 84–88.

73 For the difference between standard of proof and standard of evidence, see Amerasinghe (n 62) 251–254.

74 Amerasinghe (n 62) 247; JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2013) 167.

75 Eg, see Pasqualucci (n 74) 150.

76 *Léon Mugesera* (n 1) para 89.

77 Amerasinghe (n 62) 251.

78 Amerasinghe (n 62) 250–251, 254.

applicant's letters sent to state authorities setting out his allegations. Second, the Court did not assess whether said evidence was sufficient to discharge the burden of proof.[79] Unrebutted prima facie evidence does not automatically lead to proven claims. The African Court did not provide solid reasoning explaining why and how, in the absence of contrary information, these allegations were well-founded. Since there was no other evidence but the applicant's allegations and letters, the consistency and credibility of their content could not be verified. Consequently, the absence of contrary information could not justify the application of a *de facto* presumption against the non-appearing party. Even the IACtHR, which enjoys the discretion to apply such a presumption (as mentioned earlier, the African Court does not, as per its Rules of Procedure), still needs to ensure that the evidence is consistent with the facts on which the non-appearing state remains silent.[80] To give an example, the Court found a violation of the right to a defence under article 7(1)(a) of the African Charter on account of the applicant's allegations that the High Court Chamber for International Crimes refused to hear his arguments, experts and witnesses as well as the Public Prosecutor's refusal to provide the applicant with the information necessary to prepare his defence.[81] However, the Court in its judgment makes no reference to the actual judgment by the High Court Chamber and whether there was evidence of the applicant's claims therein. There is no reference either to the applicant's trial. Both the judgment and the trial are matters of public record and the Court could very easily have had access to them. If it did, there is nothing in its reasoning to affirm that. Finally, besides the applicant's letter addressed to the Public Prosecutor there is no mention to whether the latter responded or not to said letter. Consequently, it remains unclear on what basis the Court found the applicant's claims to be proven.

Another example comes from the Court's reasoning when it held that Rwanda violated the applicant's right to be free from cruel, inhuman or degrading treatment and the right to physical and mental integrity (articles 5 and 4 of the African Charter respectively) due to the fact, among others, that the applicant was deprived of adequate food, access to an orthopedic pillow or access to a psychiatrist so as the applicant addresses certain trauma.[82] Besides the reference to the applicant's medical certificates and letters from his own doctors there was no effort by the Court to verify the applicant's medical conditions and, more importantly, the consequences of the applicant not having access to specific food or services. A medical expert appointed by the Court could have given an independent opinion on these matters. This would have enabled the Court to verify certain of the applicant's claims and have a more robust reasoning as to the facts demonstrated,

79 Amerasinghe (n 62) 254.

80 See *Caesar* (n 34) para 37; *Hilaire, Constantine and Benjamin and Others* (n 35) para 67. See A Paúl 'An overview of the Inter-american court's evaluation of evidence' in Y Haeck and others (eds) *The Inter-American Court of Human Rights: theory and practice, present and future* (2015) 25 at 41-42.

81 *Léon Mugesera* (n 1) paras 45-47.

82 *Léon Mugesera* (n 1) paras 77, 83, 87-90, 93, 95-97.

especially in an instance of non-appearance of the respondent state. Crucially, the Court had no justification either on how the applicant's claims (assuming that they were found proven) amounted to the threshold of degrading treatment under article 5 of the African Charter. The Court also noted that the state 'took no appropriate measures to correct the abuses against the applicant'[83] but there is no explanation on whether this was actually possible to verify or not. Mugesera's vulnerable status (being elderly and ill) was treated in the Court's reasoning as an inference in his favour, supporting the finding that his detention conditions had violated article 4 of the African Charter.[84] International courts admittedly enjoy a certain latitude in assessing facts and evidence, but circumstantial evidence, including inferences, may only be considered insofar as it results in conclusions consistent with the facts.[85] Mugesera's vulnerable status was undoubtedly an inference that supports his claims but the Court was not diligent in noting that this circumstantial evidence concerned a series of facts that were unclear, as explained earlier.

Overall, the Court's reasoning leaves much to be desired as to whether the evidence was sufficient to find the applicant's claims proven; how the Court discusses and analyses the evidence; and how transparent the Court is in explaining the evidentiary difficulties at hand. An instance of the Court's cryptic reasoning is that it cited certain documentary evidence, including a report of the Council/Nurse (dated 28 December 2016)[86] and a letter from the Council (dated February 2017)[87] without explaining in the text of the judgment what documents were and how they supported the applicant's claims. One may note that the Court's approach manifests the same shortcomings in *African Commission of Human and Peoples' Rights v Libya* (also a judgment in default), where the Court merely endorsed the applicant's claims in a telegraphically reasoned judgment, as Judge Fatsouh Ouguergouz pointed out in his Separate Opinion.[88] One may, therefore, discern that the Court has a strong inclination in default judgments to accept applicants' allegations without sufficiently examining whether they are well-founded.

In addition to this, in neither case did the African Court exercise its power under rule 55 of the Rules of Procedure to request certain measures on its own accord so as to obtain evidence which may provide clarification of the facts of a case. Such measures include the option to hear from a witness or expert, request an opinion or report or conduct an inquiry and on-site visit.[89] Moreover, the Court on its own motion may invite an individual or organisation to act as amicus curiae in a

83 *Léon Mugesera* (n 1) para 93.

84 *Léon Mugesera* (n 1) paras 100-101, 104.

85 Amerasinghe (n 62) 208–209, 223. For the ICJ see von Mangoldt & Zimmermann (n 27) 1491. For the ECtHR see W Schabas *The European convention on human rights: a commentary* (2015) 810-811. For the IACtHR see Pasqualucci (n 74) 167.

86 *Léon Mugesera* (n 1) footnotes 47, 58-60.

87 *Léon Mugesera* (n 1) footnote 58.

88 Separate opinion of Judge Fatsah Ouguergouz (n 55) paras 16, 29.

89 Separate opinion of Judge Fatsah Ouguergouz (n 55) paras 17, 20.

particular matter pending before it.[90] When international courts render judgments in default, they must explore other ways to gain access to evidence in an attempt to partially compensate for the absence of the party to the dispute.[91] Admittedly, an on-site visit would not have been feasible in practice, since there was little chance, if any, that Rwanda — the non-appearing party — would have cooperated. Yet, the Court could have sought direct evidence (testimonial or documentary including an opinion or a written report), for example, from experts or NGOs or a national or regional body regarding the circumstances of Mugesera's trial, status of his health and/or his conditions of detention. In similar instances, the regional counterparts of the African Court have adopted, on their own motion, various investigative measures which were capable of clarifying the facts of the case, and have obtained further evidence concerning matters considered by it to be relevant to the case. For example, in the *Hilaire, Constantine and Benjamin and Others* case, experts testified before the IACtHR as to the prison conditions in Trinidad and Tobago.[92] In *Husayn (Abu Zubaydah) v Poland*, the ECtHR invited the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism to take part in the hearing and also decided, of its own motion, to hear evidence from experts.[93]

5 CONCLUSION

Léon Mugesera, the first judgment in which the Court applied its revised Rule of Procedure on default judgments, illustrates the difficulties encountered by the Court (and all international courts for that matter) when a party to the dispute chooses not to appear and participate in the proceedings. In the past, judges in their separate opinions have criticised the majority for either ignoring the conditions set forth in the Court's Rules of Procedure[94] or not properly reasoning how the evidence brought before the Court substantiated the applicants' claims.[95]

Certain of the recent changes of the provision on default judgments came to address specific concerns. In this way, the revised Rule of Procedure (rule 63(1)) resolves the problems pertaining to the Court's practice of ignoring the procedural requirements for rendering a judgment in default. The African Court now enjoys the power to give a judgment in default on its own motion. Furthermore, although the

90 See point 45, Practice Directions to Guide Potential Applicants, https://www.african-court.org/wpafc/wp-content/uploads/2020/06/Practice-Directions-to-Guide-Potential-Litigants-En.pdf (accessed 30 October 2022).

91 Von Mangoldt & Zimmermann (n 27) 1491; Goldmann (n 27) paras 17–18.

92 (n 35) para 76. See art 58(a) and (c), Rules of Procedure of the IACtHR (n 44).

93 *Husayn (Abu Zubaydah) v Poland* (Merits and Just Satisfaction) ECtHR (24 July 2014) App no 7511/13, para 8. See Rule A1(1) and (2), Annex to the Rules of the ECtHR (n 44) concerning investigative measures.

94 See Separate opinion by Judge Bensaoula Chafika (n 50) paras 6, 7, 9.

95 See Separate opinion of Judge Fatsah Ouguergouz (n 55) paras 16, 29.

reason that the Court purposefully omitted the reference to its obligation to satisfy itself that the applicant's submissions are well-founded in fact and in law from the text of revised rule 63 remains unclear, both international jurisprudence and the African Court in *Léon Mugesera* confirm that this obligation is inherent in its judicial function. Interestingly, the introduction of a unique provision concerning the remedy available to the defaulting party to apply to set aside a default judgment (rule 63(2)) remains to be put to the test in the future.

Judge Fatsah Ouguergouz in connection to the *African Commission on Human and Peoples' Rights* and the present analysis with regard to *Léon Mugesera* raised the question of whether the African Court sufficiently examined and reasoned in its default judgments that the claims of the applicants were well-founded in fact. In *Léon Mugesera* the standard of proof and burden of evidence were allocated in a sound manner but the Court did not appear to thoroughly examine whether Mugesera's claims were well-founded in fact. The evidence brought before the Court neither was sufficient to qualify as *prima facie* evidence nor could discharge the burden of proof. Under rule 55 of the Rules of Procedure, the Court could have exercised its power to request certain measures on its own accord so as to obtain evidence and hence mitigate the ramifications of Rwanda's absence, but it did not use this power. It would be advisable that the Court exercises its power in future non-appearing cases without necessarily expecting of course that this measure in itself may compensate for the respondent state's absence from the proceedings.

To conclude, a comparative overview of the procedural rule on default judgments across the three regional human rights courts shows that the rule of the African Court presents certain differences compared with the respective provisions for the ECtHR and the IACtHR. The African Court recently aligned its provision with one of its counterparts so that it is now able to decide on giving a default judgment on its own motion (without a request from the other party). However, the provisions concerning the standard of proof and the burden of evidence in cases of non-appearance remain different with the African Court not enjoying discretion on applying a different standard of proof in such cases.

Commentaire de l'arrêt de la Cour africaine des droits de l'homme et des peuples dans l'affaire *Anudo Ochieng Anudo c. Tanzanie*

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RÉSUMÉ: La Cour africaine des droits de l'homme et des peuples (Cour africaine) a rendu, dans l'affaire *Anudo Ochieng Anudo c. République-Unie de Tanzanie*, son premier arrêt relatif au droit de ne pas être privé arbitrairement de sa nationalité en lien avec le droit de ne pas être arbitrairement expulsé. La Cour a été saisie par la requête de M. Anudo Ochieng Anudo d'origine tanzanienne. Dans son arrêt, la Cour s'est fondée sur l'article 15(2) de la Déclaration universelle des droits de l'homme pour condamner l'Etat défendeur en prenant le contre-pied de la position constante de la Commission africaine des droits de l'homme et des peuples (Commission africaine) dans des affaires similaires. Le présent commentaire vise à faire ressortir la particularité de cet arrêt en rapport avec la jurisprudence de la Commission africaine et de la Cour européenne des droits de l'homme. Il met également en relief la nécessité de finaliser l'adoption du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique pour une protection efficace de ce droit en Afrique.

TITLE AND ABSTRACT IN ENGLISH:

Commentary on the judgment of the African Court on Human and Peoples' Rights in the case of *Anudo Ochieng Anudo v United Republic of Tanzania*

ABSTRACT: The African Court on Human and Peoples' Rights (African Court) handed down its first judgment on the right not to be arbitrarily deprived of one's nationality in relation to the right not to be arbitrarily expelled in the case of *Anudo Ochieng Anudo v Tanzania*. The Court was seized by Anudo Ochieng Anudo, a Tanzanian national. In its judgment, the African Court relied on Article 15(2) of the Universal Declaration of Human Rights to find against the respondent State. The position of the Court is contrary to a consistent position of the African Commission on Human and Peoples' Rights (African Commission) in similar cases. This commentary therefore aims to highlight the particularity of this judgment in relation to the jurisprudence of the African Commission and European courts. It emphasises the need to finalise the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Specific Aspects of the Right to Nationality and the Eradication of Statelessness in Africa for effective protection of this right in Africa.

MOTS CLÉS: Droit à la nationalité, expulsion arbitraire, Cour africaine des droits de l'homme et des peuples, Commission africaine des droits de l'homme et des peuples, étranger et national, preuve de la nationalité

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SOMMAIRE:

1 INTRODUCTION

Par son arrêt du 22 mars 2018, la Cour africaine des droits de l'homme et des peuples (Cour africaine) a examiné, pour la première fois, la question du droit à la nationalité en rapport avec l'expulsion individuelle et avec le respect du droit à un procès équitable. Dans ses dispositifs, la Cour a conclu que «la République-Unie de Tanzanie avait violé le droit du requérant de ne pas être privé arbitrairement de sa nationalité; son droit de ne pas être arbitrairement expulsé ainsi que son droit à un procès équitable».[1]

En effet, cet arrêt concerne une affaire de privation de nationalité tanzanienne du sieur Anudo Ochieng Anudo par les autorités tanzaniennes, suivi de son expulsion pour séjour illégal en Tanzanie, le 1er septembre 2014. Le requérant avait des parents d'origine tanzanienne, dénommés respectivement Anudo Achok et Dorcas Rombo Jacop.

Ainsi, ce commentaire se propose de revenir sur les avancées qu'apporte cet arrêt dans la protection au niveau africain du droit à la nationalité ou du droit de ne pas en être privé arbitrairement, ainsi que du droit de ne pas être arbitrairement expulsé. Il reviendra aussi sur certaines positions plus ou moins discutables adoptées par la Cour dans l'analyse de ces droits. Pour atteindre notre objectif, nous avons choisi de comparer cette pratique de la Cour africaine avec principalement celle de la Commission africaine des droits de l'homme et des peuples (Commission africaine) dans des affaires similaires.

2 L'APPORT DE L'ARRÊT DE LA COUR AFRICAINE SUR LE DROIT À LA NATIONALITÉ

L'analyse du droit à la nationalité ou tout du moins du droit de ne pas être privé arbitrairement de sa nationalité par la Cour africaine laisse apparaître à la fois des divergences et des convergences d'approches avec celles de la Commission africaine notamment.

1 *Anudo c. République-Unie de Tanzanie* (fond) (2018) 2 RJCA 257 para 132.

Alors que dans des affaires similaires, la Commission africaine s'est appuyée sur les dispositions de l'article 5 de la Charte africaine, la Cour, elle, s'en écarte en prenant comme fondement l'article 15(2) de la Déclaration universelle des droits de l'homme (2.1). Elle a également innové en adoptant une analyse intéressante de la question de la charge de la preuve de la nationalité (2.2). L'analyse de ce point se distingue de la littérature existante[2] en ce sens qu'il insiste davantage sur la charge de la preuve de la nationalité ainsi que sur le choix par la Cour de la Déclaration universelle des droits de l'homme comme fondement de ce droit.

2.1 L'article 15(2) de la Déclaration universelle des droits de l'homme comme fondement du droit à la nationalité

La première question de droit sur laquelle la Cour s'est prononcée en rapport avec le droit de ne pas être privée arbitrairement de sa nationalité, c'est celle de son fondement juridique. Prenant le contre-pied de la position de la Commission africaine sur la même question, la Cour africaine réaffirme le caractère coutumier de la Déclaration universelle des droits de l'homme sur la base de son article 15(2).

En effet, dans son arrêt du 22 mars 2018, la Cour africaine admet que «ni la Charte africaine ni le Pacte international relatif aux droits civils et politiques» ne consacrent expressément un droit de ne pas être arbitrairement privé de sa nationalité»[3] ou plus globalement un droit à la nationalité.

Toutefois, cela ne devrait pas signifier que ce droit est totalement méconnu. Plusieurs textes généraux[4] ou de portée restreinte font plus ou moins référence à ce droit ou à certains de ses aspects. Mais la Cour a fait le choix de la Déclaration universelle des droits de l'homme. Par exemple, au niveau international, c'est le cas de l'article 5(1) de la Convention sur la réduction des cas d'apatridie qui dispose que «si la législation d'un Etat contractant prévoit la perte de la nationalité par la suite d'un changement d'état tel que le mariage, dissolution du mariage, légitimation, reconnaissance ou adoption, cette perte doit être subordonnée à la possession ou à l'acquisition de la nationalité d'un autre Etat».

Au niveau régional, notamment africain, ce sont les articles 6 de la Charte africaine des droits et du bien-être de l'enfant ainsi que du Protocole à la Charte africaine des droits de l'homme et des peuples

2 RF Avlessi 'La prévention de l'apatridie dans le système africain des droits de l'homme' (2019) 3 *Annuaire africain des droits de l'homme* 295. Voir aussi: D Dayoro 'Commentaire *Affaire Anudo Ochieng Anudo c. République-Unie de Tanzanie*, Requête 012/2015' in A Soma & S Dabiré (dirs) *Commentaire des grands arrêts de la Cour africaine des droits de l'homme et des peuples* (2022) 318.

3 *Anudo* (n 1) para 76.

4 C'est par exemple le cas de la Déclaration universelle des droits de l'homme.

relatif aux droits des femmes en Afrique. L'article 6 de la Charte africaine des droits et du bien-être de l'enfant dispose par exemple que «tout enfant a le droit d'acquérir une nationalité». Alors que l'article 6 du Protocole de Maputo sur les droits des femmes en Afrique dispose que «la femme mariée a le droit de conserver sa nationalité et d'acquérir la nationalité de son mari».

Ainsi, l'on peut observer que ces deux articles ne consacrent pas expressément un droit de ne pas être privé arbitrairement de sa nationalité. Seul l'article 15(2) de la Déclaration universelle des droits de l'homme consacre expressément ce droit. D'où la pertinence de la question de son applicabilité devant la Cour, de son caractère conventionnel[5] ainsi que de son caractère contraignant.

En effet, adoptée le 10 décembre 1948, la Déclaration universelle des droits de l'homme est une résolution de l'Assemblée générale des Nations unies et n'avait pas une valeur juridique contraignante au moment de son adoption. La Cour a eu l'occasion de le rappeler dans ses arrêts antérieurs. Elle l'a rappelé dans son arrêt du 28 mars 2014 dans l'affaire *Franck David Omary et autres c. Tanzanie*. Dans cet arrêt, «la Cour rappelle tout d'abord que la Déclaration universelle des droits de l'homme est une résolution de l'Assemblée générale des Nations Unies. La Cour relève encore que même si la Déclaration est l'un des premiers instruments dont l'objectif est de protéger des droits subjectifs de l'individu, *elle n'est pas ratifiée par les Etats*».[6]

S'agissant de la valeur juridique de cette Déclaration, la Cour note que «même si la Déclaration n'est pas un traité qui nécessite une ratification par les Etats pour entrer en vigueur, *elle a été élevée au statut de droit international coutumier et de norme incontournable*».[7] Cette position fut ensuite, rappelée dans l'arrêt de la Cour du 11 mai 2018 dans l'affaire *Mango and Another v Tanzania*. A l'occasion, la Cour a également rappelé que «… même si la Déclaration universelle des droits de l'homme n'est pas un instrument international des droits de l'homme soumis à la ratification des États, elle a déjà établi, … que la Déclaration est reconnue comme faisant partie du droit coutumier international».[8]

Dans son arrêt du 28 mars 2014, dans l'affaire *Ayant droits de feus Norbert Zongo et autres c. Burkina Faso*, la Cour avait admis le principe de l'examen des dispositions de la Déclaration universelle des droits de l'homme devant elle.[9] C'est donc pour toutes ces raisons que

5 L'article 3(1) du Protocole à la Cour africaine dispose que «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 Etats concernés».

6 *Frank David Omary et autres c. République-Unie de Tanzanie* (fond) (2014) 1 RJCA 370 para 72. C'est nous qui soulignons.

7 *Frank David Omary et autres* (n 5) para 73. C'est nous qui soulignons.

8 *Mango c. République-Unie de Tanzanie* (fond) (2018) 2 RJCA 32 para 33.

9 *Ayants droit de feus Norbert Zongo, Abdoulaye Nikiema dit Ablasse, Ernest Zongo et Blaise Ilboudo et Mouvement Burkinabé des droits de l'homme et des peuples c. Burkina Faso* (fond) (2014) 1 RJCA 22, para 157.

la Cour africaine avait conclu dans son arrêt du 22 mars 2018 que «…la Déclaration universelle des droits de l'homme qui est reconnue partie intégrante du Droit coutumier international […] consacre ce droit en son article 15».[10]

Ainsi, au sens de l'arrêt de la Cour, la Déclaration universelle a une valeur juridique contraignante[11] d'origine coutumière. Quoiqu'elle ne soit pas une convention aux termes de l'article 3(2) du Protocole à la Cour africaine, elle est susceptible d'être interprétée et appliquée par la Cour.

Donc, si cette affirmation de la Cour n'est pas nouvelle, elle marque cette fois-ci une réelle volonté de la Cour de renforcer la protection des droits de l'homme dans le système africain. Cependant, ce choix de la Cour de prendre comme fondement du droit à la nationalité ou tout le moins du droit de ne pas en être arbitrairement privé, l'article 15(2) de la Déclaration universelle des droits de l'homme, au lieu de l'article 5 de la Charte africaine des droits de l'homme qui différencie la position de la Cour à celle de la Commission. En effet, à l'instar de la Cour africaine, la Commission africaine constate que la Charte africaine ne consacre pas expressément un droit à la nationalité. Mais contrairement à la Cour, la Commission déduit ce droit des autres droits[12] notamment l'article 5 de la Charte africaine qui consacre un droit à la personnalité juridique. Cet article 5 dispose que «tout individu a droit au respect de la dignité inhérente à la personne humaine et à la reconnaissance de sa personnalité juridique». Et le droit à la nationalité est ici compris comme un des attributs de la personnalité juridique. La Commission africaine avait par exemple adopté cette position dans l'affaire *John K. Modise c. Botswana* dans laquelle la nationalité du requérant était contestée par le Botswana. La Commission avait noté:[13]

> … le père de John Modise était un Tswana au moment de l'indépendance, le 30 septembre 1966 et son fils, le plaignant, n'ayant eu aucune indication sur son autre nationalité, a acquis la citoyenneté du Botswana en vertu de la section 20(2) de la Constitution du Botswana alors en vigueur. Le déni de ce droit est une violation des articles 3(2) et 5 de la Charte.

Dans une autre constatation dans l'affaire *Open Society Justice Initiative c. Côte d'Ivoire*, la Commission avait réitéré cette position en soulignant que «… le droit protégé à l'article 5 de la Charte est celui de la «reconnaissance de la personnalité juridique» définie plus haut. Ceci dit, la nationalité est une composante intrinsèque de ce droit … ».[14] Elle rajoute que «…le droit à la nationalité de toute personne humaine est

10 *Anudo* (n 1) para 76.

11 P Mpunga 'L'application de la déclaration universelle des droits de l'homme par la Cour africaine des droits de l'homme et de peuples. Qui trop embrasse mal étreint' (2021) 34(1) *Revue québécoise de droit international* 129.

12 Dayoro (n 2).

13 *John K. Modise c. Botswana*, Commission africaine des droits de l'homme et des peuples, Communication 97/93 14 (2000) para 89.

14 *Open Society Justice Initiative c. Côte d'Ivoire*, Commission africaine des droits de l'homme et des peuples, Communication 318/06 (2015) para 62.

un droit fondamental dérivé aux termes des dispositions de l'article 5 de la Charte ...».[15] Cette affaire concernait notamment la question de la violation du droit à la nationalité des Dioulas de la Côte d'ivoire, victimes de la politique d'«ivoirité» mise en place successivement par les gouvernements Henri Konan Bédié, Guéi et Laurent Gbagbo.

Cette position fut encore rappelée dans d'autres constatations relatives à l'affaire *Communauté Nubienne du Kenya c. le Kenya* en février 2015. La Commission était appelée à statuer sur plusieurs questions de droit, notamment sur celle de la citoyenneté ou mieux du refus de la citoyenneté kenyane aux membres de la communauté nubienne du Kenya. Face à l'absence d'un cadre juridique spécifique sur le droit à la nationalité, la Commission africaine a déduit ce droit des dispositions de l'article 5(1) de la Charte africaine des droits de l'homme énoncée ci-dessus.

Ainsi, la Commission a par exemple noté «qu'elle partage la position défendue ci-dessus, à savoir que *la nationalité est intimement liée à la personnalité juridique d'un individu* et *que le refus d'acc*ès aux documents d'identité qui permettent à une personne de jouir des droits liés à la citoyenneté viole le droit d'un individu à la reconnaissance de sa personnalité juridique».[16]

Il ressort donc de cette position de la Commission africaine que toute violation du droit à la nationalité implique celle du droit à la personnalité juridique, car ces deux notions sont intimement liées. Cette position de la Commission africaine n'est pas prise en compte par la Cour africaine dans l'arrêt commenté. La Cour a préféré une autre approche, celle de s'appuyer sur la Déclaration universelle des droits de l'homme.

Il faudra signaler que sur cette question de nationalité, la Commission a été la première à y être confrontée avant l'avènement de la Cour au niveau africain.[17] Si pour Donald Dayoro,[18] le choix par la Cour africaine de s'appuyer sur une disposition de la Déclaration universelle des droits de l'homme résulte de la volonté de celle-ci de «(...) mettre fin aux violations autrement le requérant se retrouverait sans protection» nous estimons pour notre part, qu'il n'est pas vraiment le cas. Car, la Cour disposait bien d'une autre solution notamment l'approche souvent adoptée par la Commission dans les affaires similaires. Mais le fait pour la Cour de recourir à la Déclaration universelle s'inscrit dans sa jurisprudence qui reste réceptive à l'évocation de cette Déclaration par devers la elle. Ainsi, qu'il s'agisse de l'approche adoptée par la Commission ou bien de celle adoptée par la Cour, elles demeurent toutes deux des alternatives à un régime de protection claire et précis.

15 *Open Society Justice Initiative* para 97.

16 *Open Society Justice Initiative* para 157.

17 L Balle 'La nationalité saisie par les droits de l'homme: perspectives africaines' (2022) *Revue juridique de Faso* 5.

18 Dayoro (n 2).

Ce nouveau régime devrait se baser sur le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux aspects spécifiques du droit à la nationalité et l'éradication de l'apatridie en Afrique. L'adoption par l'Union africaine marquerait donc une réelle avancée dans la protection de ce droit sur le continent.[19] Étant donné que ce Protocole consacre plusieurs droits pertinents notamment un droit de ne pas être arbitrairement privé de sa nationalité en son article 3 et la procédure requise avant de priver quelqu'un de son droit à la nationalité à l'article 16(6) de ce Protocole.

Comparativement aux autres systèmes régionaux des droits de l'homme, l'approche adoptée par la Commission africaine, consistant à considérer le droit à la nationalité comme un droit dérivé se rapproche de celle de la Cour européenne des droits de l'homme. En effet, si pour la Commission africaine, le droit à la nationalité ou de ne pas être privé arbitrairement de sa nationalité peut être tiré du droit à la reconnaissance de sa personnalité juridique, pour la Cour européenne par contre, ce droit est tiré du droit au respect de sa vie privée. La Cour européenne en a décidé ainsi dans son arrêt du 17 octobre 2016 dans l'affaire *Ramadan c. Malte*.[20] Elle avait par exemple rappelé que «la perte d'une nationalité acquise ou de naissance peut produire un effet identique (voire un effet plus important encore) sur la vie privée et familiale de la personne concernée».[21]

La Cour rajoute qu'«une déchéance arbitraire de nationalité pourrait dans certaines circonstances poser un problème au regard de l'article 8 de la Convention du fait de son impact sur la vie privée de l'intéressé».[22] Cette affaire concernait un cas de retrait de la nationalité maltaise du requérant, au motif qu'elle aurait été obtenue par des moyens frauduleux; prétention que le requérant contestait naturellement. Celui-ci soutint qu'il avait régulièrement acquis la nationalité maltaise et que depuis lors, il avait eu trois enfants maltais. Par conséquent, ce retrait portait atteinte à ses droits fondamentaux.

Face à l'absence de la consécration d'un tel droit dans la Convention européenne des droits de l'homme, la Cour s'est appuyée sur les dispositions de l'article 8 relatif au droit au respect de la vie privée pour analyser la violation du droit à la nationalité du requérant. La Cour a très clairement rappelé cette position dans plusieurs autres de ses arrêts dont l'arrêt *Karassev c. Finlande*. Elle a noté que «bien que le droit d'acquérir une nationalité ne soit garanti, comme tel, ni par la Convention ni par ses Protocoles, la Cour n'exclut pas qu'un refus arbitraire de nationalité puisse, dans certaines conditions, poser un problème sous l'angle de l'article 8 de la Convention en raison de l'impact d'un tel refus sur la vie privée de l'intéressé».[23]

19 B Kagina 'L'interdiction de déchoir arbitrairement de sa nationalité aux fins d'être expulsé vue par la Cour africaine' (2022) *Cahiers de l'EDEM* 20.

20 CEDH, *affaire Ramadan c. Malte*, Requête 761336/12, Arrêt du 17 octobre 2016, para 85.

21 *Idem*.

22 *Idem*.

23 CEDH, *affaire Karassev c. Finlande*, Requête 31414/96, Arrêt du 12 janvier 1999.

Donc, contrairement à la Commission africaine, la Cour européenne tire ce droit des dispositions du droit au respect de la vie privée, alors que la Commission le tire du droit à la reconnaissance de la personnalité juridique. Mais toutes ces deux instances partagent en commun le fait que ce droit soit un droit dérivé.

De plus, toutes ces deux instances diffèrent de la Cour africaine des droits de l'homme et de la Cour de justice de l'Union européenne. Car pour la Cour de justice de l'Union européenne, le droit à la citoyenneté européenne a comme fondement l'article 20 du Traité sur le fonctionnement de l'Union européenne. C'est donc pour cette raison que la Cour de justice de l'Union européenne avait noté dans son arrêt du 2 mars 2010 dans l'affaire *Janko Rottmann* que «le statut de citoyen de l'Union a vocation à être le statut fondamental des ressortissants des États membre».[24]

Dans un autre arrêt, la Cour de justice de l'Union européenne avait aussi noté que «l'article 20 TFUE [s'oppose à des mesures nationales ayant pour effet de priver les citoyens de l'Union de la jouissance effective de l'essentiel des droits conférés par leur statut de citoyen de l'Union]».[25] Autrement dit, pour la Cour de justice de l'Union européenne, le droit à la citoyenneté européenne est consacré à l'article 20 du TFUE, alors que la citoyenneté nationale est consacrée par les législations nationales. Toutefois, la privation de cette nationalité doit rester conforme aux dispositions communautaires pour ne pas porter atteinte à l'essentiel des droits consacrés par l'Union européenne.

Ainsi, la position de la Cour de justice se rapproche de celle de la Cour africaine sur le point de la consécration de ce droit dans une source primaire,[26] alors qu'elle s'en distancie sur la nature de cette source.[27]

2.2 La preuve de la nationalité incombe à celui ou celle qui la conteste

La deuxième question de droit à laquelle la Cour était appelée à examiner était celle relative à la charge de la preuve de la nationalité du requérant. En effet, selon la Cour, «le [r]equérant soutient qu'il est de nationalité tanzanienne, ce que l'Etat défendeur conteste. Il s'agit dans ces conditions de savoir sur qui repose la charge de la preuve».[28] Sans tergiverser, la Cour a fait application du principe général admis en droit de la preuve, celui d'*actori incumbit probatio*; c'est-à-dire que c'est à

24 CJUE, *affaire Janko Rottmann contre Freistaat Bayern*, affaire C-135/08, 2 mars 2010, para 42.

25 CJUE, *affaire Gerardo Ruiz Zambrano contre Office national de l'emploi (ONEM),* affaire C-34/09, 8 mars 2011, para 42.

26 La Déclaration universelle des droits de l'homme pour la Cour africaine et le TFUE pour le Cour de justice de l'Union européenne.

27 Elle est coutumière devant la Cour africaine (DUDH) et conventionnelle devant la Cour de justice de l'Union européenne.

28 *Anudo* (n 1) para 80.

celui qui allègue les faits, d'en apporter les preuves. La Cour note par exemple que «dès le moment où l'Etat défendeur conteste la nationalité que le [r]equérant possédait de fait depuis sa naissance sur la base de documents légaux fournis par l'Etat défendeur lui-même, la charge de la preuve du contraire lui incombe».[29]

S'agissant des documents légaux probatoires de la nationalité tanzanienne, la Cour africaine analyse non seulement le fait que le requérant dispose d'un passeport, mais aussi le fait qu'il dispose d'un acte de naissance tanzanien régulièrement délivré par les autorités compétentes. La Cour va plus loin, en prenant également en compte le fait que le requérant a toujours vécu dans ce pays depuis plus de 33 ans; qu'il y a étudié, travaillé comme tout citoyen tanzanien durant toutes ces années.[30] Et face à la contestation éventuelle de la filiation parentale et indirectement, de l'acte de naissance du requérant, la Cour admet la possibilité de recourir au témoignage et plus globalement au test ADN.

Ainsi, ce raisonnement de la Cour se rapproche de celui que la Commission africaine adopte régulièrement dans les constatations portant sur des questions similaires. Seule l'admission de la possibilité de recourir au test ADN pour établir la paternité constitue une innovation de la Cour.

Il s'agit d'abord, des constatations du 5 mai 1999 dans l'affaire *Amnesty International c. Zambie* devant la Commission africaine. Dans cette communication, il était allégué une série de violations des droits contenus dans la Charte africaine en lien avec l'exécution d'une mesure d'expulsion du territoire zambien de deux requérants: William Steven Banda et Feu John Lyson Chinula. Ils étaient tous deux, des éminents politiques de la Zambie et opposants à l'époque des faits. Si la situation du premier requérant s'éloigne un peu de celle du requérant de l'arrêt de la Cour africaine sous commentaire, la situation du Feu John Lyson Chinula en est très proche. Car non seulement celui-ci a été expulsé «de force» de la Zambie pour le Malawi; mais aussi il n'a pas eu la possibilité d'exercer les voies de recours existantes.

De plus, sa nationalité zambienne était également contestée, alors qu'il disposait «d'une carte nationale d'identité et d'un passeport zambien. Et que pendant des années, il en a librement fait usage sans aucun problème».[31]

Ainsi dans son raisonnement, la Commission africaine a pris en compte ces différents éléments[32] pour conclure à la violation des articles 5, 7(1)(2) et 12(4) de la Charte africaine du fait que «(…) la résidence et le statut de Banda en Zambie avaient été acceptés. Il avait apporté une contribution à la politique du pays».[33]

29 *Anudo* (n 1) para 80.

30 *Anudo* (n 1) para 84.

31 *Amnesty International c. Zambie*, Commission africaine des droits de l'homme et des peuples, Communication 212/98(1999), para 39.

32 Le fait qu'il dispose notamment d'une carte nationale d'identité et d'un passeport de la Zambie**.**

33 *Amnesty International*, para 40.

Donc, dans cette affaire, le raisonnement de la Cour et de la Commission se rapproche, en ce qui concerne la prise en compte de la possession d'une carte d'identité nationale, d'un passeport ou d'un acte de naissance et d'une intégration locale «politique ou sociale» du requérant dans la décision portant sur la violation du droit à la nationalité.

De plus, loin d'être un cas isolé, la Commission africaine a de nouveau adopté la même position dans les constatations du 6 novembre 2000 dans l'affaire *John K. Modise c. Botswana*.

En effet, le requérant dans cette affaire revendiquait la citoyenneté botswanaise dans la mesure où son père détenait régulièrement cette nationalité et estimait que par filiation paternelle,[34] il serait botswanais. Cette prétention du requérant était par ailleurs contestée par l'Etat défendeur et était à la base de son expulsion à quatre reprises en direction de l'Afrique du Sud, pays dont il n'avait pas non plus de nationalité. Dans son raisonnement, la Commission africaine a conclu que «le père de John Modise était un Tswana au moment de l'indépendance, le 30 septembre 1966 et son fils, le plaignant, n'ayant eu aucune indication sur son autre nationalité, a acquis la citoyenneté du Botswana en vertu de la section 20(2) de la Constitution du Botswana alors en vigueur. Le déni de ce droit est une violation des articles 3(2) et 5 de la Charte».[35]

Ainsi, cette conclusion de la Commission, qui consiste à prendre en compte uniquement la filiation paternelle pour justifier la nationalité botswanaise de John Modise, est également reprise par la Cour africaine dans l'arrêt commenté. Dans la mesure où la nationalité tanzanienne du père du requérant dans l'arrêt *Anudo* n'était pas contestée par l'Etat défendeur. Il contestait plutôt la validité de l'acte de naissance et de passeport en rapport avec la législation tanzanienne. C'est donc pour cette raison que la Cour africaine a conclu que «(…) les preuves fournies par l'Etat défendeur pour justifier le retrait de la nationalité du [r]equérant ne sont pas convaincantes et en conclut que l'annulation de la nationalité du [r]equérant a été arbitraire».[36]

La similarité entre le raisonnement de la Commission et celui de la Cour dans l'arrêt ici commenté découle de la prise en compte de la filiation paternelle dans l'analyse de la question de nationalité. En plus, dans les deux affaires analysées ci-dessus (Affaire *Modise* et Affaire *Anudo)*, les Etats défendeurs n'avaient pas pris soin de vérifier si les requérants détenaient bel et bien d'autres nationalités sans lesquelles ils risqueraient d'être apatrides.

Il faut noter que ces solutions sont reprises dans le Projet du Protocole à 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 notamment en son article 12 relatif à la preuve de

34 Conformément à l'article 20(2) de la Constitution botswanaise en vigueur au moment des faits.

35 *John K. Modise* (n 13) para 89.

36 *Anudo* (n 1) para 88.

la nationalité. L'article 13(5) de ce Protocole dispose par exemple que «même lorsqu'un document d'identité attestant de la nationalité ne vaut pas preuve irréfutable de la nationalité, la possession d'un tel document impose à la personne qui met en doute le statut de national de l'intéressé d'administrer la preuve contraire».[37]

3 L'APPORT DE L'ARRÊT DE LA COUR SUR LE DROIT DE NE PAS ÊTRE ARBITRAIREMENT EXPULSÉ

Dans son arrêt, la Cour réaffirme le principe selon lequel nul ne peut être arbitrairement privé de sa nationalité dans le seul but d'être expulsé (3.2). Elle rappelle également que toute expulsion arbitraire, qu'elle concerne un national ou un étranger, est interdite en droit international (3.1).

3.1 De la non pertinence du statut juridique du requérant dans le pays d'accueil face à une expulsion arbitraire

La Cour rappelle les différents fondements juridiques de ce droit. Au niveau international, le droit de ne pas être arbitrairement expulsé est consacré à l'article 12(1)(2) du Pacte international relatif aux droits civils et politiques. Cet article dispose au paragraphe 1 que «quiconque se trouve légalement sur le territoire d'un Etat a le droit d'y circuler librement et d'y choisir librement sa résidence», alors que le paragraphe 2 de ce même article dispose que «toute personne est libre de quitter n'importe quel pays, y compris le sien». Et la Cour a noté que «c'est la disposition pertinente par rapport à l'affaire en l'espèce, en particulier, le droit 'de revenir dans son pays'». En l'espèce, c'est cet aspect que la Cour va examiner, fait fi du fait que «le [r]equérant a quitté le territoire de l'Etat défendeur contre sa volonté».[38]

Au niveau africain, ce droit est consacré en l'article 12(2) de la Charte africaine des droits de l'homme qui dispose que «toute personne a le droit de quitter tout pays, y compris le sien, et de revenir dans son pays». Alors qu'au niveau national, ce droit est consacré au point 17(1), partie III, Chapitre 1 de la Constitution de la République-Unie de Tanzanie. Il dispose qu'«*every citizen of the United Republic has the right to freedom of movement in the United Republic and the right to live in any part of the United Republic, to leave and enter the country, and the right not to be forced to leave or be expelled from the United Republic*».

37 Commission africaine des droits de l'homme, *Projet du Protocole à 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*, Note explicative, révisé juin 2018.

38 *Anudo* (n 1) para 96.

Pour le Comité des droits de l'homme, ce droit suppose à la fois le droit de «rester dans son propre pays», mais aussi et surtout le droit de «retourner dans son pays après l'avoir quitté ou d'y entrer pour la première fois».[39] Le Comité rappelle en outre que «le terme son propre pays doit être compris de manière large, c'est-à-dire les nationaux et les étrangers légalement établis sur le territoire d'un Etat».[40] Autrement dit, toute interdiction d'un national ou d'une personne légalement établie d'entrer ou de rentrer sur le territoire d'un Etat soit prohibée dès l'instant qu'elle est arbitraire. C'est donc ce raisonnement que la Cour africaine a adopté dans l'arrêt commenté. Dans la mesure où, pour la Cour, s'il est admis que l'expulsion ou le refus de l'Etat défendeur de permettre au requérant de rentrer dans son pays est arbitraire, alors son statut juridique en Tanzanie (national ou étranger) reste non pertinent.[41] Cette position est largement partagée dans la doctrine pertinente en la matière. Olivier Delas écrit par exemple que «la notion de propre pays prend en compte non seulement les citoyens, mais plus généralement toute personne qui est capable d'établir un attachement profond et fondé au dit pays».[42] Dans le même sens, Jean Sorel soutient par exemple que «le paragraphe 2 ne précise pas la question du lien de rattachement de l'individu à «son pays». La logique implique un lien de nationalité, mais un lieu de résidence depuis de nombreuses années peut aussi suffire».[43] Ainsi, la position de la Cour sur cette question reste classique et est calquée sur l'état actuel du droit international.

En ce qui concerne le caractère arbitraire de cette expulsion ou tout le moins du refus d'autoriser le retour du requérant dans son pays, la Cour a conclu à la violation de ce droit notamment du fait de l'absence de voies de recours contre toute mesure d'expulsion dans la législation tanzanienne. Cette absence se heurte donc au devoir de prévisibilité attendue à toute mesure privative des droits garantis.[44] Contrairement à Avlessi «(...) l'objectif poursuivi par la Cour en protégeant contre l'expulsion arbitraire [serait non seulement] de permettre au requérant d'exercer les voies de recours contre la décision de déchéance de sa nationalité»,[45] mais aussi et surtout de réaffirmer l'interdiction internationale de toute forme d'expulsions arbitraires». Par cette position, la Cour a donc réaffirmé le principe de la non pertinence du

39 Comité des droits de l'homme, *Observation générale No 27 sur la liberté de la circulation*, Genève, 2 novembre 1999, para 19.

40 Para 20.

41 *Anudo* (n 1) paras 104 et 105.

42 O Delas 'Commentaire de l'article 12 du Pacte international relatif aux droits civils et politiques' in E Decaux *Le Pacte international relatif aux droits civils et politiques. Commentaire article par article* (2011) 304.

43 J-M Sorel 'Article 12' 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* (2011) 301.

44 Voir l'article 1 du Projet de Protocole du Protocole à 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.

45 Avlessi (n 2).

statut juridique de la personne à expulser face à une expulsion arbitraire.

3.2 De l'interdiction d'expulser son propre national ou de faire de son national un étranger dans le seul but de l'expulser

La Cour africaine rappelle qu'en droit international, l'expulsion de son propre national n'est admise que dans des cas limitatifs.[46] Elle s'appuie sur l'observation générale du Comité des droits de l'homme qui note que «les cas dans lesquels la privation du droit d'une personne d'entrer dans son propre pays pourrait être raisonnable, s'ils existent, sont rares».[47] Selon Olivier Delas, «(…) les restrictions à la liberté de mouvement telles qu'elles apparaissent dans le paragraphe 3 du Pacte ne s'appliquent pas au paragraphe 4. C'est une façon de reconnaître, indirectement, l'interdiction de déportations massives de nationaux hors des frontières».[48] La Cour a donc rappelé sa conclusion selon laquelle, «le requérant détient bel et bien la nationalité tanzanienne et conclut que son expulsion ou son refus de revenir dans son pays constitue une atteinte à son droit aux termes de l'article 12 du Pacte».[49] La Cour s'est en outre inscrite dans l'esprit de l'article 12(4) du Pacte qui interdit l'expulsion de son propre national dans le but de prévenir l'apatridie d'une part[50] et d'autre part, dans le but de préserver «le lien indéfectible qui doit unir un Etat et ses ressortissants».[51] Dans le cas d'espèce, l'expulsion du requérant vers le Kenya (alors qu'il ne détenait pas la nationalité kenyane), le refus des autorités tanzaniennes d'autoriser le retour de celui-ci dans son pays afin qu'il se réunisse avec les membres de sa famille se heurtent donc à ces deux objectifs.

Ainsi, le raisonnement de la Cour reste conforme à l'état actuel du droit international en la matière, qui n'admet l'expulsion de son national que de manière exceptionnelle. Il exige également le respect de certaines conditions notamment la prévention de l'apatridie et l'interdiction de porter atteinte aux autres droits fondamentaux.[52]

Somme toute, dans l'analyse de ce droit [droit de ne pas être arbitrairement expulsé], la Cour africaine adopte une approche classique, systématiquement rappelée par la Commission africaine des droits de l'homme dans les affaires similaires. En ce sens, elle rappelle que le droit de ne pas être arbitrairement expulsé est bel et bien garanti en droit international. La protection de ce droit devrait davantage être

46 *Anudo* (n 1) para 98.
47 *Comité des droits de l'homme* (n 35) para 21.
48 Delas (n 27) 302.
49 *Anudo* (n 1) para 106.
50 Article 1 de la Convention relative au Statut des apatrides.
51 Delas (n 27) 302.
52 Commission du droit international des Nations unies, *Projet d'articles sur l'expulsion des étrangers et commentaires y relatifs 2014, 66ème session*, annuaire du droit international, 2014, vol II(2), commentaire article 8, p 14.

renforcée lorsqu'il y a lieu d'expulser un national exposé au risque d'apatridie.[53] Et lorsqu'il devrait être limité, il devrait être prévu dans une loi, proportionnelle au droit violé et nécessaire dans une société démocratique.[54]

4 CONCLUSION

L'analyse de cet arrêt a permis de relever son apport essentiel dans la construction d'une architecture africaine de protection du droit à la nationalité et du droit de ne pas être arbitrairement expulsé. Cela dit, la Cour a sans doute été limitée par l'absence d'un cadre normatif adéquat, ce qui l'a contrainte à se réfugier dans une approche plus ou moins discutable.

En tout état de cause, l'arrêt aura servi à comprendre la nécessité de finaliser l'adoption du cadre africain de protection de la nationalité à travers l'adoption du Protocole à la Charte africaine des droits de l'homme et des peuples sur le droit à la nationalité en Afrique. Tout cela dans le but de rendre effectifs les droits fondamentaux garantis et de prévenir l'apatridie. Il a en outre mis en avant la justiciabilité de ce droit à la nationalité, ainsi que des autres droits analysés devant la Cour dans l'espoir d'encourager des victimes de ces droits de saisir la Cour dans l'avenir. Cet arrêt nous a également permis de comprendre la différence d'approche dans l'analyse du droit à la nationalité entre d'une part, la Cour africaine et la Commission africaine et d'autre part, entre la Cour africaine et les instances régionales européennes. Il serait donc intéressant de continuer à suivre la position de la Cour dans ses futurs arrêts et après la finalisation de l'adoption du Protocole.

53 *Anudo* (n 1) paras 102 & 99.

54 Para 100.

The South Africa High Court *Baleni* judgment: towards an indigenous right to consent?

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ABSTRACT: In the *Baleni* judgment the High Court of South Africa declared that the Umgungundlovu community has a right to consent before the exploitation of mineral resources in their traditional lands. This decision represents one of the few cases where a domestic court refers to a right to consent of an indigenous community under both domestic and international law. The article aims to explore the compatibility of the Court's findings with the current international law standard on permanent sovereignty over natural resources and on indigenous peoples' right to free, prior and informed consent to explore whether it is possible to conceive an indigenous right to consent, as a veto power, before the exploitation of natural resources on their lands. In doing so, the case discussion focuses on the possible impact of such judgment on the jurisprudence of the African Court and Commission on Human and Peoples' Rights. Furthermore, the article outlines how the findings of the Court may contribute to strengthening the concept of an indigenous right to free, prior and informed consent.

TITRE ET RÉSUMÉ EN FRANCAIS:

L'arrêt *Baleni* de la Haute Cour d'Afrique du Sud: vers un droit des peuples autochtones au consentement?

RÉSUMÉ: Dans l'arrêt *Baleni*, la Haute cour d'Afrique du Sud a déclaré que la communauté Umgungundlovu jouit du droit de consentement préalablement à l'exploitation des ressources minérales sur ses terres traditionnelles. Cette décision représente l'un des rares cas où un tribunal national fait référence à un droit au consentement des populations autochtones en vertu du droit national et international. Ce commentaire vise à examiner l'adéquation de la décision de la Haute cour avec le principe de souveraineté permanente sur les ressources naturelles consacré en droit international et le droit des populations autochtones au consentement préalable, libre et éclairé. Ce commentaire questionne, en outre, la possible existence d'un droit de consentement des populations autochtones, comme un droit de veto, avant toute exploitation des ressources naturelles sur leurs terres. Ce faisant, ce commentaire d'arrêt se concentre sur l'impact possible d'un tel arrêt sur la jurisprudence de la Cour et de la Commission africaine des droits de l'homme et des peuples. En outre, il met en exergue la manière dont les conclusions de la Cour peuvent contribuer au renforcement du concept d'un droit autochtone au consentement libre, préalable et éclairé.

KEY WORDS: right to free, prior and informed consent, indigenous peoples, Umgungundlovu community, African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, natural resources

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CONTENT:

1 INTRODUCTION

The exploitation of natural resources in lands traditionally occupied by indigenous peoples poses several questions on the relationship between the right of states to permanent sovereignty over the natural resources and the right to free, prior and informed consent (FPIC) enjoyed by those communities under international law. This tension is particularly relevant in projects involving the exploration and exploitation of subsoil resources such as oils and minerals located within indigenous lands, which may have a significant impact on the peoples living in such areas.

In the *Baleni* judgment the High Court of South Africa, considering both domestic and international law, declared that the Umgungundlovu community has a right to consent before the exploitation of mineral resources in their traditional lands. This represents one of the few cases where an indigenous community is conceived as the holder of a right to consent, and not to consultations, under both domestic and international law. The reference of the High Court to international law implies some relevant questions, including the compatibility of the Court's findings with the current international legal content of permanent sovereignty over natural resources and with the indigenous right to FPIC. Furthermore, another significant issue is represented by the possible implications of this judgment for the African Human Rights system and for the exploitation of natural resources in the African continent.

The article is divided into five sections. While Section 2 provides a description of the main facts of the dispute, Section 3 illustrates the findings of the High Court. In Section 4, the article outlines the compatibility of the judgment with current international law on permanent sovereignty over natural resources and on FPIC, including in the African Human rights system. Finally, Section 5 outlines the possible impact of the judgment on the connotation of the right to FPIC in the African Human rights system and on the successive development of international law in this field.

2 MAIN FACTS

The judgment refers to a dispute before the High Court of South Africa between the Umgungundlovu community, headed by Duduzile Baleni

and part of the Amadiba traditional authority, and the Australian mining company Transworld Energy and Mineral Resources (TEM).[1] The applicants occupy since generations the area of Umgungundlovu, and their informal rights over such land are indisputably held under the Interim Protection of Informal Land Rights Act (IPILRA)[2] and customary law.[3] TEM applied for mining rights for titanium ores and other heavy materials in an area of 2859 hectares near a coastland area. Precisely, TEM aimed to conduct various mining activities and installation of plants on some 900 hectares within that zone, while the rest of the area would have been interested in power lines, access roads, services and accommodation of employees.[4] The proposed mining area is populated by a significant number of the applicants and their families, while others live in close proximity.[5] The area has particular spiritual significance for the community since it includes traditional family graves who have a fundamental value for their cultural rights. Furthermore, the disputed area is traditionally used, owned and occupied by the Umgungundlovu community, having thus also a peculiar importance for the life and subsistence of the community, including for food and water resources and also for potential tourist related activities.[6] In order to prevent the intrusion of strangers and protect this sacred area, decisions on land application by subjects not part of the community are traditionally adopted with a higher degree of consensus than a mere majority method.[7]

The impact of the proposed mining activities on the Umgungundlovu traditional land and of its natural resources would have included possible social, economic and environmental consequences, as well as physical displacement of the community

1 Duduzile Baleni headed also the Umgungundlovu iNkosana Council, a customary institution of the community.

2 Interim Protection of Informal Land Rights Act 31 of 1996 (the 'IPILRA'). In general, O Ülgen 'Developing the doctrine of Aboriginal title in South Africa: source and content' (2002) 46(2) *Journal of African Law* 131-154; on the *Baleni* case and on South African domestic law on land rights, also Y Meyer '*Baleni v Minister of Mineral Resources*: paving the way for formal protection of informal land rights' (2020) 23 *Potchefstroom Electronic Law Journal* 23; HJ Kloppers & GJ Pienaar 'The historical context of land reform in South Africa and early policies' (2014) 17 *Potchefstroom Electronic Law Journal* 677-706; J Dugard 'Unpacking section 25: what, if any, are the legal barriers to transformative land reform?' (2019) 9 *Constitutional Court Review* 136-160; AJ van der Walt 'Land reform in South Africa since 1990 – an overview' (1995) 10 *South African Public Law* 1-30.

3 *Baleni and Others v Minister of Mineral Resources and Others* (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP); 2019 (2) SA 453 (GP) (22 November 2018) (*Baleni* case), para 3.

4 *Baleni* (n 3) paras 4-5.

5 Already in 2008, the government granted mining rights to Mineral Resources Company, the holding company of TEM. The project was initially supported by the chief of the community, but some of its members did not support it. Since 9 June 2017 a moratorium of 18 months decided by the Minister of Mineral Resources suspended mining activities.

6 *Baleni* (n 3) paras 8-9, 11-13. In general, Bradley Frolick, 'The Granting of Mining Rights Over Cultural (Heritage) Land in South Africa and Canada – A Comparative Analysis' (3 July 2020).

7 *Baleni* (n 3) para 10.

members and the destruction of their way of life. For such reasons, the community opposed the TEM project.[8] The applicants underlined that, considering the potential consequences of the project, the support of the mining activities would require a higher degree of consensus and a prior detailed and accurate information about the possible consequences of the projects, including guarantee of sufficient compensation for any harm and loss suffered.[9] Furthermore, the applicants noted how they were not involved in the procedures which led to grant mining rights to TEM and that the Australian company did not make any proposal to mitigate the impact of the mining activities.[10] According to the applicants, IPILRA Section 2(1) required a prior free and informed consent before the community would have been deprived of its lands for mining activities.

By contrast, both TEM and government parties claimed that the Mineral and Petroleum Resources Development Act (MPRDA)[11] did not grant the applicants a right to consent but a more limited right to be consulted before the concession of mining rights by the Government to the mining company.[12] Nevertheless, the applicants affirmed that, considering both domestic and international law, a traditional community cannot be compared to common-law owners and that the vulnerability of the community and its peculiar relationship with the land implied higher degree of protection and hence their consent before the realisation of the project.[13]

3 FINDINGS OF THE COURT

In its findings the High Court of South Africa first highlighted how the interpretation of relevant domestic legislation shall consider existing international law, as prescribed by sections 39(1)(b) and 233 of the South African Constitution.[14]

According to section 3 of the MPRDA, the state is the custodian of all mineral and petroleum resources on behalf of the people of South Africa, thus having the exclusive right on the exploitation of those natural resources.[15] In doing so, the provision is consistent with the

8 *Baleni* (n 3) para 14.

9 *Baleni* (n 3) para 15.

10 *Baleni* (n 3) para 18.

11 Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

12 *Baleni* (n 3) paras 25-26.

13 As above para 27.

14 According to art 39(1)(b), domestic courts shall consider international law when interpreting the Bill of Rights. On the other hand, art233 states that South African courts must prefer 'any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

15 As part of such custodian role, according to sec 3(2)(a), the state 'grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right'.

aims of the Act stated in section 2, which explicitly include to 'recognize the internationally accepted right of the state to exercise sovereignty over all the mineral and petroleum resources within the Republic'.[16] The MPRDA, in its section 23(1) recognises to the South African Minister for Natural Resources the right to grant mineral rights in case law requirements are met, not mentioning a right to consent but the duty to consult the communities involved. In such context, the Preamble of the MPRDA states the need to promote local, rural and social development of communities interested in mining activities.[17]

By contrast, a right to consent is declared in the IPILRA, a legal instrument specifically conceived to protect insecure tenure, including certain rights to and interests in land, due to the lack of formal recognition of customary title. Article 2(1) of the IPILRA states indeed that the holders of informal rights to land, such as an indigenous community, have a right to consent before the deprivation of their land or rights in land and that this land may be deprived only in accordance with customs and usage of those communities.

First, the Court found that the Umgungundlovu community falls within the notion of 'the group of persons whose rights to land are derived from shared rules determining access to land held in common by such group' of Section 1 of the IPILRA and also within the concept of 'community' stated in Section 1 of the MPRDA.[18] Mentioning the judgment of the Constitutional Court of South Africa in *Bengwenyama Minerals*, the High Court underlined the differences between 'consent', which includes an agreement with the involved communities, and 'consultations', which refers to a process of consensus that does not necessarily involve an agreement.[19] As stated in *Bengwenyama Minerals*, while one of the purposes of consultation is to identify whether an accommodation between the applicant for prospecting rights and the landowner is possible, the MPRDA does not impose

16 The provision states also that the goals of the Act include to '(b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources; (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa'.

17 *Baleni* (n 3) para 43. This principle mirrors the findings of the South African Constitutional Court in *Maledu*: *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 2 SA (CC) (*Maledu* case), para 5; also Section 104 of the Act, which gives preference in the consideration of applications for prospecting rights to, *inter alia*, communities who wish to prospect on communal land

18 *Baleni* (n 3) para 54. In the MPRDA, communities are defined as 'a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect by mining on land occupied by such members or part of the community'.

19 *Baleni* (n 3) para 76, mentioning *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011(2) SA 113 (CC), paras 62-68.

agreement for granting the prospecting right but requires engaging consultation in good faith to attempt to reach such agreement.[20]

According to the High Court the IPILRA and MPRDA may operate together, with the IPILRA granting special protection to customary informal rights compared to the rights stated under the MPRDA for common law owners. Indeed, the protection of community land rights is also among the principles of the MPRDA and is not in contrast with the latter instrument. In this context, the IPILRA provides additional obligations upon the South African Minister to seek the consent of the involved community rather than to mere consulting it as provided by the MPRDA.[21]

The Court declared that this interpretation of a right to consent of the applicant is not only consistent with the Constitutional Court jurisprudence in *Maledu*[22] but also with international law, which would require that communities have a right 'to grant or refuse' their FPIC before mining developments that will have a significant impact on them.[23] The Court underlined also that while the right to FPIC is not stated in the African Charter, according to the jurisprudence of the African Commission and of the African Court on Human and People's Rights 'no decision may be made' about people's land' without the FPIC of the people concerned.[24]

The terminology adopted by the High Court in applying those international instruments describes the right to FPIC as a veto, even if the judgment does not explicitly define the consequences of a lack of consent, which is an essential aspect to outline the content of such right. The Court found that TEM 'it obliged to obtain the full and informed consent' of the community.[25] To conclude, the Court declared that when the land is held on a communal basis, communities shall be able to take a decision according to their customary law on whether they consent or not to a proposal to dispose of their land rights.[26]

20 *Bengwenyama Minerals* (n 19) para 65. At para 67, the Constitutional Court declares that 'The consultation process required by section 16(4)(b) of the Act thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner's land has been accepted for consideration by the Regional Manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation; and (d) submit the result of the consultation process to the Regional Manager within 30 days of receiving notification to consult'.

21 *Baleni* (n 3) para 76.

22 *Baleni* (n 3) para 77, citing *Maledu* (n 18), paras 68, 95-97, stating that the two instruments should be interpreted and read harmoniously.

23 *Baleni* (n 3) paras 79-81; also, see para 4.2.

24 *Baleni* (n 3) para 82.

25 *Baleni* (n 3) para 84(2).

26 *Baleni* (n 3) para 83.

4 CONSISTENCY WITH INTERNATIONAL LAW AND THE AFRICAN HUMAN RIGHTS SYSTEM

The findings of the South African High Court in *Baleni* raise certain questions on the compatibility of the indigenous peoples' right to FPIC before the realisation of projects on their traditional lands with states' permanent sovereignty over natural resources.

4.1 Permanent sovereignty over natural resources

South African legislation and findings of the Court with reference to the role of the state in the exploitation of natural resources are consistent with existing international law. As previously mentioned, the South African state is the custodian of the mineral resources in South Africa on behalf of its peoples and that the act respects the principle of permanent sovereignty over natural resources is clearly stated in sections 2 and 3 of the MPRDA and confirmed by the jurisprudence of the South African Constitutional Court.[27]

Indeed, and as stated by the ICJ, a state's permanent sovereignty over the natural resources within its territory represents a 'principle of customary international law'.[28] As declared by UNGA Resolution 1803 (XVII) and successive UNGA seminal resolutions, states have the exclusive right on the exploitation, management, utilisation and

27 *Bengwenyama Minerals* (n 20) paras 31, 40; Constitutional Court of South Africa, *Agri South Africa v Minister for Minerals and Energy* (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013), para 71: 'The State is the custodian of all our mineral and petroleum resources on behalf of the people of South Africa'. It is worth mentioning that the Constitutional Court of South Africa found that communal ownership encompasses the indigenous right to exploit natural resources, in the surface and in the subsoil, not challenging however the permanent sovereignty that states have over such mineral resources: *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), paras 60-64; *Baleni* (n 3) para 43 and *Maledu* (n 17) para 5, underlining the importance mining for national economy.

28 *Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda*, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005) (19 December 2005), para 244; in general, N Schrijver *Permanent sovereignty over natural resources: balancing rights and duties* (1997); S Hobe 'Evolution of the principle on permanent sovereignty over natural resources' in M Bungenberg & S Hobe (eds) *Permanent sovereignty over natural resources* (2015); M S Rajan *Sovereignty over natural resources* (1978); K Hussain & SR Chowdhury *Permanent sovereignty over natural resources in international law, principle and practice* (1984); D Cambou 'Permanent sovereignty over natural resources (PSNR)' in C Binder and others (eds) *Elgar encyclopedia of human rights* (2022); A Mensi *Indigenous peoples, natural resources and permanent sovereignty* (2022); V Barrall 'Sovereignty over natural resources: environmental challenges and sustainable development' in E Morgera & K Kulovesi (eds) *Research handbook on international law and natural resources* (2016); F Visser 'The principle of permanent sovereignty over natural resources and the nationalization of foreign interests' (1988) 21(1) *The Comparative and*

conservation of natural resources within their territory.[29] This includes resources in the subsoil, with the parallel duty to exploit those resources for the benefit of their people. The right to permanent sovereignty includes the inalienable right of the states to fully and freely regulate and supervise the activities of transnational corporations, which includes the right of states to grant concessions to those companies.[30] That states have the exclusive and ultimate authority on the exploitation of natural resources within their territory is reflected not only by international treaty law[31] and jurisprudence[32] but also in the regional legal instruments and jurisprudence in the African

International Law Journal of Southern Africa 76-91; YT Chekera & VO Nmehielle 'The international law principle of permanent sovereignty over natural resources as an instrument for development: the case of Zimbabwean diamonds' (2013) 6 *African Journal of Legal Studies* 69-101; J Balroro 'Some international legal problems arising from the definition and application of the concept of permanent sovereignty over wealth and natural resources of States' (1987) 20(3) *Comparative and International Law Journal of Southern Africa* 335-352; R Pereira 'Permanent sovereignty over natural resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law' (2013) 14 *Melbourne Journal of International Law* 451; SP Ng'ambi 'Permanent sovereignty over natural resources and the sanctity of contracts', from the angle of Lucrum Cessans' (2015) 12(2) *Loyola University Chicago International Law Review* 153-172.

29 UNGA Res 3201 (S-VI) containing the 'Declaration on the Establishment of a New International Economic Order' (NIEO Declaration) (1 May 1974), art 4(e); UNGA Res 3281 (XXIX) containing the 'Charter of Economic Rights and Duties of States' (12 December 1974), arts 2(1); UNGA Res 36/103 'Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States' (9 December 1981), Preamble and Annex, art 1(b); UNGA Res 2542 (XXIV) 'Declaration on Social Progress and Development' (11 December 1969), art 3(d). It is relevant to note that according to South African Constitution Article 232, customary international law is law within the state unless it is inconsistent with the South African Constitution or acts of the Parliament.

30 As above.

31 Energy Charter Treaty (ECT) 2080 UNTS 100 (17 December 1994) (entered into force 16 April 1998), arts 1(10)(a)-(b), 18; United Nations Convention on the Law of the Sea 1833 UNTS 3 (Montego Bay, 10 December 1982) (entered into force 16 November 1994), art 193; United Nations Framework Convention on Climate Change (UNFCCC) 1771 UNTS 107, (opened for signature 9 May 1992) (entered into force 21 March 1994), Preamble; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1954 UNTS 3 (14 October 1994) (entered into force 26 December 1996), Preamble; Cf GATT article XX(g) which allows parties to adopt or enforce measures related to the conservation of exhaustible natural resources: General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 UNTS 187, 33 ILM 1153 (1994) ('GATT Agreement' or 'GATT 1994'), art XX(g); Agreement Establishing the International Bauxite Association 1021 UNTS 176 (8 March 1974) (entered into force 29 July 1975), Preamble; Agreement Establishing the Association of Iron Ore Exporting Countries 987 UNTS 356 (3 April 1975) (entered into force 12 October 1975).

32 Panel Reports, *China – measures related to the exportation of various raw materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R (adopted 5 July 2011), paras 7.380 and 7.387 panel reports, *China – measures related to the exportation of rare Earths, Tungsten and Molybdenum*, WT/DS431/R, WT/DS432/R, WT/DS433/R (adopted 26 March 2014), para 7.270; *Libyan Am. Oil Co. (LIAMCO) v Gov't of Libya Arab Republic* 20 ILM 1 (1981), 53, 29-30, para 206; also, *Ad-Hoc-Award, Kuwait v The American Independent Oil Company (AMINOIL), 21 ILM 976* (1982) *(Kuwait v Aminoil)* para 143.

continent. Precisely, the permanent sovereignty of states over their natural resources has been declared by the African Commission in *FLEC v Angola*, which found that according to article 21 of the Banjul Charter, states have the right to supervise the disposal of natural resources in the general interest of the state and its communities,[33] and is affirmed also in regional treaty law.[34]

Therefore, the MPRDA is consistent with customary international law, conferring the authority to the South African Minister for Natural Resources to grant mineral rights, with a parallel duty to consult the communities involved and to guarantee a 21-day prior notice before the start of the activities, as provided by section 5(A)(c) of the MPRDA. On the other hand, the IPILRA refers to a right to consent of communities' holders of informal rights to land before the deprivation of their rights. The IPILRA, which like any South African law shall be interpreted considering international law, does not say anything on the authority of the state to grant concessions for the exploitation of those resources, which is declared by section 3 of MPRDA and part of customary international law. By contrast, the instrument provides a stronger legal framework for the protection of communities' traditional rights, which is coherent with the MPRDA principles on the need to protect those communities.

However, since the High Court interpreted those provisions as conferring a right to consent, in the sense of a veto power, it is necessary to consider this judgment also in the light of existing international law on FPIC mentioned by the Court to fully analyse the content of such right.

4.2 Right to FPIC in international law

While the Court declared that the community has a right to consent under domestic law, as interpreted in accordance with international law, some open questions remain on the current content of FPIC and on the possible implications of such findings for international and African human rights law.[35]

33 *FLEC v Angola* (Communication No 328/06) [2013] ACHPR 10 (5 November 2013), paras 128-132.

34 OAU, Revised African Convention on the Conservation of Nature and Natural Resources (the 'Maputo Convention') (7 March 2017) (entered into force 10 July 2016), Preamble. Cf OAU, African Convention on the Conservation of Nature and Natural Resources (the 'Algiers Convention') (15 September 1968) (entered into force 16 June 1969), Article XVI(1)(b). Also, Southern African Development Community (SADC) Protocol on Forestry (3 October 2002) (entered into force 16 April 2010), art 4(2).

35 In general, M Satterthwaite & D Hurwitz 'The right of indigenous peoples to meaningful consent in extractive industry projects' (2005) 22 *Arizona Journal of International and Comparative Law*; T Ward 'The right to free, prior, and informed consent: indigenous peoples' participation rights within international law' (2011) 10 *Northwestern Journal International Human Rights* 54;

As anticipated in the previous paragraphs, while the MPRDA provides a duty to consult common law owners, the IPILRA states the right to consent of the community concerned.[36] In interpreting those instruments, the High Court mentions the UN Committee on the Elimination of Racial Discrimination (CERD) General Recommendation No 23,[37] UN Committee on Economic, Social and Cultural Rights (CESCR) General Comment No 21[38] and the UN Human Rights Committee (HRC) views in *Poma Poma v Peru*[39] to state that international law would accord a right to consent to those communities.

On the one hand, the Court is correct in mentioning how General Recommendation No 23 referred to a general duty to obtain the informed consent of indigenous peoples before any decision relating to their rights and interests;[40] the same approach is confirmed in the monitoring activity, where the Committee affirms that mere consultations are not consistent with General Recommendation No 23, declaring that states shall 'obtain' the FPIC people concerned.[41] However, on other occasions the CERD Committee does not refer to a

EM McCulloch 'Free, prior, and informed consent: a struggling international principle' (2021) 44 *Public Land & Resources Law Review*; M Storey 'States' rights to development of natural resources versus indigenous people's rights: resource corporations and free, prior and informed consent' in J Gomez & R Ramcharan (eds) *Business and human rights in Asia* (2021); L Cotula 'Reconsidering sovereignty, ownership and consent in natural resource contracts: from concepts to practice' in M Bungenberg and others (eds) *European Yearbook of International Economic Law* (2018); J Razzaque 'A stock-taking of FPIC standards in international environmental law' in S Turner and others (eds) *Environmental rights: the development of standards* (2019).

36 *Baleni* (n 3) para 3.

37 As above para 79, citing CERD, General Recommendation 23 Indigenous Peoples UN Doc CERD/C/51/misc13/Rev4 (18 August 1997), paras 3-5.

38 *Baleni* (n 3) para 80, citing CESCR, General Comment No 21: Right of everyone to take part in cultural life article 15(1) (a) UN Doc E/C.12/GC/21 (21 December 2009), para 36.

39 As above, para 81, citing *Angela Poma Poma v Peru,* Comm No 1475/2006 (27 March 2009), HRC Communication No 1457/2006, para 7.6.

40 CERD, General Comment 23 (n 37) para 4(d).

41 CERD, Concluding Observations: Ecuador UN Doc CERD/C/62/CO/2 (21 March 2003), para 16, with reference to the exploitation of subsoil resources of indigenous traditional lands; Australia UN Doc CERD/C/AUS/CO/14 (14 April 2005), paras 11, 16; Guatemala UN Doc CERD/C/GTM/CO/11 (15 May 2006), para 19; India UN Doc CERD/GTM/CO/19 (5 May 2007), para 19; cf early warning and urgent action procedure, Decision 1(67) Suriname UN Doc CERD/C/DEC/SUR/4 (1 November 2005), para 4, urging state parties to 'strive to reach agreements with the peoples concerned, as far as possible, before awarding any concessions'; also, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65 (Fifty ninth session) UN Doc E/CN.4/2003/90 (21 January 2003), para 66.

right to consent but to meaningful consultations.[42] Therefore, the CERD Committee findings, which are not binding under international law, but which shall be considered for the interpretation of the International Convention on Elimination of Racial Discrimination (ICERD), in certain occasions seems to posit a right to consent to the peoples involved but this conceptualisation is not constant.

By contrast, that those communities have a right to consent as a veto power is less evident in the other instruments cited by the Court. As a matter of fact, the findings of the CESCR Committee in General Comment 21 cited by the Court refer to communal lands, territories and resources inhabited or used without their free and informed consent, thus referring to previous deprivation of lands rather than explicitly stating a right of consent of indigenous peoples before the realisation of future projects. Furthermore, the General Comment refers to the principle that states 'should' obtain indigenous FPIC, which is a weak terminology to conceive an obligation to obtain such consent.[43]

Even in *Poma Poma v Peru* the reference to FPIC shall be read in accordance with the statement that 'the participation in the decision-making process shall be effective' and not limited to mere consultations.[44] In doing so, the HRC refers to consultations that shall not be 'mere' but effective to seek the community FPIC.[45] This conceptualisation of the right to FPIC as meaningful consultation and participation has been confirmed also in other occasions by the HRC.[46]

Therefore, while it is true that mere consultations do not correspond to the current international legal standard on indigenous rights, it seems the right to FPIC, as stated in the instruments and cited by the High Court, requires meaningful consultations. Considering the above mentioned statements of the UN Committees, meaningful consultations, in this case, should be conducted with the aim to reach a consensual agreement of the concerned communities, rather than implying a veto power that would challenge the ultimate authority that

42 Eg CERD, Ågren et al v Sweden, CERD Communication 54/2013 (18 December 2020), paras 6.5-6.7; also, CERD, Concluding Observations: Suriname UN Doc CERD/SUR/CO12 (13 March 2009), para 14; Ecuador UN Doc CERD/C/ECU/CO/20-22 (24 October 2012), para 17; New Zealand UN Doc CERD/C/NZL/CO/18-19 (17 April 2013), para 18; Bolivia UN Doc CERD/C/BOL/CO/17-20 (8 April 2011), para 20; Chile UN Doc CERD/C/CHL/CO/15-18 (7 September 2009), paras 21-23; Cameroon UN Doc CERD/C/CMR/CO/15-18 (30 March 2010), para 18.

43 CESCR, General Comment 21 (n 38) paras 37, 55(e); also, A Barratt & A Afadameh-Adeyemi 'Indigenous peoples and the right to culture: the potential significance for African indigenous communities of the committee on economic, social and cultural rights' General Comment 21' (2011) 11(2) *African Human Rights Law Journal* 560-587.

44 *Poma Poma v Peru* (n 39) para 7.6.

45 As above.

46 Eg General Comment 23: Article 27 (Rights of Minorities) UN Doc CCPR/C/21/Rev1/Add5 (8 April 1994), para 3.2; *Ilmari Länsman et al v Finland*, HRC Communication 511/1992, paras 9.5-9.6.

states have as part of their permanent sovereignty over natural resources.[47]

Such interpretation of the right to FPIC under international law is in line also with other international instruments not mentioned by the Court. First, the Court does not refer to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) which is not legally binding but which represents the most recent international legal instrument on indigenous rights. Article 32(2) of the Declaration affirms that states shall 'consult' and cooperate in good faith with the indigenous peoples through their own representative institutions 'in order to obtain' indigenous free and informed consent prior to the approval of projects affecting their lands, territories and resources, including mineral resources. This right shall be considered in accordance with UNDRIP article 3, which echoing articles 1(1) of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), states that indigenous peoples have a right to internal self-determination, as a form to autonomy to be exercised within the context of existing states, and that they freely determine their political status and freely pursue their own economic, social and cultural development.[48]

47 Also, ILO, Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) (2001), paras 89-90.

48 In general, M Lâm *At the edge of the state: indigenous peoples and self determination* (2021); C Doyle & J Gilbert 'Indigenous peoples and globalization: from "development aggression" to "self-determined development"' in European Academy Bozen/Bolzano (eds) *European Yearbook of Minority Issues* (2011) 219-262, at 245-256; F Lenzerini 'Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples' (2019) 23(1-2) *The International Journal of Human Rights* 51-62; C Charters 'Indigenous peoples' rights to lands, territories, and resources in the UNDRIP: articles 10, 25, 26, and 27' in J Hohmann & M Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples. a commentary* (2018); F Lenzerini 'Declaration on the rghts of indigenous peoples (UNDRIP)' in C Binder and others (eds) *Elgar encyclopedia of human rights* (2022); M Scheinin & M Åhrén 'The UNDRIP's relationship to existing international law' in J Hohmann & M Weller (eds) *The UN Declaration on the Rights of Indigenous Peoples: a commentary* (2018); S Wiessner 'Indigenous self-determination, culture, and land' in E Pulitano (ed) *Indigenous rights in the age of the UN Declaration* (2012); article 1(2) of the Covenants declares a people's right, including indigenous peoples, to dispose of its natural wealth and resources as part of their right to self-determination; also, J Gilbert 'The right to freely dispose of natural resources: utopia or forgotten right' (2013) 31(3) *Netherlands Quarterly of Human Rights* 314-341; B Kingsbury 'Competing structures of indigenous peoples' claims' in P Alston (ed) *Peoples' rights* (2001) 96-97; M Scheinin 'Indigenous peoples' rights under the international covenant on civil and political rights' in J Castellino & N Walsch (eds) *International law and indigenous peoples* (2004) 3-11.

The text of article 32 is different from original draft article 30, which mentioned the right of indigenous peoples that states shall 'obtain' their FPIC,[49] but also from articles 10, 29(2) and 30(1) of the Declaration, which respectively provide a right to consent in case of relocation of indigenous peoples, of storage or disposal of hazardous materials and of military activities. Therefore, the text of the UNDRIP suggests that today under international law states have a duty to consult indigenous peoples 'in order to obtain' their FPIC, in the sense that consultation shall be meaningful and with the objective to reach an agreement with the communities concerned.[50]

In international treaty law, according to article 15(2) of the 1989 ILO Convention No 169, and acknowledging that South Africa is not Party of the Convention which may however be regarded as an evidence of current international law in this field, states have the duty to consult indigenous peoples before granting exploration or exploitation of natural resources owned by the state, including the ones in the subsoil, but pertaining to indigenous lands.[51]

In international jurisprudence, in a case concerning the territory of Western Sahara, the Court of Justice of the European Union (CJEU) outlined how the FPIC of indigenous peoples is different from the right to consent enjoyed by other non-independent peoples.[52] This

49 UN Doc E/CN.4/Sub.2/1994/2/Add.1 (1994). F Gómez Isa 'The UNDRIP: an increasingly robust legal parameter' (2019) 23(1-2) *The International Journal of Human Rights* 7-21.

50 That indigenous peoples do not have a right to consent is confirmed also by recent regional legal instruments, such as the American Declaration on Indigenous Rights (ADRIP) art XXIX and art 36 of the proposed Nordic Saami Convention. In general, R Healey 'From individual to collective consent: the case of indigenous peoples and UNDRIP' (2019) 27(2) *International Journal on Minority and Group Rights* 251-269; M Barelli 'Free, prior, and informed consent in the UNDRIP: articles 10, 19, 29(2), and 32(2)' in J Hohmann & M Weller (ed) *The UN Declaration on the Rights of Indigenous Peoples. a commentary* (2018).

51 The ILO CEACR Committee highlighted the importance to ensure the consultations in good faith of indigenous and tribal peoples before any mining, oil, or gas exploitation occur in their traditional lands: Observation (CEACR) adopted 2019, published 109th ILC session (2021) Indigenous and Tribal Peoples Convention, 1989 (No 169) Bolivia (Plurinational State of) (Ratification: 1991); also, Report of the Committee set up to examine the representation alleging non-observance by Brazil of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Union of Engineers of the Federal District (SENGE/DF) (2009), paras 44, 49; Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT) (2001), paras 89-90. Also, C Courtis 'Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples' (2011) 18(4) I*nternational Journal on Minority and Group Rights* 433-460. It is worth mentioning that the Constitutional Court of South Africa found that communal ownership encompasses the indigenous right to exploit natural resources, in the surface and in the subsoil, not challenging however the permanent sovereignty that states have over such mineral resources: *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003), paras 60-64.

52 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de Oro (Front Polisario) v Council of the European Union* (General Court, 29 September 2021) (Case T-279/19), paras 368-370, 391.

interpretation of the right to FPIC under present international law has been confirmed, for example, also in international investment arbitration. As stated in the ICSID arbitration *Bear Creek Mining Corporation v Peru,* current relevant international legal instruments are coherent in affirming that consultations have to be made with the goal to obtain the community consent.[53] The right to consultation in order to obtain the indigenous FPIC, has been applied with respect to development projects on natural resources by different regional judiciary bodies and domestic jurisprudence.[54]

4.3 A right to consent as a peoples' right

Under international law only certain categories of non-independent peoples are the bearers of a collective right to permanent sovereignty over the natural resources of their territories and to consent before the exploitation of such resources. Those peoples are today represented by peoples of non-self-governing territories[55] and peoples under subjugation, domination and exploitation such as the Palestinian

53 ICSID Arbitration *Bear Creek Mining Corporation v Republic of Perú Bear Creek Mining Corporation v Republic of Peru*, ICSID Case No ARB/14/2 (30 November 2017), para 406.

54 Eg *Saramaka People v Suriname,* Interpretation of the judgment on preliminary objections, merits, reparations and costs, IACHR Series C No 185, IHRL 3058, [2008] IACHR (12 August 2008), para 129-137, mentioning how the level of consultation depends on the nature of the right at issues and that the duty to consult indigenous peoples requires their FPIC in case of large-scale projects; *Sawhoyamaxa Indigenous Cmty v Paraguay,* Merits, Reparations, and Costs, Judgment, Inter-Am Ct HR (Ser C) Mo 146 (29 March 2006), para 223; *Maya Indigenous Communities of the Toledo District v Belize,* Case 12.053, Inter-American Commission on Human Rights, Report No 40/04 (Merits Decision of 12 October 2004), paras 153-154. Also, B Frolick *The granting of mining rights over cultural (heritage) land in South Africa and Canada – a comparative analysis* (2020); EC Olivares Alanís 'Indigenous peoples' rights and the extractive industry: jurisprudence from the Inter-American system of human rights' (2013) 5 *Goettingen Journal of International Law* 187. Among domestic jurisprudence, the Supreme Court of Canada in *Haida Nation* and *Taku River* declared the duty of states to 'consult and accommodate' aboriginal peoples before exploiting resources in their traditional lands: *Haida Nation v British Columbia (Minister of Forests)* 2004 SCC 73 (18 November 2004), paras 35, 76; also, *Taku River Tlingit First Nation v British Columbia* (Project Assessment Director) 2004 SCC 74 (18 November 2004), para 42; *Delgamuukw v British Columbia* 3 SRC 1010 (1997), para 168; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] SCC 69, [2005] 3 SCR 388, para 34; Constitutional Court of Colombia, *Judgment C 169/01 of 14 February 2001*, para 2.3.

55 *Front populaire pour la libération de la Saguia el-Hamra et du Rio de Oro (Front Polisario) v Council of the European Union* (n 53), paras 368-370, 391; UNGA Res 3201 (S-VI) (n 1), art 4 (f), (h); UNGA Res 33/40 'Activities of foreign economic and other interests which are impeding the implementation of the declaration on the granting of independence to colonial countries and peoples in Southern Rhodesia and Namibia and in all other territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa' (13 December 1978), para 20; UNGA Res 71/103 'Economic and other activities which affect the interests of the peoples of the non-Self-governing territories' (23 December 2016), paras 8-9; Decree No 1 for

people.[56] Such categories of peoples have, as part of their right to external self-determination, a right to statehood and to a territory, which has a status separate from the one of the administering power.[57] This right is not enjoyed by indigenous peoples as part of their right to internal self-determination. Indeed, in international law only peoples of non-self-governing territories and peoples under subjugation, domination and exploitation have a right to consent before the exploitation of the natural resources within their territories, including the right that the exploitation of those resources is conducted exclusively for their own benefit.

Therefore, while a domestic law may provide a right to consent to indigenous people, the same assumption cannot be made with reference to present international law. International law does not refer

the Protection of the Natural Resources of Namibia, enacted by the Council on 27 September 1974 and approved by the UNGA in its resolution 3295 (XXIX) of 13 December 1974, Preamble; UNGA Res 33/182-A 'Situation in Namibia resulting from the illegal occupation of the territory by South Africa' (21 December 1978), Preamble, para 7; UNGA Res 33/182-C 'Programme of work of the United Nations Council for Namibia' (21 December 1978), Preamble, para 5; UNGA Res 44/84 'Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Namibia and in all other Territories under colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa' (11 December 1989), Preamble, para 1; UNGA Res 2226 (XXI) 'Question of the trust territory of Nauru' (20 December 1966), Preamble, para 3; UNGA Res 33/34 'Question of the United States Virgin Islands' (13 December 1978), para 6; UNGA Res 33/32 'Question of American Samoa' (13 December 1978), para 9; UNGA Res 33/33 'Question of Guam' (13 December 1978), para 8; UNGA Res 33/30 'Question of the New Hebrides' (13 December 1978), para 8.

56 UNGA Res 3005 (XXVII) 'Report of the Special Committee to investigate Israeli practices affecting the human rights of the population of the occupied territories' (15 December 1972), para 4; UNGA Res 3175 (XXVIII) 'Permanent sovereignty over natural resources in the occupied Arab territories' (17 December 1973); UNGA Res 3336 (XXIX) 'Permanent sovereignty over national resources in the occupied Arab territories' (17 December 1974), para 1; UNGA Res 31/186 'Permanent sovereignty over national resources in the occupied Arab territories' (21 December 1976), para 1; UNGA Res 32/161 (19 December 1977), para 3; UNGA Res 75/236 'Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources' (21 December 2020), paras 1ff. In general, P Alston 'Peoples' rights: their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 286; N Schrijver *Permanent sovereignty over natural resources in territories under occupation or foreign administration' in sovereignty over natural resources: balancing rights and duties* (1997) 143-168.

57 UNGA Res 2625 (XXV) 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of United Nations' (24 October 1970); also, UNGA Res 1514 (XV) 'Declaration on the Granting of Independence of Colonial Countries and Peoples' (14 December 1960); ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory opinion, [2010] ICJ Rep, para 82; also, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution* 276 (1970), Advisory Opinion [1971] ICJ Rep 31, paras 52-53; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory opinion [2004] ICJ Rep 136, para 58; CERD, General Recommendation 21: Right to Self–Determination UN Doc CERD/48/Misc.7/ Rev.3 (8 March 1996), para 4.

to a mere duty of consultation of indigenous peoples and requires a higher standard to ensure that those consultations are meaningful and done with the aim to obtain the consent of the people concerned. These consultations shall be effective, especially when projects may particularly affect the rights of the peoples involved. However, this does not correspond to a duty to obtain such consent and, therefore, does not entail a veto power of such populations.

4.4 The right to FPIC in the African human rights system

The High Court found that according to the jurisprudence of the African Court and Commission on Human and Peoples' Rights, no decisions may be made on people's land without their FPIC.[58] In doing so, the South African Court mentions the *Ogiek*[59] and *Endorois*[60] cases. While it is beyond any doubt that the right to FPIC has been declared in both judgments, it is less evident that such jurisprudence conceived such right as a veto power.

58 *Baleni* (n 3) para 83. In general, J Gilbert 'Indigenous peoples's human rights in Africa: the pragmatic revolution of the African Commission on Human and Peoples' Rights' (2011) 60(1) *International and Comparative Law Quarterly* 245-270; J Murphy 'Extending indigenous rights by way of the African Charter' (2012) 24 *Pace International Law Review* 158-189; F Viljoen 'Understanding and overcoming challenges in accessing the African Court on Human and Peoples' Rights' (2018) 67(1) *International & Comparative Law Quarterly* 63-98; WA Mutua 'The Banjul Charter and the African cultural fingerprint: an evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339; SA Yeshanew 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights: progress and perspectives' (2011) 11(2) *African Human Rights Law Journal* 317-340; JC Nwobike 'The African Commission on Human and Peoples' Rights and the demystification of second and third generation rights under the African Charter: *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*' (2005) 1(2) *African Journal of Legal Studie*s 129-146; J Swanson 'The emergence of new rights in the African Charter' (1991) 12 *New York Law School Journal of International and Comparative Law* 307; SA Dersso 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to Peoples' Rights' (2006) 6(2) *African Human Rights Law Journal* 333-357; KN Bojosi & GM Wachira 'Protecting indigenous peoples in Africa: an analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6(2) *African Human Rights Law Journal* 382-406; GM Wachira & T Karjala 'The struggle for protection of indigenous peoples' rights in Africa' in C Lennox & D Short (eds) *Handbook of indigenous peoples' rights* (Routledge 2015); F Viljoen 'Reflections on the legal protection of indigenous peoples' rights in Africa' in S Dersso (ed) *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010); J Gilbert & V Couillard 'International law and land rights in Africa: the shift from states' territorial possessions to indigenous peoples' ownership rights' in R Home (ed) *Essays in African land law* (2011); F Viljoen *International human rights law in Africa* (2012); CC Ngang & SD Kamga *Natural resource sovereignty and the right to development in Africa* (2021); VR Nalule *Mining and the law in Africa: exploring the social and environmental impacts* (2020).

59 *ACHPR v Kenya*, Application 6/2012 (2017) (*Ogiek* case).

60 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*, ACHPR Communication No 276/2003 [2009] AHRLR 75 (*Endorois* case).

In *Ogiek*, the African Court declared that article 22 of the Charter must be read in accordance with UNDRIP article 23.[61] The Court then stated that the eviction of the Ogiek peoples from their lands without effective consultations was not consistent with article 22 of the African Charter since it did not consider the impact on the Ogiek economic, social and cultural development and violated article 22 of the African Charter.[62] In such cases, the African Court referred to 'effective consultations' rather than to a right to consent, thus mirroring the above-mentioned international law on indigenous FPIC. Furthermore, the Court applied article 22 of the African Charter in light of UNDRIP article 23, a provision which refers to the right of indigenous peoples to be 'actively involved' to determine and develop priorities and strategies necessary for their right to development, including in economic and social programmes affecting them, noting that *Ogiek* people have not been 'consulted'. Therefore, the Court did not refer to a right to consent for the people involved but to a right to effective consultations and participation.

A stronger connotation of the right to FPIC is, however, declared in *Endorois*, where the Commission found that in certain circumstances states have the duty to consult effectively the communities involved to obtain their FPIC in case of projects that may have a major impact on their territories.[63] However, in the same judgment the African Commission refers to the failure to respect the obligation to 'seek consent' and not to obtain such consent'.[64] Even in the *Ogoni* case, the Commission did not refer to a right to consultation but to participation and prior environmental and social impact assessments before major industrial developments.[65]

61 *Ogiek* (n 60) para 209; C Focarelli 'Indigenous peoples' rights in international law: the *Ogiek* Decision by the African Court of Human and Peoples' Rights' in AD Blase & V Vadi (eds) *The inherent rights of indigenous peoples in international law* (2020); OD Akinkugbe & A Majekolagbe 'The African Court of Human and Peoples' Rights decision in the *Ogiek* case: an appraisal' (27 December 2018) in M Amissi Manirabona & YV Cardenas (eds) *Extractive industries and human rights in an era of global justice: new ways of resolving and preventing conflicts* (2019).

62 As above, paras 210-211.

63 *Endorois* (n 60), para 291, 290-297. Also, S Korir, A Oei & J Shepherd 'In land we trust: the Endorois' communication and the quest for indigenous peoples' rights in Africa' (2010) 57 16 *Buffalo Human Rights Law Review*; G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2012) 111(442) *African Affairs* 24-45; W Wicomb & H Smith 'Customary communities as "peoples" and their customary tenure as "culture": what we can do with the Endorois decision' (2011) 11(2) *African Human Rights Law Journal* 422-446; E Ashamu 'Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya: a landmark decision from the African Commission' (2011) 55(2) *Journal of African Law* 300-313.

64 *Endorois* (n 60), para 226.

65 *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, Comm No 155/96 Case No ACHPR/COMM/A044/1, ('*Ogoni*' case), para 53: 'ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking

Those findings shall be considered in light of the findings in the above-mentioned case *Flec v Angola*. In that case, the Commission did not only find that states have the permanent sovereignty over natural resources to be exercised in the interest of their peoples.[66] Indeed, the Commission also declared the duty of the state to involve representatives in decisions concerning the management of national wealth and resources.[67] Therefore, the jurisprudence of the African Court and Commission outlines a framework where states have the exclusive authority to determine the exploitation of their natural resources within their territory, that shall be done for the interest and benefit of their peoples. Furthermore, participation and consultation rather than a right to consent seem consolidated principles in the African human rights jurisprudence.

In such a context, the state's ultimate authority over the exploitation of natural resources has never been challenged in the African human rights system, conceiving a duty to consult indigenous peoples which requires to seek their FPIC and also environmental and social impact assessments before major projects that may have important consequences on indigenous physical and cultural survival.

5 POSSIBLE IMPACT ON THE RIGHT TO FPIC IN THE AFRICAN HUMAN RIGHTS SYSTEM

The *Baleni* judgment is particularly relevant for the rights of indigenous peoples and communities with respect to natural resources in the African region.

On the one hand, the High Court of South Africa declares a right to consent of indigenous communities before the realisation of projects on their traditional lands. Therefore, according to the Court TEM would have the duty 'to obtain the full and informed consent' of the community before the realisation of the mining project, thus limiting the right of the states to freely grant concessions for the exploitation of natural resources within its territory. This right to consent affirmed by the Court, and which is formally affirmed also by the IPILRA but not in other South African domestic law, does not correspond to the current content of the right to FPIC under international law and also by the current approach of the African Court and Commission on Human Rights, which never challenged the principle of permanent sovereignty over natural resources stating a right to consent of those communities.

appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'; also, F Coomans 'The *Ogoni* case before the African Commission on Human and Peoples' Rights' (2003) 52(3) *The International and Comparative Law Quarterly* 749–760.

66 *FLEC v Angola* (n 33) paras 128-132.

67 As above para 131.

The right to FPIC in the African human rights jurisprudence is conceived, like in international law, as a right to meaningful and effective consultations before, and participation in, decisions regarding the exploitation of natural resources within indigenous lands which requires to seek a FPIC and prior environmental and social impact assessments in case of major projects. In such a sense, states shall seek the consent of the communities involved, especially when the impact of those projects may particularly affect the rights of such communities and their cultural and physical existence.

This conceptualisation does not correspond to a right to consent in the sense of a veto, which is established under current international law only as a right of peoples of non-self-governing territories and peoples under alien subjugation, domination and exploitation. Indeed, conceiving the right to FPIC as a right to consent would have relevant economic consequences for the exploitation of natural resources in Africa. As a matter of fact, the permanent sovereignty of African states over their natural resources would be limited in the sense that before granting any concessions states, and foreign investors, would be obliged not to seek but obtain the consent of indigenous communities and would not be able to exploit freely and fully their resources on their territory.

Nevertheless, the *Baleni* judgment may have possible important consequences for the evolution of international law in this field and for the African human rights system. Indeed, from the point of view of international law the judgment may represent evidence of states practice and *opinio juris* towards continuing and progressive strengthening the indigenous right to FPIC that cannot be ignored by the African Court and Commission. While the findings of the High Court do not reflect the current content of this right under international law, *Baleni* confirmed the assumption that the large exploitation of natural resources in indigenous and traditional lands shall respect higher standards compared to the ones accorded to common law owners under domestic law, considering the importance that lands and natural resources have for those communities.

Indeed, despite the judgment postulating a community's right to consent which is not part of international law, it is not irreconcilable with current international law on indigenous rights. It seems evident that while the judgment affirms a right to consent whose existence under international law has little evidence, it does not expressly challenge the principle of permanent sovereignty stating the necessity to interpret the IPILRA in accordance with the MPRDA and international law. As mentioned before, important evidence of this is that the High Court while interpreting the ILPRIA refers to additional obligations upon the South African Minister to 'seek the consent' of the involved community rather than to mere consulting it.[68] Furthermore, the Court does not outline what may happen in case this consent is not provided by the concerned community.

68 *Baleni* (n 3) para 76.

Therefore, considering both the judgment and the principle of permanent sovereignty, a possible interpretation of the judgment that would be consistent with international law would, on the one hand, maintain vested in the state the ultimate authority on the exploitation of natural resources in their territories. On the other hand, in respect of large projects it would grant to indigenous peoples a right to manifest their FPIC, based also on environmental and social impact assessments and according to their customs and traditional institutions. States would be obliged to effectively seek, in good faith, such consent and reconsider its decision in case the consent is not provided.

Furthermore, it would seem arguable that the lack of consent would require states to effectively address the observations, interests and expectations expressed by the community concerned, and to motivate effectively any decision on the continuation of the project. This would represent an evident higher degree compared to the right to consultation of common law owners and would also strengthen the current content of FPIC under international law, respecting at the same time states permanent sovereignty.

Furthermore, this strengthening of the right to FPIC would be compatible with the jurisprudence of the African Court and Commission, including the findings in *Ogoni*, which in its judgments paid particular attention to social, environmental and economic consequences of major projects on indigenous lands.

6 CONCLUSION

The *Baleni* judgment involves important aspects of the rights that states and indigenous peoples and communities have with respect to natural resources. While the permanent sovereignty of states is still one of the most important principles of international law, the continued recognition of rights to indigenous peoples with respect to natural resources may potentially challenge the exclusive authority that states enjoy today over natural resources. Indeed, as stated in *Baleni* the protection granted by international law to indigenous rights with respect to natural resources is significant compared to the level of protection of common law owners.

Today there is almost no evidence on the possibility to reconcile a right to consent, in the sense of a veto power, of indigenous peoples and communities with states permanent sovereignty over natural resources in their territories. However, the findings of the High Court, if interpreted in accordance with current international law, may contribute to the strengthening of the indigenous right to FPIC. Broadly, international law requires states to conduct meaningful and effective consultations with indigenous communities, especially in case of large projects that may have a greater impact on those communities. This obligation includes a duty to seek the indigenous FPIC that should be based also on the social and environmental impact of the project.