African Human Rights Yearbook
Volume 1 (2017)

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 1 of the *Yearbook*, published in 2017, contains fifteen contributions by scholars from Africa and beyond.

Annuaire Africain des Droits de l'Homme
Volume 1 (2017)

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 d'experts africains 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 1 de *l'Annuaire*, publié en 2017, contient quinze contributions de chercheurs du continent et d'ailleurs.

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Annuaire Africain des Droits de l'Homme
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The *African Human Rights Yearbook* publishes peer-reviewed contributions dealing with the aspects of the African human rights system covering its norms, the operation of its institutions, with a focus on the rights of women and children in Africa.

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.

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L'Annuaire Africain des Droits de l'Homme publie des contributions révues par les paires qui portent sur les aspects du système africain des droits de l'homme, y compris ses normes, opérations et institutions, en mettant l'accent sur les droits des femmes et des enfants en Afrique.

Cet *Annuaire* est une publication annuelle 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.

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Preface

By creating the African Court on Human and Peoples' Rights, the Ouagadougou Protocol did not only inaugurate a new human rights institution in Africa. It inaugurated an era of strengthened judicial protection of human rights on the continent, of which the African Commission on Human and Peoples' Rights had been the main player during the previous two decades. Through the Advisory Opinion that it issued on the standing of the African Committee of Experts on the Rights and Welfare of the Child, the Court confirmed the extension of the African system for human rights protection to this third institution.

To give substance to this filial relationship due to their nature, the three institutions have, in recent years, developed an increasingly active cooperation, of which the *African Human Rights Yearbook* is one of the most tangible manifestations. Human rights litigation is an impressive tool of protection. Promotion is a tool of no less might because it contributes to the dissemination of knowledge and, consequently, a constant intellectual dialogue on the state of human rights.

In the first issue of the *Yearbook*, which is in the hands of the reader, the three institutions have endeavored to open a new avenue of reflection on the status of the standards, the functioning of the institutions, and women's and children's rights in Africa. By compiling the writings of academics, practitioners and civil society activists from different backgrounds, whether in Africa or beyond, this first issue also focuses on the participation of women in the academic thinking on human rights in Africa. Such an approach is positioned in the continued celebration of the year 2016, which the African Union specially dedicated to the rights of women on the continent.

It is hoped that, in its subsequent volumes, the *Yearbook* becomes the platform *par excellence* for reflection not only on human rights but also on the related themes such as the rule of law, democracy and governance in Africa.

Honourable Sylvain ORÉ,
President of the African Court on Human and Peoples' Rights

Préface

En créant la Cour africaine des droits de l'homme et des peuples, le Protocole dit de Ouagadougou n'a pas seulement consacré la naissance d'une nouvelle institution des droits de l'homme en Afrique. Il a inauguré sur le continent l'ère du renforcement de la protection judiciaire des droits de l'homme dont la Commission africaine des droits de l'homme et des peuples avait été la pièce maîtresse au cours des deux décennies précédentes. Par l'Avis consultatif qu'elle a rendu sur la qualité pour agir directement devant elle du Comité africain d'experts sur les droits et le bien-être de l'enfant, la Cour a confirmé l'élargissement à cette troisième institution, du système africain de protection des droits de l'homme.

Pour donner corps à cette relation filiale par nature, les trois institutions ont, ces dernières années, développé une coopération de plus en plus active dont l'*Annuaire Africain des Droits de l'Homme* est l'une des manifestations les plus tangibles. Le contentieux des droits de l'homme est un outil impressionnant de protection. La promotion n'en n'est pas moins un puisqu'elle participe à la dissémination de la connaissance et, par conséquent, à une veille constante d'idées sur l'état des droits de l'homme.

Par le premier numéro de l'*Annuaire*, dont le lecteur a entre les mains un exemplaire, les trois institutions se sont efforcées d'ouvrir un nouveau front de réflexion sur l'état des normes, du fonctionnement des institutions et des droits des femmes et des enfants en Afrique. En associant les écrits d'universitaires, de praticiens et d'activistes de la société civile de différents horizons, africains ou non, ce premier numéro met également l'accent sur la participation des femmes à la réflexion scientifique sur les droits de l'homme en Afrique. Une telle approche se positionne dans la célébration continue de l'année 2016 spécialement consacrée par l'Union africaine aux droits des femmes sur le continent.

Il reste à nourrir le ferme espoir que, dans ses parutions subséquentes, cet Annuaire s'affermisse comme la plateforme par excellence de réflexion pas seulement sur les droits de l'homme mais également sur les thématiques connexes de l'etat de droit, de la démocratie et de la gouvernance en Afrique.

Honorable Sylvain ORÉ,
Président de la Cour africaine des droits de l'homme et des peuples

Editorial

This is the first volume of the *African Human Rights Yearbook*. Of the three regional human rights systems, the African is the youngest. The publication of this *Yearbook* marks a point at which the African regional human rights system has attained a certain level of maturity. Bringing together contributions related to the three institutions making up the African human rights system, the *Yearbook* also reflects a system that has become more and more cohesive. The *Yearbook* aims to be a forum for analytical reflection on all aspects of the system.

Of the three siblings in the African human rights family, the African Commission on Human and Peoples' Rights (African Commission) is the eldest. The date 2 November 2017 marks 30 years since its inauguration, in 1987. Initially meeting in Addis Ababa, its seat was subsequently established in Banjul, the Gambia, where it is still located. One of the reasons for the choice of the Gambia, namely, the democratic culture symbolised by President Jawara, fell away when he (President Jawara) was unseated forcibly by military might in 1994. The undemocratic rule of his successor (President Jammeh) led to persistent calls that the seat of the Commission should be moved away from Banjul. However, Jammeh was voted out, and eventually stood down, making way for a return to democratic governance under President Barrow in 2017. This era holds the promise of Banjul yet again becoming the beacon of human rights in Africa, as it was at the time when the African Charter was drafted, and the African Charter was named the 'Banjul' Charter.

Described by many initial commentators as a document designed to fail, in the hands of successive members of the African Commission, the African Charter on Human and Peoples' Rights (African Charter) came to be interpreted purposively and progressively. Some of the Commission's greatest advances and contributions lie in the improvements in the state reporting system, which now consistently culminates in comprehensive and insightful Concluding Observations; its initiative to establish an array of relevant and influential special mechanisms; the vast improvements over time in the dissemination of relevant information; the normative expansion of the Charter through Resolutions, General Comments and other soft law standards; and the quality and innovation of its jurisprudence in a number of trend-setting communications. The Commission was also instrumental in the adoption of the Protocol to the African Charter on the Rights of Women in Africa (African Women's Rights Protocol).

A number of contributions in the *Yearbook* deal with the normative expansions by the African Commission and other aspects of its

mandate. Provisions of the African Women's Rights Protocol, in particular, prove to be fertile ground for analysis and discussion (see for example the articles by Anyangwe, Boshoff, Chekeru-Radu, Zvobgo and Dziva, Erychalu and Durojaye, Guignard, Owiso and Sefah, Oyugi and Rabenoro).

The middle sibling is the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee). Initially taking some hesitant steps, it was viewed by many as the stepchild of the African human rights system. At the time of the publication of this *Yearbook*, 18 years has lapsed since the entry into force of the treaty this Committee supervises, the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter). Since its inauguration, the seat of the Committee has been with the AU headquarters in Addis Ababa, but, at the time of this publication, its relocation is under consideration. It is fair to state that the African Children's Committee has matured into an effective and active champion for children's rights in Africa, as the article by the current Chairperson of the Committee, Professor Benyam Mezmur, illustrates.

The youngest sibling of the three is the African Court on Human and Peoples' Rights (African Human Rights Court). Hardly a decade in operation, with its first judgment handed down in 2009, the African Human Rights Court has already left its mark on Africa's human rights landscape. As this *Yearbook* appears, eleven merits judgments have been delivered, leading to decisions of human rights violations by States: nine direct-access cases, directly submitted to the Court (six cases against Tanzania; two against Burkina Faso; and one against Côte d'Ivoire); and two indirect-access cases, submitted by the African Commission (*African Commission (Saif Al-Islam Kadhafi) v Libya* and *African Commission (Ogiek) v Kenya*). In addition, the Court issued a number of advisory opinions, and handed down three judgments in which it clarified the implementation of previous judgments.

Contributors in this *Yearbook* grapple with issues such as the relationship between the African Commission and the African Human Rights Court (see the article by Yerima); the challenge of effective implementation of the Court's remedial orders (see the article by Murray *et al*; and Nyman-Metcalf and Papageorgiou); and the tension between regional specificity and universalism in the Court's jurisprudence (as reflected in the article by Ondo).

Three main themes are covered in this *Yearbook*: the norms and standards that form the basis of the regional system; the institutions that supervise these norms and standards, and make them part of people's lived realities; and the rights of women and children. A number of the contributions deal with these issues in a cross-cutting way, or place them in a broader context.

Here is a brief chronology of this first volume of the *Yearbook*: The *Yearbook* was announced late in 2016, with a call for papers closing in February 2017. The process was initiated under the complementarity cooperation between the Commission and the Court, later joined by the Children's Committee. Initial ground-work was done by a team of enthusiastic staff members of the three institutions (see the

Acknowledgements). Specific mention should, however, be made of the pivotal role of the Court, and in particular, Dr Horace Adjolohoun. The further process involved the advisory participation of the International Advisory Board, and the Editorial Committee, spearheaded from the Centre for Human Rights, Faculty of Law, University of Pretoria. Following the call for papers, a number of authors were invited to develop full papers. These were subjected to a peer review process, culminating in the papers selected and edited for this publication.

Frans Viljoen, for the Editorial Committee
November 2017

Éditorial

Ceci est le premier volume de *l'Annuaire Africain des Droits de l'Homme*. Des trois systèmes régionaux des droits de l'homme, le système Africain est le plus récent. La publication de cet *Annuaire* marque un moment où le système régional africain des droits de l'homme a atteint une certaine maturité. Rassemblant des contributions portant sur les trois institutions composant le système africain des droits de l'homme, *l'Annuaire* reflète également un système de plus en plus cohérent. *L'Annuaire* vise à être un forum de réflexion analytique sur tous les aspects du système.

Dans la fratrie africaine des droits de l'homme, la Commission africaine des droits de l'homme et des peuples (Commission africaine) est l'aînée. La date du 2 novembre 2017 marque 30 ans depuis son inauguration, en 1987. Opérant initialement à partir d'Addis-Abeba, son siège s'est ensuite établi à Banjul, en Gambie, où elle est toujours basée. L'une des raisons du choix de la Gambie, à savoir la culture démocratique symbolisée par le président Jawara, s'est édulcorée quand il (le président Jawara) a été renversé par la force militaire en 1994. Le règne antidémocratique de son successeur (le président Jammeh) a conduit à des appels persistants pour que le siège de la Commission de Banjul soit déplacé de Banjul. Cependant, Jammeh a été battu dans les urnes et s'est finalement retiré, faisant place à un retour à la gouvernance démocratique sous le président Barrow en 2017. Cette ère tient la promesse de voir Banjul redevenir la figure de proue des droits de l'homme en Afrique, comme elle l'était à l'époque de la rédaction de la Charte africaine, ce qui a valu à cet instrument d'être baptisée 'Charte de Banjul'.

Décrite par de nombreux commentateurs pionniers comme un document voué à l'échec, grâce au génie des membres successifs de la Commission africaine, la Charte africaine des droits de l'homme et des peuples (Charte africaine) a été interprétée de manière téléologique et dynamique. Certaines des plus grandes avancées et contributions de la Commission résident dans les améliorations qu'elle a apportées à la procédure de rapport des Etats, qui aboutit désormais systématiquement à des observations finales exhaustives et perspicaces; son initiative visant à établir une gamme de mécanismes spéciaux pertinents et influents; les grandes améliorations progressives dans la diffusion des informations pertinentes; l'expansion normative de la Charte à travers des Résolutions, des Observations Générales et d'autres normes juridiques non contraignantes; et la qualité et l'innovation de sa jurisprudence dans un certain nombre de communications novatrices. La Commission a également contribué à l'adoption du Protocole à la Charte africaine relatif aux droits des

femmes en Afrique (Protocole relatif aux droits des femmes en Afrique).

Un certain nombre de contributions contenus dans *l'Annuaire* traitent des progrès normatifs de la Commission africaine et d'autres aspects de son mandat. Les dispositions du Protocole relatif aux droits des femmes en Afrique procurent un terrain propice à l'analyse et la discussion (voir par exemple les articles d'Anyangwe, Boshoff, Chekeru-Radu, Zvobgo et Dziva, Erychalu et Durojaye, Guignard, Owiso et Sefah, Oyugi et Rabenoro).

Le frère cadet est le Comité africain d'experts sur les droits et le bien-être de l'enfant (Comité africain des enfants). Ayant connu des débuts laborieux, il a été considéré par beaucoup comme le fils adoptif du système africain des droits de l'homme. Au moment de la publication de cet *Annuaire*, 18 années se sont écoulées depuis l'entrée en vigueur du traité que ce Comité supervise, la Charte africaine des droits et du bien-être de l'enfant (Charte africaine des droits de l'enfant). Depuis son inauguration, le Comité est installé au siège de l'UA à Addis-Abeba mais, au moment de cette publication, sa relocalisation est en discussion. Il est juste d'affirmer que le Comité africain des enfants est devenu un champion efficace et actif des droits de l'enfant en Afrique, comme l'illustre l'article du Président actuel du Comité, le Professeur Benyam Mezmur.

La soeur benjamine des trois institutions est la Cour africaine des droits de l'homme et des peuples (Cour africaine des droits de l'homme). À peine une décennie d'existence, avec son premier arrêt rendu en 2009, la Cour africaine des droits de l'homme a déjà laissé sa marque dans le domaine des droits de l'homme en Afrique. À l'heure où cet *Annuaire* est publié, onze décisions ont été rendues au fond, concluant à des violations des droits de l'homme par les Etats: neuf affaires soumises directement à la Cour (six affaires contre la Tanzanie, deux contre le Burkina Faso et une contre la Côte d'Ivoire); et deux affaires introduites par accès indirect, soumises par la Commission africaine (*Commission africaine (Saif Al-Islam Kadhafi) c Libye et Commission africaine (Ogiek) c Kenya*). En outre, la Cour a rendu un certain nombre d'avis consultatifs ainsi que trois arrêts dans lesquels elle a clarifié la mise en œuvre d'arrêts antérieurs.

Les contributeurs à cet *Annuaire* se penchent sur des questions telles que les relations entre la Commission africaine et la Cour africaine des droits de l'homme (voir l'article de Yerima); les défis liés à la mise en œuvre effective des ordonnances de la Cour sur le fond (voir l'article de Murray *et al*, et Nyman-Metcalf et Papageorgiou); et la tension entre la spécificité régionale et l'universalisme dans la jurisprudence de la Cour (comme le reflète l'article d'Ondo).

Trois thèmes principaux sont couverts dans cet *Annuaire*: les normes et standards qui constituent la base du système régional; les institutions qui supervisent ces normes et standards, et les intègrent dans les réalités vécues des peuples; et les droits des femmes et des enfants. Un certain nombre de contributions traitent de ces questions de manière transversale ou les placent dans un contexte plus large.

Voici une brève chronologie de ce premier volume de *l'Annuaire*: *l'Annuaire* a été annoncé à la fin de l'année 2016, avec un appel à contributions ouvert jusqu'à février 2017. Le processus a été initié dans le cadre des relations de complémentarité entre la Commission et la Cour, rejointes ultérieurement par le Comité africain des enfants. Les premiers travaux ont été effectués par une équipe de membres engagés du personnel des trois institutions (voir les Remerciements). Il convient toutefois de mentionner spécifiquement le rôle central de la Cour, et en particulier du Dr Horace Adjolohoun. La suite du processus a impliqué la participation consultative du Comité consultatif international et du Comité de rédaction, ce dernier étant dirigé par le Centre for Human Rights de la Faculté de droit de l'Université de Pretoria. Suite à l'appel à contributions, un certain nombre d'auteurs ont été invités à développer des articles entiers. Ceux-ci ont été soumis à un processus d'évaluation par les pairs, aboutissant à des articles sélectionnés et édités pour cette publication.

Frans Viljoen, au nom du Comité de rédaction
Novembre 2017

Vulnerability of women in Africa to extrajudicial killings

*Carlson Anyangwe**

ABSTRACT: Extrajudicial killing is a complex phenomenon covering various types of unlawful homicide. When women are the targeted victims, it constitutes an extreme form of gender violence This article explores rather than describes the special factors that make women particularly vulnerable to such killings. Its working hypothesis is that such killings are fairly common, and that they thus warrant a qualitative, analytical and inductive study aimed at contributing to the literature on violence against women, particularly, and the right to life, generally. The theoretical and analytical perspectives that inform identification of vulnerability factors are jurisprudence and legal theory, gender studies, and feminist scholarship. The article argues that culture, tradition, socialisation, politico-socio-economic factors, and the law in some instances, create an environment favourable to the perception and treatment of women as subordinate to men, and also foster a social milieu that lends itself to women's vulnerability.

TITRE ET RÉSUMÉ EN FRANÇAIS:
Vulnérabilité des femmes aux exécutions extrajudiciaires en Afrique

RÉSUMÉ: L'exécution extrajudiciaire est un phénomène complexe qui englobe divers types d'homicides illégaux. Quand les femmes en sont les victimes ciblées, cela constitue une forme extrême de violence basée sur le genre. Plutôt que de décrire, cet article explore les facteurs spéciaux qui rendent les femmes particulièrement vulnérables à de telles tueries. L'hypothèse d'analyse est que de telles tueries sont assez courantes et qu'elles justifient donc une étude qualitative, analytique et inductive visant à contribuer, en particulier, à la doctrine sur la violence contre les femmes et le droit à la vie en général. Les perspectives théoriques et analytiques qui guident l'identification des facteurs de vulnérabilité sont la jurisprudence et la théorie juridique, les études de genre et la production académique féministe. L'article soutient que la culture, la tradition, la socialisation, les facteurs politico-socio-économiques et la loi, dans certains cas, créent un environnement favorable à la perception et au traitement des femmes comme subordonnés aux hommes favorisant ainsi un milieu social qui se prête à la vulnérabilité des femmes.

KEY WORDS: Africa, extrajudicial killing, vulnerability, women

* BA, LLB (Yaoundé), PGD Comparative Law (Strasbourg), LLM, PhD (London); Professor of Laws and former Executive Dean and a Rector, Walter Sisulu University; currently Adjunct Professor, Nelson Mandela School of Law, University of Fort Hare; Member of the African Commission's Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa. I acknowledge with thanks the assistance by Nkatha Murungi in preparing the final version of this contribution; carlany2001@gmail.com

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CONTENT:

1 INTRODUCTION: CONCEPT OF 'EXTRAJUDICIAL KILLING'

There appears to be no internationally accepted definition of what constitutes 'extrajudicial, summary or arbitrary killings (or executions)'. However, in international human rights law, 'extrajudicial' killings convey the associative meaning of 'summary' or 'arbitrary' killings. Those individual terms tend to be used conjunctively or as synonyms. The separate dictionary meaning of each says little about the wide spectrum of killings and the real nature of the issues in human rights law which the standard phrase 'extrajudicial, summary or arbitrary' seeks to capture. Each of those terms signifies not so much the method or nature of the killing but rather the character of its unlawfulness. The phrase as now understood in international human rights law and practice is less about the semantics of the individual terms comprised in it. It is more about capturing 'a range of contexts in which killings have taken place in circumstances which contravene international law and … require a response'.[1]

The nature of extrajudicial killing is broad and all-encompassing. 'Extrajudicial killing' includes 'any killing that violates international human rights or humanitarian law' such as 'unlawful killing by the police, deaths in military or civilian custody, killings of civilians in armed conflict in violation of humanitarian law, and patterns of killings by private individuals which are not adequately investigated and prosecuted by the authorities'.[2] Any killing in these circumstances is arbitrary even in a state that retains the death penalty. The reason is that such killings offend the narrowly-circumscribed scope of application of the death penalty in relation to offences, persons and procedure. There is thus a nexus between the question of extrajudicial killings and the protection of the right to life.[3]

1 'Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2004), Doc. E/CN.4/2005/7, para 6.

2 'Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Mission to the USA' (2009), Doc. A/HRC/11/2/Add.5, para 3.

3 Article 3 of the Universal Declaration of Human Rights; article 6 of the International Covenant on Civil and Political Rights (ICCPR); article 4 of the African Charter on Human and Peoples' Rights; article 5 of the African Charter on the Rights and Welfare of the Child; article 4 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

Conceptually, extrajudicial killings of women are an extreme form of violence against women in general. Such killings result from a number of factors that predispose woman to that type of harm, a violation usually perpetrated by a family member or an intimate partner. The enabling factors of such killings include the culture of so-called 'honour' killings by male family or community members of women perceived to have brought 'dishonour' upon their natal family or their community.[4] They also include the ingrained suspicion, in some rural communities, that elderly women are witches and so open to mob accusation and killing in the interest of the community. Another factor is the suspect patriarchal attitude in some settings that a woman is man's 'possession' and may be killed when she 'provokes' him particularly by conduct that excites his sexual jealousy. In these cases, the factors that induce killing are female-specific, the killing is deliberate and takes place in an exclusive space. However, there is another category of extrajudicial killings of women in which death results from the perpetration of other forms of gender violence such as sexual or non-sexual assault in intimate partner relationships. Killing in those circumstances is not always understood as extrajudicial partly because in many instances it is difficult to divorce it from domestic violence. The proportion of the perpetration of each of these two categories of extrajudicial killings of women as against the other is difficult to ascertain because available homicide statistics make no such differentiation.

2 LEGAL ACCOUNTABILITY OF THE STATE IN THE CONTEXT OF EXTRAJUDICIAL KILLINGS

In this section I consider in the broadest outline the standards, and the behavioural and substantive rules, which may be invoked to hold the state accountable in the context of extrajudicial killings. I also consider the circumstances of state accountability in international human rights law in the context of extrajudicial killings, a form of killing that is also a violation of the right to life guaranteed under human rights instruments. The discussion is framed around the conceptual distinction between two broad categories of perpetrators of extrajudicial killings, state and non-state actors. In the last part of this section I broach the matter of statistics on female victims of extrajudicial killings in Africa.

2.1 Standards and rules

The object of every treaty, including human rights treaties, is to create and impose binding obligations on states that are party to it. Parties to

4 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions', Doc A/71/372, 2 September 2016, para 99.

the African Charter on Human and Peoples' Rights (African Charter) assume an obligation to give effect to the rights therein enshrined. By becoming a party to that instrument a state *ipso facto* recognises the rights in it and assumes a general obligation to adopt legislative or other measures to give effect to those rights. Under article 1, State parties to the Charter 'recognise the rights, duties and freedoms enshrined in [it] and ... undertake to adopt legislative or other measures to give effect to them'.[5] The obligation under article 1 is complemented by another, imposed in article 25 requiring State parties 'to promote and ensure ... respect' of the rights in the Charter and 'to see to it that the ... rights are understood'. These broad obligations are absolute and immediate, encompassing an obligation to recognise, an obligation to adopt measures, and an obligation to promote and ensure respect of rights.[6]

Formal recognition by the State is of practical importance for effective implementation within the domestic sphere:

> When a society recognises that a person has a right, it affirms, legitimates, and justifies that entitlement, and incorporates and establishes it in the society's system of values, giving it important weight in competition with other social values.[7]

If a State is in breach of its obligation to recognise, that in itself would be tantamount to a breach of the relevant provision of the Charter and also a violation of the foundational principle of treaty law, *pacta sunt servanda*, entitling any other State party to take action under article 47 or 49. Aggrieved individuals cannot file a complaint based only on breach of that principle since they are not party to the treaty, and may only file a complaint in those instances where the action or inaction of the state party violates any of the rights guaranteed in the Charter.[8]

A State party to the Charter is also under an obligation to adopt such legislative or other measures as may be necessary to give effect to the rights in the Charter. This means the State must develop and enforce a national legal system and an appropriate national human rights infrastructure that is protective of human rights and is adequate to respond to claims of violation.

2.2 Killings by state actors

Extrajudicial killings by state actors may be clustered into three groups,[9] namely, politically targeted killings, arbitrary application of

5 Likewise, under article 2 of the ICCPR, each State Party to the Covenant 'undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the ... Covenant'.

6 C Anyangwe 'Obligations of States Parties to the African Charter on Human and Peoples' Rights' (1998) 10 *African Journal of International and Comparative Law* 625 629.

7 L Henkin *The age of rights* (1990) 44.

8 Anyangwe (n 6 above) 630.

9 Centre for Governance and Human Rights (CG & HR) 'Unlawful killings in Africa' (2014) 13 www.cghr.polis.cam.ac.uk (accessed 12 October 2016).

the death penalty,[10] and perpetration of killings by law enforcement officials. This last group embraces killings perpetrated by the police or by the military performing police function such as the killing of a suspect during an encounter with law enforcement officials; killing of a detainee by the police or prison guards (custodial death); and killing during law enforcement operations resulting from the disproportionate, unnecessary or excessive use of force and firearms in contravention of international standards set out particularly in the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

In international human rights law, the protection of human rights is primarily the responsibility of the State as the main actor in the international and domestic planes. Any act, such as extrajudicial killing, which violates international human rights law, is in principle imputable to the State on the sufficient reasoning that the State failed in its due diligence obligation. It does not matter whether the act is done by a public official, or by persons who use their position of authority, or by individuals acting in the capacity of an agent of the State. In all cases of killing by State actors the State is held directly responsible for the extrajudicial killing because the protection of human rights, international and municipal, is primarily the responsibility of the State as the main actor internally and externally. Under human rights law the State is not only prohibited from directly violating the right to life. It is also required to ensure the right to life and must meet its due diligence obligations by taking appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators.

The State has positive obligations under international human rights law to ensure that rights of individuals are fully protected against violations by its agents. Failure to ensure the individual is not arbitrarily deprived of his life as required by article 4 of the African Charter will be tantamount to a violation of that right by the State. This is so because in such a case the State is deemed to have permitted the killing perpetrated by its agent or to have failed to take appropriate measures or exercise due diligence to prevent, punish, investigate or redress it. If any provision of a human rights treaty is broken, responsibility follows. The violation of the treaty by the State is a breach of the treaty and engages its responsibility. It is irrelevant whether the violation is by the State as national policy or by officials acting under cover of law or by persons for whose acts the State is responsible because such acts have been encouraged or condoned by it.

2.3 Killings by non-state actors

The term 'non-state actors' includes corporations and non-governmental organisations.[11] In the context of perpetrators of

[10] C Anyangwe 'Emerging African jurisprudence suggesting the desirability of the abolition of capital punishment' (2015) 23 *African Journal of International and Comparative Law* 1.

[11] P Alston (ed) *Non-state actors and human rights* (2002).

extrajudicial killings it covers a wide range of actors clustered by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (UN Special Rapporteur) into four general groups. One group consists of private actors operating at the behest of the government or with its knowledge or acquiescence such as government-created-and-controlled paramilitary groups, vigilante groups, death squads, and private militias sometimes directed to kill political opponents or critics. The State has direct responsibility for the actions of these non-state actors. A second group consists of private contractors such as military security contractors, corporations and consultants engaged to perform core state activities such as prisons management, law enforcement, and interrogation of suspects. The State is also responsible for the actions of these non-state actors.

A third set of persons consists of armed groups that are parties to an armed conflict. The legal responsibility for any killings committed by any of these non-state actors in violation of international humanitarian law falls directly and squarely on the armed group concerned. A fourth set of persons comprises individuals in intimate relationships and individuals in organised or controlled groups such as criminal gangs, mobs, and vigilantes. These may perpetrate gang murders, vigilante murders, 'honour killings', or domestic violence killings. The responsibility of the State is engaged in circumstances where these types of killings are suggestive of a pattern and the response of the government to them is inadequate or not forthcoming.[12]

A simplified template proposed by another source identifies two broad categories of killings by non-state actors: 'conditioned homicide' (killings by private individuals), and 'mass actor killings' (killings by groups of persons).[13] 'Conditioned homicide' cases include death of an intimate partner resulting from systematic domestic violence in circumstances where the State has failed to act to remedy the situation[14]; ritual murders, especially of virgin girls, to harvest body parts for profit and for use in rituals that supposedly confer wealth or supernatural powers;[15] witchcraft, 'honour', occult, and Albino killings,[16] and prejudice-induced killings such as xenophobic killings, and killings of persons with a different sexual orientation or from an

[12] 'Report of the Special Rapporteur' (2004) (n 1 above); 'Report of the United Nations Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions' (2010), Doc. A/HRC/14/24, paras 45-47.

[13] CG & HR (n 9 above) 12.

[14] B Meyersfeld *Domestic violence and international law* (2010) 111.

[15] *The New Age*, 2 October 2015, 25, reported the ritual murder of a 13-year old girl in Liberia, noting: '[C]ases of ritual murders have been recorded in several African countries, with body parts sometimes used in ceremonies believed to confer supernatural powers. Children are particularly sought out as targets.'

[16] *The Mail & Guardian,* 15-21 May 2015, 26, writes under the caption 'Albinos fear death as polls near': 'Thought to bring luck, people with albinism are hunted in Tanzania – often by family members. … Albino body parts are associated with good luck and, as the country gears up for elections, the demand for good luck charms goes up. … Tanzania is thought to have one of the world's largest populations of people with albinism, a congenital disorder that robs skin, eyes and hair of pigmentation … A complete set of albino body parts – including all four limbs, genitals, ears, tongue and nose – can fetch up to $75 000 …'.

ethnic minority. 'Mass actor killings' cover cases of vigilante killings; killings by consultants or private security outfits engaged in core state activities, killings by organised criminal gangs (militias, death squads, pirates and drug or human traffickers), killings by terrorist groups, and killings by rebels and insurgent groups in ungoverned spaces. It appears to be the case that responsibility for killings by terrorist, rebel and insurgent groups in ungoverned spaces is entirely that of the group concerned.

International legal interpretation and norms now clearly define the positive role and responsibility of the State in preventing abuses perpetrated by non-state actors. Gone are the days when it could have been said with confidence that human rights violations against individuals could be committed only by States. A new awareness has since developed that the individual needs to be protected against the increasingly many and powerful non-state actors as well. The concept of State responsibility has evolved to recognise that a State also has an obligation to take preventive and punitive steps where human rights violations by private actors occur. A scholar of note has pertinently observed that 'international law has achieved a major breakthrough by holding the relevant governments liable in situations in which they have not shown 'due diligence' in carrying out their own obligations to investigate, prosecute, and punish those who commit such crimes'.[17]

The State is of course not ordinarily responsible for human rights abuses by private actors for, in many cases, the isolated killing of a person by an individual will constitute a simple crime and not give rise to any State responsibility. However, the State is required to ensure the right to life. It must meet its due diligence obligations to take appropriate measures to deter, prevent, investigate, prosecute and punish perpetrators. The duty of the State extends to ensuring protection against the risk of human rights violation by non-state actors and to providing effective remedies to victims of violations. In *Carmichele v Minister of Safety and State Security & Another*,[18] the South African Constitutional Court held the State liable for the brutal attack of the appellant by the accused, an attempted-rapist who was facing trial and had been released without bail. In *Van Eerden v Minister of Safety and State Security*,[19] the South African Supreme Court of Appeal held the State accountable for the rape and robbery of a 19-year old girl by a known dangerous criminal who had escaped from police custody due to the negligent failure of the police to lock the security gate.

Once a pattern of killings becomes clear in which the response of the State is clearly inadequate, the State's responsibility under international human rights law becomes applicable on the good and sufficient reasoning that through its inaction it makes itself complicit and confers a degree of impunity upon the killers. Complicity by the

17 P Alston 'Of witches and robots: the diverse challenges of responding to unlawful killings in the twenty-first century' (2011) 28 *Macalester International* 10.

18 2001 (4) SA 938 (CC).

19 2003 (1) SA 389 (SCA).

State is established by showing that it condones a pattern of abuse through pervasive non-action. Under these circumstances, therefore, the State would be in breach of its international human rights obligations. The act of the non-state actor being the act of a private person is initially not directly imputable to the State. However, the act does lead to international responsibility of the State under the rules of international law not because of the act itself but because the State failed in its due diligence obligation to prevent the violation or to respond to it as required by human rights law.[20]

In order to show that extrajudicial killing has been committed it is not necessary, as in murder under municipal criminal law, to determine the guilt of the non-state actor or his intention. Likewise, in mass-actor-killing cases, it is not necessary to identify the actual specific individual perpetrator by whose hand the victim met his death. It is sufficient simply to demonstrate that public authorities have supported or condoned or tolerated the violation of the right to life.[21] Thus, although an act by a private individual or a non-state actor would ordinarily not be directly imputable to the State, it can nevertheless generate responsibility of the State not because of the act itself, but either because of lack of due diligence on its part to prevent the violation, or because it did not take the necessary steps to provide the victims with reparations. That is the tenor of the ruling of the African Commission in *Aminu v Nigeria*; *Social and Economic Rights Centre v Nigeria*; and *Sudan Human Rights Organisation and Another v Sudan*.[22] This jurisprudence is consistent with that of the Inter-American human rights system.[23] It is also in line with the view articulated by the UN Human Rights Committee and the UN Special Rapporteur.[24]

2.4 Statistics

Extrajudicial killing of women is an extreme form of violence against women by men or by other women. Estimating the actual occurrence of this phenomenon is difficult in part because killings of this nature tend to be statistically subsumed under the generic legal rubric of homicide and is thus largely hidden. Potential sources of incidents involving the killing of women are self-reports by family members, reports by friends from phone-ins, records of social workers, and records of police and health services. These sources may record the number of women who have been murdered. But data from these sources would be problematic where it does not reflect gender discrepancies or differentiate between

[20] *Valesquez Rodriguez v Honduras* IACHR (29 July 1989) Ser C No 4.

[21] *Tradesmen v Colombia* IACHR (2004) Ser C No 109.

[22] *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000); *Social and Economic Rights Action Centre v Nigeria* (2001) AHRLR 60 (ACHPR 2001); *Sudan Human Rights Organisation & Another v Sudan* (2009) AHRLR 135 (ACHPR 2009).

[23] *Valesquez v Honduras* (n 20 above); *Tradesman v Colombia* (n 21 above).

[24] General Comment 31 of 26 May 2004; 'Report of the Special Rapporteur' 2004 (n 1 above) paras 72-73; 'Report of the Special Rapporteur' 2010 (n 12 above) paras 45-47; 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences' (1996), Doc. E/CN.4/1996/53, para 30-33.

deliberate extrajudicial killings and assaults resulting in unintended deaths. Reports of the UN Special Rapporteur provide useful information on the subject of extrajudicial killings generally. However, they tend not to detail the specific problem of extrajudicial killings of women.

The problem is not limited to cases of men killing women, denoted in feminist literature as 'femicide', meaning 'gender-motivated killings founded on particular patriarchal beliefs about women, such as that they are the possessions of men'.[25] Feminists consider femicide an extreme manifestation of male dominance and sexism as well as a form of male control over women.[26] The term also covers cases where women kill men or other women.[27] It is not possible to construct a distinct profile or prototype of either the victim or the perpetrator in the context of extrajudicial killings of women. However, anecdotal evidence and occasional media reports suggest that women rather than men are overwhelmingly the victims of gendered extrajudicial killings. In fact, a 2002 study conducted in South Africa concluded that men are four times more likely to kill their female partners than the other way around.[28] Continent-wide statistics on extrajudicial killings specifically are not available. Even at national level it is doubtful that law enforcement agencies keep statistics on extrajudicial killings as such.

A 2014 general study on the subject by the Centre of Governance and Human Rights in Cambridge University (CG & HR) provides some useful data on unlawful killings taken from a number of sources, some dependable, some not.[29] Extrapolating from that data, one notes that an average of about 3 000 unlawful killings take place each year in Africa. There were 128 623 persons who died in Africa in 2011 as a result of interpersonal violence, compared with 486 493 persons worldwide in the same year. In Sub-Sahara Africa, 15 796 people died in 2011 of collective violence while 86 307 died worldwide in the same year.

Drawing from various data sources, CG & HR estimates the 2013 homicide rate in Africa to be 11.4 per 100 000 (slightly over 110 killed each year per one million people). That rate is double the global rate of 5.8 per 100 000. In Africa, the highest homicide rate in 2013 was in Southern Africa (about 30 per 100,000), followed by West Africa (about 16 per 100,000), East Africa (about 8 per 100,000), and North Africa (about 3 per 100,000). These figures paint an interesting broad picture of unlawful killings in Africa and give some general idea of the phenomenon of extrajudicial killing in the continent. They are however not current. More importantly, they are not disaggregated by gender

25 E Bonthuys & C Albertyn (eds) *Gender, law and justice* (2007) 339.

26 D Russel 'Introduction: the politics of femicide' in D Russell & R Harmes (eds) *Femicide in global perspectives*.

27 S Mills 'Intimate femicide and abused women who kill: a feminist legal perspective' in Russell & Harmes (n 26 as above) 71.

28 L Vetten & C Ngwane *I Love You to Destruction: Selected Preliminary Findings from Five Year Analysis of Convictions and Sentences for Spousal Killings in Three Gauteng Courts* (CSVR: Johannesburg 2003).

29 CG & HR (n 9 above) 6-8.

and by categories of violent killings. They also do not deal with the specific problem of women and extrajudicial killing in Africa.

3 FACTORS CONTRIBUTING TO VULNERABILITY

The subject of extrajudicial killings is a worldwide and complex problem that reveals a consistent pattern of violations of human rights. In acknowledgement of this fact, the universal human rights system established the thematic procedure known as Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions in 1982. The procedure was established to undertake studies of the situation, paying special attention to cases concerning children and women. For its part, the African Commission on Human and Peoples' Rights (African Commission) in 2012 expanded the mandate of its Working Group on the Death Penalty to include a focus on the problem of extrajudicial killings in Africa. Extrajudicial killings of women undoubtedly take place. However, its form, shape and magnitude still needs to be researched. In this section I consider the factors that predispose women to extrajudicial killings in Africa. In this regard, I hypothesise that culture, tradition, socialisation, socio-economic and political contexts, and the dual or plural legal dynamics prevailing in African countries, all conspire to create an environment in which women are treated as subordinate to men. These factors constitute the backdrop and provide the social environment that make women vulnerable to extrajudicial killings.

The theoretical and analytical perspectives that inform the identification of these factors are feminist scholarship,[30] gender studies, and jurisprudence and legal theory which is a study of political theories with legal implications. Many feminist jurists have over the years argued that patriarchy[31] is at the root of the subordination of women to men and the unequal power relations between both.[32] They posit that gender roles are socially constructed, and that patriarchy and gender roles can therefore be socially deconstructed.[33] Unequal gender relations in African societies are rooted in socially-defined roles of men

[30] Feminism is a term coined by women's movement to signify the revolutionary changes it advocates to the status of women in society.

[31] Patriarchy is the term coined by feminists to describe the social structures which allow men to dominate women, that is, the pervasive dominance, in and of society, by the male hierarchy. See Bonthuys & Albertyn (n 25 above) p. 19; A van Blerk *Jurisprudence – an introduction* (1998) 171.

[32] K Bartlett & R Kennedy (eds) *Feminist legal theory: readings in law and gender* (1991); J Rifkin 'Toward a theory of law and patriarchy' (1988) 3 *Harvard Women's Law Journal* 3; C MacKinnon 'Difference and dominance' in C MacKinnon (ed) *Feminism unmodified: discourses on life and law* (1987) 32.

[33] K Bartlett 'Feminist legal methods' (1990) 103 *Harvard Law Review* 829; L Finley 'Breaking women's silence in law: the dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886; S Okin 'Is multiculturalism bad for women?' in J Cohen, J Howard & MC Nussbaum (eds) *Is multiculturalism bad for women?* (1999); J Oloka-Onyango & S Tamale 'The personal is political, or why women's rights are

and women. Prevailing unequal power relations between both sexes constitute the backdrop that makes women vulnerable to extrajudicial killings.

In considering the factors that make women peculiarly vulnerable to extrajudicial killings I note in passing the difference between 'factors' and 'causes'. 'Cause' is the immediate reason; 'factor' is the enabler. In legal parlance, cause is the *causa causans,* and factor the *causa sine qua non*. In the context of our subject, the extrajudicial killing of women encompasses killing within intimate social settings, the cause of which could, for example, be that family honour is at stake. Feminists do not only condemn violence against women in the private realm; they also link this abuse to violence against women perpetrated by the State.[34] Killing in these circumstances is conceptualised as the most extreme form of violence against women. Literature shows that the contributory factors to this form of violence as well as to violence against women in general, fall within three broad categories, namely, socialisation, harmful cultural practices, and inadequate legal protection.

3.1 Socialisation

Feminists subscribe to the view by Simone de Beauvoir that women are socialised or acculturated into becoming what society dictates.[35] Socialisation is a socially learnt behaviour from childhood whereby an individual internalises and deeply embeds attitudes and adopts particular roles as instructed by society. Agents of socialisation include faith based organisations which play a key role in the propagation of gender imbalances that are constructed through teachings. For example, Christian teachings on gender relations, like the teachings of African custom, advocate divinely sanctioned male headship of the family and the subordination of the wife.[36] These teachings help to reinforce traditional stereotypes. The Apostle Paul in 1 Timothy 2:9-14 directs Christian women to 'wear proper clothes that show respect and self-control, not using braided hair or gold or pearls or expensive clothes'. He instructs them to 'learn by listening quietly and being ready to cooperate in everything'. He states that he does 'not allow a woman to teach or to have authority over a man, but to listen quietly, because Adam was formed first and then Eve. And Adam was not tricked, but the woman was tricked and became a sinner'. Islamic teachings also propagate a like doctrine of female subordination and submissiveness to men.

indeed human rights: an African perspective on international feminism' (1995) 17 *Human Rights Quarterly* 691; C Smart 'Feminism and law: some problems of analysis and strategy' (1986) 14 *International Journal of the Sociology of Law* 110; C Littleton 'Reconstructing sex and equality' (1987) 75 *California Law Review* 1274.

34 S McKay 'Rape and incest in a violent male society' (1985) *Fortnight Magazine*, 27 May 1985, 9.

35 *The second sex*, 1949 (reprinted 1961).

36 WLSA *Multiple jeopardy: domestic violence and women's search for justice in Swaziland* (WLSA: Mbabane 2001) 73.

Religion thus promotes the idea that the woman must be docile, obedient, submissive and subordinate to the man 'as head of the family', and that she must avoid tempting him by exposing her body, something that makes no sense in traditional African contexts where both men and women are thinly accoutred. There are instances where the rapist's defence consists in blaming the woman for the rape perpetrated on her, arguing that she tempted him by the 'indecent' way she dressed. To 'protect' the man from such wily temptation it appears that some Islam teachings ordain that the woman must cover herself from head to toe, including her eyes since she is capable of communicating amorous messages even with her eyes.

Most socialised behaviour is institutionalised through patriarchy. For example, some women appear to have been socialised into thinking that they have to be looked after and be kept by men, even if they earn an income. Some women also appear to have been socialised to think and to believe that their proper place is at home, bearing children, doing house chores, cooking, looking after the children and the men, and being accommodative of her in-laws in all circumstances. Socialisation in a patriarchal society includes the cultural instruction that men are superior to women. This socially defined status of inferiority and subordination of women to men has ultimately been internalised by some women and is deeply embedded in their minds.

The attitude of male dominance and female submissiveness creates a situation whereby the man feels entitled to 'discipline' his 'stubborn' female partner in order to 'put her in her place'. This form of socialisation contributes to violence against women, including instances of perpetration of femicide. The unequal power relationship between men and women manifests itself in male dominance and female subordination. This provides the setting within which the man considers that he has the right, as a male, to coerce his 'stubborn, strong-headed, independent-minded and nagging' woman to submission through various violent acts, including killing in some instances.[37]

In a patriarchal society, patrilineal descent recognises consanguinity among males as more important than relations through affinity.[38] Some African societies have the matrilineal and matrilocal systems of kinship arrangements. Under such arrangements the husband is generally in a position of dependence upon his wife's family and, the children of marriages in such systems tend to look upon their maternal uncles as more important than their fathers.[39] But that is exceptional.

The social organisations in most African societies have a kinship system that is patrilineal and patriarchal. Under that system women move to their husbands' home upon marriage. The husband's family assumes total responsibility over her by providing for her material and emotional needs. This sounds good. But, in reality, the migration of the

37 Okin (n 33 above).

38 WLSA (n 36 above) 34.

39 TO Elias *The nature of African customary law* (1956) 101.

woman to the man's family creates a huge problem of belonging and identity for her. Upon being given away into marriage, the woman finds herself 'caught in-between' two families, her marital family and her natal family. The paradox is that henceforth she fully belongs to neither family.

On the one hand, she is not integrated into her marital family. She is no doubt part and parcel of her nuclear family. But she is inconsequential in relation to her husband's extended family. She does not fully belong there because she is linked to that family only by mere affinity and not by blood. Precisely because of that, when her husband dies her in-laws move in and grab the household items, considered as belonging to the deceased. Female migration or patrilocality in effect transforms the woman into an 'outsider' in her matrimonial home. Her marital affairs become subject to interference by her in-laws. This often leads to misunderstandings and conflicts between husband and wife, and between wife and in-laws particularly mother-in-law and sister-in-law. These clashes often arise over attempts to control her reproductive capacity (she must have children or so many children or at least one male child), over attempts by her in-laws to have unhindered access to her home, over family finances, and over household property which sisters-in-law quickly grab upon the death of their brother.[40]

On the other hand, the married woman also ceases to belong fully to her natal family. Before her marriage she was in fact regarded as a temporary family member destined to marry, leave her natal family and join that of her husband. When she marries she thus becomes something of an 'outsider' in relation to her natal family. It is generally considered culturally shameful to accept her back when her marriage fails or when she seeks to escape domestic violence. Partly for this reason, and partly in the interest of the children she may have had with her husband, many women endure hardship and violence in their marriage rather than seek refuge in their natal family. This unavoidable situation in which the married woman finds herself in a patriarchal society traps her in a setting in which she may easily be killed by her own husband or become victim of 'honour killing' by a member of her own family.

3.2 Cultural practices

Culturally, sub-Sahara Africa is largely homogeneous although some variations exist in the practice of specific customs. Also, since the African society is by and large patriarchal, power is vested in men who, as a result, have control over women and dominate them in all spheres of life, private and public. As a consequence of these cultural dictates, women lack autonomy and cannot therefore make independent

[40] J Mvula-Mwenda 'Property-grabbing under African customary law: repugnant to natural justice, equity and good conscience, yet a troubling reality' (2005) 37 *George Washington International Law Review* 949; WLSA (n 36 above) 77; E Stanko *Intimate intrusions: women's experiences of male violence* (1985).

decisions or access resources such as land, movable property, and money in their own right.

In some cases, culture condones wife-beating as a disciplinary measure against an 'erring' wife. Wife-assault sometimes results in death. This very controversial culture and condoned social habit, perpetuates the problem of killing in intimate settings. There are other cultural practices which are arguably harmful under human rights law and which are considered a further manifestation of the subjugation and objectification of women. Polygamy; sororate or levirate marriages; bride price; sexual cleansing; widow inheritance; labia elongation;[41] female genital mutilation (FGM);[42] and property-grabbing[43] are considered forms of violence against women and a threat to their liberty and security alongside male-child preference which is informed by the notion that male children remain in their natal family and perpetuate the family name and lineage.

These cultural practices further reinforce male dominance and the treatment of women in certain instances as 'property' that could become expendable. Women's unenviable inferior status and position is compounded by the fact that in many contexts she has to acquiesce in customary practices such as sororate, levirate, widow-inheritance, sexual cleansing, and polygamy. This appears to be the case in some countries in west, middle and east Africa. A woman who finds herself in any of these situations or who is childless (even where it is not demonstrated that the fault is from her) suffers mental anguish, low self-esteem, and blames herself. She becomes vulnerable to further abuse, including killing on suspicion of being a witch who offers her children *in vitro* to or has entered into a pact with occult forces in exchange for the art of wizardry.

Many scholars of African customary jurisprudence have argued that the institution of 'bride price' does not signify the purchase of the bride and 'cannot be regarded in the same way as the rationalistic purchase of a commodity'.[44] The reality is that it is generally understood as the latter and, in practice, it tends to promote the perception and treatment of women as merchandise traded for money or money's worth, usually stock. In some settings men argue that payment of bride price means they have 'bought' their wives. They then use this argument to justify demands for wifely obedience or even

41 K Mwenda 'Labia elongation under African customary law: a violation of women's rights?' (2006) 10 *International Journal of Human Rights* 341; M Gelfand 'Gross enlargement of the labia minora in an African female' (1973) 19 *Central African Journal of Medicine* 101; J Williams 'Labia elongation in the Shona' (1969) 15 *Central African Journal of Medicine* 165.

42 Okin (n 33 above); M Brady 'Female genital mutilation: complications and risk of HIV transmission' (1999) 13 (12) *AIDS Patient Care and Standards* 709.

43 Mvula-Mwenda (n 40 above) 1; K Mwenda 'Can secret trusts survive property-grabbing?' in KK Mwenda & DA Ailola (eds) *Frontiers of legal knowledge: business and economic law in context* (2003) 414.

44 RC Thurnwald *Black and white in East Africa* (1935), cited with approval by Elias (n 39 above) 100.

domestic violence.[45] This social attitude compromises the woman's right to make independent decisions and to exercise control over her sexuality and her reproductive capacity. After a critical study of that institution, feminist literature is unanimous that dowry or bride price is oppressive because it positions women in an oppressive institution (dowry/bride price) and is an enabler of women's vulnerability to abuse.[46]

A significant negative effect of bride price is that it entrenches the inequality between men and women. Even in the context of marriage, some women enter into it as an unequal and dependent partner who is assumed to be physically weak. Another negative effect of bride price is that in some cases it reduces the woman in the eyes of the man to an object. This objectification of women predisposes them to violence by men, including killing. This is especially so when women are objectified as 'sex pets' in pornographic and prostitution settings, as sex slaves, or as subjects of human trafficking. However, it has been argued that claims of increase vulnerability because of the payment of bride price have not always been substantiated by research[47] and that there is no necessary correlation between domestic violence and bride price.[48]

3.3 Inadequate legal, social, political, and economic protection

To a large extent, statutory and customary law inhibit women's access to certain essential resources and to public office. It also nurtures in some ways the fertile ground for social attitudes and behaviours that are oppressive to women in many settings. Land in Africa continues to be an important resource upon which the State's agricultural and subsistence-based economy depends. But it is difficult for women in some countries, particularly under customary land law tenure systems, to access land in their own right. In Swaziland, for example, a woman can access land use only through a male relative. This is not only a major contributing factor to poverty,[49] especially among rural women, it also increases women's vulnerability to violence and deprivation. Lack of control over resources by women generates a culture of economic dependence on men. This situation further exposes women to poverty and to risks of fatal assault.

45 T Bennet *Customary law in South Africa* (2004) 235; E Curran & E Bonthuys 'Customary law and domestic violence in rural South African communities' (2005) 21 *South African Journal on Human Rights* 607 617.

46 MR Cutrufelli *Women of Africa: roots of oppression* (1983); M Hay & S Stichter (eds) *African women south of the Sahara* (1984); Okin (n 33 above).

47 Bonthuys & Albertyn (n 25 above) 176.

48 L Mbatha *The content and implementation of the Recognition of Customary Marriages Act 120, 1998: a social and legal analysis* (unpublished LLM dissertation: Wits University 2006) paragraph 3.5.2 cited in Bonthuys & Albertyn (n 25 above) 176.

49 JC Mubangizi 'An African perspective on some gender-related cultural practices that violate human rights and perpetuate women's poverty' (2016) 47 *Journal of Social Sciences* 68-78.

In some cases, the law does not speak clearly when it comes to women's entitlement to land ownership, marital property, and succession.[50] Sometimes also the law leaves a lot to be desired on issues such as rape, abortion, sexual harassment in the work place, gender discrimination in recruitment and promotion, access to certain jobs and public offices, discrimination in pay, and fully paid maternity leave.[51] The legal system either ignores or does not adequately deal with certain types of killings such as intimate and 'honour' killings, or domestic violence in general.[52] The legal system appears to accept a 'defence' of custom in these cases. It thus indirectly encourages the perpetration of these extreme forms of violence against women. Establishing an adequate gender-sensitive legal environment is critical in safeguarding the rights of women, protecting them from violence, and ensuring that justice mechanisms are accessible to them and assist families whose female relatives have been killed.[53] The Banjul Declaration of the 59th ordinary session of the African Commission, in March 2017, under the theme 'Women's Rights: Our Collective Responsibility' recommends in paragraph 64 that 'States should review the measures in place, or that are being undertaken, to combat extrajudicial killings to include domestic violence and all other forms of violence that result in the death of women'.[54] The current Special Rapporteur, Agnes Callamard, recommends in her 2017 report that States should eliminate laws that support patriarchal oppression and also publish data on femicides.[55]

Since 2003, a number of African countries have taken legislative measures to address a number of gender-related issues.[56] Sierra Leone's Registration of Customary Marriage and Divorce Act 2012 and Malawi's Marriage, Divorce and Family Relations Act 2015, for example, prescribe 18 years as the minimum age for contracting any form of marriage. Additionally, Malawi's Gender Equality Act 2013 prohibits discrimination against women, outlaws sexual harassment, and prohibits harmful social, cultural or religious practices. The country's Penal Code and Domestic Violence Act 2010 criminalise sexual violence against women. Mozambique's Penal Code 2014 criminalises marital rape and removes the immunity from prosecution hitherto enjoyed by a rapist who marries his rape victim.

50 Bonthuys & Albertyn (n 25 above) 201-202.

51 As above 244-294.

52 As above 335.

53 United Nations *Strategies for confronting domestic violence: a resource manual* (New York 1993); World Health Organisation *Violence against women, family and reproductive health* (1997).

54 Available at www.achpr.org/instruments/banjul-declaration (accessed 22 September 2017).

55 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (Gender-sensitive approach to arbitrary killings)' UN Doc. A/HRC/35/23, 6 June 2017.

56 'Report of the African Human Rights Commission's Special Rapporteur on the Rights of Women in Africa: Status of Implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa', 66th Meeting of the Commission on the Status of Women, 18 March 2016, New York.

Violence against women has also come under the radar of a number of countries. Benin's Prevention and Repression of Violence against Women Act 2011 gives women protection against domestic violence, FGM, forced marriages and other traditional harmful practices against women. In Guinea Bissau and Angola, the Domestic Violence Act 2011 criminalises domestic violence as a public offence reportable to the police by anyone. Liberia's Rape Amendment Act raises the age of statutory rape to 18 years and expands the definition of rape to include sodomy rape and rape by instrumentality, thereby making rape gender-neutral so that a woman can also be criminally liable for perpetrating rape upon a man or another woman. Namibia's Combating of Domestic Violence Act 2003 broadly defines domestic violence to embrace physical, sexual, economic, verbal, emotional and psychological violence, intimidation and harassment. The Act defines rape as the intentional commission of a sexual act under coercive circumstances, and removes marriage or other relationship as a defence to a rape charge.

In 2011 Guinea Bissau passed a law banning FGM. Ghana's Criminal Code Amendment Law 2012 punishes perpetrator and accomplice of female circumcision. In 2015 The Gambia enacted a law criminalising female genital circumcision. Malawi's Deceased Estates (Wills, Inheritance and Protection) Act 2011 repeals the earlier contentious law on the subject and addresses the predicament of widows and children regarding the administration of deceased estates.

These legislative measures taken in the several countries appear to be based on the belief that fear of prosecution and imprisonment would deter some forms of violence against women. But it is doubtful that these measures in and by themselves sufficiently address the issue of extrajudicial killings of women in the context of intimate partner relations. Further, domestic violence statutes deal with only aspects of domestic violence and, arguably, problems of extrajudicial killings that are merely consequential to other forms of violence. The statutes are likely to be of little help in cases of purposive extrajudicial killings of women. In South Africa, at least, feminists argue that the law has not made the link between the law's protection of women and the court's treatment of perpetrators of gender violence. They contend that femicide is usually the tragic fate of an abused woman who has been trapped in a dangerous relationship and whom the law was unable to protect, and that the courts often treat such killings leniently.[57]

Most African countries have at least two systems of law, statutory and customary (defined in some countries as including Muslim law). Problems, especially in personal law matters, often emerge due to the co-existence and operation side by side of both systems.[58] Conflicts and

57 J Fedler *et al* 'Beyond the facelift: the legal system's need for a change of heart' in Y Park *et al* (eds) *Reclaiming women's spaces*: *new perspectives on violence against women and sheltering in South Africa* (NISAA Institute for Women's Development: Johannesburg 2000) 135.

58 C Anyangwe 'The withering away of African indigenous law and judicial system' (1998) *Zambia Law Journal, Special Edition* 46; J Stewart & A Armstrong (eds) *The legal situation of women in Southern Africa* (University of Zimbabwe: Harare 1990).

contradictions often occur between the two laws, posing a big challenge when seeking justice. In some countries, a valid marriage can be contracted either under the received law (civil marriage) or under customary law (customary marriage). A civil marriage is monogamous; a customary marriage is potentially polygamous. Under either system, marital power is exercised by the husband. In the case of a customary marriage that power is additionally exercised by the wife's in-laws.

Some African couples tend to contract two forms of marriage, one under the civil system, and another under the customary system[59] which is seen as situating them culturally and identity-wise. A dual marriage complicates matters. It impacts negatively on the rights of the woman as it makes it difficult to determine which law governs the marriage or aspects of it. Besides, the protection afforded by one type of marriage is likely to be compromised by the other. The existence of a multiple or plural legal system (statutory law, common law, different versions of customary law, and religious law) is a further complicating factor because of the existence of recognised parallel adjudicating structures. For example, in a number of West African communities the 'family meeting' or so-called 'family court' plays a critical role in the resolution of family disputes. The 'meeting' or 'court' may decree its own norms to be obeyed with sanctions in the event of transgression. The usual sanctions for transgression include denial of access to economic resources, denial of moral and spiritual support and, in extreme cases, ostracism or death. It follows that owing to their disempowered status women are unlikely to disobey their marital family and run the risk of forfeiting access to essential resources for survival or the risk of ostracism or death.[60]

Since patriarchal culture socialises men to be dominant and women to be submissive, the extrajudicial killing of a woman may be consequential to other forms of violence such as multiple or gang rape, 'rape by instrumentality' or physical assault. Criminal law regards the intentional killing of another as the most serious crime against the person because such deprivation of life violates the sanctity of human life protected by law. The penalty for murder, depending on the circumstances of the deed, may range from a long term of imprisonment to life imprisonment, and even the death sentence in States that still retain the death penalty. However, a person prosecuted for murder can be found guilty of manslaughter (culpable homicide) if he had no intention to kill or if he successfully pleads provocation. Case law shows that the murder of a woman by her intimate partner tends be treated leniently. Sentences are often light and not reflective of the gravity of the crime committed.

In the much televised South African case of *S v Oscar Pistorius,*[61] the accused was convicted of the murder of his girlfriend with whom he was living. But he got off with only six years' imprisonment, and was

59 C Himonga *et al* (eds) *African customary law* (2014) 83.

60 WLSA (n 36 above) 39.

61 Unreported. Trial began in March 2014, was concluded in 2015 but the appeal had still not been finally disposed as of July 2017.

eligible for parole after serving only three years in jail. In another South African case, S v *Shrien Dewani,*[62] the newly married wife of a British businessman, the accused, was murdered in Kayelisha Township in Cape Town by confessed killers who testified in court that they had been hired by the accused to do the job. This testimony notwithstanding, the court ruled that there was lack of positive evidence linking the accused to the murder and accordingly acquitted him. Interestingly, *Pistorius* and *Dewani* were decided by female High Court Judges. The older cases betray a similar judicial leniency.[63] In *S v Ramontoedi,*[64] the accused shot his wife in the courtroom where she had gone to seek child maintenance. The judge accepted his plea of provocation based on his wife's alleged infidelity and sentenced him to three years' correctional supervision. In *S v Arnold,*[65] the 41 year old accused who was infatuated with his 21 year old attractive wife shot and killed her and pleaded provocation. The provoking act was that the deceased bent forward displaying her bare breasts to him and indicated that she wished to return to her work as a stripper. The trial judge acquitted him on the grounds of temporary non-pathological criminal incapacity caused by severe emotional stress and provocation. In *S v di Blasi,*[66] the accused sought out his wife and shot and killed her following her decision to divorce him after he had assaulted her several times and also attempted to kill her. The lower court gave him four years, holding that the accused's criminal capacity was diminished as a result of his feelings of anger, humiliation and bitterness. The appellate court found the sentence to be inappropriate and increased the sentence to 15 years.

Courts are generally perceived, at least by women, to be insensitive when adjudicating cases involving deadly assault on women. A 2003 report sketches some of the pertinent issues:

> Women who suffer abuse at the hands of the deceased are severely disempowered by the deceased. They are fearful of the abuser, knowing he is capable of harming them at will. The sheer size of differential between the woman and her abuser and the socialisation differences between them impact on her fear of her abuser and her feelings of helplessness. All of these factors keep many women from acting in the heat of passion that typically mitigates men's sentences. Yet, the courts are only willing to understand what are typically men's responses to emotional stress and provocation. ... Women who kill their abusers in non-confrontational situations have great difficulty accessing criminal defences to murder. These findings suggest that courts do not understand women's experiences with violence and the effect of abuse on them.[67]

It is believed that in cases of that nature judges tend to convict and sentence for mere assault rather than for the very serious crime of murder. It is also believed that judges tend to refrain from passing the fully-deserved sentence against convicted males who kill their female partners presumably because judges have been socialised to believe

62 CC 15/2014) [2014] ZAWCHC 188 (8 December 2014).

63 Bronthuys & Albertyn (n 25 above) 340-341.

64 1996 WLD Case No. 199/96, unreported.

65 1985 3 SA 256 (C).

66 1996 1 SACR1 (SCA).

67 H Ludsin 'South African criminal law and battered women who kill: discussion document 2' (CSVR: Johannesburg 2003) 61 www.csvr.org.za/docs/gender/southafricancriminal2.pdf (accessed 13 October 2017).

that the man has the cultural right to chastise his female partner. Judges are also criticised for betraying 'gender bias, stereotypes of men as emotional victims of women's sexual prowess'.[68] In some countries, a man who rapes a woman is granted immunity from prosecution if he marries the rape victim. This adds to the woman's tribulations because she submits to the rape-induced marriage because of the shame and reproach of rape and has to endure the company of the man who violated her in the first place.

Some other countries still exempt rape within marriage from the ambit of the criminal law. Matrimonial rape often occurs when a man forcefully demands 'conjugal right to sex'. In some cases, refusal of sex provides an excuse for the man to assault or even kill the woman. If she declines sex and he forcibly tries to get it and she reacts by assaulting him in self-defence, killing him, if necessary, the court of law and of public opinion tend to ignore the plea of self-defence and to show her little mercy. Sometimes killing of the woman happens when the woman claims her 'conjugal right to sex' from her man. A woman who shows that she desires or enjoys sex is considered not a model wife or partner. She is called a prostitute and accused of infidelity. In some instances, she could be battered and even killed on that account.

Politically, women still do not feature very prominently in the public domain. Women have limited access to public office and limited political representation at all levels of governance. What this means is that women are still not in a position to significantly influence important legislation and State policy in their favour. Business-wise, women are also not many in the boardrooms.

It is a sociological fact that generally, women continue to have limited access to capital and economic opportunities. The economic circumstances in which a woman finds herself could result in domestic conflicts, leading to assault and even murder by her partner. Cases are known where an economically independent and assertive woman is verbally, emotionally or physically abused by her partner because the man feels that her financial independence 'disempowers' him. Such a woman is easily accused by her partner of being insolent, arrogant, disrespectful and domineering. Ironically, a woman who, career-wise and economically, is in a more powerful position than her partner, is more likely to be physically abused by him. This is done supposedly 'to put the woman in her place' and to make it clear that he is the man of the house or in the relationship. Interestingly, the collective perception of a man married to a strong woman is that he is a henpecked husband, is controlled by her, and is hanging on her apron string. This 'deflation' of the man's ego leads to insecurity and to an inferiority complex, driving him to become aggressive. Some men tend to marry down precisely for fear of 'disempowered' by a professionally and economically stronger woman. In the same way, most women tend to marry upwards because they have been socialised to view the man as the 'master' and bread-winner in the home.

68 Bonthuys & Albertyn (n 25 above) 340.

In the area of formal employment, because of gender imbalances, women are more disadvantaged than their male counterparts because they constitute, generally speaking, a minority of the workforce. Since women face multiple hurdles to formal employment, they dominate the challenging informal sector as street or market vendors. The earnings of women are generally lower than those of their male counterparts owing to the nature of the jobs that they do. These jobs offer no income security. As a result, women generally tend to be economically dependent on their partners who, invariably, seem to be in more secure employment. Problems faced by women in the labour sector include wage discrimination; access to largely low-income earning positions such as cleaners, maids, secretaries, waitresses, receptionists, and so on; non-payment of full maternity leave pay; and the unceremonious replacement of women who take maternity leave beyond a certain number of weeks.

4 CONCLUSION

Women are victims of gender based violence, including in some cases extrajudicial killings, due to several contributing factors, the overriding ones being socialisation and patriarchy. Certain cultural practices as well as the social, economic and political make-up of the African society serve to entrench the subordination of women to the power and authority of men, rendering women vulnerable to violence. The coexistence of two or more systems of law, sometimes with incompatible norms and philosophies of law, produces enormous challenges in certain instances. The justice system is not always an adequate and enabling environment that is sensitive to the protection of women against all forms of violence. Changes in attitudes and in the law would certainly improve the problem of vulnerability of women to extrajudicial killings.

Tackling this problem requires first and foremost political will on the part of African governments. It requires that men and women develop the willingness to address the problem. The key lies in educating and empowering women to be independent, to be responsible for their own lives and to take the lead in their own 'emancipation' by deconstructing narratives, customs, practices, laws and institutions that lead to the subordination of women and that facilitate violence of any kind against women. It is crucial to have the active involvement of socialisation agents (families, schools, media, faith organisations, and traditional structures) in deconstructing every harmful and socialisation narrative.

There are credible measures that governments in Africa can adopt to address the problem under consideration. These include: adopting best practices from countries that have dealt decisively with the problem; fostering a climate of non-discriminatory legal accountability for all killings; identifying and abolishing through law and other measures all harmful cultural practices; encouraging women to take the lead in the fight against gender based violence; initiating educational

and socio-economic advancement programmes designed to educate and uplift especially people in communities where this evil is prevalent.

Accompanying legislative measures should aim at strengthening existing laws on violence against women by: providing appropriate and appropriately applied penalties for perpetrators; protecting and empowering women; identifying and removing all forms of discrimination against women; amending the criminal law and procedure by removing gender bias embedded in the law; ensuring access to the courts, fairness and justice to the parties; giving families of victims effective access to counselling, restitution, reparation and other forms of just and equitable remedies. On the whole, the State and other relevant actors should undertake educational activities and programmes to prevent the perpetration of gender violence, including its extreme form, extrajudicial killing of women.

Protecting the African child in a changing climate: are our existing safeguards adequate?

*Elsabé Boshoff**

ABSTRACT: This paper sets out the ways in which children in Africa are vulnerable to the consequences of climate change, highlighting where relevant the specific vulnerability of the girl child. It identifies vulnerabilities in access to education, nutrition, the rights of migrants and refugees and the right to participate in decision-making processes. The paper considers these vulnerabilities in the context of the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter) and the Protocol to the African Charter on the Rights of Women in Africa (African Women's Rights Protocol), and also looks at specific best practices in attempting to determine the extent to which the African human rights system currently provides adequate protection to children and complies with the best interest of the child principle. It concludes by finding that the African human rights system, particularly when the African Women's Rights Protocol is read in conjunction with the Children's Charter, largely provides adequate legal protection to the African child in a climate change context, but identifies room for improvement both in the right to sustainable development and the implementation of the rights as stipulated in the respective instruments, as it relates to climate change induced vulnerability.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Protéger l'enfant africain dans un climat changeant: les moyens de protection existants sont-ils adéquats?

RÉSUMÉ: Cet article expose les façons dont les enfants en Afrique sont vulnérables aux conséquences du changement climatique en soulignant, lorsque cela est nécessaire, la vulnérabilité spécifique des filles. Il identifie les vulnérabilités dans l'accès à l'éducation, la nutrition, les droits des migrants et des réfugiés et le droit de participer aux processus de prise de décision. L'article examine ces vulnérabilités dans le contexte de la Charte africaine des droits de l'enfant et du Protocole relatif aux droits des femmes en Afrique, et examine également les meilleures pratiques spécifiques pour déterminer dans quelle mesure le système africain des droits de l'homme offre actuellement une protection adéquate aux enfants en prenant en consideration le principe de l'intérêt supérieur de l'enfant. Il conclut en constatant que le système africain des droits de l'homme, en particulier lorsque le Protocole relatif aux droits des femmes en Afrique est lu conjointement avec la Charte des enfants, fournit une protection juridique adéquate à l'enfant africain dans un contexte de changements climatiques mais identifie des posslibtités d'amélioration dans le contexte du droit au développement durable et à la mise en œuvre des droits tels que stipulés dans ces instruments respectifs, en ce qui concerne la vulnérabilité induite par le changement climatique.

KEY WORDS: African Charter on the Rights and Welfare of the Child, climate change, children, rights, Africa, best interest of the child

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CONTENT:

1 INTRODUCTION

Climate change is a phenomenon that results from increased greenhouse gasses being released through the burning of wood and fossil fuels, which results in more heat being trapped into the atmosphere.[1] The consequences include increased flooding and drought as rainfall patterns shift and become less predictable, a rise in sea levels as a result of melting ice in the polar regions as well as increased natural disasters, biodiversity destruction and spread of disease resulting from warming temperatures on land and sea. The impact of these consequences on humans include food insecurity where more erratic rainfall combined with higher or lower temperatures result in less crops being produced, water shortages as a result of increased drought, often together with flash floods and other natural disasters and a heightened risk of displacement and migration as some areas become uninhabitable.[2] Certain illnesses are also becoming more widespread as a result of a changing climate.[3] As temperatures increase, malaria is spreading into the higher and previously colder regions of East and Southern Africa.[4] The prevalence of water-borne diseases such as hepatitis E, cholera, diarrhoea and parasitic infections

1 The Inter-governmental Panel on Climate Change, the most authoritative body on climate science in its Fifth Assessment Report found that it is beyond reasonable doubt that climate change is taking place and that there is a 95per cent chance that it is as a result of human activities. IPCC 'Climate Change 2014: Synthesis Report' (2014) *Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change*.

2 JJ Romm 'Present and future climate realities for children' in UNICEF (ed) *The challenge of climate change: children on the front line* (2014) 6; R Hanna & P Oliva 'Implications of climate change for children in developing countries' in The Future of Children (ed) (2016) *Children and climate change* http://www.futureofchildren.org/publications/journals/journal_details/index.xml?journalid=86 (accessed 25 September 2016) 115; I Niang *et al* 'Africa' in IPCC Working Group II (ed) (2014) *Impacts, adaptation, and vulnerability. Part B: Regional Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* 1237-1238.

3 United Nations Development Programme 'Resource Guide on Gender and Climate Change' (2009) http://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/resource-guide-on-gender-and-climate-change.html (accessed 12 October 2017).

4 United Nations Women Watch 'Fact Sheet: Women, Gender Equality and Climate Change' (2009) 4; Climate and Development Knowledge Network (CDKN) 'The IPCC's Fifth Assessment Report: What's in it for Africa?' (2014) 11 http://cdkn.org/resource/highlights-africa-ar5/?loclang=en_gb (accessed 10 October 2016).

is also increased by the increased strain that flooding, natural disasters and rising sea levels place on water and sewage systems.

Migration or forced displacement, while it has many causes (including war, conflicts, lack of opportunities and natural disasters) can also result from climate change, in conjunction with other causes. Indications are that the 'total numbers of climate-related migrants by the middle of the century' may be between 200 million to over one billion, which even at the lower side of the spectrum, constitutes a vast migration of people.[5] The most obvious form of climate-induced migration or displacement is where rising sea levels claim low-lying areas, forcing people to move inland. In other cases climate change may be one of a number of factors resulting in migration, for example increased variability in rainfall in areas that are already drought prone may lead to conflict over limited resources resulting in displacement of communities. Yet in such cases climate change is still an important catalyst for the displacement and must thus be counted among its causes. Many of these effects are already present and measurable on the African continent.[6]

Together with other parts of the developing world, Sub-Saharan Africa is particularly prone to suffer the consequences of climate change because of its position on and close to the equator, where the most drastic changes in weather patterns are projected to take place.[7] Other causes of its particular vulnerability include the high levels of poverty and under-development and high dependence on natural resources for livelihoods.[8] These factors impact on the resilience of communities and make it harder to 'bounce back' when disaster strikes because of a lack of resources in reserve.[9] It is in this context that this article argues states have an obligation to take steps to protect people against the worst consequences of climate change, through mitigation and increasing resilience through adaptation and disaster risk management.

Children have specific vulnerabilities to climate change because of the direct threat that these risks pose to their survival, development and mental and physical well-being.[10] Children are also reliant on adults for security and are physically, psychologically and emotionally immature,

5 International Organisation for Migration 'Migration and climate change' (2008) 31 *Migration Research Series* 11.

6 African Union 'Draft African Union Strategy on Climate Change' (2014) 1, 8; CDKN (n 4 above) 1, 11.

7 MIT Technology Review 'Climate Change: Why the Tropical Poor Will Suffer Most' 17 June 2015 at https://www.technologyreview.com/s/538586/climate-change-why-the-tropical-poor-will-suffer-most/ (accessed 12 October 2017).

8 UN Women Watch (n 4 above) 1.

9 United Nations Environmental Programme (UNEP) 'Guidebook on national legislation for adaptation to climate change' (2011) 5; ANCEN (Experts Group of African Ministerial Conference on Environment) 'Guidebook – Addressing climate change challenges in Africa: a practical guide towards sustainable development' (2011) 3.

10 CC Venton 'Why we need a child-centred approach to adaptation' in UNICEF (ed) *The challenge of climate change: children on the front line* (2014) 32; J Guillemot & J Burgess 'Children rights at risk' in *The challenge of climate change: children on the front line* (2014) 32; J Currie & O Deschênes 'Children and climate change: introducing

with repercussions of negative impacts often manifesting over the course of a lifetime.[11] In the African context children make up more than 40 per cent of the population.[12] Furthermore, for physical and socially constructed reasons, the impact of climate change differs between girl children and boy children. For all of these reasons it is necessary to look specifically at the needs of children in a changing climate and the obligations that regional international law places on states to protect them.

This article considers the particular vulnerability of the African child to a changing climate and examines the extent to which the existing rights of children, and where relevant rights of girl children specifically, are protected particularly in the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol), address these vulnerabilities. At the same time, it considers some examples of international best practice to determine the extent to which the African human rights system can learn from this, in order to better protect the interests of the child on a continent bearing the brunt of a changing climate. The aim of this article, while firstly to gain a better understanding of the way in which the African child is particularly at risk of climate change, is mainly normative, and sets out to identify the challenges or gaps that exist in the rights themselves and in the implementation of the rights of children and considers some of the ways in which this may be improved, to ensure that the principle of the best interest of the child is complied with and the vulnerabilities of children, particularly girl children, are addressed.

2 CLIMATE CHANGE AND THE AFRICAN CHILD

Intersectionality theory expounds that the lived experiences of people is the result of many factors, and that it is not possible to gain a full understanding of the situation of specific people without consideration of their intersecting identities. McGibben and McPherson explain it as follows:

> Identities, sometimes referred to as identity markers, intersect to compound oppression. Age, culture, (dis)ability, ethnicity, gender, immigrant status, race, sexual orientation, social class, and spirituality all denote social location, a powerful determinant of one's access to the social and material necessities of life.[13]

the issue' in *The Future of Children* (ed) (2016) Children and Climate change http://www.futureofchildren.org/publications/journals/journal_details/index.xml?journalid=86 (accessed 25 September 2016) 3, 4.

11 UNICEF UK 'No place to call home: Protecting children's rights when the changing climate forces them to flee' 4.

12 World Bank 'Population Ages 0-14 (per cent of total) data for 2016 indicates that 42per cent of the population in Sub-Saharan Africa were between ages 0 to 14 years. http://data.worldbank.org/indicator/SP.POP.0014.TO.ZS?locations=ZG (accessed 12 October 2017).

13 E McGibben & C McPherson 'Applying Intersectionality & Complexity Theory to Address the Social Determinants of Women's Health' (2011) 61.

Children in Africa come from different cultural, religious, ethnic and social backgrounds among many other identity markers, which means that they have many-varied lived experiences, which may compound or decrease their vulnerability to climate change. The category of 'children' also includes everyone below the age of 18 years, which means that the category includes persons with vastly different capacities, e.g. a three-year-old and fifteen-year-old would have completely different lived experiences and capacities to cope with climate stressors. Despite this, and as identified above, the category of 'children' is still a useful delimitation, because what children share is a physical, psychological and emotional immaturity as well as the fact that they are at the beginning of their lives, with many years of their lives ahead, which makes their collective vulnerability of significant concern. In the case of girl children, their particular vulnerability to the effects of climate change result from the intersectionality of their vulnerabilities based on sex, age and in the African context, often also religious and socio-economic circumstances.

A first instance in which children are particularly affected as a result of a changing climate, is the right to education. In rural communities where families depend on subsistence farming or another form of reliance on natural resources for sustenance, the consequences of variations in rainfall patterns, soil salinisation and shrinking water resources may be dire. The Inter-governmental Panel on Climate Change in its fifth Assessment Report of 2014 indicate that major crops in Africa, such as maize, millet and sorghum, are highly sensitive to changes in temperature, and crop losses across Sub-Saharan Africa could average 22 per cent, and up to 30 per cent in South Africa by the year 2050.[14]

Apart from food security which affects all people, in Sub-Saharan Africa currently agriculture accounts for '65 percent of Africa's labour force'.[15] This may result in children being taken out of school (a) because parents no longer have the means to pay for education, (b) to work on the family farm in an attempt to increase crop output or to find alternative employment as a means of supplementing the family income, (c) to take over the household and food production duties from parents who may migrate to the cities in search of better employment opportunities or (d) as water and fuel becomes less accessible, to perform water and fuel sourcing duties from further locations.[16] Most

14 CDKN (n 4 above) 20.

15 World Bank 'Fact Sheet: The World Bank and agriculture in Africa' http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/0,,contentMDK:21935583~pagePK:146736~piPK:146830~theSitePK:258644,00.html (accessed 12 October 2017).

16 Children in a Changing Climate Coalition 'Child-centred adaptation: Realising children's rights in a changing climate' (2015) 24; OC Ruppel 'Climate change and human vulnerability in Africa' in OC Ruppel & K Ruppel-Schlichting (eds) *Environmental law and policy in Namibia* 284; PLAN International 'We stand as one: children, young people and climate change' (2015) 28-31; UNICEF (n 11 above) 13.

of these responsibilities are more likely to fall on girl children than boy children.[17] This kind of trend has the effect of 'perpetuating the cycle of disempowerment' experienced by girl children, who are then less likely to complete their education and find better employment opportunities.[18] Moreover, even if girls are able to balance the duties of searching for resources further from home with education, they 'become more vulnerable to injuries from carrying heavy loads long distances, and also face increased risk of sexual harassment and assault' on the way to and from remote resource locations.[19]

Secondly, children of both sexes are impacted by lack of nutrition because of food insecurity, which leads to stunting in growth and impacts on the mental development of children, particularly where undernutrition takes place within the first two years of the child's life, in which case the consequences may be 'irreversible, with life-long implications for physical, cognitive and reproductive health'.[20] UNICEF presents data which indicates that '[m]alnutrition represents a major danger to children's lives, contributing to nearly half of all deaths in children under five'.[21] Also in this regard girl children are often worse affected, with female health declining more during food shortages as compared to male health.[22]

Thirdly, children are more vulnerable to the hardships associated with forced migration, which include not only physical strain and deprivation of socio-economic rights but also emotional suffering and the possibility of being separated from their family, all of which may have repercussions for their development and future well-being.

> Displaced children and their families lose much more than shelter when forced out of an area. They lose access to health care, education, livelihoods, social services and networks, religious services, political autonomy, and the security and identity associated with a sense of home. Children that become separated from their parents and other family members are more likely to experience violence, exploitation or abuse. Long-term implications of psychological and physical childhood trauma can extend to impacts on their health, education and economic well-being over their lifetime.[23]

Migration or forced displacement as a result of climate change can take various forms. Children and particularly adolescents may migrate from rural areas into the cities, looking for better opportunities, parents may

[17] Children in a changing climate & Plan International 'Weathering the Storm: Girls and Climate change" 1; UN Women Watch (n 8 above) 2.

[18] UN Women Watch (n 8 above) 2.

[19] As above.

[20] KL Ebi 'Childhood health risks of climate change' in UNICEF (ed) The challenge of climate change: Children on the front line (2014) 8; JJ Romm 'Present and future climate realities for children' in UNICEF (ed) The challenge of climate change: Children on the front line (2014) 6; UNICEF East Asia and Pacific Regional Office (EAPRO) 'Children and Climate Change: The impacts of climate change on nutrition and migration affecting children in Indonesia' (2011).

[21] Unicef Data 'Malnutrition' http://data.unicef.org/topic/nutrition/malnutrition/ (accessed 7 October 2017).

[22] UN Women Watch (n 8 above) 2.

[23] UNICEF (n 11 above) 4.

leave for the cities, often leaving their children with extended family (where it has been shown they are at a heightened risk of abuse) [24] or in the most extreme cases migration can be across national borders. This can range from smaller displacements, such as the 90 000 people displaced by floods in the Zambezi River Valley during 2008, to more than 2.6 million people displaced by the drying up of large parts of Lake Chad.[25] Whether because of internal displacements, often the result of a natural disaster, or beyond their borders, people in camps for internally displaced persons or refugees face further violations. In such camps there is often no provision for separate facilities for women and children, 'who may put off going to the toilet until it is dark' in order to have some privacy, which then exposes them to 'the risk of sexual violence'.[26] Other challenges related to privacy relate to the 'ability and willingness' of mothers to breastfeed in crowded camp conditions, the absence of which leads to an increased risk of 'malnutrition and infectious disease in infants'. Another challenge is the lack of priority given to education in these camps, with 'only half of child refugees globally [...] enrolled in primary schools globally'.[27] Finally, in the chaos resulting from migration, more particularly following natural disasters, there is a risk of children being separated from their families, which heightens the risk of sexual and other abuse.[28] In cross-border migration it is particularly adolescent girls who are at risk of sexual violence and exploitation, 'including at borders when corrupt government officials or smugglers may demand sex in exchange for onward passage'.[29]

As discussed briefly above, climate induced migration is closely linked to conflict, both as a cause and a consequence. There is some evidence that 'the shrinking of Lake Chad to a tenth of its former size' is the result of climate change in conjunction with over-use, and the resultant migration of 2.6 million people, including 1.5 million children, looking for alternative water and food sources 'contributed to the pressures triggering the conflict in the region'.[30] The conflict in Darfur has also been characterised by the previous UN Secretary General as a 'climate' conflict.[31] Such migration and conflict resulting from climatic pressures lead to increased risk of violence against

[24] UNESCAP 'Regional Stakeholders' Consultation and Planning on the Commercial Sexual Exploitation of Children and Child Sex Abuse in the Pacific' (2007).

[25] CDKN (n 14 above) 11.

[26] UNICEF (n 11 above) 17.

[27] UNICEF (n 11 above) 11; UNICEF 'Uprooted: the growing crisis for refugee and migrant children' (2016).

[28] Children in a Changing Climate Coalition (n 16 above) 24; Ruppel (n 16 above) 284.

[29] DJJ O'Connell 'Telling tales: child migration and child trafficking: stories of trafficking obscure the realities for migrant children' (2013) 37 *Child Abuse & Neglect* 1069-1079.

[30] UNICEF West and Central Africa Regional Office 'Children on the move, children left behind' (2016) www.unicef.org/media/files/Children_on_the_Move_Children_Left_Behind.pdf (accessed 12 October 2017); UNICEF (n 11 above) 18.

[31] Ban Ki Moon 'A climate culprit In Darfur' in *Washington Post* 16 June 2007 http://www.washingtonpost.com/wp-dyn/content/article/2007/06/15/AR2007061501857.html (accessed 12 October 2017).

children, labour and sexual exploitation which has the biggest impact on girl children, who may be 'forced into marriage, domestic servitude, cheap labour, and sexual exploitation'.[32] Not just during migration and conflict, but also generally '[i]n times of hardship, child marriage is also likely to increase' as families try to ease the burden on their limited resources. [33]

Finally, with regard to the right to participation, children are often overlooked in discussions about how best to address climate change challenges. This is because children are often regarded as unable to grasp the problem, or unable to contribute in a constructive and meaningful way to its solution. However, numerous case studies, among others conducted by UNICEF, have proven the valuable input that can be provided by children, once they are empowered with the necessary knowledge.[34] Girl children, because of their particular vulnerability, also have a very specific perspective to contribute to discussions on how to mitigate and adapt to a changing climate. But because they are often slotted under the heading of either 'children' or 'women', their specific needs resulting from their intersecting identities are often overlooked. Girl children are also the group least likely to participate in decision-making processes, either because of socialisation which diminishes the worth of their opinions or because of lack of relevant child-friendly information.[35]

While lack of access to education, malnutrition, sexual exploitation and the other impacts set out above are all complex issues with multiple causes and the extent to which climate change is in a 'complex interaction … with other social, economic, political and cultural drivers' makes it hard to quantify the exact causal relationship, scientists have repeatedly established that there is a link between climate change and increases in the violations set out above.[36] For this reason it is necessary in the quest to finding holistic solutions, to recognise the role played by climate change in contributing to and exacerbating these violations.

Having considered some of the impacts, including gendered impacts arising from physical or socially constructed differences between the sexes, of climate change for African children, the next section will attempt to ascertain the extent to which there is protection in the African human rights system against these human rights violations perpetrated against children in a climate change context.

32 UNICEF (n 11 above) 17; Children in a Changing Climate Coalition (n 16 above) 1; UNODC 'Current Status of victim service providers and criminal justice actors in India on Anti human Trafficking' (2013) http://www.unodc.org/documents/southasia//reports/Human_Trafficking-10-05-13.pdf.

33 UNICEF (n 11 above) 17; Children in a Changing Climate Coalition (n 16 above) 1.

34 UNICEF (n 11 above) 22.

35 Children in a Changing Climate Coalition (n 16 above) 2; UN Women Watch (n 8 above) 2.

36 UNICEF (n 11 above) 3, 5; IPCC (n 2 above); CDKN (n 15 above) 24. See also J Barnett & WN Adger 'Climate change, human security and violent conflict' (2007) 26 *Political Geography* 639-655; S Caney 'Climate change, human rights and moral thresholds' in Gartner *et al Climate ethics* (2010) 163-177.

3 PROTECTION OF THE CHILD UNDER THE AFRICAN HUMAN RIGHTS SYSTEM

Under the African human rights system there are particularly two instruments which are of significance in the protection of the rights of children, namely, the African Children's Rights Charter and in the case of the girl child, the African Women's Rights Protocol. These two instruments are undergirded by the rights protected in the African Charter on Human and Peoples' Rights (African Charter), but, for the current purposes, reliance will be placed on the former two instruments, insofar as they provide more extensive protection of the rights of the child. However, where there is no relevant provision on a specific right in either of these instruments, regard will be had to the African Charter itself. This section will deal with the vulnerabilities set out above under specific but interrelated themes of rights, starting with the rights/principles at the core of the African Children's Rights Charter and then looking at rights related to a clean environment, education, migration and access to information and participation, in an attempt to ascertain the responsibilities which this places on African states.

3.1 Basic principles in the African Children's Rights Charter

There are a number of principles which are set out at the start of the African Children's Rights Charter, which form the bedrock of the other rights protected in the Charter, but which are also rights in themselves.[37] The first in the right to non-discrimination, which is set out in article 3 of the Children's Charter and provides that every child is entitled to the enjoyment of the rights in this Charter, irrespective of a number of grounds of discrimination, including ethnic group, colour, sex, language and social origin.[38] The right not to be discriminated against is a right which applies both by itself, and in conjunction with other rights. As a right in itself, the prohibition of discrimination on the ground of sex, for example, means that there may not be discrimination against girl children. However, while formal equality may be easy to

[37] These 'four pillars' were originally identified by the United Nations Committee on the Rights of the Child as forming the basis of the United Nations Convention on the Rights of the Child, but they equally apply to the African Children's Charter.

[38] The right to non-discrimination and equality is also a general principle of human rights and can similarly be found in article 2 of the African Charter and article 2 of the African Women's Rights Protocol, with slight variances as to the grounds of discrimination which are prohibited, the latter obviously focussed on sex and gender. Various provisions under the African Women's Rights Protocol have also been interpreted as having a character of transformative equality, which goes beyond formal and substantive equality in order to change the values and 'underlying structure' of a society. See S Fredman 'Beyond the dichotomy of formal and substantive equality: towards new definitions of equal rights' in I Boerefijn *et al* (eds) *Temporary special measures: accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) 111.

achieve, substantive and transformative equality may be more elusive, since the root causes of inequality is often deep-seated in the values of society.[39] To the extent that this principle must be understood in the context of other rights, it will be further discussed below.

The second principle is the inherent right to life, which under the African Children's Rights Charter is protected under article 5 dealing with survival and development. The right to life is relevant in the context of nutrition, as identified above, where food security is often threatened by climate induced circumstances and also relates to the right to health protected under article 14 of the African Children's Rights Charter, specifically subsections (c) and (d) which relate to nutrition. The right to life is also relevant in the context of conflict, and will be discussed as such below. The further two bedrock principles are both found in article 5 of the African Children's Rights Charter and are 'the best interest of the child', which must be the primary consideration in all decisions related to the child and the right of the child to participate and express their own views, to the full extent of their capabilities. The right to express their views will be returned to below in the section related to participation.

The best interest of the child is an interesting principle which has often been used as a standard to measure the protection of children's rights, particularly, where there are no specific rights dealing with a specific aspect, as in the current case, climate change.[40] In terms of UN Committee on the Rights of the Child General Comment 14 on the right of the child to have his or her best interests taken as a primary consideration (GC14), the best interest of the child must be understood as a substantive right of all children, as an interpretive principle when read together with other rights and as a rule of procedure. Furthermore, in the interpretation of the best interest of the child the state must ensure that the dignity of all children is respected (a negative duty) as well as ensure the 'holistic development of every child', which implies a positive duty.[41] In an attempt to formulate the best interest of the child principle clearly, Mauras states that the best interest implies that all policies and distribution of resources must 'be used in a progressive

39 Fredman (n 38 above).

40 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on behalf of Children of Nubian Descent in Kenya v Kenya*, Communication 2/2009 of the African Committee on the Rights and Welfare of the Child, delivered on 22 March 2011; Decision on the communication *Centre for Human Rights (University of Pretoria) and La Recontre Africaine pour la defense des droits de l'homme (Senegal) v Senegal* Decision 3/Com/001/2012 on 15 April 2014 at the 23rd Ordinary Session of the Children's Committee; JB Kelly 'The best interests of the child a concept in search of meaning' (1997) 35 *Family and Conciliation Courts Review* 377; M Freeman 'Article 3 the best interest of the child' in A Alen *et al* (2007) *A Commentary on the United Nations Convention on the Rights of the Child* 1-2.

41 United Nations Committee on the Rights of the Child (CRC) General Comment 14 'On the right of the child to have his or her best interests taken as a primary consideration' adopted on 29 May 2013 at the 62nd session of the CRC (GC14) para 42.

way' to fulfil the best interest of the child 'to the maximum extent possible'.[42] Thus for example, based on the already manifesting and projected ramifications of climate change, the fact that all states to a greater or lesser extent contribute to climate change,[43] and the positive duty implied by the best interest of the child, states may have a legal obligation under the African Children's Rights Charter to mitigate climate change. When the best interest of the child principle is read in conjunction or as interpretative principle in the context of other rights in the African Children's Rights Charter and the African Women's Rights Protocol, it may provide a strong legal basis for climate change mitigation and adaptation duties on states.

There are also international and regional soft law instruments which, while not enforceable, have some strength in encouraging states to adopt certain patterns of behaviour. In this regard, the current development policy at the level of the African Union, Agenda 2063, has two aspirations that are of relevance here: the first Aspiration is to build 'a prosperous Africa based on inclusive growth and sustainable development', which includes addressing climate change by 'prioritizing adaptation in all our actions, drawing upon skills of diverse disciplines' and Aspiration six which recognises the significance of the youth and the need to put children first.[44] While these two Aspirations as such do not speak to each other directly, the fact that both climate change and the best interest of the child are central to its implementation, means that states in adopting the Agenda 2063 have taken note of their responsibilities in this regard. Nonetheless, there is no clear recognition of the interrelatedness of the best interest of the child with sustainable development and the holistic approach that is required in this regard. The AU has also adopted a Draft Strategy on Climate Change in 2014 in order to provide a framework for Member States to address 'the challenges and opportunities associated with climate change in the continent' through poverty alleviation and sustainable development.[45] Finally, with the adoption of the Paris Agreement in December 2015, states made the strongest human rights commitment yet in respect of climate change, through affirming that 'Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity'. While none of these soft law instruments and guidelines are binding on states, they show a certain consensus and commitment on the side of states to address issues of common concern in the manner in which they set out,

42 M Mauras 'Public policies and child rights: entering the third decade of the Convention on the Rights of the Child' (2011) 633 *Annals* 53.

43 As recognised in the reference to 'common but differentiated duties' in the Paris Agreement of 2015, which has to date been ratified by 45 African States.

44 African Union *Agenda 2063* (2014) 3, 4, 9.

45 African Union (n 44 above) 16.

and support an interpretation of existing obligations which include these commitments.

3.2 Right to development and clean environment

Interestingly, the African Children's Rights Charter nowhere provides for environmental rights for children. The closest it comes to this is in article 14 where it provides that every child shall have the right to enjoy the best attainable state of physical, mental and spiritual health, which may imply that they must have a healthy environment which is not detrimental to their health. While there is reference to 'development' in article 5, this is not development in the same sense as understood under the African Charter. In article 5 of the African Children's Rights Charter development solely relates to the development *of the child*, which is completely different from the peoples' right to development provided in article 22 of the African Charter. It is also dissimilar from article 24 of the African Charter which provides for a general satisfactory environment favourable to peoples' development. It is not clear why the drafters of the African Children's Rights Charter did not have regard to the environmental human rights of children, or whether perhaps they thought that it was sufficiently covered by the African Charter. However, they clearly did not conceive of the far-reaching consequences of climate change, along with other environmental degradation currently experienced which is detrimental to the wellbeing of children,[46] in drafting this instrument.

In stark contrast, the African Women's Rights Protocol does provide for the right of women to live in a healthy and sustainable environment and provides extensively for their rights to participation in management and preservation, development of renewable energy and other technologies, the development of women's indigenous knowledge systems and management and disposal of domestic and toxic waste.[47] In addition, the African Women's Rights Protocol provides for the right of women to sustainable development, including participation in development of policies and access to and control over resources.[48] In this regard, while the girl child is not protected from environmental degradation under the African Children's Rights Charter, the African Women's Rights Protocol, which applies to all women, irrespective of their age (to the extent applicable), goes some way to providing a basis for the protection of rights threatened by climate change, for example where they relate to plans and policies to mitigate climate change through adoption of renewable energy sources and national development strategies.

Ironically, this thus means that under the African regional human rights system, the rights of girls to a healthy environment and

46 Including the destruction of biodiversity, pollution of land, sea and air with plastic particles and other waste and the extinction of species.

47 Article 18(1) of the African Women's Rights Protocol.

48 Article 19, particularly 19(b) and (c), of the African Women's Rights Protocol.

sustainable development are relatively better protected than boys. It is, however, beyond the scope of this article to delve into the meaning of the right to development and the right to a satisfactory environment as provided for under the African Charter, as well as its implications for the climate change responsibilities of States, and more research should be done in this regard. Still, it remains unfortunate that the African Children's Rights Charter is silent on this important aspect of the wellbeing of children. A slightly round-about way to argue for this right under the African Children's Rights Charter is to rely on the principle of the best interest of the child, noting that clearly the negative consequences of climate change, particularly for children, are such that States have duties arising from this principle to ensure that children are protected against these consequences.

3.3 Access to education

The right to education is one of the rights which has become one of the most uncontroversial rights in the human rights repertoire. As such, it is extensively provided for and protected in the African Children's Rights Charter, in the African Charter and the African Women's Rights Protocol. The African Children's Rights Charter provides in article 11 that every child has the right to education, and that this places a duty on the state in subsection (3) to (a) provide free and compulsory basic education; (b) progressively make secondary education free; (d) take measures to encourage regular attendance at schools and the reduction in drop-out rates; (e) take special measures in respect of female children to ensure equal access to education. Read as a whole, this section thus provides most of the elements which are needed in respect of children's right to education, also including a focus on girls' education.

By providing that primary education must be free and compulsory, the African Children's Rights Charter provides a distinct disincentive to parents to remove young children from school. Since it is free, their ability to access school is not dependent on having the means to do so, and being compulsory implies that there must be some kind of sanction against parents who remove their children from school. Unfortunately, similar safeguards do not exist with regard to secondary education, and while the provision for progressively making secondary education free is laudable, financial means are only one of the reasons why parents may choose to take their adolescent children out of school. Other reasons also account for parents' taking their children out of school, including that they may work for a source of income for the family, that they may take over the running of the household and resource sourcing or, in the case of girls, that they may be married to lessen the burden on the family's resources.

However, these areas that are left open by article 11(3)(b) are to some extent remedied by the provisions of (d) and (e). If read together, (d) and (e) provide for a whole range of creative actions which states should take to ensure that girl children stay in school. Article 12 of the African Women's Rights Protocol provides similarly for the elimination

of all forms of discrimination against women and guarantee of equal opportunity and access in the sphere of education and training. This relates to the need for transformative equality, identified above, where the social values and structures underlying inequality has to be addressed in order to address the problem at hand, namely, girls not going to school. Given that some of the causes (identified above) of why girl children are leaving school are related to climate change consequences, states will in this regard have to look at the environmental impacts which hinder attendance by children.

Take as an example water-sourcing duties as a reason to be taken from school, a task that is traditionally assigned to girls. This means that as part of the project of keeping girls in school, states would need to have national plans with scenario planning in place, so that the State will have a responsibility to provide people with alternatives for example better and more sustainable long-term water management and provision, possible through building of a dam, better systems of irrigation or desalination of sea water. Where projections indicate that a specific region will become so dry that it can no longer sustain human habitation there may be a need for more drastic measures such as relocating the community to another part of the country where there is water (taking into consideration the issues associated with mass migration). This is strengthened by article 15 of the African Women's Rights Protocol which provides for a duty on states to take appropriate measures to provide women with access to clean drinking water, sources of domestic fuel, land and the means of producing nutritious food as well as (b) adequate systems of supply and storage to ensure food security. A duty to have in place such a national scenario planning strategy, together with the data collection processes that it necessitates, may be one of the consequences of the best interest of the child principle, so that the state is in a position to make informed decisions and is not caught off guard by either sudden environmental upheavals or slow onset change.

A second example is early marriage entered into because the family cannot support itself. In this regard, one direct measure to be taken by the state might be to criminalise child marriages.[49] While this is a laudable and praiseworthy step, it may not eradicate the problem, or may lead families to adopt other, equally abominable courses of action, such as child inappropriate labour or child trafficking, since the root cause was not addressed. Similar strategies to those suggested above may go some way to addressing the root cause of climate change here as well.

In this regard there is thus an overlap between the right to education, the right to nutrition and food security, clean water, sexual and reproductive rights. States should adopt cross-cutting policies and approaches to development and climate change adaptation which take

[49] The African Women's Rights Protocol in any case in article 6 determines the minimum age for marriage at 18 years and the African Children's Charter in article 21(2) prohibits child marriage, stating that states should promulgate legislation to stipulate the minimum age of marriage to be 18 years.

into account the interrelated nature of the causes and effects of human rights violations.

3.4 Conflict and migration

The African Children's Rights Charter provides in article 23 for the plight of refugee children, stating that states should take all appropriate measures to ensure that a child seeking refugee status or considered a refugee in accordance with applicable international or domestic law, shall receive appropriate protection. The problem with this provision is that the international law related to refugees has not been amended to provide for climate refugees.[50] This means that persons fleeing climate induced disasters cannot claim refugee status, unless one of the traditionally accepted grounds is also present, such as conflict. The African Women's Rights Protocol, as in the case of development and environmental rights, provides more extensively for women refugees. Articles 10 and 11 provide respectively for the right to peace and protection of women in armed conflict. The right to peace includes a duty on states to take all appropriate measures to ensure increased participation of women in structures and processes for conflict prevention (which in the current context would include climate change adaptation/mitigation), in the decision-making structures to ensure physical, psychological, social and legal protection of asylum seekers, refugees, returnees and displaced persons, in particular women, and in the management of camps for such persons. Thus through increased involvement in management by women, refugee camps can be made more friendly to women and girl children in the way that they are set up, in order to minimise the risk of sexual violence and to afford privacy to mothers who are breastfeeding, thus indirectly improving the health of young children. Involving women in management of asylum seeker processes may also go some way towards addressing the issues that refugee girl children face at the borders. This is further strengthened by article 27 of the African Children's Rights Charter, which provides that states should take measures to protect children from all forms of sexual exploitation and sexual abuse and article 11 of the African Women's Rights Protocol which provides for the right to protection in armed conflict, including where women are displaced, and against sexual exploitation. Specific steps also need to be taken in terms of these provisions for children who are separated from their families during migration, particularly girl children.

Migration could further be seen as a necessary consequence of a changing climate, with which states will have to deal at a regional or sub-regional level. The African Union Peace and Security Council in February 2017 adopted a Decision on 'Free Movement of People and Goods and its Implications on Peace and Security in Africa', aimed at greater integration at a regional level. However, the Decision does not

[50] See article 1 of the Convention Governing Specific Aspects of Refugee Problems in Africa, adopted on 10 September 1969 by the African Union Assembly of Heads of State and Government. CAB/LEG/24.3.

engage with the issue of refugees and displaced persons, except in a negative sense, to the extent of underlining that measures should be put in place to ensure that migration does not result in exacerbated inequalities and challenges to peace and security.[51] It therefore does not contain a proactive initiative to aid in the movement of those who may need it the most, including climate refugees. This is in stark contrast to the New York Declaration for Refugees and Migrants and the subsequent Roadmap adopted by the United Nations in 2016, which provides for the detailed protections for refugees and migrants.[52] This Declaration clearly and explicitly addresses the concerns of children and particularly girls who are migrants or refugees. It also provides for protection for 'the human rights of all refugees and migrants, *regardless of status*' (emphasis added), which, while not directly recognising climate refugees, may at least go some way towards a wider and more inclusive definition of refugees.

UNICEF particularly calls on states 'in the absence of an international legal framework that grants legal status and protection to these vulnerable migrants – and recognising that many children will be displaced or migrate internally' to ensure that the 'humanitarian, sustainable development, climate change, migration and disaster risk reduction frameworks' that they adopt are based on children's rights and the best interest of the child is central to all decisions affecting them.[53] In this regard UNICEF identifies the best practice of the Children's Emergency Relief and Protection Act[54] in the Philippines as being ground-breaking national legislation, since it has a dual focus, on preventing displacement and in protecting the rights of children who have through necessity been displaced.[55] In order to achieve the protection of these rights, the law includes a 'child-focused Comprehensive Emergency Program that guarantees the delivery of basic needs, the establishment of evacuation centres and transitional centres for orphaned, separated and unaccompanied children, increased protection against child trafficking, exploitation and violence', as well as aiming to 'minimise the time children spend without important documentation and education', and improved data collection on affected children.[56]

3.5 Participation and access to information

Children are not just the victims of climate change induced risks, but also have an important role to play in finding solutions to the issues we

51 Ghana Business News 'AU on free movement of people and goods and its implications on peace and security in Africa' 27 February 2017, https://www.ghanabusinessnews.com/2017/02/27/au-on-free-movement-of-people-and-goods-and-its-implications-on-peace-and-security-in-africa/.

52 United Nations 'New York Declaration' http://refugeesmigrants.un.org/declaration.

53 UNICEF (n 11 above) 24.

54 Republic Act No. 10821.

55 As above.

56 As above.

face. While adults are often limited in their thinking to the short and medium term, children have displayed an ability to consider the distant future.[57] The best interest of the child also requires 'consultation with children through participatory assessments that are systematic, age-appropriate and gender-sensitive.[58] The 2030 Agenda for Sustainable Development, adopted by the United Nations High-level Political Forum on Sustainable Development in 2015, represents a commitment by world leaders to 'strive to provide children and youth with a nurturing environment for the full realization of their rights and capabilities', which, according to the Children in a Changing Climate Coalition 'is the strongest acknowledgement to date of the capacity of children to participate in the processes that shape their world'.[59] Under the African Children's Rights Charter there is also already a recognition of the agency of children, through the provision for rights *along with responsibilities*, which can only be fulfilled if children are allowed to participate.[60] Along with the non-discrimination clause in the Children's Charter, there is thus provision in the African human rights context for children to participate, also in decisions related to climate change. The concern, as already touched on above, is in the extent to which they are in practice provided with the resources, knowledge and opportunity to do so. A UNICEF project in Philippines has demonstrated that when children are equipped with the necessary skills, and have access to 'child-friendly and language-appropriate information [and] mechanisms for their meaningful participation in decision making' they are able to make meaningful contributions'.[61] Such conducive environments are not often created for children to voice their opinions in public fora.

4 CONCLUSION AND RECOMMENDATIONS

Having looked at the social and economic circumstances of children in Africa in the context of a changing climate, and considering the legal means through which the vulnerability of children in particular, and girl children specifically (created by the intersectionality of sex, age and poverty) could potentially be addressed, it is concluded that the African human rights system, particularly when the African Women's Rights Protocol is read in conjunction with the Children's Charter, largely provides adequate legal protection to the African child in a climate change context. The right to education, participation, freedom from exploitation and even rights during migration are for the most part very

57 Children in a Changing Climate Coalition (n 16 above) 2.

58 United Nations High Commissioner for Refugees (UNHCR) 'Guidelines on determining the best interests of the child' (2008) 20, 23.

59 Children in a changing climate coalition 'Child-centred adaptation: Realising children's rights in a changing climate' (2015) 11; Sustainable Development Knowledge Platform 'Transforming our world: the 2030 Agenda for Sustainable Development' https://sustainabledevelopment.un.org/post2015/transformingourworld (accessed 17 October 2016).

60 Article 31 of the African Children's Charter.

61 UNICEF (n 11 above) 7.

well covered by the African human rights system. The African Children's Rights Charter does not provide for the rights to a healthy environment and sustainable development. However, this may be remedied, at least to some extent, through reading the African Children's Rights Charter holistically, and taking into account the best interest of the child, as well as reading it in conjunction with the other regional instruments.

What is needed from states going forward from this juncture is a clear, holistic approach to implementation of their obligations towards children in the context of climate change as outlined above. From the interrelated nature of the rights considered above, it is clear that states cannot address these complex issues in isolation, with the overlap between the right to education, the right to nutrition and food security, clean water, sexual and reproductive rights being just one example. Furthermore, there is a need for states to go to the root causes of human rights challenges, including conflict and migration, food security and access to other socio-economic rights, which in the 21st century is becoming more and more related to and magnified by a changing and more unpredictable environment.

In order to address the inadequacy of current programmes and policies for implementation at the regional and national levels, there is a particular need for states to reconsider 1) policies and laws related to migration at national and regional level, as well as regional cooperation agreements, to provide for the very real challenge of climate refugees, 2) a rethinking of development policies to bring them in line with a child-centred approach and in full consciousness of the current and future challenges posed by climate change and 3) taking seriously the role of children in finding solutions to climate problems and contributing to mitigation and adaptation strategies, rather than just being victims that need protection. In order to do this, states and regional inter-governmental organisations should set up systems to track accurate data related to the impacts of climate change on children, disaggregated according to sex and age and should create the spaces for children to learn about climate change and engage with the solutions. Finally, states should take ownership of their responsibilities under the Paris Agreement which came into effect in November 2016, being the latest of the multi-lateral agreements aimed at ensuring that the global temperature rise remains below two degrees, in fulfilment of their Nationally Determined Contribution. Finally States that have not yet signed and ratified the Paris Agreement should do so in order to show their commitment to addressing this global challenge.

The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights

*Yolanda Tarisayi Chekera-Radu**

ABSTRACT: Over the last 15 years there have been concerted efforts to put in place frameworks on the protection of women's land and property rights both at the international and domestic levels. Despite the proliferation of these instruments and their supposed recognition across the African continent, the actual realisation and enjoyment of these rights by women is still scant. Systemic and systematic violations of women's rights persist. Such a state of affairs where the recognition of WLPR exists alongside violations of the protected rights points to the widely accepted fact that the realisation of WLPR cannot solely be achieved through the enactment of laws and policies that address the direct discrimination. From a legal perspective, there is need for jurisprudence that comprehensively outlines the content of rights and state obligations. In order to be fully conscious of the various limitations and challenges that exist towards the realisation of WLPR, bodies of the African human rights system have to use a substantive lens to interpret and apply equality and non-discrimination in such cases. That way the rights of women to land and property on the African continent may be guaranteed and protected.

TITRE ET RÉSUMÉ EN FRANÇAIS:

La pertinence de l'égalité réelle dans la jurisprudence du système régional africain des droits de l'homme pour les droits fonciers et de propriété des femmes

RÉSUMÉ: Au cours des 15 dernières années, des efforts concertés ont été déployés pour mettre en place des cadres nationaux et internationaux relatifs à la protection des droits fonciers et de propriété des femmes. Malgré la prolifération de ces instruments et leur supposée reconnaissance à travers le continent africain, la réalisation et la jouissance réelles de ces droits par les femmes sont encore rares. Les violations systémiques et systématiques des droits des femmes persistent. Un tel état de choses, où la reconnaissance des droits fonciers et de propriété des femmes existe en même temps que les violations des droits protégés, indique que la réalisation de ces droits ne peut être atteinte par la seule promulgation de lois et politiques traitant de la discrimination directe. D'un point de vue juridique, il y a un besoin de jurisprudence qui définit globalement le contenu des droits et des obligations de l'Etat. Afin d'être pleinement conscients des différents limites et défis existant quant à la réalisation des droits fonciers et de propriété des femmes, les organes du système africain des droits de l'homme doivent adopter une approche basée sur la réalité pour interpréter et appliquer l'égalité et la non-discrimination dans de tels cas. Ainsi, les droits fonciers et de propriété des femmes sur le continent africain pourraient être garantis et protégés.

KEYWORDS:
property, equality, women, rights, land, Africa, interdependence

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CONTENT:

1 INTRODUCTION

Of all the rights that accrue to women, the right to land and property is one of the most significant, particularly on the African continent as a larger proportion of women live in rural areas and their livelihood is closely tied to land. While the importance of land and property rights for women is recognised, a substantial number of women have not realised their rights. In this regard, this article explores the right to equality particularly as guaranteed through the equality provisions and how it has been interpreted and applied within the African regional human rights system with the view to ascertain whether the interpretation of these rights is facilitative of the realisation of women's rights to land and property.

Over the last 15 years there has been wide recognition of women's human rights under international, regional and domestic laws. To date a plethora of instruments on these rights exist. Extensive research has shown the realisation of women's rights particularly rights to land and property has positive implications for the improvement of women's lives and for development.[1] Conversely, literature has also shown that while recognition of these rights is gaining acceptance through inclusion in a number of legal documents, there is a vast disparity in the actual enjoyment of these rights in many countries.[2] In Africa this is no different.

A number of instruments in the African human rights system contain provisions that guarantee or are relevant to the protection and realisation of women's rights. In spite of these guarantees systemic violations of these rights are rampant. Underlying these violations is inequality and discrimination. One of the critical rights accruing to women that is yet to be fully realised is the right to property. A significant number of women across the continent lack secure rights to property and at the heart of these violations and non-realisation of

[1] B Agarwal *A field of one's own: gender and land rights in South Asia* (1994); LN *Fonjong Issues in women's land rights in Cameroon* (2012); H Swaminathan *Women's property rights HIV and AIDS & domestic violence: research findings from two districts in South Africa and Uganda* (2008).

[2] Open Society Foundations 'Securing women's land and property rights, a critical step to address HIV, violence, and food security' http://globalinitiative-escr.org/wp-content/uploads/2014/03/Securing-Womens-Land-Property-Rights-20140307.pdf (accessed 18 June 2017).

women's property rights lies inequality. The bodies of the African human rights system can contribute to the realisation of women's rights through development of progressive norms on the right to property for women. The development of these norms at the regional level has the potential to enhance the protection of similar rights at the domestic level.

Taking into account the indivisibility, interdependency and interrelatedness of all rights, the rights to equality and non-discrimination have a critical role to play towards the realisation and protection of women's land and property rights. As Bulto highlights, 'equality dictates the distribution of public resources for the protection and promotion of, several rights and 'other prized social goods and services to everyone at equal measure.'[3] Further, the African Commission on Human and Peoples' Rights (African Commission) has detailed the importance of equality as the basis of the enjoyment of all other rights.[4] For the interpretation of equality and its application to contribute to the realisation of women's right to property, the bodies tasked with the implementation of the various provisions must be accepting of the interdependence of rights.

The article begins with a brief overview of the development of property rights including on the African continent. The concept of indivisibility, interdependence and interrelatedness of rights and its recognition on the African system follows. Thereafter the right to equality, its development and content as applied in the international human rights system is discussed with the purpose of establishing a lens with which to view and compare the development of the right to equality in the African human rights system. The article concludes by unpacking the application of equality and non-discrimination by the African Commission.

2 THE DEVELOPMENT OF THE RIGHT TO PROPERTY

Over the years, human rights law has accumulated a number of instruments guaranteeing the right to property as a human right. The earliest formulations of this right in international human rights laws is captured under article 1(1) of the Universal Declaration of Human Rights (Universal Declaration) which provides that 'everyone has the right to own property alone as well as in association with others.'[5] The recognition of this right was without controversy and due to the controversies on the nature of the right that prevailed at the time regarding its role, functions and restrictions, the right to property was not included in the two key foundational human rights treaties of the

3 TS Bulto 'The utility of cross-cutting rights in enhancing justiciability of socio-economic rights in the African Charter on Human and Peoples' Rights' (2010) 29 *University of Tasmania Law Review* 142.

4 *Bissangou v Republic of Congo* (2006) AHRLR 80 (ACHPR 2006).

5 Universal Declaration of Human Rights.

United Nations, namely, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

After its expression in the Universal Declaration, the protection of property was mostly articulated in international instruments aimed at the protection of vulnerable people. Treaties that utilised this approach include the 1954 Convention relating to the Status of Stateless Persons[6] and the Convention on the Status of Refugees.[7] Of particular relevance to the property rights of women is the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). CEDAW does not have a specifically articulated right to property, however, several of the convention's provisions have relevance to the protection of property rights. Such provisions include articles guaranteeing rights to social security,[8] access to credit and loans,[9] and to administer property.[10]

Within the treaties of the regional African human rights system, there are several articles that have a bearing on the protection of the right to property.[11] Article 14 of the African Charter on Human and Peoples' Rights (African Charter) is the principal provision guaranteeing the right to property. The provision states that 'the right to property shall be guaranteed'. As Golay and Cismas point out, even though the provision does not specify to whom the right accrues, in light of the Charter's equality provisions in article 2 and jurisprudence of the African Commission, every individual has the right to property.[12] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) also includes a number of provisions that are of relevance to the protection of women's property rights. Such provisions include articles on the protection women's property right during marriage,[13] and at the dissolution of marriage,[14] access to land,[15] adequate housing,[16] and inheritance.[17]

In articulating the right to property and its importance, the African Commission has stated that the right to property encompasses the rights of an individual, group or people to the peaceful enjoyment of

6 UN 1954 Convention relating to the Status of Stateless Persons 360 UNTS 117 articles 13 & 14.

7 TRG van Banning *The human right to property* (2002) 49; articles 13 & 14 of the UN 1951 Convention Relating to the Status of Refugees 189 UNTS 137 (UN Refugee Convention).

8 Article 11(e), 14(c) of the African Women's Rights Protocol.

9 Article 13(b), 14(g) of the African Women's Rights Protocol.

10 Article 15(2) and 16(h) of the African Women's Rights Protocol.

11 See article 13(3) guaranteeing the rights to public property and article 21 on peoples' rights to wealth and natural resources.

12 C Golay & I Cismas 'Legal opinion: the right to property from a human rights perspective' https://ssrn.com/abstract=1635359 (accessed 15 June 2017).

13 Article 6(j) of the African Women's Rights Protocol.

14 Article 7(d) of the African Women's Rights Protocol.

15 Article 15(a) of the African Women's Rights Protocol.

16 Article 16 of the African Women's Rights Protocol.

17 Article 21 of the African Women's Rights Protocol.

property.[18] Further, the Commission has highlighted that ensuring non discrimination in the right to property requires 'measures to modify or prohibit harmful social, cultural or other practices that prevent women and other members of vulnerable and disadvantaged groups from enjoying their right to property, particularly in relation to housing and land.'[19]

As in most parts of the world however, the denial of women's land and property rights in Africa is pervasive. This is in spite of the widely accepted importance of women's control, and access to land and property to development goals. To date, systemic and systematic violations of women's land and property rights exist in many African countries in the form of statutory and customary laws, policies and practices and social norms that are widely discriminatory. These patriarchal beliefs and ideologies are deeply entrenched in the various ways through which women acquire rights to land and property.

A number of African countries have dual legal systems, with statutory law coexisting with customary or religious laws. Owing to the patriarchal beliefs as highlighted above and how a significant number of people's affairs end up being regulated through customary law the land and property rights of a large number of women have therefore been very precarious. In many instances, concerning women's land and property rights, discriminatory customary laws have tended to dominate land tenure systems, resulting in women's access to land or property being closely tied to their relationship to a man – as daughters, wives, widows and sisters. In some countries where laws have been enacted that prohibit discrimination, and constitutions guarantee equality, the application of these provisions to family and personal laws is exempted. Further, power imbalances and stereotypes within the family and home particularly around the role of women significantly pose threats to realisation of women's property rights.

As Banning points out, the right to property has linkages with a host of other rights.[20] The right to equality is one of these rights. That equality and property are closely linked cannot be doubted and there can be no question that in addition to the direct enforceability of property rights, equality jurisprudence has a critical role to play in securing women's rights to land and property. Putting this perspective forward, Bulto has propositioned that 'whenever a given socio-economic right is infringed, it usually leads to, results from or is accompanied by the violation of one or a combination of the right to equality, the right to judicial protection and the right to due process. A redress to the latter could also remedy violations of socio-economic rights.'[21] This article proceed on the same assumption that the effective

[18] African Commission on Human and Peoples' Rights 'Principles And Guidelines on the Implementation of Economic, Social And Cultural Rights In The African Charter On Human And Peoples' Rights' http://www.achpr.org/files/instruments/economic-social-cultural/achpr_instr_guide_draft_esc_rights_eng.pdf 53 (accessed 17 September 2017).

[19] Principles and Guidelines on Implementation of ESCRR (n 18 above) 55.

[20] Van Banning (n 7 above).

[21] Bulto (n 3 above) 143.

implementation of women's equality guarantees is likely to contribute to the greater protection of women's property rights.

3 THE CONCEPT OF INDIVISIBILITY, INTERDEPENDENCE AND INTERRELATEDNESS OF RIGHTS

The indirect approach of using the indivisibility, interdependency and interrelatedness of all rights has widely been accepted by scholars.[22] The principle of interdependence of rights which posits that rights are mutually reinforcing emerged as a refutal of the premise that certain categories of rights were more important than others. Traditionally, the principle was taken to mean that no right was greater in importance and in implementation. It suggests that through interpretation, the application of one right is capable of strengthening the application of another right.

Writing extensively on interdependence Scott highlights that the concept has been developed not for the sake of rights but for the sake of people entitled to the rights as the values 'related to the full development of personhood cannot be protected and nurtured in isolation.'[23] He concludes that interdependence mainly take two forms, namely, organic interdependence and related interdependence.[24] Organic interdependence makes reference to when one right forms part of another right and as a result the protection of the core right would entail protection of the other right.[25] He further distinguishes organic interdependence into logical and effectivist conception, with the former meaning that the derivative right is a more specific form of the core right while the latter meaning the effectiveness of the core right depends on the derivative right.[26] Under related interdependence two distinct rights are mutually reinforcing and therefore to protect one will indirectly result in the protection of the other.

Several authors have written on the benefits of using the indirect approach to the protection of rights, which include the experience that often rights have benefited more at all levels of human rights systems through enforcement using indirect protection.[27] Further, 'unlike the typical socio-economic rights, the cross-cutting rights to equality, judicial protection and due process guarantees have been concretely

[22] As above.

[23] C Scott 'Interdependence and permeability of human rights norms: towards a partial fusion of the International Covenants of Human Rights' (1989) 27 *Osgoode Hall Law Journal* 769.

[24] As above.

[25] As above.

[26] Scott (n 23 above) 782.

[27] L Chenwi 'Permeability of rights in the jurisprudence of the African Commission' (2014) 39 *South African Yearbook of International Law*; S Liebenberg & B Goldblatt 'The interrelationship between equality and socio-economic rights under South Africa's transfrormative Constitution' (2007) 23 *South African Journal on Human Rights* 335;

and repeatedly relied upon by the African Commission'.[28] Bulto highlights more of these advantages and states that the utility of cross cutting rights is that they are already established and undisputed rights within different systems and use of the permeability approach has the potential to reveal inherent hidden aspects of socio-economic rights.[29] As a result not only will the advantage be in the enhanced normative content of rights but the justiciability of these rights will also be enhanced.[30] The elaboration of the content of rights is quite significant as it is through this process that identification of right violations is made easier and state obligations regarding that right can be established. In *Legal Resources Foundation v Zambia*, the African Commission stressed these sentiments and stated that 'it is only to the extent that the Commission is prepared to interpret and apply the Charter that Governments would appreciate the extent of its obligations and citizens understand the scope of the rights they have under the Charter.'[31]

The African Charter in its preamble gives cognisance to the principle of indivisibility, interdependence and interrelatedness of rights provided for in the instrument. It acknowledges that the different categories of rights cannot be disassociated from each other and that the realisation of rights in one category is mutually beneficial to the realisation and enjoyment of other rights. The jurisprudence of the African Commission reflects the recognition of the interdependence of rights. It has used this approach in a number of communications filed before it. The *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (*SERAC* case), presents the Commission's classical case in the application of interdependence of rights. The Commission used the interdependence of rights to guarantee protection of the right to housing which is not specifically provided for in the Charter through an inference of its existence from the combined reading of the rights to property, health and family protection.[32] Further, the Commission derived the right to food from the right to life, the right to health and the right of all peoples to 'their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.'[33] In the same communication, the Commission

H Quane 'A further dimension to the interdependence and indivisibility of human rights?: recent developments concerning the rights of indigenous peoples' (2012) 25 *Harvard Human Rights Journal* 49; Sisay Alemahu 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 *African Human Rights Law Journal* 334.

28 Bulto (n 3 above).

29 Bulto (n 3 above) 145

30 As above.

31 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 62.

32 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (AHRLR 2001) para 63.

33 *SERAC* (n 32 above) para 64.

also found linkages between the rights to health in article 16 and the right to a general satisfactory environment in article 24.[34] In *Free Legal Assistance Group v Zaire*, the Commission also expanded on the right to health by finding that the failure to provide for basic services such as safe drinking water were a violation of this right.[35] Similarly, in the *Sudan Human Rights Organisation and Centre on Housing Rights and Evictions (COHRE) v Sudan* communication, the Commission showed its acceptance of interrelatedness of rights by referencing the jurisprudence of international law that includes the right to dignity as a component of the right to life.[36]

4 EQUALITY AND NON-DISCRIMINATION AND THEIR RELEVANCE TO WOMEN'S LAND AND PROPERTY RIGHTS

In order to appreciate the development of equality within the African human rights system it is imperative to carry out an exposition of the right to equality and non-discrimination in order to ascertain how the right is formulated, how it has developed and has been interpreted and applied at various levels. The section makes reference to equality under the United Nations human rights system and at domestic level.

A review of literature on the right to equality shows that the earliest conceptions of equality are generally traced back to Aristotle who posited the view that like should be treated as alike and unlike cases differently.[37] This view of equality known as formal equality is based on the view that fairness arises from equal treatment rendered on the basis of similarities in determined characteristics. What formal equality calls for is that laws and policies apply to everyone in the same way. In ensuring formal equality an individual's circumstances are of no relevance and as a result formal equality is said to disfavour arbitrary decision making.[38] It is worth mentioning at this point that formal equality is closely intertwined with the prohibition of direct discrimination which like formal equality also relies on comparators. It is akin to the prohibition of direct discrimination which sanctions less favourable treatment based on a prohibited ground. Formal equality and non-discrimination therefore emphasises that opportunities should not be availed on the basis of group identity but rather on merit.

34 *Sudan Human Rights Organisation and Centre on Housing Rights & Evictions (COHRE) v Sudan* (2009) AHRLR 153 (ACHPR 2009).

35 *Free Legal Assistance Group and Others v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 47.

36 *Sudan Human Rights Organisation* (n 34 above) para 146.

37 A Smith 'Equality constitutional adjudication in South Africa' (2014) 14 *African Human Rights Law Journal* 609 611; P Westen 'The empty idea of equality' (1982) 95 *Harvard Law Review* 537.

38 'The ideas of equality and non-discrimination: formal and substantive equality' http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Non-discrimination,%20Formal%20and%20Substantive%20Equality.pdf (accessed 25 June 2017).

Early formulations of this form of equality are found in international law's early conventions.

It is now widely accepted that while formal equality guarantees the same treatment for everyone, there are various intersecting factors such as sex, age, race and disability that make it difficult to attain equality even when people are treated the same way. For women, it was only recently that formal equality resulted in any gains and even then it was successful in 'eliminating explicit barriers to equal treatment'.[39] While this conceptualisation of equality in the past resulted in significant gains for women,[40] over the years the adequacy of formal equality in achieving meaningful equality has been called into question. This inadequacy of formal equality is attributed mainly with how similarity and difference are defined as well as its concern only with the form or framing of rules or laws. Formal equality it has been said: [41]

> Fails to understand the structural imbalance of power between men and women and the systemic nature of discrimination. Rightly so, it has come to be accepted that such a narrow formulation of equality creates an illusion of equality while potentially contributing to the entrenchment of inequalities for particular individuals or groups.

The problems encountered by women on the continent highlighted in the previous section attest to this. The existence of formal guarantees to equality have not done much to improve the lived experiences of a significant number of women.

The deficiencies of formal equality have spawned vast literature and scholarship acknowledging the complexities of inequality as a result of its systematic nature, and its entrenchment in social values and behaviours, the institutions, the economic systems of society.[42] In particular feminist scholarship and critique contributed vastly to how a conception of equality that is wider than formal equality can derive any meaningfulness for women. The formulation of equality as substantive equality is one of these. While there are many variations or models to substantive equality such as equality of results, equality of opportunities and the four dimensional formulation,[43] at its most basic level substantive equality recognises that equal treatment in itself does not and indeed did not guarantee equal outcomes or equality of opportunities; as a result the law should take into account relevant differences that pose disadvantage to an individual or a particular group. As opposed to the form of laws, its concern is with the actual enjoyment of a right and unmasking the factors that hinder attainment of equality in fact.

39 N Levit & RRM Verchick *Feminist legal theory* (2004) 15.

40 As above.

41 OM Fiss 'Groups and the equal protection clause' (1976) 5 *Philosophy and Public Affairs* 107.

42 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253.

43 S Fredman & B Goldblatt 'Gender equality and human rights' http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2015/goldblatt-fin.pdf?vs=1627 (accessed 18 June 2017).

While it is beyond the scope of this article to go into the different formulations of substantive equality, a substantive approach to equality delves into the individual's context in order to eliminate barriers that impinge on full realisation of equality. The concern of substantive equality is not only that laws or policies should guarantee equal treatment but it goes further into analysing that the application of laws and policies ensures equal outcomes. Fredman and Goldblatt point out that substantive equality has as its dimensions 'redressing disadvantage; countering stigma, prejudice, humiliation and violence; transforming social and institutional structures; and facilitating political participation and social inclusion.'[44] To a large degree this four dimensional approach captures the formulations of the various strands of substantive equality. Put differently, substantive equality should encompass

> equality of opportunity under the concept of 'formal equality,' meaning requiring the equal value of all; equal access to the opportunities through pro-active policy and programmatic measures and redistribution; equality of outcomes; sustaining equality of outcomes by institutional reform and creating enabling environment.[45]

By focusing on redressing disadvantage, substantive equality is achieved through recognising how power imbalances within families result in inequalities that impact access generally.[46] In this instance, the concept of direct discrimination which refers to when a practice, rule, requirement or condition is neutral on its face but impacts disproportionately upon a particular group or individual is of importance. As is the case with the relationship between formal equality and direct discrimination, substantive equality is interlinked with the concept of indirect discrimination albeit that under the four dimensional approach it is an incomplete version. Indirect discrimination sanctions the use of seemingly neutral laws and policies which have disparate outcomes. Indirect discrimination does not however 'redress disadvantage nor require institutional change.'[47]

5 THE APPLICATION OF SUBSTANTIVE EQUALITY IN INTERNATIONAL HUMAN RIGHTS SYSTEMS

There have been a number of ways in which the adoption of substantive equality has been assessed. The formulations of substantive equality mentioned above provide a lens through which to understand how substantive equality has been incorporated. This section explores how equality and non-discrimination have been adopted, interpreted and applied in the international human rights system, particularly, the ICCPR, ICESCR and CEDAW. This includes the interpretation of the

44 As above.

45 UNWomen 'Women's rights to equality: the promise of CEDAW' (2014) 24 http://asiapacific.unwomen.org/~/media/field%20office%20eseasia/docs/publications/2014/7/the%20promise%20of%20cedaw%20final%20pdf.ashx (accessed 18 June 2017).

46 Fredman and Goldblatt (n 43 above).

47 Fredman and Goldblatt (n 43 above) 8.

right to equality and non-discrimination by the bodies tasked with monitoring these treaties and the jurisprudence of these treaty bodies by looking at the decisions they have made.

While the rights to equality and non-discrimination have been expressed in general terms in the various human rights instruments, there has been growing recognition at various levels that equality should be viewed and interpreted substantively. This can be seen from a thorough comparative analysis of earlier instruments such as the Universal Declaration, the ICCPR and the ICESCR, which couched the equality guarantees in the manner mentioned above. Later treaties such as the CEDAW have evolved towards the substantive approach through provisions that go beyond requiring equal treatment between men and women. A close look at the text of the Convention reveals its adoption of different forms of equality including substantive equality. The treaty's provisions such as those on temporary special measures and those requiring states to modify social and cultural patterns are such examples of giving value to substantive equality. A further way in which international law has moved towards the substantive equality approach is through provisions that impose on states of positive obligations to respect, protect and fulfil the right.[48]

Apart from the treaty provisions, the interpretation and application of the equality and non-discrimination provisions by the various treaty bodies are particularly insightful in establishing development of the substantive approach in international law. These bodies which are mandated with interpreting the provision of the treaties they monitor have done so through General Comments or General Recommendations, communications they receive and Concluding Observations to different countries. The UN Committee on the Elimination of all forms of Discrimination against Women (CEDAW Committee) has underlined the importance of an interpretation of equality that goes beyond formal equality as a means of deconstructing underlying factors that impede on the realisation of women's rights in several of its General Recommendations. The committee has stated that equality requires that states should give attention to differences between men and women which warrant non-identical treatment in order to achieve equality that is transformative, equality of outcomes and equality of opportunities.[49] In addition to affirming substantive equality as a component of the equality guarantees, this interpretation has also informed how the Committee has interpreted the substance of various other rights and the state obligations pursuant to these rights. In addition to calling on states to guarantee formal equality in the enjoyment of several rights, General Recommendations compel states to take into account factors that impede different groups from enjoying rights on an equal footing.[50] Even though as mentioned above the equality guarantee in the ICESCR is phrased in a general manner, the UN Committee on Economic, Social and Cultural Rights (Committee on

48 Fredman and Goldblatt (n 43 above).

49 General Recommendation 25.

50 General Recommendation 24.

CESCR) has also used its General Comments to elaborate that equality as provided for in its treaty also includes substantive equality.[51] Further, the Committee has stated that in ensuring equality it is permissible for states to give different treatment where it is a measure designed to suppress factors that perpetuate discrimination.[52]

The three committees have addressed the need to take into account various factors in all spheres of life that infringe on women's rights in several concluding observations to states. In particular, the CEDAW Committee has in a number of concluding observations criticised states on placing emphasis only on formal equality.[53] In relation to redressing disadvantage it has consistently directed states to factors within the family that impede on equality.[54] The Committees have focused on the differences in power within the marriage and inheritance practices. They have in addition directed states to target measures on achieving equality to groups of vulnerable women such as women with disabilities,[55] rural women and indigenous women,[56] to deal with institutional barriers that stand in the way of equality.

The CEDAW Committee has in its decisions been to a large extent applying an interpretation of substantive equality that is in keeping with its expression of substantive equality in the various General Recommendations. Cusack argues however that the consistency of the generous substantive interpretation has varied between different categories of rights.[57] In keeping with the substantive equality interpretation requiring an acknowledgment of women's context, the CEDAW Committee has stressed the importance of taking into account women's specific needs, intersecting factors that make women vulnerable to inequality.[58] It has emphasised the importance of eliminating gender stereotypes as a means of realising de facto equality.[59] In *Kell v Canada*, the state was obliged to have taken into account the fact that the author was aboriginal and vulnerable. Similarly, in *Alyne da Silva Pimentel Teixeira v Brazil*, the Committee

51 General Comment 16.

52 General Comment 20.

53 C Buckley, A Donald *et al* (eds) *Towards convergence in international human rights law: approaches of regional and international systems* (2016) 202.

54 Concluding Observations on the initial, second and third Report of Djibouti, CEDAW Committee 28 July 2011 UNDoc CEDAW/C/DJI/CO1-3/2011, Concluding Observations on the Seventh Periodic Report of New Zealand, CEDAW Committee 27 July 2012 UNDoc CEDAW/C/NZI/CO/7(2012).

55 As above.

56 UN Committee on the Elimination of Discrimination Against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Honduras*, 10 August 2007, CEDAW/C/HON/CO/6, http://www.refworld.org/docid/46d28100d.html (accessed 14 July 2017).

57 S Cusack & L Pusey 'CEDAW and the rights to non discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 16.

58 *Kell v Canada* (26 April 2012), Communication 18/2008, UNDoc CEDAW/C/51/D/19/2008 (2012).

59 *RB v Turkey*, Communication 28/201, CEDAW Committee (12 April 2012) UNDoc CEDAW/C/51/D/28/2010 (2012).

adopted the intersectional approach which considered all factors about the author that had impeded the realisation of her right.

That the international human rights system has interpreted and applied equality and non-discrimination using a substantive lens shows what is possible in giving meaning to equality and for this reason provides a useful yardstick with which to look at this right within the African context.

6 THE APPLICATION OF EQUALITY AND NON-DISCRIMINATION IN THE AFRICAN UNION'S HUMAN RIGHTS SYSTEM

In light of the various ways outlined above that show how substantive equality has been incorporated and interpreted in international human rights systems, this section turns to the African Union's human rights system in order to establish whether there has been a recognition and acceptance of substantive equality and if so how it has been assimilated and applied. The section looks at the various instruments, processes and mechanisms that set or develop norms within the African Union's human rights system.

In the African context, the equality guarantees are expressed within the two main treaties, namely, the African Charter on Human and People's Rights (African Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol). In the African Charter, the provisions relevant to equality are found in articles 2 and 3 and 18(3). As with the earlier treaties under international law, the formulation of the guarantee to equality in article 3 is also in a general open textured manner without any expansion. Goldblatt and Fredman's have posited that the inclusion of positive duties on states to ensure equality is in accordance with substantive equality. Flowing from this argument, it could be that by virtue of the obligation in article 1 which requires states parties to the African Charter to 'undertake to adopt legislative or other measures to give effect' to rights accords with a substantive equality approach. Article 18(3) is a provision aimed at addressing discrimination against women. That the provision calls on states to 'ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions' can be viewed as a call to not only pay attention to inequalities that are overt but to take a holistic approach. As Ngwena points out,

> an intention by the drafters to give a generous interpretation to equality and non-discrimination under the African Charter can also be inferred from the fact that article 18(3) implicitly appeals to other international treaties as one of the yardsticks for determining whether the state has complied with its non-discrimination obligations.[60]

[60] C Ngwena 'Sexual health and human rights in Africa' http://www.ichrp.org/files/papers/185/140_Ngwena_Africa_2011.pdf (accessed 1 July 2017).

On the basis of this assertion he argues that the wording of article 18(3) makes it possible to allow interpretation of equality as substantive as has been done by other treaty bodies.

The African Women's Rights Protocol 'completes, develops and specifies the gender equality and non-discrimination contained in the African Charter.'[61] It contains several provisions guaranteeing the formal equality by requiring laws and practices that guarantee equal treatment between women and men. Article 8 of the African Women's Rights Protocol guarantees women and men equality before the law and equal protection of the law. The African Women's Rights Protocol, like its counterpart CEDAW, is also more expansive in the adoption of substantive equality in its provisions. The provision on elimination of discrimination in article 2 by requiring from states the effective application of the principle of equality, obliging states to 'take corrective and positive action in those areas where discrimination against women in law and in fact continues to exist', and requiring modification of social and cultural patterns of conduct of women and men accord with the conception of substantive equality. In this way the African Women's Rights Protocol acknowledges that women and men are not starting at the same point and the effect of other factors in the realisation of women's equality.

Further, the text in the provisions of the African Women's Rights Protocol have been very specific in calling on states to address imbalances fostering inequality that exist within the home and family setting. In particular article 16 addresses a number of factors that are causes of power imbalances within the family. The provisions such as article 5 calling for the elimination of cultural practises and stereotypes based on the superiority or inferiority of the different sexes, article 5(1) calling for the family education on maternity as a social function, attest to the recognition of factors that infringe on equality. In addition, other provisions such as article 9 providing for participative governance and women's governance in national politics, article 12 and article 13 obliging states to guarantee equal opportunities in education and employment resonate with the objectives of substantive equality.

Similarly, there are two bodies that have the mandate to interpret provisions of African Charter and the African Women's Rights Protocol. The African Charter makes provision for the establishment of the African Commission as a quasi-judicial body tasked with monitoring implementation of the African Charter's provisions and in article 45(3), and mandates the body with the interpretation of the Charter's provisions. On the other hand, the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) establishes the African Court on Human and Peoples' Rights (African Court) to strengthen the protective mandate of the African Commission. The jurisdiction of this court includes the interpretation and application of

61 Buckley *et al* (n 53 above) 203.

the Charter, the Protocol and any other human rights instruments ratified by states.[62] There are various processes at the disposal of these bodies through which they can elaborate on norms. Each of these processes produces standards of varying legal weight and include concluding observations and recommendations, general comments, advisory opinions. resolutions and decisions on communications. On the basis of the mandates of these bodies regarding interpretation and application of the provisions of the Charter and the African Women's Rights Protocol, the part that follows focuses on how these bodies have proceeded to interpret and apply the right to equality.

Unlike the deepened use of various means by treaty bodies in the international human rights systems, the elaboration of norms and content of rights in the African human rights system is still at a nascent stage. The African Commission has adopted only a handful of general comments and does not have a general comment that speaks exclusively to the right to equality. The approach in General Comment 2 interpreting provisions of article 4 allude to recognition on the part of the African Commission of substantive equality. The General Comment references the importance of removing impediments to health services reserved for women by addressing factors such as policies, socio-cultural attitudes and gender disparities in the attainment of equality in health care.

The African Commission is empowered by the Charter to pass resolutions.[63] Resolutions formulate and lay down principles and rules aimed at solving legal problems relating to human and peoples' rights and are generally categorised into three.[64] These are thematic resolutions, administrative resolutions and country specific resolutions. In particular, the Commission has stated that its thematic resolutions 'elaborate in greater detail specific human right themes or a particular substantive right covered in the Charter.'[65] The Commission has adopted a number of comprehensive resolutions in which it elaborates on several substantive rights.[66] However, it is yet to do the same with the right to equality.

The African Commission has also adopted a handful of guidelines but similar to the absence of a resolution on equality it does not have any guidelines that deal directly with the equality provisions in the treaties of the African Union. In its Guidelines on the Implementation of socio economic rights the Commission has however stated that

62 Articles 4 of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of the African Court on Human and Peoples' Rights.

63 Article 45 of the Charter.

64 http://www.achpr.org/resolutions/about/

65 As above.

66 231: Resolution on the right to adequate housing and protection from forced evictions, Adopted at the 52nd Ordinary Session of the African Commission on Human and Peoples' Rights held in Yamoussoukro, Côte d'Ivoire, from 9 to 22 October 2012; 234: Resolution on the Right to Nationality e African Commission on Human and Peoples' Rights, meeting at its 53rd Ordinary Session held from 9 to 23 April 2013 in Banjul, The Gambia; 375: Resolution on the Right to Life in Africa - ACHPR/Res. 375 (LX) 2017 he African Commission on Human and Peoples' Rights, meeting at its 60th Ordinary Session held in Niamey, Republic of Niger, from 8 to 22 May 2017.

'[g]uarantees of equality and non-discrimination should be interpreted, to the greatest extent possible.'[67] In formulating effective equality in the enjoyment of socio economic rights, the Commission has included the hallmarks of substantive equality by obliging states to pay attention to vulnerable groups and the factors that impede their enjoyment of rights on an equal basis. Further, the Commission clearly states that the right to equality encompasses the adoption of special measures 'in order to reduce or suppress conditions that perpetuate discrimination and to realise substantive equality.'[68] States are also required to take into account all patterns of inequality such as those based on sex, religion and ethnicity in measures aimed at ensuring equality.

The African Commission's concluding observations and recommendations to different states allow a glimpse of the body's interpretation of equality. The utility of concluding observations lie in the recommendations that the Commission gives to states on how to implement the provisions of the Charter or the obligations of states in relation to the rights in the African Union's treaties. The concluding observations to many African states have consistently included key components of a substantive equality approach. For instance, the Commission's observations and recommendations have highlighted that even in the presence of measures protecting the rights of women there are structural factors such as partriarchal cultures resulting in inequality which require attention in order to ensure women's actual enjoyment of the right to equality.[69]

Not only do these observations and recommendations recognise the need to consider the several factors that hamper the enjoyment of equality between different groups, the Commission has consistently, in keeping with substantive equality, commended or called upon states to implement measures that level the playing field between men and women and are aimed at ensuring equality. The Commission has on several occasions commended states on the implementation of provisional measures such as affirmative action in various spheres or called upon states to implement such measures.[70] The concluding observations of the Commission have also addressed themselves to

67 Principles and Guidelines on the Implementation of ESCR (n 18 above) para 31.

68 Principles and Guidelines on the Implementation of ESCR (n 18 above) paras 31 & 34.

69 Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights. 55th Ordinary Session, held from 28 April to 12 May 2014, in Luanda, Angola, and adopted at its 17th Extra-Ordinary Session, held from 19 to 28 February 2015, in Banjul, The Gambia.

70 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995 – 2013) considered during its 56th Ordinary Session, held from 21 April – 7 May 2015 in Banjul, The Gambia and adopted 57th Ordinary Session held from 04 to 18 November, 2015, in Banjul, Republic of The Gambia; Concluding Observations and Recommendations on the Consolidated 2nd to 10th Periodic Report of the United Republic of Tanzania adopted at the 43rd Ordinary Session of the African Commission on Human and Peoples' Rights held from 7 to 22 May 2008, Ezulwini, Kingdom of Swaziland

other aspects of substantive equality such as the dismantling of gender inequalities and power disparities inherent within the family.[71]

To date, there is a dearth on jurisprudence on women's human rights within the African human rights system which makes it nearly impossible to assess the extent to which substantive equality has been interpreted in relation to women. Both the Commission and the Court have hardly dealt with communications on women's human rights. However, the bodies have been occasioned with the opportunity to deal with the right to equality. Predominantly the jurisprudence of the African Commission has favoured the formal approach to equality. Several communications have consistently referred to equality as requiring sameness in treatment. In *Zimbabwe Lawyers for Human Rights v Zimbabwe*, the Commission stated that equality at its most fundamental level 'is a principle under which each individual is subject to the same laws, with no individual or groups having special legal privileges.' In the communication the Commission does not go any further than this in defining equality. Similarly, in *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa (on behalf of Andrew Barclay Meldrum) v Zimbabwe*, the Commission reiterates the above definition of equality and further explains that equality in Article 3(1) means that 'the right to equality before the law does not refer to the content of legislation, but rather exclusively to its enforcement.'[72] In *Purohit and Moore v the Gambia*, the Commission stressed on the importance of article 3 as guaranteeing fair and just treatment of individuals within the legal system of a country.

In *Egyptian Initiative for Personal Rights and Interights v Egypt*, a case in which the complainants were all women and alleged an infringement of their equality right, the Commission similarly based it's decision on violation of equality by largely using the formal equality lens. Once again the Commission relied on its interpretation of equality espoused in the *Zimababwe Lawyers for Human Rights* decision which calls for sameness in the application of the law. While the Commission acknowledged that the state has an affirmative duty to prohibit discrimination,[73] the decision does not go further to elaborate what the positive duty entails an exercise which perhaps might have resulted in the development of the Commission's substantive equality.

In *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia*, the Commission persisted on a formal approach and pronounced that the guarantee in article 3 is

[71] Concluding Observations and Recommendations on the Initial Periodic Report of the Republic of Liberia on the Implementation of the African Charter on Human and Peoples' Rights considered at its 55th Ordinary Session, held from 28 April to 12 May 2014, in Luanda, Angola, and adopted at its 17th Extra-Ordinary Session, held from 19 to 28 February 2015, in Banjul, The Gambia.

[72] *Zimbabwe Lawyers for Human Rights & Institute for Human Rights and Development (on behalf of Andrew Meldrum) v Zimbabwe,* Communication 294/2004, 26th Annual Activity Report.

[73] *Egyptian Initiative for Personal Rights and Interights v Egypt* (2006) AHRLR 94 (ACHPR 2006 para 175

'accorded to all persons in analogous situations in an equal manner and measure.'[74] Grounding its enquiry in the prohibition on discrimination, the Commission focused itself to an enquiry on direct discrimination which like formal equality relies on the use of a comparator as opposed to indirect discrimination. An indirect discrimination enquiry would have enquired into whether a law, policy or action that is seemingly neutral results in disproportionate impact on a particular group.

The *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* did not deal with violations of the equality provisions of the Charter. However, it is one of the cases that displays aspects of a substantive approach to equality through the view it took on special measures. In response to state allegations that 'special treatment in favour of the Endorois might be perceived as being discriminatory,' the Commission established that in certain cases 'positive discrimination or affirmative action' is not discriminatory when employed for the purposes of helping to redress imbalance.[75]

The African Court is a relatively recent addition to the bodies of the African human rights system established 'to complement and reinforce the functions of the African Commission.'[76] As a result of having in existence for a short period of time the Court has not had much of an opportunity to deal with cases that develop interpretation of the equality provisions.

While the jurisprudence of the African human rights system that shows a recognition of substantive equality has been limited it is worth mentioning that the Charter in articles 60 and 61 allows the Commission to be guided by international law and there have been communications in which the Commission has made reference to the jurisprudence of other bodies. In *Purohit*, the African Commission based on the similarities between article 13(1) of the African Charter and article 25 of the ICCPR endorsed the interpretation afforded to article 25 by the Human Rights Committee.[77] While General Comment on article 25 does not relate explicitly to substantive equality, the value of the approach leaves room for the Commission to be inspired to develop its own jurisprudence on the basis of some of the progressive norms and standards developed by the other treaty bodies. On this basis it is hoped that in future when the treaty bodies are occasioned to deal with communications relating to women's property rights they will do so taking into account progressive developments that have taken place in other jurisdictions when using interdependence of rights.

74 *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Federal Republic of Ethiopia* para 142.

75 *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 196.

76 http://www.african-court.org/en/

77 *Purohit and Moore v the Gambia* (2003) AHRLR 96 (ACHPR 2003).

7 CONCLUSION

Systemic and systematic violations of women's land and property rights exist in many African countries in the form of statutory and customary laws, policies and practices and social norms that are widely discriminatory. These patriarchal beliefs and ideologies are deeply entrenched in the various ways through which women acquire rights to land and property. Power imbalances and stereotypes within the family and home particularly around the role of women significantly pose threats to realisation of women's property rights. It is against this backdrop that the African human rights system needs to develop jurisprudence on WLPR based on substantive equality. Given that the jurisprudence of the African human rights system that shows recognition of substantive equality has been limited, there is room for the development of African jurisprudence drawing some of the progressive norms and standards developed by the other treaty bodies.

Practices and challenges in implementing women's right to political participation under the African Women's Rights Protocol in Zimbabwe

Ellen Farisayi Zvobgo and Cowen Dziva***

ABSTRACT: The African Women's Rights Protocol in article 9 affirms the equal participation of women in political and decision-making processes. This article largely relies on literature to examine the domestic effect of this provision in Zimbabwe, following the ratification of the African Women's Rights Protocol in 2008. Accordingly, this article explores the importance of article 9, deciphering the significance thereof. It also examines the adequacy of legal, policy and institutional practices, and the persistent challenges to women participation in public life. Guided by article 9 of the Protocol, Zimbabwe made considerable strides in ensuring women's political participation. While significant outcomes have been noted, women's participation is in most cases below the 50 per cent set by article 9. This underperformance emanates from the fact that most legal and institutional measures aimed at ensuring women participation are limited in scope, not effectively disseminated and insufficiently executed due to limited resources and political will. Besides, women continue to face persistent forms of gender based violence, poverty, socio-cultural and institutional barriers, which limit their political participation. This article recommends political and electoral reforms including the change of electoral system to proportional representation, introduction of mandatory political party and national gender quotas, levelling of the political playing field, and engaging in innovative and widespread research, lobbying and advocacy for equal women participation in public life.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Pratiques et défis dans la mise en œuvre du droit des femmes à participer à la vie publique au Zimbabwé aux termes du Protocole relatif aux droits des femmes en Afrique

RÉSUMÉ: L'article 9 du Protocole relatif aux droits des femmes en Afrique garantit la participation égale des femmes à la vie politique et à la prise de décisions. La présente réflexion s'appuie largement sur la doctrine pour examiner l'effet de cette disposition en droit interne zimbabwéen suite à la ratification du Protocole en 2008. Par conséquent, la réflexion explore l'importance de l'article 9, en analysant son sens. Elle examine également l'adéquation des pratiques juridiques, politiques et institutionnelles ainsi que les défis qui persistent quant à la participation des femmes à la vie publique. En s'inspirant des dispositions de l'article 9 du Protocole, le Zimbabwé a fait des progrès considérables en vue de garantir la participation politique

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des femmes. Bien que des résultats significatifs aient été enregistrés, la participation des femmes est, dans la plupart des cas, inférieure à la norme de 50% fixée par l'article 9. Cette sous-performance provient du fait que la plupart des mesures juridiques et institutionnelles visant à garantir la participation des femmes sont limitées et ne sont pas efficacement diffusées en raison de ressources limitées et de volonté politique insuffisante. D'ailleurs, les femmes continuent de faire face à des formes persistantes de violence sexiste, de pauvreté, d'obstacles socioculturels et institutionnels, qui limitent leur participation politique. Cette réflexion recommande des réformes politiques et électorales, y compris le changement du système électoral en vigueur au mode de représentation proportionnelle, l'introduction de partis politiques obligatoires et de quotas pour les femmes au niveau national, le nivellement du terrain politique ainsi que la recherche, le lobbying et le plaidoyer en faveur de la participation égale des femmes à la vie publique.

KEY WORDS: Protocol to the African Charter on the Rights of Women in Africa, Maputo Protocol, decision-making, women, political participation, barriers, gender, equality

CONTENT:

1 INTRODUCTION AND BACKGROUND

The equal representation and participation of women in public life gained impetus in the second half of the 20th century. This advance resulted from democratisation and development processes, worldwide, and the increasing emphasis on non-discrimination, justice and inclusiveness after the creation of the United Nations (UN). Indeed, a democratic society puts value and worth on all human beings' contribution to matters shaping their lives and the development and wellbeing of society at all levels.[1]

The quest for gender equality and non-discrimination is expressed in several UN human rights[2] and development[3] frameworks. Within the African region, a number of frameworks[4] speak to gender equality, including the African Charter on Human and Peoples' Rights (African Charter), and the Protocol to the African Charter on Human and

1 UNDP *Zimbabwe Human Development Report 2000: Governance* (Nat print: Harare 2000).

2 See art 21(1) of the Universal Declaration of Human Rights (1948); articles 3 and 25 of the International Covenant on Civil and Political Rights (1966); and articles 2 and 7 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW 1979).

3 For development strategies see the Sustainable Development Goals 5.5 (SDGs) 2015-2030, which succeeds the Millennium Development Goals (MDGs) 2000-2015.

4 See art 4(l) of the Constitutive Act of the AU; AU Gender Policy; Solemn Declaration on Equality in Africa; Agenda 2063; Commission on the Status of Women 59th and 60th Sessions (2015, 2016); and declaration of 2010-2020 as the African Women's Decade.

People's Rights on the Rights of Women in Africa (African Women's Rights Protocol).

Specifically, the African Charter was developed for the purposes of promoting and protecting human rights in Africa.[5] Although the Charter was designed to guarantee the rights of both women and men,[6] women's rights, as such, are specifically mentioned in only a few provisions.[7] This normative inadequacy[8] prompted the adoption of the landmark African Women's Rights Protocol on 11 July 2003. The Protocol entered into force on 25 November 2005, after securing ratifications by the required number of 15 African Union (AU) member states.[9] The African Women's Rights Protocol is a comprehensive framework that recognises several rights of women at the generic and specific levels in Africa. For these reasons, the Protocol is hailed as the most inventive and exciting development in women rights protection since the AU formation as it lays down essential human rights standards for African women.[10] A closer look at the Protocol shows the extent to which the AU recognises, reaffirms, or guarantees existing rights under UN human rights systems.[11]

Article 9 of the African Women's Rights Protocol, which calls for equal representation of women in political and decision-making processes, is the focus of this article. The process to achieve 50-50 representation of women and men in institutions of power includes affirmative action, enabling national legislation and other necessary measures.[12] The equal representation of women and men in political and decision-making institutions is crucial for consolidation of democracy. For democracy to be sustainable, it has to allow for the inclusion and participation of every citizen to represent their concerns and interests in matters shaping their lives. In a way, article 9 confirms that women are equal human beings, and emphasises the need to promote, protect and enforce their political rights.

The call by article 9 is important for African countries, including Zimbabwe, where women's participation in public life has been limited before ratification of the Protocol in 2008. Since independence in 1980,

5 F Ouguergouz *The African Charter on Human and Peoples' Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 432.

6 See Preamble of African Charter.

7 See art 18 of the African Charter.

8 See Preamble to the Protocol; See also F Banda 'Brazing a trail: The African Protocol on Women's Rights comes into force' (2006) 50 *Journal of African Law* 72; F Viljoen *International human rights law in Africa* (2007) 529.

9 Article 29(1) of the African Women's Rights Protocol.

10 E Durojaye & LN Murungi 'The African Women's Protocol and sexual rights' (2014) 18 *International Journal of Human Rights* 893; B Kombo, R Sow & FJ Mohamed (eds) *A journey to equality: 10 years of the Protocol on the Rights of Women in Africa, Equality Now* (2013); VO Ayeni (ed) *The impact of the African Charter and the African Women's Rights Protocol in selected African states: Zimbabwe* (2016) 281-296.

11 See F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington & Lee Journal of Civil Rights & Social Justice* 11.

12 See article 9(1) of the African Women's Rights Protocol.

women in Zimbabwe remained largely tucked away and confined to domestic roles, and were not provided with opportunities and resources to be represented and competitively participate in public life. By the year 2000, women comprised only 1 per cent of the positions in key political and decision-making institutions.[13] In Parliament, female representation ranged between 8 and 14 per cent in the period between 1980 and 2008.[14] In the judiciary, women comprised only five of the 26 judges of the High Court by 2000.[15] Women's representation was also low in local governance, cabinet, the Senate and appointed decision-making bodies, including in civil service and parastatals.

The ratification of the Protocol in 2008 was expected to improve women representation in key political and decision-making institutions in Zimbabwe. Indeed, women's representation improved significantly in political and decision-making processes. This improvement was a result of the concerted efforts to implement the Protocol through constitutional and policy reforms, and other endeavours by state and non-state actors. However, this article notes that women are yet to enjoy *equal* participation in public life even with efforts to implement article 9 of the Protocol. In most cases, statistics in Zimbabwe show women comprising around 30 per cent, but that is still below the desired 50-50 representation. Notably, there continues to be few women managers, clerks and mayors in local government even after ratification of the Protocol.[16] In various government ministries, including the Ministry of Women Affairs, Gender and Community Development, women comprise 30 per cent or less of senior managers.[17]

Similarly, the numbers of party candidates and elected women parliamentarians and councillors have been decreasing. After Zimbabwe's 2013 elections, the number of elected women fell from 34 to 26[18] for Parliament, and from 19 per cent to 16 per cent[19] for local authorities. Additionally, the number of women who contested seats as National Assembly candidates fell from 105 in 2008 to 90 in 2013.[20] Similarly, limited numbers of women participate in electoral processes and mainstream politics as voters and political party supporters. Zimbabwe remains lowly ranked with regards to women representation

13 UNIFEM *Biennial Report: Progress of the World's Women* (2000).

14 Gender Links *SADC Gender Protocol Barometer 2013 Zimbabwe* (Gender Links: Johannesburg 2015); R Gaidzanwa 'Gender, Women and Electoral Politics in Zimbabwe' (Electoral Institute of Southern Africa (EISA) Publications: Johannesburg 2004) http://www.eisa.org.za (Accessed on 10 June 2017); C Dziva *et al* 'No easy walk through primary elections for rural women in Zimbabwe' (2013) 13 *Journal of Humanities and Social Science* 6 50-57.

15 UNDP (n 1 above).

16 M Zanhi 'Is there political will to translate it into reality?' (Legal Resources Foundation: Bulawayo 2013).

17 Gender Links *SADC Gender Protocol Barometer 2015 Zimbabwe* (Gender Links: Johannesburg 2015) 8.

18 Gender Links (n 14 above) 37.

19 Gender Links (as above).

20 Gender Links (as above) 36.

in appointed offices, including in Cabinet.[21] These statistics speak volumes about the impediments that women continue to face in wrestling for elected and appointed party and government positions.

Previous attempts to evaluate the domestic impact of African Women's Rights Protocol have tended to focus on the Protocol as a whole.[22] These studies hail the Protocol's declaration on socio-economic and political participation only in passing, without an in-depth analysis of the extent at which specific provisions of the Protocol have been implemented at the national level.[23] This study discusses the importance and practices for implementing article 9 of the Protocol, and the persisting hindrances to women's participation in public life in Zimbabwe. Additionally, the article offers measures that Zimbabwe and other state parties to the Protocol can take to ensure equal representation and participation of women in the public sphere.

Although the article focuses on Zimbabwe, other African countries with similar contexts may find the article helpful. It is anticipated that state parties, civil society, and key institutions for human rights advancements within the AU, notably the African Commission, and Solidarity for African Women's Rights Coalition, the African Women's Development and Communications Network, may find this article strategic in their quest to ensure women's political rights.

Chronologically this contribution starts with this introduction and background section, followed by a discussion on the importance of article 9 of the African Women's Rights Protocol. Thereafter, the article analyses the practices employed by Zimbabwe in implementing article 9 of the Protocol. Afterwards, the article discusses some persisting obstacles to women's political participation and representation in decision-making. Lastly, the article summarises its findings and proffers suggestions for equal participation and representation of women.

Methodologically, this article adopts a qualitative methodology as informed by historical and descriptive designs. The article heavily relies on literature review of books, journals, reports, newspaper articles, and opinions of seasoned women politicians and individuals within civil society organisations advancing women's rights in Zimbabwe.

2 CONCEPT AND IMPORTANCE OF ARTICLE 9 OF THE WOMEN'S RIGHTS PROTOCOL

Article 9 of the African Women's Rights Protocol speaks of the fundamental elements of participative democracy at public level, in the following terms:

> 1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their

[21] Gender Links (as above).

[22] Kombo *et al* (n 10 above); Ayeni (n 10 above) 281-296.

[23] Kombo *et al* (as above).

countries through affirmative action, enabling national legislation and other measures to ensure that:

a) women participate without any discrimination in all elections;

b) women are represented equally at all levels with men in all electoral processes;

c) women are equal partners with men at all levels of development and implementation of State policies and development programmes.

2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

Article 9 provides for the equal (50-50) representation of women in political and decision-making institutions. The requirement of equal participation in political life should ensure for equal women participation without discrimination at all levels of development, decision-making and electoral processes. For state parties to achieve equal representation of women in politics and decision-making processes, they are supposed to take positive action through affirmative action, enabling legislation and other measures. Put differently, article 9 dwells more on the processes and is silent on the outcomes of these processes. Outcomes in this case would mean equal representation of men and women in Parliaments and different institutions of a country.

The equal representation and participation of women in political and decision-making improves governance. Women are believed to be naturally caring, kinder and more altruistic as compared to men. Honour *et al*'s study on India noted that female members of parliament had a more caring and nurturing style of leadership, which is further defined as 'interactive' when compared to men who operate with a 'transactional', command-and-control approach.[24] With their motherly touch, women dilute or totally change the political culture of men in law and policy reform, and allocate crucial resources to the needy in society. Nzomo states that 'it is now generally accepted that women constitute a key national resource, whose ideas, creative solutions and concern for cohesiveness of the social fabric can help change the quality of life and society at large'.[25] With these attributes, women may bring a different set of values, which is important in creating a more caring, pluralist and compassionate society.[26]

The other argument for women participation is based on varied interests of men and women. Men and women are somehow different, hence the need for separate representation.[27] As Shvedova noted, 'the majority of governing institutions are dominated by men who further

[24] T Honour J Barry & S Palnitkar 'The quota innovation: gender and Indian politics: experience and prospects' (1999) 18 *Equal Opportunities International* 7 1-16.

[25] M Nzomo 'Women in politics and public decision-making' in U Himmelstrand (eds) *African perspectives on development* (2003).

[26] J Squires & M Wiekham-Jones *Women in Parliament: a comparative analysis* Equal Opportunities Commission (2001) 6.

[27] D Dahlerup 'Using quotas to increase women's political representation' in J Ballington & A Karam (eds) *Women in Parliament: beyond numbers* (2005) 94; CON Moser *Gender planning and development: theory, practice and training* (1993).

their own interests. Male-dominated political institutions of government do not promote women or women's issues'.[28] Unless women are represented in legislative and decision bodies, their interests may not be articulated and may therefore suffer from policy neglect.[29] Even though there are limited empirical studies to prove that male politicians always exclude women concerns, and that female politicians always prioritise women's issues, it can be submitted that a mixed parliament, cabinet, and other decision-making bodies are poised to be fair and to transform the lives of all groups of people in society.

Similarly, gender-balanced political and decision-making bodies tend to address more of the concerns that exclusively or disproportionately affect disadvantaged groups of the society. Lovenduski and Karam are of the opinion that the 'presence of female decision-makers greatly influences the outcome of issues debated.'[30] Govender was quoted by Karam to have stated that "with more women in politics, the gun culture will be eliminated from the political agendas and certain ideals such as politics as a service to humanity and creating a qualitative difference will be reinstated".[31] Inclusion of women in local governance, parliament and cabinet can therefore be an effective starting point for reducing conflicts, gender based violence, and for effective representation of women's needs, interests and priorities.

Furthermore, the process of participative democracy infuses leadership and political skills into women. This has the capacity to produce more women leaders who are ready for higher responsibilities. The more women practice leadership and decision-making roles, including in settings outside government such as the workplace and, community affairs, the more effective women become in articulating political views and demands at higher levels. In addition, women's active participation in political life often brings a sense of ownership to decisions and deliberations reached by politically inclusive institutions. As a disadvantaged group in society, women become empowered as they develop the capacity to share problems, experiences and propose solutions on matters affecting them. As Smith stated, developing negotiating skills and an ability to cooperate are central to the process of women's empowerment and ultimately national development. [32]

All things considered, women participation and representation in public life is vital for democratic transition or consolidation. In its true sense, democracy entails a fair and reflective political system, which is representative of men and women in democratic institutions and processes. As equal human beings, women must be afforded the chance to participate at the same level with men in matters shaping their lives.

[28] N Shvedova 'Obstacles to women's participation in Parliament' in J Ballington & A Karam (eds) *Women in Parliament: beyond numbers* (2005) 20.

[29] N Chowdhury 'Women in politics, empowerment' (1994) 1 *A Journal of Women for Women* 21-42; KP Panday 'Representation without participation: quotas for women in Bangladesh' (2008) 29 *International Political Science Review* 489.

[30] J Lovenduski & A Karam *Women in parliament: making a difference* (2000).

[31] J Ballington & A Karam (ed) *Women in politics: beyond numbers* (2005).

[32] BC Smith *Good governance and development* (2007).

In several African countries, including Zimbabwe,[33] women constitute 50 per cent of the population, meaning their full representation in corridors of power and decision-making guarantees fairness, justice[34] and represents a functional and sustainable democracy. Indeed, liberal feminists generally locate the uniqueness of men and women in their capacity for rationality.[35] Representative democracy demands that political and decision-making institutions and structures are composed and representative of men and women. Expectedly, gender balanced decision-making institutions and structures are poised to be efficient, effective and responsive to the concerns and perspectives of all segments of the society.

3 PRACTICES FOR IMPLEMENTING ARTICLE 9 IN ZIMBABWE

3.1 Constitutional reform

Since independence in 1980, Zimbabwe was governed by the Lancaster House Constitution of 1979. This Lancaster House Constitution had a limited Bill of Rights, which failed to adequately provide for women's participation in public life.[36] At one point, Jessie Majome, a legislator in Zimbabwe, described the Lancaster Constitution as one of the worst constitutions in the world, due to its failure to provide for equality and to protect women rights and needs.[37] Amid numerous calls by feminists for a new Constitution, Zimbabwe renewed the process of writing a people-driven constitution, which was finally adopted in 2013. This was an opportunity to incorporate the African Women's Rights Protocol into domestic law. However, the full incorporation of the African Women's Rights Protocol into the Constitution was limited by Zimbabwe's dualist approach to the implementation of international treaties. This approach entails that international treaties ratified or acceded to by Zimbabwe do not become self-executing upon ratification or accession, but must first be domesticated through parliamentary approval and be incorporated into domestic laws through an Act of Parliament before they become binding.[38]

33 Zimbabwe National Statistics Agency (ZimStats) *2012 Census: preliminary report* (2012) 1.

34 J Squires 'Quotas for women: fair representation?' in J Lovenduski, & N Pippa (eds) *Women in politics* (1996) 12.

35 R Tong *Feminist thought: a comprehensive introduction* (2009).

36 M Makonese 'Women's rights and gender equality in the new Zimbabwean Constitution: the role of civil society in implementation and compliance' in CM Fombad (ed) *The implementation of modern African Constitutions: challenges and prospects* (2016) 156-176.

37 M Zungura & EV Nyemba 'The implications of the quota system in promoting gender equality in Zimbabwean politics' (2013) 3 *International Journal of Humanities and Social Science 2*.

38 See section 327(2) of the 2013 of the Constitution of Zimbabwe.

Nevertheless, the 2013 Constitution endeavours to incorporate provisions of the African Women's Rights Protocol. Unlike the Lancaster Constitution, the 2013 Constitution includes an expanded Declaration of Rights that explicitly guarantees equal human rights for women and men, including socio-economic and cultural rights, and civil, political and electoral rights. Under section 80, the Constitution affirms women's right to participate fully in political, social and economic affairs. Specifically, section 80(2) of the Constitution directs the state to take measures to achieve the progressive realisation of women's economic, social, and political rights. A cohort of civil liberties provided under the Constitution includes the right to vote, freedom of assembly, expression, and association. These liberties are crucial for the effective realisation of women's equal political participation.

The Constitution requires the state to progressively ensure gender balance in elective and appointive body members.[39] Specifically, section 17(b) mandates the state to take the necessary measures, including legislative measures, to ensure that 'both genders are equally represented in all institutions and agencies of government at every level; and women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this constitution or any act of parliament'. In this provision, the Constitution goes further than the wording of article 9 of the African Women's Rights Protocol. Section 17(b) does not only provide for equal participation of men and women in political and decision-making processes, but goes further to obligate the state to ensure that there is equal representation in different governmental bodies, Commission and elective positions. The Constitution of Zimbabwe should therefore be applauded for ensuring equal participation of men and women.

The section of the Constitution further provides for national institutions to ensure that women have equal access to resources such as land. Under section 17(2), the state is directed to 'rectify gender discrimination and imbalances resulting from the past practices and policies'. Clearly, in this respect the Constitution also goes beyond the Protocol be extending beyond processes stipulated in the Protocol. This move goes a long way towards ensuring gender parity outcomes in national institutions. Indeed, national institutions re-constituted after 2013, including the Public Service Commission, the Zimbabwe Gender Commission (ZGC), the Zimbabwe Human Rights Commission (ZHRC), and the Local Government Board achieved gender balanced Commissioners.[40] In addition, the ZGC and the Zimbabwe Electoral Commission (ZEC) have women chairpersons.[41] Similarly, the

39 See sections 17 and 104 of the Constitution of Zimbabwe.

40 Gender Links (n 14 above) 36.

41 'Gender Commission Appointed' *The Herald* 30 June 2015.

representation of women in public service improved significantly, to reach 31 per cent in 2014.[42]

Quotas are one of the special measures to improve women representation under article 9 of the Protocol. The Constitution introduced quotas to guarantee women representation in Senate and Parliament under section 120[43] and 124, respectively.[44] Specifically, section 120(2)(b) stipulates that elections of senators to be conducted under a party-list system of proportional representation 'in which male and female candidates are listed alternately, every list being headed by a female candidate.' Similarly, section 124(1)[45] provides for 'an additional sixty women members, six from each of the provinces into which Zimbabwe is divided, elected through a system of proportional representation based on the votes cast for candidates representing political parties in a general election for constituency members in the provinces'. The introduction of constitutional quotas has the effect of improving numerical equality of men and women National Assembly. All the countries that have achieved or exceeded 30 per cent representation of women in Southern Africa – Lesotho (58 per cent), Mozambique (35, 6 per cent), South Africa (40 per cent), Tanzania (34 per cent) and Namibia (42 per cent) have some form of quota.[46] In Zimbabwe, the introduction of constitutional quotas increased women representation from 14.29 per cent in 2008 to 32 per cent in 2013 (Parliament), and from 24.2 per cent to 48 per cent (Senate).[47] With the introduction of this constitutional quota, Zimbabwe improved on the Inter Parliamentarian Union (IPU) World Classification of women in national parliaments: from 90 out of 190 countries in 2012 to 27 out of 190 after the 2013 elections.[48] This improvement is commendable even though it remains below the 50-50 appeal of African Women's Rights Protocol.

In appointing Ministers and Cabinet, the President of Zimbabwe is guided by considerations of gender balance.[49] With section 104(4) of the Constitution requiring gender balance, leaders are constantly reminded of this need in all appointments. In a way, inclusion of a provision on gender balance has given impetus for advocacy in cases where political leaders have reneged in ensuring gender balance in their appointments. In 2013, feminists and scholars made headlines accusing the President of Zimbabwe for appointing a male-dominated Cabinet with only three women out of the 26 Ministers, arguing that

42 First Report of the Portfolio Committee on Women Affairs, Gender and Community Development on Ministry of Women Affairs, Gender and Community Development's Programmes, Activities and Challenges and Gender Mainstreaming in Government Line Ministries, Parliament of Zimbabwe, September 2014.

43 Section 120(2)(a) of the Constitution of Zimbabwe.

44 Section 124 of the Constitution of Zimbabwe.

45 See Section 124 of the Constitution of Zimbabwe.

46 Gender Links (n 14 above) 38.

47 Gender Links (as above).

48 Inter-Parliamentary Union 'Women in National Parliaments' 2013 http://www.ipu.org/wmn-e/arc/classif011213.htm (accessed 11 June 2017).

49 See section 104(4) of the Constitution of Zimbabwe.

this position is against section 17 of the Constitution.[50] Using section 17 and 104[51]of the Constitution as the basis of their argument, feminists and other scholars denounced this move by the President as a mere lack of political will for constitutionalism. Persistent calls by activists contributed to numerous subsequent Cabinet reshuffles, which saw an improvement in women representation from three in 2013,[52] to four female Ministers as of September 2017.[53]

Similarly, President Robert Mugabe rejected the proposed boards for state-owned Zimbabwe Mining Development Corporation, the Minerals Marketing Corporation of Zimbabwe, and Marange Resources in 2015 on the basis of it being not gender balanced in violation of section 17 of the Constitution and article 9 of the Protocol.[54]

3.2 National policy reforms

The National Gender Policy (2013-2017) is the key policy with regard to women participation in politics and decision-making processes in Zimbabwe. It is noteworthy that the Policy mentions the African Women's Rights Protocol on several occasions. In line with the Protocol, the AU Gender Policy and the African Women's Decade, the Policy calls for the 'inclusion and active participation of women in politics and decision-making processes'.[55] The closest the Policy mirrors article 9 of the African Women's Rights Protocol is when it sets out women's participation in politics and decision-making as one of the eight priority areas.[56] Above all, the Policy recognises women as equal partners in socio-economic and political development, and calls for their full participation in public life. One set activity under the Policy's

[50] B Dube & C Dziva 'The appointment of 2013 Cabinet Ministers in Zimbabwe: a lost opportunity for gender parity in decision-making positions' (2014) 5 *International Journal of Politics and Good Governance* 1.

[51] Section 104(4) of the Constitution of Zimbabwe states that '[i]n appointing Ministers and Deputy Ministers, the President must be guided by considerations of ... gender balance'.

[52] The 3 women ministers were: Olivia Muchena, Higher and Tertiary Education, Science and Technology Development; Oppah Muchinguri, Minister of Women Affairs, Gender and Community Development, and Sithembiso Nyoni, Minister of Small and Medium Enterprises and Co- operatives.

[53] The 4 women ministers after the reshuffling in 2015 are: Prisca Mupfumira, Ministry of Public Service Labour and Social Services; Nyasha Chikwinya, Ministry of Women's Affairs, Gender and Community Development, Oppah Muchinguri, Ministry of Environment Water and Climate, and Sithembiso Nyoni, Minister of Small and Medium Enterprises and Co- operatives.

[54] 'Outrage over Cabinet gender bias' *The Independent* 20-26 September 2013; 'President Mugabe appoints new Cabinet' 10 September 2013 http://www.herald.co.zw/breaking-news-president-mugabe-set-to-announcecabinet/ (accessed 20 June 2017); 'Mugabe excuses of gender bias lame' *The Independent*, 27 September to 3 October 2013.

[55] The National Gender Policy (2013-2017) (Ministry of Women Affairs, Gender and Community Development: Harare 2013) www.women.gov.zw/downloads?download=3:2013-national-gender-policy (accessed 20 June 2017).

[56] National Gender Policy (n 55 above).

implementation strategy is to track the progress made on the participation of women in decision-making and leadership positions.[57]

Policies in place for women empowerment include the Girl's and Young Women's Empowerment Framework (2014), Economic Empowerment Policy[58] and the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim-Asset)[59] policy. Specifically, the Girl's and Young Women's Empowerment Framework[60] was launched to guide stakeholders in implementing empowerment measures and eliminating all forms of discrimination and harmful practices against girls and young women. The framework recognises that empowering girls and young women contributes to their development, and to the future economic and political development of the nation. Women's empowerment and independence ultimately expands women's freedom to participate in politics and decision-making institutions.

Affirmative action practices have also been used to improve women's access to productive resources, capital, employment, and affordable and quality education. In the Public Service Commission affirmative action measures have engendered and improved women representation and participation in policy formulation and implementation within the government. Resultantly, the Public Service Commission has achieved a 30 per cent representation of women in all senior managerial posts in the civil service, while Ministry of Small and Medium Enterprise (SMEs) has increased its percentage of women receiving loans to above 30 per cent.[61] Similarly, the Ministry of Women Affairs, Gender and Community Development facilitated an affirmative action measure requiring 30 per cent of women's participation in tourism and mining sectors.[62] These efforts emulate article 9 of the African Women's Rights Protocol, and they remain crucial in uplifting the standards of women and ensuring women representation in public life.

Through various affirmative action practices, girls have been prioritised in universities and colleges, and in allocation of resources. Universities relax entry requirements for women in highly sought degree programmes such as law, engineering and medicine, which used to be predominantly pursued by men. Affirmative action measures resulted in improved enrolments for women in the education system, and key disciplines. In 2015, national enrolment rate at secondary school level was at 45.9 per cent for females and 43.1 per cent for males.[63] In addition, 40.7 per cent are female students in technical

57 National Gender Policy (as above).

58 See section 3(3) of the Indigenisation and Economic Empowerment Act Chapter 14:33.

59 ZimAsset is the 'economic blueprint' set to revive the fortunes of Zimbabwe between 2013 and 2018.

60 See The Girls and Women's Empowerment Framework, 2014.

61 Gender Links (n 14 above) 49.

62 Gender Links (as above).

63 ZimStats *Women and men in Zimbabwe Report 2013* (2013).

colleges and 42.1 per cent in universities.[64] Women's access to education is one of the main drivers of equality and their enlightenment for political participation. Educated women have improved skills, self-esteem and are likely to be appointed in key government posts and political positions. Thus, women empowerment and affirmative action measures have long-term potential to break inequalities hindering the advancement of women as voters, potential job seekers and candidates for appointments in public offices.

3.3 Practices by political parties

The task of ensuring women participation in public life extends beyond the role of the state to include political parties. Over the last years, political parties in Zimbabwe, including the Movement for Democratic Change (MDC-T), and Zimbabwe African National Union Patriotic Front (ZANU PF) have been consistent in engendering their structures through their women's wings. Women's wings provide avenues for women to be active participants, and to learn political and decision-making skills, and develop networks within political parties.[65]

Political parties in Zimbabwe have established various committees to mainstream gender equality in party decisions and to bring about desired outcomes of the Protocol. The MDC-T has a gender committee which carry out gender analysis of party policies and proceedings.[66] Similarly, ZANU PF's structures comprises of at least one-third of women in the party's principal organs, namely the Politburo, Central Committee, Provinces, District Committees, the Branch Committees and the Cell/Village Committees.[67] As supreme decision-making structures, within ZANU PF, engendering of these structures develop women's political skills and accords women the opportunity to partake in matters of concern to them. According to the UNDP,[68] political parties are the primary and most direct vehicle through which women can access elected office and political leadership. Thus, participation of women in party politics remains a key determinant of their prospects for political empowerment, particularly in local government, National Assembly and Cabinet.

Political parties improve outcomes of the Protocol through reservation of seats or constituencies for women to compete against each other. In South Africa, this reservation of constituencies for women members by the African National Congress proved an effective

64 ZimStats (n 63 above).

65 United Nations Department of Public Administration, *Women and elections: a guide to promoting the participation of women in elections* (United Nations Department of Public Administration: United Nations 2005).

66 UN Women *Zimbabwean women in conflict: transformation and peace building, past experience, future opportunities* (2013).

67 L Sachikonye *Political parties and the democratic process in Zimbabwe* EISA Research Report (2005) 16.

68 UNDP & NDI *Empowering women for stronger political parties: a good practices guide to promote women's political participation* (2011).

way of ensuring a substantial number of women members of parliament during the 1994 and 1999 elections.[69] One challenge of party quotas remain the fact that they are voluntary. Yet, the success of discretional quotas depends on the strong will and commitment of the party leadership to promote women participation in politics.

In most cases, voluntary party quotas that are not accompanied by compulsory constituency quotas are ineffective in increasing women representation. For instance, a certain party may reserve a constituency for a female candidate, while the opposition party may take advantage of this development by fielding a strong male candidate to compete the seat. This scenario forces political parties to overlook voluntary reservation of seats in face of stiff competition from the opposition. Furthermore, women themselves are demotivated to take the reserved seats as a result of societal shame and ridicule associated with such.

Besides, female politicians in Zimbabwe complain that political parties identify and shunt women candidates in constituencies that are not the party's strongholds, or where they often lose. When ZANU PF adopted and implemented the 25 per cent quotas in the National Assembly in 2005; the party was accused of nominating women candidates in opposition strongholds where they had little chances of success. Resultantly, only 17.7 per cent of elected ZANU-PF members were women.[70] Women party members continue to accuse political parties of viewing them as losing candidates. These double standards by political parties render the whole essence of quotas ineffective.

The implementation of special measures (both constitutional and discretional) has also been heavily opposed and criticised in political parties, and some circles of the society. Critics view quotas as a mere tokenism for sacrificing 'quality over quantity'.[71] Ahikire noted that 'there is concern about ghettoisation of women in public politics by quotas'. [72] Some women view quotas as mere perpetuation of gender inequalities by categorising women as a low class or 'others'. As Dene Smuts commented: 'When you send a person into public life under a quota system, you automatically send her with a question hanging over her head about her competence'.[73] Quotas imply that politicians are elected because of their gender, not because of qualifications and that more qualified candidates are pushed aside.[74]

In addition, society views quotas as a negation to democracy in that women are given preference at the expense of men.[75] Quotas limit the

69 S Hassim 'Representation, participation and democratic effectiveness: feminist challenges to representative democracy in South Africa' in AM Goetz & S Hassim (eds) *No shortcuts to power* (2003) 86.

70 B Chiroro 'Persistent inequalities: women and electoral politics in Zimbabwe elections in 2005' (2005) 4 *Journal of African Elections* 4.

71 Gender Links (n 14 above) 21.

72 J Ahikire 'Vulnerabilities of feminist engagement and the challenge of developmentalism in the South: what alternatives?' (2008) 39 *Institute of Development Bulletin* 28.

73 Ahikire (n 72 above).

74 Dahlerup (n 27 above) 94.

75 Dahlerup (as above).

fairness and competition of aspiring candidates, and the right of the electorate to choose a candidate of their choice: all of which are temperate elements in modern democracy. Despite this exclusionary rhetoric, extant literature confirms how compulsory and voluntary national and party quotas have proved effective in addressing deep rooted challenges deterring women from political participation.[76] Indeed, the CEDAW noted that the adoption of special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination, as they are adopted in the good spirit of addressing the history of inequality.[77]

3.4 Practices by NGOs and civil society

A major feature of political life involves civil society and non-governmental organisations (NGOs) in formulation and implementation of public policies the world over.[78] The efforts have largely emphasised on mobilisation of support, advocacy, provision of resources, awareness raising, support and imparting of skills to women venturing in political and decision-making institutions. Organisations such as the Women's Coalition of Zimbabwe, Women in Politics Support Unit, Zimbabwe Women Lawyers Association and Women's Trust have vast experience in advocating for women participation and representation in Zimbabwe, and have been utilising the Protocol and other African human rights instruments for this outcome. During the 2013 constitution-making process, the afore-mentioned organisations submitted position papers to the constitution-drafting team, calling for inclusion of clear cut provision for women participation in public life in accordance to the African Women's Rights Protocol. In addition, civic organisations mobilised women at all levels of society to actively participate during consultative meetings to canvass people's wishes in the constitution. These indubitable roles of civic organisations resulted in the adoption of a gender sensitive constitution.

In the post constitution era, civic organisations have forged modest levels of cooperation with women activists, political parties and female candidates to advocate and lobby for women's equal political participation and representation. Ahead of the 2013 elections, women's rights organisations conducted a series of campaigns including the 'Women Can Do it Campaign'[79] and the 50/50 Campaign to encourage citizens to vote for female candidates during the 2013 elections. These platforms have provided women with opportunities for capacity building to wrestle for the reserved seats under the constitutional

76 Gender Links (n 14 above) 21.

77 See article 4(1) of CEDAW.

78 J Bossuyt *Involving non state actors and local governments in ACP-EU dialogue* Policy Management Brief 13 European Centre for Development Policy Management, December 2000 http://ecdpm.org/wp-content/uploads/2013/10/PMB-13-Involving-Non-State-Actors-Local-Governments-ACP-EU-Dialogue-2000.pdf (accessed 2 July 2017).

79 The Women Can Do It Campaign was funded by UNFEM through the Women's Trust, a local NGO in Zimbabwe.

quota, and to effectively campaign and contest men during primary and national elections. The impact of such activities is both in short and long-term, as the imparted skills will even help in increasing women participation in future elections.

However, civic organisations' work to implement the African Women's Rights Protocol has been fraught with challenges in Zimbabwe. Foremost amongst these is the limited state-civic cooperation in democratisation process. Civic organisations are often mistrusted in democratisation, and have often been labelled agents of regime change in independent Zimbabwe. Civil society has gone through a polarising and traumatic experience characterised by disruption of operations, harassment, and blanket banning of activities in the third quarter of 2008, and centrally fettered engagement with the government of Zimbabwe in the better part of the first decade of the 21st century. [80] These unfavourable relations imposed harsh restrictions on the freedoms of assembly and association, yet the operations of civic groups in ensuring women participation in politics hinges on these liberties.

4 PERSISTENT OBSTACLES TO WOMEN'S PARTICIPATION

The previous section illustrated practices of implementing article 9 of the African Women's Rights Protocol in Zimbabwe. In spite of these efforts, women are yet to enjoy *equal* participation and representation in politics and decision-making bodies. In most cases, statistics show that female representation stands at around 30 per cent, which is well below the African Women's Rights Protocol desired level of 50-50 representation. These statistics speak volumes about the impediments that women continue to face in trying to effectively participate in public life.

Poverty plays a central role in increasing the individual, societal and institutional barriers of women to political participation. Poverty manifests itself through various indicators indicative of women's increased burden, including lack of education, information, employment, financial resources, health care, food and clothes. Available studies in Zimbabwe confirm that women comprise the bulk of poorer people, compared to men, in respect to access to income, justice, education, health, employment, civic involvement and social support.[81] Women head 45 per cent of households, 72 per cent of which

[80] K Chatiza 'Opportunities and challenges in institutionalizing participatory development: the case of rural Zimbabwe' unpublished PhD thesis, Swansea University (2008).

[81] ZimStats & ICF International *Zimbabwe Demographic and Health Survey 2010-11* (ZIMSTAT and ICF International Inc. Calverton 2012) http://measuredhs.com/what-we-do/survey/survey-display-367.cfm (accessed 12 June 2017); ZimStats *Zimbabwe 2011 Labour Force and Child Labour Survey* 2011 www.zimstat.co.zw/dmdocuments/Laborforce.pdf (accessed 12 June 2017).

are in poverty.[82] With limited funding and some forms of support from government and political parties, the majority of poor women cannot effectively participate in electoral processes including by attending meetings and putting themselves forward as candidates in party and national elections.

Indeed, contemporary politics and decision-making processes have been increasingly commercialised beyond the reach of the poor. Aspiring women candidates are in need of political funding to roll out effective campaigns, and to provide for the needs of campaigning aides and agents. As inequality, exclusion and dependency limit the political participation of poor women, better off women and those with well-resourced husbands and relatives are consequently financially supported to contest as candidates.

Poverty further limits the active participation of adult women in political activities. Women from poverty stricken families often find it beyond their capacity to attend political gatherings and stand in long voting queues. As Makumbe shows, active participation is often cumbersome for poor women in that attending meetings, voting and informing oneself about issues that affect one's community, and even voting itself require a lot of time. [83] A study conducted by Wordofa in Ethiopia revealed how poor women shun community meetings and voting processes as they find these to be 'a time consuming and tedious task that does not do much for them'. [84] Similarly, poor women in Zimbabwe tend to devote their energy to food and income generating activities such as working in fields, vending, and mineral panning instead of participating in public life.[85]

Poverty can also manifest through limited education. Limited education further reduces self-esteem and breeds an inferiority complex, resulting in many women shunning the public sphere. There is also a tendency by the electorate to vote for, and by political leaders to appoint financially privileged and educated people in society. Thus, limited education comes with resentment and the exclusion of women from the public sphere.

Women's participation in politics and decision-making institutions is also affected by strenuous processes undertaken to appoint or select them. Women's equal representation in elected positions continues to be affected by the first-past-the-post (FPTP) electoral system in Zimbabwe. The plurality-majority, FPTP or 'winner takes all' electoral system entails that the candidate with the highest number of votes wins even if the winner has no absolute majority.[86] The disadvantage with

82 ZimStats & ICF International (n 81 above).

83 J Makumbe *Participatory development* (University of Zimbabwe Publications: Harare 1996).

84 D Wordofa 'Internalizing and diffusing the PRA approach: the case of Ethiopia' in J Blackburn & J Holland (eds) *Who changes? institutionalizing participation in developmen*t (1998) 16.

85 Dziva *et al* (n 14 above).

86 RE Matland 'Enhancing women's political participation: legislative recruitment and electoral systems' in *Women in Parliament: beyond numbers* (1998) 68.

the FPTP system is that women candidates will be competing with men or other women directly, and voters will be focussing on the traits of an individual candidate. Because of patriarchy and stereotypes against women, voters often prefer male candidates above women candidates. This is different to the proportional representation electoral system, in which voters focus on the political party and its policies and programmes rather than on individual candidates. With proportional representation, more women are elected into office than in majoritarian systems.[87] As evidence, a review of 53 national legislatures in 1999 found that National Assemblies elected by proportional representation were composed, on average, by nearly 20 per cent women, compared to only about 11 per cent in majoritarian systems.[88]

The triumph of female candidates in elections is also affected by the strenuous process used to select candidates. Matland argues that, 'for women to get elected to parliament they need to pass three crucial barriers; first, they need to select themselves to stand for elections; second, they need to get selected as candidate by the party, and thirdly, they need to get selected by voters'.[89] At each stage, women face peculiar challenges that they must overcome before moving on to the next stage.

At the primary election stage, candidates are selected by internal party structures through a rigorous and often flawed process. In Zimbabwe, party primary elections ahead of the 2013 were marred with irregularities, and reports of women being intimidated by men, and some male candidates absconding with ballot boxes.[90] The influential role of 'male' gatekeepers who block women's entry into politics remains one of the most serious impediments to women's inclusion in primary election processes. 'Men dominate the political arena; men formulate the rules of the political game; and men define the standards for evaluation. This male-dominated model results in either women shunning politics altogether or rejecting male-style politics'.[91] Male leaders in political parties often favour their male friends, and a few female colleagues. In some cases, women candidates succeed through forging strong alliances with male leaders, even if this may mean providing male leaders with sexual favours.[92] This belief has seen many women, especially married women, shunning contesting for political party positions.

Violence and intimidation further limit women's participation in public life. A baseline study conducted by Gender Links revealed

87 A M Goetz *No shortcuts to power* (2003).
88 Goetz (n 87 above) 51.
89 Matland (n 86 above) 66.
90 Dziva *et al* (n 14 above).
91 Shvedova (n 28 above) 21.
92 Dziva *et al* (n 14 above).

rampant gender based violence in society.[93] About 68 per cent of women interviewed by Gender Links revealed how women experience some form of violence at least once in their lifetime, while 46 per cent of men confirmed to having perpetrated some form of violence against women.[94] Zimbabwe is also known for violent politics and elections that leave a trail of psychological scars to candidates and electorate.[95] Women activists are not spared of these skirmishes. In her book, Jestina Mukoko narrates her ordeal when she was kidnapped and tortured for the work of her civil society organisation.[96] Several studies documented how women have been victims of politically-motivated violence that flare up in each electoral cycle.[97] During the 2008 elections, estimates have it that 36 000 people were internally displaced, while 5 000 people were beaten and tortured, and 200 people were killed.[98] The short-term consequence of this experience was that women did not turn out to vote in the 2008 run-off election, while the long term effect remains the fact that women despise politics and elections as synonymous with violence.

Similarly, women partaking in public life, especially as candidates continue to be despised and to be subjected to acerbic verbal attacks by men and fellow women. This stems from entrenched societal norms which view the public sphere as a male domain. The verbal attacks are not simply targeted at the candidate's ideas, but often rounds on her person, on how many children she has outside marriage, on her single-motherhood status, on the alleged numbers of her sexual partners, real or imagined.[99] Verbal abuse remains one of the most pervasive women's rights violations and men use it to keep women in subordinate roles.[100] This character assassination against women results in many of them losing confidence, self-esteem and being discouraged to participate in public life.

93 M Machisa & S Chingamuka (eds) *Peace begins at home: violence against women (VAW) baseline study Zimbabwe* (Ministry of Women Affairs, Gender and Community Development and Gender Links 2013).

94 Machisa & S Chingamuka (n 93 above).

95 T Murithi & A Mawadza (eds) *Zimbabwe in transition: a view from within* (Institute of Justice and Reconciliation: Cape Town 2911); N Mushonga 'A case study of gender and security sector reform in Zimbabwe' (2005) 24 *African Security Review* 4 430-437.

96 Jestina Mukoko, an award winning peace and human rights campaigner from Zimbabwe, who won the many awards, including the United States Secretary of the State Women of Courage Award was abducted from her home in Norton, Zimbabwe on 3 December 2008 by plain clothed security agents for the activities of the organisation she worked with, the Zimbabwe Peace Project. See also J Mukoko *The abduction and trial of Jestina Mukoko: the fight for human rights in Zimbabwe* (2016).

97 Research and Advocacy Unit 'When the going gets tough the man gets going! Zimbabwean Women's views on Politics, Governance, Political Violence, and Transitional Justice' 2010; Embassy of the United States 'Human Rights Report 2011: Zimbabwe' http://harare.usembassy.gov/human_rights_report_2011.html (accessed 16 June 2017); Mushonga (n 95 above).

98 Embassy of the United States (n 97 above).

99 A Magaisa 'Politics and prejudice: plight of Zimbabwean women' 2009 http://www.newzimbabwe.com/pages/magaisa94.18710.html (accessed 20 June 2013).

100 Gender Links (n 14 above).

Society continues to view women's best place to be at home, seized with reproductive roles while men are concerned with productive roles and leadership issues. These roles are perpetuated by the media that continues to portray women's place as being in the home rather than in public life. The media's portrayal of women in the home also affects the decision of appointing individuals and the voting behaviour of the electorate.

Confined to their homes, a majority of women spend their time doing unpaid household chores, and they consequently lack leadership experience, and political networks to run for office. The plight of women is made worse by the increase of the HIV/AIDS pandemic which has claimed many lives. In 2009, 1.1 million Zimbabweans were living with HIV/AIDS (61 per cent women, 39 per cent men).[101] The increase in the numbers of those infected and dying of this scourge also means increased unpaid care work for women. As noted by Duke,[102] the manifold demands for women as wives, mothers, and home keepers, leave them with little time and energy to participate in political meetings and campaigns, which unfortunately take place at very odd hours and with no strict compliance to time. Sometimes women, especially in rural areas, are not able to leave home for paid work or even to attend meetings. As a result, women lose out as these meetings are platforms where information is disseminated, and where appointments and elections are conducted. Although there is an increasing awareness about this emerging care work by women in Zimbabwe, sustainable responses thereto are still minimal.

5 CONCLUSION AND RECOMMENDATIONS

The African Women's Rights Protocol is an innovative instrument for advancing women's rights in Africa. Its article 9 calls for equal participation and representation of women in politics and decision-making processes. This provision is potentially ground-breaking for Zimbabwe and other African countries where women's participation in decision-making institutions has for long been quite limited. This article examines the importance of article 9 of the Protocol and reflects on its domestic effect in Zimbabwe. On domestic effect, the article notes that Zimbabwe goes beyond the Protocol to provide for legal, policy and institutional practices to implement article 9, and to bring about desired outcomes in relation to equal representation of women in political institutions. It further discusses the persistent forms of violence, poverty, and socio-cultural barriers that limit women's inclusion and participation in politics and decision-making institutions.

To ensure equal and effective women participation in politics and decision-making process, Zimbabwe must aim higher, and endeavour

[101] ZimStats & ICF International (n 81 above).

[102] J Duke 'The dynamics of women participation in democratic politics and sustainable development in Africa' (2010) 12 *Journal of Sustainable Development in Africa* 4.

to achieve the ideal of 50-50 participation of women, which may be derived from article 9 of the Protocol. To this end, Zimbabwe needs to undertake electoral reform including changing the electoral system from the FPTP to proportional representation ensuring for a certain percentage of women in elected decision-making.

Legal quotas have proved crucial in improving women's representation in political and decision-making institutions. Instead of making the quotas a temporary measure, there is a need to extend the life span of the women's quota for legislators in the Constitution. It is also recommended that Zimbabwe extends the constitutional quotas to local government elections and governance. Furthermore, the government must introduce mandatory quotas to political parties, so as to affirm equal participation and gender balance in internal party structures, and lists of candidates for national elections. Legalising party quotas allows for the electoral body to sanction or disqualify non-complying political parties. Alternatively, the government may offer incentives to political parties such as additional funding or more free broadcast time for inclusion of equal number of women amongst their candidates.

The government should also level the playing field for female political participants by discouraging all forms of violence in society. One way is to ensure that the rule of law is respected, and that impunity for the perpetrators of politically-motivated and gender-based violence is curbed. Similarly, efforts should be made to improve women's access to education, funding, and to reduce levels of poverty.

The national gender machinery, political parties and civil society must sensitise society and political party leadership on the basis and justifications for special measures and gender equality in general. This may persuade women in society to participate in politics and take up leadership positions. Sensitisation efforts may also make the society and party leadership to seriously consider, embrace, and implement quotas for gender equality. In this technological era, effective awareness raising methods can take the form of print and online media platforms, including social media. Through these platforms, experiences of women role models as cabinet members, legislators, party members, or civil society leaders around the globe can be more widely shared.

Efforts should also be made to sensitise and train print and visual media journalists to effectively profile and ensure responsible coverage of women leaders. These efforts motivate women to participate in politics and decision-making, and above all reinforce, among society and party leaders, the value of women in political and decision-making institutions.

For women activists, one way to force leaders to ensure gender balance is through constitutional petitions and public interest litigation, seeking the nullification of gender imbalanced appointments on the basis that they are contrary to provisions of the Constitution and article 9 of the African Women's Rights Protocol.

The AU and state parties to the African Women's Rights Protocol must continue engaging policy makers and academics to conduct

empirical studies illustrating the quantitative and qualitative impact of the Protocol, and the challenges faced by women impeding their active participation in public life. Periodic fora should be created for academics and policy makers at national and African level to monitor, discuss and critique the domestic effect of African human rights treaties and the prospects for advancing women's political rights.

Furthermore, the AU and its institutions are challenged to urge member states to abandon their strict adherence to dualist approaches to the relationship between international and national law, so as to ease procedures for domesticating international obligations.

Developing norms and standards on maternal mortality in Africa: lessons from UN human rights bodies

Onyema Afulukwe-Eruchalu and Ebenezer Durojaye***

ABSTRACT: The African Charter on Human and Peoples' Rights and the Protocol to the African Charter Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) contain useful provisions for addressing maternal mortality as a human rights violation. In addition, the African Union and its organs have recognised maternal mortality as a violation of the rights of women in Africa through initiatives such as the Campaign on Accelerated Reduction of Maternal Mortality in Africa; the African Commission on Human and Peoples' Rights (African Commission) Resolution 135 on Maternal Mortality in Africa; as well as the African Commission's General Comment on the Right to Life. Both the African Court on Human and Peoples' Rights and the African Commission are now set to apply these frameworks in their jurisprudence and engagements with States. However, despite these developments, a significant number of African women die every year due to complications arising from pregnancy or childbirth. These deaths are avoidable if African governments have lived up to their obligations under international and regional human rights instruments. This article addresses pertinent experiences from the United Nations human rights system and analyses the key lessons learned from their approaches to addressing maternal mortality as a human rights issue, to strengthen the African system's jurisprudence and legal frameworks.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Le développement de normes et standards relatifs à la mortalité maternelle en Afrique: leçons apprises des organes des droits de l'homme des Nations Unies

RÉSUMÉ: La Charte africaine des droits de l'homme et des peuples et le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole relatif aux droits des femmes en afrique) contiennent des dispositions utiles pour traiter la mortalité maternelle comme une violation des droits humains. En outre, l'Union africaine et ses organes ont reconnu la mortalité maternelle comme une violation des droits des femmes en Afrique à travers des initiatives telles que la Campagne pour la réduction accélérée de la mortalité maternelle en Afrique; la Résolution 135 de la Commission africaine des droits de l'homme et des peuples (Commission africaine) sur la mortalité maternelle en Afrique; ainsi que l'Observation générale de la Commission africaine sur le droit à la vie. La Cour africaine des droits de l'homme et des peuples et la Commission africaine peuvent désormais appliquer ces normes dans leur jurisprudence et dans leurs relations avec les Etats. Cependant, malgré ces développements, un nombre important de femmes africaines meurent chaque année en raison de complications

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O Afulukwe-Eruchalu & E Durojaye 'Developing norms and standards on maternal mortality in Africa: lessons from UN human rights bodies' (2017) 1 *African Human Rights Yearbook* 82-106
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liées à la grossesse ou à l'accouchement. Ces décès sont évitables si les gouvernements africains respectent leurs obligations en vertu des instruments internationaux et régionaux relatifs aux droits de l'homme. Le présent article traite des expériences pertinentes du système des droits de l'homme des Nations Unies et analyse les principaux enseignements tirés des approches par lesquelles ce système traite la mortalité maternelle en tant que question de droits de l'homme pour renforcer la jurisprudence et les cadres juridiques du système africain.

KEY WORDS: African Commission on Human and Peoples' Rights, African Court on Human and Peoples' Rights, maternal mortality, maternal morbidity, resolutions on maternal mortality, United Nations human rights system

CONTENT:

1 INTRODUCTION AND RATE OF MATERNAL MORTALITY IN AFRICA

The African Commission's Resolution on Maternal Mortality in Africa in 2008, resolution 135, signalled one of the earliest coordinated regional efforts focused solely on addressing the significantly high levels of maternal deaths in African countries.[1] Prior to the adoption of resolution 135, the regional commitments to reducing maternal mortality were encapsulated in the 2003 Protocol to the African Charter Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol), the 2005 African Union's Policy Framework for the promotion of Sexual and Reproductive Health and Rights in Africa and the 2006 African Women's Rights Plan of Action. At the time of its adoption, the world experienced approximately 358 000 maternal deaths,[2] with 355 000 (99 per cent) of them occurring in

[1] African Commission on Human and Peoples' Rights, Resolution 135 available at http://www.achpr.org/sessions/44th/resolutions/135/ (accessed 14 July 2017).

[2] WHO *et al*, *Trends in maternal mortality: 1990 to 2008* http://apps.who.int/iris/bitstream/10665/44423/1/9789241500265_eng.pdf (accessed 14 July 2017).

developing countries.[3] Six of the eleven countries that accounted for 65 per cent of maternal deaths worldwide were African countries.[4] The adult lifetime risk of maternal death[5] in 2008 was highest in sub-Saharan Africa at 1 in 31 while in developed regions the lifetime risk was 1–1 in 4300.[6]

Accordingly, resolution 135 was timely, in that the African Commission on Human and Peoples' Rights (African Commission) recognised that African countries had both a regional and international obligation, under the African Women's Rights Protocol and the United Nations Millennium Development Goals (MDGs), to improve maternal health.[7] It expressed concern that no progress had been made towards reducing maternal mortality and declared preventable maternal mortality in Africa a violation of the rights to life, dignity, equality and non-discrimination.[8] It concluded by urging African governments to individually and collectively implement its specified recommendations, discussed in the section below, in order to reduce maternal deaths in the continent.[9]

The African Commission's resolution's call for a collective effort to address maternal mortality materialised in 2009 when the Campaign for the Accelerated Reduction of Maternal Mortality in Africa (CARMMA), a joint initiative of the African Union Commission and United Nations Population Fund (UNFPA), was launched.[10] Its core objective was to generate amplified action towards improving maternal health by expanding the availability and use of universally accessible health services, including those pertaining to sexual and reproductive health, which are critical for reducing maternal mortality, and ensuring accountability.[11] Currently, out of the 55 African Union (AU) member states, 46 have already launched CARMMA while 6 more are taking steps towards doing so.[12] Despite these regional commitments, a majority of African countries did not make adequate progress to meet MDG 5 which required the reduction of maternal mortality ratio (MMR) by three quarters (75 per cent) between 1990 and 2015.[13]

Indeed, the MDGs deadline coincided with the release of the latest statistics on the world's maternal mortality trend by the World Health Organization *et al* and yielded some insight into why most African countries were categorised as having made inadequate progress to meet

3 As above 1.

4 Democratic Republic of Congo, Ethiopia, Kenya, Nigeria, Sudan, United Republic of Tanzania WHO *et al* (n 2 above) 1.

5 The probability that a 15-year old female will die eventually from a maternal cause. As above.

6 As above.

7 African Commission (n 1 above).

8 As above.

9 As above.

10 http://www.carmma.org/ (accessed 19 October 2017).

11 As above.

12 http://www.carmma.org/scorecards.

13 United Nations Economic Commission for Africa *et al*, 'MDG Report 2015: Assessing Progress in Africa Toward the Millennium Development Goals' (2015).

MDG 5. The data showed that while the annual number of maternal deaths decreased by 43per cent from 532 000 in 1990 to approximately 303 000 in 2015, developing regions remained responsible for about 99 per cent of these deaths with sub-Saharan Africa accounting for 66 per cent in 2015.[14] Country-focused data also indicated that Nigeria alone accounted for 19 per cent of the world's maternal deaths with approximately 58 000 deaths while Sierra Leone and Chad were the two countries with the highest estimated lifetime risk of maternal death at 1 in 17 and 1 in 18 respectively.[15]

With the end of the MDGs timeline in 2015, the global community's unified shift from MDG 5 to the adoption of the United Nations Sustainable Development Goals (SDGs) 3 and 5, whose targets are to reduce the global MMR to less than 70 per 100 000 live births by 2030, and achieve gender equality and empower all women and girls,[16] provide an exceptional second chance. It offers opportunity to intensify African governments' efforts to reduce maternal mortality, with the assurance of international assistance and cooperation. To this end, this article analyses specific developments within the United Nations system that occurred within the same timeline as the African regional efforts, and which successfully catalysed the strengthening of norms and their practical application to reduce preventable maternal mortality, and draws key lessons from these approaches.

2 MATERNAL HEALTH AS A HUMAN RIGHTS ISSUE: THE NORMATIVE FRAMEWORK

Deaths during pregnancy and childbirth are avoidable and therefore should be viewed not only as a social injustice issue but also as human rights violations. Indeed, various human rights provisions in international and regional human rights instruments, such as the rights to life, health, information, education, personal liberty, freedom from discrimination, and freedom from torture, cruel, inhuman and degrading treatment, have been interpreted as relevant to addressing preventable maternal mortality and morbidity. This section of the paper considers some of these rights.

2.1 The right to health

The enjoyment of the right to the highest attainable standard of physical and mental health encompasses access to maternal health care services. This right, often referred to as the right to health, has been recognised in numerous international and regional human rights instruments with the most widely-recognised of these instruments

14 WHO (n 2 above).

15 As above.

16 United Nations Sustainable Development Goals, available at http://www.un.org/sustainabledevelopment/sustainable-development-goals/ (accessed 14 August 2017).

being the International Covenant on Economic, Social and Cultural Rights (ICESCR).[17] Article 12(1) of the ICESCR recognises the right of every one to the enjoyment of the highest attainable standard of health, whereas article 12(2) recognises the underlying determinants of health including maternal health care. Also, article 12 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) recognises the right of all women on an equal basis with men to the enjoyment of the right to health.[18] More importantly, article 12(2) of CEDAW enjoins states to realise the right to health care services to all pregnant women.

Both the Committee on Economic Social and Cultural Rights (ICESCR Committee) and Committee on the Elimination of Discrimination against Women (CEDAW Committee), expert bodies charged with interpreting ICESCR and CEDAW, have issued relevant general comments or recommendations touching on the right to health in general and on women's health in particular.[19] For instance, in its General Comment 14, the ICESCR Committee noted that states must ensure four key principles of the right to health: availability, accessibility, acceptability and quality of health services for everyone, including pregnant women.[20] These principles are explained in detail below. Moreover, the ICESCR Committee has emphasised that states must give priority to the right to health of vulnerable groups, including women and children. Also, the CEDAW Committee in General Recommendation 24 has noted that states must ensure access to health care services peculiar to women's needs.[21] More importantly, the CEDAW Committee has noted that states must ensure the allocation of adequate resources to facilitate access to health care services needed by women and girls. It further notes that article 12 of the Convention requires governments to respect, protect and fulfil women's right to health.[22]

The United Nations Human Rights Council (UNHRC) for the first time in 2009 adopted a resolution on maternal mortality in which it calls on states to take steps and measures to address maternal mortality across the world.[23] According to the UNHRC, maternal mortality constitutes a gross violation of women's fundamental rights, including the rights to life, health, dignity and non-discrimination.[24] Thus, it

[17] International Covenant on Economic, Social and Cultural Rights, adopted 16 December 1966; GA Res 2200 (XXI), UN Doc A/6316 (1966) 993 UNTS 3 (entered into force 3 January 1976).

[18] Convention on the Elimination of All Forms of Discrimination Against Women GA Res 54/180 UN GAOR 34th Session Supp No 46 UN Doc A/34/46 1980.

[19] The Committee on ESCR and CEDAW Committee are the expert bodies tasked with ensuring compliance with the ICESCR and CEDAW.

[20] Committee on ESCR *The Right to the Highest Attainable Standard of Health; General Comment No 14*, UN Doc E/C/12/2000/4 para 12.

[21] CEDAW Committee *General Recommendation 24 on Women and Health* UN GAOR 1999, Doc A/54/38 Rev para 11.

[22] As above, paras 14-16.

[23] Human Rights Council *Preventable maternal mortality and morbidity and human rights* A/HRC/11/L.16/Rev 1, 16 June 2009.

[24] As above para 2.

urges states to take appropriate measures to prevent women from dying during pregnancy or childbirth. The UNHRC has also adopted a Technical Guidance on maternal mortality, where it urges states to adopt appropriate laws and policies to ensure safe motherhood and prevent women dying during childbirth and pregnancy.[25]

At the regional level, all the three major human rights instruments; the African Charter on Human and Peoples' Rights (African Charter),[26] the African Charter on the Rights and Welfare of the Child (African Children's Rights Charter)[27] and the African Women's Rights Protocol, contain provisions on the right to health, including access to maternal health care services. Article 14 of the African Women's Rights Protocol guarantees women's rights to health care, including sexual and reproductive health care. More importantly, article 14(2) enjoins states to

> (a) provide adequate, affordable and accessible health services, including information, education and communication programmes to women especially those in rural areas;
>
> (b) establish and strengthen existing pre-natal, delivery and post-natal health and nutritional services for women during pregnancy and while they are breast-feeding.

The relevance of this provision to addressing maternal deaths in the region is discussed below.

According to Hunt and de Mesquita, maternal health care services must be understood broadly as an entitlement to an available, accessible, adequate, effective, well-resourced, culturally acceptable and integrated health system.[28] They further reasoned that some of the critical services that must be accessible to women in this integrated health system so as to prevent maternal deaths include: emergency obstetric care, a skilled birth attendant, education and information on sexual and reproductive health, safe and legal abortion services, and other sexual and reproductive health care services, such as family planning or contraceptive services.

Hunt and de Mesquita have further examined how the elements of the right to health as developed by the ICESCR Committee can be applicable specifically to maternal mortality and noted that availability requires states to ensure sufficient number of qualified health care

[25] Human Rights Council, Practices in adopting a human rights-based approach to eliminate preventable maternal mortality and human rights. 18th Session A/HRC/18/27; 8 July 2011.

[26] African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/3/Rev 5, adopted by the Organisation of African Unity, 27 June 1981, entered into force 21 October 1986.

[27] African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.0/49 (1990) (entered into force 29 November 1999).

[28] P Hunt & JB de Mesquita *Reducing maternal mortality: the contribution of the right to the highest attainable standard of health* (2010) 6.

providers to provide maternal health care services to pregnant women.[29] Accessibility is made up of four elements-physical, economic, non-discrimination and information. This will require states to provide maternal health care services that are physically and financially accessible to all pregnant women, especially those in rural areas. It will also require states to address discriminatory laws, policies, practices and gender inequalities in health care and in society that prevent women and adolescent girls from accessing good quality services, including maternal care services. Information accessibility requires states to ensure that women and adolescents enjoy access to sexual and reproductive health information. This will require states to remove legal and policy as well as socio-cultural barriers to information on sexual and reproductive health. Acceptability requires that services must be respectful of the culture of individuals, minorities, peoples and communities and sensitive to gender and life-cycle requirements.[30] States must ensure that maternal services are sensitive to the rights, cultures and needs of pregnant women, including those from indigenous peoples and other minority groups. Moreover, States are expected to ensure that maternal health care services are medically appropriate and of good quality.

2.2 The right to life

The right to life is often regarded as one of the most fundamental of all human rights.[31] It is guaranteed in international and regional human rights instruments and national law including articles 6 of the International Covenant on Civil and Political Rights (ICCPR)[32] and 5 of the African Charter. As affirmed at the Vienna Programme of Action, all human rights (whether civil and political or socioeconomic rights), are indivisible, interrelated and interdependent.[33] Consequently, the violation of the right to health may result in the violation of the right to life.[34] This is even more pertinent with regard to maternal injuries and deaths, as deaths during pregnancy are largely avoidable. Previously, the right to life had been construed narrowly to impose negative obligations on the state to refrain from taking life. However, decisions of regional human rights bodies and national courts have affirmed that

29 As above 7.

30 As above.

31 See General Comment 6 of the Human Rights Committee on article 6 of the ICCPR.

32 International Covenant on Civil and Political Rights, adopted in 1966 entered into force on 23 March 1976.

33 Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

34 See for instance, Committee on ESCR General Comment No 14: The Right to the Highest Attainable Standard of Health, UN Doc E/C/12/2000/4 para 3. See also AE Yamin `Not just a tragedy: access to medication as a right under international law' (2003) 21 *Boston University International Law Journal* 370.

the right to life imposes positive obligations on states to prevent loss of life.[35] For example, in *Laxmi Mandal v Deen Dayal Haringar Hospital*; and *Jaitun v Maternity Home,* an Indian High Court found that death occasioned by lack of access to maternal health care services amounted to a violation of the right to life guaranteed in the Constitution.[36]

This approach would seem to reaffirm the positive nature of the duty imposed by the right to life as well as reinstate the indivisibility and interrelatedness of all rights including the rights to health and life. It is consistent with the reasoning of some United Nations treaty monitoring bodies (UNTMBs) who have emphasised that deaths arising from poor or lack of access to maternal health care services will amount to the violation of the right to life.

For instance, the Human Rights Committee in its General Comment 6 has explained that the right to life should not be construed narrowly but that it intersects with other rights such as housing, food and health care.[37] The Human Rights Committee has equally noted in its Concluding Observations that lack of access to reproductive health care services, including emergency obstetric care and services related to contraception for women, is a violation of their right to life.[38] In particular, the Committee has consistently expressed grave concern over high rates of maternal mortality, framing it as a violation of women's right to life.[39]

The broad interpretation of states' obligation to guarantee the right to life in instances of preventable maternal deaths has also been explicitly recognised by the African Commission in its concluding observations, and most recently in its General Comment 3 on the Right to Life.[40] The African Commission specifically noted that states have a responsibility to address chronic but pervasive threats to life such as preventable maternal deaths by establishing functioning health systems and eliminating discriminatory laws and practices that restrict access to healthcare services.[41]

35 See *Pachim Banga Khet Majoor Samity v State of West Bengal* (1996) 4 SCC 37. The Court held that failure on the part of a government hospital to provide emergency treatment to a citizen amounted to a violation of the right to life guaranteed under article 21 of the Indian Constitution

36 *Laxmi Mandal v Deen Dayal Haringar Hospital*; and *Jaitun v Maternity Home, MCD*, MANU/DE/1268/2010, cases WP(C) 8853/2008 and 10700/2009 (High Court of Delhi) judgment on 04.06.2010.

37 HRC *General Comment 6: The Right to Life* UN GAOR Human Rights Committee 37th session Supp No 40 para 6.

38 See HRC *Concluding Observation: Chile* 30/3/99 UN Doc CCPR/79/Ad. 104,para 15.

39 See for instance HRC *Concluding Observations: Bolivia* 01/04/97 UN Doc. CCPR/ 79/Ad. 74, 22; Concluding Observation: Guatemala 27/08/2001 UN Doc CCPR/CO/ 72GTM, para 19.

40 African Commission on Human and Peoples' Rights *General Comment 3: the right to life* Paras 3 and 42 available at http://www.achpr.org/files/instruments/general-comments-right-to-life/general_comment_no_3_english.pdf (accessed 14 July 2017).

41 As above.

2.3 The right to dignity and to be free from torture, cruel, inhuman or degrading treatment

Another important right and freedom relating to maternal death is the right to dignity and the freedom from torture, cruel, inhuman and degrading treatment, guaranteed in most human rights instruments. The preamble to the Universal Declaration of Rights (Universal Declaration) provides that 'the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family, is the foundation of freedom, justice and peace in the world.'[42] Article 1 of the Universal Declaration further provides that all human beings are born free and equal in dignity.

While provisions of corresponding international human rights instruments do not explicitly guarantee the right to dignity, the equivalent of this right is expressed in provisions relating to the right to be free from torture, cruel, inhuman and degrading treatment. For instance, article 7 of the ICCPR provides as follows:

> No one shall be subjected to torture or cruel and inhuman or degrading treatment or punishment. In particular no one shall be subjected without his free consent to medical or scientific experimentation.[43]

Regional instruments contain explicit guarantees of both the right to dignity and freedom from torture and inhuman treatment. Article 5 of the African Charter recognises an individual's right to dignity. It provides that '[e]very individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status'. It further prohibits all forms of cruel, inhuman and degrading treatment against any human being. This is complemented by article 3 of the African Women's Rights Protocol, which guarantees women's rights to dignity. It provides that 'every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights'. Article 3 further provides that 'every woman shall have the right to respect as a person and to the free development of her personality'.

The right to dignity and freedom from torture and inhuman treatment has often been interpreted to ensure that prisoners are treated in humane ways. However national, regional and human rights mechanisms are increasingly recognising its application beyond prisons and other traditional settings where torture may occur to non-traditional settings such as healthcare institutions, as discussed below. National-level jurisprudence in Kenya and the UN Special Rapporteur on Torture have recognised that denial of care to, humiliation, mistreatment or detention of pregnant women seeking maternal care

42 Universal Declaration of Human Rights, GA Res 217 A (III), UN Doc A/810 (10 December 1948).

43 International Covenant on Civil and Political Rights adopted in 1966 entered into force 23 March 1976 999 UNTS 171 and 1057 UNTS 407 / [1980] ATS 23 / 6 ILM.

services will undermine their right to dignity and freedom from torture, cruel, inhuman or degrading treatment.[44]

Indeed, the recent General Comment of the African Commission on Redress for Torture expressly addressed torture, cruel, inhuman or degrading treatment in healthcare facilities and urged states to be mindful of the gendered nature of torture and other ill-treatment and ensure adequate protective measures are put in place.[45]

Consequently, where a state fails to ensure quality maternal health care services to pregnant women free of mistreatment, abuse and neglect, this will result in the violation of their right to dignity and freedom from cruel and inhuman treatment.

2.4 The right to equality and non-discrimination

The link between low status of women and high maternal deaths has been firmly established.[46] Indeed, as stated in the introduction, high maternal mortality rates are common among women in developing countries compared to developed countries as well as among vulnerable and marginalised women within a country. This perhaps is the most profound evidence of the injustice this avoidable situation represents. It also raises the issue of non-discrimination and violation of the right to equality. Article 12 of the CEDAW requires states to ensure access to health care services to women on a non-discriminatory basis.

The rights to equality and non-discrimination are essential to maternal mortality, particularly where poor, disadvantaged and vulnerable women in rural areas or indigenous communities are concerned. This was unequivocally confirmed by the CEDAW Committee in a ground breaking decision in *Alyne da Silva Pimentel v Brazil,* which is discussed in detail in the next section.[47]

Likewise, the African Women's Rights Protocol requires states to eliminate every form of discrimination against women including by undertaking measures to address the social and cultural patterns that perpetuate discrimination against women and girls.[48] It further obligates state parties to enact and implement appropriate measures prohibiting and curbing all forms of discrimination particularly those

44 *Millicent Awuor Maimuna & Another v Attorney General of Kenya & Others* (2012) Petition No 562. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment,* Human Rights Council, para. 47, UN Doc. A/HRC/22/53 (1 February 2013) (Juan E Mendez).

45 African Commission on Human and Peoples' Rights, *General Comment No.3 on the Right to Life,* paras 19 and 30, available at http://www.achpr.org/files/instruments/general-comment-right-to-redress/achpr_general_comment_no._4_english.pdf (accessed 15 July 2017).

46 See R Cook *et al Reproductive health and human rights: integrating medicine, ethics, and law* (2003).

47 Communication 17/2008, *Alyne da Silva Pimentel v Brazil* CEDAW Committee CEDAW/C/49/D/17/ 2008. Decision of 25 July, 2011.

48 Article 2 of the African Women's Rights Protocol.

harmful practices which endanger the health and general well-being of women.[49]

Given the high maternal deaths in many African countries and the failure of governments to address this situation, African governments can be held accountable for the violation of the rights to equality and non-discrimination of women.

2.5 The right to information

Access to comprehensive sexual and reproductive health information is crucial to preventing ill-health and ensuring the well-being of all individuals. More importantly, access to sexual and reproductive health information can help in preventing unplanned pregnancies, unsafe abortion and minimising incidence of maternal deaths and morbidities. The ICESCR Committee has noted that the enjoyment of the right to health includes access to health facilities and information.[50] The right to information is guaranteed in most international human rights instruments. Article 19 of the ICCPR provides for the right to information, while articles 10(h) and 16(1)(e) of CEDAW guarantee women, including those in rural areas, access to family planning information. The right is equally guaranteed in regional instruments such as the African Women's Rights Protocol, particularly article 14(2)(a), which tasks states with providing adequate, affordable, and accessible health-related information, particularly for women in rural areas.[51]

These provisions impose both positive and negative obligations on states to ensure access to sexual and reproductive health information and to refrain from interfering with the enjoyment of this right.[52] Yet, in many parts of Africa, vulnerable women, including young women and women in rural areas, often lack access to adequate information to prevent unplanned pregnancies and other risks associated with pregnancy.

3 INITIATIVES AND JURISPRUDENCE OF UN HUMAN RIGHTS BODIES ON MATERNAL MORTALITY

As illustrated in the section above, UN institutions, including treaty monitoring bodies have had the opportunity to address maternal mortality as a human rights concern. This section considers the

49 Article 2(1)(b) of the African Women's Rights Protocol

50 UN CESCR General Comment 14 (n 20 above).

51 African Women's Rights Protocol, http://www.achpr.org/instruments/women-protocol/#14 (accessed 14 July 2017).

52 See S Coliver 'The right to information necessary for reproductive health and choice under international law' (1995) 44 *American University Law Review* 1279.

clarification and elaboration provided under the UN human rights system with regard to maternal mortality.

3.1 Resolution 11/8 and the first report of the Office of the High Commissioner for Human Rights regarding maternal mortality and morbidity

As noted above, despite the fact that regional and international instruments guarantee rights, which are applicable to preventable maternal deaths and injuries, these deaths have persisted in high levels. Concerted advocacy by stakeholders, and particularly non-governmental organisations (NGOs), at the regional and global levels eventually yielded extraordinary results at the United Nations. In June 2009, a year after the African Commission's resolution on maternal mortality and the same year that CARRMA was launched, the UN Human Rights Council adopted resolution 11/8 which ultimately became its first of a series of resolutions on preventable maternal mortality and morbidity and human rights to advance and set standards on maternal health.[53]

Recalling states' obligations under CEDAW, ICCPR and CESCR among others, the 2009 resolution recognised the need for increased political will, cooperation and technical assistance at the international and national levels to effectively reduce preventable maternal deaths and injuries.[54] Resolution 11/8 recognised that these deaths and injuries are aggravated by poverty, gender inequality and discrimination and other factors including inadequate access to health facilities and lack of infrastructure.[55] It further recognised that a majority of maternal deaths and injuries are preventable and should be addressed through protecting the rights of women and girls, especially their rights to life, dignity, education, health, information, non-discrimination and to enjoy the benefits of scientific progress.[56] The resolution urged states to fulfil and implement their human rights commitments under several instruments including by allocating sufficient resources to health systems.[57] It provided specific recommendations to states which included both honouring existing commitments and making new ones, swapping effective practices and technical assistance to reinforce their capacities, and integrating a human rights perspective into all of their efforts by addressing the link between discrimination against women and maternal mortality and morbidity.[58]

53 A/HRC/11/L.16 http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_11_8.pdf (accessed 14 July 2017).

54 As above.

55 As above.

56 As above, para 2.

57 As above, para 3.

58 As above, para 4.

Resolution 11/8 went beyond addressing states to urging other stakeholders, including national human rights institutions (NHRIs) and non-governmental organisations (NGOs), to prioritise the issue of preventable maternal mortality and morbidity in their work with the UN human rights system including the treaty monitoring bodies, special procedures, and the universal periodic review process.[59] It also tasked the UN High Commissioner for Human Rights (UNHCHR) with preparing a thematic study on the issue within one year, with the input of states, relevant UN agencies, and stakeholders.[60] The study would specifically identify the human rights dimensions of preventable maternal deaths and injuries in the existing international legal framework and offer suggestions for improving how the UN system had so far been addressing those human rights dimensions.[61] The resolution concluded with the Human Rights Council obliging itself to review the thematic study during its fourteenth session, in June 2010, to hold an interactive dialogue on the study, and take further action as needed.[62]

Indeed, the African Commission's resolution equally called on civil society, including NGOs, to advocate accountability and monitor the implementation of government programs to reduce maternal mortality.[63] It further provided specific recommendations to states such as to fulfil their obligations to allocate 15 per cent of their national budgets to the health sector, adopt a human rights framework in maternal health programs and strategies, and provide updates on policy, institutional and other national efforts aimed at decreasing maternal deaths and injuries, during periodic review sessions. However, it did not contain any time-specific deliverables which would have encouraged urgent action and assured accountability. The Commission neither had nor did the resolution call for the establishment of a mechanism equivalent to the UNHCHR, to coordinate the regional human rights system's and states' efforts and provide tailored technical guidance to states to promote compliance.

In contrast, the concrete mandates and time-specific provisions in the Human Rights Council's resolution, as well as the express inclusion of the contribution of other stakeholders beyond states, lent urgency to the issue, gave legitimacy to various stakeholders, and galvanised action. For instance, by April 2010, the Office of the High Commissioner for Human Rights (OHCHR) developed a thematic study, with the input of states, NGOs, and external experts, along with its key findings, serving as a game changer for how the United Nations system had previously worked to address maternal mortality and morbidity. The study clarified the conceptual framework for understanding the connection between maternal mortality and human rights. It confirmed the linkages between gender inequality and

59 As above, para 5.
60 As above, para 6.
61 As above.
62 As above, para 7.
63 African Commission (n 1 above) para 8.

discrimination against women and girls and maternal deaths and injuries and stressed the importance of ensuring women's human rights, including sexual and reproductive rights.[64] The study, in delineating an overview of the United Nations system's efforts to reduce preventable maternal deaths and injuries, determined that a significant initiatives were in existence and ranged from development of norms and policies to service provision and accountability measures.[65]

However, it further determined that these efforts sometimes lacked coherence and frequently needed greater action to ensure expected results,[66] and offered recommendations on what the Human Rights Council could do to strengthen these existing efforts.[67] For instance, the study urged governments to scale up technical interventions which are affordable, acceptable and culturally sensitive.[68] It noted that reducing maternal deaths would include much more than guaranteeing access to health care services and would entail addressing the underlying socio-cultural, political and economic determinants of health such as ensuring access to information on sexual and reproductive health, education, and promoting gender equality.[69] The OHCHR study further provided an analysis of what a human rights-based approach to reducing maternal mortality requires including the application of seven human rights principles.[70] These principles which are accountability,[71] non-discrimination, participation[72] and transparency,[73] empowerment,[74] sustainability,[75] as well as international assistance and cooperation,[76] must be integrated in all policies and programmes.

The effective application of these core principles to all of the efforts undertaken at a regional or country level in the African region would take the continent closer to its objective of effectively reducing preventable maternal mortality and morbidity. For instance, entrenching accountability in ongoing maternal mortality initiatives or campaigns in Africa such as CARMMA and 'Africa cares: no woman should die while giving life' must require all governments to not only ensure adequate redress is given to victims of preventable maternal

64 Report of the Office of the United Nations High Commissioner for Human Rights on preventable maternal mortality and morbidity and human rights; http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.39_AEV-2.pdf (accessed 14 July 2017).

65 As above, 22.

66 As above.

67 As above.

68 As above, 16-17.

69 As above.

70 As above, 18.

71 As above, 18-20.

72 As above, 20.

73 As above, 20-21.

74 As above, 21.

75 As above.

76 As above, 22.

injuries and death but to simultaneously prevent future occurrences through health system-wide reforms.[77] Ensuring redress for victims requires investigating violations, prosecuting perpetrators and providing reparation including compensation.[78] Though there are recent and ongoing efforts to secure this type of accountability for maternal deaths and injuries through the judicial system in a few African countries,[79] successful implementation of systemic changes to the health systems of African countries, a second component of what it means to ensure accountability, is yet to be attained.

3.2 Resolution 15/17 and the second report of the OHCHR

The findings and recommendations in the OHCHR study directly contributed to the adoption of a second resolution which sustained the momentum that was generated by the first. In 2010, the Human Rights Council adopted resolution 15/17, a second resolution on maternal mortality, in which it reaffirmed resolution 11/8 and welcomed recent maternal mortality-reduction initiatives, including in Africa.[80] These initiatives include the convening of the summit of the African Union in Kampala in July 2010 on 'Maternal, infant and child health and development in Africa', the launch of CARMMA and the 'Africa cares: no woman should die while giving life' campaign.[81] The Human Rights Council urged states to adopt the recommendations in the OHCHR study, discussed above, including collecting disaggregated data,[82] redoubling efforts to fulfil relevant rights obligations, and allocating adequate resources to the health sector.[83]

In the resolution, the Council also mandated OHCHR to invite states, UN and regional bodies, NHRIs, civil society organisations and other stakeholders to submit information on instances of good or effective practices that exemplify the adoption of a human rights-based approach to eliminating avoidable maternal deaths and injuries.[84] It

77 As above, 18.

78 As above, 18-20.

79 For a detailed discussion on this see O, Afulukwe-Eruchalu 'Accountability for non-fulfilment of human rights obligations: a key strategy for reducing maternal mortality and morbidity in sub-Saharan Africa; in C Ngwena and E Durojaye (eds) *Strengthening the protection of sexual and reproductive health and rights in the African region through human rights* (2014) 119-151; see also O Afulukwe-Eruchalu 'Accountability for maternal healthcare services in Nigeria' (2017) 137 *International Journal of Gynecology and Obstetrics* 220-226.

80 Preventable maternal mortality and morbidity and human rights: follow-up to Council resolution 11/8. A/HRC/15/L.27 https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/167/35/PDF/G1016735.pdf?OpenElement (accessed 14 July 2017).

81 As above.

82 As above, para 3.

83 As above, para 5. For a detailed discussion of the role of NGOs and NHRIs in addressing preventable maternal mortality and morbidity see Afulukwe-Eruchal (n 79 above).

84 As above, para 9.

was tasked with developing a second study that would represent an analytical compilation of its results.[85]

The Council, like it did with the first resolution, expressly called for the cooperation of NGOs and other stakeholders,[86] and included a provision in the resolution committing itself to be prepared to take additional action to reduce preventable maternal deaths and injuries during its next session.[87] This consistent and deliberate setting aside of time and space on the Council's agenda during a specified upcoming session to address ongoing efforts to reduce preventable maternal deaths also served as evidence of political will and ensured that preventable maternal mortality remained visible within the United Nations system.

Complying with the Council's request, the UNHCHR engaged a wide range of stakeholders, including 14 NGOs and five NHRIs, in developing an analytical report.[88] This second report identified good or effective practices in adopting a human rights-based approach to eliminating preventable maternal mortality and morbidity. It outlined how such initiatives embodied a human rights-based approach and which aspects succeeded in achieving a reduction in maternal mortality and morbidity through a human rights-based approach. These aspects included those that enhanced the status of women; strengthened health systems; addressed unsafe abortion; expanded access to sexual and reproductive rights; and improved monitoring and evaluation of states' accountability measures.[89] The report further provided concrete examples of ways in which similar initiatives could give effect more fully to a human rights-based approach in Africa,[90] and other regions.

A thorough review of these examples by African countries, and their application in existing regional initiatives on maternal mortality, could strengthen their chances of successfully reducing preventable maternal deaths.

85 As above, para 10.

86 As above, para 7.

87 As above, para 11.

88 A/HRC/18/27, para 1, available http://www2.ohchr.org/english/issues/women/docs/WRGS/A-HRC-18-27_en.pdf (accessed 14 July 2017).

89 As above, para 5.

90 As above, paras 35-50.

3.3 Resolution 18/2 and the OHCHR's technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal mortality and morbidity

The Human Rights Council subsequently adopted a third resolution in 2011 which urged states and other stakeholders to pay heightened attention to the inter-linkages between maternal deaths and injuries and root causes such as gender inequality, lack of access to adequate health care services, and violence against women and girls.[91] It further mandated the UNHCHR to prepare a third report which would be a concise technical guidance on the application of a human rights-based approach to the implementation of policies and programmes to reduce preventable maternal mortality and morbidity.[92] Resolution 18/2 raised the bar that had been set by the previous two resolutions by going beyond requesting a study that would give a theoretical explanation of a human rights-based approach to addressing preventable maternal deaths and injuries, including the 7 principles discussed above, to requesting one that would also lay out what it would mean to apply this approach in practice.[93]

In 2012, the OHCHR released the technical guidance[94] which served to operationalise the previous reports by providing concrete step-by-step information on what it would mean to apply a human rights-based approach in developing policies and programs to address preventable maternal deaths and injuries.

3.4 Resolution 33/18 and a unified focus on the Sustainable Development Goals

Since the release of the OHCHR's technical guidance, states have been encouraged to provide information on how they are applying the technical guidance. Civil society organisations and all other stakeholders also have periodic opportunities to submit information on how states are implementing the practical examples in the technical guidance in their programming and policies on maternal health.

91 A/HRC/RES/18/2, para 3, available at http://www.legal-tools.org/doc/1a2b4c/pdf/ (accessed 14 July 2017).

92 As above, para 5.

93 A/HRC/RES/18/2, para 3, available at http://www.legal-tools.org/doc/1a2b4c/pdf/ (accessed July 14 2017).

94 (A/HRC/21/22), available at http://www2.ohchr.org/english/issues/women/docs/A.HRC.21.22_en.pdf (accessed 14 July 2017).

In 2016, the HRC adopted a resolution on maternal mortality. Resolution 33/18, represents the latest instalment of these ground-breaking resolutions which continue to raise the bar on United Nations-led initiatives to address preventable maternal deaths.[95] In keeping with the global focus on meeting the targets set under the SDGs, the resolution has also recognised the importance of identifying, within the SDGs framework, appropriate national indicators in reducing maternal mortality and morbidity. It urges states to assess, reform and establish accountability mechanisms to ensure access to justice for women and girls, and to continue to apply the OHCHR's technical guidance.

Like the previous resolutions, it has retained the use of time-specific deliverables including by committing to convening a panel discussion on the connections between SDGs 3 and 5 and preventable maternal deaths and injuries, and sexual and reproductive health and rights. In doing so, the Council continues to send a strong message that its focus on maternal health will remain a priority and its deliberations, and perhaps resolutions, will not cease till preventable maternal deaths and injuries become a thing of the past. The African human rights system could benefit from this approach in developing and rolling out initiatives including resolutions, studies, and technical guidance which are especially designed to account for Africa's unique challenges and prospects.

3.5 Jurisprudence: CEDAW Committee decision in *Alyne v Brazil*

Aided by the adoption of the maternal mortality resolutions, the development and findings of the OHCHR's studies, and the work of NGOs, the CEDAW Committee, charged with interpreting and ensuring states' compliance with CEDAW, categorically confirmed states' obligations to address preventable maternal deaths and ensure to women adequate access to maternal health services, as a fundamental right, in its seminal decision of August 2011 in the case of *Alyne v Brazil*.[96]

On 11 November 2002, Alyne, a Brazilian woman of African descent who was then six months pregnant with her second child, went to a local health centre due to vomiting and severe abdominal pain.[97] The doctor did not perform any tests before sending her home with vitamins and medicine. She came back two days later, still complaining that she had severe pain, and only then did the doctors admit her and establish the absence of a foetal heartbeat.[98] Alyne had a stillbirth but, against prevailing medical standards which prescribe that surgery should be

95 A/HRC/RES/33/18 available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/33/18 (accessed 15 July 2017).

96 Communication 17/2008, *Alyne da Silva Pimentel v Brazil*, CEDAW Committee 10 August 2011 UN Doc CEDAW/C/49/D/17/2008.

97 *Alyne da Silva Pimentel* (n 96 above) paras 2.1-2.14.

98 As above, paras 2.3-2.4.

performed urgently to ward off any bleeding or infection, she did not receive surgery for over 14 hours.[99]

After surgery, she had severe haemorrhaging and low blood pressure, but the doctors did not transfer her to a hospital with better-equipped facilities until her condition had worsened.[100] When they tried to transfer her, a municipal hospital was the only one that had space.[101] The local health centre did not own an ambulance and though the municipal hospital owned only one, it was reluctant to use it to facilitate the transfer, so Alyne's family attempted but was unable to arrange for a private ambulance.[102] During the resulting eight-hour delay in getting her to the municipal hospital, she fell into a coma.[103] When she was eventually transported to the municipal hospital, her medical records were not sent along.[104] Ultimately, Alyne was left in the hallway of an emergency room in the municipal hospital until she died 21 hours later,[105] on 16 November 2002, leaving behind a five year old daughter.[106]

Due to the undue delays in obtaining a remedy in Brazil, substantiated by evidence that women who belong to vulnerable groups in Brazil, such as those who are poor and those who are of African descent, are unlikely to obtain a remedy in the courts,[107] the case was initiated before the CEDAW Committee in 2007. The main claims were that the government of Brazil had violated Alyne's rights to life, health and legal redress, guaranteed by its Constitution as well as international human rights treaties, including CEDAW.[108] The claims highlighted the poor quality of care at an inadequately-equipped health centre, the delay in recommending a referral, the lack of space at better-equipped hospitals, the lack of reliable transportation to effect the transfer, the failure to transfer her medical records along with her to ensure appropriate and timely care, and the lack of access to emergency obstetric care as the main factors that caused her death.

The CEDAW Committee determined that Alyne's death was due to low-quality care.[109] It also found that Brazil had violated Alyne's right to health under article 12 of the Convention. It determined that the government's assertion that it could not be held responsible for the actions of a private health institution was invalid, emphasising that governments could not relinquish their responsibilities by outsourcing

99 As above, para 2.6.
100 As above, paras 2.6-2.8.
101 As above, para 2.8.
102 As above.
103 As above.
104 As above, para 2.10.
105 As above, paras 2.12 & 3.6.
106 As above, para 3.14.
107 As above, para 5.3.
108 Paras 3.1-3.15; see articles 1, 2 & 12 of the CEDAW.
109 As above, paras 7.3-7.5.

medical services. Instead, they must supervise and regulate the health practices and policies of private health facilities.[110] It also found that Brazil had violated Alyne's right to access to justice guaranteed in article 2(c), due to the delays and ultimate lack of redress. It further determined that the government had failed in its obligation to exercise due diligence in ensuring that private healthcare providers deliver sufficient care as provided for in article 2(e) of the Convention.[111] It also held that Alyne's right to non-discrimination, defined under article 1, had been violated.[112]

The Committee issued both individual and broader remedies aimed at addressing structural shortcomings. It mandated individual remedies such as reparation to Alyne's family, including financial compensation.[113] It also required the government to ensure maternal healthcare was affordable to all women,[114] and to train healthcare providers about women's reproductive rights including quality care during pregnancy and timely emergency obstetric care.[115] The Committee asked the government to provide effective remedies for violations of women's reproductive rights,[116] to make certain that health centres respect reproductive healthcare standards,[117] to punish providers who violate women's reproductive rights,[118] and to implement a national law to reduce maternal mortality and morbidity.[119]

The case also established state responsibility for private healthcare facilities, and can offer the African Court on Human and Peoples' Rights (African Court) crucial insights on the role it could play to develop and strengthen standards and ensure accountability for preventable maternal mortality and morbidity.

4 POTENTIAL OF THE AFRICAN COURT AND COMMISSION TO DEVELOP NORMS ON MATERNAL MORTALITY

As noted above, all the three major human rights instruments in the region – the African Charter, the African Children's Rights Charter and the African Women's Rights Protocol – contain important provisions relevant in addressing maternal mortality as a human rights violation. Furthermore, both the African Court and the African Commission have

110 As above, para 7.5.
111 As above, para 8.
112 As above.
113 As above, para 8.1.
114 As above, para 8.2(a).
115 As above, para 8.2(b).
116 As above, para 8.2(c).
117 As above, para 8.2(d).
118 As above, para 8.2(e).
119 As above, para 8.2(f).

important roles to play in developing norms and standards on maternal mortality. The Court can develop important jurisprudence on maternal health to hold states accountable in this regard. Equally, the African Commission through its promotional and protective mandate can develop norms and standards to address maternal mortality in the region. So far, the African Court is yet to decide any case relating to maternal mortality. Most of the cases that the Court has dealt with relate to civil and political rights. This may be due to the fact that only 8 countries have entered a declaration as envisaged under article 36(4) of the Protocol to the African Charter establishing the Court. It might be necessary for the Court to consider experiences from other jurisdictions in this regard.

While the Commission and Courts are yet to issue any decision specifically relating to maternal mortality, some important standards have been developed relevant to addressing this issue in the region. As noted earlier, as far back as 2008, the Commission adopted a resolution relating to maternal mortality as a human rights challenge. In that resolution, the Commission declared maternal mortality a state of emergency in Africa and called on African governments to wake up to their obligations to address preventable maternal deaths in the region. The Commission reasoned that maternal deaths in the region constituted a violation of women's rights to dignity, life, health and non-discrimination.

In its first General Comment on article 14 of the African Women's Rights Protocol, the Commission had called on African governments to create an enabling environment where legal and policy frameworks respect the rights of persons living with or affected by HIV.[120] The Commission noted that

> States Parties should also ensure that health workers are not allowed, on the basis of religion or conscience, to deny access to sexual and reproductive health services to women as highlighted in this document.[121]

It further expressed deep concerns about lack of access to sexual and reproductive health services for women in the region. Moreover, the Commission urged African governments to adopt a holistic approach towards addressing norms that perpetuate the low status of women in societies and improve access to sexual and reproductive health services for women.[122] This statement is not only crucial to addressing the high prevalence of HIV among women, but also important in mitigating some of the factors that aggravate maternal mortality in the region. Studies have shown correlation between high HIV prevalence and maternal mortality in the region.[123]

[120] African Commission on Human and Peoples' Rights General Comments on article 14(1)(d) and (e) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted during the 52nd Ordinary Session in Côte d'Ivoire 9-22 October 2012.

[121] As above, para 31.

[122] As above.

[123] See for instance L Say *et al* 'Global causes of maternal death: A WHO systematic analysis' (2014) *Lancet* e323-e333.

Furthermore, in its General Comment 2 on other provisions of article 14 of the African Women's Rights Protocol, the Commission called on African governments to ensure universal access to sexual and reproductive health in order to address unsafe abortion and mortalities among women and girls.[124] Although the General Comment did not specifically focus on maternal mortality, some of the standards developed by the Commission are relevant in addressing high maternal mortality in the region. For instance, the Commission calls on African governments to ensure availability of contraceptive services, family planning services and sexuality education in order to advance the sexual and reproductive health of women in the region.[125] Given that low uptake of contraception and lack of access to family planning services often lead to unplanned pregnancies, this statement by the Commission is germane in addressing maternal mortality in the region.[126]

Also, in its General Comment 3 the Commission adopted a similar progressive approach as the HRC in its General Comment 6 to interpreting the right to life guaranteed under the African Charter by noting that states do not only have negative obligations to refrain from taking lives but also positive obligations to prevent loss of life.[127] The Commission specifically notes that the right to life includes preventing maternal deaths. This is also consistent with the approach of the other United Nations bodies such as the CEDAW Committee, Committee on the Rights of the Child, and the CESCR in its General Comment 14, where it noted that the enjoyment of the right to health is dependent on other rights such as life, dignity, privacy and non-discrimination.[128]

The Commission's stance is also an acknowledgment of the interdependence and interrelatedness of all human rights. The Commission has affirmed this approach in some of its jurisprudence. For instance, in the *SERAC* case, the Commission had reasoned that the pollution of water and land of the Ogoni people not only violated the right to health but also undermined the rights to life, dignity, food and non-discrimination.[129] Also, in *International Pen* case, the Commission noted that a denial of access to health care services to a prisoner would undermine the right to life guaranteed in the African

[124] African Commission on Humana and Peoples' Rights General Comment 2 on article 14(1)(a), (b), (c) and (f) and article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted during the 55th Ordinary Session in Angola 28 April -12 May 2014.

[125] As above.

[126] For a detailed analysis of this General Comment see C Ngwena *et al* 'Human rights advances in women's reproductive health in Africa' (2014) 129 *International Journal of Gynaecology and Obstetrics* 184-187.

[127] African Commission on Human and Peoples' Rights General Comment No. 3 On the African Charter on Human and Peoples' Rights: The Right to Life (Article 4) adopted during its 57th Ordinary Session, held in Banjul, The Gambia, in November 2015.

[128] General Comment 14 (n 15 above).

[129] *Social and Economic Rights Action Centre (SERAC) and another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

Charter.[130] This approach provides an opportunity for the Commission in future to address maternal mortality as not only a violation of women's rights to health and reproductive well-being, but also the rights to life, dignity and non-discrimination.[131]

Although the Commission is yet to clearly outline the nature of states' obligations in relation to the right to health under the Charter or the African Women's Rights Protocol, it has, however, noted as follows:

> Enjoyment of the human right to health as it is widely known is vital to all aspects of a person's life and well-being, and is crucial to the realisation of all the other fundamental human rights and freedoms. This right includes the right to health facilities, access to goods and services to be guaranteed to all without discrimination of any kind ... The African Commission would however like to state that it is aware that millions of people in Africa are not enjoying the right to health maximally because African countries are generally faced with the problem of poverty which renders them incapable to provide the necessary amenities, infrastructure and resources that facilitate the full enjoyment of this right. Therefore, having due regard to this depressing but real state of affairs, the African Commission would like to read into article 16 the obligation on part of states party to the African Charter to take concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all its aspects without discrimination of any kind.[132]

This statement would seem to suggest that the realisation of the right to health under the Charter must be interpreted broadly to cover not only physical access but also health facilities and goods. Implicit in this is that states must ensure access to comprehensive maternal health care including availability of skilled health care providers, emergency medical care and access to transportation services for women in rural areas. In addition, it would require African governments to ensure access to quality, affordable maternal health medicines such as oxytocin and misoprostol to prevent post-partum haemorrhage and magnesium sulphate for the treatment of pre-eclampsia and eclampsia. A report has noted that more than 80 million out of 136 million women (majority of whom are in developing countries, including Africa) that give birth annually suffer from excessive bleeding (known medically as postpartum haemorrhage (PPH)) after childbirth.[133] It further notes that pre-eclampsia and eclampsia claim the lives of an estimated 63,000 women (majority in developing countries) each year.[134] It is noted that the odds of a woman dying as a result of these conditions in developing countries are about 300 times higher than that of developed countries.[135] This unacceptable and tragic waste of human lives requires the urgent attention of African governments.

[130] *International Pen and Others (on behalf of Ken SaroWiwa) v Nigeria* (2000) AHLR 212 (ACHPR 1998).

[131] For a detailed discussion of this approach see E Durojaye 'The approaches of the African Commission to the right to health under the African Charter' (2013) 17 *Law Democracy and Development* 393.

[132] See *Purohit and Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) paras 80-84.

[133] R Wilson *et al Key data and findings: medicines for maternal health* (2012).

[134] As above.

[135] As above.

In some of its concluding observations to states reports, the Commission has expressed concerns about the unacceptably high maternal deaths in some countries. For instance, in its concluding observations to the government of Nigeria the Commission noted with concern the high maternal mortality in the country and urged the government to take adequate steps and measures to address the situation.[136] Similarly, in its Concluding Observations to the report of the government of Malawi, the Commission expressed concerns about the inability of women to access health care services, including reproductive health care, due mainly to shortages of skilled health care providers and distance to health care facilities.[137] According to the Commission, this situation impacted more negatively on women in rural areas than in other parts of the country. The Commission, thus, called on the government of Malawi to strengthen all initiatives aimed at reducing maternal deaths and increase budgetary allocation to the health sector to at least 15 per cent in line with the Abuja Declaration.[138] More importantly, the Commission enjoined the government to:

> [e]nhance the availability and accessibility of maternity services, including post-natal services, including by: increasing the number of healthcare facilities that are fully equipped to provide comprehensive maternal healthcare; increasing the number and training of skilled health personnel and utilization of skilled health personnel during pregnancy, childbirth and postnatal period at all levels of the health system; and building and improving facilities in rural areas and access to skilled medical birth attendants to reduce labour complications.[139]

This admonition of the Commission to the government of Malawi resonates with the approach of human rights bodies such as the ICESCR Committee in its General Comment 14, the Human Rights Council and the CEDAW Committee.[140] It is also consistent with the reasoning of the Commission in some of its interpretative documents such as the resolution on maternal mortality and the Principles and Guidelines on the Implementation of Socio-economic Rights under the African Charter.[141] An important conclusion to be drawn from this is that while the Commission has not yet issued a decision on a communication on maternal mortality, the existing interpretative guidance and the experiences from international human rights bodies provide it with ample arsenal to issue a decision on this issue in future.

[136] African Commission, Concluding Observations and Recommendations on the 5th Periodic Report of the Federal Republic of Nigeria on the Implementation of the African Charter on Human and Peoples' Rights (2011 - 2014) adopted during the 57th Ordinary Session 4 - 18 November 2015, Banjul, The Gambia.

[137] African Commission, Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the Republic of Malawi on the Implementation of the African Charter on Human and Peoples' Rights (1995-2013) adopted during the 57th Ordinary Session held from 4-18 November 2015 Banjul, The Gambia.

[138] As above, 77.

[139] As above, 105.

[140] HRC General Comment 6 of the HRC on article 6 and General Recommendation 24 of the CEDAW Committee.

[141] African Commission, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights adopted in 2010.

5 CONCLUSION

The African human rights system continues to play a crucial role in efforts to reduce preventable maternal mortality and morbidity in Africa. Its laws, policies, and programmes have set standards and clarified the obligations of states to uphold human rights guarantees that apply to maternal health. Existing and new standards and initiatives on this issue could benefit from the approaches and lessons learned from the United Nations human rights system. The unified global focus on the SDGs, including the goal to reduce maternal mortality worldwide, and the availability of international cooperation and assistance, and technical guidance offer African governments' timely opportunities to amplify efforts to address the significant level of preventable pregnancy-related injuries and death. The African Commission and Court's mandates to promote and protect human rights, and interpret human rights laws and standards, put them in unique positions to identify, operationalise, and ensure the implementation of human rights-based approaches to successfully reduce preventable maternal deaths and injuries in the region. Both the Commission and Court will benefit from the establishment of a special mechanism on human rights in Africa, equivalent to the UNHCHR, to coordinate and operationalise the regional human rights bodies' and states' efforts to address preventable maternal mortality and morbidity and other human rights violations.

Le rôle des acteurs non-gouvernementaux dans la mobilisation juridique en faveur du Protocole de Maputo

*Lison Guignard**

RÉSUMÉ: Cet article étudie le rôle des acteurs non-gouvernementaux dans l'adoption, la ratification, la domestication et la mise en œuvre du Protocole additionnel à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes (Protocole africain relatif aux droits des femmes), adopté en 2003 par l'Union africaine. Si cet ensemble normatif coercitif est au premier regard une 'cause sans mouvement' – les initiateurs et les rédacteurs du Protocole africain relatif aux droits des femmes sont en grande majorité issus des professions juridiques et se distinguent par une expertise reconnue sur les questions d'égalité entre hommes et femmes - ce texte fait rapidement l'objet d'une intense campagne de mobilisation. Cette campagne est qualifiée de 'mobilisation juridique' car les acteurs qui y prennent part recourent au 'langage du droit' pour construire et publiciser leurs revendications.

TITLE AND ABSTRACT IN ENGLISH:
The role of non-state actors to legally mobilise in favour of the African Women's Rights Protocol

ABSTRACT: This article examines the role of non-state actors in the adoption, ratification, domestication and implementation of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol), which the African Union adopted in 2003. If this binding normative framework is, at first sight, an advocacy initiative without any social movement supporting it, the initiators and drafters of the Women's Rights Protocol mostly have a legal background and distinguish themselves through expertise on the issues of gender equality. This campaign is called 'legal mobilisation' because the actors involved take advantage of the 'language of the law' to build and publicise their demands.

MOTS CLÉS: Protocole additionnel à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes; Protocole de Maputo, mobilisation juridique, acteurs non-gouvernementaux, coalition de cause, usages du droit

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1 INTRODUCTION

Le Protocole additionnel à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes (Protocole africain relatif aux droits des femmes ou Protocole de Maputo), adopté à Maputo au Mozambique en 2003 lors de la deuxième conférence des chefs d'État et de gouvernement de l'Union africaine (UA), est entré en vigueur le 25 novembre 2005, après la ratification de quinze États. Loin d'être le simple produit de décisions étatiques, il reflète également la prise de participation d'acteurs non étatiques mise en évidence par la perspective constructiviste. L'enjeu de la mise en œuvre du Protocole de Maputo rompt ainsi avec le schéma westphalien traditionnel dans lequel les États sont les seuls acteurs des relations internationales.[1] C'est la raison pour laquelle nous utiliserons le terme 'transnational' pour signifier que, sans dénier l'importance accordée à l'État, nous privilégierons dans cette analyse les effets de solidarité entre réseaux et communautés d'acteurs non étatiques. Nous souhaitons ainsi dépasser le cadre des spécificités nationales pour mieux montrer les 'configurations d'interactions transnationales',[2] en soulignant les connexions d'acteurs associatifs au-delà des champs nationaux afin de porter la cause du Protocole.

L'objectif de cet article est ainsi d'étudier le rôle des acteurs non-gouvernementaux dans l'adoption, la ratification et la mise en œuvre du Protocole de Maputo. Même si celui-ci semble, au premier regard, une 'cause sans mouvement'[3] (ses initiateurs et rédacteurs sont en grande majorité issus des professions juridiques et se distinguent par une expertise reconnue sur les questions d'égalité hommes/femmes), il fait rapidement l'objet d'une intense campagne de mobilisation. Nous qualifions cette campagne de 'mobilisation juridique'[4] car les acteurs

1 JS Nye & RO Keohane 'Transnational relations and world politics: an introduction' (1971) 25 *International Organization* 329.

2 P Hassenteufel 'De la comparaison internationale à la comparaison transnationale' (2005) 55 *Revue française de science politique* 113 126.

3 L Bereni *La bataille de la parité* (2015) 300.

4 Voir les travaux de Michael Mc Cann sur les '*legal mobilisations*': M McCann *Rights at work* (1994) 372. Plus récemment: M N'Diaye 'Le développement d'une mobilisation juridique dans le combat pour la cause des femmes: l'exemple de l'Association des juristes sénégalaises (AJS)' (2011) 124 *Politique africaine* 155.

qui y prennent part recourent au 'langage du droit'[5] pour construire et publiciser leurs revendications.

Plusieurs études, portant notamment sur les mobilisations féminines et/ou féministes, ont abordé le droit sous l'angle de la reproduction/subversion des rapports de pouvoir.[6] Cependant, loin de n'être que l'expression d'un rapport de force, le droit peut constituer une contrainte aussi bien qu'une ressource. De même, notre étude de cas permettra de voir les usages collectifs et militants[7] qui découlent de la production d'un texte sur l'égalité hommes/femmes au niveau régional: nous évaluerons ainsi dans quelle mesure ce processus génère une mobilisation juridique d'acteurs associatifs et, supposément, reconfigure les répertoires d'action utilisés.

Sur le plan méthodologique, cet article combine archives et entretiens[8] avec les acteurs mobilisés en faveur de ce Protocole.[9] Ces informations ont été recueillies à l'occasion de trois enquêtes de terrain: à Banjul aux sièges de la Commission africaine des droits de l'homme et des peuples (Commission africaine)[10] et du Centre africain pour la démocratie et les études sur les droits de l'homme en mars 2014; à Addis-Abeba au siège de la Commission de l'UA en janvier 2015 et à Nairobi, aux sièges de 'Solidarité pour les droits des femmes africaines' (SOAWR) et d'autres organisations, membres de la coalition, telles que 'le réseau des femmes africaines dans le développement et la communication' (FEMNET) et 'Égalité maintenant' en février 2015.

Cette 'enquête multi-située'[11] nous permet d'étudier dans un même *continuum* le processus de production du Protocole et sa mise en œuvre. En effet, les représentations que les différents acteurs s'en font évoluent en même temps qu'elles altèrent la portée des normes juridiques qu'il contient, et plus précisément, leurs interprétations, les mobilisations et le contentieux éventuel relatif aux normes en jeu, et partant, son inscription dans le quotidien. Nous nous distinguons ainsi

5 E Agrikoliansky 'Les usages protestataires du droit' in O Fillieule *et al Penser les mouvements sociaux* (2009) La Découverte 231.

6 L Bereni & A Revillard 'Les femmes contestent: genre, féminismes et mobilisations collectives' (2012) 85 *Sociétés Contemporaines* 5; L Bereni *et al* 'Edito: entre contraintes et ressources, les mouvements féministes face au droit' (2010) 29 *Nouvelles questions féministes* 6-15.

7 L Israël 'Usages militants du droit dans l'arène judiciaire: le cause lawyering' (2001) 49 *Droit et société* 793; L Israël *et al Sur la portée sociale du droit: usages et légitimité du registre juridique* (2005).

8 Plusieurs des personnes que nous avons interrogées souhaitent que leur propos restent anonymes. C'est pourquoi nous ne précisons pas le nom des personnes que nous citons.

9 Cet article s'inscrit dans le cadre d'une thèse de doctorat dont l'ambition est de restituer, à partir des sources de première main et dans une perspective socio-historique, le processus de genèse de ce Protocole additionnel, en s'intéressant à la fois au processus d'élaboration du Protocole, aux expertises juridiques mobilisées qu'à la constitution de coalitions d'acteurs qui ont milité au plan transnational.

10 Organe de l'OUA/UA créé en 1981 aux termes de l'article 30 de la Charte africaine et mis en place en 1987 à Banjul, qui a pour mandat la promotion et la protection des droits humains sur le continent africain.

11 GE Marcus 'Ethnography in/of the world system: the emergence of multi-sited ethnography' (1995) 24 *Annual Review of Anthropology* 95.

de la 'mise en œuvre' entendue dans l'approche de politiques publiques comme un processus comprenant une phase d'évaluation durant laquelle sont mesurés les effets produits concrètement sur le terrain. Il ne s'agit pas ici d'évaluer le Protocole en étudiant son impact sur la réalité sociale, et en particulier sur l'évolution du statut des femmes dans les sociétés concernées. Le parti pris de cet article est de concevoir la mise en œuvre comme faisant pleinement partie du cheminement de la construction de ce texte. Dans cette perspective, le Protocole de Maputo, loin d'être une entité distincte qui dominerait la société et tenterait de la réguler depuis l'extérieur, ne peut exister que si des individus s'en saisissent et l'utilisent. D'où la nécessité de l'étudier à partir de ses conditions de production aussi bien que des mobilisations qu'il génère.

À l'issue de cette étude empirique, il est apparu indispensable de distinguer trois séquences qui engagent trois types d'acteurs différents. Durant la première séquence, qui correspond à la période allant du vote de la résolution en 1995 à la présentation du texte à la Conférence des chefs d'États et de gouvernement de l'UA en 2003, plusieurs organisations de promotion des droits des femmes suivent la procédure institutionnelle de son adoption. Cette séquence engage surtout des professionnels du droit, des experts nationaux et des représentants d'organisations internationales (partie 1). La deuxième séquence, qui va de son adoption en 2003 jusqu'à son entrée en vigueur en 2005, se caractérise par la mise en place de SOAWR – coalition *ad hoc* de la cause du Protocole de Maputo conçue initialement pour promouvoir l'entrée en vigueur et la ratification du Protocole par les États membres (partie 2). La troisième séquence, de 2005 à aujourd'hui, témoigne des usages militants qui découlent de l'entrée en vigueur de ce texte. Dans cette perspective, le droit est appréhendé à travers son potentiel contestataire en tant que ressource pour les mobilisations en faveur de l'égalité entre les sexes, y compris dans un contexte transnational (partie 3).

2 MISE À L'AGENDA DE LA QUESTION DES DROITS DES FEMMES DANS L'ESPACE[12] RÉGIONAL AFRICAIN (1995-2003)

Les acteurs associatifs, s'étant intéressés tardivement au Protocole de Maputo, ont davantage servi de relais plus que d'initiateurs. C'est ainsi que les dynamiques de mise à l'agenda du Protocole se distinguent du

[12] Nous parlons ici d'espace car l'amorce du processus d'institutionnalisation des droits humains sur le continent africain paraît insuffisant pour parler de la constitution d'un 'champ' transnational africain – comme cela a été fait dans le cadre de l'Union européenne (UE). Nous privilégions par conséquent la notion d'espace régional, appréhendant celui-ci comme le lieu de tensions, de conflits de valeurs et de rapports de force entre acteurs. Voir A Mégie et G Sacriste 'Polilexes : champ juridique européen et polity communautaire' (2009) 28 *Politique européenne* 157; A Cohen & A Vauchez 'Sociologie politique de l'Europe du droit' (2010) 60 *Revue française de science politique* 223.

modèle déroulé dans la notice du Dictionnaire *Genre et Science politique,* où la mise à l'agenda est décrite comme 'une des séquences de l'action publique où la participation d'acteurs issus de la société civile est la plus visible'.[13] Dans notre étude de cas, les 'faiseuses d'agenda'[14] ne sont pas à proprement parler les associations de femmes et la mise à l'agenda d'un tel Protocole ne s'est pas faite 'par la mobilisation'.[15] L'émergence de la mobilisation se situe à l'approche de l'adoption du texte finalisé.

2.1 La conception et l'élaboration du Protocole, une affaire de spécialistes

L'idée de créer un Protocole spécifiquement dédié aux droits des femmes trouve son origine dans la multiplication des espaces de rencontres entre militants pour l'égalité des sexes, plus spécifiquement le forum des organisations non gouvernementales (ONG) organisé depuis 1993 avant chaque session de la Commission africaine des droits de l'homme et des peuples. Les ONG, dont plusieurs associations de défense des droits des femmes, comme Women in Law and Developement/ 'Femme, Droit et Développement en Afrique' (WiLDAF/FeDDAF),[16] sont de plus en plus nombreuses à avoir accès au forum. Ainsi, de 29 en 1990 (création), elles sont passées à 140, fin 1994.

Lors du forum des ONG de mars 1995 qui se tient à Lomé, ce réseau régional panafricain organise - en collaboration avec la Commission Internationale des Juristes (CIJ) ainsi qu'avec la première femme à être élue commissaire à la CADHP, Madame Vera Duarte Martins - un séminaire de deux jours sur 'la Charte africaine des droits de l'homme et des peuples et les droits de la femme africaine'. Il rassemble 44 participants venus de 17 pays africains. À l'occasion, la question s'était posée de savoir s'il fallait procéder à un amendement ou à une révision de la Charte africaine ou s'il fallait adopter un Protocole supplémentaire ou optionnel à la Charte. Le contexte d'alors avait fait pencher la balance en faveur de la seconde option. En effet, l'adoption par l'Organisation de l'Unité africaine (OUA) d'un Protocole additionnel sur les droits et le bien-être de l'enfant en 1990 et la rédaction en cours, à cette époque, d'un Protocole additionnel portant création d'une Cour africaine, avaient constitué des preuves que les projets de Protocole additionnel pouvaient aboutir. Il s'y ajoutait l'idée

13 C Achin & L Bereni 'Agenda/mise à l'agenda' in C Achin & L Bereni *Dictionnaire genre & science politique, concepts, objets, problèmes* (2013) 57.

14 M Rabier 'Entrepreneuses de cause. Contribution à une sociologie des engagements des dirigeantes économiques en France' (2013) Thèse de doctorat en Sciences de la société EHESS.

15 Achin & Bereni (n 13 ci-dessus).

16 Cette organisation, constituée en 1990, a pour objectif de promouvoir une culture du respect des droits des femmes en Afrique et de porter ainsi les intérêts des femmes de tout le continent. L'organisation s'est développée et comprend aujourd'hui des membres dans 23 pays. Voir le site web de l'organisation : http://www.wildaf-ao.org/ (consulté le 3 février 2017).

selon laquelle une révision de la Charte ne suffirait pas à prendre en compte l'ensemble des droits des femmes.

À l'issue de la rencontre, la recommandation phare a été de proposer à l'OUA d'élaborer un document additionnel sur les droits des femmes. C'est ainsi que lors de sa dix-septième session ordinaire qui avait succédé au forum (13-22 mars 1995), la Commission africaine a adopté cette recommandation sous la forme d'une résolution. La production normative est ainsi amorcée. Lors de sa trente-et-unième session ordinaire en 1995, l'OUA a adopté la résolution AHG/Res.240(XXXI) chargeant la Commission africaine de nommer un panel d'experts pour l'élaboration d'un Protocole sur les droits des femmes.

Selon le groupe d'experts chargé de la rédaction, l'écriture du texte ne revient pas aux organisations de femmes elles-mêmes. Ce sont des membres de la Commission africaine et des représentants des organisations régionales et internationales, telles que la CIJ et WiLDAF/FeDDAF, qui en élaboreront une première ébauche avant que ne s'ensuive une procédure de consultation des associations de femmes, à travers des ateliers de réflexion, financés majoritairement par les agences de coopération canadienne. Mais le Protocole reste essentiellement, à la fin des années 1990, l'affaire de réseaux internationaux et de juristes militants pour l'égalité entre les sexes. Ces derniers pilotent le projet et participent également au processus d'amendement du texte. En effet, selon les archives consultées, l'ensemble des propositions d'amendements ont été formulées par un cabinet d'avocat Frances Claudia Wright et Yasmin Jusu-Sheriff, basé à Freetown, au Libéria, et quatre organisations de défense des droits des femmes: l'Association des femmes juristes de Côte-d'Ivoire, l'organisation internationale de défense des droits des femmes 'Égalité maintenant', *Shelter Rights Initiative* (SRI) et le Centre africain pour la démocratie et les études sur les droits de l'homme. Ce sont donc ces experts non gouvernementaux, sélectionnés par la Commission africaine sur la base de leur compétence, qui rédigeront le premier projet de Protocole appelé 'projet 2000'. Si certains membres associatifs peuvent amender le texte, la possibilité pour les représentants d'associations locales d'influencer son contenu même reste limitée.

Le secrétariat de l'OUA, sur le point de devenir la Commission de l'UA, reçoit le projet achevé et le groupe d'experts est dissous.

2.2 Quand se rencontrent droit et militantisme

Le processus de finalisation du projet de Protocole a connu des aléas au niveau institutionnel, lesquelles difficultés se sont traduites par un retard dans la mise en œuvre des réunions des experts gouvernementaux et des ministres. En effet, les deux réunions dont la tenue était prévue respectivement début 2001 et décembre 2002, n'ont eu lieu finalement que fin 2001 et mars 2003. Ces contraintes n'ont pourtant pas empêché la société civile de s'organiser durant cette

période de latence pour que les dispositions soient renforcées jusqu'à la finalisation du texte.

Ainsi, deux types de 'diplomaties catalytiques'[17] - entendues comme l'implication d'acteurs non-gouvernementaux dans des activités diplomatiques – se sont distingués au niveau régional à cette époque. Le premier, porté par l'Association 'Femmes Africa Solidarité' (FAS), consistait à faire pression directement sur les membres du Conseil exécutif de l'UA et les chefs d'État pour accélérer le processus de production du Protocole, en organisant des pré-sommets avant les conférences. Ainsi, durant les sommets de l'UA entre 2002 et 2003, plusieurs membres associatifs interagissent pour mettre en place des stratégies communes - incarnées par les déclarations de Durban et de Maputo, et la Stratégie de Dakar - afin d'asseoir le plaidoyer pour l'adoption du Protocole additionnel. Les participants y demandent que

> des mesures soient prises pour assurer la participation effective des experts gouvernementaux compétents, ayant une formation juridique, y compris des femmes, à la deuxième réunion d'experts sur le projet de Protocole [et] que les dispositions nécessaires soient mises en place pour assurer la participation effective des ministres compétents à la réunion ministérielle qui se tiendra après la deuxième réunion d'experts sur ledit Protocole.[18]

Ils émettent enfin le souhait que 'le Projet de Protocole soit adopté, ratifié et mis en vigueur'.[19]

Le second type de diplomatie catalytique avait pour but de faire du plaidoyer en amont auprès des représentants étatiques, pour influer sur le fond, lors des négociations. Les associations qui agissent dans ce sens sont notamment le Centre africain pour la démocratie et les études sur les droits de l'homme, WiLDAF/FeDDAF, FEMNET ou encore Égalité maintenant.

C'est ainsi que les 4 et 5 janvier 2003, en préparation de la seconde réunion des experts gouvernementaux, ces différentes organisations se retrouvent à Addis-Abeba pour s'accorder sur une stratégie de plaidoyer auprès de l'UA et ses États membres afin d'assurer que les dispositions du Protocole soient au-delà de celles contenues dans les textes internationaux déjà ratifiés par la plupart des États africains.[20] Suite à cette réunion, elles produisent un document d'information détaillant les manières dont cette version pourrait être renforcée. Ce document est largement disséminé, notamment auprès des gouvernements nationaux, et en particulier, des ministres de la justice, et de ceux chargés des droits des femmes.

Durant cette séquence, les associations ont la possibilité de suivre la procédure institutionnelle d'adoption du texte, en tant qu'observatrices mais leur rôle dans la négociation sur son contenu

[17] B Hocking 'Catalytic diplomacy: beyond newness and decline' in J Melissen (ed) *Innovation in diplomatic practice* (1999).

[18] 'Déclaration de Durban sur l'intégration de la perspective genre et la participation active de la femme dans l'UA': h*ttp://www.genderismyagenda.com/campagne/actes_fran/1_declaration_durban.pdf* (consulté le 20 mars 2017).

[19] *Id.*

[20] 'Mark-up from the Meeting convened on 4-5 juin 2003 in Addis-Abeba, by the Africa regional office and the law project of Equality Now' (archive).

même reste cependant limité. Elles ne sont en effet pas consultées durant les débats des experts et représentants gouvernementaux. C'est à l'issue de ces deux longs processus d'examen que le projet de Protocole a été adopté en juillet 2003.

Au moment où les représentants étatiques discutent du projet de Protocole, se met en place une mobilisation de femmes en sa faveur, dans un contexte d'ouverture institutionnelle au niveau régional avec le remplacement de l'OUA par l'UA. Ainsi, si les associations ne sont pas les premières à se saisir de l'enjeu de la codification d'un texte régissant les droits des femmes au niveau régional, leur rôle devient de plus en plus important. Quasiment absentes lors de sa mise à l'agenda, elles sont consultées lors de sa formulation puis se mobilisent au moment de son adoption. Le processus d'adoption du Protocole entraîne ainsi un renouvellement des acteurs.

3 LE PROTOCOLE DE MAPUTO: UNE CAUSE TRANSNATIONALE MOBILISATRICE (2003-2005)

Si le contexte de grande ouverture institutionnelle, avec le remplacement de l'OUA par l'UA en 2001, est généralement invoqué pour expliquer la rapide entrée en vigueur du Protocole de Maputo, c'est une autre piste que nous souhaitons explorer ici. Il s'agit de la mobilisation de la coalition SOAWR qui, cimentée autour de la volonté d'accompagner cette entrée en vigueur auprès des chefs d'État, a joué un rôle de catalyseur.

3.1 La constitution d'une coalition de la cause pour l'entrée en vigueur du Protocole de Maputo

Dans la période qui suit l'adoption du Protocole, les associations ont montré un grand engouement. Symbole d'une rupture, ce texte cristallise les aspirations en vue d'une amélioration des conditions de vie des femmes en Afrique. Ce qui explique que les organisations de femmes qui se sont mobilisées ne tardent pas à se préoccuper de son devenir. En témoigne l'organisation par FEMNET, de la conférence sur le thème 'une stratégie régionale pour la participation politique des femmes africaines et le *gender mainstreaming* dans l'UA', à Nairobi au Kenya du 27 au 30 octobre 2003. Y participent notamment les organisations *Akina Mama Wa Africa*, 'Égalité maintenant', FAS et WiLDAF/FeDDAF. L'adoption du Protocole fait ainsi naître le sentiment qu'une mobilisation pour son entrée en vigueur est nécessaire, comme le souligne la militante de WiLDAF/FeDDAF Adjamabdo-Johnson: 'Personne n'était dupe. Une fois le Protocole

adopté, il en restait tout autant à faire pour obtenir son entrée en vigueur'.[21]

Pour autant, ces organisations ne se mettent pas tout de suite en mouvement. Une employée de l'antenne d'Égalité maintenant' à Nairobi déclarait: 'durant une année, nous avons juste attendu pour voir. C'est autour de mai 2004 que nous nous sommes mises ensemble et avons contacté le bureau du conseiller juridique de la Commission de l'UA'.[22] À cette époque, soit dix mois après son adoption, seul l'État des Comores a ratifié le Protocole, et encore par inadvertance. Selon cette même employée 'les Comores ont ratifié parce qu'ils avaient de nombreux textes en suspens et qu'ils étaient sous pression de l'UA. Donc pour résoudre la situation, le Parlement a pris tous les instruments de l'UA et les a ratifiés, y compris celui sur les femmes. C'était donc involontaire !'.[23]

C'est ainsi que lors du sommet des chefs d'État et de gouvernement de juillet 2004, douze organisations nationales, régionales et internationales – parmi lesquelles 'Égalité maintenant', FEMNET, Oxfam Grande-Bretagne, WiLDAF/FeDDAF – décident de plaider conjointement pour l'entrée en vigueur du Protocole: 'nous avons décidé de joindre nos forces pour assurer que le Protocole entre en vigueur le plus rapidement possible. On pensait qu'en se mettant ensemble pour pousser, on serait capable de convaincre les chefs d'État'.[24] Mais les effets tardent à se faire sentir car jusqu'en septembre 2004, seuls 4 États parmi les 30 qui l'avaient déjà signé, ont ratifié le Protocole. Il s'agissait des Comores, de la Namibie, du Rwanda et de la Libye.

C'est dans ce contexte que, lors d'une rencontre organisée à nouveau par FEMNET à Nairobi en septembre 2004, pour le renforcement des capacités des organisations de femmes, la coalition SOAWR est mise en place. C'est ce que relate cette même employée do'Égalité maintenant:

> FEMNET nous a fourni l'espace en permettant que le dernier jour soit consacré au Protocole. Toutes les organisations présentes étaient intéressées pour créer une plate-forme pour plaider et populariser le Protocole en Afrique, pour s'assurer que les gouvernements ne le mettent pas sur leurs étagères mais qu'au contraire, il soit utilisé activement, de telle façon qu'il puisse devenir une force de changement.[25]

Le Protocole constitue dès lors un enjeu crucial pour plusieurs organisations de défense des droits des femmes, qui élaborent des arguments et une stratégie qui participent à la construction d'une

[21] K Adjamabdo-Johnson 'The entry into force of the Protocol on the Rights of Women in Africa: a challenge for Africa and women' in *African Voices on Development and Social Justice* (24 juin 2004) 162 *Pambazuka News* 108 (traduction de l'auteure).

[22] Entretien avec une employée d'Égalité maintenant, 6 mars 2015, siège de SOAWR, Nairobi (traduction de l'auteure).

[23] *Id.*

[24] *Id.*

[25] *Id.*

communauté militante. L'ensemble de cette communauté forme à ce moment-là une 'coalition de cause',[26] entendue comme l'ensemble des acteurs individuels et collectifs qui développent des activités stratégiquement reliées entre elles afin de diffuser un socle de revendications communes. Il s'agit de la coalition *ad hoc* 'Solidarité pour les droits des femmes africaines' (SOAWR) qui s'est spécifiquement créée autour de l'objectif de l'entrée en vigueur du Protocole de Maputo. À la première assemblée générale de ladite coalition, 'Égalité maintenant' est élue pour en assurer le secrétariat.

L'adoption du Protocole, en créant un contexte politique et juridique favorable, est propice à ce que le militantisme de différentes associations de promotion des droits des femmes du continent, aussi diversifié soit-il, s'articule autour de l'enjeu commun de sa mise en œuvre, qui dépend, dans un premier temps, de sa ratification par les États.

3.2 Garantir l'entrée en vigueur '*coûte que coûte*'[27] : le rôle catalyseur des associations

L'adoption du Protocole de Maputo ouvre la possibilité d'une nouvelle voie de recours au droit, au niveau régional. Dans cette perspective, le recours au droit cesse ainsi d'avoir des ancrages exclusivement nationaux pour en appeler aux institutions régionales.

Afin que le Protocole puisse entrer en vigueur, la coalition tente de légitimer le texte auprès des dirigeants politiques, notamment lors des sommets bi-annuels de l'UA. Ainsi, évoquant les bénéfices tirés de ces pré-sommets, une membre de WiLDAF/FeDDAF affirmait: 'On a pu mieux cerner les dirigeants politiques qui nous soutiendraient pour l'adoption du texte, mais aussi qui seraient capables d'en influencer d'autres (…). Il y avait avec nous Thabo Mbeki, alors président de l'UA, et Abdoulaye Wade'.[28] Les sommets de l'UA permettent également de communiquer directement avec les chefs d'État sur une base régulière pour les rappeler constamment à leurs engagements, 'car quand on les interpelle dans leurs bureaux au niveau national, ils disent 'oui, oui' et dès qu'on est parti, ils balayent cela d'un revers de main.'[29] Ainsi, l'accès aux espaces officiels, particulièrement à l'UA, permet aux membres de la coalition de se faire entendre.

[26] En concordance avec la définition qu'en donne Paul Sabatier, l'auteur qui a forgé cette approche et l'a diffusée, à savoir une configuration 'd'acteurs provenant d'une multitude d'institutions […] qui partagent un système de croyances lié à l'action publique et qui s'engagent dans un effort concerté afin de traduire des éléments de leur système de croyances en une politique publique' in Z Scchlager & PA Sabatier 'Les approches cognitives de politiques publiques: perspectives' (2000) 50 *Revue Française de Science Politique* 227. Voir aussi PA Sabatier 'Advocacy coalition framework (ACF)' in L Boussaguet *et al Dictionnaire des politiques publiques* (2004) 40-49.

[27] Entretien avec une militante de la coalition SOAWR, Banjul, 20 mars 2014.

[28] Entretien avec une membre de WiLDAF/FeDDAF Togo, Addis-Abeba, 20 janvier 2015.

[29] *Id.*

Dans la déclaration qu'elle avait faite lors du pré-sommet de la troisième Conférence des Chefs d'État et de Gouvernement qui s'était déroulé à Addis-Abeba du 28 au 29 juin 2004, la Coalition y avait exhorté 'les États membres à signer et à ratifier le Protocole d'ici la fin 2004 et à appuyer le lancement de campagnes publiques en vue de la sensibilisation sur l'importance de ce Protocole pour assurer son entrée en vigueur en 2005.'[30] Lors de la quatrième session ordinaire de l'assemblée de l'UA de janvier 2005 à Abuja, les organisations de femmes coalisées parviennent alors à l'adoption d'un 'accord consensuel'. Tout en 'gardant à l'esprit les efforts de l'UA pour assurer la visibilité de la machinerie du genre,'[31] les auteurs de cet accord réprouvent 'ceux qui n'ont pour l'instant mené aucune action dans ce sens'.[32]

Lors de cette même conférence des chefs d'État, la coalition adopte des stratégies de plaidoyer reposant sur le 'blame and shame'[33] avec la remise de cartons jaunes, verts ou rouges aux autorités gouvernementales selon l'avancement de leur pays respectif dans la ratification du Protocole: 'à l'entrée de la salle de conférence où doivent passer les chefs d'État, *on brandissait nos drapeaux verts (pour les États* qui avaient ratifié), un drapeau jaune (pour les *États* qui avaient signé mais n'avaient toujours pas ratifié) et un rouge (pour ceux qui n'avaient fait ni l'un ni l'autre)'.[34]

Les associations lancent en outre une campagne téléphonique de textos intitulée '*text now 4 women's rights*' ainsi qu'une pétition en ligne pour demander aux États africains de ratifier le Protocole. Elles publient également des articles en faveur de la ratification dans l'hebdomadaire en ligne *Pambazuka*.[35]

En manifestant de cette façon, ces militants de la cause du Protocole n'attendent rien à court terme des institutions panafricaines, dont leur sort ne dépend pas directement puisque celles-ci sont tributaires des systèmes nationaux. Ils le font en grande partie pour se rendre visibles dans l'espace africain, afin de pouvoir faire davantage pression sur les gouvernementaux nationaux. Cette stratégie se révèle payante sur le plan formel, puisque, le 25 novembre 2005, le Protocole entrera finalement en vigueur après sa ratification par 15 États membres de l'UA. Le directeur du bureau du conseiller juridique d'alors explique que: 'ce qui a été vraiment unique avec ce Protocole, c'est la vitesse à laquelle il est entré en vigueur. Dans toute l'histoire de l'OUA/UA,

30 FAS, ' Contribution des femmes africaines à la déclaration sur l'intégration de la perspective genre' dans l'UA',*http://www.genderismyagenda.com/campagne/actes_fran/4_declaration_ethiopie.pdf* (consulté le 12 novembre 2016).

31 FAS, 'Accord consensuel d'Abuja', http://www.genderismyagenda.com/campagne/actes_fran/5_accord_consensuel_abuja.pdf (consulté le 12 novembre 2016).

32 FAS (n 31 ci-dessus).

33 WLF Felstiner *et al* 'The emergence and transformation of disputes: naming, blaming, claiming' (1980) *15 Law & Society Review* 631.

34 Entretien avec une militante de la coalition SOAWR, Banjul, 20 mars 2014.

35 Regroupés dans l'ouvrage SOAWR *Not yet a force for freedom: the Protocol on the Rights of Women in Africa* (2004) *Pambazuka News* 162

aucun Protocole n'est entré en vigueur aussi rapidement'.[36] Les obstacles à sa mise en œuvre apparaissent cependant très importants, notamment en raison de la faiblesse des moyens institutionnels au niveau national mais aussi du contexte du pluralisme juridique existant en Afrique. Mais son entrée en vigueur n'en constitue pas pour autant un jeu à somme nulle. En effet, par des mécanismes d'appropriation, différents acteurs s'en prévalent pour revendiquer des droits violés par les États, faisant naître de nouveaux combats politiques au niveau national.

Dès son adoption, l'espace d'action et de mobilisation autour du Protocole s'élargit aux militants des organisations de femmes non juristes qui font de sa mise en œuvre un enjeu. D'un outil technique entre les mains d'experts, le Protocole devient dès lors une ressource pour de nombreuses organisations de défense des droits des femmes. Comme l'ont mis en évidence les approches en termes de coalition de cause,[37] toutes les membres de SOAWR partagent des valeurs et des idées qui constituent des dimensions cruciales de l'élucidation des liens entre adhésion à la cause commune et but poursuivi: l'entrée en vigueur, puis la mise en œuvre du Protocole. Elles la défendent au sein de différents espaces afin 'de l'imposer à l'agenda public pour contraindre les autorités publiques à l'inscrire à l'agenda gouvernemental [en] appelant une décision'.[38]

4 USAGES DU DROIT POUR L'ÉGALITÉ DANS L'ESPACE TRANSNATIONAL AFRICAIN (2005 A AUJOURD'HUI)

Avec son entrée en vigueur en 2005, le Protocole de Maputo, de ressource potentielle, devient une ressource actuelle dont les acteurs peuvent se prévaloir dans l'espace transnational africain. L'approche en termes de coalition de cause, qui met en avant leurs fonctions d'intermédiation sur le long terme, est particulièrement opérante pour conceptualiser les modalités d'action de SOAWR pour influencer les processus politiques au niveau national dans le but de favoriser la mise en œuvre du Protocole de Maputo. Douze ans plus tard, SOAWR s'est en effet pérennisée et ses objectifs se sont étendus à sa promotion, sa vulgarisation et sa domestication. Parce qu'un nombre plus large d'actrices se rend compte que ce Protocole contient les germes d'une amélioration de la vie des femmes et d'une réduction des injustices de genre sur le continent africain, la coalition s'est également élargie.

36 Entretien avec le directeur du bureau du conseiller juridique de la Commission de l'UA (1999-2011), Nairobi, 21 mars 2015.

37 CM Weible & PA Sabatier 'A guide to the advocacy coalition framework' in F Fischer, GJ Miller & MS Sidney (eds) *Handbook of public policy analysis* (2006) 123.

38 L Boussaguet *et al Dictionnaire des politiques publiques* (2004) 40-49.

4.1 Le droit, une ressource du jeu politique

Le but visé par la coalition SOAWR est d'accroître la volonté politique des États membres de l'UA, à ratifier, de préférence sans réserves, et mettre en œuvre le Protocole de Maputo. Une employée *d'*Égalité *maintenant* se projette en cas termes: 'il y aura un jour où nous n'aurons plus besoin d'une telle coalition, quand tous les *État*s membres de l'UA auront ratifié, peut-être dans 20 ou 40 ans!'.[39]

En effet, si une coalition de cause se met en place à ce moment-là, c'est bien parce que le Protocole est perçu comme un cadre juridique exhaustif permettant de tenir les gouvernements africains pour responsables des violations des droits des femmes: 'si le Protocole est ratifié et mis en œuvre, il a le potentiel de mettre un terme à l'impunité pour toutes les formes de violations des droits humains des femmes en Afrique'.[40] De ce fait, les mobilisations sont dirigées en premier lieu à l'endroit des gouvernements. Pour reprendre les propos d'Éric Agrikoliansky, 'Parce que l'État agit par le droit [...], l'État peut être contraint par le droit. [...] Les protestataires peuvent se saisir de la légalité pour retourner contre l'*État* la force du droit'.[41]

Leur mobilisation, si elle évolue dans le temps, repose principalement sur des stratégies de plaidoyer.[42] Les membres de la coalition de cause élaborent par exemple des versions simplifiées du Protocole pour les transmettre aux ministres qui n'en auraient pas lu la version complète. Ils prennent directement contact avec les ministères de la justice, des affaires étrangères et ceux chargés des questions féminines et identifient des points focaux. L'objectif poursuivi est la prise de conscience publique du Protocole, en particulier par ceux qui sont susceptibles de jouer un rôle dans sa mise en œuvre (fonctionnaires, juristes, officiers de police, médecins etc.). Ils font plus spécifiquement un travail de socialisation et de sensibilisation au Protocole auprès des parlementaires. Une employée *d'*Égalité maintenant explique ainsi que des solutions simples existent: 'Parfois, il s'agit d'un problème de budget au niveau national. Il nous arrive de faire des photocopies pour chacun des députés, de telle façon qu'ils puissent délibérer en toute connaissance de cause'.[43]

Constituer une coalition permet ainsi de gagner en audience et en légitimité. Dans cette perspective, c'est le partage d'informations et de bonnes pratiques, la mutualisation des ressources, et de l'expertise

39 Entretien avec une employée *d'Égalité maintenant*, 6 mars 2015, Nairobi.

40 H Forster 'African States Equal to the Task? Not yet a Force for Freedom' African Voices on Development and Social Justice (juin 2004) *Pambazuka News* 162 112-113 (traduction de l'auteure).

41 E Agrikoliansky 'Les usages protestataires du droit' in O Fillieule *et al Penser les mouvements sociaux* (2009) La Découverte 225.

42 Nous définissons le plaidoyer comme le fait de rendre une cause visible, par le biais par exemple de lobbying, de campagne publique ou médiatique, afin de changer les pratiques et les politiques publiques. Pour aller plus loin: E Ollion & J Siméant 'Politiques du plaidoyer' (2015) 67 *Critique Internationale*.

43 Entretien avec une employée d'*Égalité maintenant*, 6 mars 2015, Nairobi.

acquise qui doivent permettre à SOAWR de faire connaître et reconnaître le Protocole de Maputo: 'il y a beaucoup de preuve qu'un lobbying efficace et approprié auprès de la société civile est un moyen efficace de faire pression sur les décideurs politiques'.[44]

Pour disséminer des connaissances à propos du texte, la coalition vise plus largement la société civile aux niveaux national et local. Selon les associations, seul un processus d'apprentissage de cet instrument juridique le rendra contraignant et permettra d'en jouir. Sans quoi, la fonction coercitive du droit ne peut fonctionner. En Gambie par exemple, la stratégie du Centre africain pour la démocratie et les études sur les droits de l'homme consiste à sensibiliser les chefs religieux ainsi qu'à s'appuyer sur des techniques de communications pour aider les personnes analphabètes à comprendre le Protocole:

> l'implication de communicants traditionnels (surtout des femmes) dans la composition de musique dans les langues locales a été utile pour disséminer l'information parmi les communautés rurales [...]. En outre, la production de brochures, de posters et la traduction du Protocole dans les langues locales a engendré une meilleure connaissance de cet instrument dans l'ensemble de la population.[45]

Les membres de la coalition mettent à la disposition des associations nationales de défense des droits des femmes nationales l'information sur le Protocole de Maputo, par exemple en organisant des sessions de formation pour expliquer notamment la procédure de ratification. C'est aussi pour promouvoir le Protocole qu'ils utilisent les médias (radio, TV, journaux) et que l'organisation FEMNET produit une pièce radiophonique en collaboration avec la Compagnie nationale '*Kenya Broadcasting Corporation*'.

Le plaidoyer peut également s'effectuer à distance par la mise en réseau et la création de *mailing list* qui font circuler du matériau militant: projets de lois, pétitions, slogans ... Dans les États qui l'ont ratifié, les membres de la coalition de cause font pression en repérant des violations du Protocole, tandis que pour ceux qui ne l'ont encore ratifié, ils élaborent une cartographie visant à énumérer de façon exhaustive les entraves à la ratification.

On le voit, la spécificité de la mobilisation de la coalition de cause est qu'elle combine un répertoire protestataire (dénonciations, pétitions, interpellations publiques) à un 'répertoire d'action'[46] plus feutré qui renvoie à des stratégies d'influence des autorités politiques

44 Oxfam "Promoting Women's Rights across Africa: Raising Her Voice – Pan Africa Effectiveness Review" (décembre 2013) 27 http://reliefweb.int/sites/reliefweb.int/files/resources/er-promoting-women's-rights-pan-africa-effectiveness-review-061213-en.pdf (consulté le 26 mai 2017) (traduction de l'auteure).

45 Oxfam "Promoting Women's Rights across Africa: Raising Her Voice – Pan Africa Effectiveness Review" (décembre 2013), 18 http://reliefweb.int/sites/reliefweb.int/files/resources/er-promoting-women's-rights-pan-africa-effectiveness-review-061213-en.pdf (consulté le 26 mai 2017) (traduction de l'auteure).

46 Le concept de répertoire d'action a été introduit en sciences politiques par Charles Tilly pour rendre compte de la rigidité relative des formes d'action populaire. Cinq facteurs pèseraient sur la disponibilité d'un moyen d'action dans une société donnée par un groupe donné : les standards de droit et de justice qui prévalent dans la population et rendent plus ou moins socialement acceptables différents types d'action collective, les routines quotidiennes de fonctionnement d'un groupe protestataire, l'organisation

par des techniques de persuasion et de plaidoyer plus ou moins discrètes (contacts personnalisés, informations techniques, élaboration et diffusion d'argumentaires). Paradoxalement, si la coalition de cause tente d'influencer les processus de mise à l'agenda du Protocole au niveau national pour améliorer le statut des femmes par le droit, c'est-à-dire si le droit constitue l'objet des revendications, il n'est pas leur principal répertoire d'action. Le Protocole de Maputo constitue à cet égard un exemple particulièrement intéressant d'usages politiques et contestataires du droit qui ne passent pas (encore?) par une stratégie proprement juridique ou judiciaire.

En d'autres termes, l'"arme'[47] défensive est activée (la production d'un texte permettant de se prévaloir de droits) mais pas encore l'arme offensive: l'arène judiciaire au niveau régional, la Cour africaine des droits de l'homme et des peuples, bien que saisie plusieurs fois 'au nom du' Protocole de Maputo,[48] n'a pas encore rendu de décision concernant une violation de ce texte. Au niveau national néanmoins, un jeu avec les arènes judiciaires semble s'être mis en place, dans la mesure où le Protocole de Maputo a été invoqué à plusieurs reprises devant les instances de justice.[49] Ici donc, le droit ne constitue pas un 'répertoire d'action' spécifique mais un horizon à construire pour obtenir, par des mobilisations, une mise en œuvre future.

4.2 Le droit, une ressource instrumentalisée pour la cause de l'égalité entre les sexes

Mus par l'idée selon laquelle le Protocole de Maputo permettra de réduire les inégalités de sexes, les membres de la coalition de cause déploient une activité militante en vue d'en promouvoir la ratification, la domestication et l'implémentation. Car si ces acteurs appréhendent

interne de ce groupe, le modèle de répression qui domine et l'expérience dans les actions collectives précédentes in M Offerlé 'Retour critique sur les répertoires de l'action collective (XVIIIe - XXIe siècles)' (2008) 81 *Politix* 181.

47 L Israël *L'arme du droit* (2009).

48 En 2017, pour la première fois, le code de la famille malien fait l'objet d'une plainte auprès de la Cour africaine des droits de l'homme et des peuples pour non-conformité au Protocole. Voir Requête de l'Association pour le Progrès et la Défense des Droits des Femmes (APDF) et l'*Institute for Human Rights and Development in Africa* (IHRDA) contre La République du Mali: http://en.african-court.org/index.php/news/press-releases/item/154-african-court-on-human-and-peoples-rights-to-hear-application-046-2016-of-apdh-ihrda-v-republic-of-mali-tomorrow [consulté le 25 juin 2017]. À noter également la demande d'avis consultatif par cinq organisations de défense des droits des femmes, dont deux membres de SOAWR (Center for Human Rights et la fédération des femmes juristes-FIDA) et sur l'article 6(d) du Protocole relatif à l'enregistrements des mariages : http://en.african-court.org/images/Cases/Judgment/001-2016-Request%20for%20Advisory%20Opinion-Advisory%20Opinion-28%20September%202017.pdf (consulté le 2 octobre 2017).

49 Parmi les affaires jugées sur la base du Protocole figurent l'arrêt de la Cour suprême de Zambie du 30 juin 2008 au sujet d'une écolière âgée de 13 ans violée par son maître.

le Protocole de Maputo comme une protection des femmes contre les abus de pouvoir de l'État, ils y voient également un dispositif de médiation des relations de genre entre individus. Dans cette perspective, le Protocole additionnel est appréhendé comme devant permettre de réaliser l'égalité entre les sexes, ou du moins, le respect par les États membres des engagements dans ce domaine: 'Les droits ne sont plus seulement un vocabulaire d'affirmation, ils deviennent un moyen de l'égalité'.[50]

Pour la coalition de cause, le Protocole tient une place particulière au sein des instruments qui peuvent contribuer à réformer les législations discriminatoires, et en premier lieu, au niveau des États membres de l'UA. Par exemple, dans un contexte où le principe d'égalité entre les hommes et les femmes est formellement inscrit dans la constitution, la militante et juriste djiboutienne Zeinab Kamil Ali soutient que 'la ratification du Protocole mettra les mécanismes constitutionnels en action et où ils sont absents, il rendra possible leur mise en place'.[51]

Les associations engagées dans la mobilisation juridique souhaitent en outre qu'il soit suivi d'un processus de domestication au niveau national. Sur le moyen terme, la mise en œuvre du Protocole est ainsi conçue comme un moyen d'adopter des mesures législatives en faveur de l'égalité entre les sexes, et d'abolir les législations discriminatoires contre les femmes. En utilisant le droit comme un moyen de promouvoir leur émancipation, les associations affichent leur foi en la capacité du droit à aider les groupes sociaux désavantagés. C'est ce qu'illustrent les propos de Faiza Jama Mohamed, directrice d'Égalité maintenant:

> la signature, la ratification et la mise en œuvre du Protocole de Maputo auront un effet considérable sur les droits des femmes sur un continent qui a historiquement vu les femmes porter le poids du fardeau de la pauvreté, de l'exclusion et des guerres.[52]

À plus long terme encore, les membres de la coalition SOAWR appréhendent le Protocole de Maputo comme un moyen d'établir une jurisprudence. Dès 2004, notant que la CADHP n'a jamais été saisie d'une plainte relative aux droits des femmes, la commissaire Rapporteure spéciale sur les droits des femmes avait émis le vœu de voir des membres de la coalition SOAWR se spécialiser dans les litiges judiciaires, tant au niveau régional que national.[53] Cet instrument doit ainsi apporter des orientations et des précédents pour les tribunaux nationaux. Plus important encore, le Protocole doit offrir aux femmes une réelle voie de recours au niveau régional et permettre à la

[50] PY Baudot & A Revillard *L'État des droits: politique des droits et pratiques des institutions* (2015) 17.

[51] A Zeinab Kamil 'A plea for ratification' *African Voices on Development and Social Justice* (2004) 1*62 Pambazuka News* 104 (traduction de l'auteure).

[52] FJ Mohamed '11 years of the African Women's Rights Protocol: progress and challenges' (2014) 57 *Development* 71 (traduction de l'auteure).

[53] Melo 'NGOs and the UN' in *Watch my agenda,* (juin 2007) 2 GIMAC Newsletter 21 http://www.genderismyagenda.com/Gender_is_My_Agenda_Newsletter_June2007.pdf (consulté le 25 juin 2017).

Commission africaine et à la Cour africaine des droits de l'homme et des peuples de faire respecter de manière effective les droits qui y sont reconnus.

Les acteurs de la coalition de cause – qui se mobilisent aussi bien sur les scènes nationale que régionale – ne veulent pas que le Protocole reste tel quel. Ils entendent au contraire s'en servir à des fins sociales pour atteindre l'objectif d'amélioration du statut des femmes dans les pays où leurs actions se déploient et susciter des effets concrets, tels que des réformes législatives en faveur de l'égalité entre les sexes. On le voit, l'usage du Protocole de Maputo en tant que ressource correspond à une forme de mobilisation du droit comme instrument de changement social qui altèrerait les relations de pouvoir entre gouvernants et gouvernés. Ces acteurs appréhendent le droit régional comme un instrument de promotion et de protection des droits des femmes africaines qui réorganiserait les rapports de force, conformément à la façon dont le définissent Pierres Lascoumes et Patrick Le Galès dans leur ouvrage *L'instrumentation de l'action publique, controverses, résistance, effets*. Si l'on suit cette perspective, le Protocole de Maputo peut être associé à 'un dispositif à la fois technique et social qui organise des rapports sociaux spécifiques entre la puissance publique et ses destinataires en fonction des représentations et des significations dont il est porteur'.[54]

Quand il fait l'objet de mobilisations transnationales, le droit peut être indissociablement objet (Protocole), vecteur (l'égalité hommes/femmes par le droit) et objectif (la mise en œuvre du Protocole), même pour des organisations qui ne semblent pas avoir de liens directs avec la sphère juridique, ni s'intéresser à elle *a priori*.

5 CONCLUSION

Cet article a présenté l'itinéraire du Protocole de Maputo, en distinguant trois grandes séquences renvoyant chacune à un état particulier de la mobilisation. La première partie, qui est dédiée à la conception et l'élaboration du Protocole (1995-2003), a montré que la production d'un texte juridique sur l'égalité hommes/femmes est d'abord un enjeu pour les professionnels du droit. Si les premières impulsions sont données par des femmes intellectuelles, juristes ou engagées dans les questions d'accès à la justice, cette première séquence donne à voir la transformation de la morphologie des mobilisations sous l'effet d'une implication croissante des associations. La deuxième partie, à partir de son adoption en 2003 jusqu'à son entrée en vigueur en 2005, s'est consacrée à la construction d'un espace militant pour la cause du Protocole de Maputo au niveau régional, porté notamment par la convergence d'associations au sein de la coalition SOAWR. Elle a analysé la façon dont le Protocole de Maputo, d'un objet juridique débattu de façon technique entre experts, se transforme en une 'cause' pour l'égalité entre les sexes. La troisième partie, de 2005 à

54 P Lascoumes & Y Le Galès (eds) *Gouverner par les instruments* (2004) 13.

aujourd'hui, a investigué les modalités d'action du plaidoyer et la façon dont les associations cherchent à faire de ce texte un instrument d'action publique de promotion et de protection des droits des femmes. Car aujourd'hui, ceux sont autant des professionnels du droit que des militants aux caractéristiques sociologiques différentes (médecins, universitaires, métiers du développement, experts en 'genre') qui se mobilisent pour la cause du Protocole de Maputo afin de l'imposer aux gouvernements.

En 2017, sur les 55 États membres de l'UA, 52 l'ont signé (seuls l'Égypte, le Botswana et le Maroc font exception) mais seulement 38 d'entre eux l'ont ratifié. Le Protocole, et c'est d'ailleurs tout l'argumentaire de l'article, ne peut rester un perpétuel jeu à somme nulle: non pas parce qu'il a été signé et ratifié par une grande majorité de pays africains, mais en raison de la mobilisation juridique qui l'accompagne et qui, elle, produit des effets transformatifs. Si les changements législatifs et juridiques au niveau national peuvent, de prime abord, relever l'inefficacité et l'ineffectivité du Protocole (faibles taux de recours au Protocole, décalage entre le texte et les normes effectivement appliquées), les effets potentiels de la mobilisation juridique en faveur de l'adoption, l'entrée en vigueur et la mise en œuvre du Protocole sur la réalité sociale ne doivent pas être sous-évalués. Les effets de conscientisation juridique et de légitimation à long terme du plaidoyer pour le droit, en termes de changements de comportements et de mentalités, sont loin d'être négligeables.

De ce fait, il convient d'apporter une réponse nuancée quant à l'impact produit concrètement par le Protocole de Maputo sur le terrain, et en particulier sur l'évolution du statut des femmes dans les sociétés concernées: une des caractéristiques du droit étant sa disponibilité pour des usages pluriels, des appropriations par des acteurs sociaux peuvent produire des effets inattendus, à plus ou moins long terme et plus ou moins conformes aux enjeux qui ont présidé à sa production. En analysant ainsi cette production comme un processus dans lequel s'investissent plusieurs acteurs dans un jeu multi-niveaux, on voit bien comment le Protocole ouvre un espace social de négociation et de mobilisation qu'il convient donc de prendre au sérieux. Et c'est justement parce qu'il fait l'objet de telles mobilisations qu'il a pu entrer en vigueur, et pourra peut-être, à terme, être mis en œuvre.

Happy 18th birthday to the African Children's Rights Charter: not counting its days but making its days count

*Benyam Dawit Mezmur**

ABSTRACT: November 2017 marks the 18th anniversary of the coming into force of the African Charter on the Rights and Welfare of the Child, its transition from 'childhood' to 'adulthood'. The anniversary indeed offers an opportunity to reflect and take stock of the limited progress so far, and the work that remains to be done, in our collective efforts to create an African fit for children. Apart for discussing the 'slow start' the Charter faced, as well as reservations entered into it by few States, the piece focuses on three substantive issues that the Charter has added value on, namely, the definition of a child, child marriage, and children and armed conflict. The section that follows delves briefly into the core business of the African Committee, namely, consideration of State party reports, dealing with individual complaints, and conducting investigative missions. The piece concludes that, despite limitations, the Charter is not counting its days but making its days count.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Joyeux 18ème anniversaire à la Charte africaine des enfants: ne pas compter ses jours mais faire en sorte que ses jours comptent

RÉSUMÉ: Novembre 2017 marque le 18ème anniversaire de l'entrée en vigueur de la Charte africaine des droits et du bien-être de l'enfant, son passage de 'l'enfance' à 'l'âge adulte'. L'anniversaire offre en effet l'occasion de réfléchir et de faire le point sur les progrès limités jusqu'ici, et le travail qui reste à faire, dans nos efforts collectifs pour créer une afrique convenable pour les enfants. Outre les discussions sur le 'démarrage lent' de la Charte, ainsi que sur les réserves émises par quelques Etats, cet article se concentre sur trois questions de fond sur lesquelles la Charte apporte une valeur ajoutée: la définition d'un enfant, le mariage des enfants et les enfants dans le contexte des conflits armés. La section qui suit décrit brièvement les principales activités du Comité africain, à savoir l'examen des rapports étatiques, le traitement des plaintes individuelles et la conduite de missions d'enquête. La pièce conclut que, malgré les limites, la Charte ne compte pas ses jours mais fait en sorte que ses jours comptent.

KEY WORDS: African Charter on the Rights and Welfare of the Child, implementation, child marriage, child soldiers, African Committee of Experts on the Rights and Welfare of the Child

CONTENT:

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1 INTRODUCTION

The African Charter on the Rights and Welfare of the Child (African Children's Rights Charter or Charter) came into force on 29 November 1999. The coming into force materialised a month after the 15th instrument of ratification was submitted to the then Organization of African Union (OAU, now the African Union (AU)). November 2017 thus marks the 18th anniversary of the Charter, counting from the years since it has come into force.

For children, and in children's rights discourse, 18th birthdays are very important. For an individual, 18 years marks, in the large majority of countries in Africa as well as globally, the age of the legal transition from childhood to adulthood. It is considered to be a time at which full legal autonomy is acquired. It is also often accompanied by full responsibility of the individual. In other words, it is a time that is often characterised by the assumption of acquiring maturity.

A stock-taking exercise of the various anniversaries of the Convention on the Rights of the Child (CRC), for instance its 18th as well as 25th anniversaries, have been undertaken by different stakeholders. These stakeholders include academics,[1] UN agencies,[2] and treaty bodies.[3] A similar exercise by stakeholders in relation to the African Children's Rights Charter would assist to inform progress, but would also reflect on the work that remains to be done in maximising the potential of the Charter to contribute to the creation of an Africa that is fit for children.

Admittedly, it is not an easy task to determine causation, or establish a linear relationship, between the ratification of the African Children's Rights Charter by a State, on the one hand, and subsequent behavioural change in the form of law and policy reform, and the design and implementation of programmes, on the other. In the same streak, the link between the obligations to undertake 'other measures' (such as

1 See, for instance, K Arts 'Twenty-five years of the United Nations Convention on the Rights of the Child: achievements and challenges' (2014) 61 *Netherlands International Law Review* 267-303.

2 See, for instance, UNICEF '25 years of the Convention on the Rights of the Child: Is the world a better place for children?' (2014) available at https://www.unicef.org/publications/files/CRC_at_25_Anniversary_Publication_compilation_5Nov2014.pdf (accessed 10 October 2017)

3 See, for instance, Institut international des droits de l'enfant (IDE) and OHCHR '18 candles: The Convention on the Rights of the Child reaches majority' (2007) available at http://www.ohchr.org/Documents/Publications/crc18.pdf (accessed 10 October 2017).

institutional frameworks, or allocation of resources) in accordance with the provisions of the Charter and the recommendations provided to a State within the framework of Concluding Observations from a monitoring body,[4] is not always apparent.

With this as a backdrop, an article of this nature can aim to assess the maturity or otherwise of the Charter, and explore its general contribution to the conceptualisation and implementation of children's rights in Africa. What has been the significant added value of the only child rights focussed regional instrument in the world in the last 18 years?[5] What are some of the important developments in relation to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and its work on State party reporting, individual complaints, and investigations? What is the synergy of the Charter with the African human rights architecture, in particular with the African Commission on Human and Peoples' Rights (African Commission), and the African Court on Human and Peoples' Rights (African Court)? What are some of the main challenges faced in implementing the African Children's Rights Charter?

This piece, however, will be limited in scope. It will start with a discussion on the drafting, as well as 'slow start' the Charter faced. This is followed by a section that raises a few issues in relation to the ratification of the Charter, as well as reservations entered into it by a number of States. The next section focuses on three substantive issues that the Charter has added value on, namely, the definition of a child, child marriage, and children and armed conflict. The section that follows delves briefly into the core business of the African Children's Committee, namely, consideration of State party reports, dealing with individual complaints, and conducting investigative missions. Subsequently, some reflections on the future of the Charter as well as the work of the Committee is proffered in the form of concluding remarks.

2 A QUICK DRAFTING, LEADING TO A SLOW START?

The 1979 Declaration on the Rights and Welfare of the Child[6] of the OAU served as a precursor to the African Children's Rights Charter. To a limited extent, the 1924 Geneva Declaration on the Rights of the Child[7] and 1959 Declarations on the Rights of the Child have also served as a background in informing the content of the Charter.[8]

4 Such as the African Committee, or UN Committee on the Rights of the Child (CRC Committee).

5 Unfortunately, the search for a *travaux préparatoires*, or any background documents that chronicle the discussions that unfolded during the drafting and adoption of the Charter has proven elusive to date.

6 Available at www.chr.up.ac.za/chr_old/hr_docs/african/docs/ahsg/ahsg36.doc.

7 Available at http://www.un-documents.net/gdrc1924.htm.

8 Available at https://www.unicef.org/malaysia/1959-Declaration-of-the-Rights-of-the-Child.pdf.

However, the influence of these non-binding instruments on the African Children's Rights Charter pales in comparison when the extent to which the provisions of the CRC (not only what is contained in the CRC, but also what is not) have informed its content.

In fact, the idea for the African Children's Rights Charter was triggered as a spill-over of the negotiation process to adopt the CRC.[9] In particular, the very limited number of African countries that were meaningfully involved in the drafting of the CRC stood as a concern.[10] Therefore, in 1988, with the support of UNICEF, the African Network for the Prevention and Protection Against Child Abuse and Neglect (ANPPCAN)[11] convened a meeting that aimed to look at the draft CRC, and deliberate on the extent to which it covers peculiar issues that children in Africa were facing at the time.[12] The main recommendation of the meeting was the need to draft and adopt an Africa specific instrument on children's rights.

There is an adequate amount of literature interrogating[13] and comparing the provisions of the Charter with the CRC.[14] Suffice to mention that the issue of children living under apartheid,[15] the involvement of children in armed conflict, the protection of refugees and internally displaced persons, the special vulnerability of the girl child including in relation to accessing education during and after

9 See, in general, D Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal on Children's Rights* 157; BD Mezmur 'The African Committee of Experts on the Rights and Welfare of the Child: an update' (2006) 6 *African Human Rights Law Journal* 550. D Olowu 'Protecting children's rights in Africa: a critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127; J Sloth-Nielsen 'Strengthening the promotion, protection and fulfilment of children's rights in African context' in Alen *et al* (eds) *The UN Children's Rights Convention: theory meets practice* (2007) 81.

10 One of the reasons for a separate African Charter on the Rights and Welfare of the Child was that during the drafting process of the CRC, Africa was underrepresented. Only Algeria, Morocco, Senegal and Egypt participated meaningfully in the preparatory meetings. Furthermore, specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument.

11 More details on ANPPCAN available at http://www.anppcan.org/.

12 P Ankut 'The African Charter on the Rights and Welfare of the Child: linking principles with practice' (2007/2008) available at http://www.fairplayforchildren.org/pdf/1299577504.pdf (accessed 10 October 2017).

13 See, for instance, B Thompson 'Africa's Charter on Children's Rights: a normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432; F Viljoen 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 *CILSA* 199; F Viljoen 'The African Charter on the Rights and Welfare of the Child' in C Davel (ed) *Introduction to child law in South Africa* 214.

14 See, for instance, O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child (ACRWC) only underline and repeat the Convention on the Rights of the Child (CRC)'s provisions?: examining the similarities and the differences between the ACRWC and the CRC' (2015) 5 *International Journal of Humanities and Social Science* 143; BD Mezmur 'The African Children's Charter versus the UN Convention on the Rights of the Child: a zero sum game?' (2008) 23 *SA Public Law* 1; T Kaime *The African Charter on the Rights and Welfare of the Child: a socio-legal perspective* (2009).

15 Article 26 of the Charter.

pregnancy,[16] are some of the provisions added by the African Children's Rights Charter to the CRC.

The time that lapsed between the starting of the drafting and the adoption of the African Children's Rights Charter is only about two years. This can be seen as being a reasonably short amount of time especially as compared to the 10 years it took for the drafting of the CRC. This analysis is reversed when one compares the amount of time it took for the coming into force of the Charter (9 years) with the Convention (less than 1 year). There was no ratification of the Charter in 1990 and 1991, immediately after its adoption. The first ratification came in 1992 by Seychelles,[17] and the 15th ratification, triggering the coming into force of the Charter, only happened 7 years later, in 1999.[18]

It is worth recalling that out of the first 20 countries that ratified the CRC, and led to its coming into force on 2 September 1990,[19] only Sweden is a developed country. Others were developing countries. Half of the 20 State parties on that list are African countries: Egypt, Ghana, Guinea, Guinea Bissau, Mauritius, Niger, Senegal, Sierra Leone, Sudan, and Togo. In addition, the largest number of first signatories of the CRC, on 26 January 1990, were African countries:[20] Burkina Faso, Gabon, Guinea Bissau Kenya, Mali, Mauritania, Morocco, Niger, Nigeria, Rwanda, Senegal, and Togo.[21] However, most of these African countries did not show the same level of enthusiasm towards the African Children's Rights Charter.

If indeed the Charter reflected the peculiar concerns of African countries in relation to children, why did it then take 9 years, from 1990-1999, to receive the 15 ratifications needed for the Charter to come into force? For the purpose of comparison, it is worth noting that the African Charter on Human and Peoples' Rights was adopted in 1981 and came into force in 1986, just after 5 years.

There is neither any one answer, nor a way to conclusively identify the reason(s) for such a delay. However, it is possible, but also important, to tender a few possible explanations. The short time it took for the drafting of the African Children's Rights Charter might have limited the level of awareness about its existence among States in Africa. There is anecdotal evidence that some States confused it with the CRC, and assumed that they have either ratified or are in the process of ratifying it. Moreover, the extent to which UNICEF[22] has been able to allocate resources to advocate for the ratification of the

16 Article 11(6) of the Charter.

17 On 13 February 1992.

18 In accordance with article 47(3) of the Charter which states that '[t]he present Charter shall come into force 30 days after the reception by the Secretary-General of the Organization of African Unity of the instruments of ratification or adherence of 15 Member States of the Organization of African Unity.

19 Article 49(1) of the Convention.

20 See, United Nations Treaty Collection, available at https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11&chapter=4&clang=_en (accessed 10 October 2017).

21 As above.

22 Which is the official custodian of the CRC.

Charter is not clear. The same can be said of ANPPCAN, and other CSOs in Africa. While there is a systemic practice of advocating for the ratification by the AU Office of Legal Counsel (OLC) including during AU Summits, it is doubtful if such a practice existed in the 1990s. Since the African Children's Committee was created only in 2002, it did not get the chance to play any role in lobbying for ratification in the 1990s. If the reason for the delay for ratification resulted from African countries harbouring doubts about some of its contents, it would have led to a significant number of reservations upon ratification, which, as is shown in the next section, was not really the case. It is important that current and future engagements and plans aimed at reaching universal ratification of the Charter will need to take some of this information on board.

3 THE COMMITMENT TO BE BOUND: RATIFICATIONS, AND RESERVATIONS

As at October 2017, the ratification of the Charter stands at 48 countries. The latest ratification of the Charter, in July 2016, was by the Central African Republic.[23] Subsequently, between August 2016 and January 2017, there remained 6 countries that have not ratified the Charter. These countries are the Democratic Republic of Congo (DRC), Saharawi Republic, São Tome and Principe, Somalia, South Sudan, and Tunisia. In January 2017, with the re-admission of Morocco into the AU, this list of countries increased to 7. With the exception of Morocco, all 6 countries have signed the Charter, and have received a promotional visit by the African Children's Committee, advocating for ratification.

A number of systemic efforts are exerted to urge ratification of the Charter. For instance, the African Committee has undertaken promotional missions to advocate for ratification of the Charter to Tunisia (2013), to Saharawi Republic (2014), to DRC (2015), and to São Tome and Principe (2016). A long list of subsequent decisions of the AU Executive Council urge member States that have not ratified the Charter to do so.[24] The Secretariat of the African Committee regularly sends *note verbales* to States as a reminder about ratification. In 2013, the African Children's Committee started a two years campaign aimed

[23] Available at https://au.int/sites/default/files/treaties/7773-sl-african_charter_on_the_rights_and_welfare_of_the_child_1.pdf (accessed 10 October 2017).

[24] See, for instance, EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child (ACERWC) – Doc. EX.CL/858(XXV) (2014); EX.CL/Dec.923(XXIX) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Doc. EX.CL/977(XXIX), (2016); EX.CL/Dec.977(XXXI) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc.EX.CL/1033(XXXI) (2017).

at accelerating ratification and reporting.[25] A theme of the Day of the African Child (DAC) focussing on the same topic has also been commemorated in 2015. It is hoped that all these and other efforts would bring about a universal ratification of the Charter in the foreseeable future.

It still begs the question, if indeed, the African Children's Rights Charter is an African fingerprint on children's rights, why then is there not a universal ratification after 18 years of the coming into force of the instrument? Why was it a challenge for Somalia and South Sudan, the two countries that ratified the CRC more recently, to undertake a parallel ratification process for the African Children's Rights Charter? Why is Tunisia, whose government announced in 2013 that it will ratify all AU human rights instruments, taking too long to ratify the Charter?

Ratification of the Charter without reservations is also critical for the enjoyment of all the rights in the Charter by all children. African countries, in general, are not known for the practice of entering many reservations to both regional and international human rights treaties. It is therefore no surprise that the number of countries that entered a reservation to the African Charter is limited. These countries are Botswana (reservation on Article to on the definition of a child),[26] Egypt (reservations on child marriage,[27] adoption,[28] children of imprisoned mothers,[29] and on the mandate of the Committee to receive communications and undertake investigative missions[30]), Mauritania (on the right to freedom of religion),[31] and Sudan (on the right to privacy,[32] on the education of children who fall pregnant,[33] and child marriage[34]).

While the number of reservations entered by State parties is relatively small, it is notable that the majority of the reservations entered by the four State parties can be considered to be far reaching, thereby placing serious limitations on the enjoyment of rights under the Charter. In fact, some of these reservations appear to be against the object and purpose of the Charter. For example, Botswana's reservation challenges the very core, scope of application, as well as added value of the Charter. Moreover, Egypt's reservations to articles 44 and 45 of the

25 In EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child – Doc. EX.CL/858(XXV), para 3, the Executive Council of the AU 'Welcomed the Committees campaign on the Universal Ratification of and Reporting on the implementation of the African Charter on the Rights and Welfare of the Child which builds towards the 25th anniversary of the adoption of the Charter in 2015.

26 Article 2 of the African Children's Rights Charter.

27 Article 21(2) of the African Children's Rights Charter.

28 Article 24 of the African Children's Rights Charter. Notably a similar reservation that the government of Egypt entered into in the CRC has already been withdrawn.

29 Article 30 of the African Children's Rights Charter.

30 Articles 44 and 45 of the African Children's Rights Charter.

31 Article 9 of the African Children's Rights Charter.

32 Article 10 of the African Children's Rights Charter.

33 Article 11(6) of the African Children's Rights Charter.

34 Article 21(2) of the African Children's Rights Charter.

Charter is jurisdictional in nature, and deprives the African Children's Committee from exercising its mandate in full. Even though the question of who has the mandate to decide on the validity or otherwise of reservations entered into human rights treaties is still not settled,[35] there are few examples that suggest that the African Committee should be able to exercise such a mandate in relation to the Charter.[36]

In relation to Egypt's reservations under articles 44 and 45, it is questionable if reservations on procedural/jurisdiction related provisions of a human rights instrument are generally permitted.[37] In addition, an argument can also be made that, as the practice in the UN human rights treaty making process establishes, where States would like to make a communication procedure optional, such a procedure is often introduced through an 'Optional Protocol' which would be a separate treaty from the 'mother' instrument.[38] However, in the case of the African Children's Rights Charter, individual complaints and the mandate to undertake investigative missions is in-built in the Charter. It can also be contended that the object and purpose of the African Children's Rights Charter, which in general is to promote and protect the best interests of children in all actions in Africa, as provided for in Article 4 of the Charter, is directly linked to its individual communications process and investigations procedure, which, in the absence of effective domestic remedy, serve as a recourse.[39]

In a number of occasions, the Executive Council of the AU has asked State parties that have entered reservations on the application of the provisions of the Charter to consider the withdrawal of such reservations. This was done, for instance in 2014,[40] and in 2016.[41] In a marked departure from these and other related previous decisions,

35 See, in general, I Ziemele and L Liede 'Reservations to human rights treaties: from Draft Guideline 3.1.12 to Guideline 3.1.5.6' (2013) 24 *The European Journal of International Law* 1135; L Helfer 'Not fully committed?: reservations, risk, and treaty design' (2006) 31 *Yale Journal of International Law* 367.

36 See, for instance, General Comment No 24 of the United Nations Human Right Committee which considered itself to have the mandate to review the reservations entered into the ICCPR. See too the case of *Loizidou v Turkey*, ECHR (1995) Series A, No 310 and the case of *Belilos v Switzerland*, ECHR (1988) Series A, No 132.

37 In the case between *Loizidou v Turkey*, the European Court of Human Right held that States may not make a reservation in relation to an Article of the Convention that does not deal directly with substantive rights and freedoms, but instead with procedural or formal matters.

38 See, for instance, the CRC, the International Covenant on Civil and Political Rights, and International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of Persons with Disabilities, and the Convention on the Elimination of Discrimination against Women, all of which provide for an optional protocol that establishes the individual complaints as well as investigation/inquiries mechanisms under each treaty.

39 As General Comment 24 of the Human Rights Committee noted, reservations that purport to evade an essential element, such as monitoring implementation of human right instrument in the design of that instrument, which is also directed to securing the enjoyment of the rights, are incompatible with its object and purpose of that treaty. For the Human Rights Committee's General Comment 24, see UN Doc. CCPR/C/21/Rev.1/Add. 6 (1994), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.6&Lang=en.

40 EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child – Doc. EX.CL/858(XXV), para 3.

during the 28th AU Summit in Addis Ababa in June/July 2017, the Executive Council emphasised the 'right of Member States to formulate reservations on the African Children's Rights Charter in accordance with the relevant international laws, particularly the Vienna Convention on the Law of Treaties of 1969'.[42] Despite this decision, there can be comfort in that article 19(c) of the Vienna Convention on the Law of Treaties prescribes that reservations incompatible with the object and purpose of a treaty are invalid.[43] As a result, it is difficult to make a legally valid argument to uphold some of the current, and potential future reservations to the African Children's Rights Charter. In moving forward, these and related issues on reservations need to be addressed by the African Children's Committee, in consultation with State parties.

4 EXAMPLES OF SUBSTANTIVE PROVISIONS

This section highlights three provisions of the African Children's Rights Charter that have added value to the implementation of children's rights in Africa. These provisions are article 2 on the definition of a child, article 21(2) on child marriage, and article 22 on children and armed conflict. The effort is not to undertake an exhaustive analysis of these provisions, but to shed some light on what their strengths have been so far, and where appropriate, offer proposals on how the conceptualisation, interpretation and implementation of these provisions can be improved.

4.1 Definition of a child

It would be incomplete to discuss children's rights in connection with a child rights instrument, without first establishing who a child is. After all, the scope of application of the African Children's Rights Charter is linked to the definition of a child. It is rightly argued that age is a criterion that can help to escape the ambiguities and contradictions of other definitions of a child, as it gives predictability regarding which rule or provision will apply to whom.[44]

Article 2 of the African Children's Rights Charter offers a clear and concise definition of the child as 'every human being under 18 years' of

41 EX.CL/Dec.923(XXIX) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc. EX.CL/977(XXIX), para 3.

42 EX.CL/Dec.977(XXXI) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc.EX.CL/1033(XXXI), para 5. Article 2(1)(d) of the Vienna Convention on the Law of Treaties, allows State parties to international treaties to place reservations on provisions of a treaty they ratify or accede to.

43 Vienna Convention on the Law of Treaties, opened for signature on 23 May 1969.

44 See M Grahn-Farley 'A theory of child rights' (2003) 57 *University of Miami Law Review* 867.

age. In addition, unlike the CRC provision,[45] there are no limitations or attached considerations, so that it may be applied to as wide-ranging a number of children as possible. It contains no loopholes relating to exemptions for national law that undercut the guarantee of universal rights for all children without distinction.[46]

It is promising to witness that some of the law reform efforts on the African continent reflect the impact of the African Children's Rights Charter on standard-setting exercises at the national level. In this respect, the definition of a child is one example.[47] Apart from ordinary law, a number of constitutions too have emulated article 2 of the Charter.[48] These include the South African Constitution of 1996,[49] the 1995 Constitution of Uganda,[50] the 2011 Transitional Constitution of the Republic of South Sudan,[51] the 2010 Constitution of Angola,[52] the 2010 Constitution of Kenya,[53] and despite non-ratification of the Charter, the 2012 Provisional Constitution of the Republic of Somalia.[54] The choice of age 18 in the African Children's Rights Charter can be perceived to have contributed to the construction of a uniform identity of the child[55] without exposing persons below the age of 18 to different, and sometimes low level, protections under traditional, religious, or customary laws.

45 This provision is ambiguous and weak, lacking specific protection within the African context in order to take into account child betrothals, child participation in armed conflict and child labour.

46 See S Grover 'On recognizing children's universal rights: what needs to change in the Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights* 260.

47 The constitutions of South Africa and the Democratic Republic of Congo, for example, follow the ACRWC's definition of a child without exception – that is, as persons under the age of 18 years. Furthermore, in Nigeria, where the 1943 Children and Young People's Act classified only those people under 17 years as juvenile offenders, the Child's Rights Act of 2003 rectifies this and puts the age at 18. A similar problem transpires under Chapter 44 of the Children and Young Persons Act of 1945 of Sierra Leone and will most likely be addressed when the Child Rights Bill becomes an Act. Egypt adopted a Children's Code in 1996 that regulates the duties and functions of institutions providing juvenile justice services to children and applies to all persons under the age of 18. In addition, it is interesting to note that although Morocco is not a party to the African Children's Rights Charter, under Law no 11 of 1999, which amends and supersedes section 446 of the Penal Code, a child is defined as a person under the age of 18. In section 2, the Kenyan Children's Act specifically defines a 'child' as any person under the age of 18 years. The adoption of the definition of a child with no exception (in consonance with the African Children's Rights Charter) is not without practical advantage in the lives of African children, as it helps to extend the protection of the rights under the Charter and the CRC to a larger group of persons and to the maximum extent possible.

48 Violations of article 2, albeit very limited, are also present. In Namibia, the 1998 Constitution reads in article 15(2) that '[f]or the purposes of this paragraph child shall be under the age of sixteen (16) years'.

49 Section 28(3).

50 Article 257(c).

51 Article 17(4).

52 Article 24 of the Constitution states that 'the age of majority shall be 18'.

53 Article 260.

54 Article 29(8).

55 There are a number of places in the world where children are governed by customary law that does not define childhood by reference to numerical age.

The added value of article 2 has not only been in relation to proactive and 'voluntary' measures undertaken by State parties to align their laws and practice. Article 2 has also started to be used in enforcing the obligation of State parties under regional human rights law. For instance, as provided in more detail below,[56] article 2 was used to convince (some would prefer to say 'coerce') the government of Malawi to amend its Constitution[57] by raising the definition of a child from 16 years to 18 years.

A regional standard that helps to align the definition of a child also facilitates protection of children across various jurisdictions in a region. In other words, a person that is considered to be a child in a particular jurisdiction benefits from the same status as a child in another jurisdiction within the region. This is important in particular in the context of international migration, trafficking, and intercountry adoption.

However, it is also important to highlight the few limitations that an interpretation of article 2 needs to address concretely. While article 2 indicated the end of childhood, the beginning of childhood, and its implications and interactions in relation to sexual and reproductive health rights, including abortion, should benefit from some guidance. Moreover, article 2 should not only be seen as prescribing age, but emphasis should also be placed on the use of the term 'child'. In a discourse where different terms such as 'youth', 'young person', 'minor', 'infant', 'juvenile', 'nubile', 'toddler', and even 'kid' are used, it is critical that legislation provides an overarching definition of a person below the age of 18 as a 'child'.

Moreover, in the context of the CRC, it has been observed that the 'Convention provides a framework of principles; it does not provide direction on the specific age, or ages, at which children should acquire such rights'.[58] The same can be said of the Charter, which might explain the wide state of influx in minimum ages on the continent. While determining whether a minimum age for a particular purpose (such as criminal responsibility, consent to medical treatment, surgery, sexual consent, standing in court, entering into contracts, the end of compulsory education etc) is congruent with the letter and spirit of the CRC is not simple,[59] such minimum ages should also pay attention to best interests, non-discrimination, as well as 'the evolving capacities of the child' principle.[60]

56 See sec 5.2 below.

57 Sec 23(5) of the Constitution of Malawi.

58 R Hodgkin and P Newell *Implementation handbook for the Convention on the Rights of the Child* (2007) 4.

59 Although, ages such as the minimum age for criminal responsibility has been established by the CRC Committee to be 12, see CRC Committee, General Comment 10 (2007) para 33 in this regard.

60 See article 5 of the CRC.

4.2 Child marriage

Closely linked with the definition of a child is the issue of child marriage, a phenomenon that continues to pose a serious human rights challenge to the African continent. Article 1(3) of the African Children's Rights Charter, captioned '[o]bligation of State Parties', sets the initial tone with which State parties to the Charter should address harmful practices. It reads that '[a]ny custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall, to the extent of such inconsistency, be discouraged'. While the obligation to 'discourage' is indeed an obligation of a very limited scope, the specific provision on harmful practices in article 21 elevates the nature of obligations that State parties have under the Charter in relation to harmful practices.

Article 21 of the Charter, entitled '[p]rotection against harmful social and cultural practices', states in full:

> 1. State Parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
>
> (a) those customs and practices prejudicial to the health or life of the child; and
>
> (b) those customs and practices discriminatory to the child on the grounds of sex or other status.
>
> 2. Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.

By virtue of articles 1(3) and 21, the drafters of the Charter have provided solid ground upon which efforts to address harmful practices, in particular child marriage, can and should be undertaken. In fact, the only place in the Charter where the words 'effective action' is used is in relation to the obligation to child marriages in article 21(2). The provision acknowledges that while legislation is an important element in prohibiting and preventing child marriages and betrothals, it is not an end in itself. This appears to be the main reason why article 21(2) reads by saying 'including legislation'.

There are three critical elements underscored by article 21(2). First, the efforts of State parties should not only be towards prohibiting child marriages, but also betrothals, also known as 'promise marriages'. Moreover, these efforts should not only be about girls, which notably constitute most of the global child marriage population but should also be applicable to boys. It is also notable that the Charter avoids the two rather confusing notions, namely, 'early marriage' and 'forced marriage'. As a result, the consent of a child for child marriage is not relevant and would still constitute a violation of article 21(2) is undertaken by a child, by definition a person below the age of 18, as provided for under article 2 of the Charter.

Secondly, specifying the minimum age for marriage to be 18 years for both boys and girls is not an issue that the Charter leaves room for negotiation. The use of the instructive 'shall' in relation to specifying the minimum age at 18 years is a testament to this assertion.[61] This stands in clear contrast with the Joint General Recommendation 31/ Comment of the Committee on the Elimination of Discrimination against Women/General Comment 18 of the Committee on the Rights of the Child on harmful practices (2014). In this Joint General Recommendation/Comment an exception to the age 18 is provided.[62]

Thirdly, the requirement to make 'registration of all marriages in an official registry compulsory' is relevant from both the prevention and addressing of child marriages. Official registries for marriages usually have in-built age verification processes. This requirement is also critical for the African continent whereby religious (such as Christian, Muslim and Hindu marriages), and customary/traditional marriages are recognised by the laws, sometimes the Constitutions, of State parties to the African Children's Rights Charter.[63] For instance, as an anecdote, a mission to Niger[64] in 2016 by the Special Rapporteur of the African Union on Ending Child Marriage has been informed that the requirement by the municipal officials asking the bride and groom to kiss in public during the marriage ceremony has been identified as a barrier for the formal registration of marriages. It should be viewed as falling within the obligation to undertake 'all appropriate measures' that such barriers as the requirement to kiss in public be addressed with a view to encourage registration of all marriages as required by the Charter.

The notable impact of article 21 has been to spur legislation on the continent prohibiting and addressing child marriage,[65] even though legislative standards that still leave room for exceptions for marriage to

[61] The so-called 'love marriages', where children themselves decide to marry, finds no solace in the provisions of the Charter.

[62] The relevant part, para 20 of the Joint General Recommendation/Comment reads '[a]s a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, a marriage of a mature, capable child below 18 years of age may be allowed in exceptional circumstances, provided that the child is at least 16 years of age and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity, without deference to culture and tradition'.

[63] Since what is required is the mere registration, and not necessarily a requirement to conduct all marriages through the formal state non-religious or non-traditional manner, it still accommodates those cultural or religious diversities prevalent throughout the continent.

[64] Notably, Niger has one of the highest numbers of child marriages on the continent.

[65] See, for instance, Egypt, the Child Law 126 (2008) article 31; Eritrea, Transitional Civil Code article 581 as amended by article 46 of Proclamation 1/1991; The Gambia, The Children's Act (2005), sections 2(1) and 24; Ghana, Children's Act (1998) includes in section 13 the right not to be betrothed, be a subject of a dowry transaction, or be married, while below the age of 18.

be undertaken below the age of 18 remain in some jurisdictions.[66] To assist in addressing these efforts, the African Children's Committee, together with the African Commission, is finalising a Joint General Comment on ending child marriage in Africa. On the basis of the Charter provisions, two significant initiatives of the African Union that are relevant in the context of child marriages have been launched and rely heavily on the relevant provisions of the African Children's Rights Charter. The first one is the African Union Campaign on Accelerated Reduction of Maternal Mortality in Africa. The second one is the AU Campaign on Ending Child Marriage in Africa.

It is also critical to highlight, the extent to which article 21 of the Charter is proving instrumental in court decisions on the African continent. In 2015, in *Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*, the Constitutional Court of Zimbabwe found child marriage to be a violation of the Zimbabwe Constitution of 2013.[67] The Zimbabwean Constitutional Court relied heavily on article 21(2) of the African Children's Rights Charter in declaring that it has 'direct effect', and that section 22 of the Marriages Act,[68] which allows for child marriage is unconstitutional.[69] The High Court of Tanzania also issued a judgment on a similar case, where it declared that sections 13 and 17 of the Law of Marriage Act[70] are discriminatory for giving preferential treatment regarding the eligible ages of marriage between girls and boys (which provides for the possibility of girls to marry at the age of 14 with the consent of the court, and at the age of 15 with the consent of their parents) and that they have lost their usefulness and deserve to be declared null and void.[71]

66 Examples include cases in which guardians, a minister, a heads of state/government have the legal authority to consent to marriage of children especially girls in accordance with customary or statutory law. See for instance Guinean Children Code (2008) (Loi L/2008/011/AN) article 268; Kenya, The Hindu Marriage and Divorce Act Chapter 157, Revised edition 2008 (1984) article 3(1); and Madagascar, Family Code Law No 2007-022, 20 (2007) article 3.

67 For a review of the case, see J Sloth-Nielsen and K Hove 'Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others: a review' (2015) 15 *African Human Rights Law Journal* 554.

68 Chapter 5:11.

69 Sloth-Nielsen and Hove (n 67 above) 561.

70 Cap 29 R.E. 2002.

71 See Girls Not Brides 'High Court judgement in Tanzania rules age of marriage laws discriminatory and unconstitutional' (13 July 2016) available at https://www.girlsnotbrides.org/high-court-tanzania-child-marriage/; Human Rights Watch 'Tanzania needs to renew commitment to ending child marriage' (11 October 2016) https://www.hrw.org/news/2016/10/11/tanzania-needs-renew-commitment-ending-child-marriage.

4.3 Children and armed conflict

The impact of armed conflict on children is staggering.[72] Aware of the significant importance of the subject of children and armed conflict, the African Children's Committee dedicated its first continental report to this topic.[73] In the last decades, the use of child soldiers by both government forces and armed groups in African countries has been witnessed and condemned by the international community.[74]

Among the reasons that required the adoption of the African Children's Rights Charter was the use of children as soldiers and the need to institute a minimum age of 18 for military service.[75] Under article 22(2), the African Children's Rights Charter prohibits the recruitment and use of children under 18 in both international and internal armed conflicts and requires states to 'take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.' Unlike the CRC and the Optional Protocol, it adopts a 'straight 18' position. Moreover, the rule on the protection and care of children who are affected in armed conflict also applies 'to children in situations of internal armed conflicts, tension and strife'[76] has its own appeal.

By adhering to 18, it is not implied that someone by some magic wand on the stroke of a pen turns into a fully competent, mature, wise and autonomous individual upon attaining a certain arbitrarily fixed age.[77] Rather, it is necessary for international law to grant comprehensive protection for all persons under the age of 18 years who are deemed to be in need of protection. Under the African Children's Rights Charter, the obligation that a State undertakes is 'to take all necessary measures to ensure' that no child takes a direct part in

72 See UNICEF *25 Years of the Convention on the Rights of the Child: Is the World a Better Place for Children?* (2014) 9 which highlights that '[a]lthough the number of armed conflicts around the world has decreased from a peak of 52 in 1991 to 33 in 2013,5 the new century has already seen major conflicts in Afghanistan, Iraq and the Syrian Arab Republic, among other countries. In a world in which more than 1.5 billion people are experiencing political and social instability or large-scale criminal violence, there is no climate of peace and certainly no peace dividend'.

73 African Children's Rights Committee 'Continental Study on the impact of conflict and crises on children in Africa' (2016) available at http://www.acerwc.org/download/continental-study-on-armed-conflict-and-crises-on-children/?wpdmdl=10007 (accessed 10 October 2017).

74 For example, the UN Security Council (UNSC) passed a number of resolutions condemning the use of child soldiers. These include resolution no. 1261 (1999), 1314 (2000) and 1539 (2004).

75 L Muthoga 'Introducing the African Charter on the Rights and Welfare of the Child and the Convention on the Rights of the Child' (paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape, 1992) as cited in F Viljoen 'The African Charter on the Rights and Welfare of the Child' (2000) in CJ Davel (ed) *Introduction to child law in South Africa* 219.

76 Article 22(3) of the African Children's Rights Charter.

77 M Gose *The African Charter on the Rights and Welfare of the Child: an assessment of the legal value of its substantive provisions by means of a direct comparison to the Convention on the Rights of the Child* (2002) 28.

hostilities and refrain in particular, from recruiting any child.[78] This should also cover children who are involved in non-combatant status but in the meantime are at the risk of real danger.

While the reference 'constitutional processes' in article 1 of the Charter is not interpreted by the African Committee to mean an obligation to constitutionalise the provisions of the Charter, constitutionalisation of children's rights is often welcome. In this respect, in Central African Republic, the 1994 Constitution and in Burundi the February 2005 Constitution[79] provide the age of 18 as minimum age to join armed forces. Subsidiary legislation setting a minimum age for military service at 18 is also in abundance.[80] However, out of about 50 States globally (mostly in the north[81]) that allow under-18s to join the armed forces of a State,[82] some are African countries.[83]

Despite some of the progress, according to the Special Representative of the Secretary General on Children and Armed Conflict (SRSG), the current state of affairs in relation to children and armed conflict still leaves much to be desired. According to the SRSG, as at 2016, there were about 59 parties to a conflict at the global level involved in 14 countries that are listed in the SRSG's report's annexes.[84]

78 Article 22(2) of African Children's Rights Charter.

79 Article 45 of the African Children's Rights Charter.

80 In Madagascar, by way of example, the minimum age of recruitment for national service has been raised to 18 years by Act No. 2005-037 of 20 February 2006. In Zimbabwe, in terms of the National Service Act [Chapter 11:08] persons can volunteer to join the army only at the age of 18 years. In Malawi, a new Defence Force Act came into force in September 2004, replacing the earlier Army Act, which removed any possibility of under-18s serving in the Defence Force (previously the Malawi Army). The Act provided that the Defence Force had three components: the regular Defence Force, the Defence Force reserve and the militia. In Algeria, while the age for voluntary recruitment is unclear, the National Service Code makes explicit reference that the age for conscription into the regular armed forces is set at 19 years of age. In Angola, under Law 1/93, military service was compulsory for all men aged between 20 and 45, and voluntary recruitment is set at 18 years of age. The Botswana Defence Force Act of 1977 provided that recruitment to the armed forces was on a voluntary basis and that recruits had to appear to be 18. In Comoros military recruitment is governed by law No. 97-06(AF), which provides that the minimum age for entrance into the armed forces is 18. In Burkina Faso Decree No. 2000- 374/PRES/PM/DEF of 1 September 2000 allowed for recruitment from the age of 18, provided that the recruit was unmarried and enjoying full civic rights.

81 US, and the UK, as well as some countries in Eastern Europe and Asia.

82 Child Soldiers International 'The Issue' (2016) available at https://www.child-soldiers.org/where-are-there-child-soldiers (accessed 10 October 2017).

83 For instance, Seychelles, despite being a State party to the African Children's Rights Charter still maintains the possibility of under 18s being recruited into the armed forces as its Defence Act does not explicitly prohibit the enlistment of any person under the age of 18 years. In fact, it explicitly allows for the possibility for under 18s to join its armed forces on a voluntary basis. In Cape Verde, in accordance with Article 31 of Legislative Decree No. 6/93 of 24 May 1993, the minimum age for special voluntary recruitment into the Cape Verdean armed forces is 17 years. In Chad-the 1992 General Statute of the Army provided that a person under the age of 18 could be enrolled with the consent of a parent or guardian.

84 SRSG CAAC '20 years of the children and armed conflict mandate' (August 2016) available at https://childrenandarmedconflict.un.org/wp-content/uploads/2016/08/Children-in-Conflict_WEB.pdf 5 (accessed 10 October 2017).

Out of the 59 parties, while the largest majority are non-State armed groups, eight are government forces.[85] Out of this, 5 were Africa States namely Central African Republic, Mali, Somalia, South Sudan, and Sudan.[86] In 2017, Central African Republic was delisted.

The African countries where armed groups recruit children below the age of 18 are the Central African Republic, the Democratic Republic of Congo, Mali, Nigeria, Somalia, South Sudan, and Sudan.[87] There seems to be a correlation between the recruitment of children by armed forces and by armed groups. The SRSG also indicates that the abductions of children in the context of armed conflict is a continuing problem in Africa, and in fact increasing in few contexts, particularly by the Lord's Resistance Army (LRA), *Al-Shabaab*, *Boko Haram*, and Islamic State in Iraq and the Levant (ISIL).[88]

There are a number of issues that the interpretation of the African Children's Rights Charter by the African Committee can add value to the promotion and protection of the rights of children in the context of armed conflict. For instance, the arrest and detention, and in some instances torture and ill treatment of children that are accused of association with terrorist organisations or terrorist activities, needs closer scrutiny if the enjoyment of the rights in the Charter are to be realised by all. Prevention detention, used under the guise of protecting children from joining terrorist organisations such as *Boko Haram*, and ISIL has lead to arrests of children in Cameroon, Nigeria and Libya.[89] The use of children for suicide bombing has been flagged as one of the issues in need of attention especially in the context of *Boko Haram* and *Al-Shabaab* activities. For instance, it has been reported that there has been an increase of suicide bombings carried out by children in Cameroon and Nigeria in the context of the *Boko Haram* violence.[90]

Another issue worthy of exploration relates to the denial of humanitarian access, including its use as a weapon of war and its relationship with children's rights. Activities of this nature have reportedly increased, for instance, in the context of the conflict in South Sudan.[91] It begs the question how the provisions of the Charter, especially articles 22 and 5, as well as relevant standards from

85 As above.

86 As above.

87 Child Soldiers International (n 82 above).

88 SRSG CAAC 'Annual report of the Secretary General on children and armed conflict' (20 April 2016) (A/70/836–S/2016/360) available at http://www.un.org/ga/search/view_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E para 9 (accessed 10 October 2017).

89 Child Soldiers International 'Submission to the 75th Pre-session of the UN Committee on the Rights of the Child: Cameroon' (August 2016) available at https://www.child-soldiers.org/Handlers/Download.ashx?IDMF=19c99637-7122-4356-927e-4748db4d617f (accessed 10 October 2017).

90 UNICEF, 'Nigeria regional conflict: 10-fold increase in number of children used in 'suicide' attacks', 12 April 2016, available at http://www.unicef.org/media/media_90827.html (accessed 10 October 2017).

91 SRSG CAAC 'Annual report of the Secretary General on children and armed conflict' (24 August 2017) (A/72/361–S/2017/821) available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2017/821 para 152 (accessed 10 October 2017).

international humanitarian law, should be interpreted and applied. Moreover, the relative success or lack thereof of the Charter can also be measured by the extent to which its provisions and their interpretation have an impact on non-state armed groups, and are also applied in instances of extraterritoriality including sexual exploitation and abuse by peacekeepers. Other areas in need of further interpretative guidance include the relevance of the provisions of the Charter in reducing the impact of violent extremism on children, children displaced by armed conflict, and attacks on schools and hospitals. It is important that the work of the African Children's Committee address these issues in the foreseeable future.

5 THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

The African Children's Rights Charter established the African Committee with the mandate to promote and protect the rights established by the Charter.[92] The African Children's Rights Committee has the power to consider State party reports as well as individual and inter-state communications, which presumably gives additional teeth to its provisions.[93]

5.1 State party reporting

One of the central obligations of State parties under the African Children's Rights Charter is to submit initial and periodic reports.[94] Part of the core businesses of the African Committee is to consider such reports and provide Concluding Observations. While initial reports are due two years after the entry into force of the Charter for the State party concerned,[95] and periodic reports are due every three years thereafter,[96] the Committee considered its first reports only in 2008.[97]

Despite such a slow start, the reporting process has garnered some traction. As a result of the momentum, in 2014, the Committee held its first extraordinary session dedicated for the consideration of State party reports. To date, the number of States that have reported has increased to 36. In fact, six countries have reported twice,[98] and Burkina Faso stands out as the only State that has reported three times.

92 Article 32 of the African Children's Rights Charter.
93 Articles 44 and 45 of the African Children's Rights Charter.
94 Article 44(1)(a) of the African Children's Rights Charter.
95 As above.
96 Article 44(1)(b) of the African Children's Rights Charter.
97 The initial reports of Egypt and Nigeria.
98 Cameroon, Kenya, Nigeria, Rwanda, South Africa and Tanzania.

There still remain 11 State parties with overdue reports,[99] and Central African Republic's initial report will be due in August 2018.

While the Rules of Procedures of the Committee make provision for the consideration of the situation of children's rights in a State party in the absence of a State party report, the Committee seems to have preferred not to invoke such a rule but rather engage and support State parties to report. Such an approach is reflected in the most recent AU Executive Council report, in which it asked the Committee to continue to support the efforts of State parties that have not reported to enable them to report.[100]

To date, the great majority of reports submitted by States are of good quality and the engagement during the constructive dialogue has often been composed of high level and multi-sectoral members of delegation. The submission of complementary reports by CSOs has also informed both the dialogue as well as the contents of concluding observations. What is in need of further improvement include an engagement with national human rights institutions around reporting and follow up, consolidation of the method and process of the follow up to implementation of Concluding Observations conducted by the Committee, as well as the extent to which the recommendations contained in concluding observations are focused, actionable, and to a certain extent prioritised.[101] While the Committee has already undertaken measures to reduce the reporting fatigue by States,[102] it would also be worthwhile to explore the advantages and disadvantages of aligning the timing for periodic reports from every three years to every five years.

5.2 Individual complaints and investigative missions

Probably by design, the first three individual complaints decided on their merits by the African Committee have focused on issues on which the African Children's Rights Charter has added normative value.[103]

[99] Botswana, Burundi, Cape Verde, Djibouti, Equatorial Guinea, Gambia, Guinea Bissau, Mauritius, Seychelles, Swaziland, and Zambia. In 2014, the Executive Council of the AU '[w]elcomed the Committees campaign on the Universal Ratification of and Reporting on the implementation of the African Charter on the Rights and Welfare of the Child which builds towards the 25th Anniversary of the adoption of the Charter in 2015 and URGES the 7 Member States who have not yet ratified the Charter, to expedite their ratification process for possible completion on or before the end of 2015'. See EX.CL/Dec.843(XXV) Decision on the Report of the African Committee of experts on the Rights and Welfare of the Child – Doc. EX.CL/858(XXV) para 3.

[100] EX.CL/Dec.977 (XXXI) Decision on the Report of the African Committee of Experts on the Rights and Welfare of the Child Doc.EX.CL/1033(XXXI) (2017).

[101] 'Prioritization' does not mean making a hierarchy between rights, but rather identifying and labeling few recommendations as in need of urgent attention.

[102] Such as indicating in its guidelines for reporting that States that have submitted a report to the CRC Committee, can use the elements of the same report and submit to the African Committee by highlighting the specificities of the African Children's Rights Charter.

[103] Table of cases available at http://www.acerwc.org/communications/table-of-communications/ (accessed 10 October 2017).

The first communication decided on its merits, *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,*[104] dealt with the question of the right of the child to acquire a nationality and not be discriminated against in accessing services on the basis of nationality.[105] The second communication, *Hansungule and others (on behalf of children in Northern Uganda) v Uganda*[106] revolved around the obligation of the Ugandan government to protect children in armed conflict, and in particular, not to recruit or use persons below the age of 18 in armed conflict in line with article 22 of the Charter. The third communication decided on its merits is *The Centre for Human Rights (University of Pretoria) and La Recontre Africaine sur la Defense des Droits de l'Homme (Senegal) v Senegal,*[107] finding the Senegalese government in violation of protecting children, in particular against enforced begging by religious teachers (*Marabouts).*

All these three cases evidence the argument that the individual complaints mechanism under the African Children's Rights Charter holds a very strong potential to protect children in Africa. All the communications involve an unidentified number of children, thereby highlighting the Committee's flexibility to entertain individual complaints even when the alleged victims are not individually identified. The African Children's Committee has also invoked the principle of the best interests of the child not only as a substantive right, but also as a principle that should inform procedure. For instance, in the *Children of Nubian descent in Kenya* case, the fact that the government of Kenya did not appear before the Committee on a number of occasions was perceived to go against the principle of children's best interests, and was used as a ground to continue with the proceedings in the absence of the State party. Where appropriate and possible, child participation has also informed the process for these communications. Also, all three communications have benefitted from *in situ* investigation or implementation follow-up by the Committee. The cases against Kenya and Senegal were moreover made a subject of implementation hearings with government representatives during the Committee's 29th Ordinary Session in April/May 2017 in Maseru, Lesotho. Because of the 'precedent' setting nature of these cases, African countries that might have similar issues within their jurisdictions can learn more on their obligations to undertake legislative and other measures from these decisions.

[104] No. 1/Com/1/2005 (*Children of Nubian descent in Kenya).* Full text of decision available at https://www.opensocietyfoundations.org/sites/default/files/ACERWC-nubian-minors-decision-20110322.pdf (accessed 30 October 2017).

[105] The children in the *Children of Nubian descent in Kenya* case are qualified to be Kenyan citizens and were found to be deprived of their rights in articles 3 (non discrimination), 6 (name and nationality), 11 (education), and 14 (health and health services) of the Charter.

[106] No. 2/Com/002/2009. Full text of decision available at http://www.chr.up.ac.za/images/files/news/press/DSA-ACE-64-1038.15.pdf (accessed 30 October 2017).

[107] No. 3/Com/001/2012. Full text of decision available at http://www.chr.up.ac.za/images/files/news/press/DSA-ACE-64-1047.15_2_3.pdf (accessed 30 October 2017).

Two more recent communications titled *Dalia Lofty on behalf of Ahmed Bassiouny v Arab Republic of Egypt*[108] as well as *Dalia Lofty on behalf of Emad v Arab Republic of Egypt* have also been finalised by the Committee. Both of these communications dealt with the right to liberty and protection from violence, and were declared inadmissible. As discussed above,[109] while Egypt has entered reservations on article 44 of the Charter, the Committee found such reservations as incompatible with the object and purpose of the Charter,[110] thereby considering itself as having the mandate to consider the two communications.

As indicated in the Committee's website,[111] there are at least four more communications that are currently pending before the Committee, covering a wide range of child rights issues. The *African Centre of Justice and Peace Studies (ACJPS) and Peoples' Legal Aid Centre (PLACE)* v *Sudan*[112] deals with issues related to the right to acquire a nationality and non-discrimination. The *Minority Rights Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania*[113] raises important questions related to contemporary forms of slavery, while the *Institute for Human Rights and Development in Africa and Finders Group Initiative on behalf of TFA (a minor) v Cameroon*[114] revolves around issues such as access to justice and right of appeal in a criminal case involving sexual abuse of a child. Another communication, *Etoungou Nko'o on behalf of Mr and Mrs Elogo Menye and Rev Daniel Ezo'o Ayo v Cameroon,*[115] tests the limit of the scope of application of the Charter in relation to alleged violations of children's rights committed once the children have died.

The African Committee has also concluded its first amicable settlement. In October 2014, the Committee received a communication *Institute for Human Rights and Development in Africa (IHRDA) v Malawi.*[116] The complainant submitted that the Constitution of Malawi, which provides in section 23(5) that 'for the purposes of this section, children shall be persons under sixteen years of age' constituted a violation of article 2 of the African Children's Rights Charter that defines a child as a person below the age of 18.[117] The African Children's Committee declared the communication admissible.

[108] No. 8/Com/001/2016.

[109] See sec 3 above.

[110] Available at http://www.acerwc.org/download/ruling-on-admissibility-of-communication-no-0080022016/?wpdmdl=10222 (accessed 30 October 2017).

[111] Available at http://www.acerwc.org/communications/table-of-communications/ (accessed 13 October 2017).

[112] No. 5/Com/001/2015.

[113] No. 7/Com/003/2015.

[114] No. 6/Com/002/2015.

[115] No. 10/Com/003/2016.

[116] No. 4/Com/001/2014.

[117] The Constitutional provision was also not aligned with other subsidiary legislation, such as the Marriage, Divorce and Family Relations Law that increased the minimum age of marriage from 15 to 18 years.

However, before proceeding on the merits, the Committee was approached by the two parties indicating that they would like to resort to an amicable settlement. Such a process is allowed by the Revised Communications Guidelines,[118] provided that the request is made before the Committee makes a decision on the merits of a communication.[119]

As part of the amicable settlement, the government of Malawi agreed to undertake efforts to amend its constitutional provision with a view to comply with article 2 of the African Children's Rights Charter by 31 December 2018.[120] In the interim, and while the amendment of the constitutional provision is underway, the government also agreed to undertake all possible and administrative measures to ensure that all persons below the age of 18 in the State party enjoy the right in the Charter.[121] With a view to ensure follow up, it was also agreed that the Government would submit periodic reports on the developments related to the implementation of the said agreement.

Fortunately, in February 2017, the government of Malawi amended its Constitution to raise the age for a definition of a child to 18 years.[122] An overwhelming number of parliamentarians – reportedly 131-2 in favour — voted supporting such an amendment.[123] Indeed this amicable settlement sets a very positive precedent in that parties to a communication make use of the good offices of the Committee, and implement agreed upon settlement in good faith. While a number of advocacy efforts by stakeholders have contributed to the amendment of the Constitution of Malawi, it is not far-fetched to argue that the amicable settlement agreed upon within the framework of the African Children's Rights Charter has lend significant positive pressure, and urgency, to convince parliamentarians, and complete the amendment process within a reasonable period of time.

In terms of article 45(1) of the Charter, the Committee may use any appropriate method to investigate any matter covered by the Charter, and to investigate measures taken by State parties to implement the

[118] Section XIII of the Revised Guidelines on the Consideration of Communications.

[119] Therefore, during the 28th Ordinary Session in October 2016, the Committee offered its good offices to facilitate a discussion between the two parties on the terms for an amicable settlement. The amicable settlement was reached under the auspices of the African Children's Committee, as provided for in sec XIII (2) of the Revised Communication Guidelines.

[120] M Yadessa 'Malawi amends its constitution to comply with article 2 of the Charter' (April 2017) 1 *ACERWC Tribune* 11.

[121] As above.

[122] See, Human Rights Watch 'Malawi amends Constitution to remove child marriage loophole' (23 February 2017) available at https://www.hrw.org/news/2017/02/23/malawi-amends-constitution-remove-child-marriage-loophole (accessed 14 October 2017); UN Women 'Malawi parliament adopts amendment to end child marriage' (22 February 2017) available at http://www.unwomen.org/en/news/stories/2017/2/news-malawi-parliament-adopts-amendment-to-end-child-marriage (accessed 13 October 2017); The Nation 'Constitutional amendment on cards' (by F Namangale) 27 November 2016 available at http://mwnation.com/constitutional-amendment-on-cards/ (accessed 13 October 2017).

[123] Yadessa (n 120 above). Such an amendment of the Constitution is reported to be the second since 1995.

Charter. Investigative missions enable the Committee to directly gather information relevant for monitoring the implementation or violation of the Charter by States parties.[124]

The experience of the Committee in relation to investigative missions, while limited, still holds a lot of potential. The investigative mission undertaken to Tanzania on the situation of children with albinism in temporary holding shelters, the opportunity to engage with stakeholders, in particular government officials, and the report emanating from the mission has been central for advocacy.[125] This investigative mission was requested by a civil society organisation, Under the Same Sun, and supported by other stakeholders in Tanzania and beyond, further underscoring the important role played by CSOs, UN agencies and national human rights institutions. Other promotional/investigative missions undertaken to South Sudan (2014) and Central African Republic (2014), two non-state parties to the Charter at the time of the mission, further consolidate the positive impact this mandate can contribute as well as the positive willingness of African countries to engage with the Committee.

6 CONCLUDING REMARKS

Even before it came into force, and as early as 1995, the African Children's Rights Charter has been called 'the most progressive of the treaties on the rights of the child'.[126] As the Charter transitions from 'childhood' to 'adulthood' and turns 18 in November 2017, there are indications that its theoretical added value also has had some positive impact on the lived realities of children on the African continent. Indeed, it is befitting that the African Committee has interpreted 'welfare' in the title of the African Children's Rights Charter to mean that, while the recognition of the rights contained in the Charter is an obligation of State parties, and a starting point, such recognitions should lead to the enjoyment of rights and the wellbeing of children.

An assessment of the Charter's 18 years of operation can be juxtaposed with that of the impact of the CRC which has been in existence for 27 years. In 2014, in the context of the 25th anniversary of the CRC, UNICEF posed the question 'Does a child born today have better prospects in life than one who was born in 1989?',[127] and provided a verdict by saying 'yes, but not every child'.[128] The same can be said of the Charter. While a number of children are thriving as a result of its implementation, there still remain those that continue to be

[124] Apart from article 45 of the Charter, investigative missions are governed by the Guidelines on the Conduct of Investigations by the ACERWC (the Investigation Guidelines).

[125] The report is available at http://www.acerwc.org/download/report-on-the-investigation-mission-on-children-with-albinism-in-tanzania/?wpdmdl=9694 (accessed 15 October 2017).

[126] G Van Bueren *The international law of the rights of the child* (1995) 402.

[127] UNICEF (n 2 above) 7.

[128] As above.

left behind such as children living in poverty, children deprived of their family environments, children affected by armed conflict, children subjected to harmful practices, children with disabilities, and indigenous children.

Substantively speaking, there still remain a number of provisions of the Charter whose application to issues of great significance today needs to be clarified. Some of these issues have been around for years, while others are emerging issues. In relation to the latter, challenges created as a result of the advancement of technology, climate change, migration crisis, health emergencies (such as Ebola), terrorism (such as the so-called Islamic State and its effect on children's rights) and responses to it, privatisation and increased globalisation, as well as economic crisis (including the current fall on commodity prices) which often lead to austerity measures need to benefit from a robust interpretation of the provisions of the Charter. As shown above, there are also issues that need further guidance in relation to definition of a child, child marriage, and children and armed conflict.

The sustained success (or lack thereof) of the Charter also hinges on the extent to which its provisions are able to stimulate efforts for institutional reforms. This includes institutional reforms for improved data collection, coordination, budgeting, as well as concerted efforts by and engagement with national human rights institutions and CSOs. Ongoing work by the African Committee on a draft General Comment on general measures of implementation and systems strengthening holds potential to give States detailed guidance on some of these important institutional reforms.

Inevitably, the extent to which States manage to create synergy between the Charter and their efforts to achieve the 2030 Agenda for Sustainable Development will be critical. Indeed, breaking the silos between those working in human rights and those in development is apposite to make progress on issues such child protection, early childhood education and reducing inequality. The themes for the DAC in 2017 and 2018 that are focused on the SDGs are indeed a welcome platform to contribute to achieving this link, and positive synergy.

The core work of the Committee in relation to State party reporting, individual complaints and investigative missions is on a positive trajectory. Moreover, the activities around the DAC, issuing general comments, conducting studies, and the granting of observer status are important catalysts for the implementation of the Charter. Critically important, the prospect of the Committee having direct access to the African Court through an amendment of the Court Protocol, a process that has officially been triggered by the Court in 2017,[129] holds a lot of potential to improve the protective mandate of the Committee. Engagement with relevant AU organs, such as the Peace and Security Council needs to be strengthened. These notwithstanding, unless the budgetary allocations for the Committee significantly increase beyond

[129] Advisory Opinion, Request 2/2013, 5 December 2014, http://en.african-court.org/images/Cases/Advisory%20Opinion/Advisory%20Opinions/Advisory%20Opinion%20no%20%20002-2013.pdf (accessed 30 October 2017).

the current less than 1 per cent of the total AU budget, the Committee will continue to be seriously constrained to achieve its mandate in full.

Like any international human rights instrument, the Charter still faces some criticisms. So does the work of the African Committee. For instance, some might still argue that it is not adequately sensitive to the socio-cultural and religious contexts of some African countries. But as the Charter solidifies its impact, and the Committee makes its presence felt, most of the arguments of detractors will continue to fade into the background.

The ultimate judges of the added value of the Charter are children in Africa whose lives have been improved as a result of its implementation. However, as shown above, the 18th anniversary of the coming into force of the Charter indeed offers an opportunity to reflect and take stock of the limited progress so far, and the work that remains to be done, in our collective efforts to create an Africa fit for children. This notwithstanding, the Charter is not counting its days, but making its days count.

Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights

Rachel Murray, Debra Long**, Victor Ayeni*** and Augustin Somé*****

ABSTRACT: It is only relatively recently that attention has been paid to what happens after the African Commission and Court on Human and Peoples' Rights have issued decisions or judgments, and to the question whether these decisions or judgments actually result in any meaningful change on the ground. Results of a collaborative research project involving desk-based research and interviews with role players on the implementation of the decisions and judgments show that the body monitoring implementation is expected to play various roles. While there has been some movement to establish processes and mechanisms at the regional level to monitor implementation of the Commission and Court's decisions and judgments, the role that they adopt in monitoring implementation is confused and does not necessarily play to their respective strengths. Perhaps because of this confused state of play, there is an impasse, certainly at the level of the African Commission, in developing further the monitoring of implementation. This article therefore concludes by proposing some pragmatic, low-cost solutions to move monitoring implementation forward on the continent.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Suivi de la mise en œuvre des décisions et jugements de la Commission africaine et de la Cour africaine des droits de l'homme et des peuples

RÉSUMÉ: L'intérêt accordé au sort des décisions ou arrêts rendus par la Commission africaine et la Cour africaine des droits de l'homme et des peuples est récent. Il en est de même en ce qui concerne la question de savoir si ces décisions ou arrêts ont un impact réel. Les résultats d'un projet de recherche collaboratif impliquant une recherche documentaire et des entretiens avec des acteurs sur la mise en œuvre des décisions et des arrêts montrent que l'organe en charge du suivi de la mise en oeuvre devrait jouer différents rôles. Bien qu'il y ait eu un certain engouement pour établir au niveau régional des processus et des mécanismes de suivi des décisions et arrêts de la Commission et de la Cour, le rôle que les deux organes jouent dans le suivi est confus et ne milite pas nécessairement en faveur de leur renforcement respectif. Sans doute du fait de cette situation confuse, il y a une impasse, certainement davantage au niveau de la Commission africaine, de faire avancer le suivi de la mise en œuvre. Cet article conclut par conséquent en proposant des solutions pragmatiques et peu coûteuses pour aller de l'avant dans le suivi de l'exécution des décisions concernées sur le continent.

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KEY WORDS: African Court on Human and Peoples' Rights, African Commission on Human and Peoples' Rights, implementation, monitoring, decisions, judgments

CONTENT:

1 INTRODUCTION

When the African Charter on Human and Peoples' Rights (African Charter) was adopted 30 years ago, scholarly debate on the new African human rights system focused on its provisions and on the question whether, what on paper appeared to be a toothless African Commission on Human and Peoples' Rights (African Commission), would have any effect on promoting and protecting the broad range of rights contained in the African Charter. Over the years, the African Commission developed standards on the various provisions of the African Charter through the adoption of resolutions or general comments, and through the various activities of its special procedures. It has received well over 400 communications, nearly all from individuals, organisations or groups alleging violations of the rights in the African Charter.[1] In 2006 it was joined by the African Court on Human and Peoples' Rights (African Court), which has since then received numerous cases and adopted a handful of judgments in which it found human rights violations.[2]

It is only relatively recently, however, perhaps in line with shifts at the international level and among human rights funders, that attention has been paid to what happens post-decision or judgment,[3] and to the question whether many of these documents and standards elaborated by the African Commission and decisions and judgments adopted by the African Commission and African Court actually result in any meaningful change on the ground. This article draws upon preliminary findings from a collaborative research project examining the

1 See http://www.achpr.org/communications/; and the Institute for Human Rights and Development in Africa (IHRDA)'s Case Law Analyser: http://caselaw.ihrda.org (accessed 10 October 2017).

2 See eg *Konaté v Burkina Faso*, Application 4/13 (Judgment of 5 December 2014); *Zongo v Burkina Faso*, Application 13/11 (Judgment of 21 June 2013); *Jonas v Tanzania*, Application 11/2015 (Judgment of 28 September 2017); *Onyachi and Others v Tanzania*, Application 3/2015 (Judgment of 28 September 2017); *African Commission on Human and Peoples' Rights v Kenya*, Application 6/2012 (Judgment of 26 May 2017); *Actions pour la protection des droits de l'homme (APDH) v Côte d'Ivoire*, Application 1/2014 (Judgment of 18 November 2016).

3 See Open Society Justice Initiative (OSJI) *From judgment to justice: implementing international and regional human rights decisions* (2010) 12; OSJI *From rights to remedies: structures and strategies for implementing international human rights decisions* (2013) 26; C Heyns & F Viljoen *The impact of the United Nations human rights treaties on the domestic level* (2002) 1.

implementation of cases from the African Court and Commission, as well as the regional treaty bodies in Europe and the Americas and some of the treaty bodies in the UN. It has taken a handful of cases from nine States, three in each of the regions (Africa, the Americas and Europe), and examined the extent to which the recommendations or reparations ordered have been implemented by the State. Desk-based research, and interviews with government officials, the victims, litigants, parliamentarians, the judiciary, national human rights institutions (NHRIs), civil society and others, as well as representatives from the respective treaty bodies, have enabled us to identify factors that impact on the implementation of these decisions and judgments.[4]

This article focuses on the monitoring of implementation of decisions and judgments of the African Commission and African Court, and not on other findings such as Concluding Observations or resolutions issued by the African Commission. We use the term 'implementation' to refer to the *process* by which individual or collective measures are taken (through legislation, judicial decision, administrative action, executive decree, or other steps) to give effect to an adverse judgment or decision.[5] This is distinguished from 'compliance', which is a *status* that is attained if and when a State's law and practice are in line with the requirements of the judgment or decision, as interpreted by the responsible international body.[6] Thus, compliance is understood as the outcome of implementation: a state implements a judgment or decision in order to ensure that it is in compliance with its obligations under this ruling. African human rights bodies use the terms 'monitoring' or 'following-up' decisions and judgments that we consider broader terms to cover the formal and informal processes of oversight of the human rights bodies, and it is these which this article examines. While acknowledging that the monitoring of implementation cannot be the sole responsibility of the respective treaty bodies, this article concentrates specifically on the role of two human rights treaty body mechanisms (the Commission and the Court) established within the AU. The contribution of the other AU organs, including the Assembly of the Union (AU Assembly), Executive Council, Peace and Security Council (PSC), Permanent Representatives

4 For information on the project, see http://www.bristol.ac.uk/law/research/centres-themes/hric/projects/implementationandcompliance/#d.en.278672 (accessed 10 October 2017). This is an independent research project funded by the Economic and Social Research Council (ESRC) of the United Kingdom. Interviews have been conducted under the University of Bristol's rules on ethical research. This has required that interviewee consent be obtained to attribute them in publications arising from the research and anonymity, if requested, will be respected at all times. Therefore, quotations cited in this article do not identify their authors. All interviews are held on file with the research team, which includes the co-authors of this article.

5 See M Burgstaller *Theories of compliance with international law* (2004) 4; R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 28; VO Ayeni 'Introduction' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 9.

6 K Raustiala 'Compliance and effectiveness in international regulatory cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 388-391; B Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Michigan Journal of International Law* 345.

Committee (PRC), the AU Commission (AUC), and the Pan-African Parliament (PAP), will be touched upon but not be dealt with fully here.

2 WHAT ROLE SHOULD THESE BODIES PLAY?

It is first worth reiterating that it is clear from our research that the African Commission and African Court should themselves play some role in monitoring implementation of their own decisions and judgments. Firstly, it gives them a sense of ownership, as interviewees told us: the African Court 'still need(s) to know if the decision has been implemented or not in case [it needs] to issue other orders, or draw parties to other cases';[7] further: 'it is good to see that your decisions are implemented and monitored'.[8] In addition, the bodies are then able to assess their own impact and consequently amend their practices accordingly. The ability to indicate examples of where states have implemented also contributes to enhancing the legitimacy and credibility of the body itself. This will then 'build confidence in the institution',[9] so that

> the Court should work towards the ideal position, where compliance with its decisions impacts on the Respondent State's legitimacy among its peers, in other words, non-compliance with the Court's decisions will have adverse consequences to States which they cannot afford to ignore. The Court should continue undertaking its work with independence and integrity without fear of repercussions from Member States. It should avoid self-censoring, which could arise from a fear of non-compliance with its decisions or a fear of active backlash against it.[10]

From our research we would suggest grouping monitoring and implementation into two categories: (i) monitoring and implementation that can be viewed as *reactive* (for example, receiving information on the extent to which the State has implemented any recommendations or orders); and (ii) monitoring and implementation that is *proactiv*e (for example, going out and seeking information where it is lacking; cross-checking that evidence and validating what has been said; and then also making assessments on whether this is sufficient or not, based on some clear criteria of what is satisfactory implementation).

Our research has found that the African Commission and African Court play, or are considered to play, a variety of different roles when it comes to 'monitoring' implementation. These roles include: information-gathering; reporting; dialogue with the parties; interpretation and technical assistance; assessment; coordination; and enforcement. Our terminology recognises, but does not necessarily

7 Interview D6, held May 2017. See also Interview D1, May 2017; Interview D3, April 2017.

8 Interview D8, held May 2017.

9 Interview D5, held May 2017.

10 Communique/Outcome of the International Symposium on the 10th Anniversary of the African Court on Human and Peoples' Rights, A Decade of Human Rights Protection in Africa, 21-22 November 2016, Arusha, United Republic of Tanzania 5.

equate with, proposals made by the African Court itself in consideration of articles 29 and 30 of the Protocol.[11]

'Information-gathering' is understood to mean receiving or seeking evidence from the parties to the case as well as other actors on what measures States have undertaken to implement the decision or judgment. This may take the form of direct questions to the State delegation during consideration of State reports, holding implementation hearings, correspondence to parties and visits to relevant stakeholders at the domestic level.

'Reporting' encompasses informing others, including organs of the AU and other national and international actors, of the measures taken by the State.

'Dialogue with the parties' entails that the monitoring body works with the two parties to the communication either through offering 'good offices' or facilitating meetings to discuss the implementation of the measures.

'Interpretation and technical assistance' is provided when the monitoring body provides further clarification on what the specifics of its recommendations and orders mean.

'Assessment' is the evaluation of the extent to which the State has implemented the recommendations or orders.

'Coordination' has been used to note that the bodies can also play a role in coordinating efforts to monitor implementation with other bodies at the national or regional level.

Examples of 'enforcement' tools are: the 'naming and shaming' through the publication of lists of States that have failed to implement decisions; Rules 118(1) and (2) of the African Commission's Rules of Procedure which enable it to refer cases to the African Court when the state has failed to comply;[12] or ultimately the ability of the AU organs to impose sanctions on states.[13] Here, consequences may flow from the failure to implement. These various forms of monitoring are not always distinct, neither are they mutually exclusive in that they can be undertaken together and at the same time. In addition, for example, undertaking 'interpretation and technical assistance' does not

[11] See below; and GW Kakai 'Compliance with supranational human rights judgements and decisions in Sub-Saharan Africa: successes, challenges and opportunities. African Court on Human and Peoples' Rights Experience', Presentation, Raoul Wallenberg Institute, Closing The Implementation Gap – Strengthening Compliance with Regional Human Rights Decisions Regional Symposium, 27–28 September 2016, Hotel Intercontinental, Nairobi, Kenya, on file with authors.

[12] *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Arab Jamahiriya*, Application 2/2013 para 27.

[13] Article 23(2) of the AU Constitutive Act. See African Court Coalition *Booklet on the implementation of decisions of the African Court on Human and Peoples' Rights* (2017) para 2.3.1. See also Rule 33(2) of the Assembly Rules of Procedure (Rules of the Assembly). However, see Rule 36 of the Rules of the Assembly, and counter-argument by GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: a possible remedy' (2006) 6 *African Human Rights Law Journal* 465 484.

necessarily mean that the body will not also take some steps to, for instance, assess implementation as well.

A related issue is that whatever role these bodies play must not impact on their neutrality and independence. This applies equally to the African Commission as to the African Court. The legitimacy and credibility of the bodies come in part from the perception of them as independent and their ability to be resolute in the face of pressures from States or other actors.[14] Some of the tasks employed in monitoring implementation potentially could compromise this neutrality. So, for example, on the one hand one might see the benefits for a Commissioner who lived in the State against which a decision was adopted to be a source of expertise for the State authorities when determining how to implement that decision. On the other hand, his or her lack of engagement with the case prior to its adoption, in accordance with the Rules of Procedure to ensure neutrality,[15] does not make this a straightforward proposition.

Bearing in mind the importance of independence, the question then becomes: What roles do the treaty provisions and rules presume?

3 TREATY PROVISIONS AND RULES OF PROCEDURE/RULES OF COURT

Article 1 of the African Charter requires States Parties to 'recognise the rights, duties and freedoms enshrined in the Charter' and to 'undertake to adopt legislative or other measures to give effect to them'. The African Commission has a broad mandate in article 45 to promote, protect and interpret the African Charter. Article 46 further enables it to 'resort to any appropriate method of investigation'; it may hear from the Chairperson of the AU Commission or any other person capable of enlightening it.[16] Rule 98(4) of the African Commission's Rules of Procedure requires the State to report to the African Commission on measures taken to implement provisional measures. Rule 112 has further detail on 'follow-up' on the recommendations of the Commission. This Rule provides as follows:

> 1. After the consideration of the Commission's Activity Report by the Assembly, the Secretary shall notify the parties within thirty (30) days that they may disseminate the decision.
> 2. In the event of a decision against a State Party, the parties shall inform the Commission in writing, within one hundred and eighty (180) days of being informed of the decision in accordance with paragraph one, of all measures, if any, taken or being taken by the State Party to implement the decision of the Commission.

[14] Open Society Justice Initiative (n 3 above) 11; H Koh 'Review essay: why do nations obey international law?' (1997) 106 *Yale Law Journal* 2599 2602.

[15] Rule 101 of the African Commission's Rules of Procedure.

[16] Article 46 of the African Charter.

3. Within ninety (90) days of receipt of the State's written response, the Commission may invite the State concerned to submit further information on the measures it has taken in response to its decision. If no response is received from the State, the Commission may send a reminder to the State Party concerned to submit its information within ninety (90) days from the date of the reminder.
4. The Rapporteur for the Communication, or any other member of the Commission designated for this purpose, shall monitor the measures taken by the State Party to give effect to the Commission's recommendations on each Communication.
5. The Rapporteur may make such contacts and take such action as may be appropriate to fulfill his/her assignment including recommendations for further action by the Commission as may be necessary.
6. At each Ordinary Session, the Rapporteur shall present the report during the Public Session on the implementation of the Commission's recommendations.
7. The Commission shall draw the attention of the Sub-Committee of the Permanent Representatives Committee and the Executive Council on the Implementation of the Decisions of the African Union, to any situations of non-compliance with the Commission's decisions.
8. The Commission shall include information on any follow-up activities in its Activity Report.

In setting out when the African Commission is able to submit a case to the African Court, Rules 118(1) and (2) provide that this can be done where the African Commission 'considers that the State has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in Rule 112(2)' and where it 'considers that the State has not complied with the Provisional Measures requested'. Rule 125 enables the African Commission to request the AU Assembly, when it submits its activity report, 'to take necessary measures to implement its decisions' and for the African Commission to 'bring all its recommendations to the attention of the Sub-Committee on the Implementation of the Decisions of the African Union of the Permanent Representatives Committee'.

Article 29(2) of the African Court Protocol states that the Executive Council of the AU 'shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly'. Under article 30 of the Protocol, States parties are required to 'comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution' and in compliance with article 31 the Court shall submit a report to each regular session of the AU Assembly which should include 'the cases in which a State has not complied with the Court's judgment'.

Rule 51 of the Rules of Court notes that the article 31 report shall also include reference to the interim measures ordered by the Court and '[i]n the event of non-compliance with these measures by the State concerned, the Court shall make all such recommendations as it deems appropriate' and it can also 'invite the parties to provide it with

information on any issue relating to implementation of the interim measures adopted by it'.[17] Rule 54(5) of Rules of Court enables the Court to 'invite the parties to provide it with information on any issue relating to implementation of the interim measures adopted by it'.

4 MECHANISMS

The challenge with monitoring implementation of the judgments of the African Court and decisions of the African Commission does not appear to be due to the lack of available mechanisms to do so. In addition to any specific procedure or mechanism to deal with monitoring, these bodies have also used the more generic procedures established under their mandates to monitor implementation of their judgments and decisions. So, the African Commission has asked questions of States during the examination of their article 62 reports about what measures have been taken to implement decisions;[18] it has amended the structure of its activity reports to refer to the implementation status of decisions;[19] it has included follow-up on decisions in its fact-finding missions by special procedures,[20] and its promotional missions;[21] and it has made reference to the status of implementation of decisions in country-specific resolutions.[22]

The African Court has enabled States to use the application for interpretation of a judgment procedure as set out in Rule 66 of the Rules of Court to request clarity on what is expected from them in the implementation of judgments and orders ruled by the Court. The African Court can and does offer technical assistance to States on how to implement its decision. At least two States have requested the Court to clarify aspects of its orders in order for them to be able to implement

17 Rule 51(4) of the Rules of the African Court

18 Eg the Concluding Observations on Mauritania's report, 16 February 2012.

19 Eg African Commission, 35th Activity Report of the African Commission, adopted October 2013, reference to *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, Communication 323/2006, to 'follow-up on implementation' 7, see also para 27: 'With regards to Communication 419/2012 - *The Indigenous Peoples of the Lower Omo (Represented by Survival International Charitable Trust) v Ethiopia*, the Commission issued an Order against the State, requesting the latter to adopt Provisional Measures to prevent irreparable harm being caused to the victim of alleged human rights violations; the State has not respected that Order'.

20 Eg OSJI (n 3 above) 107; Report of the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa, presented at the 52nd Ordinary Session of the African Commission, 9-22 October 2012 para 44.

21 Eg a decision on a number of related communications against Mauritania was discussed in a promotional visit by the CPTA Chairperson in 2012, Report of the Promotional Mission to the Islamic Republic of Mauritania, 26 March – 1 April 2012 9. Similarly, in a mission to Botswana in 2005, the visiting delegation requested information on the steps taken to implement recommendations on the decision on *Modise v Botswana* communication, Report of the Promotional Mission to the Republic of Botswana, 14-18 February 2005 13.

22 See African Commission, Resolution 91 on the human rights situation on Eritrea, adopted December 2005.

the ruling.[23] The procedure is in effect a new application, for interpretation of a judgment, as set out in Rule 66 of the Rules of Court. Here, however, the roles are reversed: the State then becoming the applicant, and the previous applicant, the respondent.

Are such processes insufficient or simply not properly used? Why, given the above tools, has the African Commission, for example, not produced publicly available information on the status of implementation of at least some of its decisions? In part, the processes do not appear to have been exploited to their full potential due to limited information from States, and insufficient staffing resources, among other factors. In addition, there are also key processes or tools behind the scenes that are missing, such as efficient and comprehensive case management systems or databases which, if in place, would help the monitoring overall. The task of follow-up and monitoring implementation has been added on to already existing processes but with limited if any additional resources.

Specific mechanisms have also been established to enable the bodies themselves to monitor implementation of their decisions and judgments. These, as will be seen, encompass many of the types of monitoring that are listed above. Rule 112 of the African Commission's Rules of Procedure sets out the procedure for 'follow-up' to be used by the African Commission. Here its role includes reporting, information-gathering, assessment and arguably enforcement and is not only reactive but also proactive. These roles have principally been coordinated by the African Commission's Working Group on Communications, composed of Commissioners and members of the secretariat, which is tasked with considering communications.[24] Its mandate was expanded in October 2012 to include the coordination of follow-up of decisions and collection of 'information on the status of implementation of the Commission's decisions' that it should then present in a report at each session.[25]

Article 29 of the Court Protocol gives the task of *monitoring* to the AU's Executive Council although its ability to do so is dependent on the African Court providing it with the information on 'non-compliance' in its activity report.[26] In a 2014 Decision, the Executive Council called on the African Court to 'propose, for consideration by the PRC, a concrete reporting mechanism that will enable it to bring to the attention of relevant policy organs, situations of non-compliance and/or any other issues within its mandate, at any time, when the interests of justice so

[23] See for instance, *Mkandawire v Malawi*, Application 3/2011 http://en.african-court.org/images/Cases/Judgment/Ruling%20Appl.%20003-2011%20Urban%20Mkandawire%20v%20Malawi%20-%20English.pdf (accessed 12 July 2017); and *Interpretation of Judgment of 20 November 2015 Thomas v Tanzania*, Application 1/2017 (Judgment 28 September 2017).

[24] African Commission, Resolution 212 on the mandate of the Working Group on Communications of the African Commission on Human and Peoples' Rights, adopted March 2012.

[25] African Commission, Resolution 255 on the expansion of the mandate of the Working Group on Communications and Modifying its Composition, adopted October 2012.

[26] Article 31 of the Court Protocol.

require'.[27] It has been suggested that 'reporting' should be considered as separate from 'monitoring' and 'enforcement'.[28] 'Reporting' includes those reports on non-compliance submitted by the African Court to the Executive Council through article 31 of the Protocol. 'Monitoring' should be undertaken by the Executive Council in accordance with article 29; and include the ability of the Executive Council, through working groups or a group specifically for 'ongoing supervision of the state of execution of judicial decisions of the Court', to issue regulations or directions or appropriate action.[29] 'Enforcement' will then be carried out by the AU Assembly, with information on the measures taken by the State being maintained by a register at the AU Commission.[30]

The practice of the African Commission and the African Court reveals that they employ a range of different tasks to monitor implementation. With respect to information gathering, the African Commission has received information from one or both parties to the communication,[31] and on occasion others,[32] on the extent to which its recommendations have been implemented. It has also been more active in gathering evidence of implementation, for example, by sending *notes verbales* and letters to the States and parties requesting information, although the responses are not always provided.[33] Despite it not being expressly mentioned in Rule 112, it has also held hearings on

27 AU Executive Council, Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights, adopted January 2014 para 9.

28 African Court Coalition (n 13 above) para 2.2. See also GW Kakai 'Compliance with supranational human rights judgements and decisions in Sub-Saharan Africa: successes, challenges and opportunities. African Court on Human and Peoples' Rights experience', Presentation, Raoul Wallenberg Institute, Closing The Implementation Gap – Strengthening Compliance with Regional Human Rights Decisions Regional Symposium, 27-28 September 2016, Hotel Intercontinental, Nairobi, Kenya, on file with authors.

29 African Court Coalition (n 13 above). See also Kakai (n 11 above).

30 As above.

31 'In Communication 365/08, the Complainant informed the Commission that the decision of the Commission has been partially implemented, and the Commission has requested the State to implement the outstanding part of the decision. In Communication 323/06, the Respondent State indicated that efforts have been made to protect the rights of women in the country in general, and the Commission has requested the State for information regarding the concrete measures (being) taken to implement the specific decision of the Commission in the Communication in identified areas', African Commission, Thirty-Sixth Activity Report, November 2013-May 2014 paras 24-27.

32 *Malawi Africa Association et al v Mauritania*, Communications 54/91-61/91, 98-93-164/97, 196/97, 210/98, ImplementationDossier. For presentation to the African Commission on the occasion of the 50th Ordinary Session, October 2011. IHRDA were not the original complainants. See also statements made during sessions of the African Commission, eg IHRDA, Statement of IHRDA on implementation of the African Commission's decision in Communication 292/04, *IHRDA v Angola*, 58th Ordinary Session, 12 April 2016.

33 Eg African Commission, Thirty-Seventh Activity Report, June – December 2014 para 50: 'The Commission did not receive any information on this during the reporting period'.

implementation[34] and held a panel on implementation as part of its plenary sessions.[35]

For example, at the 53rd ordinary session of the African Commission in April 2013, the Commission held an implementation hearing in respect of the *Endorois* case. During the hearing, the parties updated the Commission on the implementation of its decision in the *Endorois* case.[36] Thereafter, the Commission sent a *note verbale* dated 29 April 2013 to the government of Kenya reminding the government of its pledge during the oral hearing to submit an interim report within 90 days of the hearing and a comprehensive report at the next session (54th ordinary session) of the Commission.[37] The oral hearing on implementation was followed by a workshop held on 23 September 2013 on the status of implementation of the *Endorois* decision, organised by the African Commission's Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council.[38] Due to the failure of the government of Kenya to participate in the implementation workshop and provide feedback as promised during the oral hearing, the Commission adopted Resolution 257 on 5 November 2013 urging the government of Kenya to comply with its obligations under the African Charter by implementing the *Endorois* decision.

With respect to reporting as a tool for monitoring implementation, the African Commission's annual report, which includes the annexes of the decisions on communications, has for a number of years included a section outlining 'the situation of the compliance with its recommendations by the State Parties'.[39] This is consolidated by requests from the Executive Council that 'Parties to Communications to provide the [African Commission] with information regarding implementation of decisions and recommendations of the [African Commission]'.[40] The African Court publishes in its activity report a list of States and increasingly detailed information on implementation.[41] The information lists the particular reparation ordered by the Court

34 Eg in relation to the *Endorois* case, African Commission, Resolution 257 Calling on the Republic of Kenya to implement the Endorois decision, adopted November 2013.

35 As a panel at its session in November 2015. See also Meeting between African Commission, African Court, African Committee on Rights and Welfare of the Child and AU, September 2012, Addis Ababa.

36 See African Commission, Thirty-Fourth Annual Activity Report, November 2012 – April 2013 5; Minority Rights Group International 'The Endorois decision – four years on, the Endorois still await action by the Government of Kenya' http://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 12 July 2017).

37 African Commission (n 23 above).

38 As above.

39 African Commission, Resolution 97 on the importance of the implementation of the recommendations of the African Commission on Human and Peoples' Rights by States Parties, adopted November 2006 para 3.

40 AU Executive Council, Decision on the Thirty-Sixth Activity Report of the African Commission, 28 April 2014 para 5.

41 See eg Executive Council, Report on the Activities of the African Court on Human and Peoples' Rights, 22-27 January 2017, para 21; African Court, Mid-Term Activity Report, 1 January – 30 June 2017 section 21(d).

and then provides detail on what the State has done, if anything, to implement that measure. In one situation, with respect to Libya, it adopted an Interim Report noting that 'Libya has failed to comply with a judgment of the Court'.'[42] It submitted this report to the AU Assembly in accordance with article 31 of the Protocol and Rule 51(4) of the Rules of Court, urging

> the Assembly to express itself on Libya's non-compliance with the Court Order and to call upon Libya to comply forthwith and, also for Libya to report to the Court within 14 days on what measures Libya has taken to comply with the Court Order; the Assembly to adopt a decision calling upon all Member States of the African Union to comply with and implement Judgments and Orders of the Court, in accordance with Article 30 of the Protocol; the Assembly to take such other measures as it deems appropriate to ensure that Libya fully complies with the Court Order.[43]

The African Commission can offer its good offices to parties to a communication and facilitate dialogue between them in the implementation of its decisions.[44] Whether the parties make use of this potential as often as they might is a question to be considered in further research.[45]

In carrying out its role under the Protocol and the Rules of Court, the African Court has required, as part of the judgment or ruling in reparations, for States to report back to it within a period of time on the measures they have taken to implement the judgment.[46] The African Court, we were informed,[47] also writes to States to request information and regularly updates this information. Neither the African Commission nor African Court appears to have an electronic case management database that incorporates data on the implementation of the decisions and rulings.

Both the African Court and the African Commission have then used any information they have collated to make an assessment on the extent to which the State has implemented the judgment or decision. For the African Commission this is not done consistently. For example, there are only a handful of cases where the African Commission has made more detailed analysis and statements on a State's failure to implement, prompted, it would appear, by sustained campaigns from the litigants or interested civil society organisations.[48]

42 African Court, Interim Report of the African Court notifying the Executive Council of non-compliance by a State (Interim Report on Libya), 17 May 2013 para 8.

43 African Court (n 42 above) paras 9-10; AU Executive Council (n 41 above) para 56.

44 African Commission, Final communiqué of the Workshop on the Status of Implementation of the Endorois Decision of the African Commission, 23 September 2013 para 4.

45 NJ Udombana 'Towards the African Court on Human and Peoples' Rights: better later than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45; ST Ebobrah, 'Towards a positive application of complementarity in the African human rights system: issues of functions and relations' (2011) 22 *European Journal of International Law* 663-688.

46 Ruling on Reparations in *Mtikila v Tanzania*, Application 11/2011,

47 Interview D5, May 2017; Interview D8, May 2017.

48 African Commission (n 34 above).

The African Court has not published any criteria on what amounts to 'full' or 'partial' implementation, although it has used these terms. For example:

> While welcoming the efforts made by Burkina Faso and Tanzania to implement the Court's judgments, the Court notes that the two countries are yet to fully comply with the orders of the Court in those judgments, and further notes Tanzania's unwillingness to comply with the Court's Orders for Provisional Measures.[49]

This terminology could, however, be read as relating to the number of specific orders in the judgment, rather than an assessment of the nature of the measures taken with respect to each particular order.

There is no information that is consistently publicly available on how the African Commission or African Court assess the accuracy or test the veracity of information given to them on the extent to which the State has implemented the decision or judgment. In the end it may come down to whether the complainant or applicant accepts and is content with what the State claims it has done.

5 CONCLUSIONS

Our research asserts the following conclusions. It reveals that although the bodies monitoring implementation, in our context, the African Commission or the African Court, are expected to play various roles, there appears to be no coherent or strategic approach. The consequences of this insight are far-reaching. First, there are times at which none of these tasks are being carried out because the bodies do not consider it their responsibility to do so. Second, many of these tasks are being carried out but not well or consistently well. Third, there is no coherent picture from those within or outside the bodies as to whether these roles are appropriate or not, whether they themselves are best placed to play them, play them on some occasions and not others, or whether others should be doing these tasks instead. Finally, one of the reasons why the African Court and African Commission appear to be carrying out the variety of monitoring activities is because they are doing so instead of putting a more holistic and coherent system in place, particularly at the AU level. The sub-committee envisaged by Rule 112(8) of the African Commission's Rules of Procedure has not become operational and any real monitoring or enforcement from the AU level, beyond simply calling on states to implement decisions of the two bodies,[50] is therefore limited and in many respects absent.

[49] AU Executive Council, Report on the Activities of the African Court to the Executive Council, 22-27 January 2017 para 57.

[50] Eg AU Executive Council (n 40 above) para 4, where it 'call[ed] on states to implement the decisions and recommendations' of the African Commission as well as to 'respond to the ACHPR's Urgent Appeals and comply with Orders for Provisional Measures issued by the ACHPR'; AU Executive Council, Decision on the Thirty-Fifth Activity Report of The African Commission, 21-28 January 2014 para 4: 'Calls upon Member States to implement decisions and recommendations of the ACHPR, respond to Urgent Appeals from the ACHPR, and to comply with Provisional Measures issued by the ACHPR'; AU Executive Council, Decision on the Thirty-Fourth Activity Report of the African Commission, 19-23 May 2013 para 4: 'Exhorts State Parties to take concerted action to address the human rights issues that the ACHPR has identified as being

The inter-relationship between the African Court and African Commission is also dependant on clarifying what their respective roles should be. The African Court has a specific role under Rule 118(1) and (2) of the African Commission's Rules of Procedure arguably to 'enforce' decisions of the African Commission where the State has failed to implement. Given the lack of clarity on the African Commission's role with respect to monitoring its own decisions, the execution of Rule 118 and which cases it should refer to the African Court is problematic. This is not least because in order to refer cases of non-implementation to the African Court, the African Commission has to have sufficient information on implementation of its own decisions and should have used this to make an assessment on whether the recommendations have been fulfilled. Even if it can select which of the cases the State has failed to implement it would like to refer to the Court, the African Commission's reluctance has been compounded by the perception that the African Court can examine the case *de novo*.

Further, one has to ask what precisely the role of the African Court is with respect to Rule 118 referrals. Is it to 'enforce' the African Commission's decision by in effect giving it binding status? If so, does this potentially, and paradoxically, weaken the African Commission's own view that its decisions are binding,[51] and thereby undermine its own legitimacy? Could it, arguably, imply that States are not obliged to react to the African Commission's decision until there is a confirmation

continuing concerns on the continent and to comply with the decisions and recommendations of the ACHPR'; see also AU Executive Council, Decision on the Twenty-Second Activity Report of the African Commission, 25 – 29 June 2007 para xi: '[U]rge[d] Member States to commit unconditionally to, and comply with judgements rendered by the Court'; AU Executive Council, Decision on the 2014 Activity Report of The African Court On Human And Peoples' Rights, 23 – 27 January 2015 para 3: 'Welcomes the response of Libya to the Court's Order of Provisional Measures in relation to a matter filed against the State Party before the Court, but NOTES that the response does not indicate the measures Libya has taken to implement the said Order, with regard to allowing "...the accused access to a lawyer of his choosing, family visits and to refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health..."'; AU Executive Council, Decision on the Mid-Term Activity Report of the African Court On Human And Peoples' Rights para 3; AU Executive Council, Decision On The Mid-Term Activity Report of the African Court, para 3: 'Welcomes the response of Libya to the Court's Order of Provisional Measures in relation to a matter filed against the State Party before the Court, but NOTES that the response does not indicate the measures Libya has taken to implement the said Order, with regard to allowing "the accused access to a lawyer of his choosing, family visits and to refrain from taking any action that may affect the Detainee's physical and mental integrity as well as his health"'.

[51] *Jawara v Gambia*, Communications 147/95-149/96, (2000) AHRLR 107 (ACHPR 2000); *Legal Resources Foundation v Zambia*, Communication 211/98, (2001) AHRLR 84 (ACHPR 2001) paras 61-62; 'Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights' 6; *International Pen, Constitutional Rights Project, Civil Liberties Organisations and Interights (on behalf of Ken Saro-Wira) v Nigeria,* Communications 137/94, 139/94, 154/96, 161/97, (2000) AHRLR 212 (ACHPR 1998) paras 113 and 116. See also R Murray *The African Commission on Human and Peoples' Rights and international law* (2000) 54-55; F Viljoen *International human rights law in Africa* (2007) 339; *Constitutional Rights Project (in respect of Zamani Lakwot and six others) v Nigeria*, Communication 87/93, (2000) AHRLR 183 (ACHPR 1995); African Commission, Resolution 97 on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties, adopted November 2006.

of such a decision by the Court? This is clearly not a desirable solution. The African Court has had no real opportunity to explore this relationship and its role in monitoring non-implementation of African Commission decisions. Therefore, a more positive approach is possible: it does have the potential, given the chance, to bolster the African Commission's reputation and status through upholding and strengthening its decisions. Indeed, the African Court's judgments so far indicate that far from challenging the jurisprudence of the African Commission, it has drawn heavily on it in its own interpretation of the African Charter. Furthermore, the concern that States may not be implementing the decisions of the African Commission because they are not binding has not so far been borne out in the research we have conducted: in the majority of situations that we have been examining the State has not at all questioned the legal status of the African Commission's decision.[52]

Rather, our research concludes that the reasons why the decision or judgment will be implemented are more complex. They include the nature of the current political context, such as whether there has been a change in government; the particularly sensitivity of the issues in the decision or judgment in the light of what is happening in the State at the time; what kind of particular remedies the decision or judgment requires; and the practical feasibility of carrying them out. Sometimes States may well have implemented, at least in part, a decision or judgment but this is not information that is known publicly. Other factors impeding implementation include consideration of the specificity of the recommendations or orders made by the African Commission and Court, and whether a correct balance was made between providing clarity to the State on what precisely was required of it to implement the decision, as against giving it the discretion to determine what was the most appropriate way of implementing within the context of the State.[53]

We recognise that detailed consideration of all of these issues relies on some structural reform not only at the levels of the bodies themselves but also at the AU. Equally, clarity on the respective roles impacts on basic procedural issues. For example, research elsewhere, supported by our preliminary findings, indicates that the visibility of the decision and judgment as well as what the State may or may not have done to implement it, is crucial to successful implementation.[54] Yet, it is not always clear whose responsibility it is to publicise the decision, inform others beyond the parties, and make national, regional and international actors aware of what the State has done to implement. As noted above, the African Court is providing some detail

52 There is one notable historical exception, *Good v Botswana*, Communication 313/05, Combined 32nd and 33rd Activity Report: 'the Government has made its position clear; that it is not bound by the decision of the Commission' para 24.

53 See also S Cardenas *Conflict and compliance: State responses to international human rights pressure* (2007); C Hillebrecht *Domestic politics and international human rights tribunals: the problem of compliance* (2014); B Simmons *Mobilizing for human rights: international law in domestic politics* (2009); Open Society Justice Initiative (n 1 above).

54 See eg Open Society Justice Initiative (n 3 above) 52, 77, 80, 83, 88, 92.

in its activity reports on the measures taken by the States to implement its judgments. The African Commission, in contrast, has been more hesitant in taking an active role in disseminating, beyond the parties to the case, information on the decision or judgment and the level of its implementation. Relatedly, decisions are now not attached to the African Commission's activity reports, as they had been in the past. The African Commission may also delay the process of finalising the final text of the decision, thus introducing further uncertainty and lack of clarity about when the State and parties have been 'informed' of the Commission's decision.

There is clear acknowledgment by those within and outside the African Court and African Commission that monitoring implementation is not working as well as it could be. For the African Court the information provided in its reports suggests that it is undertaking some forms of the monitoring, although the results of the extent to which the judgments are being implemented are unsatisfactory. The Court noted in its 2017 mid-term report listed among its challenges the non-implementation of its decisions, including refusals to implement, failure to inform the Court of what measures have been taken, and the slow-pace' or 'reluctance' to comply.[55] Similarly, the African Commission has recently 'lamented the low compliance rate' of States with its decisions.[56] Yet, there is also an impasse, certainly at the level of the African Commission, in terms of what steps should now be taken to put in place a coherent and effective system. While it is admirable that time is being taken to consider these issues, this is also frustrating. Even if a cohesive approach can be found, it will not be quick. In the meantime, victims are still awaiting justice on the remedies already recommended and ordered. We therefore consider that there are various practical and immediate steps that can be taken to enhance the monitoring process.

Leaving aside proper consideration of what roles these bodies should undertake, our research concludes, in the first place, that at the very least the African Commission and the African Court should gather information about implementation. Both the Commission and Court have the competence to do so within their existing Rules of Procedure. A reactive role requires no immediate additional resources and indeed, the bodies appear already to be carrying this out, albeit not consistently or comprehensively. However, a proactive information-gathering role requires a little more thought and necessitates actively seeking out information, on a regular basis, from the parties but also other actors at the national, regional and international levels.

Second, an internal case management system which includes information on the measures taken by the State to implement the decision or judgment could assist the African Commission and African Court in keeping track on the sources of evidence, the timeframe in which any measures may have been taken, and enable this data to be cross-referenced with other records that they may hold on that State.

55 See African Court, Mid-Term Activity Report, 1 January - 30 June 2017, paras 45-46.
56 African Commission, 42nd Activity Report, February 2017 - May 2017 para 35(a).

Finally, one of the challenges, certainly for the African Commission, which has many more decisions than the Court, appears to have been the difficulty in prioritising which communications it should focus its efforts in monitoring implementation. It is suggested that the African Commission could use a 'pilot' approach, starting with a handful of communications around which it could develop a strategy and which it could use to consider what role or roles it is best placed to play. In due course, the African Commission may also consider the need to establish a dedicated rapporteur or working group specifically on monitoring implementation of its decisions. This may be preferable to having the Working Group on Communications also oversee implementation.

These suggestions are very modest, and are certainly not sufficient, but could be part of broader and more ambitious moves to take monitoring of implementation forward.

Why should we obey you? Enhancing implementation of rulings by regional courts

Katrin Nyman-Metcalf and Ioannis Papageorgiou***

ABSTRACT: 'Regionalization' of human rights protection means an increase in regional instruments: continent-wide and sub-regional courts develop in Africa and the Americas in an interesting and dynamic interplay. However, the courts do not possess enforcement mechanisms but rely on the member state for enforcement. Studies on regional human rights protection often focus on substantive rights rather than institutional issues. The aim of this article is to discuss the role regional courts can play in the protection of human rights, given the challenges to enforcement of their rulings. By using a comparative method, the article analyses what the impact can be for regional rights protection. Based on the study of various courts, the study concludes that although regional courts cannot replace national ones in protecting citizens, regional judicial oversight of rule of law in regions with fragile democracies constitutes a useful addition to national protection by setting limits on states and making citizens aware of their rights. The article thus demonstrates how regional courts can have a significant impact on the protection of human rights, while highlighting the risk of courts losing respect if their rulings are not implemented, thus setting in process a vicious circle: rulings not being implemented lead to courts being underused, further reducing respect, and so on. The article finally advocates for strong commitment by member states and increased legitimacy of the regional systems, specifically focussing on the role of courts, and thus contributes to the debate on how to enhance the impact of regional human rights protection systems.

TITRE ET RÉSUMÉ EN FRANÇAIS:
Pourquoi devrions-nous vous obéir? Améliorer l'exécution des décisions des juridictions régionales

RÉSUMÉ: La 'régionalisation' de la protection des droits de l'homme signifie une augmentation des instruments régionaux: les juridictions continentales et sous-régionales se développent en Afrique et dans les Amériques dans une intéraction intéressante et dynamique. Cependant, les juridictions ne disposent pas de mécanisme d'exécution mais dépendent des Etats pour l'exécution. Les études sur la protection régionale des droits de l'homme mettent souvent l'accent sur les droits fondamentaux plutôt que sur les questions institutionnelles. Le but de cet article est de discuter du rôle que les tribunaux régionaux peuvent jouer dans la protection des droits de l'homme, étant donné les défis que connaît l'application de leurs décisions. En utilisant une méthode comparative, l'article analyse l'impact potential de cette situation sur la protection régionale des droits. Basée sur une étude de différentes

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juridictions, l'article conclut que les juridictions régionaux ne peuvent pas remplacer les juridictions nationales dans la protection des citoyens mais que le contrôle judiciaire régional de l'état de droit dans les régions où il y des démocraties fragiles renforcement utilement la protection nationale en fixant des limites aux Etats et en sensibilisant les citoyens sur leurs droits. L'article démontre ainsi comment les tribunaux régionaux peuvent avoir un impact significatif sur la protection des droits de l'homme, tout en soulignant le risque que ces juridictions perdent en légitimité si leurs décisions ne sont pas appliquées, créant ainsi un cercle vicieux: si les décisions ne sont pas appliquées, les juridictions seront sous-utilisées, réduisant davantage le respect et ainsi de suite. L'article plaide enfin pour un engagement fort des Etats et une légitimité accrue des systèmes régionaux, en se concentrant spécifiquement sur le rôle des tribunaux, et contribue ainsi au débat sur la manière d'améliorer l'impact des systèmes régionaux de protection des droits de l'homme.

KEY WORDS: regional integration, Africa, the Americas, human rights, regional courts; enforcement

CONTENT:

1 INTRODUCTION

For the past several decades, we have witnessed an increasing 'regionalization' of human rights protection, evidenced by the proliferation of regional human rights instruments and the establishment of judicial or quasi-judicial mechanisms for the promotion and protection of human rights in several regional integration systems. This takes place at the level of continent-wide human rights organs as well as via courts of sub-regional integration organisations. Although Europe is the continent with the oldest and furthest reaching integration in the shape of the European Union (EU), as well as the oldest human rights court, the European Court of Human Rights, recent developments in, especially, Africa and South and Central America are dynamic. These regions provide interesting examples of the impact of regional systems, often projected against a background of less than perfect democratic systems in their member states. Regional human rights courts can provide support for organs within states in ongoing processes of democratisation and improved protection of rights, where different national bodies may be pulling in different directions. We also see how the interaction between sub-regional and continent-wide organisations creates a dynamic for the protection of rights, often despite that the relationship between sub-regional and continent-wide bodies is not specified.

Regional courts show a variety of competences. At times, their powers appear surprisingly wide, in particular given that the level of integration within the regional system in question may not be so high.

Their powers usually include the right to interpret the regional integration rules and solve disputes arising therefrom. In addition, some courts are entrusted with quasi-constitutional competences, for instance, upholding principles of democracy and rule of law and resolving conflicts between the various branches of State power. Contrary to Europe, where there has been a relatively clear distinction between regional integration courts and regional human rights protection courts, in other continents although there are specialised regional human rights courts, other courts also deal with human rights or more widely with the protection of the rights of individuals, either as explicitly included in the court's competence or derived from interpretation of general principles. Nevertheless, one common feature in all these schemes is how decisions of the courts can be and are enforced against member states. This question is less well developed than substantive rights although it is a major one and there is a danger that failure to enforce decisions leads to an erosion of the respect for the regional courts.

The objective of this analysis is to highlight how regional systems of political and judicial oversight, especially in weak or fragile democratic systems, can be a useful addition to national judicial or other mechanisms of protection of human rights and rule of law and control of the executive. The article analyses if and how decisions of regional courts can have a real impact, even in the absence of effective regional enforcement systems. We examine the various courts in Africa and in the Americas to draw conclusions through a comparative analysis as to the validity of the article's hypothesis: Is it possible to use regionalisation of human rights to enhance their protection and promote rule of law at national level? And if yes, how can enforcement of decisions of courts of regional integration organisations be ensured and enhanced? [1]

2 REGIONAL INTEGRATION AND COURTS OF JUSTICE

2.1 Europe

This article will not go into any detail on the European regional courts. However, as both the Court of Justice of the European Union and the European Court on Human Rights have served as models for many regional courts, some salient European issues will be briefly touched upon as a background. The matter of enforcement is interesting in this context, as even these far-reaching regional integration systems with powerful courts lack designated enforcement mechanisms. Responsibility for enforcing decisions by both the Court of Justice of

[1] Reflections in this article are based on interviews by the authors at the mentioned courts in Africa and the Americas, during study visits in February 2015 (the Americas) and February - April 2016 (Africa), supported by a travel grant from the Folke Bernadotte Academy as part of the latter's Rule of Law programme.

the European Union and the European Court of Human Rights lies with member states, which are not only obliged to ensure adherence to the rulings of the courts in the specific cases but also to modify laws and practices in line with any decision. The systems include various guarantees and mechanisms to ensure that enforcement takes place – making member states the tools for the common policy.

When the EU was created, it did not have a mandate for human rights. However, as integration deepened as well as widened, it became clear that human rights issues were intertwined with such matters that were in the EU competence, as free movement, trade and others. In recent years, there has been a dynamic development of human rights protection in Europe, with the EU and the Court of Justice of the European Union assuming competence over human rights to the extent that these rights are linked to EU areas of competence;[2] this tendency was enhanced with the adoption in 2000 of the Charter of Fundamental Rights of the EU that became binding in 2009[3] and with the ongoing debate of the EU as an organisation adhering to the European Convention of Human Rights (European Convention).[4] After the fall of communism and the discussion of enlarging the EU, adherence to the Council of Europe (CoE) and its human rights instruments became a prerequisite for EU membership through the so-called Copenhagen criteria.[5]

Mattli calls organs of the EU like the Court of Justice of the European Union (and the European Commission) 'commitment institutions'. The powers of these organs mean that implementation of rights is not only in the hands of the member states.[6] The institutions can ultimately decide on suspension of member states and limitations of their rights, but their daily monitoring of the application of EU law is normally more important than any strong action to sanction member states.

In addition to the Court of Justice of the European Union, Europe has the most powerful regional human rights court, the European Court of Human Rights, which implements the European Convention in the context of the CoE. Enforcement is formally in the hands of the CoE Committee of Ministers, but member states are under strong pressure

2 T Kerikmäe 'EU Charter: Its nature, innovative character, and horizontal effect' in T Kerikmäe (ed) *Protecting human rights in the EU* (2014) 6.

3 http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm (accessed 6 July 2017).

4 The first explicit reference in EU law of the ECHR was in the Maastricht Treaty 1992. Similar standards of human rights had also earlier been implemented by the CJEU.

5 The Copenhagen criteria were established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995. They include three main sets of conditions, the first of which (the so-called political criteria) require from a membership candidate to fulfill the conditions of "stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities". https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en (accessed 7 July 2017).

6 W Mattli *The logic of regional integration* (1999) 13-15. See also D Webber 'Regional integration in Europe and Asia' in B Fort & D Webber (eds) *Regional Integration in East Asia and Europe: convergence and divergence* (2006) 302.

both from their peers and from public opinion to implement rulings. It is not a genuine 'name and shame' policy but, to a large extent, acts as such. Furthermore, the Committee of Ministers possesses the 'nuclear option' of suspension and expulsion of a state as a reaction to its failure to meet human rights requirements.[7] This measure has never been fully used, although it was close to being applied in 1969 against Greece,[8] then a military dictatorship.[9] With a larger and a more diverse membership in the Council of Europe, with states such as Russia, Turkey and Azerbaijan that are not or no longer democratic, one could imagine more instances of use of the suspension possibility although this has not been the case in practice. A 'nuclear option' also exists in the EU after the Treaty of Nice[10] in the form of suspension of membership for violations of values of the Union.[11] Again, this option has not been used although it has been aired recently vis-à-vis Hungary and Poland following a number of government interferences with the principles of separation of powers, media freedom and freedom of education.[12]

Nowadays, the EU has become such an important player on the global stage that the human rights commitments that member states have via other organisations or treaties could be affected by EU membership. Already in 2000, the Court of Justice of the European Union stated that measures incompatible with human rights are not acceptable in any conflict between EU law on specific matters (like free movement) and human rights provisions.[13] This was stressed again in the *Kadi* case, which found that human rights obligations supersede even other international obligations (like commitments of member states as UN members to institute sanctions).[14]

7 Article 8 of the Statute of the CoE (ETS No 001, London 3 August 1949) provides for the suspension of rights of representation and, eventually, the expulsion of 'any member of the Council of Europe which has seriously violated Article 3 [of the Statute, namely principles of rule of law and of human rights and fundamental freedoms]'.

8 Applications 3321/67 (*Denmark v Greece*), 3322/67 (*Norway v Greece*), 3323/67 (*Sweden v Greece*), and 3344/67 (*Netherlands v Greece*).

9 The Greek government declared that it did not intend to respect the rights enshrined in the ECHR and eventually the country withdrew from the CoE and denounced the Convention before it could be expelled. See C Ovey & RCA White *Jacobs & White: The European Convention on Human Rights* (2006) 504.

10 In force since 2003.

11 Article 7 of the Treaty of the European Union (Treaty of Lisbon) provides that the EU member states, 'acting by unanimity' (without the participation of the member state concerned) 'may determine the existence of a serious and persistent breach by a member state of the values referred to in Article 2' (namely respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities) and suspend the participation and rights of this state.

12 In July 2016, the Commission adopted a Rule of Law Recommendation on the situation in Poland (see relevant press release in http://europa.eu/rapid/press-release_IP-16-2643_en.htm) which is still pending. Concerning Hungary, the European Parliament, in a resolution adopted in May 2017, requested from the Commission "to launch a formal procedure to determine whether there is a clear risk of a serious breach" of EU values by Hungary (see European Parliament resolution of 17 May 2017 on the situation in Hungary P8 TA (2017)0216).

13 Case C-112/00 *Schmidberger*.

14 Cases C/402/05P and 415/02P *Kadi v Council*.

From the above, it becomes evident that human rights form part of European law in a wide sense and permeate decisions of regional as well as national organs. What perhaps is the main characteristic of the European legal system is the well-developed interplay between the regional and the national, with national organs being obliged to implement European decisions and having a set framework for doing so, with oversight by the European organs.

2.2 Africa

The African continent is home to many regional integration organisations. The African Charter on Human and Peoples' Rights (also called the Banjul Charter) was adopted in 1981 by the then Organization for African Unity (OAU) and entered in force in 1986.[15] Several regional integration instruments in Africa have been inspired by European counterparts, but the Charter shows examples of both different and more innovative rights.[16] Nevertheless, it has not yet reached the level of impact of the European system and its monitoring system is less innovative than the substantive rights. There still appears to be a significant amount of scepticism among African leaders concerning 'interference' in internal affairs. Reforms of the human rights system have aimed at improving the impact of the human rights provisions, as the history of the regional system shows that this has been the weak point within the system. For instance, the African Commission on Human and Peoples' Rights (African Commission),[17] which was set up in 1987, was vested with many competences but monitoring procedures, reporting requirements, inter-state and individual complaints procedures were not well developed or efficient.[18] Eventually, the African Commission started formulating recommendations in which it urged, requested or appealed to member states to undertake actions in order to enforce its decisions.[19]

The African Court on Human and Peoples' Rights (African Court) was established by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), adopted by the OAU in June 1998. The Protocol came into force on 25 January 2004 and the Court started operating in 2008. It is based in Arusha, Tanzania. It

15 M Nowak *Introduction to the international human rights regime* (2003) 203-214.

16 For example, the African human rights system was the first to include the right to a satisfactory environment as a human right. This right was interpreted in the *Ogoniland* case (*Communication 155/96 The Social and Economic Rights Action Centre and another against Nigeria*). See M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC communication' (2003) 3 *African Human Rights Law Journal* 170.

17 The African Commission on Human and Peoples' Rights was established by the African Charter, and inaugurated on 2 November 1987 in Addis Ababa, Ethiopia. The Commission's Secretariat is located in Banjul, The Gambia.

18 Nowak (n 15 above) 203–214.

19 Van der Linde & Louw (n 16 above) 181

issued its first ruling in 2009 and the Rules of Procedure of the Court were adopted in 2010. Until now, only a handful of states[20] have made the declaration recognising the competence of the African Court to receive cases brought by individuals, which was the most significant development in human rights protection in Europe. A feature of the African human rights system with a Commission as well as a Court is that the two organs are quite independent from one another. There is even a certain competition between them, even if the trend is toward greater co-operation, as the Court will hopefully assume a greater role. Work is ongoing[21] concerning the possibility for the Court to deal with international criminal cases, following the criticism – very common in Africa – that the International Criminal Court is prejudiced towards Africa.[22]

Until September 2017, the African Court has issued decisions in 38 cases and given three interpretations of judgements; it has 88 pending cases.[23] This number is very low considering the size of the African continent and we can see that the degree of enforcement varies. For instance, recent decisions by the Court show partial, almost full or no follow-up at all. In the joined Application 9 and 11/2011 *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher Mtikila v Tanzania* (13 -14 June 2013), Tanzania was ordered to take constitutional, legislative and other measures within a reasonable time to remedy the violations, as well as to publish the judgment in a specified manner. The judgment was published to some extent but no other measures had been taken by the end of 2016.[24] In other cases against Tanzania,[25] the country had not reported on any measures taken.[26] As for Burkina Faso (*Zongo & others,* Application 13/2011), the country had met with requirements to pay compensation as well as enabled the case in question to be reopened in the national courts, leading to the prosecution for murder of the indicted persons. However, in this case, the country had not adequately published the ruling of the Court.[27] A pattern that has been observed is that states often do abide by the obligations set by the specific decision but do not take actions to deal with the underlying root causes of violations.

The African Union (AU) shows evidence of potential as a regional integration organisation but has until now fewer accomplishments of

[20] Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania, Tunisia.

[21] To this end, the AU Assembly of Heads of State and Government in June 2014 adopted the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol), which includes as an Annex an amendment to the Statute of the African Court, 27 June 2014. As of July 2017, 10 countries had signed but none have ratified the Protocol.

[22] http://en.african-court.org/index.php/about-us/jurisdiction (accessed 10 October 2017). This was a common theme brought up by our interlocutors during interviews.

[23] http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court (accessed 10 October 2017).

[24] *African Court Activity Report* 2016 (EX.CL/999(XXX), 22-27 January 2017

[25] *Thomas v Tanzania*, Application 5/2013 (20 November 2015), *Nganyi and 9 Others v Tanzania,* Application 6/2013 (18 March 2016) (n 24 above).

[26] *African Court Activity Report 2016* (n 24 above).

[27] *African Court Activity Report 2016* (n 24 above).

genuine integration to show. It has been said to rather provide parameters for future integration than a proper inter-governmental forum in which to solve concrete issues.[28] The weak implementation possibilities of the AU contributes to its limited role, which although growing has not changed dramatically since its inception. In an effort to enhance enforcement, the African Commission has increased possibilities in its Rules of Procedure to refer communications to the African Court if it considers that the state concerned has not complied with or is unwilling to comply with its recommendations.[29] The Commission can also refer serious and massive human rights violations to the Court.[30] However, like in the European system, the development is toward the political organs of the AU monitoring enforcement.[31] The AU's Human Rights Strategy identifies among its strategic objectives the importance of ensuring effective implementation of human rights instruments and decisions. The Strategy's 2012-2016 action plan called for strengthening the collaboration on the implementation of findings of African human rights bodies.[32]

The African human rights system is interesting in a global comparison as it emphasises the collective rights of peoples as well as those of individuals and it is the strongest on developing *actio popularis* to permit groups to support protection of human rights. Before the establishment of the Court, the Commission was vested with the competence to issue advisory opinions, rule on interpretation and deal with complaints from state parties and individuals, groups and NGOs. In theory, this should allow for a genuine *actio popularis* human rights monitoring system, including the possibility for those not directly concerned to complain about a human rights violation. In practice, there were many obstacles to strong enforcement of rights: The Commission had to reach unanimous decisions, the violation had to be part of a systematic pattern of gross human rights violations and even if a case passed these hurdles, there were no effective enforcement mechanisms to ensure that the guilty state would change its ways.[33] Views on the African human rights system set up through the African Charter vary between it being an expression of taking rights seriously to doubts about any effectiveness of the system. One of the criticisms

[28] T Maluwa 'Fast-tracking African Unity or making haste slowly?' (2004) 51 *Netherlands International Law Review* (2004) 231.

[29] African Commission's Rules of Procedure, rule 118.

[30] African Commission's Rules of Procedure, rule 84.

[31] Article 29(2) of the African Court statute stipulates that the Council of Ministers shall be notified of judgments and monitor execution on behalf of the Assembly of the AU. Article 30 of the statute states that States parties undertake to comply with the judgment in any case to which they are parties within the time stipulated by the Court and to guarantee its execution. See M du Plessis 'Implications of the AU decision to give the African Court jurisdiction over international crimes' *Institute for Security Studies, Paper 235* (June 2012) 2.

[32] Guidelines on the Role of NHRIs in Monitoring Implementation of Recommendations of the African Commission on Human and Peoples' Rights and Judgments of the African Court on Human and Peoples' Rights (2016) 7.

[33] Nowak (n 15 above) 203–214.

levied is that states can join without any questions asked about their previous human rights record.[34]

In Africa, both as regards courts and other co-operation, the sub-regional organs tend to be more active and influential than the pan-regional ones.[35] If the all-African framework faces many challenges, important developments can be observed in the sub-regional integration systems[36], in particular in the East African Community (EAC)[37] and the Economic Community of West African States (ECOWAS).[38] A common trend in them is that they started as regional courts and gradually either implicitly or expressly developed a human rights mandate. The EAC presents an interesting example of how such systems and courts can take an active role for human rights. The EAC consists of few states but includes some of the larger and more developed ones in Africa. It includes a regional court among its institutions, the East African Court of Justice (EACJ) whose mandate is, briefly expressed, to ensure the adherence to law in the application of and compliance with the EAC Treaty. The EACJ (like the EAC) are not new, but rather re-established organs of the defunct East African Community and East African Court of Appeal.[39] However, despite still being only temporarily operational (since 2001, pending that the Council of Ministers of EAC determines if there is need for a full-time court), the Court has become perhaps the most activist of the regional courts.

An interesting example of this activism is how the EACJ assumed the right to deal with human rights issues, despite this not having been explicitly included in its competence.[40] The Court made clear in the 2007 case of *Katabazi and 21 others v Secretary General of the EAC and Uganda*[41] that it was not going to interpret its limited competence over human rights issues in a restrictive manner. It said:

> While the Court will not assume jurisdiction to adjudicate on human rights disputes, it will not abdicate from exercising its jurisdiction of interpretation under

34 AK Wing 'Women's rights and Africa's evolving landscape: the Women's Protocol of the Banjul Charter' in JI Levitt (ed) *Africa: mapping new boundaries in international law* (2010) 25-26.

35 M Forere 'Is discussion of the United States of Africa premature? Analysis of ECOWAS and SADC' (2012) 56 *Journal of African Law* 36-37.

36 For a historical analysis of the gradual inclusion of human rights into the mandate of sub-regional integration organisations in Africa see LN Murungi & J Gallinetti 'The role of sub-regional courts in the African human rights system' (2010) 7 *SUR International Journal on Human Rights* 119-141.

37 The East African Community (EAC) was established, as a regional intergovernmental organisation, in 2000. It has seven Partner States: Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania and Uganda.

38 ECOWAS members are Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone and Togo.

39 http://eacj.org/?page_id=19 (accessed 6 July 2017).

40 A Possi 'Striking a balance between community norms and human rights: the continuing struggle of the East African Court of Justice' (2015) 15 *African Human Rights Law Journal* 194.

41 http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf (accessed 6 July 2017).

> Article 27(1)[42] merely because the reference includes allegation of human rights violation.[43]

Finding a legal basis for dealing with cases on human rights, democracy and constitutional matters, the judgment set a precedent for the EACJ. The basis lies in the link between human rights and matters such as the rule of law and good governance – matters that are explicitly within the competence of the Court.[44]

Another active African regional organisation is ECOWAS. ECOWAS was formally established in 1975 as an economic co-operation organisation, and subsequently developed into a body with a more political mandate. Gradually, ECOWAS has taken upon itself a right to intervene in case of member states' behaviour that contravenes principles of human rights, creating expectation of such action – as most recently (in January 2017) seen in the case of the Gambia. What is interesting is that such reaction does not necessarily pass through the judicial organ but rather permeates general policy. ECOWAS possesses various instruments based on which it can react to challenges to democracy in any of its members. It has the mandate to deal with human rights and permits individual complaints against states, based on a protocol of 2005.[45] In the words of Adjolohoun, this "brought the regional tribunal from the shadows of hypothetical inter-states human rights litigation into the light of promising international human rights adjudication".[46] In this context, it is interesting that, even if the ECOWAS institutional structure includes a court of justice, whose rulings are binding, this is not necessarily used in situations like the Gambian case. This is furthermore despite that the court has been active not least on cases with a human rights element, stressing that constitutional guarantees for rights must be respected in practice.[47] Still, lately it is seen that ECOWAS states intervene using the political framework of the organisation rather than its court.

Nevertheless, strengthening courts is not a straight-forward matter for Africa. A case to this effect is the Southern Africa Development Community (SADC)[48] Tribunal, which presents an example of the long process to create a court only for it to be side-lined when it starts to act

42 Including interpretation of the Treaty.

43 http://eacj.org/wp-content/uploads/2012/11/NO._1_OF_2007.pdf (accessed 6 July 2017).

44 Possi (n 40 above) 194. Although it is possible – as the practice of the court has shown – to deal with human rights issues in this manner, as Possi explains, an explicit mandate would make the situation clearer and more predictable. Possi (n 40 above) 201 & 203.

45 Supplementary Protocol A/SP.1/01/05 Amending Protocol Relating to the Community Court of Justice, 19 January 2005. Possi (n 40 above) 196.

46 HS Adjolohoun 'The ECOWAS Court as a human rights promoter: assessing five years' impact of the Koraou Slavery Judgment' (2013) 31 *Netherlands Quarterly of Human Rights* 342-371, 343

47 The jurisdiction in human rights cases was extended in Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending Protocol A/P.1/7/91 of 6 July 1991.

48 SADC members are Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

decisively. The Tribunal was first envisioned in 1992, decided upon in 2000 and officially established in 2005. According to its constitutive documents, the SADC Tribunal should ensure adherence to, and proper interpretation of the provisions of, the SADC Treaty and subsidiary instruments, and adjudicate on disputes referred to it.[49] The problems started soon after its creation, when it ruled on a number of cases against Zimbabwe; as a result, the Zimbabwean government challenged its legitimacy. In August 2010, the SADC Summit announced a review of the role of the Tribunal[50] pending which its operation would be suspended and it *de facto* ceased to exist.[51] Although another SADC Summit decided in 2012 that a new Tribunal with a more limited mandate should be created,[52] this has not yet happened.[53] This illustrates the limits of regional courts if there is an absence of any democracy.

2.3 The Americas

The American continent has a long and gradually evolving system of regional protection of human rights, which provides another interesting analogy for Africa, different to that of Europe and in some respects closer to the African developments with a multitude of organisations. The Charter of the Organisation of American States (OAS) and the American Declaration of the Rights and Duties of Man adopted in 1948 were the first documents to proclaim and promote human rights for the American continent.[54] The Charter provided for an Inter-American Commission on Human Rights, the first specific human rights organ, created in 1959 and functioning from 1960. The protection of rights became more explicit with the American Convention on Human Rights (also known as the San José Pact) adopted in November 1969 in San José (Costa Rica) by the member states of OAS. The Convention which protects classical individual rights and freedoms, inspired from among others the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, entered into force in July 1978, though not all OAS member states, notably neither the USA nor Canada, have ratified it. It established the Inter-American Court of Human Rights (Inter-American Court).[55]

49 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 7 July 2017).

50 Communiqué of the 30th Jubilee Summit of SADC Heads of State and Government, Windhoek 17-18 August 2010. http://www.sadc.int/files/3613/5341/5517/SADC_Jubillee_Summit_Communique.pdf.pdf. (accessed 16 October 2017).

51 http://www.southernafricalitigationcentre.org/2015/05/11/sadc-tribunal-petition/ (accessed 7 July 2017).

52 http://www.sadc.int/about-sadc/sadc-institutions/tribun/ (accessed 7 July 2017).

53 The new draft protocol can be found in http://www.ijrcenter.org/wp-content/uploads/2016/11/New-SADC-Tribunal-Protocol-Signed.pdf (accessed 7 July 2017).

54 L Henkin, RC Pugh, O Schachter & H Smit *International law: cases and materials* (1982) 823.

55 http://www.corteidh.or.cr/index.php/en (accessed 7 July 2017).

As in Africa, the American human rights protection system is shared between the Commission and the Court, but given the longer period of operation of the latter, the Inter-American Court plays an increasingly significant role, especially in recent years. Many Latin American states today have left behind their post-authoritarian period but have not succeeded in consolidating their democratic systems. In this context, the Inter-American Court can educate and at the same time correct state behaviour.[56] The level of influence it has been able to exert varies, depending on political issues and the willingness of the member states to pay heed to its decisions. However, the Inter-American Court has been more effective than what was presumed by a predominantly rather pessimistic opinion at its creation.[57]

Among states that are willing to permit some influence of the court are Mexico[58] and Colombia[59] and, to some extent, Guatemala.[60] In Colombia, the Constitutional Court and the Inter-American Court showed examples of a "compliance partnership", to quote Huneeus.[61] Parra Vera puts this in the context of a common agenda of the two courts, with the same aims to improve respect for human rights as well as for supranational decisions.[62] He brings forward the situation in Colombia around 2006, when the fight against impunity for crimes committed by paramilitaries, who were very well connected with many politicians, led to a battle between the executive and the judiciary. Some judges turned to the Inter-American Commission for protection and the Commission duly adopted protective measures, for example against illegal surveillance of judges. One may question what such measures practically could achieve, as the planned surveillance and other restrictive measures would in any event be undertaken by national authorities with no tools for the regional one to actively stop it, but lifting the matter to the regional level brought attention to it and may have had a restraining effect on national authorities.[63] The Court (and Commission's) jurisprudence has had a significant impact on national courts allowing for a globalisation of human rights standards. It is important to stress that the rulings of the inter-American system should go beyond the actual case - international case law is used as a

[56] V Abramovich 'De las violaciones masivas a los patrones estructurales: nuevos enfoques y clásicas tensiones en el Sistema Interamericano de Derechos Humanos' (2009) 63 *Derecho PUCP (Pontificia Universidad Católica de Peru)* 95-138.

[57] O Parra Vera 'El impacto de las decisiones interamericanas: Notas sobre la producción académica y una propuesta de investigación de torno al "empoderamiento institucional"' in HF Fix-Fierro, A von Bogdandy & MM Antoiazzi (eds) *Lus constitutionale commune en América Latina: rasgos, potencialidades y desafíos* (2016) 393.

[58] Parra Vera (n 57 above) 412-413.

[59] Parra Vera (n 57 above) 394.

[60] Parra Vera (n 57 above) 398-399.

[61] A Huneeus 'Courts resisting courts: lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* (2011) 493-533.

[62] Parra Vera (n 57 above) 394.

[63] Parra Vera (n 57 above) 396-397.

guide for domestic court rulings, which try to avoid that member states are condemned for their practices by international courts.[64]

In the case of Guatemala, the Inter-American Court specified in detail what measures the state was supposed to take in examining a forced disappearance (in the context of the civil war). Guatemala was thus faced with a decision that it would be difficult to ignore without highlighting that it was ignoring its obligations - among them to report on what disciplinary, administrative or penal measures it had taken against those implicated in the forced disappearance.[65]

Venezuela represents an opposite example. Although having been denounced and condemned by the Inter-American Court for human rights violations, it has not implemented the Court decisions but chosen a confrontational approach.[66] In 2012, it denounced the Convention and withdrew from the jurisdiction of the Inter-American Court.[67] Earlier, in 1999, Peru also took a decision to leave the Inter-American Court after several rulings against it, in the context of its fight against terrorism. Between 1995 and 2007, there were 22 cases against Peru, which included disappearances, arbitrary killings, torture and other serious human rights violations and made up the majority of Inter-American Court´s contentious jurisdiction.[68] However, after political changes in Peru, the attitude towards the Inter-American Court changed. The Peruvian Supreme Court decided that the Inter-American Court ruling in the *Barrios Altos* case[69] was binding on the domestic judicial system, thus endorsing the fight against impunity. This was further supported by the interplay between the Court and the Truth and Reconciliation Committee.[70]

Central America can compete with Africa as the region outside of Europe with the furthest reaching regional integration, reflected in the rights given to its regional court. The Central American Integration System (*Sistema de la Integración Centroamericana* or SICA)[71] has a judicial organ, the Central American Court of Justice (CCJ), entrusted with supranational powers and, at least in theory, enforceability of its rulings.[72] The Court was set up by the Tegucigalpa Protocol, which established the SICA, in 1994. Article 3 of this Protocol specifies that

64 Abramovich (n 56 above) 95-138.

65 Case *Molina Theissen v Guatemala* (16 November 2009). See also Case *Bamaca Velasquez v Guatemala* (27 January 2009). Parra Vera (n 57 above) 399-402.

66 S Otamendi & PS Alessandri (eds) *Diálogos: El impacto del sistema interamericano en el ordenamiento interno de los estados* (2013) 396-399.

67 The official letter of withdrawal of Venezuela from Inter-American Court http://www.minci.gob.ve/wp-content/uploads/2013/09/Carta-Retiro-CIDH-Firmada-y-sello.pdf (accessed 7 July 2017).

68 C Sandoval 'The challenge of impunity in Peru: The significance of the Inter-American Court of Human Rights' (2008) 5 *Essex Human Rights Review* 6.

69 Inter-American Court *Barrios Altos*, Judgment on the merits, 14 March 2001.

70 Sandoval (n 68 above) 14.

71 Its full members are Belize, Costa Rica. El Salvador, Guatemala, Honduras, Nicaragua and Panamá.

72 KN Metcalf & IF Papageorgiou *Regional integration and courts of justice* (2005) 45-49.

> the fundamental objective of the Central American Integration system is to bring about the integration of Central America as a region of peace, freedom, democracy and development" and that "to that end [it reaffirms] the objective... to consolidate democracy and strengthen its institutions on the basis of the existence of Governments elected by universal and free suffrage with secret ballot, and of unrestricted respect for human rights.[73]

The Court possesses important powers, among them to examine the validity of acts taken by a state when these affect Central American Integration and to rule on conflicts that may arise between the fundamental organs of the state, as well as when judicial rulings are not respected in fact. These powers make CCJ a genuinely supranational judicial institution with almost sovereign powers.[74] Especially the fact that the CCJ may act as a supranational constitutional court at second instance gives it at least in theory an almost unique position globally. This is not necessarily translated into ability to enforce its rulings, though. CCJ obliges states to follow the rulings but does not have many powers to enforce them or to impose sanctions. To obtain such tools requires political will of the member states – to give the requisite powers to the supranational organ. This is not the case now, as only three (Honduras, Nicaragua and El Salvador) of the seven SICA member states have nominated judges to the CCJ. Consequently, currently it does not have the reputation as a powerful body - parties may not turn to a court that is seen as weak, which creates a vicious circle, having further detrimental effect on the respect for its decisions. Representatives of the Court expressed the opinion that, potentially, CCJ could play the role of regional conscience, in which case it could really affect development of democracy in the region, but it does not always appear comfortable in its role.

The CCJ Statute specifically provides that it does not examine human rights violations, which fall exclusively under the Inter-American Court. However, the Court has gradually ruled that, given the fact that the foundations of the Central American integration system include, among others, respect of human rights and fundamental freedoms, it may and can rule on a possible violation of human rights by acts of a state or an integration organ, to the extent that this is taking place in the context of the integration process.[75] In fact, the Court has timidly already made use of this right, most notably in a case against Panama[76] and in the context of the right to vote in the Central American Parliament elections, where it ruled that the right to vote is an individual community right and thus the Court was competent to examine the case.

73 Article 3 of the Tegucigalpa Protocol I 1991.

74 Metcalf & Papageorgiou (n 72 above) 45-49.

75 AG Pérez-Cadalso 'La tutela de los derechos humanos en el proceso de integración regional centroamericano' http://portal.ccj.org.ni/ccj/wp-content/uploads/LTDL DHIE.pdf (accessed 16 October 2017).

76 Case 8-7-05-2012 *Octavio Bejerano Kant v Panama*.

There are also other regional integration systems in the Americas, the Mercado Comun del Sur (Mercosur),[77] the Andean Community of Nations (CAN)[78] and the Caribbean Community (CARICOM)[79] among others. Mercosur has been described as an intergovernmental structure with community objectives.[80] Initially, its institutional structure was very limited, although after some years (in 1996), it was modified to include more organs, still though without a court of justice.[81]

A judicial body was introduced through the Olivos Protocol, adopted in 2002 and in force since 1 January 2004. The Permanent Court of Review of Mercosur (Tribunal Permanente de Revisión – TPR) was created, based in Asunción, Paraguay and operational from August 2004. The TPR has competence over appeals against the rulings of Ad Hoc Arbitration Tribunals within the Mercosur system and can furthermore act as a single jurisdictional instance if so requested by the parties or when member states request an urgency procedure. TRP can give consultative opinions on request of governments, supreme courts or the decision-making organs and parliament of Mercosur. Access to the Court is not granted to individuals or moral persons.[82] The Olivos Protocol provides that the rulings are compulsory for the States Parties in the dispute and will have the force of *res iudicata*.

TPR, like many regional tribunals, is underused. In the words of TPR representatives, this is not necessarily for lack of will, but the relevant parties are not sure (or even not aware of) how to use it. There is a lack of understanding over the kind of role the TPR can and should play. However, they also stressed that the fact of having few cases does not mean that the tribunal has no influence. It can impact other institutions by introducing a rule of law element in discussions that may otherwise remain purely political. Such an effect, though, is hard to measure and any court that is not functioning as a proper court will eventually lose significance. Another aspect of the TPR, that is a common feature for other American regional tribunals, is that the personalities of the judges may play a great role. In the absence of a clear and strong institutional role of the tribunals, the fact that distinguished persons sit on them– the very people who would in any case be asked for advice on integration legal issues – means that the organ will command respect even if its formal role is limited. This is however not sustainable in the long term as it relies on the right kind of

77 Argentina, Brazil, Paraguay, Uruguay and Venezuela.

78 Bolivia, Colombia, Ecuador and Peru. As the Court of Justice of the Andean Community (Tribunal de Justicia de la Comunidad Andina) has mostly dealt with trade and common market issues and for reasons of space, it shall not be examined in this article.

79 Antigua & Barbuda; Barbados; Belize; Dominica; Grenada; Guyana; Jamaica; St. Kitts & Nevis; St. Lucia; St. Vincent & The Grenadines; Suriname; and Trinidad & Tobago.

80 JAE Vervaele 'Mercosur and regional integration in Southern America' (2005) 54 *International and Comparative Law Quarterly* 387-410.

81 M Luna Pont 'Southern American Common Market (MERCOSUR)' in L Levi, G Finizio & N Vallinoto (eds) *The democratization of international institutions* (2014) 261-285.

82 Luna Pont (n 81 above) 267.

persons being in the positions; even if the selection process intends to ensure this, political decisions may thwart such ambitions.

Like in Central America, the states of the Caribbean appear to have a strong incentive for regional co-operation. Most are very small, they come largely from the same colonial background, while most also share a language; there was thus no shortage of reasons to consider regional co-operation or even a federal construction – which was the original scheme of the British colonial power before independence. Eventually, the Caribbean Community (CARICOM) set up in 1973 was not so ambitious, but is still gradually asserting itself.[83]

The decision to establish a CARICOM court was taken in February 2001 when an Agreement Establishing the Caribbean Court of Justice was signed by ten CARICOM States, with two more joining in 2003. This allowed work on establishing the judicial structures to start, first with a Regional Judicial and Legal Services Commission (RJLSC) and in 2004 with the first President of the Caribbean Court of Justice being sworn in. The inauguration was held in April 2005 at the seat of the Court in Port of Spain, Trinidad & Tobago.[84] The Court uses an impressive array of electronic means to hold hearings, to overcome practical problems of the poor physical communications in the region and to be more accessible to all CARICOM citizens.

The Caribbean Court of Justice has an interesting and wide mandate despite that the founding treaties do not say much about the Court or its jurisdiction.[85] There is however a rule of law principle and the court can develop jurisprudence based on this. Accountability and human rights flow from this general principle. The Court can inform about its interpretation of the treaties even in the absence of a fully-fledged preliminary ruling procedure and thus influence interpretation of community law. Decisions are not directly enforceable as CARICOM legislation, in general, is not directly applicable, but the founding treaty does express that CARICOM legislation should be respected at member state level. At the same time, the regional tradition is generally one of strong dualism, with Haiti being the most significant example of this. The influence of the Court is increased by its additional roles, as a supreme court for some CARICOM members and furthermore as it is called upon as an arbiter in commercial disputes involving several states.

83 D Berry *Caribbean integration law* (2014) 23-24.

84 http://www.caribbeancourtofjustice.org/about-the-ccj/ccj-concept-to-reality (accessed 7 July 2017).

85 http://www.caribbeancourtofjustice.org/ (accessed 7 July 2017).

3 ENFORCEMENT

3.1 Background

Enforcement of the rulings of courts is an essential feature of any judicial system, national or international. If rulings are not enforced, this will lead to a loss of respect for the courts and perhaps for the political system in a state. This is even more significant for regional integration systems, where lack of enforcement may lead to questioning the legitimacy of the organisation. Enforcement is therefore perhaps the most crucial parameter in regional integration judicial mechanisms. Thus, we examine here enforcement provisions in regional courts – and more widely in regional organisations - and obstacles to it. We have already seen that there is a problem of enforcement in most regional integration organisations, creating a vicious circle where inability to enforce rulings leads to regional courts being underused, which further reduces respect for them. What is required is a strong commitment by member states and a belief in the legitimacy of the regional systems.

3.2 Obeying or not obeying rules – that is the question

The question why people obey rules in an organised society is a favourite of legal thinkers, from philosophers to more practical oriented lawyers. It is not just because of the fear to be caught and punished, though clearly this risk plays a role – sometimes immediately and sometimes more indirectly. Cultural norms and beliefs play a part and most thinkers would presume this is more important than sanctions as such. The various factors interplay as a possibility to get away with illegal behaviour too easily may alter the perception of what is right and wrong. There is a complex web of reasons, including the legitimacy of the body that issues a ruling or decision, that determines the propensity to act in accordance with it. Consequently, one question for regional integration systems is whether they muster sufficient legitimacy.[86]

Ensuring obedience of rules in a multi-state system is even more complex than in a state because of the lack of immediate effective enforcement. The issue is political rather than practical. If there is political will, ways will be found to enforce decisions. States – just like humans – join in a society to achieve certain goals and for this purpose surrender part of their sovereignty. The main element in enforcement can thus only be the superior interest even of the state adversely affected, at least in the long term. For states as for individuals, sanctions, or fear thereof, is an effective deterrent from disobeying the common rules but it is rarely the main reason for following rules. In

[86] KN Metcalf & IF Papageorgiou *Democracy through regional integration* (2015) 72.

fact, very many rules are obeyed even in situations where it is highly unlikely that non-obedience would ever be established. Still, fear of punishment or at least of a reaction plays a role. In public international law, the notion of 'mobilisation of shame' is an important factor. In Europe, this was a significant element for the general respect and enforcement of European Court of Human Rights rulings. However, contamination by refractory members weakens this behaviour. The increase of cases of blatant disrespect of rule of law provisions by states as different as Russia, Azerbaijan, Hungary and Poland means that the emulation element is less pronounced. Indeed, Knaus sees the adherence of Azerbaijan to the European Convention as being motivated by the end of 'naming and shaming' to make human rights effective, instead showing that states want to join for image purposes and manage to twist the system to allow that. [87]

Most regional integration systems contain rules and mechanisms to ensure enforcement of their decisions, ultimately upheld by their court. Although the strength of these provisions varies and there is room for improvement for several systems, all organisations have some rules. The main issue to analyse in relation to insufficient enforcement are the actual obstacles to giving full force to existing provisions.

Even the advanced regional integration systems in Europe lack their own autonomous enforcement systems. There are many reasons for this. It would be practically difficult to set up a regional body with competences similar to those of national enforcement organs (such as police and bailiffs), as their relationship with any national bodies would need to be carefully considered. Under the rule of law, use of force is a monopoly of the state that has to exercise this right under the law, in a proportional manner and only to the extent that is necessary in a democratic society. Enforcement powers ultimately may include certain levels of use of force against persons, something that states would be reluctant to give up. Psychologically, it would be sensitive to have an organ entitled to use force without being under the direct control of the government. No regional integration system has until now reached the level of legitimacy of states. It is noteworthy that even European agencies such as Europol for police co-operation and Eurojust for prosecutor co-operation are organs for co-operation, rather than independent organs with autonomous powers. The concept of special rapporteurs, as used in the African context, combines country- or issue-specific recommendations with persuasion efforts that fall of short of direct judicial enforcement but is more than general recommendations.[88]

Courts are aware of these limitations and try to deal with this reality: in the absence of firm enforcement mechanisms, there is always a risk that countries dissatisfied with decisions disobey, denounce the

[87] G Knaus 'Europe and Azerbaijan: the end of shame' (2015) 26 *Journal of Democracy* 15-18.

[88] D Long & L Muntingh 'The Special Rapporteurs on prisons and conditions of detention in Africa and the Committee for the Prevention of Torture in Africa: the potential for synergy or inertia?' (2010) 13 *SUR-International Journal of Human Rights* 99.

courts, or even withdraw from their jurisdiction, if such behaviour carries no consequences. Bringing this to the extreme is the abolition of the tribunal in question. What happened to the SADC Tribunal is an example of how leaders of countries in a not too subtle manner can react against a tribunal that is active and independent, even though the review undertaken by these same leaders found that the Tribunal was properly constituted and had acted within its mandate.

Courts tackle this problem in different ways. The Inter-American Court, for instance, not having any powerful tools to enforce its rulings, aims to ally itself with national courts. Parra Vera[89] suggests that Inter-American Court rulings can help to strengthen such institutions in member states that wish to support human rights against other organs within the state. He sees difference in behaviour according to whether the effect of court decisions is direct or indirect.[90] The factors that affect implementation vary depending on the beneficiaries, the rights in question, the relationship between the national and the regional court and the social context.[91]

Authors underline the role that intermediaries like national elites or civil society can play in promoting adherence to decisions of regional courts.[92] In that sense a "compliance partnership" as seen in the case of Colombia and the Inter-American Court[93] could be a strong enhancer for enforcement, not only with civil society but also with the national or other regional judicial authorities. In Africa, the African Court and the African Commission try to build this kind of partnership with civil society and with other courts, in particular, in 'follow-up efforts' to enforcement. Given the absence of any formal follow-up policy to African Commission rulings, NGOs are 'instrumental in applying pressure on and lobbying states at domestic and international levels' to make them comply with rulings.[94]

3.3 The rights of the individual

For international co-operation between states there is a default implementation mechanism in the shape of diplomacy and the rules that have developed over centuries. Regional organisations create special systems, organs and mechanisms or discuss *ad hoc* how problems should be solved. What is different in the kind of regional integration systems that we examine is that they take decisions that directly affect individuals.[95] The person is seen in his or her own

89 Coordinating lawyer of the Inter-American Court and the person interviewed by the authors.

90 Parra Vera (n 57 above) 384.

91 Parra Vera (n 57 above) 387.

92 Parra Vera (n 57 above) 387.

93 Huneeus (n 61 above).

94 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights 1993-2004' (2007) 101 *American Journal of International Law* 1.

95 J Klabbers *An introduction to international organizations law* (2015) 24-25.

capacity, with rights that are upheld by courts. Even if citizenship or residence may matter as it determines the competence of different regional systems, the person is still seen as an individual and not just a subject of a certain state. The person has human rights because he or she is a human and courts are there to protect these rights. This is an important development in international law, dating approximately to the end of the Second World War. However, such decisions must be implemented as the person lacks the possibility to use diplomatic means to persuade states to do – or refrain from doing – something.

Regional human rights courts can show that respect for inalienable rights of individuals go further than – sometimes opportunistic – political decisions, even if taken in a democratic manner. In this way, the courts are allies of the citizens against their own leaders, if needed. Clearly, this can lead to tensions and it is far from evident that national authorities will support implementation of rulings.[96] Furthermore, it is essential for regional courts to be very clear on what the rights are that they protect, how and why, so that their actions are not seen as alien impositions against the will of the people. The way popular opposition against the European Court of Human Rights has been drummed up by the tabloid press in the United Kingdom shows that even a mature and well-functioning regional human rights system cannot presume support.

Access to the courts is another essential issue. As regional organisations become more important in many fields, they take an increasing number of decisions that affect individuals. There must be corresponding access to justice as there needs to be a tandem between decisions taken at regional level and the possibility to challenge them. If a regional integration system is created without such possibilities, it could rightly be seen as weakening the rule of law. This would be the case also in the event that the system makes access to justice more complicated, even if not totally impossible. For a positive impact of a regional integration system on rule of law and democracy, effective enforcement should be combined with guarantees of legal accessibility (including appealing decisions to a judicial organ).

Legal accessibility is more than just the existence of courts: it includes a real possibility to gain effective access to justice. Its importance is seen for example in the number of European Court of Human Rights cases concerning violation of article 6 of European Convention, on the right to a fair trial and access to legal remedies. Among requirements are demands that processes are not overly complicated or time-consuming, that there are practical as well as

[96] In Uruguay, legislation instituting impunity for serious crimes against human rights (abduction and forcible adoption of babies) was found against human rights and thus illegal, even if it was adopted by democratic vote in referenda. The Inter-American Court ruling concurred with a ruling by the Supreme Court of Uruguay. It has to be noted that the fact that the rulings were implemented are due to support of the President of Uruguay, who stated that adherence to Inter-American Court rulings was a voluntary and sovereign act of the country. Case *Gelman v Uruguay*. See Parra Vera (n 57 above) 408.

formal guarantees for an actual access to courts or other legal bodies and that the cost of a process is not prohibitive.[97]

International protection of human rights can only be subsidiary to the national one: it is national political processes that guarantee enforcement. Regional human rights systems usually require exhaustion of domestic remedies, even if the exact way in which this is done varies. The reasons are both practical – to keep the case load at a reasonable level – and ideological – as regional courts supplement and do not replace national ones.[98] There are also exceptions, like the ECOWAS Community Court of Justice, that does not require exhaustion of national remedies and that through this has managed to influence controversial issues where states have been reluctant to adjudicate.[99] Regional systems should aim to not only provide compensation for victims in particular cases, but also to create a body of principles and standards with the purpose of influencing democratic processes and strengthening mechanisms for the protection of rights at domestic level, recognising the limits of international oversight.

4 IMPROVING ENFORCEMENT

It is generally accepted that regional integration presupposes a minimum of democracy at national level since the enforcement to a large extent depends on the member states. We have stated that regional judicial organs supplement national ones, rather replace them. Blatant cases of generalised disrespect of rule of law and overt dictatorships cannot fall under the cases examined in this article. A certain level of democracy is required for enforcement of regional court decisions.[100] In some events, like for ECOWAS, the enforcement may come about as a consequence of political changes, when a new government complies with decisions the court took regarding actions of a previous regime.[101] Even if the end result may be positive, this is not a viable way to ensure proper enforcement, since the idea should be that all governments recognise the rulings of the courts they have created and ensure their enforcement.

Regional integration organisations support enforcement of decisions, ultimately upheld by their courts. Although the strength of these provisions varies and there is room for improvement in several systems, all organisations have some rules. These include strict reporting mechanisms; special monitoring systems; or ultimately the ability to sanction states by suspension or expulsion from the

97 A Frändberg 'Legal accessibility' in A Frandberg, S Hedlund & T Spaak (eds) *Festskrift till Anders Fogelklou* (2008) 33-47.

98 On the African system, see Van der Linde & Louw (n 16 above) 171.

99 Adjolohoun (n 46 above) 344.

100 Viljoen and Louw in their analysis of cases of noncompliance to rulings of the African Commission demonstrate that out of the '13 cases of clear States noncompliance' with the Commission`s recommendations, the wide majority were characterised as unfree according to the Freedom House index. See Viljoen & Louw (n 94 above) 44.

101 Adjolohoun (n 46 above) 346.

organisation. What has been described by Viljoen and Louw as the indirect effect of human rights law is the 'incremental and less immediate' changes that countries need to establish in order to achieve a higher degree of compliance with human rights rulings.[102]

As a comparative example from the Americas, the Inter-American Court has achieved some success with implementation of rulings that contained detailed requirements for the state to report on what measures it had taken against impunity. If the conditions the state has to meet are set out in detail, it is difficult for it to ignore this, especially if civil society and the victims of the human rights abuse keep up pressure on the government, as we discussed above for Guatemala. The African Commission is an example of how relatively brief references only to the articles infringed without much further explanation were replaced with more motivated decisions and recommendations.[103] If we assume good will of states to enforce rulings, they may need assistance in knowing what this can mean.[104] Protection of human rights may require procedural as well as substantive law changes or changes to the working practices of authorities in member states and this should be made clear in the relevant decision. A clear decision against which to compare measures taken will help both those monitoring enforcement and those actually undertaking it. Treaty bodies can facilitate the enforcement of their decisions through their follow-up procedures.[105] An explicit right to undertake measures, like what OAS adopted in 2001,[106] or what is included in the recommendation by the African National Human Rights Institutes[107] provides tools for follow-up. Thus, the style and content of the decisions of the regional courts is not without importance.

The activities that regional integration organs undertake to follow up enforcement (like requiring annual reports) are also essential. As Possi mentions, if judges are supported by a community of lawyers, experts, academics and others, they are more likely to be expansionist and for example enforce human rights in a wider manner than what the letter of the law, narrowly interpreted, permits.[108] Ultimately, an environment may be created in which the enforcement of rulings becomes natural. An assertive civil society plays an important role in this respect. The use of modern technologies can also help increase the regional court's impact and popularity. As the case with the CARICOM Court shows, this can include not only electronic means of receiving or

[102] Viljoen & Louw (n 94 above) 22.

[103] Van der Linde & Louw (n 16 above) 173.

[104] Van der Linde & Louw (n 16 above).

[105] Sandoval shows how ICHR rulings against Peru went from statements on specific aspects of a situation to more general pronouncements on the wider context of the abuses. See Sandoval (n 68 above).

[106] OAS General Assembly Resolution on 'Evaluation of the workings of the Inter-American system for the protection and promotion of human rights with a view to its improvement and strengthening' (AC/Res. 1828 (XXXI-O/01).

[107] *Guidelines on the Role of NHRIs* (n 32 above) 10.

[108] Possi (n 40 above) 202. This was the case with the EU in the 1950s and 1960s as well as with the EAC in the 2000s.

sending documents, but also holding electronic court sessions, hearing applicants or witnesses remotely and, generally, becoming more accessible to citizens.

A more dramatic and ultimate means to enhance enforcement is the introduction of some form of suspension in the constitutive documents of regional integration organisations.[109] Even if this remains a 'nuclear option' never to be used in practice, it helps obedience to the rules and enhances enforcement of decisions, not only of courts but of regional integration generally.

5 CONCLUDING REMARKS

Regional courts in many parts of the world have surprisingly wide powers, given the level of regional integration that has so far been achieved. The reasons are linked to the internationalisation of human rights, the fact that regional organisations tend to reproduce the institutional structure of more integrated systems, or a desire by states to relegate legal issues, including rights of individuals, to judicial professionals. This may be done without being aware of the long-term impact of such choice on policy, overestimating their capacity to control courts. Such courts, endowed with wide powers, well acquainted with the regional political environment and with relative independence from any specific state, may become a natural mechanism of control of national political behaviour in support of the rights of individuals. Through the activities of these courts, states gradually become aware of the limits they have themselves set and citizens of their possibilities to challenge political power beyond the national context. Though this picture is far from uniform and depends on the implicit acceptance by states and governments, regional courts have become an important feature of the global judicial structure. This includes both specialised regional human rights courts and general courts of regional integration systems.

The authority of the decisions of the international judicial organs depends in part on the social legitimacy they achieve and on the existence of a community of stakeholders that accompanies and disseminates their standards. Many regional courts have managed to build up a considerable legitimacy through their independence and professionalism. At the same time, their capacity to enforce implementation of their decisions remains precarious. As shown, even as the regional court system is increasingly well developed and active, the courts in many instances lack efficient mechanisms to enforce their rulings. In most cases, the enforcement system relies on member state organs. Regional courts cannot replace national ones in terms of protecting citizens: and their impact as well as that of the regional organisations constantly needs to be reaffirmed and they have to demonstrate – through their commitment and results – that they merit loyalty from citizens. If the rulings of courts are not enforced, this will

[109] Metcalf & Papageorgiou (n 86 above) 129.

lead to a loss of respect for the courts and perhaps for the regional systems as such.

As we have shown, inadequate enforcement leads to a vicious circle where regional courts are underused, as ineffective, leading to further reduction of their use. What is required is a strong commitment by member states and a belief in the legitimacy of the regional systems. The protection of individual rights is an important element in conferring legitimacy. Thus, if a regional integration structure involves itself actively in the protection of rights of the citizens in member states, it will acquire an independent relationship with persons and can contribute to integration of peoples, rather than just of states. The international, regional enforcement of rights means that a standard of human rights is established that is wider than the national interpretation. For regional integration organisations, having independent courts or other judicial organs, which enable a legalistic interpretation of the tasks of the organisation lifts the organisation to a different level than just a vehicle for inter-state co-operation. Courts can play a positive role both directly and indirectly, through the correct and specific implementation of decisions or in a more symbolic manner. However, their role and impact must be visible. Thus, if the significance of courts is evident, it is easy to see that they cannot be the only strong institution. Decisions must always be enforced.

Contextualising the corporate human rights responsibility in Africa: A social expectation or legal obligation?

*Chairman Okoloise**

ABSTRACT: It has been nearly impossible to muster global consensus on attributing companies with human rights obligations because of persisting contestations on how best to regulate corporate businesses under international law. Whilst several propositions exist including the recent UN Guiding Principles on Business and Human Rights, they mostly constitute 'soft law', are non-binding and essentially reinforce the same old argument that only states have human rights obligations. They have little or no legal repercussions on businesses, and provide no remedies to victims. Given the fault lines between the global North and South on the issue and the fatal impacts of transnational corporations in Africa, this article conceptualises a legal basis for demanding corporate accountability in Africa. The article utilises a doctrinal methodology, and two analytical approaches – the human right-based approach and insights from Third World approaches to international law – in establishing that since international human rights law places the protection and realisation of fundamental human and group interests at its core, its legal threshold requires that all endeavours which can impact on human rights, including abusive corporate conduct, are bound by its rules. It finds that the concept of 'corporate human rights responsibility' derives from international and domestic human rights law and therefore is vested with a legal basis as against the broader idea of corporate social responsibility that is based on voluntarism. With its emphasis on the protection of groups and individual duties, and recognition of corporate criminal responsibility, the African human rights and evolving criminal justice systems provide a background for conceptualising corporate responsibility in Africa differently.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Contextualiser la responsabilité des entreprises en matière de droits de l'homme en Afrique: une attente sociale ou une obligation légale?

RÉSUMÉ: Il a été presque impossible de trouver un consensus mondial d'imposer aux entreprises des obligations en matière de droits humains en raison des contestations persistantes sur la meilleure façon de réglementer les entreprises commerciales en vertu du droit international. Bien que plusieurs propositions existent, y compris les récents Principes directeurs des Nations Unies relatifs aux entreprises et aux droits de l'homme, elles constituent essentiellement des normes non contraignantes et renforcent l'argument selon lequel seuls les États ont des obligations en matière de droits humains. Ces normes ont peu ou n'ont aucune répercussion juridique sur les entreprises et ne fournissent aucun recours aux victimes. Compte tenu des positions divergentes entre le Nord et le Sud sur la question et les conséquences néfastes des entreprises multinationales en Afrique, cet article conceptualise une base juridique

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pour exiger la responsabilité de ces entreprises en Afrique. L'article utilise une méthodologie doctrinale et deux approches analytiques – l'approche fondée sur les droits de l'homme et les approches tiers-mondistes du droit international – pour établir qu'étant donné que le droit international des droits de l'homme place la protection et la réalisation des intérêts fondamentaux humains et collectifs à sa base, son seuil légal exige que tous les efforts qui peuvent avoir un impact sur les droits de l'homme, y compris les comportements abusifs des entreprises, soient soumis à ses règles. L'article constate que le concept de 'responsabilité des entreprises en matière de droits de l'homme' découle du droit international et national des droits de l'homme et est donc doté d'une base juridique au contraire de la conception plus large de responsabilité sociale des entreprises fondée sur le volontarisme. En mettant l'accent sur la protection des groupes et les devoirs individuels et la reconnaissance de la responsabilité pénale des entreprises, le système africain de droits de l'homme et la justice pénale évolutive fournissent un contexte pour conceptualiser différemment la responsabilité des entreprises en Afrique.

KEY WORDS: corporate responsibility, corporate accountability, human rights, social expectation, legal obligation, Africa

CONTENT:

1 INTRODUCTION

The unregulated pursuit of business objectives very often results in an adverse human rights impact on society. When undertaken without due regard for its potential impact on society, the corporate desire to maximise profit and minimise cost in the use of labour, land and services can lead to avoidable grievances.[1] Businesses are generally obliged to pursue policies that 'are desirable in terms of the objectives and values of society'.[2] But this is hardly so in Africa where many transnational corporations (TNCs) have come under heavy criticisms for their poor labour conditions, inadequate compensation for land resource acquisition and use, poor consultations with local communities, forced displacement, environmental pollution, and the destruction of the sacred heritages of communities.[3] Undoubtedly, corporate businesses are entitled to pursue the legitimate interests of

1 S Deva 'Companies must strike a balance between human rights and need for profits' *South China Morning Post* 5 August 2014 http://www.scmp.com/comment/article/1567010/companiesmust-strike-balance-between-human-rights-andneed-profits (accessed 26 May 2017).

2 HR Bowen *Social responsibilities of the businessman* (2013) 6.

3 JL Černič 'Corporations and human rights: towards binding international legal obligations' in MK Sinha (ed) *Business and human rights* (2013) 1 8; NMC Jägers & MJC Van der Heijden 'Corporate human rights violations: the feasibility of civil recourse in the Netherlands' (2008) 33 *Brooklyn Journal of International Law* 833 833-834; B Freeman *et al* 'A new approach to corporate responsibility: the Voluntary Principles on Security and Human Rights' (2001) 24 *Hastings International and Comparative Law Review* 423 426.

their primary stockholders, but they must do so with due regard for the rights and interests of those on whom their activities may have a negatively impact. They cannot ignore the foreseeable risks they pose to the society,[4] which equally has the legitimate corresponding expectations that business activities are to be conducted without injuries to third parties, and that where injuries do occur, they are reduced to the barest minimum.

The conceptualisation of corporate responsibility for human rights responds to the urgent need to strike a delicate balance between the competing interests of society and business.[5] It is an attempt to construct some form of civilised response that imposes a measure of answerability on businesses for human rights risks to third parties that are otherwise avoidable or may be mitigated. The basic idea is to make businesses avoid the snares of 'making opportunistic concessions to the most vociferous demands' and act in an informed and responsible manner.[6] If corporate objectives are to be justified, they should be such that benefit the entire society rather than just the owners and managers of enterprises.[7] But the equilibrium needed for the harmonisation of corporate economic interests with the public's human rights concerns perhaps oscillates somewhere between the legitimate expectations of society and the protection and remedies afforded to victims. Hence, the most fundamental point of conceptual contestation has been the definitive basis for the apportionment of human rights responsibility as a standard of conduct to corporate businesses.

Attempts by scholars to justify each principled position have split the debate on the source of corporate responsibility; frequently questioning whether it is merely a social expectation based on voluntary business conduct or rooted in existing human rights law.[8] This conceptual dialectic raises the following pertinent questions: First, are businesses legally bound to observe human rights or merely obliged to do so as a form of earning their social licence to operate? Second, does the theorisation of corporate responsibility mean that businesses can be held accountable for human rights breaches by victims or merely conveys an idea of loose responsibility without answerability? Thirdly, does the appropriation of responsibility to businesses reduce the role of the state in human rights protection or complements it? These questions provoke an inquiry into the conceptual basis of the corporate responsibility idea altogether, notwithstanding the outright disagreements among scholars.

4 Bowen (n 2 above) 4-5.

5 Business, in this context, is broadly defined as the economic activity that the corporation undertakes for profit.

6 KM Leisinger 'On corporate responsibility for human rights' (2006) *Novartis Foundation for Sustainable Development* 1 7.

7 Bowen (n 2 above) 5.

8 JG Ruggie *Just business: multinational corporations and human rights* (2013) xvii.

Indeed, many factors, including context, ideological leanings, the North-South divide[9] as reflected in scholars' academic background and legal writings, and the respective approaches to international law scholarship, have influenced and intensified the unending debates. As Mutua aptly notes, academics are very often 'the subject of intellectual bias and normative location'.[10] These divergences and opinion shifts even more necessitate that the debate must be contextualised. In Africa, where collective values supersede individual interests, the African human rights and criminal justice systems protect individual and group concerns, recognise duties as correlative of rights, and increasingly anticipate a broader regime of accountability that encapsulates atrocious corporate conduct.[11] This paper therefore suggests that context and the victims of corporate human rights abuse are central to any determination of the basis of corporate responsibility in view of the various factors that have shaped its development.[12]

Two propositions are relevant to this discussion. First, this paper suggests that corporate responsibility is based on the notion that domestic and international human rights guarantees imply corresponding obligations from all – individuals, corporate entities and the government – to respect human rights and freedoms. It is unviable to argue otherwise that rights and freedoms are guaranteed only against the state when they can very easily be violated by fellow individuals, groups and corporate bodies. Second, this paper suggests that corporate responsibility is based not on voluntarism but on law. Voluntarism may be a useful complement, not an alternative. Since human rights are guaranteed by international and domestic law, they must be enforceable against all who threaten its protection and realisation. This proposition presupposes it futile to have a responsibility that is unenforceable at law because it contradictorily puts the requirement of accountability and remediation almost entirely at the discretion of corporate violators, and does not ultimately address the concerns of victims. At law, the existence of a right must give rise to a remedy. This is aptly captured by the Latin maxim: *ubi jus, ibi remedium* (where there is a right, there is a remedy). Equally well-established is the international law principle that a wrongful act must give rise to reparation. So, the idea of responsibility must place at its core accountability for corporate wrongs and, possibly, the compensation of victims by abusive corporations.

Accordingly, this paper adopts two essential approaches in its attempt to not only contextualise the subject but in seeking a legal construction of its basis. It relies, first, on the human rights-based

9 United Nations Commission on Human Rights (UNCHR) 'Human Rights and human responsibilities' [prepared by Miguel Alfonso Martinez] E/CN.4/2003/105 20 (17 March 2003) http://www.concernedhistorians.org/content_files/file/TO/278.pdf (accessed 18 June 2017).

10 M Mutua 'Human rights in Africa: the limited promise of liberalism' (2008) 51 *African Studies Review* 17 18.

11 African Charter on Human and Peoples' Rights; article 31 of the African Charter on the Rights and Welfare of the Child; article 46C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.

12 Černič (n 3 above) 4.

approach by showing that the victim as a human being with the inherent right to dignity – rather than the corporation – must be the centrepiece of any determination of the corporate responsibility for human rights.[13] It suggests that the seeming lack of attention to the impact of abusive corporate conduct on individuals and groups frustrates the whole idea of corporate human rights responsibility. Secondly, it adopts the Third World approach to international law in arguing that the 'dynamics of difference' in terms of the socio-political and legal structures between the global North and South substantially influences and perpetuates the differing conceptualisation of corporate human rights responsibility. [14] Essentially, the study is desk-based and relies on the legal analysis of existing literature on human rights and business in contributing to this controversial discourse.

In terms of structure, the paper problematises, in the introductory section, the conflicting conceptualisation of corporate responsibility and the need for proportional harmonisation between the social construction of the idea and its legal fortification in the African context. Section two undertakes a definitional and theoretical clarification of the corporate responsibility to respect human rights. Section three evaluates the established but differentiated notion of corporate social responsibility, which is predicated on voluntarism – a conceptual 'misfit' in international human rights lexicon. Section four enunciates that the corporate responsibility is driven by the ideal of justice for victims of corporate abuse and the legal accountability of corporate violators. This section also clarifies the role of the state and businesses as unequal human rights duty-bearers. The fifth section concludes by summarising the arguments in this paper and making a case for normative review at different governance levels to reflect this proposed understanding of corporate human rights responsibility.

2 CORPORATE HUMAN RIGHTS 'RESPONSIBILITY' CLARIFIED

Business involvement in human rights abuse is not a novel occurrence. Corporate businesses can and do, in fact, violate human rights. In Africa, the footprints of corporate human rights violations are traceable to the transatlantic slave trade more than 400 years ago.[15] Corporations were instrumental to Africa's colonialisation and the brutal human rights violations that marked its imperial domination. According to Černič, 'more than 40 European corporations were involved in facilitating the slave trade or controlling colonised

[13] A Cornwall & C Nyamu-Musembi 'Putting the "rights-based approach" to development into perspective' (2004) 25 *Third World Quarterly* 1415 1417-1418.

[14] JT Gathii 'TWAIL: a brief history of its origins, its decentralized networks, and a tentative bibliography' (2011) 3 *Trade Law and Development* 31; A Anghie *Imperialism, sovereignty and the making of international law* (2007) 26 29, 186-189.

[15] S Khoury & D Whyte *Corporate human rights violations: global prospects for legal action* (2017) 136; Černič (n 3 above) 8.

territories.'[16] They practiced or were involved in racial differentiation and discrimination, forced and exploited labour, torture, and inflicting harms on the spiritual and cultural life of the people. Many African societies still suffer from the vestiges not only of the slave trade and colonialism but the violations themselves. Even after independence, TNCs have continued to thrive on profits tainted by armed conflicts, extra-judicial killings, large-scale bribery and, very often, poor labour conditions in Africa.[17] What is relatively different, however, is how violations involving corporate actors can be holistically addressed.[18] And so, the issue about corporate responsibility and accountability for human rights violations borders on the determination whether it is an obligation voluntarily assumed by corporations or a legal obligation arising from already existing international human rights standards.

2.1 Definition and theories of corporate human rights responsibility

Human rights are the basic rights guaranteed to every individual everywhere in the world by virtue of being a human being. They are grounded on the principle of respect for the individual;[19] and are premised on the fundamental supposition that every human being is a rational being worthy of dignity and respect. Viljoen defines human rights as a peculiar kind of moral claim that all human beings may invoke or 'the manifestation of these claims in positive law'.[20] To a large extent, human rights depend on domestic constitutions and international human rights provisions for their protection and enforcement. Since the aftermath of the Second World War, several human rights instruments have been adopted at the global, regional and domestic levels. The Universal Declaration of Human Rights 1948 (Universal Declaration) is the first international human rights instrument adopted by the United Nations (UN) as 'a common standard of achievement for all peoples and all nations'. It recognises the universality, indivisibility, interrelatedness and interdependence of human rights. Consequently, it makes no distinction or categorisation of rights or obligations. However, ideological differences and rivalries

16 Černič (n 3 above) 8.

17 Khoury & Whyte (n 15 above) 136-137; C Kabemba 'Undermining Africa's wealth' 2 March 2014 http://www.osisa.org/economic-justice/blog/undermining-africas-wealth (accessed 17 June 2017); J Sarkin 'The coming of age of claims for reparations for human rights abuses committed in the South' (2004) 1 *Sur Revista Internacional de Direitos Humanos* 66 71.

18 Černič (n 3 above) 8; United Nations Human Rights Council 'Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Guiding Principles on Business and Human Rights: Implementation of the United Nations "Protect, Respect and Remedy" Framework' UN Doc A/HRC/17/31 (21 March 2011) principles 12-13.

19 MK Sinha 'Business and human rights: an Indian perspective' in Sinha (n 3 above) 52; United for Human Rights 'Human rights defined' http://www.humanrights.com/what-are-human-rights/ (accessed 19 June 2017).

20 F Viljoen *International human rights law in Africa* (2012) 3.

between the pre-Cold War West and East blocs led to the categorisation of rights and the adoption of two separate binding instruments in 1966: The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments – the Universal Declaration, the ICCPR with its optional protocols and the ICESCR – jointly make up the 'International Bill of Rights'. Africa, Europe, and the Americas have their respective human rights treaties.

Like human beings, a corporation is a person in law. It is a business entity established under law to 'act as a single person distinct from its shareholders'.[21] It can exercise rights and, subject to the terms of its incorporation, may exist indefinitely. The primary goal of a corporate business is to make profit for the benefit of its stockholders – shareholders and creditors. Corporations provide goods and services to the public and are regulated by the laws of the state where they operate. Like individuals and groups, they depend on the protection of the Constitution and laws of the land to secure access and rights to land resources, the commodities they produce, and the properties they acquire. They are equally bound to operate within the confines of law.

The integration of the world market economy and the effects of globalisation have seen the expansion of corporate businesses beyond the shores of the home state. These have spurred the increasing participation of corporations on the international scene and, with much wealth, their steady rise in power and influence. Today, many corporations are richer and more powerful than many states in the developing world, particularly in Africa,[22] and are providing services previously delivered by governments. The negative impact of their wealth and power is being felt by not just weak African states but also individuals and host communities in form of human rights violations. Whilst states have the primary obligation for human rights,[23] the growing incidences of corporations' alleged involvement in human rights infractions have erupted the debate that corporations should bear some degree of responsibility. Weeramanty states as follows:[24]

> Indeed, the economic power of several individual multinationals is greater than that of more than three-quarters of the nation States of the world. But it is power which they wield in the territory of the developing countries, without any responsibility or accountability. It is therefore contrary to a basic democratic principle which postulates that power without responsibility is anathema to the democratic ideal.

[21] BA Garner (ed) 'Corporation' in *Black's Law Dictionary* 9th ed (2009) 391.

[22] Sinha (n 19 above) 60.

[23] C Odinkalu 'Back to the future: the imperative of prioritising for the protection of human rights in Africa' (2003) 47 *Journal of African Law* 1 2.

[24] CG Weeramantry 'Human rights and the global marketplace' in L Henkin & CG Weeramantry 'Keynote addresses' (1999) 25 *Brooklyn Journal of International Law* 27 41.

By itself, the term 'responsibility' means the fact of being accountable for something. It is 'the state or fact of being responsible, answerable, or accountable for something within one's power, control, or management.'[25] It presages an obligation to satisfactorily perform a task that must be fulfilled, the failure of which elicits a penalty.[26] But what is 'corporate responsibility'? Does it have any significance for human rights law? There is currently no precise definition of the term. As such, a definition within context may suffice. Plainly, the term suggests that corporate businesses have an obligation to pursue objectives that are in line with specific rules and principles, failing which they may be held accountable. Rules and principles, in this context, include written or established rules of conduct that are codified in domestic law and international human rights principles. Self-imposed responsibility, which is subject to discretionary compliance and against which no accountability is due, arguably, raises a difficulty of assessment, due to its lack of objective standard to measure compliance. Against this background, the idea of corporate responsibility will be weighed and assessed in the context of established rules.

Ideally, human rights principles are often couched in the language of state obligations. They do not expressly impose human rights duties or responsibilities on corporations towards individuals. The duty to protect, respect, and fulfil human rights is basically that of the state. This is because the state has enormous control over the individual and was the traditional violator of the individual's dignity. Today, it is no longer vigorously contested that corporations are co-violators of human rights. Since the era of globalisation, the massive expansion of corporate business frontiers beyond the boundaries of the nation-state has been unmatched by effective regulation. Local laws are inapplicable beyond national boundaries unless to nationals on foreign soil. Similarly, public international law applies principally to state relations. The ability of corporations to operate on a transboundary basis meant that they could invariably go below the radar of international and domestic regulation. It has been reported that corporate-related violations 'occurred, predictably, where governance challenges were greatest',[27] especially in regions with a history of conflict, high level of corruption and weak rule of law system, such as Africa.[28]

With this in mind, the idea of corporate human rights responsibility (CHRR) is predicated on the argument that with the protection of legal

[25] Dictionary.com 'responsibility' in *Dictionary.com Unabridged* Random House Inc http://www.dictionary.com/browse/responsibility (accessed 20 June 2017). In this sense, it is synonymous with 'answerability' or 'accountability'.

[26] BusinessDictionary.com 'responsibility' WebFinance, Inc. http://www.businessdictionary.com/definition/responsibility.html (accessed 20 June 2017).

[27] United Nations Human Rights Council 'Protect, Respect and Remedy: a Framework for Business and Human Rights – Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' UN Doc A/HRC/8/5 (7 April 2008) para 16.

[28] 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 45.

rights and freedoms comes correlative duties and responsibilities. Under international human rights law, human rights are considered to have express or implicit corresponding obligations. The United Nations (UN) Special Rapporteur on the Study of Human Rights and Human Responsibilities says that it is not possible to think rights without the correlation of duties: 'Every right, in one way or another, is linked to some obligation or some responsibility, and every time that a duty is fulfilled, it is very likely that the violation of some right is prevented.'[29] Similar, the UN Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies clearly states that 'Rights imply duties, and duties demand accountability.'[30] But the suggestion that human rights protection produces correlative duties has been rejected, prominently, by the industrialised states of the global North. They argue that *duty* be construed more broadly to include moral or ethical responsibilities, rather than legal duties; thereby leaving open the debate whether the corporate responsibility for human rights is a legal one, or simply a moral or ethical one.

Accordingly, CHRR as an idea has been subject of conflicting intellectual and definitional propositions. It has been attributed different meanings by different scholars in different jurisdictions under varying contexts. But this should not be. As stated above, it is the responsibility of businesses to observe in their operations human rights principles recognised by domestic and international law.[31] Such principles, existing for the benefit and protection of individuals and groups, constitute aspects of the values of society to be respected by all who live and function in it. As Černič argues, '[t]he protection of human rights is a fundamental value and reflects not only individual interests but also the interests of society as a whole.'[32]

The justification for attributing corporate businesses with legally enforceable human rights responsibility relies on two basic approaches in this paper. First is the human right-based approach, which places the victim of corporate human rights harms at the centre of the debate of corporate responsibility for human rights. It moves away from the traditional notion that 'international norms are created to [only] respond to states' interests and goals,'[33] by presupposing that rights are grounded on legal obligations. According to Khan, former Secretary-General of Amnesty International, 'human rights are rooted in law. Respecting and protecting them was never meant to be an optional extra, a matter of choice. It is expected and required.'[34] A cursory look

29 United Nations Commission on Human Rights (n 9 above) 43.

30 Office of the United Nations High Commissioner for Human Rights 'Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies' http://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf (accessed 21 June 2017).

31 United Nations Human Rights Council (n 18 above) principle 12.

32 Černič (n 3 above) 12.

33 C Fernández de Casadevante Romani 'International law of victims' (2010) 14 *Max Planck Yearbook of the United Nations Law* 219 221.

34 C Avery 'The difference between CSR and human rights' https://business-humanrights.org/sites/default/files/reports-and-materials/Avery-difference-between-CSR-and-human-rights-Aug-Sep-2006.pdf (accessed 22 June 2017).

at the evolution of international human rights standards will show that they advanced to not only restrict state interference with the individual's fundamental rights and freedoms but also to guarantee protection from harm and address violations of whatever kind and by whomsoever. While society may have a genuine expectation that businesses will comply with human rights, the obligation itself to do so is not predicated on society's expectation but on the threshold of law. To that extent, this approach suggests that if human beings are the object of the international human rights protection regime, then the law is the only objective benchmark for their protection.

Voluntary corporate commitments to observe human rights are, by themselves welcome developments, but their absence does not diminish, in the least, the responsibility of corporate businesses to respect human rights. What makes human rights guaranteed is that violators are accountable for any breach based on the root of the law, rather than on a platter of morality or ethics or voluntarism. In this regard, Černič cautions that the fundamental human rights obligations which corporations are bound to observe are enforceable nationally and internationally, and the lack of their enforcement must not be mistaken for a lack of obligation.[35] In essence, he argues that the corporate obligation to observe human rights exists independently of its enforcement.

The effectiveness of moral commitments or voluntary corporate obligations as a channel for meeting society's human rights expectations depends on the socio-economic and legal context of any society. Human rights protection depends on each country's socioeconomic and legal systems, its character and the varied levels of its development.[36] In Africa, the crisis of the post-independence African state in terms of weak institutions, poverty and the inability to forge a common national identity, values and ethos, warranted an objective basis for human rights guarantees, other than the voluntary commitment of its organs of society. So far, the law has been the most potent basis for doing so. Although Zeleza states that human rights in Africa have historically been 'products of concrete social struggles, not simply textual or legal discourse',[37] it is argued that the law has been the only neutral source for securing their protection and their modern conceptualisation on the continent. Odinkalu states rightly that human rights is a normative or value framework that depends for its realisation on differential economic, social, cultural, political, and institutional infrastructure that are proportionate to the evolution of the state.[38]

35 JL Černič *Human rights law and business: Corporate responsibility for fundamental human rights* (2010) 27.

36 L Marcinkutė 'The role of human rights NGO's: human rights defenders or state sovereignty destroyers?' (2011) 4 *Baltic Journal of Law & Politics* 52 74; R Goodman & D Jinks 'How to influence states: socialization and international human rights law' (2004) 54 *Duke Law Journal* 623 634.

37 PT Zeleza 'The struggle for human rights in Africa' in PT Zeleza & PJ McConnaughey (eds) *Human rights, the rule of law, and development in Africa* (2004) 6.

38 Odinkalu (n 23 above) 6-7 (emphasis mine).

Accordingly, for human rights to be realised minimally, 'guarantees of social justice or equitable ground rules' are an essential imperative.[39]

Human rights do not evolve from 'asking favours',[40] nor are they guaranteed merely by society's expectation that they be respected, or by some ethical or moral consideration, or of the personal volition of the beneficent oppressor. Rather, they are protected to the extent that they are recognised by law. They are recognised as 'fundamental human rights' in the constitutions of many African states because they determine the limits of state authority and are enforceable against all potential violators. The fragility of many African states requires that the law and the courts remain the last hope of the individual. Consequently, the legal codification of rights is arguably a sure means of enforcing their protection.

In the global North, however, the socio-economic and legal contexts vary considerably from Africa in terms of the ideology, character, capacity and organisation of the state and its long-established relationship with the individual. The evolutionary processes of the socioeconomic, political and juridical character of the state aligns very much with Western individualistic society and the tendency towards private accumulation of capital, which often conflicts with the broader public interests and shared values of African societies. These ostensibly explain a differential conceptualisation of human rights between western states and the developing world. Murphy observes that ideological interpretations of human rights frequently frustrate consensus on key issues and make it 'difficult to develop specific codes of behaviour which can be used to protect human rights and to punish those who would deny them.'[41]

The Third World approach to international law is similarly relevant in this discourse in that it illustrates how disproportions in the political, legal and socioeconomic structures between the developed states of the Northern hemisphere and their counterparts in the global South essentially shape the progress of the international normative regime. Developments on the international legal scene are understood in this context as being generated by problems relating to development disparity and colonial order.[42] The continuing legacies of Western economic exploitation, according to Anghie, can best be understood within the context of the relationship between colonisation and international law. Anghie describes the exploitation of this developmental imbalance against weak and poor states in the South as a 'dynamic of difference' between the global North and South that gives 'an important impetus in the generation of some of the defining doctrinal problems of international law.'[43] Anghie's idea of a dynamic

39 As above, 3 (emphasis mine).

40 C Heyns 'A "struggle approach" to human rights' in CH Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa* (2006) 16.

41 C Murphy 'Ideological interpretations of human rights' (1972) 21 *DePaul Law Review* 286 291-292.

42 Anghie (n 14 above) 6-7.

43 Gathii (n 14 above) 31.

of difference suggests that the lingering developmental imbalances between the global North and South, and the absence of a global governance framework for corporations, in many ways, perpetuates economic exploitation, social injustices and the deep structural inequalities between the North and the South. As Martinez notes in his report to the defunct United Nations Commission for Human Rights,[44] there is a

> clear division between the developed countries "of the North" that oppose the formal establishment of the correlation between rights and responsibilities and those of the underdeveloped "South" whose responses unanimously acknowledge this extremely important connection.

The conceptual divergence in framing the responsibility of corporations for human rights harms only incentivises the continuing exploitation of Africa and other third world states by western multinationals. The non-regulation of powerful corporations sustains the status quo of irresponsible business practices that were carried on from the era of exploitative slavery and colonialism. On this basis, the Third World approach considers that corporate voluntary or moral commitments to human rights compliance, without more, appears only to favour capitalism – a Western socio-economic and political ideology – to the detriment of the developing world. In this regard, Evans states that already the current international human rights regime is 'globalizing capitalism' because of its emphasis on legal rights without corresponding legal obligations, private property ownership, free market and minimum government regulation.[45] Flere supports this argument by saying that '[h]uman rights have become a universal sacred canopy, potentially legitimizing any act convenient for the reproduction of the existing world distribution of power and wealth.'[46]

For ideological conflicts to be narrowed, they must be driven by common humanistic, rather than economic, aspirations as a threshold for global consensus.[47] However, in the race for pocket-deep profits, humanistic aspirations are the least concern of capitalist states and wealthy multinationals. Thus, the argument that only states should directly regulate corporations contrives an international legal order that is legally deficient in demanding accountability from abusive corporations that are more powerful than developing African states.[48]

44 United Nations Commission on Human Rights (n 9 above) 2.

45 T Evans 'Does globalizing capitalism violate human rights?' 10 December 2016 https://blog.oup.com/2016/12/globalizing-capitalism-human-rights/ (accessed 29 June 2017).

46 S Flere 'Human rights and the ideology of capitalist globalization: a view from Slovenia' (2001) 52(8) *Monthly Review* https://monthlyreview.org/2001/01/01/human-rights-and-the-ideology-of-capitalist-globalization/ (accessed 29 June 2017) (emphasis mine).

47 Murphy (n 41 above) 289.

48 There is already the danger of procuring universal acceptance of a definition of corporate responsibility for human rights from a purely western notion of voluntarism or morality. This is a danger because ascribing voluntary obligations to prescriptive principles waters down the inherent value of human rights as an instrument of and for accountability.

2.2 The corporate 'responsibility' to respect human rights – an implied duty

Human rights are moulded by interactions between human beings and organs of society, and by the progressing dialogue on our common humanity.[49] Like individuals, corporations interact with people and segments of society. By this relationship, they are expected to observe the same rules that foster social order. Human rights principles form part of the rules of social engagement. They govern the relationship between the state and individuals including corporations on a vertical dimension as well as the relationships among individuals, groups and corporate entities themselves horizontally. In other words, human rights are protected not only against the state but also between individuals and corporate entities. The Universal Declaration requires that each individual and organ of society 'shall strive' to promote *respect* for human rights and freedoms.[50] Henkin poignantly argues that, by this prescription, the Universal Declaration applies to everyone including companies. He says that '*[e]very individual* includes juridical persons. *Every individual and every organ of society* excludes no one, no company, no market, no cyberspace.'[51]

The UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (UN Draft Norms) reiterates the understanding that corporate businesses, as organs of society, 'are also responsible for promoting and securing the human rights set forth in the Universal Declaration'.[52] Equally, the ICCPR and ICESCR each provide that nothing in the Covenants may imply that any *person*,[53] *group* or state can 'engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms' thereby guaranteed.[54] Since a corporation is a person composed of a group of individuals and functions as an important organ of society, it accordingly falls within the contemplation of the International Bill of Rights. Based on this understanding, the Committee on Economic, Social and Cultural Rights recently clarified that 'under international standards, business entities are expected to respect Covenant rights regardless of whether

49 J Ife *Human rights and social work: towards rights-based practice* (2001) 6.

50 Universal Declaration of Human Rights 1948 Preamble. The effect of the phrase 'shall strive', even though appearing in the Preamble, is underlined by the expectation that non-state social actors like individuals and corporations shall act in accordance with the principles enshrined in the Declaration.

51 L Henkin 'The Universal Declaration at 50 and the challenge of global markets' in L Henkin & CG Weeramantry 'Keynote addresses' (1999) 25 *Brooklyn Journal of International Law* 17 25; also see JL Černič 'Corporate human rights obligations at the international level' (2008)16 *Willamette Journal of International Law and Dispute Resolution* 130 147-150.

52 UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights Preamble (third paragraph).

53 The use of 'person' as against the Covenant's usual reference to 'individual' or 'everyone' suggests that individuals and corporations are required to respect the rights and freedoms so guaranteed.

54 Article 5(1) of the ICCPR; article 5(1) of the ICESCR.

domestic laws exist or whether they are fully enforced in practice.'[55] These, largely, depict law as the fundamental foundation of the corporate obligation to respect human rights.

Flowing from the above, it is clear that the international protection regime anticipates that the human rights of every individual are holistically recognised and guaranteed. The recognition of a right is only effectively secured by the assurance that it will not be violated by either the state or third parties. This assurance is confirmed by the inferable duty of observance imposed by each right. If the protection of rights entails corresponding duties from those most likely to impact them, as voiced by the Special Rapporteur on the Study of Human Rights and Human Responsibilities, then the mere circumstance that an instrument does not expressly impose duties does not diminish or reduce the intrinsic value of the responsibility of observance. Indeed, only states can assume the international obligation of compliance upon ratifying an instrument. However, this does not imply that it is only the government of the ratifying state that has an obligation to respect the right. In monist states, ratification warrants that every person – and 'person' here includes corporate person – and institution under state control comply with the standard of obligation assumed under the treaty. In other words, a monist state's ratification of a treaty demands that every capable violator desist from so doing.[56] No one – individual, group, corporation or the state – may interfere with such right.

To illustrate the point, imagine for a moment that the right of an individual to equitable and just conditions of work is guaranteed under an international instrument or under the constitution and local laws of the state in which he resides. On a vertical dimension, the legal fortification by domestic and international law means that the individual is legally protected from arbitrary state policies and actions in respect of his labour. His labour services cannot be unfairly exploited nor can he be subjected to conditions of work that undermine his dignity or are injurious to his health. Should the state violate this right in any material respect, he is entitled to seek redress before a court of law or, where the circumstances permit, an international tribunal. This is the vertical relationship between the individual and the state. Assuming however that this individual is the employee of a private employer – individual or corporate. Is he protected from a vicious employer? Does the fact that the private employer is not party to the international instrument or enforcer of the domestic law mean that it is not bound to observe the employee's right to fair labour conditions?

55 Committee on Economic, Social and Cultural Rights 'General Comment No 24 on state obligations under the ICESCR in the context of business activities' UN Doc E/C12/GC/24 (23 June 2017) para 5.

56 D Sloss 'Domestic application of treaties' (2011) 3. http://digital commons.law.scu.edu/cgi/viewcontent.cgi?article=1620&context=facpubs (accessed 29 June 2017); I Brownlie *Principles of public international law* (2008) 32-33.

The answer is not a complicated one, but frequently twisted by ideological perspectives.[57] This paper considers that once the right to fair and satisfactory work conditions is guaranteed by law, it is protected against all except the right holder. No employer is permitted to trample upon the right on the justification that the employer is not the state. The protection of the right is linked to the correlative duty of observance by all other members of society. In other words, individuals including juridical persons, as articulated by Henkin, owe each other the obligation to respect rights in their interpersonal relationships. There is already proof of this right-duty correlation under international law. Under the African Charter on Human and Peoples' Rights (African Charter), for example, the rights of every individual are neither exclusive nor only correlatively applicable to the state. Rather, they are exercisable with due regard to the rights of others, collective security, morality and common interest.[58] The African Charter arguably exemplifies the horizontal application of international human rights obligations. Besides, if corporate individuals enjoy rights which are expected to be respected by other members of society, then they must be considered to owe corresponding obligations to individuals as well. In Europe, corporations have successfully relied on the protection afforded under the European Convention on Human Rights.[59] They have judicially secured the rights to property, privacy, fair trial and freedom of expression under the Convention.[60] Therefore, it appears so convenient for businesses to legally claim these rights while rejecting the responsibility to respect those of others.[61]

Essentially, the content of the human rights responsibility of corporate enterprises is based on the principle of respect. To respect simply is to have due regard for the rights of others;[62] to not encroach on their rights – to do them no harm.[63] Corporate businesses have an obligation to respect the human rights of individuals who may be impacted by their day-to-day activities by exercising due diligence and

57 P Muchlinski 'The development of human rights responsibilities for multinational enterprises' in R Sullivan (ed) *Business and human rights: Dilemmas and solutions* (2003) 35.

58 Article 27(2) of the African Charter on Human and Peoples' Rights. Although neither the African Commission nor the African Court has articulated a linear or horizontal application of this obligation, it is arguably a basis for do so. Also, under article 46C of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, corporations can now be held criminally liable for human rights atrocities in Africa.

59 J Wouters & A Chané 'Multinational corporations in international law' Working Paper No 129 – December 2013 5-7 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2371216 (accessed 19 June 2017); M Emberland *The Human Rights of Companies: Exploring the structure of ECHR protection* (2006) 125.

60 *Sovtransavto Holding v Ukraine* ECHR 2002-VII 95; *Sunday Times v The United Kingdom* (1979) Series A no 30; *VGT Verein gegen Tierfabriken v Switzerland* ECHR 2001-VI 243 para 57.

61 H Paul 'Corporations are not human, so why should they have human rights?' September 2011 http://www.econexus.info/publication/corporations-are-not-human-so-why-should-they-have-human-rights (accessed 28 June 2017).

62 Oxford Dictionaries 'respect' https://en.oxforddictionaries.com/definition/respect (accessed 29 June 2017).

63 United Nations Human Rights Council (n 27 above) para 24.

taking steps to avoid or mitigate actual or potential harm. According to the United Nations Guiding Principles on Business and Human Rights (UNGPs), the respect obligation entails undertaking due diligence to 'avoid infringing on the human rights of others' and 'address adverse human rights impacts' with which businesses are involved.[64] It further states that '[t]he responsibility of business enterprises to respect human rights refers to internationally recognized human rights' as stipulated in the International Bill of Rights and the International Labour Organization's Declaration on Fundamental Principles and Rights at Work. In the commentary on Principle 12 of the UNGPs, it is categorically emphasised that '[t]hese are the benchmarks against which other social actors assess the human rights of business enterprises.'[65] Under the UN Draft Norms, 'internationally recognized human rights' have been defined as 'civil, cultural, economic, political, and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.'[66]

Despite its ground-breaking articulation of corporate responsibility, the UNGPs have been described as 'a weak regime that suffers from serious deficiencies,'[67] and are considered in this paper to be replete with conflicting postulations. Specifically, the method or 'principled pragmatism' adopted by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other businesses (SRSG) seemed to have failed in many material respects to logically address two important points: one, it failed to establish a clear basis of the corporate responsibility to respect human rights by ambivalently attributing the responsibility to social expectation without clearly defining its parameters; and second, it misinterpreted the scope of the corporate responsibility by attributing the *corporate* responsibility to all business enterprises.

On the first point, the SRSG seems to have misconceived the basis of the concept of corporate responsibility. In the 2008 report to the Human Rights Council, also called the 'Ruggie Framework', the SRSG declared that the corporate responsibility to respect '*is* the basic expectation society has of business';[68] that the broader scope of this responsibility '*is defined by* social expectations – as part of what is sometimes called a company's social licence to operate' the breach of which can subject companies to the courts of public opinion'.[69]

64 United Nations Human Rights Council (n 18 above) principle 11.

65 United Nations Human Rights Council (n 18 above) principle 12 commentary.

66 UN Draft Norms para 23.

67 S Deva & D Bilchitz 'Response of Surya Deva and David Bilchitz to comments of Professor John Ruggie on "Human rights obligations of business: beyond the corporate responsibility to respect?" (Cambridge University Press, 2013)' 15 January 2014 https://business-humanrights.org/sites/default/files/media/documents/surya-deva-david-bilchitz-re-ruggie-15-01-14.pdf (accessed 26 June 2017).

68 United Nations Human Rights Council (n 27 above) para 9 (emphasis mine).

69 United Nations Human Rights Council (n 27 above) para 54 (emphasis mine).

Subsequently in the UNGPs, which are essentially the implementation rules for the Ruggie Framework, the SRSG declares that the responsibility to respect refers to 'internationally recognized human rights' as benchmarks. In the same breadth, the SRSG argues that international human rights instruments should only be 'carefully constructed precision tools' to be deployed where other means have failed.[70] This is a paradox of articulation that has misled quite a bunch of scholars to think that the corporate responsibility does not emanate from law. Relying on the SRSG's position, Redmond has strenuously argued that the responsibility refers to moral obligations or social expectations that are neither derived from international law nor 'grounded in legal obligations beyond the domestic law of the host states'.[71] But this is absolutely not the case. Like Bentham states, every legal principle commands and, by doing so, creates duties or obligations.[72]

The SRSG claims that the responsibility to respect is different from legal liability and enforcement.[73] He suggests that human rights standards are just reference points or 'precision tools' for social expectations.[74] This proposition is problematic for two reasons.

First, the argument inordinately disengages the positive application of international human rights law in many jurisdictions that have no requirement of domestic legislation. In many monist states, the ratification of an international instrument becomes immediately operational, binding all organs of state, juridical entities and individuals locally.[75] Bilchitz strongly disagrees that international human rights law is a mere tool to be used for other issues than to protect and realise fundamental human interests.[76] The UNGPs, touted to be grounded on international human rights principles, cannot be isolated from legal liability, nor can companies appropriate the discretion to comply with them. An internationally-recognised right is a legal interest that demands observance from all-and-sundry. As such, its full protection is such that must be reinforced by not just its importance to social life but by firm and persistent pressure to conform.[77] Therefore, the assertion that the corporate responsibility to respect is short of a legal basis becomes untenable.

70 J Ruggie 'A UN business and human rights treaty? An issues brief by John G. Ruggie' 28 January 2014 5 https://business-humanrights.org/sites/default/files/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf (accessed 28 June 2017).

71 P Redmond 'International corporate responsibility' in T Clarke & D Branson (eds) *The SAGE handbook of corporate governance* (2012) 602.

72 J Bentham *Of laws in general ed HLA Hart* (1970) 294.

73 United Nations Human Rights Council (n 18 above) principle 12 commentary.

74 JG Ruggie 'Business and human rights: the evolving international agenda' (2007) 101 *The American Journal of International Law* 839; Deva & Bilchitz (n 67 above) 2-3.

75 NJ Botha 'National treaty law and practice: South Africa' in DB Hollis *et al* (eds) *National treaty law and practice* (2005) 600-602.

76 Deva & Bilchitz (n 67 above) 3.

77 HLA Hart *The concept of law* 2nd ed postscript eds P Bulloch & J Raz (1961) 85-88; HLA Hart 'Legal and moral obligation' in AI Melden (ed) *Essays in moral philosophy* (1958) 82-107.

Second, the ideologically-influenced argument that human rights claims lie only against states seems to be inconsistent with reality.[78] In many third-world states, the Bill of Rights in the constitution does not categorically restrict respect for human rights to the state. Rather, they often elastically provide that anyone who considers that any provision of the Bill of Rights has been, is being or like to be violated in relation to him or her, may file an action before a competent tribunal for fundamental rights enforcement.[79] Such provisions put to rest the argument that rights are protected only against the state, because they leave open the question of who may be held accountable for human rights violations. In South Africa, the Constitution expressly provides that '[a] provision of the Bill of Rights binds a natural or *a juristic person* if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'[80] This accordingly confirms that, contrary to the dominant argument in the West, legally protected rights are also considered to elicit corresponding duties that demand corporate compliance.

Social expectations, on their own, can be highly problematic as a basis of business compliance. In many fragile states where there are competing socio-economic and political interests among various groups and stakeholders internally, it is difficult to measure social expectations if state regulation and law enforcement are weak and multinationals have government officials by the groins. This is because expectations of society are often multi-faceted, starkly diverse, and incoherent. Contrary to the SRSG's position, they are not enough to ensure responsible corporate conduct. The assertion that failure to act consistently with the responsibility to respect can render abusive corporations amenable to the court of public opinion is equally weak; it does not anticipate any potential accountability in the face of brutal violations and weak legal systems. It implies that abusive corporations like Shell in Nigeria's Niger Delta region, should only be accountable to the court of public opinion where they neglect to abide by this responsibility, even when a legal and judicial system like Nigeria's is glaringly incapable of properly dispensing with the matter. Undeniably, however, social expectations do shape normative action, but they by no means guarantee compliance. Being indicative of social concerns, they should be taken into consideration in the normative development process. But they do not and, in fact, cannot alter corporate conduct to act in accord with them, without proper regulation through legal prescriptions. Green suggests that 'obligations are central to the social role of law'.[81]

78 Muchlinski (n 57 above) 36.

79 See the enforcement provisions in the constitutions of many states, especially in the third world.

80 Sec 8(2) of the Constitution of the Republic of South Africa (emphasis mine); M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18 *Potchefstroom Electronic Law Journal* 3114.

81 L Green 'Legal obligation and authority' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (2012) https://plato.stanford.edu/archives/win2012/entries/legal-obligation/ (accessed 28 June 2017).

The SRSG has been highly criticised for the weak language and approach to corporations in the Framework and the UNGPs.[82] The preference for 'responsibility' over 'obligation' or 'duty' deepens perceptions of a collusive attempt to push the business and human rights dialogue from one that is victim-focused to one that is more romantic to the very companies cited for corporate abuses.[83] Lopez queries why the rationale for the corporate responsibility to respect is predicated on social norms, the origin and character of which was never clarified.[84] He also observes that although the SRSG attributes society's expectations with normative value in his report, 'the report does not appeal to any source, ethical or moral system or religion-based ethics, as the normative underpinning of those social norms that give rise to corporate responsibilities.'[85] The SRSG may have been presumptuous to conclude that social expectations were universally accepted to have normative value, when in fact they are not. Recently, Ruggie stated that there is 'near-universal recognition' of the corporate responsibility to respect as a social norm.[86] For this reason, he argues further that '[w]e know that the corporate responsibility to respect human rights is a transnational social norm because the relevant actors acknowledge it as such'.[87] But should normative value be attributed to an idea merely because some of its stakeholders acknowledge it as such? What about the several other hundreds of thousands of companies which do not? It may be this forced universalisation of Western ideology that does not resonate in the third world.[88]

The SRSG's preference for the term 'responsibility' as against 'obligation' or 'duty' further feeds the reservations of critics. A major Achilles heel of the conceptualisation of the respect obligation is the effort to design a new paradigm of human rights obligations for companies that amounts to no accountability.[89] All the talk about the corporate responsibility to respect human rights is contrived simply to transpose corporate social responsibility into the business and human rights debate at the international level. The Framework and UNGPs suggest that only states have *duties* under international human rights law, and that corporations only have *responsibilities* because they

82 S Deva 'Treating human rights lightly: a critique of the consensus rhetoric and the language employed by the Guiding Principles' in S Deva & D Bilchitz (eds) *Human rights obligations of business: beyond the corporate responsibility to respect* (2013) 91.

83 Deva & Bilchitz (n 67 above).

84 C Lopez 'The "Ruggie process": from legal obligations to corporate social responsibility?' in Deva & Bilchitz (n 82 above) 65.

85 As above.

86 JG Ruggie 'The social construction of the UN Guiding Principles on Business and Human Rights' Corporate Responsibility Initiative Working Paper No 67 (June 2017) 13 https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cri/files/workingpaper_67_0.pd (accessed 18 August 2017).

87 As above, 14.

88 Assuming this is not another attempt to universalise western agenda, the ascription of 'near-universal acceptance' of the corporate responsibility to respect to 'a social norm' is nothing but a superficial attempt to blur the lines of disagreements between the global North and South.

89 Deva & Bilchitz (n 67 above) 3.

derive – not from law but – from social expectations.[90] In this context, the SRSG introduces something quite controversial – the singlehanded differentiation between duty and responsibility, appropriating the former to states and the latter to companies. Nowhere do the contours of international law evidence such distinction. Since international law is fashioned primarily by the consent and customs of states accepted as binding, there is yet no evidence of such distinction or recognition. By the distinctions, duties are suggested to be obligations categorically prescribed by an international instrument while responsibilities are not. But obligations are not duties merely because they are expressly stipulated and attributed to a duty-bearer like the state. Even in the realm of semantics, there is no distinction between 'responsibility' and 'obligation' or 'responsibility' and 'duty'. They really mean the same thing, and to differentiate them is akin to making a distinction without a difference.[91] Lopez submits that the respect obligation was inaccurately differentiated:[92]

> Whether or not the distinction of duties or obligations on the one hand and responsibilities on the other is an accepted UN terminology is questionable. There is evidence to suggest that the opposite may be more accurate: in UN parlance, the term 'responsibilities' is usually taken as equivalent or derivative of duties and obligations.

On the second point, the SRSG suggests that the scope of *corporate* responsibility to respect extends to *all businesses* irrespective of size, ownership, structure, sector and operational context.[93] No doubt, this proposition is well intended but logically flawed. The corporate responsibility cannot rationally extend to all business; only to corporate businesses. The whole idea of a *corporate* responsibility was to conceptualise human rights responsibilities applicable to harmful corporate – rather than (in)formal – businesses. Unincorporated businesses – sole proprietorships, partnerships, informal traders, and family trusts – do not fall under the radar of corporate responsibility if properly construed. Those responsible for running this category of businesses arguably bear individual rather than corporate responsibility for any adverse human rights impacts they may have on third parties. If this were not so, the word 'corporate' should have been easily substituted with 'business', which is a much wider term as aptly captured in the title of the UNGPs. Unlike the UN Draft Norms that was unmistaken in its applications to TNCs and other business enterprises, the Framework and the UNGPs seem to have applied the concept of 'corporate' responsibility to all businesses in error. Had it been intended to go beyond the scope of corporate responsibility to include all businesses, there was ample opportunity to make a suggestion to the Human Rights Council for a review of the mandate in this regard.

Furthermore, the SRSG's mandate was essentially to identify and clarify standards of *corporate responsibility and accountability* of

[90] United Nations Human Rights Council (n 27 above) para 24; United Nations Human Rights Council (n 18 above) principles 11-16.

[91] See the definitions of 'duty', 'obligation' & 'responsibility' respectively in *Black's Law Dictionary* (n 21 above) 580, 1179 & 1427.

[92] Lopez (n 84 above) 65.

[93] United Nations Human Rights Council (n 18 above) principle 14.

TNCs and other business enterprises with regard to human rights.[94] It is arguable whether the final output was a flawless victory if both the Framework and UNGPs were completely lacking in corporate accountability – an important component of the mandate. One may counter-argue that the unanimous adoption of the UNGPs subsequently ratified whatever zealous elaboration that had been undertaken. But that does not cure the faulty conceptualisation of 'corporate responsibility' as applying to all businesses. It also cannot cure the failure to fulfil the *accountability* component of the mandate.

3 CONCEPTUAL (DIS)SIMILARITIES WITH CORPORATE SOCIAL RESPONSIBILITY

However, despite the contraption of CHRR within the framework of internationally recognised human rights standards, it is a concept somewhat unpopular in the global North. In North America and Europe, there is a preference for 'social responsibility' or 'corporate social responsibility' (CSR) – a much broader and differentiated term.[95] CSR is broadly understood in the Northern hemisphere as the social obligation of businesses to conduct their affairs in a manner that is consistent with the concerns of society. Historically, it emanated from the much earlier concept of 'business responsibility', a term that is contemplated to have surfaced sometime between 1899 and the Great Depression in the 1920s.[96] The idea of 'business responsibility' is known to have been propounded by Bernard Dempsay.[97] But it did not come into prominence until the 1950s when Howard Bowen expounded the idea.[98] Since then, it has steadily evolved as a social construct requiring voluntary business commitments to harmonise corporate objectives with social concerns rather than as a corresponding duty emanating from the legally guaranteed rights of individuals and

94 Office of the High Commissioner for Human Rights 'Human rights and transnational corporations and other business enterprises – Human Rights Resolution 2005/69' para 1(a) Commission on Human Rights 59th meeting 20 April 2005.

95 L Moir 'What do we mean by corporate social responsibility?' (2001) 1 *Corporate Governance* 16 17; K Davis 'Can business afford to ignore social responsibilities?' (1960) 2 *California Management Review* 70 ('Social responsibility' means different things to businesses. It is on the one hand 'a broad obligation to the community with regard to economic developments affecting the public welfare'; and on the other hand, it is the 'obligation to develop and nurture human values').

96 N Farcane & E Bureana 'History of "corporate social responsibility" concept' (2015) 17(2) *Annales Universitatis Apulensis Series Oeconomica* 31 35; RE Smith 'Defining corporate social responsibility: a systems approach for socially responsible capitalism' unpublished MPhil thesis (2011) 1 http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=od_theses_mp (accessed 21 June 2017).

97 Farcane & Bureana (n 96 above) 35; Centre for Ethical Business Culture 'Corporate social responsibility: the shape of a history, 1945-2004' (2010) Working Paper No 1 9 http://www.cebcglobal.org/wp-content/uploads/2015/02/CSR-The_Shape_of_a_History.pdf (accessed 21 June 2017).

98 Bowen (n 2 above); RE Smith 'Defining corporate social responsibility: a systems approach for socially responsible capitalism' unpublished MPhil Thesis (2011) 1 http://repository.upenn.edu/cgi/viewcontent.cgi?article=1009&context=od_theses_mp (accessed 21 June 2017).

communities under international human rights law.[99] Hence, a few definitions are considered in this analysis in order to clarify and differentiate the dominant understanding of CSR as exemplified in the global North from the concept of CHRR, which is still very much evolving and enjoys much support from the global South.

By itself, the term 'CSR' is a nebulous idea capable of a multiplicity of meanings.[100] With over 70 known definitions today,[101] each differing from the other, it is one of the most uncertain terms ever conceptualised in human history.[102] Manne asserts that there is 'a considerable amount of confusion inherent in the common use of the phrase "corporate social responsibility".'[103] Bowen, the foremost proponent of the idea,[104] defines CSR as the obligation of businesses 'to pursue those policies, to make those decisions and to follow those lines of action which are desirable in terms of the objectives and values of' society.'[105] He argues that when the influence held and the decisions made by businesses are inconsistent with the general welfare of society, businesses have a choice to either reverse them voluntarily or be forced to do so. As many scholars hopped on the CSR bandwagon, early notions of CSR gradually advanced. Johnson, for example, states that a socially responsible company is one that balances many social interests and takes into account its employees, suppliers, partners, local communities and nation rather than only focusing on increasing profits for shareholders.[106] Frederick, another influential contributor to the CSR discourse, describes CSR as the obligation of businesses to 'oversee the operation of an economic system that fulfils the expectation of the public',[107] arguing that 'business corporations have an obligation to

[99] HG Manne & HC Wallich *The modern corporation and social responsibility* (1972) i (where it is said that CSR in America has been 'subsumed as part of the broader subject of the economics of charity').

[100] Davis (n 95 above) 70; Centre for Ethical Business Culture (n 97 above) 23-26. Also see D Crowther & G Aras 'Corporate social responsibility' (2008) 11 http://mdos.si/Files/defining-corporate-social-responsibility.pdf (accessed 21 June 2017) – 'There is however no agreed definition of CSR so this raises the question as to what exactly can be considered to be corporate social responsibility.'

[101] MP Low 'Corporate social responsibility and the evolution of internal corporate social responsibility in 21st century' (2016) 3(1) *Asian Journal of Social Sciences and Management Studies* 56-74.

[102] GB Sprinkle & LA Maines 'The benefits and costs of corporate social responsibility' (2010) 53(5) *Business Horizons* 445; A Dahlsrud 'How corporate social responsibility is defined: an analysis of 37 definitions' (2006) 15 *Corporate Social Responsibility and Environmental Management* 3.

[103] Manne & Wallich (n 99 above) 3-4.

[104] Caroll describes Bowen as the 'Father of corporate social responsibility' in AB Carroll 'Corporate social responsibility: evolution of a definitional construct' (1999) 38 *Business & Society* 270.

[105] Bowen (n 2 above) 6.

[106] HL Johnson *Business in contemporary society: framework and issues* (1971) 50; Also see RE Freeman 'Stockholders and stakeholders: a new perspective of corporate governance' (1983) 25 *California Management Review* 88-106.

[107] WC Frederick 'The growing concern over business responsibility' (1960) 2 *California Management Review* 54 60.

work for social betterment.'[108]

Despite the growing recognition that business objective must align with social values, the CSR dialogue remains largely unclear as to what its scope and extent are for business. With years of debates and consolidation of the concept, more scholars have made effort to set some conditionality for shaping what the responsibility of business should be. Manne and Wallish worked out some criteria for determining the socially responsible business. They suggest that the responsibility must be: purely voluntary; regarded as a cost rather than an increased profit; and done with genuine charity or philanthropic intentions.[109] But these criteria did not put a stop to the endless debate. In a bid to clarify the dimensions of society's expectations of business, Carroll declared that '[t]he social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time'.[110] By this definition, Carroll brings out four elements of CSR that respond to the concerns of society – the responsibility of business to be economically profitable to its investors, the legal responsibility to comply with local laws and regulations, the ethical responsibility to do what is proper and consistent with society's values, and the responsibility to undertake discretionary actions such as philanthropy that are beneficial to society. In a subsequent article, Carrol reaffirms that these four elements 'constitute total CSR' and 'might be depicted as the pyramid' of CSR.[111]

Since the UN Conference on the Human Environment in the 1970s, the environmental element was added as a dimension to the CSR pyramid. Thus, ushering a business approach that promotes the delivery of social, economic and environmental benefits to all stakeholders as a way of contributing to the society's sustainable development.[112] This integrative approach very much characterised the CSR idea over the next few decades. CSRwire.com, a public relations press service, describes the combination of various social concerns in

[108] WC Frederick 'From CSR1 to CSR2: the maturing of business-and-society thought' (1994) 33 *Business & Society* 150 151.

[109] Manne & Wallich (n 99 above) (unnumbered preliminary page ii).

[110] AB Carroll 'A three-dimensional conceptual model of corporate performance' (1979) 4 *Academy of Management Review* 497 500.

[111] AB Carroll 'The pyramid of corporate social responsibility: toward the moral management of organizational stakeholders' (1991) 34 *Business Horizons* 39 40; AB Carroll 'Corporate social responsibility' (1983) 49(19) *Vital Speeches of the Day* 604. NB. In this latter definition, Carroll replaces the words 'discretionary actions' with 'voluntary or philanthropic' contributions. Carroll has also championed calls for businesses to move away from being merely 'socially responsible' to being 'socially responsive' and 'socially performing' - see AB Carroll 'Managing ethically with global stakeholders: a present and future challenge' (2004) 18 *Academy of Management Executive* 114-120; AB Carroll 'Ethical challenges for business in the new millennium: corporate social responsibility and models of management morality' (2000) 10 *Business Ethics Quarterly* 33-42; Carroll (n 104 above) 268-295; AB Carroll 'The four faces of corporate citizenship' (1998) 100 *Business & Society Review* 1-7.

[112] Financial Times 'Definition of corporate social responsibility (CSR)' in *ft.com/lexicon* http://lexicon.ft.com/Term?term=corporate-social-responsibility--(CSR) (accessed 21 June 2017).

the corporation's relations with society as 'an integration of business operations and values'.[113] In 1971, the Committee for Economic Development (CED) observed that the basic purpose of business is 'to serve constructively the needs of society – to the satisfaction of society'.[114]

Apart from the inherent fluctuations in the CSR dialogue, other issues suffice from the definitional conundrum upon which its distinction from CHRR can be articulated. But first, the commonalities. Several threads, definitely, run through the hangers and hooks of CSR that are consistent with the idea of CHRR. There is some consensus on both sides of the argument that: corporations can infringe human rights; corporations should bear some responsibility for ensuring that their business objectives do not transgress the interests and values of society due to their increasing power and influence; and that human rights and the conservation of the environment form part of the common interests and values of society. There is also some understanding that the broader degree of 'stakeholders', as defined by Johnson, includes employees, suppliers, partners, local communities and the state.

However, the greatest denominator between both concepts is the voluntariness element. From the above definitions, it is clear that CSR is more-or-less a company's voluntary, moral or ethical commitment to harmonise its stockholders' interests with those of society. However, this essentially leaves two questions unresolved. First, the definitions do not answer the nagging question of accountability of a corporate entity whose policies and actions (in)advertently violate human rights. What will happen to the corporation that fails, neglects or refuses to discharge its so-called ethical obligations, resulting in human rights harm as was the case in the Piper Alpha disaster?[115] Will it be accountable for its human wrongs? What lesson will each violation serve for future occurrence by other abusive corporate enterprises? Second, the definitions do not conceptualise CSR as a corresponding obligation to respect human rights. If the corporate entity itself can enjoy rights as earlier established, can it not therefore be attributed with the obligation to equally respect the rights of other stakeholders in society? Can the corporation freely act in such a way as to take away the life, human dignity, privacy, the fair working conditions, or the freedom from discrimination of an individual without accountability? These questions remain unsolved by many of the opinions on CSR.

Also, what is even more vague is the convenient use of voluntariness in the CSR dialogue. Assuming this paper adopts the pyramidal CSR-structure suggested by Carroll with the addition of the environmental and human rights dimensions as a basis for linking CHRR to CSR,

[113] CSRwire 'Corporate social responsibility categories' http://www.csrwire.com/categories (accessed 22 June 2017).

[114] Research and Policy Committee of the Committee for Economic Development *Social responsibilities of business corporations* (1971) 11.

[115] C Woolfson & M Beck 'Corporate social responsibility failures in the oil industry' in Sullivan (n 52 above) 114-117.

Wettstein states that 'human rights have played a very peripheral role overall for the conceptualization of CSR'.[116] Jenkins has similarly identified that CSR is an entirely inadequate response to human rights issues.[117] In truth, companies give different considerations to the various dimensions of their CSR. The corporation's approach to stockholders' profit-making agenda differs considerably from their human rights and environmental responsibilities to society.[118] Whilst they consider stockholders' interests as an 'inalienable right' upon which their survival depends, there seems to be a disproportionate emphasis on the economic, social, environmental and human rights dimensions of their social responsibilities. The latter category becomes mere voluntary obligations.

There is no doubt that the prevailing North-South divide is not without prejudice. The developed states of the Northern hemisphere oppose the idea that corporations should have binding human rights responsibilities because TNCs that have been called out for some of the most vicious human rights violations in Africa are headquartered there. In Eastern Congo, the Canadian-based mining company, Anvil Mining, has been accused of facilitating the massacre of dozens of civilians.[119] In Malawi, Eland Coal Mining – a subsidiary of European-based Independent Oil and Resources - has been cited for forced eviction of local populations and destruction of Malawian farmlands.[120] In Nigeria's Niger Delta, the European oil giant, Royal Dutch Shell Company, is notorious for thousands of oil spillages and complicity in the extrajudicial killings of Ogoni human rights activists.[121] The growing resistance to abusive multinational corporations in the mining, pharmaceutical and chemicals industries in the global South is

[116] F Wettstein 'CSR and the debate on business and human rights: bridging the great divide' (2012) 22 *Business Ethics Quarterly* 739 746.

[117] R Jenkins 'Globalisation, corporate social responsibility and poverty' (2005) 81 *International Affairs* 525; Christian Aid *Behind the mask: the real face of corporate social responsibility* (2004) 2.

[118] Enlazando Alternativas 'Profit before people and human rights: European transnational corporations in Latin America and the Caribbean' [prepared by: B Brennan *et al*] https://www.tni.org/files/download/profitbeforepeople_0.pdf (accessed 4 July 2017). This report accused the European Union and governments of member states of complicity in violations committed by TNCs.

[119] F Ngugi 'Western multinational corporations are profiting from poor Africans' in *Face2Face* (14 February 2017) https://face2faceafrica.com/article/western-corporations-in-africa (accessed 8 July 2017). M Wagna 'Trading human rights for corporate profits: Global trade policy weakens protections for health, the environment' <http://www.reimaginerpe.org/node/219 (accessed 6 July 2017) (says that the United States and other countries relinquish the power to protect human rights 'when doing so would interfere with corporate profits').

[120] K Hodal 'Mining in Malawi brings forced evictions and ruined crops, report says' *The Guardian* 27 September 2016 https://www.theguardian.com/global-development/2016/sep/27/mining-malawi-brings-forced-evictions-ruined-crops-human-rights-watch-report-says (accessed 29 June 2017); Human Rights Watch '"They destroyed everything": Mining and human rights in Malawi' 27 September 2016 https://www.hrw.org/report/2016/09/27/they-destroyed-everything/mining-and-human-rights-malawi (accessed 4 July 2017).

[121] Wettstein (n 116 above) 742; Centre for Constitutional Rights 'Corporate human rights abuse' 4 https://ccrjustice.org/sites/default/files/assets/files/CCR_Corp.pdf (accessed 8 July 2017).

precipitating a construction of corporate responsibility under domestic and international law different from CSR. Southern scholars contend that since human rights are legally guaranteed and enforceable against violators, then the responsibility for corporate wrongs must ultimately lead to accountability.

The divergence on corporate responsibility is just one aspect of the conceptual divide. There is another category of scholars who are utterly opposed to the notion altogether that businesses should have any responsibilities beyond those accruing to their primary stockholders. From these opponents have come a backlash to the theorisation of business responsibility to society, arguing dismissively that the idea of business responsibility is analytically loose, lacks rigor, and nothing short of the 'preaching of pure and unadulterated socialism'.[122] They argue that the idea of business responsibility is pure rhetoric that is antithetical to the ideals of a free society. Friedman, for example, emphatically berates that '[w]hen I hear businessmen speak eloquently of the "social responsibility of businesses in a free-enterprise system", I am reminded of … unwitting puppets of the intellectual forces that have been undermining the basis of a free society these past decades.'[123] To him, only individuals and corporations have responsibilities; '"business" as a whole cannot be said to have responsibilities, even in this vague sense.'[124]

Despite Friedman's deep disagreement, his distinction between business and corporate responsibility aligns with this paper's analysis, and much of his reservations may not easily be categorised as misplaced. His position that CSR is fraught with ambiguity and looseness appears justified. Indeed, as he queried elsewhere, if businesses do have responsibilities, 'how are they to know what it is?'.[125] As it stands, the above CSR definitions do not seem to clarify with certainty what those responsibilities are. Are the responsibilities managerial (that is, to meet profit expectations of investors), socio-economic (that is, to act consistently with the objectives and values of society which vary from society to society), legal (that is, to merely meet the legal conditions for their functioning) or discretionary? If they are discretionary, is it in the sense of pursuing philanthropic ends or complying with human rights obligations?

As seen from the incoherence and overly broad attributions to the concept, CSR does not clearly align human rights standards as an integral part of business operations. The emphasis on discretion over and above obligation essentially deviates from the human rights principle that breaches of human rights standards will give rise to redress and accountability.

[122] M Friedman 'Legitimacy and responsibility: the social responsibility of business is to increase its profits' in RF Chadwick & D Schroeder (eds) *Applied ethics: critical concepts in philosophy* Vol 5 (2002) 57 (extracted from *The New York Times Magazine* 13 September 1970).

[123] As above; M Friedman 'Capitalism and freedom: fortieth anniversary edition' (2009) 135.

[124] Friedman (n 122 above) 57.

[125] Friedman (n 123 above) 133.

4 CORPORATE RESPONSIBILITY NECESSITATES ACCOUNTABILITY

Surely, within the context of human rights, any idea of responsibility that deviates from answerability as an ultimate end of justice is no responsibility at all. If the protection of the individual is truly the focus of international human rights law, then no category of violators, especially corporate violators, should be allowed to fly below the accountability radar. Given the events in many parts of the world that show that corporations have been involved in adverse human rights impacts, there is sufficient basis to demand that they be answerable for abuses for which they have been identified.[126] Human rights principles are not cast in stone such that they cannot respond to the exigencies of evolving corporate infractions. They are dynamic and adaptive; and they demand progressive interpretation from local and international tribunals as well as scholars for their full realisation.

The Universal Declaration recognises the imperative of a wholistic human rights regime that responds to and prevents human rights violations by all; and that is why it requires not just individual or states but every organ of society to respect them. Being 'a common standard of achievement for all mankind',[127] and notwithstanding its non-binding character, all other standards must meet its humanistic aspirations. The call for corporate accountability is neither utopian nor inconsistent with the Declaration's sacrosanct objective. To realise the corporate accountability objective, both hard and soft measures may prove to be useful, and voluntary as well as binding obligations may be ideal in this regard. But room for their coherent utilisation will first need to be created. The UNGPs, unfortunately, do not seem to make ample room for such complementarity. By creating elusive distinctions, using weak language, and pulling the essential legal roots of human rights off the corporate responsibility discourse, the UNGPs substantially twist the business and human rights debate from a victim-centred one, and far from the realm of business accountability. In many ways, it advances greater business interests than it does the individual's.

Internationalising CSR through the UNGPs work at cross-purposes with the international human rights regime and significantly weaken its objective towards protecting and realising fundamental human interests.[128] The goal should not be merely to have in place a regime of global governance for corporations. Rather, it must be to ensure that such regime functions 'in a normatively desirable way, that is, in

[126] S Khoury & D Whyte 'How human rights law has been used to guarantee corporations a "right to profit"' (15 March 2017) https://theconversation.com/how-human-rights-law-has-been-used-to-guarantee-corporations-a-right-to-profit-74593 (accessed 28 June 2017).

[127] Universal Declaration Preamble.

[128] Deva & Bilchitz (n 67 above) 3.

accordance with the values and principles underlying international human rights.'[129] That is not to say that corporations may not voluntarily employ CSR as a complementary catalyst to further close-up the governance gaps. Their failure to do so should not, however, prevent underlying corresponding obligations that operate in human rights instruments from applying to them.

So far, the UN Draft Norms may have been the only assemblage of standards to have come close to holding abusive corporations accountable for human rights infractions. They stipulate that TNCs and other businesses 'have the obligation to promote, secure the fulfilment of, respect, ensure respect of, and protect human rights recognized in international as well as national law.'[130] However, this prescription of business responsibility has been sternly criticised by prominent scholars from the global North including Ruggie: for directly applying human rights obligations to companies;[131] and for equating the responsibility of states with that of business entities.

There is no doubt that the power and influence of corporations and their potential for perpetrating abuse make them 'informal' duty-bearers under the international human rights regime. This, however, does not ostensibly place corporate enterprises on the same pedestal as the state.[132] The general acknowledgement is that states remain primarily liable for human rights promotion, protection and fulfilment. They however do not bear responsibility for infractions directly committed by companies. Their liabilities lie in their failure to properly regulate potential harmful conduct. Corporate enterprises remain liable for any adverse human rights impacts they create. Illustratively, a company can be held liable for violating the Bill of Rights under the South African Constitution due to the duty imposed by each right.[133] Equally, in a state like Benin where international law applies directly, every right established under a ratified international instrument imposes a duty of observance that is binding not only on the state but also on individuals and juristic persons.[134] In such cases, corporate responsibility and accountability are undisputable. As has been stated above, a distinction however must be made between the obligation to respect human rights and its enforcement. In dualist states, legislation maybe required for the domestic enforcement of international human rights law.

[129] Deva & Bilchitz (n 67 above) 2.

[130] UN Draft Norms para 1.

[131] Černič (n 3 above) 20; Ruggie (n 73 above) 827.

[132] Černič (n 3 above) 13; MT Kamminga 'Corporate obligations under international law' (2004) Submission to the Office of the United Nations High Commissioner for Human Rights 6.

[133] n 80 above.

[134] Articles 34 & 147 of the Constitution of the Republic of Benin 1990.

5 CONCLUSION

It must be acknowledged that the international human rights regime falls substantially short of fulfilling its objective of protecting human rights and fundamental freedoms. Its continuing inability to achieve consensus on corporate accountability for human rights violations significantly frustrate victims' hope of supranational redress in instances where domestic judicial systems fail. Domestic law similarly falters in its ability to regulate both local and transnational corporate actors. The inadequacies of both levels of governance (in)advertently appropriate to corporations, power without responsibility, and the liberty to violate individuals and ravage peoples unimpeded. Weak institutions and poor regulatory governance in the Third World, notably in Africa, make corporate human rights violations a recurring phenomenon. Persisting North-South divides do not assuage victims of egregious corporate violations; and the status quo, indeed, only favours the oppressor.

On the flip side, Africa's position on the legal basis of corporate human rights responsibility is far from being imprecise. The African human rights and bourgeoning criminal justice systems provide a background for conceptualising corporate responsibility in Africa differently. African human rights instruments emphasise the protection of individual and group concerns, and recognise that rights are underpinned by duties. More so, the recognition of corporate criminal responsibility in Africa amidst the persisting debates at the international level further clarifies Africa's quest to close its accountability deficit. These mark important points of engagement in the CHRR discourse, and are indicative of the growing acceptance on the continent that corporate responsibility should ultimately lead to legal answerability. This also shows Africa's preparedness to depart from a blind allegiance to non-African perspectives on contentious issues, in order to accomplish a broader and more comprehensive regime of accountability and social justice on the continent.

Given the seeming consensus that corporations should, indeed, bear some degree of responsibility, it is long past the time for human rights to cease to be used as 'a political tool in the legitimation of highly diverse political acts on the part of the ruling actors on national and world stages'.[135] States and scholars must put aside ideologically twisted conceptualisations, and place at the core of every human rights debate the individual's fundamental interests. The legal protection of rights imposes an implied duty of observance on all – individuals, groups, companies and the state – domestically and internationally without exceptions. Therefore, for corporate objectives to be justified in law or on the basis of social expectations, they must be consistent with internationally recognised human rights principles; and the breach of these must give rise to accountability. While voluntary commitments by corporate businesses to respect human right are welcome developments, their absence should not diminish the obligation to

[135] Flere (n 46 above).

respect human rights. By this proposition, domestic judicial systems and regional human rights mechanisms should rise up to the challenge of giving human rights protection in Africa a living face.

La promotion de la démocratie et d'un ordre constitutionnel de qualité par le système africain des droits fondamentaux: entre acquis et défis

*Alain Didier Olinga**

RÉSUMÉ: Les droits de l'homme ont un programme idéologique, celui de la mise en place, de la consolidation et de la préservation d'une société démocratique. Cette donnée, bien prise en compte notamment par les instances régionales européenne et interaméricaine, a été reçue au niveau africain. Les institutions chargées de la mise en œuvre de la Charte africaine des droits de l'homme ont en effet parfaitement compris et intégré cette mission. La Commission de Banjul, puis la Cour d'Arusha, fortement accompagnées en ce sens par les cours des communautés régionales, ont d'ores et déjà engagé une action significative en ce sens, sur le terrain de la démocratie électorale et de la culture démocratique, sur le terrain de la préservation des libertés publiques particulièrement sensibles pour l'Etat de droit, en l'occurrence la liberté d'expression, la liberté de la presse, le procès équitable. La jurisprudence africaine des droits de l'homme est déjà riche de l'affirmation d'un ensemble de principes, relativement stabilisés, qui valent comme des directives générales à destination des Etats parties à la charte de 1981. Ces acquis, cependant, méritent d'être consolidés, car les défis restent nombreux, en ce qui concerne les questions électorale et constitutionnelle. Pour les relever, il faut espérer que les institutions africaines des droits de l'homme sauront tirer tout le parti de la collaboration avec les juridictions des communautés régionales et de la mise à profit de la jurisprudence nationale des Etats africains. Spécifiquement, il faut espérer une mobilisation plus ambitieuse de la Charte africaine de la démocratie, des élections et de la gouvernance. Ces défis sont importants, mais largement à la portée des instances africaines.

TITLE AND ABSTRACT IN ENGLISH:

Promoting democracy and a high quality constitutional order through the African system of fundamental human rights: achievements and challenges

ABSTRACT: Human rights have an ideological objective, namely, the establishment, consolidation and preservation of democratic societies. This fact, well understood by the European and Inter-American regional bodies, has been adopted in Africa. The institutions responsible for implementing the African Charter on Human and Peoples' Rights (African Charter) have fully understood and integrated such mission. The Banjul Commission and the Arusha Court, strongly supported by the courts of the regional economic communities, have already taken significant steps in this direction, in the field of electoral democracy and democratic culture, in the field of the preservation of public freedoms that are central to the rule of law, especially freedom of expression, freedom of the press, and fair trial. African human rights jurisprudence is already rich in the affirmation of a set of relatively stable principles, which are valid as general guidelines for States Parties to the African Charter. These achievements, however, should be consolidated, as there are still many challenges with regard to electoral and constitutional issues. In order to overcome these challenges, it is hoped

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that African human rights institutions will be able to make full use of the collaboration with the courts of the regional communities, and the national jurisprudence of African States. Particularly, one should hope for a more ambitious mobilisation of the African Charter on Democracy, Elections and Governance. These challenges are real, but largely within the reach of African bodies.

MOTS CLÉS: culture démocratique, l'émergence démocratique africaine, consolidation de sociétés démocratiques, Afrique, jurisprudence africaine des droits de l'homme

SOMMAIRE:

1 INTRODUCTION

Si la Charte africaine des droits de l'homme et des peuples (Charte africaine), à la différence de la Convention européenne des droits de l'homme dédiée à la préservation de l'ordre démocratique européen,[1] n'a pas été portée sur ses fonds baptismaux par des régimes démocratiques, il est clair que la stratégie d'accompagnement de l'émergence et de la consolidation de sociétés démocratiques en Afrique ne peut faire l'économie de sa mobilisation volontariste. Une lecture attentive de la Charte de 1981 montre en effet que les mots de 'démocratie' et de 'constitution' n'y figurent pas. La Charte est une concession à la liberté faite par des Etats préoccupés pour leur plus grande part par le souci de combattre la subversion, terme qui, lui, figure bel et bien dans l'instrument adopté à Nairobi.[2] Et pourtant, le temps de la démocratie[3] n'a pas épargné l'Afrique, et l'impératif

1 S de Coqueray 'La Convention européenne des droits de l'homme et le droit des élections: entre patrimoine européen et suprématie étatique' (2016) *Constitutions* 557.

2 Article 23(2)(a) et (b) contient une référence claire aux activités subversives que les Etats s'engagent à interdire sur leur territoire respectif. Sur cette disposition, voir le commentaire de H Ascensio 'Article 23' in M Kamto (ed) *La Charte africaine des droits de l'homme et des peuples et le Protocole s'y rapportant relatif à la Cour africaine des droits de l'homme et des peuples* (2011) 599-625.

3 G Hermet 'Le temps de la démocratie' (1991) 128 *Revue internationale des sciences sociales* 265.

démocratique s'y exprime.[4] La décennie 1990, celle des transitions démocratiques en Afrique,[5] ainsi que celles qui l'ont suivie, ont vu le développement des instruments africains voués à la formulation des principes démocratiques, d'Etat de droit,[6] au point où il ne semble pas excessif d'avancer l'idée de la construction progressive d'un droit international africain de la gouvernance publique démocratique. Dans la foulée, la Commission de Banjul a su saisir le vent de l'histoire, pour faire de la Charte de 1981, le vecteur, le régulateur et le garant d'une gouvernance démocratique des Etats africains, avec une hardiesse jurisprudentielle remarquable, dans le sillage de laquelle semble vouloir s'inscrire la jeune Cour africaine des droits de l'homme et des peuples d'Arusha. Rendre compte des efforts des organes de contrôle de la Charte pour accompagner l'émergence et l'enracinement des ordres démocratiques en Afrique, tel est précisément l'objet de la présente contribution. Elle relève, à cet égard, des éléments de production normative et jurisprudentielle qui peuvent constituer, toutes choses étant égales et avec toute la prudence nécessaire, des acquis contributifs de ces organes de contrôle à la vie démocratique en Afrique. Elle relève, ensuite que de nombreuses lacunes et insuffisances, ou aspects non encore correctement adressés, demeurent et méritent d'être gérés de manière méthodique et durable. Avant d'examiner ces défis, il y a lieu tout d'abord d'exposer les acquis.

2 LES PRINCIPES DEMOCRATIQUES STABILISES DANS L'ŒUVRE DES ORGANES PANAFRICAINS DE PROTECTION DES DROITS DE L'HOMME

La Commission de Banjul, à travers de nombreuses résolutions, a clairement exprimé son souci pour l'avènement et l'enracinement de la culture des élections sincères et loyales sur le continent africain, de la culture d'alternance politique ou ce qu'elle appelle 'une culture politique de changement de pouvoir'.[7] Elle l'a fait car, à son avis, 'les élections représentent le seul moyen grâce auquel les peuples peuvent démocratiquement mettre en place leur gouvernement, conformément à la Charte africaine des droits de l'homme et des peuples'.[8] Ce travail

4 AD Olinga 'L'impératif démocratique dans l'ordre régional africain' (1998) 6 *Revue de la Commission africaine des droits de l'homme et des peuples* 57-80.

5 AD Olinga 'L'Afrique en quête d'une technique d'enracinement de la démocratie constitutionnelle' in M Kamto (ed*) L'Afrique dans un monde en mutation. Dynamiques internes, marginalisation internationale?* (2010) 165-189.

6 A titre d'exemple on peut citer: l'Acte constitutif de l'Union africaine; la Charte africaine de la démocratie, des élections et de la gouvernance; la Convention de l'Union africaine sur la prévention et la lutte contre la corruption; la Charte africaine sur les valeurs et les principes du service public et de l'administration.

7 Résolution sur les élections en Afrique adoptée lors de la 13ème session extraordinaire de la Commission, février 2013.

8 Résolution sur le processus électoral et la gouvernance participative, adoptée lors de la 19ème session ordinaire de la Commission, du 26 mars au 4 avril 1996 à Ouagadougou.

résolutoire, général ou spécifique à une situation prévalant dans un pays, a eu une suite jurisprudentielle importante, laquelle est aujourd'hui poursuivie, par la jurisprudence naissante de la Cour d'Arusha. Deux grandes tendances sont à mettre en évidence à cet égard. Dans un premier temps, les éléments directement liés à la démocratie électorale ont été progressivement définis. Ces éléments s'emboîtent avec des principes plus larges, relatifs à l'enracinement de l'Etat de droit.

2.1 La formulation des principes relatifs à la démocratie électorale

Les organes africains, en particulier ceux chargés au premier chef du contrôle du respect de la Charte africaine des droits de l'homme et des peuples, ont eu à connaître de cas relatifs à la démocratie électorale. Dans *l'affaire Mamboundou c Gabon,*[9] vidée par une décision du 24 juillet 2014, la Commission de Banjul a, probablement, énoncé de manière générale ce que l'on peut considérer à ce jour comme la philosophie des organes panafricains des droits de l'homme en matière électorale. Pour la Commission, 'même si aucun système électoral spécifique n'est applicable à tous les pays de manière indifférente, un processus électoral libre est constitué d'une série d'actes et de critères minimaux'.[10] La Commission énumère par la suite ces éléments, considérés comme 'les plus importants de ces composantes':[11]

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

C'est dire que des principes relativement clairs en la matière ont déjà été énoncés. En tout état de cause, un travail important a été abattu, notamment, contre les pratiques discriminatoires en la matière, de manière à engager une promotion plus conséquente de la culture démocratique, y compris le pluralisme et le rejet des pouvoirs militaires.

2.1.1 La lutte contre les discriminations en matière électorale

Sans refuser aux Etats une marge nationale d'appréciation[12] dans l'aménagement de leur règlementation en matière électorale, la

9 Communication 320/06.

10 Para 48.

11 Para 49.

12 AD Olinga & C Picheral 'La théorie de la marge d'appréciation dans la jurisprudence récente de la Cour européenne des droits de l'homme' (1995) 24 *Revue trimestrielle des droits de l'homme* 567-604.

Commission de Banjul a tenu à encadrer les prérogatives des Etats, y compris en matière constitutionnelle, pour que cette marge ne couvre pas l'arbitraire. Dans de nombreux Etats, les pouvoirs établis instrumentalisent, notamment, les conditions d'éligibilité dans l'unique objectif d'éliminer politiquement des adversaires. Pour la Commission, 'ces formes de discriminations sont à la base d'actes de violence et d'une instabilité sociale et économique qui n'ont profité à personne, mais ont plutôt jeté un doute sur la légitimité des élections nationales et sur l'image démocratique de certains Etats'.[13] Trois espèces de la Commission peuvent être à cet égard convoquées.

Dans la décision du 7 mai 2001, *Legal Resources Foundation c Zambie,* était sur la sellette un amendement à la Constitution zambienne en vertu duquel tout candidat à la présidence de la République devrait établir que ses deux parents étaient zambiens par la naissance ou par la descendance, bref qu'il est un 'autochtone zambien'. Le but principal, peut-être même son unique objectif, était de priver l'ancien président Kenneth Kaunda du droit de prendre part à l'élection présidentielle. La Commission a censuré cet amendement constitutionnel et prié la République de Zambie de prendre les dispositions nécessaires en vue de mettre ses lois et sa constitution en conformité avec la Charte africaine. Ce faisant, la Commission, bien avant l'adoption de la Charte africaine de la démocratie, des élections et de la gouvernance (CADEG), mettait en garde contre les manipulations des lois fondamentales dans un but de conservation du pouvoir et d'éviction d'adversaires politiques. Peu importe que les dispositions constitutionnelles querellées, comme c'était le cas en l'espèce, aient été approuvées par le Parlement, après un processus de consultation dans le cadre de la Commission Mwanakatwe. Pour la Commission la justification d'une limitation arbitraire 'ne peut pas provenir de la seule volonté populaire et, partant, elle ne peut pas être utilisée pour limiter les responsabilités des Etats parties en vertu de la Charte africaine'.[14] Finalement, pour le cas de l'ancien président zambien, la Commission se prononce de la manière suivante: 'des droits dont on a joui 30 années durant ne peuvent pas être retirés de manière si cavalière. Avancer qu'un zambien autochtone est un individu dont les parents sont nés dans ce qui, plus tard, est devenu le territoire souverain de l'Etat de Zambie est, à notre avis, arbitraire'.[15]

La deuxième espèce dans laquelle la Commission de Banjul affirme sa jurisprudence anti-discrimination est l'affaire *Mouvement Ivoirien des droits humains (MIDH) c Côte d'Ivoire*,[16] du 29 juillet 2008. Etaient sur la sellette les dispositions de la Constitution ivoirienne adoptée par référendum le 23 juillet 2000, dispositions aux sources de la funeste théorie de 'l'ivoirité'. En particulier, l'article 35 de ce texte énonçait que 'le Président de la République … doit être ivoirien d'origine, né de père et de mère eux-mêmes d'origine'. De même,

13 *Legal Resources Foundation c Zambie*, Communication 211/98, 7 mai 2001.
14 Para 70 de la décision.
15 Para 71.
16 Communication 246/02.

l'article 65 énonçait que le candidat aux fonctions de Président de la République, de président ou de vice-président de l'Assemblée Nationale, 'doit être ivoirien d'origine et ses deux parents eux-mêmes ivoiriens d'origine, doit n'avoir jamais renoncé à la nationalité ivoirienne et ne doit s'être jamais prévalu d'une autre nationalité'. Bien que la Constitution ait été approuvée par voie référendaire, la Commission va sanctionner les dispositions problématiques et demander leur révision. Ce faisant, la Commission semble indiquer que la Constitution, même adoptée par voie référendaire, n'exprime légitimement la volonté générale que dans le respect des engagements internationaux de l'Etat relatifs, notamment, aux droits fondamentaux, et que l'argument tiré de l'approbation par le peuple d'un dispositif normatif ostensiblement discriminatoire ne peut suffire à libérer l'Etat de son obligation de ne pas discriminer en vertu de la Charte africaine des droits de l'homme et des peuples. Dans l'affaire sous examen, la Commission va élaborer sa doctrine en matière de lutte contre les discriminations politiques et électorales, en ces termes: 'la Commission reconnait le fait que la fonction de Président de la République, de Président et de Vice-Président de l'Assemblée Nationale et d'autres fonctions similaires sont cruciales pour la sécurité d'un pays et qu'il serait imprudent de donner un chèque en blanc à l'accessibilité de ces fonctions. Le fait de placer des restrictions à l'éligibilité à ces fonctions ne constitue pas en soi une violation des droits de l'homme. Toutefois, lorsque ces restrictions sont discriminatoires, déraisonnables et injustifiables, l'objectif qu'elles sont destinées poursuivre sera éclipsé par leur caractère déraisonnable. S'agissant des restrictions posées par les dispositions constitutionnelles querellées, la Commission estime qu'elles sont des restrictions non nécessaire(s) au droit de participer aux fonctions publiques garanti à l'article 13 de la Charte africaine'.[17] Ces prises de position sont un coup de semonce général à destination de tous les Etats africains, où les dirigeants sont tentés d'instrumentaliser la Constitution à des fins de discrimination politique.

La troisième espèce jurisprudentielle est l'affaire *Modise c Botswana* du 6 novembre 2000.[18] Le nommé Modise, co-fondateur du Botswana National Front, parti d'opposition, a été déclaré immigré indésirable par le gouvernement du Botswana, déchu de sa citoyenneté botswanaise et expulsé en Afrique du Sud, Etat dans lequel il était né, de parents botswanais. Pour le Botswana, Modise ne pouvait bénéficier que d'une citoyenneté par acquisition et non d'une citoyenneté par naissance, ce qui était lourd de conséquences pour l'exercice de son droit à la participation politique. La Commission demande instamment au gouvernement du Botswana de prendre les mesures appropriées pour reconnaître à Modise sa citoyenneté par la naissance. La Commission invite ainsi l'Etat à avoir une démarche d'ouverture et d'acceptation de la différence d'opinions politiques, toutes choses importantes pour la promotion de la culture démocratique.

17 Para 86.
18 Communication 17/93.

2.1.2 La promotion de la culture démocratique

En luttant de manière déterminée contre les législations électorales discriminatoires, les organes chargés de l'application de la Charte visent plus fondamentalement la promotion de la culture démocratique. Cette culture implique la reconnaissance du rôle des partis politiques, sans en faire certes des rouages impératifs du jeu électoral. Dès *Jawara c Gambie*, 11 mai 2000,[19] la Commission de Banjul estime que 'l'interdiction des partis politiques est une violation du droit des plaignants à la liberté d'association reconnu par l'article 10(1) de la Charte'.[20] Deux ans plus tard, dans l'affaire *Lawyers for Human Rights c Swaziland*,[21] la Commission condamne la proclamation du roi Sobhuza III du 12 avril 1973 par laquelle ce dernier abrogeait la Constitution démocratique de 1968, déclarant illégaux les partis politiques, en ces termes: 'les partis politiques constituent un des moyens par lesquels les citoyens peuvent participer à la gouvernance, soit directement, soit par l'élection des représentants de leur choix. En interdisant la formation des partis politiques, la proclamation du Roi compromet sérieusement la capacité du peuple du Swaziland à participer à la gestion des affaires publiques de son pays, ce qui constitue une violation de l'article 13 de la Charte'.[22] Si les partis politiques sont, dans le cadre de la Charte, un maillon important de la vie démocratique, ils ne sont cependant pas un creuset impératif pour la sélection du personnel politique. Il est revenu à la Cour d'Arusha de préciser que le droit de participer librement à la direction des affaires publiques de son pays énoncé à l'article 13(1) de la Charte est un droit individuel, qui n'est pas sensé uniquement s'exercer avec d'autres individus ou dans le cadre de groupements d'individus, comme les partis politiques. Dans l'affaire *Tanganyika Law Society, the Legal and Human Rights Centre c Tanzanie, Mtikila c Tanzanie*,[23] au delà des considérations liées au contexte propre à l'Etat défendeur, la Cour a formulé une position générale qui vaut bien au-delà de l'affaire examinée, en ces termes: 'toute loi qui exige du citoyen d'être membre d'un parti politique avant de se présenter aux élections présidentielles, législatives et locales est une mesure inutile, qui porte atteinte au droit du citoyen de participer directement à la vie politique et constitue donc une violation d'un droit'. Cette prise de position générale de la majorité de la Cour a une portée considérable, car elle rend potentiellement condamnable devant la Cour, toute législation étatique hostile à la candidature indépendante ou particulièrement contraignante pour elle.

19 Communications 147/95 et 149/96.

20 Para 68.

21 Communication 251/2002.

22 Para 63; Pour un commentaire de cette décision, voir AD Olinga 'Vers un contentieux objectif à Banjul? L'affaire Lawyers for Human Rights contre Royaume de Swaziland devant la Commission africaine des droits de l'homme et des peuples' (2007) 1 *Revue juridique et politique des Etats Francophones* 29-52.

23 Requête 9/2011 et 11/2011.

La culture démocratique implique l'acceptation du verdict des urnes, surtout lorsque les élections ont été crédibles. C'est le sens de la position exprimée par la Commission de Banjul dans l'affaire *Constitutional Rights Project et Civil Liberties Organisation c Nigeria,* 31 octobre 1998:[24] 'participer librement à la gestion des affaires publiques implique, entre autres, le droit d'élire un représentant de son choix. Le corollaire évident de ce droit veut que le résultat de la libre expression de la volonté des électeurs soit respecté; autrement le droit de voter librement n'aurait pas de sens. En conséquence, l'annulation des résultats des élections, qui reflétaient le libre choix des électeurs, est une violation de l'article 13(1)'.[25] Dans la même espèce, la Commission met l'accent sur l'importance des observateurs indépendants pour la validation du scrutin. Pour la Commission, 'les critères des éléments essentiels qui constituent des élections libres et justes sont universellement convenus et des observateurs internationaux sont détachés pour veiller à ce qu'ils soient appliqués. Il serait contraire à la logique du droit international qu'un gouvernement ayant un intérêt quelconque concernant une élection, soit le juge ultime chargé de trancher si les élections se sont déroulées conformément aux normes internationales ou pas'.[26] L'annulation de l'élection nigériane, pour laquelle Bashorun M KO Abiola avait été donné vainqueur, était le fait du régime militaire de Sani Abacha. Cette précision est utile, car elle explique la position constante de la Commission de Banjul à l'égard des régimes militaires. Déjà dans l'affaire *Jawara c Gambie*, la Commission relève qu'il est évident que les militaires ont pris le pouvoir par la force, quoique cela se soit passé dans le calme. Ce n'était pas la volonté du peuple qui jusque-là ne connaissait que la voie des urnes comme moyen de désigner ses dirigeants politiques.[27] Mais c'est dans l'affaire *Media Rights Agenda and Constitutional Rights Project c Nigeria,* 31 octobre 1998,[28] que la Commission énonce une position générale selon laquelle 'les régimes militaires se fondent sur une base juridique contestable. Le gouvernement par la force n'est pas en principe compatible avec les droits des peuples à déterminer leur avenir politique'.[29] Exit le régime militaire, les organes africains se ruent sur l'objectivation des principes relatifs à l'enracinement de l'Etat de droit.

2.2 Les principes relatifs à l'enracinement de l'Etat de droit

L'Etat de droit est un concept aujourd'hui englobant, dont le référentiel de base est la soumission des institutions de l'Etat et des autorités publiques à la prééminence du droit, ainsi que la garantie des droits et libertés, notamment par une institution judiciaire indépendante. Si la

[24] Communication 102/93.
[25] Para 50.
[26] Para 49.
[27] Para 73.
[28] Communication 105/93.
[29] Para 80.

garantie de tous les droits participe, d'une manière ou d'une autre, à la réalisation de l'Etat de droit, deux aspects particuliers méritent d'être mis en évidence ici : d'une part le statut de l'institution judiciaire, d'autre part la protection de la liberté de la presse.

2.2.1 La préservation du statut de l'institution judiciaire

Au regard de l'instrumentalisation dont l'institution judiciaire est souvent l'objet dans les Etats africains, en particulier pour discréditer et éliminer des adversaires politiques, voire pour couvrir du sceau de la légalité et de la régularité des processus électoraux problématiques, une attention particulière doit lui être accordée.

La Commission africaine, par une interprétation et une application combinée des articles 7 et 26 de la Charte, a développé les éléments de ce que l'on peut considérer comme le statut de l'institution judiciaire dans la préservation de l'Etat de droit, du moins au regard de la Charte africaine. Elle a affirmé sa jurisprudence, notamment dans le contexte tourmenté des actes liberticides adoptés au Nigeria sous la présidence de Sani Abacha. Dans l'affaire *Civil Liberties Organisation c Nigeria,* mars 1995,[30] la Commission voit dans l'article 26 de la Charte,[31] celui qui traite des institutions qui sont 'normalement le bastion de la protection des droits de la personne contre les abus de pouvoirs de l'Etat'.[32] L'indépendance des tribunaux, en particulier vis-à-vis de la branche exécutive du gouvernement, est donc une nécessité de l'Etat de droit démocratique, ce qui exclue que l'on puisse soustraire purement et simplement certains actes de la puissance publique à tout contrôle juridictionnel. Le principe du contrôle juridictionnel des actes publics doit ainsi remettre en cause non seulement la vieille construction jurisprudentielle française des actes dits de gouvernement, mais aussi les régimes spéciaux d'irresponsabilité de la puissance publique institués par certains Etats. Sur ce dernier point, la position de la Commission a été clairement affirmée dans l'affaire de *l'Association des Victimes des violences post-*électorales *et Interights c Cameroun.*[33] Dans une autre affaire camerounaise, la Commission est allée jusqu'à remettre en cause l'organisation du Conseil Supérieur de la Magistrature, instance de gestion de la magistrature au Cameroun. En effet, dans l'affaire *Gunme et autres c Cameroun,*[34] mai 2009, la Commission affirme que 'l'admission par l'Etat défendeur que le Président de la République et le Ministre chargé de la Justice soient respectivement le Président et le Vice-Président du Conseil judiciaire supérieur constitue une preuve manifeste que le judiciaire n'est pas

30 Communication 129/94.

31 Article 26: 'les Etats parties à la présente Charte ont le devoir de garantir l'indépendance des tribunaux et de permettre l'établissement et le perfectionnement d'institutions nationales appropriées chargées de la promotion et de la protection des droits et libertés garantis par la présente Charte'.

32 Para 15 de la décision.

33 Communication 272/03, décision du 25 novembre 2009.

34 Communication 266/2003.

indépendant'.[35] La Commission dans sa décision, invite le Cameroun à 'réformer le Conseil judiciaire supérieur en veillant à ce qu'il soit composé de personnalités autres que le Président de la République, le Ministre de la Justice et les membres de l'Exécutif', ce qui nécessite en réalité une révision de la Constitution[36] et, au-delà, un changement radical de la logique institutionnelle dans laquelle le Président de la République est garant du fonctionnement régulier des pouvoirs publics, garant en particulier de l'indépendance de la magistrature. En fait au sein de la Commission, il y a plusieurs traditions judiciaires qui se croisent, l'une francophone avec une grande implication du pouvoir exécutif dans le fonctionnement de la justice, l'autre anglo-saxonne avec une implication *a priori* moindre de l'exécutif. Toutefois, cette opposition doit être nuancée car, comme la Cour d'Arusha l'a relevé, au sujet de la figure du Procureur dans le cadre judiciaire burkinabé, en dehors des comportements particuliers d'un procureur dans une affaire donnée, 'on ne saurait dire que l'institution et le profil du procureur dans le système juridique burkinabé, soit en soi et par nature contraire à l'article 7 de la Charte, dès lors que l'existence de cette institution n'affecte pas l'indépendance des juridictions saisies'.[37]

S'agissant de l'institution judicaire, il y a lieu de mettre en évidence une position de principe de la Commission africaine, en particulier dans le contexte actuel de lutte contre le terrorisme, à savoir l'illégitimité radicale des tribunaux militaires à juger des civils, au regard de leur composition, des relations hiérarchiques et des procédures suivies, toutes choses qui ne peuvent garantir un procès équitable. Dans l'affaire *Media Rights Agenda c Nigeria* 6 novembre 2000,[38] la Commission estime déjà 'la comparution, le jugement et la condamnation de Malaolu, un civil par un tribunal militaire spécial, présidé par des officiers militaires en activité, qui sont encore régis par le règlement militaire est, sans plus, préjudiciable aux principes fondamentaux du procès équitable'. Pour la Commission, 'tant la doctrine que la pratique judiciaire s'accordent sur ce que les tribunaux militaires sont des mécanismes disciplinaires créés pour connaitre des infractions de type militaire, prévues par une législation militaire, commises par des membres du personnel militaire et lorsque ceux – ci sont sous l'emprise de la législation militaire. En somme, et même au risque d'une tautologie, la compétence des juridictions militaires est strictement militaire'.[39] Cette prise de position générale interpelle l'ensemble des Etats africains ayant retenu ou étendu la compétence *ratione personae* des juridictions militaires aux civils, afin qu'ils modifient en conséquence leur législation. Cette approche interpellatrice vaut également en ce qui concerne la liberté de la presse.

35 Para 211.

36 Le Conseil supérieur de la magistrature est, en effet, évoqué à l'article 37 alinéa 3 de la Constitution, notamment.

37 Voir *Zongo c Burkina Faso,* affaire 13/2011, arrêt du 28 mars 2014, par 126.

38 Communication 224/98.

39 *Titanji Duga Ernest (pour le compte de Chéonomu Martin et autres) c Cameroun,* Affaire 287/04, mars 2014, paragraphe 61.

2.2.2 La protection de la liberté de la presse

Que ce soit à l'occasion de l'examen de la condition de recevabilité relative à la prohibition des termes outrageants et insultants, ou plus directement à l'occasion de l'examen des communications mettant en jeu l'article 9 de la Charte, les organes chargés du contrôle du respect de la Charte ont bâti un régime protecteur de la liberté d'expression, y compris la liberté de presse, la protection des journalistes. L'examen de la condition de recevabilité de l'article 56(3) de la Charte, au-delà de l'aspect procédural qu'est la recevabilité, a été en effet utilisé pour bâtir un équilibre entre liberté d'expression et respect de l'ordre public.[40] Ainsi, dans l'affaire 293/2004, *Zimbabwe Lawyers for Human Rights & Institute for Rights and Development c Zimbabwé*, mai 2008, au paragraphe 47 de sa décision, la Commission de Banjul énonce de manière générale qu' 'il doit y avoir un équilibre entre le droit de s'exprimer librement et le devoir de protéger les institutions étatiques en vue de s'assurer que, tout en décourageant le langage injurieux, la Commission africaine ne viole pas ou n'entrave pas en même temps la jouissance des autres droits garantis par la Charte africaine, notamment le droit à la liberté d'expression'.

Dans le groupe d'affaires 140/94, 141/94 et 145/95, *Constitutional Rights Project, Civil Liberties Organisation et Media Rights Agenda c Nigeria*, la Commission de Banjul déclare de manière générale que 'la liberté d'expression est un droit fondamental et vital pour l'épanouissement de la personne et de sa conscience politique, ainsi que sa participation à la direction des affaires politiques de son pays. Aux termes de la Charte Africaine, ce droit comprend le droit de recevoir des informations et celui d'exprimer ses opinions'.[41] Il convient de relever avec emphase le lien que la Commission établit entre la liberté d'expression, le développement de la conscience politique des citoyens et la participation conséquente de ceux-ci à la direction des affaires politiques de leur pays. Ce lien doit rendre la Commission, et la Cour d'Arusha, plus vigilantes sur les démarches des Etats, pendant les élections, consistant à priver les citoyens de tout accès aux moyens modernes de communication que constituent les réseaux sociaux. Il est à espérer que la Commission de Banjul diligentera une résolution sur la liberté d'expression et les NTIC, de même qu'elle finalisera l'étude sur la liberté d'expression en rapport avec les élections. Dans la même affaire nigériane sus évoquée, la Commission a pu déclarer que 'le droit de recevoir des informations est absolu : l'article 9 ne prévoit aucune dérogation, quel que soit le sujet des informations ou opinions et quelle que soit la situation politique du pays'.[42] La formule peut sembler excessive, mais plus avant dans sa décision, la Commission reconnait elle-même que si les limitations à ce droit, comme à tout autre du reste,

[40] Voir AD Olinga 'La condition de recevabilité relative à l'interdiction des termes outrageants et insultants dans la jurisprudence de la Commission africaine des droits de l'homme et des peuples' (2012) 92 *Juridis Périodique, Revue de droit et de science politique* 99-106.

[41] Para 36 de la décision.

[42] Para 38.

ne doivent pas conduire à le rendre illusoire, le principe même des limitations ne souffre aucune contestation, ce qui relativise le caractère 'absolu' du droit[43] précédemment affirmé.

Les organes africains ont pris sur eux d'assurer la protection des journalistes contre les empiètements injustifiés dans l'exercice de leurs fonctions ou contre les représailles vis-à-vis de leur personne. Dans l'affaire *Jawara c Gambie*, la Commission de Banjul déclare que 'l'intimidation, l'arrestation ou la détention des journalistes pour des articles publiés ou des questions posées privent non seulement les journalistes de leurs droits d'expression et de diffusion de leur opinion, mais aussi le public de son droit à l'information'.[44] La Cour africaine des droits de l'homme et des peuples a, pour sa part, apporté une contribution décisive à la protection des journalistes, en prenant position sur la question controversée de la 'dépénalisation des délits de presse', dans son arrêt du 5 décembre 2014 en l'affaire *Lohé* Issa *Konaté c Burkina Faso*. Lohé avait signé dans un journal du pays, *l'Ouragan*, deux articles particulièrement critiques contre le Procureur du Faso. Il a été poursuivi pour diffamation, injures publiques et outrage à magistrat, jugé, condamné à douze mois d'emprisonnement, à des amendes et dommages-intérêts, le journal *l'Ouragan* étant suspendu de parution pour six mois, entre autres peines. Pour la Cour d'Arusha, les dispositions du Code Pénal burkinabé sur la base desquelles Lohé a été condamné à une peine privative de liberté 'ne sont pas compatibles avec les prescriptions de l'article 9 de la Charte et de l'article 19 du Pacte'.[45] De manière générale, de l'avis de la juridiction africaine, 'hormis des circonstances graves et très exceptionnelles en particulier l'apologie de crimes internationaux, l'incitation publique à la haine, à la discrimination ou à la violence ou les menaces à l'égard d'une personne ou d'un ensemble de personnes, en raison de critères spécifiques tels que la race, la couleur, la religion ou l'origine nationale, la Cour considère que les infractions aux lois relatives à la liberté d'expression et de presse ne sauraient être sanctionnées par des peines privatives de liberté sans être contraires aux dispositions de la Charte'.[46] En clair, la peine privative de liberté pour les journalistes n'est pas exclue, mais elle doit être exceptionnelle, pour des infractions particulièrement graves. Il y a là une directive générale qui devrait inspirer la révision de nombreuses législations relatives à la communication sociale en Afrique. Il est compréhensible, devant un énoncé d'une telle audace, que l'on ait pu écrire que 'with this approach, the Court already applies

43 Sur le traitement de la liberté d'expression par la Commission africaine, par comparaison avec l'approche de la Cour européenne des droits de l'homme, voir notre article 'Les emprunts normatifs de la Commission africaine aux systèmes européen et interaméricain des droits de l'homme' (2005) 62 *Revue trimestrielle des droits de l'homme* 532-534.

44 Para 65.

45 Le Pacte auquel il est fait référence est le Pacte international relatif aux droits civils et politiques.

46 Para 165 de l'arrêt.

siginificantly standards than Germany, for example, in terms of the admissible statutory nature of relevant criminal provisions'.[47]

En somme, bien que la démocratie et l'Etat de droit n'aient pas été explicitement évoqués dans la Charte de 1981, la Commission et la Cour africaines des droits de l'homme et des peuples sont, patiemment et résolument, en train d'en faire des instruments au service de l'émergence d'un ordre démocratique régional africain. Toutefois, si les acquis, jurisprudentiels notamment, sont à saluer, les défis restent importants sur le chemin de la consolidation, avec l'aide des instances africaines des droits de l'homme, des jeunes expériences démocratiques africaines.

3 LES DEFIS DE L'ACCOMPAGNEMENT DEMOCRATIQUE AFRICAIN PAR LES ORGANES AFRICAINS DE PROTECTION DES DROITS DE L'HOMME

Les organes africains chargés de la mise en œuvre de la Charte africaine des droits de l'homme et des peuples sont résolument invités à accompagner, par une politique jurisprudentielle volontariste, mais techniquement rigoureuse, les espoirs des sociétés africaines vers des régimes de droit,[48] vers des sociétés démocratiques, respectueuses du pluralisme, garantes de la tolérance et vivifiées par une culture d'ouverture et de consensus. En d'autres termes, ils doivent faire de la Charte africaine le socle de la réalisation et de la préservation de la qualité de l'ordre constitutionnel et démocratique au sein des Etats africains parties. A cet égard, plusieurs questions cruciales doivent être adressées, de même que les instruments africains dédiés à la démocratie telle que la CADEG doivent connaître un traitement processuel conséquent, l'exemple des juridictions des communautés économiques régionales pouvant à cet égard être hautement instructif.

3.1 Questions cruciales de l'émergence démocratique africaine

Deux aspects doivent être pris à bras le corps par les organes de suivi de la Charte africaine des droits de l'homme et des peuples, sur le terrain de la protection devant la Commission et la Cour, ce qui dépend de l'initiative des plaideurs, et aussi sur le terrain de la promotion, que la Commission peut actionner *proprio motu*. Il s'agit, d'une part, de la question électorale et, d'autre part, de la question constitutionnelle, deux aspects du reste intimement liés, les controverses autour de la

47 M Loffelmann 'Recent jurisprudence of the African Court on Human and Peoples' Rights. Developments 2014 to 2016' (2016) German Cooperation/GIZ 34.

48 La formule 'régime de droit' est tirée du préambule de la Déclaration universelle des droits de l'homme.

Constitution ayant généralement pour enjeu la dévolution subséquente du pouvoir politique par le jeu électoral. En dépit de la souveraineté des Etats et du principe de l'autonomie constitutionnelle, ces questions ne sont pas soustraites par nature au droit international en général,[49] au droit international des droits et libertés en particulier.[50]

3.1.1 La question électorale

Au regard de l'abondance des controverses relatives à la qualité, ou plutôt à la mauvaise qualité, des scrutins sur le continent, il peut sembler étrange que le contentieux en matière électorale devant la Commission de Banjul et la Cour d'Arusha soit presque nul. Le droit à la participation politique électorale est à ce jour, quantitativement, l'un des parents pauvres du contentieux africain des droits de l'homme. Or, la Commission et la Cour ont un rôle crucial à jouer pour faire asseoir en Afrique une culture des élections démocratiques, une culture d'acceptation du verdict des urnes, une culture d'alternance pacifique des hommes et des partis au pouvoir politique et au gouvernement de l'Etat. Elles doivent œuvrer résolument dans le sens de l'intégrité, de la sincérité et de la loyauté des élections. Ainsi il leur faut prêter une attention au mode de fabrication de la règle électorale, selon qu'il reflète le consensus minimal de la classe politique ou non, selon que cette fabrication intervient à la veille des élections ou non. Il faut ensuite veiller au contenu de la loi électorale, notamment si elle ne contient pas des éléments de discrimination, en ce qui concerne l'éligibilité, la constitution de l'électorat, les circonscriptions électorales, les modes de scrutin, l'accès aux médias, le financement des élections, la possibilité de contester les éléments du scrutin dans le cadre d'un procès équitable, entre autres. Si les Etats, en la matière, ont une marge d'appréciation liée à la diversité des trajectoires historiques et des contextes politiques et sociologiques nationaux, il est clair que l'on doit veiller, en s'inspirant de l'orientation de l'ordre conventionnel européen des droits de l'homme,[51] à la libre expression de l'opinion du peuple sur le choix des élus, y compris le Président de la République,[52] élément du droit à la libre participation politique du citoyen. La

[49] M Kathia 'Droit international et démocratie' (2007/4) 220, in *Diogène* 36-48; voir aussi J Tajadura Tejada 'La doctrine de la Cour européenne des droits de l'homme sur l'interdiction des parties politiques' (2012/2) 90 *Revue française de droit constitutionnel* 339-371; X Souvignet 'Le modèle politique de la Cour européenne des droits de l'homme: du pouvoir du peuple à la souveraineté du sujet' (2010) 5 *Jurisdoctoria* 41-60; V Fabre-Alibert 'La notion de 'société démocratique' dans la jurisprudence de la Cour européenne des droits de l'homme' (1998) *Revue trimestrielle des droits de l'homme* 465-496.

[50] Y Lecuyer '*Le droit à des élections libres' (2014)* Conseil de l'Europe.

[51] Voir M Levinet 'Droit constitutionnel et Convention européenne des droits de l'homme. La confirmation de l'autonomie des Etats en matière de choix des systèmes électoraux. Brèves réflexions sur l'arrêt rendu par la Cour européenne des droits de l'homme dans l'affaire *Yumak et Sadak c Turquie* (Gr.Ch. 8 juillet 2008)' (2009) 78 *Revue Française de Droit Constitutionnel* 423-430.

[52] Voir B Duarte 'Le Chef de l'Etat: un 'corps législatif' au sens de l'article 3 du protocole n°1 de la Convention européenne des droits de l'homme?' (2009) 79 *Revue française de droit constitutionnel* 477-511.

Commission de Banjul, à notre sens, devrait prendre l'initiative d'une résolution thématique à vocation normative sur le droit à la participation politique, même si la Cour a déjà vu dans l'Observation générale 25 du Comité des droits de l'homme une 'déclaration faisant autorité sur l'interprétation de l'article 25 du pacte international relatif aux droits civils et politiques (PIDCP).'[53] Cela ne dispense pas les instances africaines d'un travail de définition autonome ou d'une démarche contextuée en la matière.

Les organes africains doivent, par ailleurs, s'intéresser au fonctionnement des commissions électorales ou, plus largement, des organismes électoraux. En effet, l'expérience de maints Etats africains montre que les organismes électoraux, loin d'être des rouages indépendants, neutres et impartiaux, brillent plutôt par leur posture partiale, partisane, généralement au profit des pouvoirs en place. Les éléments qui peuvent intéresser les instances africaines en rapport avec ces organismes électoraux sont, entre autres: leur composition, le mode de désignation et le statut de leurs membres, leurs compétences et pouvoirs, leurs moyens d'action y compris leur mode de financement. De même que le droit international des droits de l'homme consacre le droit de toute personne d'être jugée par un tribunal indépendant et impartial, de même faut-il considérer que les exigences d'indépendance, d'impartialité, de neutralité et d'intégrité des organismes électoraux devraient être considérées comme des éléments essentiels du droit du citoyen à la libre participation politique. Dès lors, les questions relatives à ces organismes ne sauraient être soustraites au champ des droits de l'homme, et à l'examen des instances africaines compétentes. A cet égard, si l'on ne peut que s'étonner de la faiblesse du contentieux relatif à la matière électorale devant la Commission de Banjul et la Cour d'Arusha, il faut saluer l'inauguration à Arusha d'une jurisprudence audacieuse, avec l'arrêt du 18 novembre 2016 en l'affaire *Actions pour la protection des droits de l'homme (APDH) c Côte d'Ivoire*. Certes la Cour n'a pas fait sienne, telle quelle, la formule de la requérante évoquée au paragraphe 108 de son arrêt, à savoir 'le droit qu'ont les citoyens d'avoir des organes électoraux nationaux indépendants et impartiaux', elle a donné des éléments concrets devant orienter l'appréciation de la compatibilité du statut d'un organisme électoral avec les instruments de droits de l'homme dont elle assure le contrôle du respect. Ainsi, à l'indépendance institutionnelle énoncée au plan des principes dans le texte de création, l'organe électoral doit 'être composé selon la loi de façon à garantir son impartialité et à être perçu comme tel';[54] pour cela, 'pour qu'un tel organe puisse rassurer le public sur sa capacité à organiser des élections transparentes, libres et justes, sa composition doit être équilibrée'.[55] Cet équilibre, à la lecture des développements subséquents de la Cour, dépend de la représentation respective du 'pouvoir en place' et de 'l'opposition' et les conséquences qui en découlent en termes de

53 *Tanganyika Law Society and The Legal and Human Rights Centre et Mtikila c Tanzanie*, Requête 9 & 11/2011, 14 juin 2013, para 107-3.

54 Para 123.

55 Para 125.

'situation plus avantageuse' des candidats d'un bord par rapport à ceux d'un autre. Il est évident que les données de l'affaire examinée ont influencé l'analyse du principe d'équilibre effectuée par la Cour. Cela n'exclut pas que, à l'avenir, la Cour puisse s'appuyer sur d'autres considérations, notamment le genre, l'âge, la ventilation des catégories socio professionnelles, pour examiner la variable d'équilibre. Au-delà de l'aspect contentieux, il est envisageable que les attributaires de la saisine en matière consultative puissent activer cette procédure pour faire vérifier systématiquement par la Commission ou la Cour la conformité des procédures et dispositions relatives aux élections à la Charte africaine des droits de l'homme et des peuples et aux autres instruments juridiques internationaux applicables devant ces instances. Bien que les énoncés qui découleraient de telles démarches ne soient pas obligatoires, leur accumulation ne manquerait pas de constituer une somme tenant lieu de directive d'interprétation et, par conséquent, de faire jurisprudence.

Les mécanismes africains doivent se montrer ouverts à l'examen des questions touchant au contentieux électoral, soit au titre du droit à un procès équitable, soit au titre du droit à la participation politique. La faiblesse quantitative du contentieux international africain des droits de l'homme relatif au contentieux national des élections étonne l'observateur et l'analyste du système africain des droits de l'homme, au regard des crises post-électorales liées à de graves dysfonctionnements des procédures relatives au contentieux des élections. Dans ce décor encore peu fourni, il faut cependant mettre en exergue l'affaire *Pierre Mamboundou c Gabon* déjà citée, dans laquelle la Commission de Banjul a examiné la question de la gestion du contentieux électoral. Il est vrai que l'Etat visé n'a pas été condamné, mais cela n'a pas empêché la Commission d'énoncer que

> les normes relatives aux élections (...) consacrent le principe de crédibilité des organes chargés du contentieux électoral comme un critère central de transparence des élections. Notamment, un contentieux électoral crédible inclut la possibilité pour toute partie prenante intéressée de saisir les institutions compétentes pour contester la légalité de l'organe de contrôle des résultats et la régularité des actes posés par ledit organe.[56]

En fait, en saisissant de manière plus dynamique la matière électorale, les mécanismes panafricains œuvreraient à la consécration, dans le système africain, d'un véritable droit aux élections ainsi qu'à l'émergence de standards africains de l'intégrité et de la loyauté des élections, gages d'un ordre constitutionnel de qualité.

3.1.2 La question constitutionnelle

L'infortune dans laquelle se trouve aujourd'hui, dans de nombreux Etats africains, la norme constitutionnelle, est l'une des causes des soubresauts socio-politiques porteurs de graves violations de droits fondamentaux, des droits civiques et politiques et des droits civils.

[56] Para 67.

Alors que la CADEG affirme de manière emphatique le principe de la prééminence de la norme constitutionnelle,[57] la réalité dans plusieurs Etats montre une logique de manipulation de la Constitution contraire à ce principe. Certes, de par le droit international, la souveraineté de l'Etat induit son autonomie en ce qui concerne la définition des contours de son ordre constitutionnel. Même, a-t-on pu penser, il y aurait une indifférence du droit international, du droit international des droits de l'homme quant à l'orientation du régime politique et constitutionnel de l'Etat.[58] Toutefois, il faut relever que, dans l'ordre international, la formule des révolutionnaires français contenue dans l'article 16 de la Déclaration des droits de l'homme et du citoyen,[59] suivant laquelle toute société dans laquelle la garantie des droits n'est pas assurée n'a pas de constitution, tend à devoir être retenue. Du point de vue des droits de l'homme, trois aspects relatifs à la Constitution méritent une attention particulière: la fabrication de la norme constitutionnelle, le contenu de la norme constitutionnelle, le contentieux de la norme constitutionnelle.

Les modalités de fabrication de la norme de nature ou de valeur constitutionnelle, dans toute la mesure où elle n'emprunte pas la voie de la sédimentation prétorienne, doivent être respectueuses du droit des citoyens à la participation politique. Ces modalités impliquent l'association des diverses composantes politiques de la nation à la discussion constitutionnelle, l'implication des institutions nationales compétentes, y compris les parlements et les juridictions constitutionnelles, l'implication le cas échéant du peuple par voie référendaire dans le processus. Le processus d'élaboration et de révision de la loi fondamentale doit être consensuel, participatif, ouvert et transparent, recueillant l'assentiment du peuple ou de ses représentants légitimes, pour être conforme au droit des citoyens à la libre participation politique prévu par les instruments des droits de l'homme. Toute démarche ayant trait à la Constitution qui, au plan méthodologique, exclue tout processus réellement participatif et inclusif, limite le débat et les possibilités d'amendement du projet de texte concerné, rejette ou biaise le processus référendaire, doit être considérée comme une violation du droit à la libre participation politique des citoyens. La Constitution des droits de l'homme est une Constitution dont on a eu le temps suffisant de discuter les termes et le contenu, une Constitution pour l'élaboration de laquelle l'on a eu recours à un processus ouvert et inclusif. Le droit des droits de l'homme

57 L'article 2(2) énonce l'objectif de 'promouvoir et renforcer l'adhésion au principe de l'Etat de droit fondé sur le respect et la suprématie de la Constitution et de l'ordre constitutionnel dans l'organisation politique constitutionnel dans l'organisation politique des Etats parties'.

58 Le Pr Philippe Weckel évoque 'le principe d'indifférence du droit international à l'égard des questions constitutionnelles'. Voir 'Présentation' in R Adjovi (ed) *Cour africaine des droits de l'homme et des peuples. L'affaire Mtikila c Tanzanie.* Dossier du pôle Afrique de *Sentinelle*, 2013, 3. A contrario, voir SM Kienou 'L'incidence du droit régional africain sur le droit constitutionnel des Etats francophones d'Afrique de l'Ouest' (2017/2) 110 *Revue française de droit constitutionnel* 413-436.

59 Pour un commentaire de cette disposition, voir P Albertini in G Conac, M Debene & G Teboul (dirs) *La Déclaration des droits de l'homme et du citoyen de 1789. Histoire, analyse et commentaires (1993)* 331-342.

certes à cet égard, ne peut prétendre imposer un carcan méthodologique uniforme aux Etats. Toutefois, l'essentiel est que les procédures et méthodes utilisées soient garantes de la réelle, large et libre expression de l'opinion du peuple ou des institutions légitimes sur la norme constitutionnelle à adopter ou à réviser.

Le droit international des droits de l'homme ne peut se désintéresser de la substance et du contenu de la norme constitutionnelle. Une constitution est plus qu'un cadre formel, et l'on ne peut en avoir qu'une vision instrumentale. Elle a également et surtout une dimension substantive. En effet, le principe de la prééminence ou de la suprématie de l'ordre constitutionnel serait vidé de sens, et pourrait même devenir un danger, si une attention particulière n'était pas accordée à la substance de l'ordre constitutionnel dont il faut précisément garantir la suprématie. Une grande différence existe en effet entre la Constitution formelle, éventuellement problématique voire liberticide que l'on peut malgré tout invoquer comme la loi fondamentale, à respecter, et la Constitution substantielle qui peut conduire à refuser à celle-ci le titre même de Constitution. Du point de vue des droits de l'homme, toute constitution qui de manière générale n'énonce pas les droits et n'aménage pas les modalités de leur garantie, et de manière spécifique n'aménage pas la participation politique et civique libre des citoyens, n'en est pas véritablement une. La qualité de l'ordre constitutionnel, sous le prisme des droits fondamentaux, n'est pas une affaire d'enveloppe servant d'enseigne décorative à un ordre politique non libéral et non démocratique; elle est liée à une substance matérielle, à des arrangements procéduraux et à des montages institutionnels tendus, tous, vers l'organisation de la liberté, la préservation de la dignité, la réalisation du bien-être et l'aménagement de la participation des citoyens à la vie de la cité. Plus un ordre constitutionnel tend vers cet *idéal commun à atteindre*[60] par les nations, plus sa qualité augmente, la perfection absolue étant naturellement difficile à atteindre en la matière. La matière des droits de l'homme opère ainsi, tel le levain dans la pâte, à la manière d'un aiguillon permanent de la qualité de l'ordre constitutionnel, d'un régulateur et d'un facteur d'amélioration constante dudit ordre.

Enfin, le droit international des droits de l'homme ne peut se désintéresser du contentieux national relatif à la norme constitutionnelle. En d'autres termes, d'une manière générale, et plus spécifiquement encore pour des sociétés démocratiques en voie d'émergence, comme celles d'Afrique, le contentieux des règles constitutionnelles doit être réfléchi par les droits fondamentaux des citoyens, au premier rang desquels le droit à la libre participation politique. A cet égard, l'on peut s'interroger sur le certificat de conformité aux droits de l'homme que l'on peut décerner aux

[60] Formule empruntée au préambule de la Déclaration universelle des droits de l'homme.

jurisprudences constitutionnelles récentes au Burundi (arrêt 4 mai 2015 de la Cour Constitutionnelle du Burundi), au Congo,[61] en RDC, pour ne prendre que ces exemples. Dans les deux premiers cas, il s'est agi de lever le verrou de la limitation des mandats par une révision constitutionnelle menée dans des conditions politiques et procédurales hautement questionnables. Si la même préoccupation existe en RDC, l'on n'y a pas encore procédé formellement à une révision de la Constitution. Dans son arrêt du 8 août 2015, rendu sur saisine de la commission électorale nationale indépendante (CENI), la Cour constitutionnelle a constaté 'un cas de force majeure, irrésistible et insurmontable qui motive la commission électorale nationale indépendante à adapter son calendrier électoral', un cas de force majeure empêchant la Commission d'organiser les élections dans les délais prévus par la loi. Dans toutes ces hypothèses, la justice constitutionnelle était parfaitement consciente d'avoir été sollicitée pour revêtir la volonté politique de ne pas se soumettre à la règle constitutionnelle existante, souvent relativement plus consensuelle, du vernis de la régularité constitutionnelle.[62] Autrement dit, les juridictions constitutionnelles, de par leur statut et l'autorité constitutionnelle de leurs énoncés, ont imposé à l'ensemble de la nation la volonté d'une partie de celle-ci, voire d'un individu ou d'un groupe d'individus de ne pas respecter la constitution. Au nom de quoi, dès lors, ceux qui sont chargés de veiller au respect par tous de la Constitution, à commencer par les juges constitutionnels eux-mêmes, pourraient-ils exiger des autres de la respecter scrupuleusement, y compris l'autorité de leurs décisions qui ne se fonde que sur ladite constitution, alors même qu'ils en organisent les conditions de non respect et de violation par certains? Telle est la question, grave, de théorie constitutionnelle, que le fonctionnement récent de certaines juridictions constitutionnelles africaines soulève, lorsque les gardiens de l'autorité de la norme constitutionnelle en sont les premiers fossoyeurs, lorsqu'ils légitiment l'oppression politique en la drapant des apparences de la constitutionnalité, ouvrant la voie à la résistance à l'oppression, droit naturel en vertu de la Déclaration des droits de l'homme et du citoyen de 1789 en France, même si sa consécration en droit international des droits de l'homme n'est pas acquise.

Face à ces défis particuliers, il est clair que la garantie des principes démocratiques, en tant qu'éléments au cœur de la participation politique des citoyens, doit faire l'objet d'une attention accrue des instances africaines.

[61] *Avis n° 002-ACC-SVC/15 du 17 septembre 2015* sur le fondement juridique de l'initiative du referendum en vue de l'évolution des institutions de la République. S'en tenant à une approche essentiellement formaliste de son office, la Cour constitutionnelle du Congo énoncera que 'l'évolution des institutions de la République est, de toute évidence, au sens de l'article précité de la loi électorale, une question d'intérêt national sur laquelle le peuple peut être consulté, directement, par voie de référendum', ouvrant la voie à la suppression de la limitation constitutionnelle des mandats présidentiels alors consacrée dans la loi fondamentale et empêchant une nouvelle candidature du président sortant.

[62] Voir JI Senou 'Le nouvel avatar démocratique en Afrique: l'obsession du second mandat' (2016) *Revue française de droit constitutionnel* 633-652.

3.2 Organiser une meilleure garantie des principes démocratiques devant les mécanismes africains

Le prétoire international africain est appelé à être un cadre important de promotion et de protection des principes démocratiques et d'Etat de droit en Afrique. L'exemple en est déjà donné par les juridictions des communautés économiques régionales. Il mériterait d'être suivi et densifié par les mécanismes dédiés à la garantie spécifique des droits de l'homme en Afrique.

3.2.1 L'exemple encourageant des juridictions des communautés économiques régionales

Les juridictions des communautés économiques régionales africaines ont déjà ouvert la voie d'une garantie crédible des droits fondamentaux en général, des droits relatifs à la participation politique en particulier. Cela est vrai de la plupart de ces juridictions, même si l'exemple de la Cour de Justice de la Communauté économique des Etats de l'Afrique de l'Ouest (CEDEAO) est particulièrement éloquent. Cette dernière, prenant appui sur la Charte africaine des droits de l'homme et des peuples, sur le PIDCP et surtout sur le Protocole de la CEDEAO de 2005 relatif à la démocratie, a déjà produit une intéressante jurisprudence. L'exemple le plus récent dans ce sens est l'arrêt rendu le 13 juillet 2015 (arrêt n° ECW/CCJ/APP/19/15) en l'affaire Congrès pour la démocratie et le Progrès (CDP) et autres contre l'Etat du Burkina Faso, suite à l'adoption le 7 avril 2015 d'un nouveau code électoral frappant d'inéligibilité, notamment, 'toutes les personnes ayant soutenu un changement anticonstitutionnel qui porte atteinte au principe de l'alternance démocratique, notamment au principe de la limitation du nombre de mandats présidentiels ayant conduit à une insurrection ou à toute autre forme de soulèvement '. Face à une telle législation, la Cour d'Abuja va énoncer une position qui devrait pouvoir être reprise par tous les autres mécanismes africains, en ces termes:

> si (donc) le principe de l'autonomie constitutionnelle et politique des Etats implique sans conteste que ceux – ci aient la latitude de déterminer le régime et les institutions politiques de leur choix, et d'adopter les lois qu'ils veulent, cette liberté doit être exercée en conformité avec les engagements que ces Etats ont souscrits en la matière.

Pour la Cour, 'interdire de candidature toute organisation ou personne ayant été politiquement proche du régime défait mais n'ayant commis aucune infraction particulière, revient, pour la Cour, à instituer une sorte de délit d'opinion qui est évidemment inacceptable'. En conclusion, la Cour estime que le Code électoral du Burkina Faso, tel que modifié par la loi n° 005-2015/ CNT du 07 avril 2015 'est une violation du droit de libre participation aux élections'. Le Burkina Faso, comme on le sait, s'est rebellé contre cette décision et ne l'a pas appliquée. Cela, pour regrettable que ce soit sur le terrain du respect des sentences internationales par les Etats qui s'y sont préalablement engagés, importe finalement peu. Ce qui est remarquable, c'est l'audace du juge international qui n'hésite pas, malgré la sensibilité et même le caractère éruptif du contexte national, à dire froidement le droit, à

apprécier sans état d'âme la conformité d'un texte national porteur de discrimination sur le terrain de la participation politique avec les principes démocratiques intégrés dans l'ordre juridique communautaire de la CEDEAO. Cette posture doit pouvoir inspirer d'autres instances africaines, comme la Cour africaine des droits de l'homme et des peuples l'a déjà fait dans sa première décision au fond rendue contre la Tanzanie.[63] Il est du reste remarquable que, devant la Cour d'Abuja comme devant la Cour d'Arusha, une référence explicite et appuyée a été faite à l'Observation générale 25 du Comité des droits de l'homme relative au droit à la libre participation politique. Si cette référence a déjà intégré l'ordre régional africain, sans préjudice de la possibilité de définir une version contextuée du droit à la libre participation politique, une mobilisation plus conséquente doit être faite des instruments juridiques africains relatifs à la démocratie devant les mécanismes africains des droits de l'homme.

3.2.2 L'action résolue attendue des mécanismes africains des droits de l'homme

Les développements précédents ont déjà mis en exergue l'action de la Commission et de la Cour africaines des droits de l'homme et des peuples en faveur de la promotion des principes démocratiques sur le continent, à travers leur activité contentieuse. Si cette action est à saluer, elle mérite d'être amplifiée. Cette amplification peut être effectuée par une mobilisation conséquente de la CADEG devant ces instances.[64] Cet instrument, dans une large mesure, développe l'article 13(1) de la CADHP relatif au droit des citoyens à la libre participation politique. Il doit pouvoir être invoqué directement par les plaideurs devant ces instances, ce d'autant plus que celles-ci sont visées parmi les mécanismes de suivi de la CADEG.[65] L'on doit ainsi s'attendre à un contentieux abondant à Arusha et à Banjul au sujet des changements anti constitutionnels de gouvernement au sens de l'article 23 paragraphes évoquées par la CADEG. L'espoir, à cet égard, est d'autant plus fondé que la Cour d'Arusha a, d'ores et déjà, tranché la question du statut de la CADEG en tant qu'instrument des droits de l'homme, dans l'arrêt du 16 novembre 2016 rendu en l'affaire *Actions pour la protection des droits de l'homme (APDH) c Côte d'Ivoire*. Après avoir, au paragraphe 57 de son arrêt, précisé la notion juridique d'instrument des droits de l'homme,[66] la Cour conclut au paragraphe 65 que la

63 AD Olinga 'La première décision au fond de la Cour africaine des droits de l'homme et des peuples' (2014) 6 *Revue des droits de l'homme, Revue du centre de recherches et d'études sur les droits fondamentaux*.

64 AD Olinga 'La Charte africaine de la démocratie, des élections et de la gouvernance. Une présentation générale' (2013) *Revue Camerounaise d'études internationales* 107-118.

65 Voir à cet égard l'article 45(c) de la CADEG.

66 Cela, en ces termes: 'pour déterminer si une convention est un instrument des droits de l'homme, la Cour considère qu'il y a lieu de se rapporter principalement à l'objet de ladite convention. Un tel objet est décliné soit par une énonciation expresse des droits subjectifs au profit des individus ou groupe d'individus, soit par la prescription à l'égard des Etats d'obligations impliquant la jouissance conséquente des droits'.

CADEG en est bien un 'au sens de l'article 3 du Protocole' et qu'elle a, en conséquence, compétence pour l'interpréter et la faire respecter. C'est notamment sur la base de la CADEG, en son article 17, que la Cour a considéré que l'organe électoral ivoirien, de par son manque d'indépendance et d'équilibre, affectait le droit pour chaque citoyen ivoirien de participer librement à la direction des affaires publiques de son pays.

La Commission et la Cour africaines doivent pouvoir s'appuyer sur les instruments régionaux relatifs aux principes démocratiques et aux élections, dans toute la mesure où ils lient l'Etat concerné. Ainsi, le Protocole de 2005 de la CEDEAO peut parfaitement être mobilisé, en même temps que la Charte africaine des droits de l'homme et des peuples, à l'effet de garantir les droits électoraux et politiques, dès lors qu'un Etat membre de la CEDEAO serait concerné par une communication ou requête.[67] Il en est de même, des textes des autres communautés économiques régionales, et même des textes et pratiques nationaux, lorsque ceux-ci offrent un standard élevé de protection des principes démocratiques. A cet égard, la Commission et la Cour africaines de droits de l'homme et des peuples pourraient, par exemple, s'inspirer utilement de la 'décision' en matière consultative du Conseil constitutionnel du Sénégal du 12 février 2016. Dans cette très intéressante espèce, la haute juridiction sénégalaise a précisé les modalités d'application dans le temps des lois de révision ayant une incidence sur la durée d'un mandat électif en cours. Le Conseil a formulé deux propositions que, à l'occasion, les organes chargés de la mise en œuvre de la Charte de 1981 pourraient reprendre à leur compte et en faire des directives d'application générale par tous les Etats africains. D'abord, que 'le mandat en cours au moment de l'entrée en vigueur de la loi de révision, par essence intangible, est hors de portée de la loi nouvelle'. Par ailleurs, 'ni la sécurité juridique, ni la stabilité des institutions ne seraient garanties si, à l'occasion de changements de majorité, à la faveur du jeu politique ou au gré des circonstances notamment, la durée des mandats politiques en cours, régulièrement fixée au moment où ceux-ci ont été conférés pouvait, quel que soit au demeurant l'objectif recherché, être réduite ou prolongée'. La Cour d'Arusha, qui aurait pu se prononcer sur un cas de révision constitutionnelle dans l'affaire *Nyamwasa et autres c Rwanda,* n'a même pas pu ordonner des mesures conservatoires tendant à empêcher la révision de l'ancien article 101 de la Constitution. Dans son ordonnance du 17 mars 2017, elle constate que, le référendum ayant eu lieu le 15 décembre 2015, la demande a été dépassée par les événements, est devenue sans objet et est rejetée en conséquence. Il n'est pas déraisonnable de penser que dans une autre affaire la Cour pourra ordonner de telles mesures.

[67] Cela était du reste le cas dans l'affaire *APDH c Côte d'Ivoire* devant la Cour d'Arusha.

4 CONCLUSION

La finalité de la démarche ambitieuse, consciemment assumée, attendue de la Commission et de la Cour, dans le sillage des évolutions d'ores et déjà tracées, est de faire émerger, progressivement mais résolument, un standard africain de société démocratique,[68] dont les instances africaines et nationales seraient les garantes. La tâche, immense et de longue haleine, n'est évidemment pas aisée. Elle est, cependant, nécessaire et à la portée des mécanismes africains.

[68] Voir G Bombela Mosoua 'Le standard africain de société démocratique' (2008) Mémoire de DEA en droit public international et communautaire. Faculté des Sciences juridiques et politiques. Université de Yaoundé II.

La jurisprudence de la Cour africaine des droits de l'homme et des peuples: entre particularisme et universalité

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RÉSUMÉ: La Cour africaine des droits de l'homme et des peuples (Cour africaine) constitue, avec la Commission africaine des droits de l'homme et des peuples (Commission africaine), le système africain de protection des droits de l'homme. C'est dans ce cadre qu'elle exerce ses fonctions consultative et contentieuse à l'égard des Etats Parties et peut recevoir des requêtes émanant de la Commission africaine, des individus et des organisations non gouvernementales introduites contre les Etats ayant accepté sa compétence. L'exercice par la Cour de son office laisse apparaître une construction ambivalente du droit africain des droits de l'homme. Cette construction se caractérise d'une part, par le développement d'une jurisprudence relativement originale qui met en exergue, non seulement la constitutionnalisation et la socialisation, mais aussi l'humanisation et la moralisation du droit africain. Elle est marquée, d'autre part, compte tenu du caractère embryonnaire du droit africain des droits de l'homme, par la mise en relief de ce droit considéré comme le relais régional de l'universalisme du droit des droits de l'homme, dans ses dimensions procédurale et matérielle.

TITLE AND ABSTRACT IN ENGLISH:

The jurisprudence of the African Court of Human and Peoples' Rights: between particularism and universality

ABSTRACT: The African Court on Human and Peoples' Rights (African Court), together with the African Commission on Human and Peoples' Rights (African Commission), make up the African system for the protection of human rights. It is within this framework that the African Court exercises its advisory and contentious jurisdictions in respect of State parties. The Court may receive applications from the African Commission, individuals and non-governmental organisations against States that have accepted its jurisdiction. The Court's implementation of its missions reveals an ambivalence in the interpretation of African human rights law. This ambivalence is characterised by, on the one hand, the development of a relatively original jurisprudence which highlights not only the constitutionalisation and socialisation, but also the humanisation and moralisation of African law and, on the other hand, in view of the burgeoning nature of African human rights law, by shedding light on that law, which is considered as the regional relay of universalism of human rights law, in its procedural and material dimensions.

MOTS CLÉS: Cour africaine des droits de l'homme, humanisation, universalisme, particularisme

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1 INTRODUCTION

La Cour africaine des droits de l'homme et des peuples (Cour africaine) a été instituée par 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), adopté le 10 juin 1998 à Ouagadougou.[1] Institution judiciaire principale des droits de l'homme en Afrique, la Cour africaine a été créée pour renforcer le mandat de protection de la Commission africaine des droits de l'homme et des peuples (Commission africaine), dans un système africain de protection des droits de l'homme[2] fondé principalement sur la Charte africaine des droits de l'homme et des peuples (Charte africaine).[3]

Aux termes des dispositions des articles 3(1) et 7 du Protocole, la Cour est compétente pour connaître de l'interprétation et de l'application non seulement de la Charte africaine, mais également de 'tout autre instrument pertinent relatif aux droits de l'homme et ratifié par les Etats concernés'. Quant au sens à donner à la notion 'd'instrument relatif aux droits de l'homme', la Cour a conclu, dans l'arrêt majeur qu'elle a rendu dans l'affaire *APDH c Côte d'Ivoire*, qu'entraient dans cette catégorie, la Charte africaine de la démocratie et

[1] Article 1, 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, adopté le 10 juin 1998 et entré en vigueur le 25 janvier 2004, après avoir été ratifié par plus de 15 pays. Ce Protocole est toujours en vigueur. Un autre Protocole, fusionnant le Protocole portant création de la Cour africaine des droits de l'homme et des peuples et du Statut de la Cour de justice de l'Union africaine, a néanmoins été adopté le 1er juillet 2008 pour créer la Cour africaine de justice et des droits de l'homme. Lors de la 23e Session ordinaire du Sommet de l'Union africaine tenu à Malabo en Guinée Equatoriale, ce Protocole a fait l'objet d'un amendement, le 27 juin 2014, instituant une Chambre criminelle au sein d'une Cour plus large dont les deux premières cours constitueront l'une, la Chambre des affaires générales et, l'autre, celle des droits de l'homme. A ce jour, ce Protocole dit de Malabo n'est pas encore entré en vigueur puisqu'il n'a été signé que par 9 Etats dont aucun ne l'a ratifié.

[2] Article 2 du Protocole portant création de la Cour africaine.

[3] Adoptée le 27 juin 1981 à Nairobi, la Charte africaine est entrée en vigueur le 21 octobre 1986, après sa ratification par 25 Etats.

le Protocole de la Communauté Economique des Etats de l'Afrique de l'Ouest (CEDEAO) sur la démocratie.[4]

C'est dans ce cadre que la Cour africaine exerce sa fonction contentieuse à l'égard des Etats Parties reconnaissant sa compétence. Conformément aux dispositions des articles 5(3) et 34(6) du Protocole,[5] la Cour peut recevoir également des requêtes émanant de la Commission africaine, des individus et des organisations non gouvernementales, introduites contre lesdits Etats. A n'en point douter, il s'agit là d'une évolution notable du droit africain des droits de l'homme. En effet, en droit international, la reconnaissance de droits fondamentaux aux individus et aux peuples ne s'est pas originellement accompagnée de la capacité juridique à agir en cas de violation. La consécration d'un droit d'accès direct ou indirect des personnes privées (individus et organisations non gouvernementales) au prétoire de la Cour africaine, qui se situe dans le sillage global de la reconnaissance de ces personnes comme sujets du droit international,[6] constitue dès lors une véritable révolution juridico-institutionnelle.[7]

Cette option d'une juridiction internationale à l'accès libéral apparaît non seulement comme 'la forme de protection des droits de l'homme la plus avancée et la plus perfectionnée',[8] mais aussi comme la plus dynamique.[9] Il est vrai que ce modèle libéral est limité par la condition très critiquée du dépôt d'une déclaration spéciale de reconnaissance de compétence. Quoi qu'il en soit, que les individus soient demandeurs dans presque toutes les 155 requêtes reçues et 34 décisions rendues par la Cour africaine au cours de sa première décennie d'existence, est la preuve intangible de cette démocratisation de l'accès à son prétoire.

4 La Charte africaine de la démocratie, des élections et de la gouvernance a été adoptée le 30 janvier 2007 et est entrée en vigueur le 15 février 2012. Le Protocole de la CEDEAO sur la démocratie et la bonne gouvernance additionnel au Protocole relatif Mécanisme de gestion, de règlement des conflits, de maintien de la paix et de la sécurité a été adopté le 21 décembre 2001 et est entré en vigueur en 2008. Voir *Actions pour la protection des droits de l'homme (APDH) c Côte d'Ivoire* (Arrêt du 18 novembre 2016, Fond) paras 49-65.

5 Sur 30 Etats parties, seuls 8 ont fait une telle déclaration. Il s'agit du Bénin (8 février 2016), du Burkina Faso (28 juillet 1998), de la Côte d'Ivoire (28 juillet 2013), du Ghana (10 mars 2011), du Malawi (09 octobre 2008), du Mali (19 février 2010), de la Tanzanie (29 mars 2010) et de la Tunisie (1er mai 2017). Le Rwanda, après avoir déposé sa déclaration le 6 février 2013, l'a retirée en 2016. Sur ce retrait, cf. Cour africaine, *Umuhoza c Rwanda* (arrêt du 3 juin 2016).

6 AA Cançado Trindade *Evolution du droit international au droit des gens. L'accès des individus à la Justice Internationale, le regard d'un juge* (2008).

7 Fl Ntsatsiesse *L'accès des personnes privées à la Cour africaine des droits de l'homme et des peuples* (2016) Mémoire de Master Recherche Droit public fondamental, Faculté de Droit et des Sciences Economiques, Université Omar Bongo, p. 5. Il convient de noter néanmoins que les personnes privées ont également un accès direct au Conseil des droits de l'homme des Nations-Unies, aux organes des traités de l'ONU, à la Commission interaméricaine des droits de l'homme et à la Commission africaine des droits de l'homme et des peuples.

8 Rapport annuel sur le travail de la Cour interaméricaine des droits de l'homme à l'Assemblée générale de l'Organisation des Etats Américains, 2000.

9 Voir O Delas 'La création de la Cour africaine des droits de l'homme et des peuples: mécanisme efficace de protection des droits de l'homme?' (1999) 12 *Revue Québécoise de droit international* 99.

Conjointement à cette fonction contentieuse, la Cour africaine exerce une fonction consultative en vertu des dispositions des articles 4 du Protocole et 68 de son Règlement intérieur. Les demandes d'avis sont à l'initiative des Etats membres, de l'Union africaine, de tout organe de l'Union africaine ou d'une organisation africaine reconnue par l'Union.[10] La Cour a reçu à ce jour 12 demandes et rendu 11 avis consultatifs.

Dans l'exécution de sa mission, la Cour met en perspective les différents acteurs; elle garantit la confrontation directe entre les supposées victimes de violation des droits de l'homme et les Etats défendeurs, dans le respect du principe du contradictoire; elle reconnaît aux victimes les droits de participation au procès et de réparation des dommages qui leur sont causés; et elle garantit l'égalité des armes entre les parties tout au long de la procédure devant la Cour, dans le respect des exigences du procès équitable. Ce faisant, la Cour interprète, irrigue, développe et enrichit le droit africain des droits de l'homme. Dans quelle mesure ce droit en construction apparaît-il comme avant-gardiste, non-conformiste, voire créatif par rapport aux canons du positivisme juridique volontariste et universaliste du droit international public?

L'objet de la présente réflexion est de montrer que, dans l'exercice de ses fonctions contentieuse et consultative, la Cour africaine fait œuvre d'une construction relativement originale de la jurisprudence, reposant sur une conception particulière du droit africain des droits de l'homme. Cependant, ce particularisme ne doit pas être surestimé. En effet, le caractère embryonnaire du droit africain des droits de l'homme, le développement du dialogue avec d'autres juridictions internationales et régionales dans le cadre des rapports de systèmes,[11] la similitude et la convergence des intérêts protégés avec ces juridictions manifestement en avance, justifient les influences universalistes particulièrement remarquables de la jurisprudence internationale sur l'activité de la Cour africaine.

[10] Sur le sens de la notion 'd'organe de l'Union africaine', voir Avis consultatif, *Comité d'experts sur les droits et le bien-être de l'enfant au sujet du statut du Comité africain d'experts sur les droits et le bien-être de l'enfant devant la Cour africaine des droits de l'homme et des peuples* (5 décembre 2014) paras 55-57 ; quant à la notion 'd'organisation africaine reconnue par l'Union africaine', voir Avis consultatif, *Socio-Economic Rights and Accountability Project (SERAP)* (26 mai 2017) paras 43-65. Voir également en général, Avis consultatif, *Rencontre Africaine pour la Défense des Droits de l'Homme (RADDHO)* (28 septembre 2017) paras 27-38; Avis consultatif, *Centre for Human Rights, Federation of Women Lawyers Kenya, Women's Legal Centre, Women Advocates Research and Documentation Centre, Zimbabwe Women Lawyers Association* (28 septembre 2017) paras 38-49.

[11] H Kelsen 'Les rapports de système. Entre le droit et le droit international public' (1925) 10 *Recueil des Cours de l'Académie de droit international* 231.

2 LE PARTICULARISME DE LA JURISPRUDENCE DE LA COUR AFRICAINE

Contrairement à ce que suggère Mubiala par exemple,[12] la Cour africaine n'est pas une réplique identique des autres juridictions régionales des droits de l'homme. Elle se caractérise par une certaine démarcation du volontarisme étatique en développant une jurisprudence relativement originale qui met en exergue, non seulement la constitutionnalisation et la socialisation, mais aussi l'humanisation et la moralisation du droit africain.

2.1 La constitutionnalisation et la socialisation du droit africain

La constitutionnalisation et la socialisation du droit africain sont deux traits caractéristiques de la jurisprudence de la Cour africaine qu'il faudrait examiner successivement.

2.1.1 La constitutionnalisation

La constitutionnalisation s'entend ici du processus par lequel la Cour africaine va, conformément à la volonté du législateur africain, ériger les normes relatives aux droits de l'homme en normes suprêmes devant lesquelles le droit interne doit s'incliner.[13] Cette suprématie est garantie par la Cour africaine. En effet, le rôle de la Cour africaine ne se limite pas à interpréter la Charte africaine et les autres instruments relatifs aux droits de l'homme ratifiés par les Etats africains,[14] ni à en contrôler le respect. Son mandat est beaucoup plus large et consiste à instaurer une véritable culture non seulement du respect des droits de l'homme et de la justice, mais aussi de la responsabilité.

Tel que l'article 3(2) du Protocole l'indique sans ambages, 'en cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide'. Selon le juge africain, cette disposition

> couvre toutes les affaires et tous les différends en matière de droits de l'homme concernant l'interprétation et l'application de la Charte, du Protocole et de tout autre instrument pertinent relatif aux droits de l'homme ratifiés par les Etats concernés.[15]

Ainsi, dans l'affaire *Commission africaine des droits de l'homme et des peuples c Grande Jamahiriya arabe Libyenne populaire et socialiste*, concernant les violations des droits de l'homme commises lors du

[12] M Mubiala 'La Cour africaine des droits de l'homme et des peuples: mimétisme institutionnel ou avancée judiciaire?' (1998) 102 *Revue générale de droit international public* 765.

[13] Voir CM Fombard 'Internationalization of constitutional law and constitutionallism in Africa' (2012) 60 *American Journal of Comparative Law* 439.

[14] Article 3(1) du Protocole.

[15] *Mkandawire c République du Malawi* (arrêt, 21 juin 2013) para 34.

printemps arabe, alors que la requérante ne l'envisageait pas, la Cour, en exerçant compétence *prima facie*, a ordonné,[16] de toute urgence et sans autre procédure, des mesures provisoires. Selon la Cour,

> dès lors qu'il existe une situation d'extrême gravité et d'urgence, de même qu'un risque de dommages irréparables aux personnes qui sont l'objet de la requête, en particulier pour ce qui est des droits de celles-ci à la vie et à l'intégrité physique, tels que garantis par la Charte,[17]

elle n'avait pas d'autres choix que d'agir. Depuis, cette jurisprudence sur les mesures provisoires a été confirmée à plusieurs reprises. [18] L'exécution de ces mesures provisoires par les Etats concernés aura forcément un impact non seulement sur l'ordonnancement juridique national, mais aussi sur les décisions des juridictions internes. La Cour africaine, à l'instar d'une véritable cour suprême, pourrait ainsi s'investir dans les systèmes juridiques des Etats membres pour les contraindre à respecter les droits de l'homme.

Dans l'exercice de sa mission, elle le fait de deux manières: d'une part, en assurant le contrôle des systèmes juridictionnels et juridiques des Etats et, d'autre part, en rappelant aux Etats leurs obligations internationales en matière de respect des droits de l'homme.

Dans le cadre de l'appréciation de la mise en œuvre de la règle de l'épuisement des voies de recours internes, la Cour assure un véritable contrôle des systèmes juridiques et juridictionnels des Etats sur le fondement des critères de disponibilité, d'efficacité et de suffisance. Dans l'affaire *Konaté c Burkina Faso,*[19] la Cour, après avoir contrôlé le système juridictionnel burkinabé, a indiqué que si le pourvoi en cassation, dont le délai est de cinq jours, est bien disponible, il ne vise qu'à annuler le jugement et non la loi. Dès lors, selon la Cour,

> dans de telles circonstances, il est clair que le requérant dans la présente affaire ne pouvait rien attendre de la Cour de cassation, s'agissant de sa demande en annulation des lois burkinabé en application desquelles il avait été condamné.[20]

Autrement dit, précise la haute juridiction continentale, 'il n'était pas nécessaire de recourir au même processus judiciaire dès lors que le résultat était connu d'avance'.[21] Ensuite, la Cour a rappelé que, dans le cas d'espèce, c'est le Conseil constitutionnel qui pouvait connaître du litige dès lors qu'il assure le contrôle de constitutionnalité des lois. Or, indique la Cour, celui-ci ne peut nullement être saisi par les individus. Selon la Cour,

> il ressort de l'ensemble des considérations qui précèdent que le système juridique burkinabé n'offrait au requérant dans la présente affaire aucun recours efficace et suffisant lui permettant de faire censurer les lois burkinabé dont il se plaint. Par voie de conséquence, le requérant n'avait pas à épuiser le recours en cassation, ni

16 Ordonnance en indication de mesures provisoires (25 mars 2011) Requête 4/2011.

17 Ordonnance (n 15 ci-dessus) para 22.

18 La Cour a rendu à ce jour 21 ordonnances relatives aux mesures provisoires dont 17 portent sur des cas de peine de mort en Tanzanie. Cf. fr.african-court.org/index.php/54-list-of-cases-with-provisional-measures/448-liste-des-affaires-ayant-fait-l-objet-d-ordonnances-de-mesures-provisoires.

19 *Konaté c Burkina Faso,* Requête 4/2013 (5 décembre 2014) para 107.

20 *Konaté c Burkina Faso* (n 19 ci-dessus) para 111.

21 *Konaté c Burkina Faso* (n 19 ci-dessus) para 112.

> d'ailleurs un quelconque autre recours, après sa condamnation définitive au fond, par la Cour d'appel de Ouagadougou, le 10 mai 2013.[22]

Dans la même affaire, la Cour, en véritable juge constitutionnel, a assuré le contrôle de la conformité des lois burkinabé avec les dispositions de la Charte africaine et du Pacte international sur les droits civils et politiques (PIDCP) de 1966, relativement à la liberté d'expression, sur la base de critères précis. Il s'est agi plus concrètement de vérifier que la limitation de la liberté d'expression est prévue par la loi, qu'elle répond à un objectif légitime et qu'elle est nécessaire pour atteindre l'objectif visé et proportionnée dans une société démocratique. Dans le cas d'espèce, le juge africain a estimé que non seulement la législation burkinabé, en prévoyant la diffamation comme une infraction pénale, viole manifestement les articles 9 et 19 respectivement de la Charte et du Pacte de 1966,[23] mais aussi que les décisions prises par des tribunaux condamnant le requérant sont disproportionnées par rapport au but poursuivi par le Code pénal et le Code de l'information du Burkina Faso.[24]

Enfin, toujours dans son contrôle du système juridique de l'Etat, la Cour va jusqu'à censurer les dispositions constitutionnelles. Par exemple, elle a jugé que celles de la Tanzanie-Unie qui interdisent les candidatures indépendantes aux élections politiques violent la Charte africaine, notamment le droit des requérants tanzaniens de participer aux affaires publiques de leur pays.[25] De même, le fait que la Constitution exige que les candidats soient membres d'un parti politique viole la liberté d'association garantie par la Charte,[26] viole également le droit à la non-discrimination et l'égalité devant la loi.[27] Et pour remédier à cette situation, la Cour a ordonné

> au Défendeur de prendre toutes les mesures constitutionnelles, législatives et autres dispositions utiles dans un délai raisonnable, afin de mettre fin aux violations constatées et informer la Cour des mesures prises à cet égard.[28]

Dans son arrêt du 18 novembre 2016,[29] la Cour a, en revanche, procédé à la remise en cause de l'autorité absolue de chose jugée du Conseil constitutionnel ivoirien. En effet, alors que ce dernier avait jugé, par une décision du 16 juin 2014, la loi sur la Commission électorale indépendante conforme à la Constitution, la Cour a indiqué qu'

22 *Konaté c Burkina Faso* (n 19 ci-dessus) para 113.

23 *Konaté c Burkina Faso* (n 19 ci-dessus) para 164.

24 *Konaté c Burkina Faso* (n 19 ci-dessus) para 170.

25 *Tanganyika Law Society and The Legal and Human Rights Centre c Tanzanie*, Requête 9/2011 et *Mtikila c Tanzanie*, Requête 11/2011 (14 juin 2013) (ci-après *Jonction d'instance d'affaires*) para 111.

26 *Jonction d'instance d'affaires* (n 25 ci-dessus) para 114.

27 *Jonction d'instance d'affaires* (n 25 ci-dessus) para 119.

28 *Jonction d'instance d'affaires* (n 25 ci-dessus) point 3.

29 *APDH c Côte d'Ivoire* Requête 1/2014 (18 novembre 2016). Dans une autre affaire, *Nyamwasa et six autres c Rwanda* (ordonnance sur la demande aux fins de mesures provisoires 24 mars 2017) alors que les requérants demandaient la prise de mesures provisoires visant à interdire au défendeur de poursuivre l'organisation d'un référendum destiné à amender l'article 101 de la Constitution, à la lumière de l'interdiction à cet égard inscrite à l'article 23(5) de la Charte africaine sur la démocratie, la gouvernance et les élections ('est-à-dire de contrôler la conformité de la Constitution du Rwanda à cette

> au regard de sa composition, l'organe électoral ivoirien ne présente pas les garanties d'indépendance et d'impartialité requises et qu'il ne peut donc pas être perçu comme tel. [30]

Par conséquent, ajoute la Cour,

> en adoptant la loi contestée, l'Etat défendeur a violé son obligation de créer un organe électoral indépendant et impartial, prévu par l'article 17 de la Charte africaine sur la démocratie et l'article 3 du Protocole de la CEDEAO sur la démocratie.[31]

Par ailleurs, la Cour ne manque pas de rappeler aux Etats leurs obligations internationales, c'est-à-dire l'obligation de respecter et de garantir les droits de l'homme; l'obligation de prendre des mesures de droit interne, l'obligation d'organiser des recours judiciaires suffisants et efficaces contre les violations des droits. Par exemple, dans l'affaire *Zongo et autres c Burkina Faso,*[32] la Cour a censuré l'Etat burkinabé pour violation de son obligation de garantir non seulement le droit de la victime à ce que sa cause soit entendue par les juridictions nationales compétentes, mais aussi les droits des journalistes. De même, dans l'affaire *Konaté,*[33] la Cour a indiqué que le Burkina Faso a manqué à son obligation de respecter les droits de l'homme, en l'occurrence la liberté d'expression. Dans l'affaire *APDH c Côte d'Ivoire,* la Cour a aussi jugé que 'lorsqu'un Etat devient partie à un traité relatif aux droits de l'homme, le droit international l'oblige à prendre des mesures positives pour assurer la mise en œuvre de ces droits'.[34] La Cour peut rappeler aussi aux Etats membres leur obligation de se conformer aux arrêts qu'elle a rendus.[35]

2.1.2 La socialisation

La socialisation du droit africain s'entend du processus social par lequel les juges de la Cour africaine interprètent les dispositions de la Charte et autres instruments relatifs aux droits de l'homme et rendent des arrêts en tenant compte des spécificités africaines.

En effet, dans son rôle de protectrice des droits et libertés, la Cour s'efforce d'interpréter les normes relatives aux droits de l'homme dans l'intérêt des individus en procédant à une méthode sociologique. Ainsi, par exemple, dans l'affaire *Konaté*, la Cour a tenu compte des réalités africaines relatives au faible niveau d'alphabétisation, en retenant sa

Charte), la Cour a simplement indiqué que, faute pour les requérants de se rendre à Arusha pour assister à l'audience publique et n'ayant pas prise de date spécifique à laquelle l'audience devait être reportée, elle ne pouvait prendre de mesures provisoires, puisque le référendum a été dûment tenu le 17 décembre 2015, rendant ainsi la demande sans objet (paras 34-35). Ceci laisse présager que si une nouvelle date avait été fixée, de telles mesures provisoires pouvaient être prises par la Cour.

30 *APDH c Côte d'Ivoire*, Requête 1/2014 (18 novembre 2016) para 133.

31 *APDH c Côte d'Ivoire* (n 29 ci-dessus) para 135.

32 Arrêt du 28 mars 2014 para 150 et paras 186-187.

33 *Konaté c Burkina Faso* (n 19 ci-dessus) para 170.

34 *APDH c Côte d'Ivoire* (n 29 ci-dessus) para 61.

35 *Abubakari c Tanzanie*, Requête 7/2013 (3 juin 2016); *Onyachi et autres c Tanzanie*, Requête 3/2015 (28 septembre 2017).

compétence pour modifier le titre d'une requête truffée d'erreurs, en l'occurrence la République du Burkina Faso a été qualifiée de 'République Populaire et Démocratique du Burkina'.[36] Contrairement à ce que soutenait l'Etat burkinabé, et en tenant compte du niveau intellectuel moyen du requérant, la Cour a jugé qu'il ne s'agit nullement là de termes outrageants ou insultants.

Dans la même affaire, en tenant compte de ce que, dans plusieurs corps de métiers, les Africains exercent dans l'illégalité, sans formalité administrative, la Cour a reconnu la qualité de journaliste de fait au requérant, même si ce dernier ne s'est pas conformé aux formalités administratives.[37]

En outre, dans le contexte africain marqué par la problématique de la conservation des pièces d'état civil, la Cour, en vertu de l'article 26(2) du Protocole, 'reçoit tous moyens de preuves (orale et écrite) qu'elle juge appropriées et sur lesquelles elles fondent ses décisions'. Selon la Cour, dans l'affaire *Zongo*,

> cette disposition, qui consacre le principe de la libre admissibilité de la preuve, implique notamment que la Cour n'est pas tenue par les règles restrictives de droit interne en ce qui concerne les moyens de preuve admissibles. Elle peut donc décider qu'un moyen de preuve exigé par le droit interne, n'est pas nécessairement requis devant elle.[38]

En l'espèce, plusieurs ayants droit ne disposaient pas d'actes de naissance ou de filiation.

Par ailleurs, compte tenu de la faible maîtrise des droits de l'homme et des règles contentieuses par les requérants, la Cour fait preuve de souplesse à l'égard des personnes privées. Ainsi, elle ajuste ou interprète la requête pour bien identifier un droit prétendument violé. Aussi, alors que la requérante n'invoquait que la seule violation du 'droit à l'égalité devant la loi', la Cour a conclu à la violation par l'Etat défendeur du droit 'à une égale protection de la loi'.[39] Toujours en tenant compte du contexte, la Cour a retenu sa compétence dès lors que les droits dont la violation est alléguée sont protégés par la Charte ou par tout autre instrument relatif aux droits de l'homme et ratifié par l'Etat concerné, même lorsque ces droits ne sont pas nécessairement précisés dans la requête.[40]

36 *Konaté c Burkina Faso* (n 19 ci-dessus) paras 46-48.

37 *Konaté c Burkina Faso* (n 19 ci-dessus) paras 54-59.

38 *Zongo c Burkina Faso* (n 32 ci-dessus) para 52. Notons toutefois que la Cour a censuré la République unie de Tanzanie dont les dispositions constitutionnelles interdisaient les candidatures indépendantes aux élections politiques, interdiction dictée par les nécessités sociales du pays et fondée sur les réalités historiques du pays. Selon la Cour cette interdiction est une violation de la Charte. Affaire *Mtikila c Tanzanie* (arrêt du 13 juin 2014 portant *sur la réparation)* requête 11/2011 paras 42-43; *Jonction d'instance d'affaires* (n 25 ci-dessus) para 115.

39 *APDH c Côte d'Ivoire* (n 29 ci-dessus) paras 146-151.

40 *Omary et autres c Tanzanie* (Affaire 1/2012); *Chacha c Tanzanie* (Affaire 3/2012); *Thomas c Tanzanie* (Affaire 5/2013, Arrêt du 20 novembre 2015).

Enfin, pour éviter d'être influencée par la tendance de certains Etats africains[41] au rejet de la compétence de la Cour pénale internationale, la Cour n'hésite pas à remettre en cause certaines règles de procédure pour se soumettre aux prétentions des Etats. Ainsi, dans l'affaire *APDH c Côte d'Ivoire,*[42] la Cour a, dans l'intérêt de la justice, décidé de recevoir le mémoire de l'Etat défendeur soulevant hors délai les exceptions d'irrecevabilité, alors qu'elle devait rendre un arrêt par défaut. De même, dans l'affaire *Umuhoza c Rwanda*,[43] la Cour, sans que l'Etat défendeur ait eu à comparaître à l'audience et à plaider quoi que ce soit, a pourtant suspendu l'examen de la recevabilité de la requête et du fond de l'affaire, pour sauvegarder le principe du contradictoire. En réalité, selon le juge Ouguergouz, dans l'opinion dissidente[44] jointe à cette ordonnance, 'la Cour apparaît ainsi comme ayant pris fait et cause pour l'Etat défendeur qui a fait le choix délibéré de ne pas comparaître à l'audience. En accordant un traitement préférentiel à l'une des parties au détriment de l'autre, la Cour rompt ainsi le principe d'égalité des parties qui doit présider à l'exercice de sa fonction judiciaire', alors qu' 'à ce stade, la Cour aurait dû prendre acte de cette non-comparution et continuer la procédure'.[45]

La jurisprudence de la Cour africaine contribue également à l'humanisation et à la moralisation du droit africain.

2.2 L'humanisation et la moralisation du droit africain

Le développement de la jurisprudence de la Cour africaine a largement enrichi le droit africain qui est devenu non seulement un droit à visage humain, mais également un droit prenant en compte les questions morales ou éthiques.

2.2.1 L'humanisation

L'Afrique a souvent été qualifiée de 'berceau de l'impunité',[46] au regard de l'ampleur des violations des droits de l'homme qui y sont perpétrées. Le rôle de la Cour africaine est de promouvoir les droits de l'homme par une prise en compte des victimes qui méritent respect et justice. Le

41 T Ondo 'La non-coopération avec les juridictions pénales internationales' (2015) 1 *Revue de droit international et de droit comparé* 79.

42 *APDH c Côte d'Ivoire* (n 29 ci-dessus) paras 24-31.

43 *Umuhoza c Rwanda* (n 5 ci-dessus).

44 Opinion dissidente du juge Fatsah Ouguergouz jointe à cette ordonnance para 33. Sur ce mécanisme, voir T Ondo 'Les opinions séparées des juges à la Cour africaine des droits de l'homme et des peuples' (2015) 104 *Revue trimestrielle des droits de l'homme* 941.

45 Opinion dissidente du juge Ben Achour jointe à cette ordonnance.

46 Amnesty International, *Ending impunity: developing and implementing a global action Plan using universal jurisdiction* (2009) 9; T Ondo 'La compétence universelle en Afrique: essai d'analyse' (2011) 1 *Revue de droit international et de droit comparé* 120.

processus d'humanisation du droit africain enclenché par la Cour vise donc à placer l'individu, en l'occurrence la victime, au cœur du système africain de protection des droits de l'homme. Deux aspects importants permettent d'illustrer ce processus.

D'une part, l'humanisation transparaît dans la prise de mesures provisoires au profit des victimes des violations graves des droits de l'homme, même lorsque les requérants ne l'ont pas demandées. Ainsi, dans l'affaire *Commission africaine des droits de l'homme et des peuples contre Grande Jamahiriya arabe Libyenne populaire et socialiste,*[47] la Cour, pour éviter des conséquences irréparables pour les victimes, a ordonné les deux mesures provisoires suivantes: l'abstention pour la Libye de tout acte qui pourrait entraîner des pertes en vies humaines ou toute atteinte à l'intégrité physique des personnes et qui pourrait constituer une violation des instruments africains et internationaux relatifs aux droits de l'homme et ratifiés par la Libye et la remise par la Libye d'un rapport à la Cour, dans un délai de 15 jours, indiquant les mesures prises pour mettre en œuvre l'ordonnance de la Cour.

Dans l'affaire *Armand Guéhi c Tanzanie*, la Cour a également jugé que 'compte tenu des circonstances particulières de l'affaire, qui révèlent un risque d'application de la peine de mort, ce qui risque de porter atteinte aux droits du requérant protégés par l'article 7 de la Charte et l'article 14 du Pacte international relatif aux droits civils et politiques, la Cour décide d'exercer la compétence que lui confère l'article 27(2) du Protocole'.[48] En conséquence, 'la Cour conclut que ces circonstances exigent une ordonnance portant mesures provisoires, en application de l'article 27(2) du Protocole et de l'article 51 de son Règlement intérieur, pour préserver le statu quo ante, en attendant la décision sur la requête principale'.[49]

D'autre part, l'humanisation du droit africain repose sur le droit à un recours effectif garanti par la Cour aux victimes. Ainsi, dans l'affaire *Zongo c Burkina Faso,* la Cour a relevé plusieurs carences du système judiciaire burkinabé due à la longueur des procédures de recours, à la non diligence des autorités compétentes pour investiguer sur l'assassinat des journalistes et l'audition tardive des parties civiles et a conclu à la violation par cet Etat du droit à un recours effectif.[50]

La jurisprudence de la Cour africaine contribue également à la moralisation du droit africain.

2.2.2 La moralisation

La moralisation du droit africain repose entièrement sur la question de la responsabilité internationale de l'Etat et son corollaire la réparation des dommages causés aux victimes en cas de violation des droits de

47 Ordonnance en indication de mesures provisoires (requête 4/2011 25 mars 2011).
48 *Guéhi c Tanzanie* Requête 1/2015 (3 octobre 2015) para 19.
49 *Guéhi c Tanzanie* Requête 1/2015 (3 octobre 2015) para 21.
50 Paras 156-157.

l'homme. Cette réparation peut être ordonnée aux Etats par la Cour africaine. Ce mécanisme est consacré à l'article 27(1) du Protocole: 'Lorsqu'elle estime qu'il y a eu violation d'un droit de l'homme ou des peuples, la Cour ordonne toutes les mesures appropriées afin de remédier à la situation, y compris le paiement d'une juste compensation ou l'octroi d'une réparation'. C'est en application de cette disposition que la Cour a rendu quelques arrêts relatifs à la réparation.[51]

Ce terme est générique et couvre plusieurs modes appliqués à différentes situations et divers types de dommages. Pour simplifier, et en reprenant les formes usitées par le juge africain, la réparation vise deux formes de préjudice: pécuniaire ou matériel et non pécuniaire ou moral.

Dans les deux cas, le juge peut ordonner le paiement d'une compensation financière, des frais et dépens, à la condition d'apporter la preuve, par tout moyen et à l'appréciation du juge, du préjudice subi.[52]

La réparation ordonnée par le juge peut également prendre la forme soit des garanties de non-répétition, par exemple l'adoption de mesures de droit interne,[53] soit des mesures de satisfaction, à l'exemple de la publication et de la diffusion de l'arrêt de la Cour sanctionnant les violations des droits de l'homme.[54]

De façon générale, dans sa jurisprudence, la Cour se montre pédagogue, voire paternaliste, en donnant en quelque sorte une leçon de morale à l'Etat violateur, en vue de l'éduquer à la culture des droits de l'homme.

Au total, la Cour, par le biais de sa jurisprudence, met en exergue quelques aspects saillants du particularisme du droit africain des droits de l'homme. Pour autant, ce particularisme ne doit pas être surestimé, comme l'illustre d'ailleurs le manque d'audace de la Cour africaine lorsque l'occasion se présente à lui d'innover ou faire évoluer le système de protection qu'elle incarne. En réalité, au regard des textes pertinents et de la jurisprudence africaine, le système africain de protection des droits de l'homme baigne manifestement dans le moule de l'universalisme.

3 L'UNIVERSALISME AFRICAIN DES DROITS DE L'HOMME

L'universalisme africain met en exergue les rapports que la Cour et le droit africain entretiennent avec les autres systèmes de protection des droits de l'homme et même plus généralement avec le droit international. De l'analyse des instruments juridiques pertinents et de

51 *Mtikila c Tanzanie* (n 38 ci-dessus) et *Zongo c Burkina Faso* (n 32 ci-dessus).
52 *Mtikila c Tanzanie* (n 38 ci-dessus) para 39.
53 *Mtikila c Tanzanie* (n 38 ci-dessus) paras 42-43.
54 *Mtikila c Tanzanie* (n 38 ci-dessus) para 44.

la jurisprudence, il ressort clairement que le droit africain, en raison de son caractère embryonnaire, constitue le relais régional de l'universalisme du droit des droits de l'homme, dans ses dimensions procédurale et matérielle.

3.1 Le relais régional du droit international procédural

Tous les aspects du droit international procédural ne seront pas abordés ici. Au regard de la jurisprudence de la Cour, l'influence du droit international procédural sur le droit africain concerne surtout la question des exceptions préliminaires, le retrait de la déclaration de compétence et la méthode d'interprétation du juge.

3.1.1 Les exceptions préliminaires

La Cour africaine est très fréquemment saisie d'exceptions préliminaires sur lesquelles elle doit statuer *in limine litis*, avant d'examiner le fond de l'affaire. Ces exceptions s'appuient sur divers arguments.

D'abord, l'incompétence *ratione personae*, *ratione materiae* et *ratione temporis* de la Cour. Sur cette question, l'influence du droit international est déterminante.

Le point de départ de la compétence du juge africain est fixé par l'article 3(2) du Protocole qui dispose que: 'En cas de contestation sur le point de savoir si la Cour est compétente, la Cour décide'. En réalité, cette disposition qui dérive des textes régissant plusieurs juridictions internationales (le Statut de la CPJI et l'article 36(6) du Statut de la CIJ par exemple), ne fait que codifier une jurisprudence arbitrale constante.[55]

Dans l'affaire *Zongo c Burkina Faso*, l'Etat défendeur a soulevé l'exception d'incompétence *ratione temporis* de la Cour au motif que lorsque les assassinats des journalistes avaient été perpétrés en 1998, le Protocole créant la Cour n'était pas encore entré en vigueur. Pour démontrer sa compétence, la Cour s'est appuyée sur les normes internationales, notamment, d'une part, sur les dispositions de l'article 28 de la Convention de Vienne sur le droit des traités, qui consacrent le principe de la non-rétroactivité des traités non contestés par les Parties, et, d'autre part, sur le Projet d'articles de la CDI sur la responsabilité internationale de l'Etat. Sur ce dernier point, la Cour a rappelé la distinction établie par le Projet d'articles entre les 'violations instantanées ou achevées' (article 14(1)) et les 'violations continues' (article 14(2)). La Cour a alors indiqué que l'assassinat des journalistes est une 'violation achevée'[56] alors que la violation du droit à ce que la

[55] Décision 2-A2-FT, *Etats-Unis/Iran* (21 décembre 1981) Iran-US CTR, 1/101; décision avant dire droit rendue par la Commission d'arbitrage pour l'ex-Yougoslavie le 4 juillet 1992 (1992) *Revue générale de droit international public* 584.

[56] *Zongo* (n 32 ci-dessus) para 68.

cause des victimes soit entendue devant les juridictions nationales compétentes est 'continue'.[57] Dans le premier cas, elle conclut à son incompétence, alors que dans le second, elle retient sa compétence *ratione temporis*.

Ensuite, l'exception d'irrecevabilité des requêtes formulées par les individus et les ONG sur le fondement des articles 5(3) et 34(6) du Protocole relatifs respectivement à l'exigence de la qualité d'observateur auprès de la Commission africaine et à la déclaration de reconnaissance de compétence de la Cour lorsqu'elle est saisie par les personnes privées. En réalité, il s'agit d'une tendance générale du droit international des droits de l'homme à favoriser l'accès direct ou indirect des personnes privées à la justice internationale, dans le respect de la volonté des Etats.[58]

Enfin, l'exception d'irrecevabilité peut être liée à la règle du non-épuisement des voies de recours internes. En raison du caractère embryonnaire du droit africain des droits de l'homme, la Cour, dans ses arrêts,[59] s'appuie systématiquement sur la jurisprudence d'autres juridictions internationales pour qualifier la nature judiciaire des recours internes et déterminer les critères de disponibilité, d'efficacité et de satisfaction.[60]

La Cour africaine s'inspire également du droit international procédural en matière de retrait de la déclaration de reconnaissance compétence et de méthode d'interprétation.

3.1.2 Le retrait de la déclaration de reconnaissance compétence et la méthode d'interprétation du juge

Sur le retrait de la déclaration de compétence dans l'affaire *Umuhoza c Rwanda*, la Cour était appelée à répondre à trois questions relatives à la validité du retrait, à ses conditions et à ses effets.

Sur le premier point, la Cour, en accord avec les parties, a reconnu que le Protocole ne contenait aucune disposition relative à son éventuelle dénonciation. Dès lors, après avoir indiqué que la déclaration est un acte unilatéral qui ne relève pas du droit des traités, elle a ajouté qu'elle 'sera guidée par les règles pertinentes qui régissent les déclarations de reconnaissance de compétence', à l'instar de celles

57 *Zongo* para 76-77.

58 Voir, entre autres, *Atemnkeng c Union africaine (*décision du 7 décembre 2012); *Mahmoudi c Tunisie* (décision du 26 juin 2012); *Timan c Soudan* (décision du 30 mars 2012); *Uko et autres c Afrique du Sud* (décision du 30 juin 2012); *Moundi c Cameroun et Nigéria* (décision du 23 septembre 2011); *Efoua Mbozo'O c Le Parlement panafricain* (décision du 30 septembre 2011).

59 *Jonction d'instance des affaires* para 82; *Mkandawire* (n 15 ci-dessus) para 38.

60 Cf., entre autres, Communications de la Commission africaine des droits de l'homme et des peuples 147/95 et 147/96, *Jawara c Gambie*, 13e rapport d'activité (1999-2000) para 1; Cour interaméricaine des droits de l'homme, *Velaquez-Rodriguez c Honduras* (arrêt du 29 juillet 1988) (Série C) n°4; Cour européenne des droits de l'homme, *Akdiva et autres c Turquie* (requête 21893/93 jugement du 16 septembre 1996) para 66; Commission interaméricaine des droits de l'homme, *Mariblanca Staff et OE Ceville c Panama* 22 octobre 2003 requête 12/303 paras 34-35.

concernant la Cour internationale de justice,[61] la Cour européenne des droits de l'homme[62] et la Cour interaméricaine des droits de l'homme,[63] 'ainsi que par le principe de la souveraineté des Etats en droit international'.[64] Selon la Cour, ce dernier principe 'prescrit que les Etats sont libres de s'engager et qu'ils conservent le pouvoir discrétionnaire de retirer leurs engagements'.[65]

S'agissant des conditions du retrait, la Cour, après avoir relevé que le pouvoir discrétionnaire de retrait n'est nullement absolu, souligne, en s'appuyant sur la jurisprudence de la Cour interaméricaine[66] et l'article 56(2) de la Convention de Vienne sur le droit des traités, qu'il est néanmoins soumis à 'une exigence de préavis d'au moins un an pour assurer la sécurité juridique et empêcher une suspension soudaine des droits ayant inévitablement des conséquences sur les tiers que sont, en l'espèce, les individus et les ONG qui sont titulaires de ces droits'.[67]

Enfin, en application des règles internationales en la matière et du principe de non rétroactivité, la Cour a jugé que l'acte de retrait ne prendra effet qu'après la période de préavis et que la notification du retrait de la déclaration n'a aucun effet sur les affaires pendantes devant la Cour.[68]

La Cour est également compétente pour interpréter les dispositions du Protocole qui la crée. En tant qu'une juridiction internationale et vu le caractère lacunaire des textes pertinents et de la jurisprudence, la Cour va les interpréter conformément aux normes de droit international et notamment aux dispositions de la Convention de Vienne sur le droit des traités. Celle-ci prévoit, en son article 31(1), qu' 'un traité doit être interprété de bonne foi suivant le sens ordinaire à attribuer aux termes du traité dans leur contexte et à la lumière de son objet et son but'.

Dans l'affaire *Yogogombaye c Sénégal*, la Cour a été amenée à interpréter l'article 34(6) du Protocole qui prévoit qu'elle 'ne reçoit aucune requête en application de l'article 5(3) intéressant un Etat partie qui n'a pas fait une telle déclaration'. Selon la Cour, le terme 'reçoit' ne doit cependant être entendu ni dans son sens littéral, comme renvoyant au concept de 'réception' ni dans son sens technique comme renvoyant au concept de 'recevabilité'. Il doit plutôt être interprété à la lumière tant de la lettre que de l'esprit de l'article 34(6) pris dans son ensemble et en particulier l'expression 'déclaration acceptant la compétence de la Cour pour recevoir les requêtes' et figurant dans une première phase de cette disposition.

61 Article 36(2) du Statut de la CIJ.

62 Article 46 de la Convention européenne des droits de l'homme et le Protocole 11 à cette Convention.

63 Article 62(1) de la Convention américaine des droits de l'homme.

64 *Umuhoza c Rwanda* (n 5 ci-dessus) para 55.

65 *Umuhoza c Rwanda* (n 5 ci-dessus) para 58.

66 *Ivcher Bronstein (Ivcher Bronstein) c Pérou* CIADH Series C No 74 para24(b).

67 *Umuhoza c Rwanda* (n 5 ci-dessus) paras 62, 65.

68 *Umuhoza c Rwanda* (n 5 ci-dessus) paras 67, 68.

En matière d'application du droit à un procès équitable, la Cour a indiqué qu'elle 's'inspire de la jurisprudence du Comité des droits de l'homme sur l'interprétation et l'application de l'article 14(3)(d) du PIDCP'.[69]

Toutefois, le droit africain, grâce à la jurisprudence de la Cour africaine, devient de plus en plus le relais africain du droit international matériel.

3.2 Le relais africain du droit international matériel

L'influence du droit international sur le droit africain se manifeste dans quatre matières importantes: d'une part, la notion d'organisation internationale et la responsabilité internationale de l'Etat, et d'autre part, l'institution d'un organe électoral indépendant et impartial et les limitations à la jouissance des droits.

3.2.1 La notion d'organisation internationale et la responsabilité internationale de l'Etat

A un requérant ayant attrait l'Union africaine devant elle, la Cour africaine, dans l'affaire *Falana c Union africaine*, tout en le déboutant, a pris le soin de distinguer l'Etat et l'organisation internationale. Selon la Cour, même si formellement, l'adoption des traités est faite par la Conférence des Chefs d'Etat et de Gouvernement de l'Union africaine, leur signature et leur ratification relèvent toujours de la prérogative exclusive de ses Etats membres. Dès lors, l'adoption du Protocole créant la Cour par la Conférence ne suffit pas pour établir que l'Union africaine est partie au Protocole et de ce fait, peut être attraite devant la justice sur cette base ou au nom de ses membres. Sur ce dernier point, la Cour, en s'appuyant sur un avis consultatif célèbre de la Cour internationale de justice[70] a indiqué qu''en tant qu'organisation internationale, l'Union a une personnalité juridique distincte de celle de ses Etats membres'. Dès lors, ajoute la CIJ,

> les obligations internationales découlant d'un traité ne peuvent être imposées à une organisation internationale, à moins que celle-ci ne soit partie à ce traité, ou soumise à ces obligations par tout autre moyen reconnu par le droit international.

En conséquence, la Cour africaine, en convoquant la Convention de Vienne de 1986 sur le droit des traités entre Etats et organisations internationales ou entre organisations internationales, a conclu que

> l'Union africaine ne peut donc pas être soumise à des obligations découlant du Protocole, à moins qu'elle n'ait été autorisée à devenir partie au Protocole et qu'elle soit disposée à le faire, ce qui n'est pas le cas en l'espèce.[71]

Autrement dit, elle ne peut être attraite devant la Cour au nom de ses membres.

69 *Thomas c Tanzanie*, Requête 5/2013 para 120.

70 Avis consultatif relatif à la *réparation des dommages subis au service des Nations Unies* Recueil CIJ (1949) 79 paras 68-69.

71 *Falana c Union africaine*, Requête 1/2011 (arrêt du 26 juin 2012) para 71.

En matière de violation des droits de l'homme, la question de la responsabilité internationale de l'Etat et son corollaire la réparation est fondamentale. Sur ce point, le droit africain est particulièrement pauvre.[72] En effet, lorsqu'elle est saisie sur ces questions, la Cour africaine n'a d'autres choix que de recourir au droit international et à la jurisprudence internationale. Elle l'a fait dans deux arrêts datant du 13 juin 2014 et du 5 juin 2015 relatifs à la réparation dans les affaires respectivement *Mtikila* et *Zongo*. La Cour a d'abord posé le fondement de la responsabilité internationale de l'Etat (para 27 et paras 20-22). Selon celle-ci,

> l'un des principes fondamentaux du droit international contemporain sur la responsabilité de l'Etat et qui constitue, par ailleurs, l'une des normes coutumières du droit international, veut que toute violation de l'obligation internationale ayant causé un préjudice doit être réparée.

Ce principe a été dégagé par la jurisprudence de la Cour permanente de justice internationale, dans l'arrêt du 26 juillet 1927, affaire de *l'usine de Chorzow (Allemagne c Pologne)*: 'Toute violation d'un engagement compte l'obligation de le réparer'. C'est ce principe, rappelle la CPJI, qui a été consacré non seulement par l'article 31(1) du Projet d'articles sur la responsabilité de l'Etat pour fait internationalement illicite de la CDI de 2001, mais également, en Afrique, par l'article 27(1) du Protocole créant la Cour.

Sur la question proprement dite de la réparation, la Cour africaine va recourir systématiquement au droit international et surtout à la jurisprudence internationale particulièrement élaborée. Elle le fera pour distinguer le préjudice matériel et le préjudice moral,[73] laquelle distinction est consacrée par l'article 31(2) du Projet d'articles de la CDI sur la responsabilité internationale de l'Etat. Le même texte (article 34) prévoit également plusieurs formes de réparation qui, dans l'ensemble est intégrale. En s'appuyant sur une jurisprudence internationale abondante,[74] elle peut prendre la forme d'une compensation financière,[75] de frais et dépens, de garanties de non-répétition et de mesures de satisfaction.

Enfin, la Cour s'est évertuée, en se fondant sur le droit international des droits de l'homme, à clarifier la notion de victime qui, contrairement au droit national, ne doit pas être nécessairement limitée à celle d'héritier en première ligne d'une personne décédée. Elle

72 Néanmoins, la Commission africaine a eu à connaître quelques cas significatifs par exemple *République démocratique du Congo c Burundi, Rwanda et Ouganda*, Communication 227/99. Cf. *Recueil des documents clés de l'Union africaine relatifs aux droits de l'homme* (2013) PUL 354.

73 *Usine de Chorzow* CPIJ (13 septembre 1928) Serie A 17; *Goiburú et al c Paraguay* CIADH (22 septembre 2006) Série C 153 paras 29-35, 26-29.

74 Cour interaméricaine des droits de l'homme (CIADH), Affaire dite des 'enfants de la rue' *Villagrain Morales et autres c Guatemala* (26 mai 2011) 84; *Neira Alegria et autres c Pérou* (19 septembre 1986) para 59; Cour européenne des droits de l'homme, *Perks et autres c Royaume Uni* (12 octobre 1999) Requêtes CEDH 25277/94, 25279/94.

75 La Cour africaine a préféré s'appuyer sur les exemples internationaux alors qu'elle aurait dû, sur ce point, s'inspirer de la jurisprudence abondante de la Commission africaine depuis 2013. Cf. H Adjolohoun *Droit de l'homme et justice constitutionnelle en Afrique: le modèle béninois. A la lumière de la Charte africaine des droits de l'homme et des peuples* (2011).

doit donc être prise au sens général, et concerner toute personne proche de la personne décédée dont on peut raisonnablement penser qu'elle a pu subir un préjudice moral caractérisé du fait de la violation des droits de l'homme concernée.[76]

La jurisprudence de la Cour africaine s'inspire également du droit international matériel, notamment pour déterminer le caractère indépendant et impartial d'un organe électoral indépendant et impartial et pour fixer les limitations à la jouissance des droits.

3.2.2 L'institution d'un organe électoral indépendant et impartial et les limitations à la jouissance des droits

Le phénomène d'internationalisation du droit électoral à la faveur de la mondialisation de la démocratie et de l'Etat de droit a largement contribué à l'émergence d'un droit international des élections.[77] Certains éléments matériels de ce droit en gestation, notamment l'obligation pour les Etats de créer un organe électoral indépendant, ont été portés devant la Cour africaine, dans l'affaire *APDH c Côte d'Ivoire*.

En se basant non seulement sur la position d'une institution internationale spécialisée en matière électorale et sur le rapport de la Mission de l'observation des élections de l'Union africaine du 27 octobre 2015, mais aussi sur la jurisprudence de la Cour européenne des droits de l'homme,[78] la Cour a indiqué que si l'organe électoral ivoirien dispose d'une indépendance institutionnelle dès lors qu'elle bénéficie, de par la loi, d'une autonomie administrative et financière, il ne présente pas néanmoins les garanties d'indépendance et d'impartialité requises, au regard de sa composition déséquilibrée (huit membres pour la majorité contre quatre pour l'opposition) et de son mode de prise de décision (majorité simple).[79] Par conséquent, conclut la Cour, la loi contestée viole l'article 17 de la Charte africaine sur la démocratie qui prévoit l'obligation pour les parties de créer un organe électoral indépendant et impartial.

Sur la question de la limitation à la jouissance des droits, en raison du caractère embryonnaire du droit africain, la Cour s'inspire également du droit international. La Cour africaine pose le principe dans *Jonction d'instance d'affaires*

> La jurisprudence internationale[80] sur les limitations à la jouissance des droits a établi le principe que les restrictions doivent être non seulement nécessaires dans une société démocratique, mais aussi raisonnablement proportionnelles à l'objectif légitime recherché.[81]

[76] *Zongo et autres c Burkina Faso (réparation)* para 46.

[77] T Ondo 'L'internationalisation du droit relatif aux élections nationales: à propos d'un droit international des élections en gestation' (2012) 5 *Revue de Droit Public* 1405.

[78] *Findlay c Royaume-Uni* (arrêt du 25 février 1995) para 76.

[79] *APDH c Côte d'Ivoire*, para 133.

[80] *Handysyde c Royaume-Uni* requête 5493/72 para 49; *Gullow c Royaume-Uni* requête 9063/80 para 55; *Baena Ricardo et autres c Panama* arrêt du 2 février 2001.

[81] *Jonctions d'affaire d'instances* (n 25 ci-dessus) para 106.1.

Confrontée à la restriction du droit d'éligibilité, du droit d'égalité et du droit à la non-discrimination en matière électorale en République unie de Tanzanie, la Cour, dans l'affaire précitée, se réfère de façon particulière à l'observation générale 25 du Comité des droits de l'homme de l'ONU sur le droit de participer à la direction des affaires publiques, le droit de vote et le droit d'accéder, dans les conditions d'égalité, à des fonctions publiques. La Cour africaine indique qu'elle

> fait sienne cette observation générale car il s'agit d'une déclaration faisant autorité sur l'interprétation de l'article 25 du Pacte international relatif aux droits civils et politiques, qui reflète l'esprit de l'article 13 de la Charte africaine et qui, en vertu de l'article 60 de la Charte, est un instrument adopté par les Nations Unies relatif aux droits de l'homme dont la Cour peut s'inspirer pour sa propre interprétation.[82]

4 CONCLUSION

Au total, la Cour africaine a élaboré une jurisprudence originale qui repose sur une conception particulière des droits de l'homme. Cette construction prétorienne qui irradie et pourrait à terme transformer l'ensemble du système vise, selon une interprétation sociologique, à constitutionnaliser, socialiser, humaniser et moraliser le droit africain des droits de l'homme. Toutefois, cette approche paraît encore limitée. En effet, la jeunesse du droit africain des droits de l'homme, le développement du dialogue avec d'autres juridictions internationales largement en avance et la forte dépendance de la Cour à l'égard des canons du positivisme juridique, volontariste et universaliste du droit international public freinent manifestement l'audace du juge africain. Dès lors, l'affranchissement de cette conception et la construction d'une approche plurielle ou pluraliste, à l'exemple de la posture prise par la Cour interaméricaine des droits de l'homme,[83] apparaissent, à notre sens, comme les conditions *sine qua non* d'un véritable décollage de la Cour africaine et de l'émergence d'un droit africain des droits de l'homme véritablement centré sur l'humanité.

82 *Jonctions d'affaire d'instances* (n 25 ci-dessus) para 107.3.

83 L Hennebel et H Tigroudja (eds) *Le particularisme interaméricain des droits de l'homme? 40e anniversaire de la Convention américaine des droits de l'homme* (2009); M Lopez et S Bellina 'La démarche interculturelle d'élaboration de la jurisprudence: outil privilégié pour une approche plurielle des droits de l'homme. Le cas du système interaméricain de protection des droits de l'homme' (2011) *Etude Institut de recherche et débat sur la gouvernance* 45.

Actualising women's participation in politics and governance in Africa: the case of Kenya and Ghana

Rodger Owiso and Bright Sefah ***

ABSTRACT: Almost two decades into the 21st century, women are still not accorded a place of prominence in politics and governance, particularly in Africa. Using the examples of Kenya and Ghana, this article undertakes a critical analysis of the implementation of women's right to participation in political and decision-making processes in Africa with a view to highlighting progress made, challenges faced and possible solutions to these challenges. Women's right to participation in political life is enshrined in article 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol). The article argues that while some progress has been made towards implementing the above right, much more still needs to be done to achieve effective and transformative participation by women. The progress revealed is mainly in the domestication by national laws of the relevant international obligations. However, the article also notes a significant disconnect between the normative framework and actual participation of women. The two case studies expose an unimpressive lack of political will and persistent societal perceptions, together contributing to the failure to move beyond codification of laws to improvements in actual practice. With lessons learnt from these two countries, this article argues for collaborative effort among African countries to promote genuine intra-Africa learning allowing African states to share experiences, consolidate gains and innovate around common challenges. By so doing, African states can consolidate efforts towards breaking the current inertia and accelerate the actual implementation of article 9 of the African Women's Rights Protocol. Overall, the article cast a spotlight on the need to refocus debates from standard-setting to actual implementation necessary to achieve transformative equality.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Actualiser la participation des femmes à la vie politique et à la gouvernance en Afrique: le cas du Kenya et du Ghana

RÉSUMÉ: Presque deux décennies après le début du XXIe siècle, les femmes ne se voient toujours pas accorder une place prépondérante dans la vie politique et dans la gouvernance, en particulier en Afrique. En prenant les exemples du Kenya et du Ghana, le présent article entreprend une analyse critique de la mise en œuvre du droit des femmes à participer aux processus politiques et décisionnels en Afrique afin de souligner les progrès réalisés, les défis rencontrés et les solutions possibles à ces défis. Le droit des femmes à participer à la vie politique est prévu par l'article 9 du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole relatif aux droits des femmes en Afrique). L'article fait valoir que

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si certains progrès ont été enregistrés dans la mise en œuvre de ce droit, il reste encore beaucoup à faire pour que les femmes puissent participer de manière efficace et transformatrice. Les progrès réalisés concernent principalement l'incorporation dans les législations nationales des obligations internationales pertinentes. Cependant, l'article note également un décalage important entre le cadre normatif et la participation effective des femmes. Les deux études de cas révèlent un manque de volonté politique et des perceptions sociétales persistantes qui contribuent à l'incapacité d'aller au-delà de la codification des lois pour améliorer la pratique réelle. Sur la base de leçons tirées de ces deux pays, l'article plaide en faveur d'un effort collaboratif entre les pays africains pour promouvoir un véritable apprentissage intra-africain permettant aux Etats de partager leurs expériences, de consolider leurs acquis et d'innover concernant les défis communs. Ce faisant, les États africains peuvent consolider leurs efforts pour mettre un terme à l'inertie actuelle et accélérer la mise en œuvre effective de l'article 9 du Protocole relatif aux droits des femmes en afrique. En somme, l'article a mis en lumière la nécessité de recentrer les débats sur le movement necéssaire de la normalisation à la mise en œuvre effective pour parvenir à l'égalité transformative.

KEY WORDS: Protocol to the African Charter on the Rights of Women, Maputo Protocol, women, political participation, Africa, equality

CONTENT:

1 INTRODUCTION

The African continent has in recent decades made significant progress in establishing normative frameworks on human rights, particularly on the rights of women. Besides the African Charter on Human and Peoples' Rights (African Charter)[1] which is the 'parent' instrument for human rights in Africa, a number of other regional instruments have codified laudable provisions on the rights of women. The most significant of these is the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Rights Protocol) of 2003,[2] which has since been reinforced by other instruments such as the African Charter on Democracy, Elections and Governance (African Democracy Charter).[3] The continent is therefore quite rich in codified legal provisions on women's rights. The enthusiasm and speed with which African countries adopted and ratified the above instruments have, however, not been mirrored in the implementation of the instruments. Among the provisions whose implementation still eludes many African nations and which continues

1 OAU Doc CAB/LEG/67/3 rev 5 (27 June 1981), entered into force 21 October 1986.

2 AU Doc CAB/LEG/66.6 (11 July 2003), entered into force 25 November 2005.

3 AU Doc Assembly/AU/Decl 147 (VIII) (30 January 2007), entered into force 15 February 2012.

to elicit significant debate is the provision on participation of women in political and governance processes.

This article interrogates the continental implementation of the right of women to equally participate in political and governance processes as provided in various regional instruments. This examination inquires how the political participation provisions of these instruments have been translated into tangible and sustainable gains for African women, if at all. Specifically, the article highlights the gains made in implementation, identifies the challenges experienced and anticipated and proposes ways of plugging these gaps in order to ensure that this right is effectively guaranteed. In so doing, the article uses Kenya and Ghana as case studies in an attempt to determine broad implementation patterns across the continent. The choice of the two countries is informed by the fact that Ghana's Constitution, promulgated in 1992, evidenced one of Africa's first examples of the constitutional entrenchment of gender equality principles at the domestic level. This Constitution was largely influenced by the African Charter. Ghana has also made significant and consistent democratic strides uncommon in many African countries and is for this reason considered one of the few beacons of democratic light on the continent. Kenya's progressive and much-hailed Constitution, promulgated in 2010, was expected to open up the political space for women in a revolutionary way. The fact that Kenya and Ghana have taken some bold steps towards actualising the right of women to political participation has also exposed them to a number of challenges to effective implementation. The choice of the two countries therefore provides the opportunity to examine in one breath both bold attempts at implementation as well teething challenges to such attempts. However, Africa is characterised by such diversity and extreme dissimilarities that to assume homogeneity in how the 55 African Union member states implement the provisions on women's participation would be simplistic and false. However, in highlighting the successes, challenges and gaps in continental implementation, this article uses the experiences of Kenya and Ghana as representative of the continent without purporting to be authoritative.

Section two highlights the provisions of the various regional instruments on political participation as read together with other provisions on related rights. Section three explores implementation in Kenya and Ghana by examining the legal and institutional frameworks and interrogating the composition of the two countries' parliaments in order to explore the practical implementation and highlight successes and challenges. Section four traces trends and practices and highlights the social realities characterising the political and governance environment for women in Kenya and Ghana specifically, and Africa, more generally. Finally, section five summarises the findings of the article and makes conclusions relevant to continental implementation of the provisions on women's participation in political and governance processes.

2 AFRICA'S NORMATIVE FRAMEWORK ON WOMEN'S PARTICIPATION

Women all over the world have historically been excluded from political participation and governance,[4] with very low numbers in African Parliaments.[5] Women's exclusion continues despite the fact that their inclusion and equality in the democratic process has been recognised as a precondition for democracy, rather than as a consequence of democratic governance.[6] In an attempt to right the above wrong, article 9 of the African Women's Rights Protocol obliges African states to take specific positive action to ensure participation by women in governance and political life. The article provides as follows:

> 1. States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national legislation and other measures to ensure that:
>
> (a) women participate without any discrimination in all elections;
>
> (b) women are represented equally at all levels with men in all electoral processes;
>
> (c) women are equal partners with men at all levels of development and implementation of state policies and development programmes.
>
> 2. States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.

A close reading of the provision reveals a deliberate use of language. The phrase 'at all levels' emphasises the fact that the measures expected of states should be all-encompassing as they are expected to address gender inequities and inequalities in the entire political and governance system. In other words, these measures should not be piecemeal approaches targeting isolated sections or aspects of the system. Further, article 1(b) lays emphasis on the broad nature of the anticipated measures by using the phrase 'in all electoral processes' thereby implying that the provision speaks more to the entire *process* leading up to political life as opposed to the specific outcomes. Also, the use of the phrase 'increased and effective representation and participation' affirms the view that, while the outcome of the anticipated measures is important, these results are very much functions of the process leading up to them. The import of this deliberate phraseology is that the provision targets the broad range of

4 P Paxton & S Kunovich 'Women's political representation: the importance of ideology' (2003) 82 *Social Forces* 87 87-88; SM Rai 'Gender and democratization: Ambiguity and opportunity' in R Luckman & G White (eds) *Democratization in the South: the jagged wave* (1996) 221.

5 T Thabane & M Buthelezi 'Bridging the gap between *de jure* and *de facto* parliamentary representation of women in Africa' (2008) 41 *Comparative and International Law Journal of Southern Africa* 175 176.

6 F Raday 'Gender and democratic citizenship: the impact of CEDAW' (2012) 10 *International Journal of Constitutional Law* 512 516.

actions and steps necessary to achieve the desired outcome of gender equity in the political and governance spheres. In other words, article 9 demands transformative equality which imposes upon countries the obligation to transcend mere literal comprehension of equality and adopt tangible measures to eliminate existing historical, structural and institutional hurdles that frustrate equality in reality in order to achieve equal participation of women.[7] As such, transformative equality focuses on the results of measures taken[8] rather than the aesthetics of the measures themselves and as such lays emphasis on interrogating the entire process leading up to the desired results.

The African Women's Rights Protocol is the authoritative instrument on women's right to political participation in Africa, and Thabane and Buthelezi have in fact called it the most progressive and defiant women's rights instrument. [9] However, it is not the genesis of this right on the continent: two decades earlier, the African Charter had entrenched the right of all citizens of a country to freely participate in the government of their country without discrimination on any ground or status.[10] To emphasise the centrality of participation to the democratic governance of a country, the African Charter reinforces this right by imposing a duty on all persons to place their physical and intellectual abilities at the service of the country.[11] It is therefore not only a right of all citizens to participate in the government of their country, but it is also an obligation which should not be disregarded. To ensure that all citizens are actually able to participate in government, the state is obliged to adopt measures to enable participation by all citizens on an equal footing.[12] In terms of the African Charter, participation in government by all is therefore as much a right as it is a duty, with the right and duty mutually reinforcing each other.

The political rights entrenched in the African Charter were, however, not followed by immediate enthusiastic implementation. It was not until the 1990s as Africa slowly began embracing democracy as an ideal form of governance that African leaders started appreciating popular political participation not merely as a codified right, but as a prerequisite for transforming the socio-economic fortunes of nations. This was evidenced by the Organisation of African Unity's adoption in 1990 of the Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World which recognised popular participation in governance, an enabling political environment, human rights guarantees and the rule of law as prerequisites for achieving socio-economic transformation.[13] This

7 S Fredman 'Beyond the dichotomy of formal and substantive equality: towards a new definition of equal rights' in I Boerefijn *et al* (eds) *Temporary special measures: accelerating de facto equality of women under article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (2003) 111.

8 Raday (n 6 above) 514 - 515.

9 Thabane & Buthelezi (n 5 above) 184.

10 Articles 13 & 2 of the African Charter.

11 Article 29(2) of the African Charter.

12 Article 1 of the African Charter.

13 AHG/Decl 1 (XXVI), 9-11 July 1990 para 10.

signalled a symbolic recommitment by African leaders, at least in principle, to the provisions of the African Charter particularly on political participation by all. However, in characteristic fashion, the above declaration was also not immediately followed by any significant concrete steps towards ensuring actual participation of all citizens, particularly women, in political and governance processes. Even though participatory politics replaced authoritarian one-party systems in a number of African states towards the close of the 20th Century, the declaration's principles remained largely symbolic for women as the new 'democratic' systems largely retained the old patriarchal models of leadership and access to political power.

At the dawn of the 21st century, African leaders made a strategic decision to consolidate the gains of the last four decades of the previous century, take lessons from the failures and challenges and review their continental strategy for the new century. The Organisation of African Unity (OAU) was wound up and replaced by the African Union (AU). This move signalled a value shift from the OAU's dispassionate approach to the continent's contemporary concerns, to a more proactive approach by the AU to issues such as democratic values, the rule of law, sound governance and human rights.[14] There was an emerging unequivocal recognition on the continent that the continent's socio-economic and peace and security challenges could not be sustainably addressed if African governments continued to perpetuate or tolerate bad governance practices[15] such as those that exclude a significant part of society, namely women, from the political and governance processes.

Apart from establishing the AU, the Constitutive Act of the African Union of 2000 emphasised the promotion of democracy, *popular participation* and good governance and reaffirmed the commitment of African countries to promoting and protecting the rights and freedoms enshrined in the African Charter.[16] Gender equality formed a specific operational principle of the new organisation.[17] As testament to this renewed commitment, the African Women's Rights Protocol was adopted three years later, on 11 July 2003. Barely 18 months later, a rather unprecedented speed in African multilateral human rights treaty ratification, it had received the requisite 15 ratifications and entered into force on 25 November 2005.[18]

14 H Wulf 'The role of regional organisations in conflict prevention and resolution' in H Wulf (ed) *Still under construction: regional organisations' capacities for conflict prevention* (2009) 15 http://researchmap.jp/?action=cv_download_main&upload_id=8542 (accessed 16 June 2017).

15 See the Preamble & article 3 of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union 2001.

16 Article 3(g) & 3(h) of the Constitutive Act of the African Union OAU Doc CAB/LEG/23.15 (11 July 2000), which entered into force 26 May 2001.

17 Article 4(l) of the Constitutive Act of the African Union.

18 African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: Status list' https://www.au.int/web/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_righ.pdf (accessed 1 July 2017).

Around the same time, the AU was moving fast to codify its commitments to democracy and governance which of course included equal participation for all as a key pillar. The new body adopted the Declaration on the Principles Governing Democratic Elections in Africa in July 2002, in which the member states committed themselves to establish all-inclusive electoral systems; encourage participation by women in all aspects of the electoral process; and hold all-inclusive elections.[19] Such a bold statement on democracy come soon after the AU had categorically recognised the link between peace and democratic practices, good governance and the rule of law.[20]

The above declaration set the stage for the adoption of the African Charter on Democracy, Elections and Governance (African Democracy Charter) five years later, on 30 January 2007, and its entry into force another five years later, on 15 February 2012. The African Democracy Charter's uniquely African approach to democracy has been hailed for its contribution to Africa's democratisation efforts.[21] The African Democracy Charter sought to adapt the broad provisions of the African Women's Rights Protocol on women's participation by including among its objectives and principles the promotion of citizen's participation in public affairs, the promotion of representative government systems and the promotion of gender equality and balance in governance and development processes.[22] To achieve the above objectives, the African Democracy Charter mandatorily obligates states to take concrete steps such as eliminating gender-based discrimination; adopting legislative and administrative measures to guarantee the rights of women (including the right to participation); creating conditions to ensure full and active participation of women in decision-making at all levels; and taking all possible measures to encourage women to participate fully and actively in the electoral process and to ensure gender parity in representation at all levels, particularly in Parliament.[23]

The common spirit flowing through the African Women's Rights Protocol and the African Democracy Charter in relation to the participation of women in political and governance processes is the unequivocal manner in which states' obligations are framed. The instruments use the phrases 'specific positive action' and 'all possible measures to encourage full and active participation' respectively[24] to convey the message that what is expected of states are concrete and measurable steps capable of achieving actual and sustainable

[19] AU Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl 1 (XXXVIII), 8 July 2002 paras II & III.

[20] Article 3(f) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, 10 July 2002.

[21] P Glen 'Institutionalizing democracy in Africa: a comment on the African Charter on Democracy, Elections and Governance' (2012) 5 *African Journal of Legal Studies* 119 120.

[22] Article 2 of the African Democracy Charter.

[23] Articles 8 & 29 of the African Democracy Charter.

[24] Article 9(1) of the African Women's Rights Protocol; article 29(3) of the African Democracy Charter.

participation for women, as opposed to merely routine measures designed to give the illusion of compliance.

The following section examines, under thematic heads, the measures Kenya and Ghana have taken towards implementing the provisions of the African Women's Rights Protocol and the other instruments mentioned above relating to participation of women in political and governance processes. In so doing, the section identifies good practices capable of setting continental standards and also highlights some challenges encountered by the two countries which other African countries should anticipate and take into consideration when embarking on their implementation processes.

3 ACHIEVING TRANSFORMATIVE EQUALITY: LESSONS FROM KENYA AND GHANA

As mentioned above, measures aimed at achieving transformative equality in governance and politics as called for by the above instruments should be focussed on opening up political space to women and changing societal perceptions of women's participation in politics.[25] In other words, these measures should address the broad spectrum of issues that create bottlenecks for women in governance and political life. In order to determine their effectiveness, the measures should be examined through a double lens that interrogates the legal framework designed to achieve women's participation as well as the relevant institutional structure. This section therefore starts by highlighting Kenya's and Ghana's relevant legal framework in light of these countries' human rights obligations as highlighted above. It then proceeds to examine the representative structure of the legislatures of Kenya and Ghana with a view to highlighting women's position in these institutions and the attendant challenges, again in light of the human rights obligations above. Being the apex of political power in most jurisdictions, the composition of Parliaments often attracts a much-needed and healthy scrutiny. Being the institution where the people's political power is represented, Parliament's composition is usually indicative of the society's general attitude towards women's right to political participation.

3.1 Women's right to political participation under municipal law

The appropriate starting point when examining a country's implementation of international human rights obligations is the treatment accorded to such rights under that country's supreme law. For countries like Kenya and Ghana whose supreme law is a written constitution, that examination is relatively straight-forward. Entrenching a principle in the constitution of a country arguably gives

[25] Paxton & Kunovich (n 4 above) 88.

it greater legitimacy as an expression of the people's values; it imposes a mandatory obligation on the state to implement the principle; and also ensures supreme protection for the principle since constitutional provisions are often accompanied by procedures that make constitutional amendment more onerous.

The Constitution of Kenya 2010 (Kenyan Constitution) is celebrated as perhaps the most transformative and progressive on the continent, second only to the South African Constitution.[26] This transformative and progressive attribute is largely due to the fact that it includes, as one of its chapters, a very robust Bill of Rights which contains an array of progressive human rights and fundamental freedoms provisions.[27] It is noteworthy that the text of Kenya's Bill of Rights borrows quite significantly from international human rights treaties ratified by Kenya, including the African Women's Rights Protocol and the African Charter. Such treaties are further expressly recognised under article 2(6) of the Kenyan Constitution as forming part of the laws of Kenya.

Key among the rights in the Bill of Rights is the right to make political choices which includes participating in political activities and seeking political office.[28] Specific to participation of women, the Bill of Rights provides that women and men have the right to equal opportunities in political, socio-economic and cultural spheres and in this regard the state is obligated to take legislative and other measures to ensure that 'not more than two-thirds of the members of *elective* or *appointive* bodies shall be of the same gender'.[29] While article 9(1)(b) of the African Women's Rights Protocol calls for women to be represented *equally* with men, thereby implying a 50 per cent:50 per cent representation, the above provision of the Kenyan Constitution appears to lower this threshold to 33.3 per cent: one-third as the bare minimum. The effect of this is that the state would be tempted not to pursue aggressive measures aimed at achieving transformative equality as required by the African Women's Rights Protocol, but to only pursue those measures that ensure the bare constitutional minimum. The Supreme Court of Kenya has further arguably enabled this 'bare-minimum' approach. With specific reference to the implementation of this principle in Parliament, the Supreme Court rendered its advisory opinion in *In the matter of the principle of gender representation in the National Assembly and the Senate,*[30] in which it interpreted this principle as being *progressively realisable*, as opposed to being immediately realisable, and affirmed the constitutional deadline for enacting the enabling legislative framework as 27 August 2015, five years after the Constitution's promulgation.

26 G Musila 'Realizing the transformative promise of the 2010 Constitution and new electoral laws' in G Musila (ed) *Handbook on election disputes in Kenya: context, legal framework, institutions and jurisprudence* (2013) 2.

27 Constitution of Kenya 2010 cap 4.

28 Article 38 of the Constitution of Kenya 2010.

29 Articles 27 & 81(b) of the Constitution of Kenya 2010.

30 Supreme Court of Kenya Advisory Opinion 2 of 2012 [2012] eKLR para 79.

In addition to constitutionally entrenching the so-called two-thirds gender principle for elective and appointive bodies, the Kenyan Constitution provides further safeguards to this principle. To guard against political tinkering, the Constitution secures this principle from whimsical amendment or repeal by providing two rigid procedures for its amendment. The first is through a parliamentary initiative, which must be approved separately by each of the two Houses of Parliament, each House approving by at least a two-thirds majority of all its members.[31] At least 90 days must lapse between the first and second readings in either House.[32] Thereafter, the proposal must be subjected to a referendum where at least 20 per cent of registered voters in at least half of Kenya's 47 counties must vote and it must be approved by an overall countrywide simple majority.[33] The second procedure involves a popular initiative by not less than one million registered voters, subsequently approved by a majority of Kenya's 47 county assemblies and ultimately by the people in a referendum as mentioned above.[34]

Ghana, on the other hand, has had a series of Constitutions since gaining its independence in 1957, but none significantly provided for the rights of women in the manner that the Constitution of Ghana 1992 (Ghanaian Constitution) has done. Drawing inspiration from the African Charter, the 1992 Constitution represents significant advances for human rights.[35] The Ghanaian Constitution expresses an instrumental supremacy over any other laws in the land[36] and bestows upon the Supreme Court, the highest court of the land, the utmost power of interpretation and striking down inconsistencies between the Constitution and legislation.[37]

Chapter 5 of the Ghanaian Constitution is entirely dedicated to 'fundamental human rights and freedoms' to be enjoyed by every person in Ghana regardless of 'race, place of origin, political opinion, colour, religion, creed or gender'.[38] These are political, civil, social and economic rights including protection from forced labour and slavery,[39] equality and the prevention of discrimination on the grounds of gender or race.[40] Further, it provides for 'freedom of expression and association[41] and fairness among administrative bodies and their subordinates'.[42] Article 21(3) explicitly stipulates the right to 'form or join political parties and to participate in political activities subject to

31 Articles 255 & 256 of the Constitution of Kenya 2010.

32 Articles 256(1)(c) of the Constitution of Kenya 2010

33 Articles 255 & 256 of the Constitution of Kenya 2010.

34 Articles 255 & 257 of the Constitution of Kenya 2010

35 The drawing and promulgation of the 1992 Constitution followed the ratification of the African Charter in 1989. In its bid to measure up to the standards set by the African Charter, Ghana modelled its Constitution after the African Charter.

36 Article 1(2) of the Constitution of Ghana 1992

37 Article 2 of the Constitution of Ghana 1992.

38 Article 12 of the Constitution of Ghana 1992.

39 Article 16 of the Constitution of Ghana 1992.

40 Article 17(2) of the Constitution of Ghana 1992.

41 Article 21(1)(a) & (e) of the Constitution of Ghana 1992.

42 Article 23 of the Constitution of Ghana 1992.

such qualifications and laws as are necessary in a free and democratic society'.[43] The Constitution also calls for equal economic opportunities for citizens with full integration of women into economic development of the country[44] as well as equality in working under satisfactory, safe and healthy conditions and equal work without discrimination.[45] These general constitutional protections are further broadened by the Labour Act, 2003, which calls for equity in employment for men and women. Part five of the Act is entirely dedicated to the rights of women necessary to promote the participation of women in public offices. It considers specificities in relation to women such as frowning upon overtime work by pregnant women after normal working hours;[46] proscription of allocating above-weight duties to pregnant women especially after their fourth pregnancy month;[47] and maternity, annual and sick leave, together with a number of days' entitlement for nursing mothers.[48]

The Ghanaian Constitution in addition demands unique care for mothers during reasonable periods before and after child-birth with paid leave and special care for the children so that women can realise their full potential.[49] Further, there is also the guarantee of equal rights during trainings and promotions void of impediments from any person.[50] Chapter 6 of the Constitution covers the Direct Principles of State Policy for guidance of cabinet, government organs and political parties towards human rights and again obliges the executive to report to parliament annually on the essential measures undertaken for 'full realisation of basic human rights'.[51] It then calls on the state to promote integration and eliminate discriminative preconceptions based on gender among others, and to see to measures for realising 'regional and gender balance in recruitment and appointments to public offices'.[52] In this regard, a 'quota system' has been created in a number of statutes designed towards achieving women's political empowerment. The Legal Aid Scheme Act, 1997, for example, establishes the Legal Aid Board whose membership must include at least one female member.[53] The Persons with Disability Act, 2006, also creates the National Council on Persons with Disability whose membership includes a representative from the ministry responsible for women and children's affairs (now Ministry of Gender, Children and Social Protection) and two other female representatives.[54] When nominating persons to occupy the two positions available to be filled by the president in the

43 Article 21(3) of the Constitution of Ghana 1992.
44 Article 36(6) of the Constitution of Ghana 1992.
45 Constitution of Ghana 1992 art 24(1).
46 Section 55 of the Labour Act 651 of 2003.
47 Section 56 of the Labour Act 651 of 2003.
48 Section 57 of the Labour Act 651 of 2003.
49 Article 27(1) & (2) of the Constitution of Ghana 1992.
50 Article 27(3) of the Constitution of Ghana 1992.
51 Article 34(1) & (2) of the Constitution of Ghana 1992.
52 Article 35(5) &(6)(b) of the Constitution of Ghana 1992.
53 Sections 3 & 4(1)(h) of the Legal Aid Scheme Act 542 of 1997.
54 Sections 41 & 43 of the Persons with Disability Act 715 of 2006.

governing body of the National Peace Council, the president is also obligated to nominate one woman.[55] The same requirement applies to the membership of the governing bodies of the Regional Peace Councils and the District Peace Councils.[56]

Other relevant constitutional protections under the Ghanaian Constitution include an equal right to vote,[57] the right to join any political party by any eligible voter[58] and the right to political participation for influencing structures and policies of government.[59] Article 35(6)(b), read in conjunction with article 36(6) of the Ghanaian Constitution, asserts an affirmative responsibility on the state to put in place 'appropriate measures to achieve regional and gender balance in recruitment and appointment to public offices' as well as 'all necessary steps so as to ensure the full integration of women into the mainstream of the economic development of Ghana'.

The discussion above reveals the recognition Kenya and Ghana's constitutional frameworks have made of the intersectionality between various rights. The essence is that participation of women in political and governance processes is not an isolated right. Rather, it is an indivisible right related to and dependent upon a host of other rights. Therefore, in order to effectively ensure women's participation, countries ought to take a multi-dimensional approach through several measures aimed at simultaneously tackling all barriers manifested in all aspects of life. This process starts by constitutionally recognising the indivisibility, interrelation and interdependence of the right to participation and the host of other rights mentioned above. This indeed is what article 9 of the African Women's Rights Protocol envisions when it calls for a wide range of measures targeting the entire process necessary to reform the political and governance system. The legal framework of a state forms a fundamental part of this process hence the discussion of the normative frameworks of Kenya and Ghana above.

While the discussion above has revealed robust constitutional guarantees in Kenya and Ghana regarding *formal* protection and promotion of women's rights particularly the right to participation, these guarantees are not exhaustive. As the constitutions of Kenya and Ghana recognise, the constitutional guarantees should take account of 'others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man [and woman]'[60] and 'other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law'.[61] Therefore, guaranteed rights in 'treaties, conventions, international or regional

55 Section 4(1)(b) of the National Peace Council Act 818 of 2011.

56 Article 9(b) & 12(b) of the National Peace Council Act 818 of 2011.

57 Article 42 of the Constitution of Ghana 1992.

58 Article 55(2) of the Constitution of Ghana 1992.

59 Articles 55(2) & (10) of the Constitution of Ghana 1992, respectively.

60 Article 33(5) of the Constitution of Ghana 1992. See also articles 17(2), 22, 26(2) & 39(2) of the Constitution of Ghana 1992

61 Article 19(2)(b) of the Constitution of Kenya 2010.

accords, and norms'[62] and 'provisions of international human rights instruments (and practice under them) or from the national human rights legislation and practice of other states'[63] could be applied here. The following discussion will therefore examine the interplay between Kenya's and Ghana's domestic provisions on women's rights and the countries' obligations under international instruments.

3.2 Constitutional recognition of international obligations

The general notion of international human rights law which can hardly be disputed is its embodiment and commitment towards women's rights.[64] In the case of Kenya, the constitution is express on the question of international law by providing that international instruments ratified by Kenya are part of Kenya's laws.[65] Arguably therefore, Kenya is a monist state and as such the international instruments it has ratified particularly those pertaining to human rights are binding. Further, general rules of international law [whether expressed in ratified instruments or not] form part of Kenyan law.[66] Specifically on equality of rights, the High Court of Kenya has emphasised that, 'Equality or rights under the law for all persons, male or female, is so basic to democracy and commitment to human rights.'[67] Arguably therefore, regardless of whether a right is expressly codified or not and regardless of the instrument in which a particular right is codified, that right is recognised under Kenyan law in as far as it reinforces the right to equality of persons.

The situation is slightly less straight-forward in Ghana. International law in the Ghanaian context is subject to interpretations. The Ghanaian Constitution is silent on international law and how it relates to national law. Conversely, provisions of rights in the constitution are not exhaustive and may include others that are not specified and may also be considered with the aim of securing man's

62 *Adjei-Ampofo v Attorney General* [2003-2004] SCGLR 418.

63 *Ghana Lotto Operators Association & Others v National Lottery Authority* [2007-2008] SCGLR 1088.

64 These instruments put direct obligations on states to put in place necessary measures to do away with barriers that undermine women's capacity to handle opportunities and also provide equal protection and empowerment to women. Notable among these are the Universal Declaration of Human Rights, the Charter of the United Nations, the Convention on the Elimination of All forms of Discrimination Against Women, the International Covenant on Economic Social and Cultural Rights, the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Constitutive Act of the African Union and the African Charter on Democracy, Elections and Governance.

65 Article 2(6) of the Constitution of Kenya 2010.

66 Article 2(5) of the Constitution of Kenya 2010

67 *Centre for Rights Education and Awareness & 2 others v Speaker of the National Assembly & 6 others* High Court Petition 371 of 2016 [2017] eKLR.

[and woman's] freedom and dignity'[68] including laws of international instruments that pursue the promotion of human rights.[69] Moreover, duties to be discharged by the state in reference to article 37 on securing and protecting a social order based on the ideals and principles of freedom, equality, justice, probity and accountability 'shall be guided by international human rights instruments which recognise and apply particular categories of basic human rights to development processes'.[70] In the face of the constitution's silence on international law, the country remains party to a significant number of international instruments which include soft law norms. Prominent among these are: The international Convention on Civil and Political Rights, the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Economic Social and Cultural Rights, the African Charter, the African Women's Rights Protocol and the Beijing Declaration and Platform for Action.

There appears to be no better statement of a country's intent on promoting and protecting human rights than the signing and ratification of international instruments. However, signing or ratifying treaties does not equate to implementation and a real influence on people's lived realities. Many countries' failure to implement provisions of ratified instruments buttresses this argument. According to the United Nations Population Fund, for example, considering the harsh working conditions which result in impoverishing a higher number of women in many countries regardless of the countries' level of development, the ratio of illiteracy between women and men is two to one respectively. The report further indicates existence of 'discriminatory laws on inheritance, land, marriage and property' in several nations though they have ratified the CEDAW.[71] This is an indication of the fact that ratification of international instruments, and even domestication, do not in themselves provide assurance of these transformative provisions actually impacting on women's lived experiences. Without concerted effort to implement them, these provisions remain little more than utopian aspirations. While ratification and eventual domestication provide a firm foundation for implementation, a genuine follow-through in the form of targeted implementation efforts is required if these noble ideals are to deliver on their transformative promise.

3.3 Shaking up Kenya's Parliament: a mirage?

The Kenyan Constitution has adopted a unique mix of strategies to enhance women's representation in both houses of its bicameral

68 MG Nyarko 'The impact of the African Charter and the Maputo Protocol in Ghana' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected states* (2016) 99-100.

69 As above.

70 Article 37(3) of the Constitution of Ghana 1992.

71 United Nations Population Fund 'The human rights of women' 2006 http://www.unfpa.org/resources/human-rights-women (accessed 24 June 2017).

parliament, the Senate and the National Assembly (NA), and in its devolved government system. One of these strategies is the adoption of a multi-member electoral constituency system where more than one member is elected to the legislature from one electoral constituency/ district.[72] The use of a multi-member electoral constituency system is considered very likely to achieve a quick rise in women's membership in the legislature.[73] Kenya's Constitution provides for the election by universal adult suffrage of two members from each of the country's 47 counties with each county constituting a single-member constituency.[74] While one of these elected members represents the county as a member of the Senate, the other member represents the county in the NA. The unique feature of this system is that while the Senate seat can be contested by any eligible person regardless of gender, the NA seat is exclusively for female contestants.

Kenya has also adopted a proportional representation system based on party lists. Proportional representation is a system whereby political parties allocate parliamentary seats based on the proportion of the votes each party receives in an election and usually on the basis of a list of candidates prepared before elections.[75] While the majority of Senate seats, 47 seats, are filled through universal adult suffrage where male and female candidates can contest, 16 seats are reserved for women nominated by political parties based on the proportion of the parties' elected members in the Senate and from an exclusively female party-list prepared and presented to the Electoral Commission at least 45 days before the date of the general election.[76] A further two female members of the Senate are nominated by political parties based on party list proportional representation to represent the youth and persons with disabilities.[77]

Further, 12 special interest seats are created in the NA and filled by political parties based on the proportion of the parties' elected members in the NA but drawn from party-lists that alternate between male and female candidates.[78] Additionally, apart from elected members of county assemblies, each of Kenya's 47 county assemblies comprises a number of special seats necessary to ensure that the two-thirds gender principle is achieved and which are filled based on a proportional gender-exclusive party list, and six special interest seats based on party-lists that alternate between male and female candidates.[79]

72 JF Banzhaf 'Multi-member electoral districts – do they violate the "one man, one vote" principle?' (1966) 75 *Yale Law Journal* 1309 1309.

73 L Kenworthy & M Malami 'Gender equality in political representation: a worldwide comparative analysis' (1999) 78 *Social Forces* 235 261.

74 Articles 97(1)(a) & 98(1)(a) of the Constitution of Kenya 2010.

75 Paxton & Kunovich (n 4 above) 104.

76 Article 98(1)(b) of the Constitution of Kenya 2010; section 35 of the Election Act 24 of 2011.

77 Articles 98(1)(c) & (d) of the Constitution of Kenya 2010.

78 Article 97(1)(c) of the Constitution of Kenya 2010

79 Articles 177(b) & (c) of the Constitution of Kenya 2010; section 7(1)(b) of the Governments Act 17 of 2012.

Three safeguards stand out about the above party lists. First, the lists once submitted to the electoral commission before the elections remain valid for the duration of parliament's term.[80] Second, nominative seats in parliament and the county assemblies are allocated from the list based on the priority in which they are listed, that is, first to last on the party list.[81] The above safeguards serve to prevent political parties or any other person from tampering with the list thereby giving the list a degree of certainty. Third, party lists that are not required to be gender-exclusive must alternate between male and female candidates.[82] By mandatorily requiring parties to alternate men and women in party lists, chances of women landing seats in parliament are increased. Left to their own devices, political parties would most likely position women at the bottom of the party lists thereby reducing their chances of making it to parliament and beating the purpose of the system altogether.[83] This particular measure, it is argued, increases political competition and attracts experience and diversity to parliament.[84]

The above measures taken by Kenya are considered by the African Women's Rights Protocol as reasonably necessary to ensure or facilitate participation by women in the electoral and governance processes of the state.[85] Further, Kenya seems to have heeded the call in article 9 of the African Women's Rights Protocol for a multiplicity of measures. Indeed, following Kenya's first general election in 2013 under its new constitutional dispensation, the number of women members of parliament rose to 86 and then to 97 after the 2017 general elections,[86] the highest ever in the country. This increased representation promotes gender sensitivity in legislation, which angle is most likely to be ignored in a male-dominated legislature.[87] Gender-sensitive legislation can go a long way in addressing structurally and historically entrenched challenges to women's advancement. However, while the above measures adopted by Kenya have increased the number of women in representative politics, Kenya's parliament is still grossly imbalanced. According to the World Classification of Women in National Parliaments Kenya is still very unequal, ranking at position 86 with 30.9 per cent and 21.8 per cent women representation in the Senate and NA respectively.[88] Further, of the 97 women in the combined

80 Section 34(10) of the Elections Act 24 of 2011.

81 Article 90(2)(b) of the Constitution of Kenya 2010.

82 Article 90(2)(b) of the Constitution of Kenya 2010.

83 Thabane & Buthelezi (n 5 above) 189.

84 R Darcy *et al Women, elections and representation* (1994) 15-18.

85 J Finnis 'Equality and differences' (2011) 56 *American Journal of Jurisprudence* 17 33.

86 Kenya Women Parliamentary Association 'Members' http://www.kewopa.org/?page_id=72 (accessed 09 March 2016); T Onyinge *et al* (eds) *86 and counting: Women leaders in the 11th parliament* (2014); Inter-Parliamentary Union 'Women in national parliaments: World classification' 1 September 2017 http://www.ipu.org/wmn-e/classif.htm (accessed 4 October 2017).

87 Thabane & Buthelezi (n 5 above) 201.

88 Inter-Parliamentary Union 'Women in national parliaments: World classification' 1 September 2017 http://www.ipu.org/wmn-e/classif.htm (accessed 4 October 2017).

parliament, only 73 of them are directly elected (three directly elected to the Senate in all-inclusive elections, 23 directly elected to the NA in all-inclusive elections and 47 directly elected to the NA for positions reserved for women contestants) while the rest are nominated.[89] Considering that Kenya's constitution provides as a mandatory principle of governance that, 'Not more than two-thirds of the members of elective public bodies shall be of the same gender,'[90] the current scenario falls short of the minimum 33 per cent female membership required. Consequently, effective gender representation is hampered resulting in largely gender-insensitive legislation.[91]

In fact, achieving the above threshold has proven quite problematic for Kenya's parliament. Despite the constitutional provision that the legislation to ensure this threshold is met ought to have been enacted within five years of the constitution's promulgation,[92] parliament failed to enact the requisite legislation by 27 August 2015.[93] Consequently, parliament extended this period by the maximum constitutionally permissible period of one year,[94] but this extension also lapsed without any concrete action. As a result, concerned civil society organisations petitioned the High Court in *Centre for Rights Education & Awareness & 2 others v Speaker of the National Assembly & 6 others*.[95] The High Court agreed with the petitioners that parliament had indeed failed to enact the requisite legislation to ensure that not more than two-thirds of its membership is of one gender within the timeline provided in the constitution. Exercising its powers under article 261 of the Kenyan Constitution, the High Court directed that Parliament should enact the legislation within 60 days (by 28 May 2017) failure to which any person could petition the Chief Justice to advise the president to dissolve parliament. By this date, however, parliament had neither enacted the requisite legislation[96] neither had the Chief Justice advised the President to dissolve parliament. This could probably be attributed to the fact that by May 2017, political activities for the 8 August 2017 general elections were already in high gear.

89 A Shiundu 'Factsheet: Kenya's new parliament by numbers' *AfricaCheck* 31 August 2017 https://africacheck.org/factsheets/factsheet-kenyas-new-parliament-numbers/ (accessed 4 October 2017).

90 Article 81(b) of the Constitution of Kenya 2010.

91 Thabane & Buthelezi (n 5 above) 201.

92 Articles 27, 81, 100 & 261 of the Constitution of Kenya 2010.

93 The Constitution of Kenya 2010 was promulgated on 27 August 2010 after being overwhelmingly approved in a referendum.

94 Article 261(2) of the Constitution of Kenya 2010; Kenya National Assembly Official Hansard Report of Tuesday 25 August 2015 http://www.parliament.go.ke/the-national-assembly/house-business/hansard?start=255 (accessed 28 June 2017).

95 High Court of Kenya Petition 371 of 2016 [2017] eKLR.

96 Parliament had earlier in 2016 shot down a bill intended to provide a framework for achieving the two-thirds gender principle. Some politicians argued that the bill's provision for more nominative seats would bloat an already-bloated parliament.

3.4 Debunking the illusion of equality in Ghana's Parliament

In contrast to the Kenyan system, Ghana's parliamentary representation system affords very little, if any, assurances of women's participation. Ghana's unicameral parliament comprises 275 members from single-member constituencies elected through universal adult suffrage.[97] Through a constitutional provision requiring a majority of cabinet ministers to be appointed from among sitting members of parliament,[98] quite a number of women have nonetheless been appointed to the cabinet from parliament. However, this has not been with the intention of encouraging women representation in parliament.

Ghana's parliament has significant powers it can channel towards improving women's rights particularly by exercising its legislative authority. Additionally, parliament has a 25-member Parliamentary Select Committee on Gender whose role is to scrutinise issues related to gender and children in order to ensure total recognition of the rights of women in appropriate legislation.[99] Proposals geared towards improving affirmative action are fronted to parliament by the committee which also reports progress to the house.[100] Further, parliament oversees the African Peer Review Mechanism in Ghana, a mechanism that assesses countries' performance in attaining the New Partnership for African Development's goals in order to ensure greater gender equity.[101]

Despite these extensive powers, parliament has failed to pass specific affirmative action laws and initiatives to improve political participation by women. Particularly worrying is parliament's failure to pass a progressive Affirmative Action Bill presented by the Gender, Children and Social Protection ministry that targets addressing gender and sex-based discrimination and also guaranteeing equality in public services and political discourse for women by pushing for a '40 per cent women representation in decision-making bodies and power positions and other public institutions.[102] This Bill is inspired by the Affirmative Action Policy Guidelines of 1998 that direct the government to guarantee 40 per cent representation of women at all levels of governance, including public sector boards, commissions, councils, and

97 Parliament of Ghana 'Overview' https://www.parliament.gh/mps (accessed 26 June 2017).

98 Article 78 of the Constitution of Ghana.

99 Parliament of Ghana 'Gender and children committee' https://www.parliament.gh/committees?com=17 (accessed 27 June 2017).

100 As above.

101 UN Economic Commission for Africa 'The role of parliament in African Peer Review Mechanism: Information on how parliamentarians can participate in APRM' (2011) 10 https://www.uneca.org/sites/default/files/PublicationFiles/5-pamphlet_the_role-of-parliament-in-aprm.pdf (accessed 26 June 2017).

102 Nyarko (n 68 above) 103; Government of Ghana 'Gender ministry, stakeholders speak on Affirmative Action Bill' http://www.ghana.gov.gh/index.php/media-center/news/1802-gender-ministry-stakeholders-speak-on-affirmative-action-bill (accessed 26 June 2017).

the executive although this is yet to be implemented. Nonetheless, the Constitutional Review Committee of Parliament has acknowledged receipt of proposed amendments to the Ghanaian Constitution expected to see to a 30 per cent representation of women in all government institutions so as to increase visibility in the male-dominated public institutions.[103]

Largely because Ghana's legal framework does not provide affirmative action provisions and partly due to lack of political goodwill, Ghana's parliament is more gender-imbalanced than Kenya's. Presently, Ghana is ranked 141st out of 193 countries in the Inter-Parliamentary Union's ranking of women's representation in parliaments around the world.[104] Only 35 of the parliamentary seats out of the 275-seat parliament are occupied by women, representing a marginal 12.7 per cent.[105] Further, Ghana has only had one female speaker of parliament since independence in 1957.[106] The lack of a specific enabling legal framework should not, however, be an excuse for not taking proactive measures. There exist constitutional institutions in Ghana whose mandate can be exploited to advance women's participation in political affairs. One such institution is the Electoral Commission of Ghana (electoral commission) which is the only institution in Ghana with a nationwide electoral mandate. It also has the power to formulate policies and electoral laws that directly influence electoral processes. Nonetheless, no electoral laws or policies have been formulated by the commission to advance affirmative action and to close the gender gap. In as much as it is promisingly welcoming that five of the seven commissioners of the electoral commission are women,[107] there is no evidence of any clear and unequivocal work that the electoral commission has undertaken to promote women's political participation. The commission should take advantage of its strategic position to advance women into sought-after public positions through gender-sensitive and friendly electoral reforms that will seek to create equal playing field for men and women. The electoral commission can liaise with the political platforms including the Inter-Party Advisory

[103] Government of Ghana 'White Paper on the Report of the Constitutional Review Commission' (2012) 14 http://ghana.gov.gh/index.php/media-center/reoprts/653-white-paper-on-the-report-of-the-constitution-review-commission-presented-to-the-president (accessed 26 June 2017).

[104] Inter-Parliamentary Union (n 88 above).

[105] As above.

[106] The late President, Professor John Evans Fiifi Atta Mills, in his first term which he did not fully serve due to his demise, appointed Mrs Joyce Bamford Addo remains the only woman to have graced Ghana's parliament as the speaker.

[107] It must be noted that of the five out of seven commissioners are all presidential appointees. In this regard, although it serves as a shining example to other women, it would have been better served if the appointments had come from the commission itself. By them being appointed by the president, it cannot be attributed to the prowess of the commission.

Committee[108] and exploit these platforms to advance gender sensitive agendas within political parties. Moreover, the electoral commission can capitalise on its close working relationship with the National Commission for Civic Education and embark on sensitising citizens on the necessity of eradicating prejudices and stereotypes to close the gender gap.

4 TRENDS, PRACTICES AND SOCIAL REALITIES FOR WOMEN IN DECISION-MAKING PROCESSES AND ORGANS

In tracking and analysing the participation of women in political discourse and governmental organs, women's representation at the highest levels of decision-making bodies have always been the benchmark. The last two decades have seen a relative increase of women in such spaces in both Kenya and Ghana.[109] As evidenced by table 1 below, numerical increase of women in such areas although gradual, has not been stable. The 1992 elections in Ghana saw 16 women elected to parliament,[110] while elections held the same year in Kenya resulted in only six women as against 196 men in parliament.[111]

[108] Formed after the loss and subsequent accusations by the opposition party of electoral malpractices and rejection of the results of the 1992 elections, the Inter-Party Advisory Committee has served as a platform for registered political parties, the Electoral Commission of Ghana and relevant stakeholders to meet and discuss electoral issues. Here, views of political parties, expectations and challenges are forwarded and addressed. The electoral commission also uses the opportunity it presents for educating the political parties on significant changes in the electoral processes including the channels to address electoral disputes. In as much as decisions from IPAC meetings are not binding on parties and stakeholders, they go a long way in influencing parties' decisions as well as bringing parties and stakeholders to speed on relevant issues.

[109] To highlight the point, women in Ghana have progressively been assuming higher political and decision-making positions since the 1980s and 1990s. 1989 saw Mrs Mary Chinery-Hesse become the first ever woman to be appointed Deputy Director-General of the International Labour Organisation; Dr Mrs Matilda Fiadzigbey was also appointed as Ghana's first administrator of Stool Lands (1996); Ms Esther Ofori was selected as the first woman to be the Chief Executive Officer of the Ghana Trade Fair Authority (2001); Ms Eva Lokko was appointed the first woman Director- General of the Ghana Broadcasting Corporation and Ms Elizabeth Adjei the first female to be appointed as Director of the Ghana Immigration Service (2002); Dr. Regina Adutwum the first Woman to be appointed the Director-General of the National Development Planning Commission (2005); Her Ladyship Justice Mrs Georgina Wood, first Woman to be appointed Chief Justice (2007);. Hon Justice Joyce Adeline Bamford-Addo made history as the first woman to hold the position of Speaker of the Fifth Parliament of the Fourth Republic of Ghana (2009); Ms Christina Samia Yaba Nkrumah was elected as the first woman chairperson of the Convention People's Party and the first woman to ever head a political party in Ghana (2011); Mrs Charlotte Kesson-Smith Osei became the first women since the country's independence in 1957 to hold the position of Chairperson of the Electoral Commission of Ghana (2015).

[110] Ghana Statistical Service 'Women and men in Ghana: A statistical compendium 2014' (2014) 172 http://www.statsghana.gov.gh/docfiles/publications/W&M per cent202014.pdf (accessed 25 June 2017).

[111] Inter-Parliamentary Union 'Kenya National Assembly: Historical archive of parliamentary election results' http://www.ipu.org/parline-e/reports/2167_arc.htm (accessed 28 June 2017).

An increase to 19 women was recorded in Ghana in the 1999 and 2000 elections, far below the 181 male representations.[112] The 1997 elections in Kenya resulted in an unimpressive increase to eight women, from the previous election's six.[113] However, in the 2002 elections, the number of women increased to 16,[114] which probably is attributable to the euphoric political wave that ended almost four decades of hegemonic and dictatorial rule by the Kenya African Union Party. This number increased slightly to 21, following the chaotic 2007 elections.[115] In Ghana, the 2004 elections recorded a minimal increase to 25 women parliamentarians, which again dropped to 19 in the 2008 elections.[116]

Just as the sun set on the first decade of the millennium, women's representation increased steadily, although not to levels that can be considered acceptable by contemporary standards. The last two elections in Ghana, in 2012 and 2016, recorded a steady rise from 30 to 35 women; a representation that has, however, not met the internationally-agreed 30 per cent threshold of women parliamentarians.[117] The 2013 elections in Kenya saw the number of women parliamentarians rise to 65, as against 285 men, in the National Assembly; and 18 as against 50 men in the newly-created Senate.[118] This number rose to 76 in the NA and 21 in the Senate in the 2017 general elections (of 8 August 2017).[119] This increase is attributable in part to the affirmative action provisions in the 2010 Kenyan Constitution, discussed earlier in the article. Even though the above figures and the slow-paced rise over the past two decades, as evidenced in Table 2 below, do not inspire confidence, they shed light on how far Africa has come and still has to go to achieve transformative equality for women in the political and governance spheres.

[112] Ghana Statistical Service (n 110 above) 172.

[113] Inter-Parliamentary Union 'Kenya National Assembly: Historical archive of parliamentary election results' http://www.ipu.org/parline-e/reports/2167_arc.htm (accessed 28 June 2017).

[114] As above.

[115] n 113 above.

[116] Ghana Statistical Service (n 110 above) 172.

[117] As above; The Inter-Parliamentary Union's world classification of women ranks Ghana 141 out of 193 countries for women's representation in government. See generally Inter-Parliamentary Union (n 88 above).

[118] Inter-Parliamentary Union 'Kenya National Assembly: Last elections' http://www.ipu.org/parline-e/reports/2167_E.htm (accessed 28 June 2017); Inter-Parliamentary Union 'Kenya Senate: Last elections' http://www.ipu.org/parline-e/reports/2168_E.htm (accessed 28 June 2017).

[119] Inter-Parliamentary Union 'Women in national parliaments: World classification' 1 September 2017 http://www.ipu.org/wmn-e/classif.htm (accessed 4 October 2017).

Table 1: Gender representation in Ghana's Parliament (1992 - 2016)

Allocation of seats in Ghana's parliament per election based on gender							
Year	1992	1996	2000	2004	2008	2012	2016
Female	16	19	19	25	19	30	37
Male	184	181	181	205	211	245	238
Total seats	200	200	200	200	230	275	275

Sources: Ghana Statistical Services (2014); Inter-Parliamentary Union[120]

Table 2: Progress in women's parliamentary representation in Kenya and Ghana (1995 - 2017)

Global ranking (as 1 September 2017)	Country	per cent of women (1995)	per cent of women (1 September 2017)	per cent point change
86	Kenya	3.0 per cent	23.3 per cent (combined per cent for both Houses)	20.3 per cent
141	Ghana	8.0 per cent	12.7 per cent	4.7 per cent

Source: Inter-Parliamentary Union Report (2017)[121]

The above discussion depicts the relatively lower number of women representatives in Kenya and Ghana's Parliaments as opposed to the expected threshold, resulting in the dominance of men. Inroads by women into political spaces are still met with scepticism and prejudices on the place of women in the national governance and political spheres. This has negatively affected the presence and contribution of women in impactful political and socio-economic developments in Kenya and Ghana. A particular criticism levelled against Kenya specifically is that the system has almost exclusively trained its focus on reserved seats for women (quota system), as opposed to the promotion of women's engagement in competitive electoral politics. There is in fact a growing

[120] Ghana Statistical Service '(n 110 above) 172; Inter-Parliamentary Union (n 88 above).

[121] Inter-Parliamentary Union 'Women in parliament: 20 years in review' 2015 http://www.ipu.org/pdf/publications/WIP20Y-en.pdf (accessed 28 June 2017); Inter-Parliamentary Union (n 88 above).

perception that considering the number of 'special seats' reserved for women and the women-only elective positions women should not contest other elective positions.[122] The result is the relegation of women to 'hand-out' seats and the entrenchment of the very social inequalities democracy seeks to eliminate.[123] Therefore, this focus skirts around the real issues hindering women's participation in competitive elective politics such as economic barriers[124] and entrenched cultural and social biases. As a result, Kenya is seen as being more concerned with increasing the numbers for statistical purposes rather than working towards ensuring *genuine and effective* representation as envisioned under article 9 of the African Women's Rights Protocol.

The above criticism does not negate the impressive fact that most women who were nominated to Kenya's Parliament after the 2013 elections actually contributed positively to parliamentary business[125] and even used these positions as a launching pad to elective politics and contested for elective positions during the 2017 general elections.[126] As such, despite the criticism levelled against the so-called affirmative action seats, it is undeniable that they serve as powerful platforms through which women can launch forays into elective politics. To consolidate this gain, Kenya and any other country considering the above option should seriously consider operationalising a law to regularise and regulate campaign spending[127] and hopefully ensure that women who are historically economically disadvantaged[128] do not get locked out of elective political competition by virtue of lack of financial ability to counter that of their male counterparts. Also, potentially effective and worth exploring is the introduction of incentives for political parties that promote and facilitate participation of women in party primaries. Taken together, these initiatives can help move the effort beyond mere numerical representation to representation by women who are actually capable of representing not

[122] F Blyth 'New constitution helps Kenyan women gain traction in politics' 29 March 2013 https://theglobalobservatory.org/2013/03/new-constitution-helps-kenyan-women-gain-traction-in-politics/ (accessed 26 June 2017).

[123] D Rueschemeyer 'Addressing inequality' in L Diamond & L Morlino (eds) *Assessing the quality of democracy* (2005) 7.

[124] P Paxton 'Gender and democratisation' in CW Haerpfer *et al* (eds) *Democratization* (2009) 149.

[125] The Kenya Women Parliamentarians' Association meticulously tracks contribution by women members of parliament to parliamentary business [*See* Kenya Women Parliamentarians' Association 'Publications' http://www.kewopa.org/?page_id=97 (accessed 29 June 2017)]

[126] While many of the previously nominated members contested for elective positions, only a few of them won.

[127] Kenya enacted the Election Campaign Financing Act 42 of 2013 in 2013 but its operation was suspended till after the 2017 general elections [*See* Election Laws (Amendment) Act 1 of 2017 sec 32].

[128] HH Sheikh 'Human rights in the transition to multi-party democracy: The gender dimension' in J Oloka-Onyango *et al* (eds) *Law and the struggle for democracy in East Africa* (1996) 290.

only women's interests, but the interests of broad segments of society.[129]

The situation is in fact not different in other spheres of civil service. This failure on the political arena manifests itself in other governance institutions. A 2010 report by Ghana's Gender, Children and Social Protection ministry indicates that 3 out of 28 institutional boards surveyed nationwide have 40 per cent of the board as women. The report further affirms that 18 per cent of directorate positions in the civil service are occupied by women.[130] A look at the judiciary also indicates that, of the current 12 Justices of the Supreme Court, only 3 are women (one being the Chief Justice).[131] The Chief Justice position has been occupied by women since 2007. Of the 27 judges on the Court of Appeal bench, 6 are women.[132] Of Kenya's seven Supreme Court judges, only two are women while of the 22 Court of Appeal judges, only seven are women.[133]

While the legal frameworks of both Kenya and Ghana call for measures to enhance the participation of women in all spheres of governance, the governments of both countries have largely failed in their obligation to extend these and other measures beyond parliamentary representation to appointive bodies[134] in order to create a society where equality of the sexes is a defining feature.[135] The lack of strong role models in the political and other governance spheres discourages active participation by women, particularly young women, in institutions which are historically dominated by men thereby perpetuating imbalanced governance policies and practices.

The reasons for the aforementioned low representation of women in public spaces and influential political positions are multifaceted as they emanate from diverse legal, political and socioeconomic factors, some of which have been alluded to in the discussion above. Similar to happenings in most parts of the continent and beyond, patriarchy has heavily dominated and penetrated the social lives of many Kenyan and Ghanaian communities and is 'characterised by entrenched cultural norms, beliefs and practices that propagate gender inequalities'.[136] The penetration and permeation of patriarchy is not only felt around

[129] Paxton (n 124 above) 150.

[130] Ghana Statistical Service (n 110 above) 171.

[131] Judiciary of the Republic of Ghana 'The Supreme Court' https://judicial.gov.gh/index.php/the-supreme-court (accessed 28 June 2017).

[132] Judiciary of the Republic of Ghana 'The Court of Appeal' https://judicial.gov.gh/index.php/the-court-of-appeal (accessed 28 June 2017).

[133] The Judiciary of the Republic of Kenya 'Supreme Court judges' http://www.judiciary.go.ke/portal/page/supreme-court-judges (accessed 1 July 2017); The Judiciary of the Republic of Kenya 'Court of Appeal judges' http://www.judiciary.go.ke/portal/page/court-of-appeal-judges (accessed 1 July 2017).

[134] Article 27(8) of the Constitution of Kenya 2010.

[135] Thabane & Buthelezi (n 5 above) 197.

[136] TP Uteng 'Gendered bargains of daily mobility: Citing cases from both urban and rural settings' (2011) 18 https://openknowledge.worldbank.org/bitstream/handle/10986/9111/WDR2012-0010.pdf?sequence=1&isAllowed=y (accessed 28 June 2017); See also M Mies *Patriarchy and accumulation on a world scale: Women in the international division of labour* (2014).

households but has practically been evidenced in processes and structures of government.[137] The result of these unfortunate social realities and cultural norms is the underrepresentation of women because the socialisation process in most African societies, and indeed many other societies around the world, has had a history of pushing women to the periphery and regarding women as subordinate to men in the quest for political office. More to this social reality is the embedded and rooted religious connotations which have rendered most societies quite destructively conservative.

General household duties and activities which were traditionally and historically expected of Kenyan and Ghanaian women have invariably limited these women in terms of attaining decision-making roles and political positions unlike their male counterparts without such burdens. While there has been considerable positive change in attitudes over the years, historically-entrenched attitudes can be quite stubborn. To some extent, some of these attitudes have survived to this day and as such secondary burdens are significantly contributing on a daily basis to many women being hindered from the possibility of advancing from the household duties to circles of decision-making and political institutions.

In spite of the relatively remarkable records in development in both Kenya and Ghana, there still exists a persistent income gap between men and women.[138] This persistent occurrence adversely affects or disadvantages women from amassing economic power and as a result restricts their prospects of competitively participating in political discourse due to their lack of financial strength. This in extension perpetuates women's inability to financially engage with men on an equal footing in competing for the already male-dominated political processes since these processes often involve significant financial implications and costs.

In addition to the above-mentioned, one major limitation which has also contributed to the perpetuation of women's peripheral treatment in political and governance processes is 'restrictive exposure' of women in parliament and other spheres. Most women who have been selected for cabinet positions since Kenya's and Ghana's return to multi-party democracy in 1992 have mostly been placed in positions with less prominence as compared to their male counterparts.[139] These continuous developments reinforce the already deep-rooted perceptions and false impressions pertaining to women's political and overall leadership competencies. These occurrences further restrict the space for women to strengthen their political and leadership abilities thereby stifling women's political and leadership growth and maturity.

[137] S Bawa 'Women's rights and culture in Africa: a dialogue with global patriarchal traditions' (2012) 33 *Canadian Journal of Development Studies* 90 102-103.

[138] United Nations Development Programme 'Inequalities in Ghana: A fundamental national challenge' (2014) 5 http://www.undp.org/content/dam/ghana/docs/Doc/Inclgro/Ghana-unicef%20Inequality%20Briefing%20Paperpercent20FINAL%20DRAFT%20Apr%202014.pdf (accessed 28 June 2017).

[139] Notable of these positions include the ministry of education, health etc.

The end result is a relatively low number of women who are skilled and experienced in the tactical manoeuvres necessary to navigate the male-dominated rigour of politics and emerge as formidable candidates for high political offices and appointments to strategic positions. Quite tragically, no woman has yet to ascend to the positions of president or even vice or deputy president in Kenya or Ghana,[140] and this also entrenches the false idea of women's inability to perform in some capacities. In as much as the current and immediate past governments tried in this regard by appointing women as Chief Justices and Attorneys General in Ghana and as cabinet secretary for defence in Kenya, other high-ranking positions that elevate their holders to the political and governance limelight such as the government finance and economy dockets have never been occupied by women. It should be noted that these positions are not elective positions in both Kenya and Ghana, and indeed in many African states, and as such appointments only require the political will of the appointing authority. The retrogressive patriarchal attitude that has seen successive governments fail to elevate women to such positions only serves to cement structural inequalities that continue to subjugate the African woman.

5 CONCLUSION

The discussion above has revealed some laudable progress on the part of Kenya and Ghana particularly in constitutionalising the right of women to participation in political and decision-making organs. While these advances are laudable, numerous challenges have been identified in the implementation process. These challenges can be summarised as arising out of a failure to move beyond mere codification of equality in law towards measurable empowerment programmes that eliminate the systemic barriers to effective participation of women in the politics and governance.[141] Normative provisions without any genuine action to back them up only serve to gloss over underlying gender inequality and the invisibility of women in seemingly democratic systems,[142] thereby resulting in cosmetic equality.

The article argues that these challenges are not insurmountable. They can be overcome through concerted political and societal goodwill and effort. African countries that are genuinely dedicated to achieving transformative equality for women in the political and governance spheres ought to take lessons from Kenya and Ghana to the extent that these countries have made progress and learn valuable lessons from the two countries' failures, challenges and shortcomings. The process of implementing their obligations under article 9 of the African Women's Rights Protocol as analysed in section two above must commence with

[140] In fact, the continent's list of female heads of state is very brief and uninspiring: Catherine Samba-Panza (Central African Republic 2014); Ellen Johnson-Sirleaf (Liberia 2006 -); Joyce Banda (Malawi 2012-2014); Ameenah Gurib-Fakim (2015 -).

[141] SJ Kpundeh (ed) *Democratization in Africa: African views, African voices* (1992) 21.

[142] Paxton (n 124 above) 146.

an honest audit of a country's obligations and processes through a multi-stakeholder process. This way, countries will be able to gauge progress, if they have already commenced the process; identify and consolidate gains; identify, isolate and dedicate targeted effort towards plugging gaps in implementation; and identify channels for collaboration and learning.

It is worth noting that while advocating for intra-Africa learning, African states should take into account specific country realities and avoid misguided attempts at one-size-fits-all attempts.[143] As such, the above analysis is not representative of all African countries, neither are the proposed solutions desirable for all countries. However, this should not be mistaken for an apologist free pass for countries that have made no effort at realising women's right to political participation or those that have made half-hearted aesthetic attempts. Rather, it should be understood as being an appreciation of the unique and diverse circumstances of African countries while at the same time recognising the common features and ideals of democracies.

[143] See Relaunching Africa's Economic and Social Development: The Cairo Agenda for Action, AHG/Res 236 (XXXI), 26-28 June 1995; Algiers Declaration, AHG/Decl 1 (XXXV) 12-14 July 1999; Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl 5 (XXXVI), 10-12 July 2000; UN General Assembly, Resolution 60/1 (24 October 2005) para 35.

Article 6 of the African Women's Rights Protocol: towards the protection of the rights of women in polygamous marriages

*Phoebe Oyugi**

ABSTRACT: Article 6 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Rights Protocol) provides that State Parties shall enact legislation to ensure *inter alia* that the rights of women in marriage and family, including in polygamous marital relationships, are promoted and protected. However, the United Nations Human Rights Committee, in its interpretation of article 3 of the International Covenant on Civil and Political Rights (ICCPR), stated that polygamy amounted to a violation of the rights of women and therefore ought to be abolished. This raises an interesting issue since on one hand, the African Women's Rights Protocol provides for the protection of the rights of women in polygamous marriages, but on the other hand, the Human Rights Committee, which is an overseer of the implementation of a global human rights regime, has held that polygamy is an inadmissible violation of the rights of women. Apart from the two issues above, article 6 also raises fundamental questions such as: What are the rights of women in polygamous marriages and why it is critical to protect such rights? This article analyses the above issues and makes the general argument that, in line with article 6 of the African Women's Rights Protocol, pending the outlaw of polygamy (which is also in line with international best practice), African states should legislate to protect women in polygamous marriages.

TITRE ET RÉSUMÉ EN FRANÇAIS:

Article 6 du Protocole relatif aux droits des femmes en afrique: vers la protection des droits des femmes dans les mariages polygamiques

RÉSUMÉ: L'article 6 du Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole relatif aux droits des femmes en afrique) stipule que les Etats parties doivent promulguer des lois garantissant, entre autres, la promulgation et la protection des droits des femmes dans le mariage et au sein la famille, y compris dans des relations conjugales polygamiques. Toutefois, dans son interprétation de l'article 3 du Pacte international relatif aux droits civils et politiques (PIDCP), le Comité des droits de l'homme des Nations Unies a déclaré que la polygamie constituait une violation des droits des femmes et devait donc être abolie. Cela soulève un problème intéressant puisque d'une part, le Protocole relatif aux droits des femmes en Afrique prévoit la protection des droits des femmes dans les mariages polygamiques, mais d'autre part, le Comité des droits de l'homme, qui supervise la mise en œuvre du système global des droits de l'homme, a déclaré que la polygamie est une violation inacceptable des droits des femmes. Outre les deux points ci-dessus, l'article 6 soulève également des questions fondamentales telles que: quels sont les droits des femmes dans les mariages polygamiques et pourquoi est-il essentiel de protéger ces droits? Cet article analyse les questions ci-dessus et propose que, conformément à l'article 6 du Protocole relatif aux droits des femmes en afrique, en attendant l'interdiction de la polygamie (qui est également conforme aux meilleures pratiques internationales), les Etats africains doivent adopter des lois pour protéger les femmes dans des mariages polygamiques.

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KEY WORDS: Article 6 of the African Women's Rights Protocol, polygamy, the rights of women, the right to marriage, polygamous marriages

CONTENT:

1 INTRODUCTION

1.1 Article 6 of the African Women's Rights Protocol

The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Rights Protocol) was adopted to supplement the provisions of the African Charter on Human and People's Rights (African Charter) in accordance with article 66 of the African Charter.[1] It aims 'to ensure that the rights of women are promoted, realised and protected in order to enable them to enjoy fully all their human rights.'[2] It has been hailed as a valuable addition containing ground-breaking provisions in the field of human rights not only in Africa but also in the world.[3] The African Women's Rights Protocol has made an invaluable contribution to the continent's human rights architecture and has since been signed by 49 states and ratified by 38 states.[4]

It contains comprehensive provisions in relation to women's rights, specifically: the elimination of harmful practices, access to justice, reproductive health, protection of women during war, special protection for women with disabilities, property rights and marriage

1 See the Preamble of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Rights Protocol).

2 African Women's Rights Protocol (n 1 above).

3 C Purvis 'Emerging voices: engaging with African human rights law' http://opiniojuris.org/2013/07/19/emerging-voices-engaging-with-african-human-rights-law/ (accessed 15 July 2017).

4 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' African Union https://au.int/web/sites/default/files/treaties/7783-sl-protocol_to_the_african_charter_on_human_and_peoples_rights_on_the_righ.pdf (accessed 11 July 2017).

rights. It places an obligation on states to enact legislation and take measures to ensure the full realisation of the rights enshrined therein.[5] As noted by the Special Rapporteur on the Rights of Women in Africa, since the coming into force of the African Women's Rights Protocol, State Parties have indeed adopted numerous legislation, in compliance with the Protocol, which have led to notable protection and promotion of the rights of women on the continent.[6]

One of the most notable provisions of the African Women's Rights Protocol is article 6, which provides for the right to marriage. Article 6 obligates State Parties to ensure that men and women enjoy equal rights and are recognised as equal partners in marriage. State Parties are also required to enact legislation to ensure that marriage is based on the full and free consent of both parties and that the parties are at least 18 years of age at the time of contraction of the marriage. The right to marriage is provided for in many international and regional human rights instruments including article 23 of the International Covenant on Civil and Political Rights (ICCPR), article 16 of the Universal Declaration on Human Rights (UDHR), and article 12 of the European Convention on Human Rights (ECHR) among others. The African Charter does not provide for the right to marriage, therefore this is one example of an issue where the African Women's Rights Protocol complements the African Charter.

Article 6 further provides for the right of a married woman to: participate in the choice of marital residence, retain her nationality or acquire that of her husband, retain her maiden name or adopt that of her husband, as well as the right to acquire and administer property during the subsistence of the marriage. The article also provides the right of registration of marriages. Unique to the African Women's Rights Protocol, is the provision in article 6(c) that requires states to enact legislation which ensures that 'monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, *including in polygamous marital relationships* are promoted and protected' (emphasis added).

Polygamy, is often discussed in tandem with other women rights issues for example gender equality, violence against women, sexual health rights, economic and social rights of women. For this reason, article 6(c) has been the subject of debate among scholars, human rights activists and practitioners as discussed in detail in part 2 below. This article aims to contribute to this debate by placing article 6(c) within the cultural, political, socio-economic and human rights context of the African continent. This article discusses how legislation made pursuant to article 6 of the African Women's Rights Protocol can contribute to the protection of women in polygamous marriages and why this is necessary pending the outlaw of polygamy in line with international best practice.

5 Article 6 of the African Women's Rights Protocol.

6 Status of implementation of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa' African Commission on Human and Peoples' Rights (2016) http://www.peaceau.org/uploads/special-rapporteur-on-rights-of-women-in-africa-presentation-for-csw-implementation.pdf (accessed 15 July 2017).

1.2 Main argument and structure of the article

Many human rights practitioners, activists and scholars argue that polygamy is against the rights of women and therefore, it should be outlawed. I argue in this article that outlawing polygamy without dealing with the cultural, socio-economic and religious factors will not result in the eradication of the practice. In the journey to conforming to international best practice by outlawing polygamy, African States should enact laws that regulate polygamy and protect the rights of women in polygamous marriages.

This argument is premised on the following point: polygamy continues to exist in Africa because of cultural, religious, economic and sociological reasons. Because the practice is so deeply entrenched, laws that were enacted to criminalise polygamy and invalidate polygamous marriages in colonial times failed to eradicate the practice. Instead polygamy continued to exist in practice, while non-existent in law. This discrepancy created a group of disenfranchised women in polygamous marriages who had no recourse to law for protection or fulfilment of their rights. Hence, article 6(c), which extends legal protection to polygamous marriages, has the much-needed effect of remedying this situation.

The article illustrates how the top-down laws that prohibited polygamy disenfranchised women in polygamous marriages since they failed to tackle the relevant socio-economic and cultural factors. It further discusses how this situation is remedied by article 6(c) of the African Women's Rights Protocol. This article relies on two pieces of domestic legislation - the Kenyan Marriage Act and the South African Recognition of Customary Marriages Act – both which contain provisions which protect the rights of women in polygamous marriages, as case studies.

The article is structured as follows: Part one, the current section, contains the introduction. Part two examines the tension between the African regional view and the international view on polygamy. Specifically, it discusses the provision of article 6(c) of the African Women's Rights Protocol in relation to the argument that polygamy is inherently contrary to the rights of women and should therefore be abolished. Part three discusses the socio-economic, cultural and religious factors that feed into polygamy. This section argues that polygamy cannot be adequately tackled without considering and resolving the multi-faceted issues behind it. It illustrates how women in polygamous marriages tend to be particularly vulnerable and are therefore in more need of legal protection. Part four explores the rights of women in marriage which are provided for in article 6 of the African Women's Rights Protocol and article 16 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This part contends that pending the outlaw of polygamy according to international best practice, states parties should legislate to ensure that women in subsisting polygamous marriages enjoy all the substantive rights listed in these articles. Section five discusses the value added to the African human rights regime by article 6 of the African Women's

Rights Protocol by recognising the rights of women in polygamous marriages. It further discusses how legislation can regulate polygamy to protect the rights of women involved. In this regard, the Kenyan Marriage Act of 2014 and the South African Recognition of Customary Marriages Act of 1998 are used as case studies to illustrate how laws passed in accordance with article 6 of the African Women's Rights Protocol can contribute towards the protection of the rights of women in polygamous marriages. The article in its last section, which the concluding remarks.

It is necessary to mention that the term polygamy is used in this article only to refer to the practice where two or more women are simultaneously married to the same man. Admittedly, polygamy is an umbrella term used by most anthropologists to encompass: polygyny, where one man marries two or more women; polyandry, where one woman marries two or more men; and group marriages in which several men marry several women.[7] However, in this article, the term is only used to refer to polygyny and therefore excludes polyandry and group marriages.

2 ARTICLE 6 OF THE AFRICAN WOMEN'S RIGHTS PROTOCOL VERSUS THE ARGUMENT FOR THE ABOLITION OF POLYGAMY

Though international human rights instruments provide for the right to marriage and equality in marriage, none of them expressly mentions polygamy.[8] The interpretation given to these treaties by most scholars and human rights activists is that polygamy is against a woman's right to dignity and equality and should therefore be prohibited. For instance, on 29 March 2000, the Human Rights Committee, the body of independent experts that monitors the implementation of the ICCPR, issued a General Comment on the interpretation of article 3 of the ICCPR - the clause on equality between men and women.[9] The Human Rights Committee stated:

> It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.[10]

Furthermore, the Committee on the Elimination of Discrimination Against Women, while interpreting the CEDAW, similarly stated that

7 MK Zeitzen *Polygamy: a cross-cultural analysis* (2008).

8 For an analysis of these provisions see R Gaffney-Rhys 'Polygamy: a human right or human rights' violation?' (2011) 2 *Women in Society* 1.

9 UN Human Rights Committee General Comment 28 (2000) UN Doc CCPR/C/21/Rev.1/Add.10.

10 UN Human Rights Committee (n 9 above) para 24.

the practice of polygamy is against the rights of women and should be prohibited.[11]

Apart from this, many scholars have encouraged the legal prohibition of polygamy and their arguments may be summarised in two main prongs. First, polygamy violates the internationally recognised rights and the dignity of women; and secondly, polygamy is often associated with many harmful practices such as forced marriages, child marriages, gender-based violence and female genital mutilation.[12] For example two scholars, Cook and Kelly, presented a report to the Canadian Government that discussed these two issues.[13] They argued that polygamy is a violation of three major rights of women. First, polygamy violates the right to family which encompasses: the right to equality within marriage and within the family, the right to private and family life, the right to be free from all forms of stereotyping, and the right to exercise free and full consent in choosing a spouse and entering marriage. Second, polygamy infringes the right to security, which encompasses: the right to be free from all forms of violence, the right to be free from inhuman and degrading treatment, the right to the highest attainable standard of health, the right to be free from slavery and the right to an adequate standard of living. Third, in their view, polygamy violates the right to citizenship, which involves: the right to receive and impart information, the right to education, the right to religious freedom, and the right to enjoy their culture.[14] One of their main arguments is that although different rights may be violated depending on the context of polygamy, 'the right to equality within marriage and the family is violated *per se* by polygyny, regardless of the cultural or religious context in which it is practised.'[15] Cook and Kelly therefore argue for the abolition of polygamy.

On the other hand, the African Women's Rights Protocol seems to be taking a contrary approach to this issue. Article 6 provides that

> they [State Parties] shall enact appropriate national legislative measures to guarantee that monogamy is encouraged as the preferred form of marriage and that the rights of women in marriage and family, including in polygamous marital relationships are promoted and protected.

Article 6 of the African Women's Rights Protocol, instead of prohibiting polygamy, states that monogamy is preferred and that the rights of women in polygamous marriages should be promoted and protected.

[11] CEDAW Committee General Recommendation 21 (1994) http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21 (accessed 19 November 2016).

[12] See for example J Witte *The Western Case for Monogamy Over Polygamy* (2015); R Gaffney-Rhys (n 8 above); V von Struensee 'The contribution of polygamy to women's impoverishment: an argument for its prohibition' (2005) 2 *Murdoch University Electronic Journal of Law* 1 http://www.austlii.edu.au/au/journals/MurUEJL/2005/2.html#fn1 (accessed 31 July 2016); N Wadesango *et al* 'Violation of women's rights by harmful traditional practices' (2011) 13 *Anthropologist* 121.

[13] R J Cook & L M Kelly 'Polygyny and Canada's obligations under international human rights law' Department of Justice Canada (2006) http://www.justice.gc.ca/eng/rp-pr/other-autre/poly/poly.pdf (accessed 19 November 2016).

[14] Cook & Kelly (n 13 above) 21–43.

[15] Cook & Kelly (n 13 above) 87.

This provision has been criticised by many scholars who consider it as condoning polygamy which, they argue, is against the rights of women and against internationally recognised human rights principles.[16]

It is noteworthy that article 6 of the African Women's Rights Protocol was included as a compromise between, on one hand, the push for the complete abolition of polygamy made by NGOs and most human rights activists, and on the other hand, the refusal by government officials to completely abolish polygamy.[17] The government officials argued that the African Women's Rights Protocol should not prohibit polygamy because it exists in the culture and religion of many Africans, and therefore, prohibition would result in hardships for the women in polygamous marriages.[18]

From the above discussion, it appears that there are two opposing schools of thought on the issue of polygamy and human rights. The first, and the mainstream, argues that polygamy should be abolished in order to protect the rights of women. The second school of thought argues that since polygamy is deeply rooted in culture and religion, prohibition will not bring an immediate end to this practice, but will merely result in increased hardship for the women in polygamous marriages. Before going into the merits and demerits of these arguments, it is necessary to examine polygamy in the African context by discussing the socio-economic, cultural and religious factors which give rise to it.

3 POLYGAMY AS A SOCIO-ECONOMIC, CULTURAL AND RELIGIOUS PHENOMENON

3.1 The socio-economic and cultural reasons that feed into polygamy

Polygamy has been deeply entrenched in the culture and religion of most communities in Africa since pre-colonial times.[19] During colonialism, polygamy was prohibited by law and the offence of bigamy introduced in most African countries, a policy which was viewed as an important part of bringing 'civilization' to the 'dark' continent.[20] However, this prohibition failed to consider the cultural, political,

16 See for example J Obonye 'The practice of polygamy under the scheme of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: a critical appraisal' (2012) 4 *Journal of African Studies and Development* 147 http://www.academicjournals.org/jasd/abstracts/abstracts/abstracts2012/July/Obonye.htm (accessed 6 August 2016).

17 F Banda 'Blazing a trail: the African Protocol on women's rights comes into force' (2006) 50 *Journal of African Law* 72.

18 As above.

19 A Ibidapo-Obe 'The dilemma of African criminal law: tradition versus modernity' (1992) 19 *Southern University Law Review* 327, 343.

20 Ibidapo-Obe (n 19 above) 343.

social, religious and economic aspects of polygamy and therefore failed to eradicate the practice.[21]

If polygamy is to be tackled, in line with international best practices, then it must first be understood in the cultural, socio-economic and religious context of African societies which are mostly patriarchal in nature. In this regard, it is important to note first, that men are 'the traditional holders of power over "strategic resources" (namely, land, cattle, women and children)'.[22] Second, marriage in most African societies is traditionally for procreation and survival.[23] Children are therefore at the core of marriage and women are traditionally viewed as child bearing vessels.[24] Third, unlike in western societies where marriage is between the two individuals concerned, in most African societies marriage signifies the coming together of families and kinship.[25] Therefore, the interest of the community supersedes that of the individual and in patriarchal societies such community 'interests are framed in favour of men.'[26] This has to be the starting point in understanding polygamy in the African context.

Polygamy has been said to have many justifications most of which originate from the power, dominance and control that men have over women in a patriarchal society as explained above. First, it is a solution to the problem of infertility in marriage or lack of a male heir.[27] Since children are at the centre of marriage, when a woman is infertile, or the couple has not had male children, the husband is often encouraged by the society, and sometimes by the wife, to marry another woman to bear him (male) children.[28] Polygamy is also considered as a remedy for menopause as well as pregnancy and nursing.[29] The justification here is that traditionally in many African communities, during menopause, pregnancy and nursing, women are prohibited from having sexual intercourse. Therefore, the husband would marry another woman with whom he could continue having sexual relations during this period. In the case of pregnancy and nursing, the prohibition lasts until the baby has been weaned which can take up to three years. In case of menopause, the prohibition is permanent.[30]

[21] T Nhlapo 'African family law under an undecided constitution' in J Eekelaar & T Nhlapo (eds) *The challenge for law reform in South Africa* (2008); Zeitzen (n 7 above) 41-65.

[22] T Nhlapo 'The African family and women's rights: friends or foes' (1991) 1991 *Acta Juridica/ African Customary Law* 135, 136.

[23] G Kimathi *Your marriage and family* (1994) xxx page no.

[24] Kimathi (n 23 above).

[25] Nhlapo (n 22 above).

[26] Nhlapo (n 22 above) 137.

[27] See E M Baloyi 'Critical reflections on polygamy in the African Christian context' (2013) 41 *Missionalia* 164; G L Chavunduka, 'Polygyny among urban Shona and Ndebele Christians: a case study' (1979) 12 *Nada: The Southern Rhodesia Native Affairs Department Annual* 10.

[28] Baloyi (n 27 above).

[29] Baloyi (n 27 above).

[30] Baloyi (n 27 above).

The other justification for polygamy is that it is a remedy for societal exclusion. Since marriage is a fundamental rite of passage in most African communities, unmarried persons, especially women are considered as pariahs, therefore women sometimes end up marrying men who are already married to other wives to fit into the society.[31] Additionally, polygamy is the easiest way to have big families which is important in most African countries, especially in rural areas, because large families provide a huge labour force for economic development and help provide social security for the aged within the family.[32] Furthermore, in some contexts it is a method of taking care of widows, where a man dies and the widow marries the brother, or relative of the dead man to take care of her. According to Chavundika, it is believed that polygamy can improve the social and economic welfare of the woman especially in communities where levirate is prevalent.[33]

In some cases, polygamy continues to exist as a vestige of political structures which no longer exist. For example, Hansungule writes that traditionally, Kings in Africa married many wives for diplomatic and political reasons in order to solve conflicts with neighbouring communities.[34] Although this reason no longer exists, he states that the culture still lives on and kings, chiefs and other wealthy individuals still marry many wives.[35] He further describes the situation in Northern Nigeria and Swaziland where polygamy continues to exist due to religious and cultural norms, respectively. He concludes that: 'Culture in Africa is still very much a reality … religious beliefs and practices long dispensed with in other parts of the world continue to determine the status of women.'[36]

Apart from the above patriarchal power structure, culture and politics, there are other socio-economic factors which continue to feed into polygamy. These include lower levels of education among women, poverty, laws preventing women from owning land, Female Genital Mutilation (FGM), child marriages, ostracisation of unmarried and childless women, anti-abortion laws, lack of access to reproductive health care and information, rampant teenage pregnancies, as well as the practice of resolving rape cases by marrying off the rape victim to the perpetrator. Also, there are religious practices for example allowing men to terminate a marriage verbally and allowing men to marry up to four wives which encourage polygamy.

Since polygamy is enabled by issues which are often beyond the control of the women involved, some scholars and activists argue that the choice of a woman to be engaged in a polygamous marriage is often

31 Baloyi (n 27 above).

32 See TD Thobejane & F Takayindisa 'An exploration of polygamous marriages: a worldview' (2014) 5 *Mediterranean Journal of Social Sciences* 1058 http://mcser.org/journal/index.php/mjss/article/view/5179 (accessed 14 July 2017).

33 Chavunduka (n 27 above).

34 M Hansungule 'The status of women in contemporary African society with special reference to Zena Mahlangu (Swaziland) and Amina Lawa (Nigeria)' http://www.rwi.lu.se/pdf/seminar/hansungule.pdf (accessed 14 July 2017).

35 Hansungule (n 34 above) 9-10.

36 Hansungule (n 34 above) 25.

not a 'real' choice because it arises from the fact that polygamy is the only suitable or available option.[37] This argument gives rise to difficult questions such as: how much of an individual's choice can be free from societal influence? And, what is the acceptable limit of societal influence on an individual's choice? The above view seems to be based on the presumption that the women who would willingly be involved in polygamy simply do not know any better, an argument which, according to one commentator, is both 'arrogant and intolerant to cultural diversity'.[38] Since polygamy is kept alive by many patriarchal cultural and religious values, as well as socio-economic factors, it is difficult to ascertain whether women continue to engage in polygamy by choice, or whether they are implicitly 'forced', persuaded or convinced by circumstances beyond their control.

What is clear is that because polygamy is so deeply entrenched and the causes are so multi-faceted, a top-down abolition, like that implemented by colonialists cannot bring an end to the practice. In fact, in the words of one scholar 'if the bigamy laws were to be rigorously enforced ninety per cent of Africans might find themselves in jail.'[39] This seems to be an exaggeration because of the existence of contrary data which suggests that polygamy is on the decline on the continent.[40] Be that as it may, one scholar, Obonye, observes that 'this practice is still heavily embedded in the psyche of many Africans as an acceptable practice' therefore 'legislation alone cannot succeed in eliminating a deeply entrenched cultural practice like polygamy'.[41]

For this reason, it is necessary for State Parties to the African Women's Rights Protocol to tackle this issue by dealing with these socio-economic, cultural and religious practices that hinder the empowerment of women. States should endeavour to empower women to prevent situations where they would be involuntarily involved in polygamous marriages. This would be an important step in the fulfilment of their obligations under the African Women's Rights Protocol. However, since this is a long-term goal, this article argues that in the meantime State Parties should legislate to ensure that the rights of women in polygamous marriages are promoted and protected in line with the African Women's Rights Protocol. This point is illustrated with reference to South African and Kenyan statutes.

37 E A Archampong 'Reconciliation of women's rights and cultural practices: polygamy in Ghana' (2010) 36 *Commonwealth Law Bulletin* 325, 331. See also Obonye (n 16 above).

38 A Malik 'Case for polygamy in Scotland?' (2013) 2 *Edinburgh Student Law Review* 36, 43.

39 Ibidapo-Obe (n 19 above) 344.

40 J Fenske 'African polygamy: past and present' Centre for the Study of African Economies Working Paper 2012 http://www.economics.ox.ac.uk/materials/papers/12544/csae-wps-2012-20.pdf (accessed 14 July 2017).

41 Obonye (n 16 above) 147–148.

3.2 The need to legislate to protect the rights of women in polygamous marriages

The socio-economic and cultural factors which give rise to polygamy make women in polygamous marriages more vulnerable to human rights abuses especially because they have no legal protection in most African states. To begin with, it is noteworthy that the colonial laws mentioned above, introduced numerous advantages for monogamous marriages and not for polygamous ones.[42] For example, the fact that polygamous marriages were not recognised by law, meant that women in polygamous marriages could not inherit property upon their husband's death and had no recourse to law if abandoned.[43] This is well illustrated by a famous Kenyan case called *Re Ruenji's Estate*.[44] The facts of this case were as follows: a man contracted a marriage under a statute that disallowed polygamy and only recognised monogamous marriages. However, he subsequently married a second wife, under customary law, with whom he had children. Upon his death intestate, his two wives were engaged in a succession dispute over his property. The judge held as follows:

> Women married under customary law by a man who had previously married under statute are not wives and their children are not children for the purpose of succession, and they are therefore not entitled to a share in the estate of the deceased.

This decision, which failed to recognise a polygamous marriage and therefore, disenfranchised the second wife and her children, was relied on by judges in subsequent succession disputes in Kenya.[45] This necessitated parliament to create a special amendment to the Law of Succession Act which was intended to correct the situation and protect the property rights of women in polygamous marriages, regardless of the circumstances of their marriage. The amendment came into force in 1981 and stated as follows:[46]

> Notwithstanding the provisions of any other written law, a woman married under a system of law which permits polygamy is, where her husband has contracted a previous or subsequent monogamous marriage to another woman, nevertheless a wife for the purposes of this Act, and in particular sections 29 and 40 thereof, and her children are accordingly children within the meaning of this Act.

The above case demonstrates how the legal abolition of polygamy resulted in a situation whereby polygamy did not exist in law but

42 A K Wing 'Polygamy from Southern Africa to Black Britannia to Black America: global critical race feminism as legal reform for the twenty-first century' (2000) 11 *Journal of Contemporary Legal Issues* 811.

43 P K Mbote 'The law of succession in Kenya: gender perspectives in property management and control' International Environmental Law Research Centre 1995 http://www.ielrc.org/content/b9501.pdf (accessed 31 July 2016).

44 *Re Ruenji's* Estate 1977 (7) Kenya Law Reports 21.

45 See discussion in H S Arunda 'The mischief of section 3(5) of Kenya Succession Act' https://harrystephenarunda.wordpress.com/2013/04/30/the-mischief-of-section-35-of-kenya-succession-act/ (accessed 31 July 2016). See *also In Re Estate Of Boaz Harrison Ogola* (Deceased) (1978) eKLR http://kenyalaw.org/caselaw/cases/view/38197/ (accessed 31 July 2016).

46 Section 3(5) of the Law of Succession Act cap 160.

continued to exist in practice. This led to the disenfranchising of women in polygamous marriages making them vulnerable without the protection of the law. One women's rights organisation stated in this regard that:

> [W]omen in polygamous unions are also often hard pressed to prove a valid marriage was concluded under customary law, without which women cannot claim any rights in the marriage or upon divorce.[47]

The scenario is not limited to Africa. In fact, the practice of polygamy exists even in Western countries, such as in Britain and the United States of America, where the practice has been illegal for centuries especially among immigrant communities.[48] This often results, just like in the African context, in very unfortunate consequences for women in polygamous marriages as shown, for example, in the famous case of *Bibi v the United Kingdom*.[49] In *Bibi,* the Applicant was a girl whose mother, the first wife of her father, was refused entry into the United Kingdom (UK). The Applicant's father had married the applicant's mother in Bangladesh, and after three weeks he had married a second wife. The man later relocated to the United Kingdom where he became a citizen. After some time, he was joined by his second wife followed by the Applicant. Later, the Applicant's mother sought to join them in the UK but was refused entry on the basis that polygamy was not recognised in the UK. The European Commission of Human Rights accepted that the issue interfered with the family life of the Applicant but held that the UK was justified in its decision to deny entry to the Applicant's mother. The Commission held:

> In the circumstances of the case the Commission is of the view that the family life circumstances in the present case do not outweigh the legitimate considerations of an immigration policy which rejects polygamy and is designed to maintain the United Kingdom's cultural identity in this respect.

The above are merely illustrative examples showing that the top-down outlawing of the practice without dealing with the underlying socio-economic and cultural factors, does not end polygamy but instead results in suffering for women in polygamous marriages who are left unprotected.

Therefore, the move to prohibit polygamy, expressed by the Human Rights Committee and the CEDAW Committee with the best intention, might further stigmatise and alienate women engaged in polygamous marriages. As shown above, the prohibition of polygamy in many African countries did not bring an end to this practice. Instead, it led to the denial of the rights of women in polygamous marriages by for example excluding them from inheriting their husband's property upon death. This justifies the conclusion that, despite prohibition, so long as the socio-economic, cultural, and religious factors above continue to exist, there will always be women engaged in polygamous marriages and who need protection. Whatever one's sentiment towards polygamy,

47 'Kenyan Laws and Harmful Customs Curtail Women's Equal Enjoyment of ICESCR Rights' (Federation of Women Lawyers - Kenya (FIDA-Kenya) and the International Women's Human Rights Clinic) http://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/FIDAKenya41.pdf (accessed 31 July 2016).

48 Wing (n 42 above) 854-857.

49 *Bibi v The United Kingdom* (1992) ECHR 19628.

refusing to acknowledge that it continues to exist and the women involved need human rights protection is akin to the proverbial burying one's head in the sand. The African Women's Rights Protocol therefore fulfils the much needed and long overdue role of obligating states to enact legislation to ensure that the rights of women in polygamous unions are promoted and protected.

4 THE RIGHTS OF WOMEN IN MARRIAGES IN THE AFRICAN WOMEN'S RIGHTS PROTOCOL

Articles 6, 7 and 21 of the African Women's Rights Protocol contain a comprehensive regime of rights to be enjoyed by women in marriage, including polygamous marriages. Most of these rights are also provided for in article 16 of the CEDAW. The underlying principle in both regimes is that of equality of men and women in marriage. Article 6 of the African Women's Rights Protocol provides that: 'State Parties shall ensure that women and men enjoy equal rights and are regarded as equal partners in marriage.' Similarly, article 16(1) of the CEDAW provides that State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and shall ensure that women enjoy rights on a basis of equality of men and women.

As discussed above, the commentators who argue for the abolition of polygamy claim that the very fact that a woman is engaged in a polygamous marriage, which allows the man to have more than one spouse, but does not permit the same for the woman, essentially means that her right to equality in marriage is violated *per se*. The concept of equality in marriage is an abstract one and is therefore difficult to quantify even with regard to monogamous marriages. The issue raises more questions than answers: how does one measure equality in marriage? What is the determining factor? If a husband, like the wife, is only entitled to marry one spouse does that necessarily mean there is inherent equality in that marriage? What about situations where both men and women were allowed to have more than one spouse, would that make it equal? Considering the cultural, socio-economic and religious factors rallying against women, discussed above, it is difficult to envision a situation where men and women can be equal in marriage, whether monogamous or polygamous, unless these factors are resolved.

This calls to mind the two equality of rights theories: on one hand, nominal equality 'which advocates that men and women be treated alike because the sexes are the same in law';[50] and on the other hand substantive equality which 'focuses on the nature of the impact of particular laws on women's lives'.[51] Without going into this debate, the

[50] Archampong (n 37 above).
[51] Archampong (n 37 above) 328.

views I express in this article are based on the presumption that in the African context, because of political, cultural, and historical factors mentioned above, treating men and women alike may not necessarily lead to equality between the sexes because the playing ground is not level.

It is therefore more important to evaluate polygamy on the impact it has on the lives of the women involved in it. As demonstrated in the next section, the legal abolition of polygamy in Africa in the past has not brought an end to polygamy in practice. This disparity between law and practice has had very negative effects on the rights of women in polygamous marriages, and it is for this reason that I argue that pending the outlaw of polygamy in line with international best practice, State Parties should promote and protect the rights of women in polygamous marriages through legislation.

The underlying argument in this article is that women in subsisting polygamous marriages ought to enjoy all the rights provided for in the African Women's Rights Protocol as well as in article 16 of the CEDAW. This refers to the rights provided in articles 6, 7 and 21 of the African Women's Rights Protocol and article 16(1) of the CEDAW. These rights may be divided into three categories: the rights at the commencement of marriage, the rights during the subsistence of marriage, and the rights upon dissolution and/or death of the husband.

4.1 The rights at the commencement of marriage

Article 6(a) and (b) of the African Women's Rights Protocol and article 16(1)(a) and (b) of the CEDAW provide for the right to enter marriage, the right to choose a spouse and the right to enter the marriage with free and full consent. The right to give full and free consent to marriage - effectively means the woman should be of legal age and have the cognitive ability to consent to marriage. A provision like this guards against child marriages, because children lack the capacity to consent; and forced marriages since full and free consent is a requirement. However, as discussed in part 3.1 above, the issue of whether women can truly consent to polygamous marriages, or whether their choices are often forced by their circumstances and societal pressure is a delicate and difficult one.

4.2 Rights during the subsistence of marriage

During the subsistence of a marriage, women in both polygamous and monogamous marriages should enjoy the relevant internationally accepted rights some of which are provided for in article 6 sub-articles (d) to (j) of the African Women's Rights Protocol as well as article 16(1)(d) through (h) of the CEDAW. These are: 'the same rights and responsibilities as parents … in matters relating to their children'; 'The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights'; 'The same rights and

responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions'; 'The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation' and 'The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration'. State Parties should legislate to ensure that women in subsisting polygamous marriages enjoy these rights.

The rights in this category require access to resources, education and sexual reproductive information and services among other things. However, in the African context, where the males are holders of power over 'strategic resources' and most women have lower levels of education, and lack of access to sexual reproductive health and information,[52] it is difficult for women, both in polygamous and monogamous marriages to exercise the rights in this category. State Parties still have a long way to go to ensure compliance with the African Women's Rights Protocol in this regard.

4.3 Rights at the dissolution of marriage and/or upon the death of a spouse

Article 7 of the African Women's Rights protocol provides for the right of a woman during separation, divorce or annulment of marriage. The Protocol requires State Parties to set up legislation which ensures: that divorce, separation or annulment is effected by judicial order; that women have equal rights to seek divorce, separation or annulment; that men and women have equal rights with regard to children and in case of dispute the weight is placed on the best interest of the children; that women have the right to share equally in the joint property deriving from the marriage.

Upon the death of the spouse article 21 of the African Women's Rights Protocol provides for the right to inheritance of property by widows. The article provides as follows:

> A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

Because there are many factors currently playing against the interest of women,[53] women have to be empowered to exercise these rights, through means such as litigation. States could also do away with religious laws which allow for verbal dissolution of marriage.

In this article, I argue that pending the outlaw of polygamy (which is also in line with international best practice), African states should legislate to promote and protect the above-mentioned rights with regard to all women, especially those in polygamous marriages. Admittedly, provisions relating to polygamous marriages might require

[52] See part 3.1 above.
[53] See part 3.1.

special attention in order to provide protection. For example, the provision that a widow is entitled to inherit an equitable share of her husband's property might be more challenging to implement in a polygamous marriage than in a monogamous one. This is the more reason why women in polygamous marriages are in dire need of the protection of the law.

5 LAWS THAT PROMOTE AND PROTECT THE RIGHTS OF WOMEN IN POLYGAMOUS MARRIAGES

The best way to protect the rights of the women in polygamous marriages would be by the enactment of laws which promote and protect their rights as proposed by article 6 of the African Women's Rights Protocol. As mentioned in part 2 above, many have viewed this as condoning polygamy, but this is not necessarily the case. Such a provision is justified by the appreciation of the African reality, discussed in part 3 above, that there are many socio-economic, cultural and religious factors which continue to give life to polygamy and which require long term solutions. Pending the outlaw of polygamy, in line with international best practice, women in polygamous marriages require legal protection. Municipal laws which provide for polygamous marriages, in line with article 6 of the African Women's Rights Protocol, can contribute towards enforcing the rights of women in such marriages. This is demonstrated below with reference to the Kenyan Marriage Act of 2014, which was enacted pursuant to the African Women's Rights Protocol and the South African Recognition of Customary Marriages Act which was enacted in 1998, before the African Women's Rights Protocol.

5.1 The Kenyan Marriage Act of 2014

The Kenyan Marriage Act of 2014 defines polygamy as the state or practice of a man having more than one wife simultaneously. Some of the pertinent provisions of this Act are as follows: Marriage is defined as 'the *voluntary union* of a man and a woman whether monogamous or polygamous'. The minimum age for marriage is 18 years and at the time of contraction, the parties have a choice between a monogamous marriage and a potentially polygamous marriage. Moreover, if the parties so wish, a potentially polygamous marriage may be converted to a monogamous marriage. This can only be done if each spouse voluntarily declares the intent to make such a conversion. However, a polygamous marriage may not be converted to a monogamous marriage unless at the time of the conversion the husband has only one wife.

This Act, which makes express provisions for polygamous marriages, helps promote and protect the rights of women in polygamous marriages more than the previous regime, which prohibited polygamy. First, marriage is defined as a voluntary union

between a man and a woman and by that definition forced marriages are prohibited. Under this Act, a woman cannot therefore be forced into contracting a polygamous marriage. Second, the minimum age of marriage is set at 18 years; therefore, child marriages are prohibited. One of the main arguments of the human rights activists who advocate for the abolition of polygamy is that it is characterised by forced marriages and child marriages.[54] By outlawing these two harmful practices, this law, though permitting polygamy, helps to promote and protect the rights of adult women to marry a partner of their choice.

Third, the Act provides for the recognition of polygamous marriages, which means that women in polygamous marriages have recourse to the law in case their rights are violated. This does away with the harmful effects of the prohibition of polygamy discussed above, for example, where a woman in a polygamous marriage was denied the right to inherit her dead husband's property because polygamy was not recognised by law. Fourth, the Act provides that when contracting a marriage, the spouses can choose to have either a monogamous marriage or a potentially polygamous one. This therefore means that women now have a choice, at the time of contraction, to define their marriages as monogamous or potentially polygamous.

Furthermore, the Act also provides that while a monogamous marriage may be converted into potentially polygamous one by the express consent of both parties, a polygamous marriage cannot be converted to a monogamous one unless the man had only one wife at the time of the conversion. This therefore means that women in polygamous marriages are protected from the instances where a man could unilaterally decide to convert a marriage from polygamous to monogamous, thereby disenfranchising some of his wives as occurred in the *Ruenji's Estate* case discussed above. In this case, the law did not recognise one of the wives because the man had converted a polygamous marriage into a monogamous one without her knowledge or consent. The provisions of this Act, though not perfect, offer better protection for women in polygamous marriages than a blanket prohibition on polygamy which disregards the fact that polygamy continues to exist in practice in Africa.

By recognising polygamous marriages and providing for it in law, the Act makes it possible for women in polygamous marriages, just as their counterparts in monogamous ones, to enjoy the rights provided for in article 6, 7 and 21 of the African Women's Rights Protocol and article 16 of CEDAW which are discussed in part 4 above. The Act also removes the uncertainty associated with polygamous marriages which had not been provided for in law post-independence. It has the effect of reversing the criminalisation of polygamy, which was done by the colonialists through the introduction of the crime of bigamy in Kenya, and all former British colonies in Africa.[55] Finally, because of this Act polygamous marriages are expressly recognised under the law in

54 Gaffney-Rhys (n 8 above).

55 See Ibidapo-Obe (n 19 above). He discusses the dilemma of criminalisation of polygamy by introduction of the crime of bigamy by the colonialists in Africa.

Kenya, and can be registered and therefore the women involved are no-longer disenfranchised and can enjoy internationally recognised rights of women in marriage. When the Act was enacted, Christine Ochieng the Executive Director of the Federation of Women Lawyers (Kenya), one of the leading organisations in women rights in Kenya, reportedly commented as follows:

> We are happy with the law because finally all marriages are being treated equally ... All marriages will be issued with marriage certificates, including customary marriages. Before this, customary marriages were treated as inferior with no marriage certificates. This *opened up suffering for the women because they could not legally prove they were married to a particular man* (my emphasis).[56]

It remains to be seen how the Act's provisions will be implemented or interpreted by the courts but it is definitely a step in the right direction towards the protection of the rights of women in polygamous marriages. Kenya can therefore be said to have partly fulfilled its obligation under article 6 of the African Women's Rights Protocol. The obligation will be wholesomely fulfilled by dealing with the cultural, socio-economic, and religious factors discussed in part 3.1 above which disadvantage women and tend to make women involuntary parties to polygamy.

5.2 South African Recognition of Customary Marriages Act

The second example of a statute that regulates polygamy is the South African Recognition of Customary Marriages Act 120 of 1998 (RCMA). The RCMA came into force in November 2000 and aims to:

> Make provisions for the existence of customary marriages, to specify the requirements of customary marriages, to provide for equal status and capacity of spouses in customary marriages, to regulate the proprietary consequences of customary marriages and the capacity of spouses for such marriages, to regulate the dissolution of customary marriages ...[57]

The Act does not expressly mention polygamy but it is clear that polygamous marriages fall under the ambit of the Act since South African Customary law recognises polygamy and the Act uses words such as 'if a person is a spouse on more than one customary marriage'.[58]

Like the Kenyan Act discussed above, this Act contains the same provisions aimed at protecting and promoting the rights of women in customary marriages, which include polygamous marriages. Section 2 of the Act recognises all customary marriages as valid, whether contracted before or after the commencement of the Act. The Act also provides for the requirements for the validity of customary marriages which are: consent as a prerequisite of marriage, a minimum age of 18

56 F Karimi & L Leposo 'New Kenya law legalizes polygamy; women's group applauds' *CNN* http://www.cnn.com/2014/05/01/world/africa/kenya-polygamy-law/index.html (accessed 14 July 2017).

57 Preamble of the South African Recognition of Customary Marriages Act 120 of 1998 (RCMA).

58 See for example secs 2 and 7 (4)(b) of the RCMA

years and marriage celebrations according to customary law.[59] Furthermore the Act provides for the registration of customary marriages which either party can apply for after which a certificate of marriage is to be issued.[60] Even if the parties fail to register their marriage, upon proof that a valid customary marriage was conducted, the marriage shall be considered valid in the eyes of the law.[61] More importantly the Act provides for equal status in a marriage and particularly states:

> A wife in a customary marriage has, on the basis of equality with her husband full status and capacity including the capacity to acquire assets and dispose of them, to enter into contracts and litigate in addition to other rights and powers she may have under customary law.[62]

This Act goes even further with the inclusion of a section which protects existing wives' property rights when the man decides to take on another wife.[63] In this regard, when a husband to an existing customary marriage wishes to enter another customary marriage with another woman, he must apply to the court to approve a contract which will govern the matrimonial property systems of his marriages.[64] In case the marriage is based on community of property or accrual system, the court would terminate the property system applicable to the marriage or effect a division of property. The aim is to ensure an equitable division of property while taking into account the circumstances of the family groups affected by the division of property.[65] The court would then approve the contract on the basis of any conditions it deems fit, allow amendments to the terms of the contract or refuse the contract on the basis that the interests of any of the parties would not be safeguarded by the provisions thereof.[66] The courts have been keen to implement these provisions as seen for example in the case of *MM v MN* where the court held that a subsequent marriage was invalid because of failure to comply with Section 7 (6) which requires a contract of the property arrangements.[67]

The effect of this Act is that it regulates polygamy and protects the interest of the women in polygamous marriages. The Constitutional Court of South Africa has gone further to hold that, in the Tsonga nation, the consent of an existing wife is required for a subsequent marriage contracted by the husband to be valid. This was held in the case of *Mayelane v Ngwenyama,*[68] where the applicant married her husband (deceased in 1984) under customary law. The marriage was not registered. After the man's death, the applicant learnt that the

59 Sec 3 of the RCMA.
60 Sec 4 of the RCMA
61 Sec 4 of the RCMA.
62 Sec 6 of the RCMA.
63 See secs 7(1) - (6) of the RCMA.
64 Sec 7(6) of the RCMA.
65 Sec 7(6) of the RCMA.
66 Sec 7(6) of the RCMA.
67 *MM v MN* 2010 (4) SA 286 (GNP). See also a detailed discussion of the provision in IP Maithufi 'MM v MN 2010 (4) SA 286 (GNP)' (2012) 45 *De Jure* 405.
68 *Modjadji Florah Mayelane v Mphephu Maria Ngwenyama* (2013) ZACC 14.

deceased had purported to marry another wife, the first respondent. The applicant petitioned the court to rule that the deceased's marriage to the first respondent was not valid because it was conducted without the consent of the applicant. On appeal, the Constitutional Court held that based on the evidence provided, Tsonga customary law required the consent of an existing wife for a subsequent marriage to be valid. The deceased marriage to the first respondent was therefore not valid.

The Act has the effect of increasing the protection for the women in polygamous marriages. Admittedly, the protection provided by the Act is also not perfect[69] and some women are still 'left in the cold' as one scholar puts it.[70] But the comprehensive provisions of this Act, as well as the interpretation of the courts in the *Mayelane v Ngwenyama and MM v MN* decisions, contribute to the promotion and protection of the rights of women in customary marriages, whether polygamous or monogamous. As with Kenya, a more wholesome protection of women's rights can be reached by implementing changes which will deal with the factors discussed in part 3.1 which sometimes push women into polygamous marriages.

6 CONCLUSION

In the debate of whether to abolish polygamy or not, the main aim of human rights activists and practitioners is to protect the rights of women. However, pushing for prohibition of polygamy in law, without focussing on the cultural, social and economic factors which feed into it is an inadequate way to achieve this goal. Polygamy is deeply entrenched in culture and is supported by political, social and economic structures of most African communities, especially in the rural areas. Culture cannot change overnight, and a top-down prohibition of the practice would result in more harm than good for women in polygamous marriages.

Ensuring equality between men and women is a noble endeavour that State Parties should aspire to attain in fulfilment of their obligations under the African Women's Rights Protocol. However, prohibition of polygamy without dealing with its root causes would lead to the violation of the rights of the very women it is meant to protect, as made clear in the *Re Ruenji* and *Bibi* cases above. While endeavouring to comply with international best practice, State Parties should pay attention to women in subsisting polygamous marriages and the women who for one reason or another continue to enter into polygamous marriages. Any action towards ensuring equality between men and women is desirable only if such action results in the improvement of the condition of the women in question.

69 See for example challenges to implementation in P E Andrews 'Big love-the recognition of customary marriages in South Africa' (2007) 64 *Washington and Lee Law Review* 1483, 1495-1497.

70 R M Jansen 'The Recognition of Customary Marriages Act: many women still left out in the cold' (2002) 27 *Journal for Juridical Science* 115.

The reality in Africa is that people keep entering polygamous marriages for various complex and diverse reasons. As has been shown above, the mere prohibition of polygamy by law has not succeeded in bringing an end to this practice. The reasons why people engage in polygamy are so varied, complex and deeply entrenched that mere prohibition by the law will not put an end to this practice. The fact that no provision exists in law to protect these women only serves to further alienate them and make them more vulnerable to human rights violations.

Pending the outlaw of polygamy in line with international best practice, in the interim, the best way to protect the rights of women in polygamous marriages is to formulate laws which are informed by the realities on the ground such as the Kenyan Marriage Act and the South African RCMA. The objective of such laws should be to regulate the practice of polygamy, by for example, preconditioning it upon the full, free and express consent of the women and prohibiting child marriages. Such regulations would counter the arguments often given in support of prohibition of polygamy such as the violation of the right to equality of women, forced marriages, child marriages etc. Such regulations would also promote the fundamental right to family and the right of adult women to marry partners of their choice, whether their marriage of choice is polygamous or monogamous.

A right to marry a partner of one's choice is enshrined in all the major international and regional human rights instruments. In a world that is continually welcoming diverse forms of marriage, it would be counterintuitive to prohibit a practice that exists in the culture and religion of many Africans, without dealing with its root causes. Polygamy is simply one of the symptoms of a set of complex and multi-faceted issues explained in part 3.1 above. This underscores the importance of article 6 of the African Women's Rights Protocol in ensuring the promotion and protection of the rights of women in polygamous marriages in Africa.

'It is better that ten guilty persons escape than that one innocent suffer': the African Court on Human and Peoples' Rights and fair trial rights in Tanzania

*Ally Possi**

ABSTRACT: The African Court on Human and Peoples' Rights (African Court) has recently been flooded with fair trial cases against its host state, Tanzania. To date, the African Court has disposed with five of these cases on the merits, and dismissed the other as being inadmissible. These cases are *Abubakari v Tanzania, Jonas v Tanzania, Nganyi v Tanzania*, *Onyachi v Tanzania*, and *Thomas v Tanzania.* Numerous similar cases, all alleging that Tanzania is in violation of fair trial rights as guaranteed in the African Charter on Human and Peoples' Rights and other human rights instruments, are pending before the African Court. This article traces the involvement of the African Court, in the context of the five decided cases, in nurturing fair trial norms in Tanzania. On the one hand, the emerging Court jurisprudence on fair trial is of importance for the promotion and protection of fair trial norms on the continent; and, on the other hand, it is an opportunity for the African Court to firmly stamp its authority in this thematic domain, taking into account of the little jurisprudence it has in its disposal. In some cases, the African Court has shied away from granting effective remedies in favour of the applicants, whose fair trial rights were ruled to be violated. Further, an assessment of the cases gives an impression that the country's judiciary and prosecuting authority are careless and sloppy in their application of fair trial standards. There therefore is a need for domestic fair trial rights to be strengthened.

TITRE ET RÉSUMÉ EN FRANÇAIS:

'Il vaut mieux laisser s'échapper dix personnes coupables que de voir souffrir un seul innocent': La Cour africaine des droits de l'homme et des peuples et le droit à un procès équitable en Tanzanie

RÉSUMÉ: La Cour africaine des droits de l'homme et des peuples (Cour africaine) a récemment été inondée d'affaires concernant le droit à un procès équitable contre son pays d'accueil, la Tanzanie. À ce jour, la Cour africaine s'est prononcée au fond sur cinq de ces affaires et en a déclaré une autre irrecevable. Ces affaires sont *Abubakari c Tanzanie*, *Jonas c Tanzanie*, *Nganyi c Tanzanie*, *Onyachi c Tanzanie* et *Thomas c Tanzanie*. De nombreuses affaires similaires, toutes alléguant que la Tanzanie viole le droit à un procès équitable tel que garanti par la Charte africaine des droits de l'homme et des peuples et d'autres instruments relatifs aux droits de l'homme, sont pendantes devant la Cour africaine. Cet article retrace l'implication de la Cour africaine, en ce qui concerne les cinq affaires jugées, dans la promotion des normes de procès équitable en Tanzanie. D'un côté, la jurisprudence émergente de la Cour sur le procès équitable est importante pour la promotion et la protection des normes de procès équitable sur le continent; et, de l'autre, c'est l'occasion pour la Cour africaine d'affirmer fermement son autorité dans ce domaine thématique, compte tenu de la faible jurisprudence dont elle dispose. Dans certains cas, la Cour africaine s'est

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A Possi '"It is better that ten guilty persons escape than that one innocent suffer": the African Court on Human and Peoples' Rights and fair trial rights in Tanzania' (2017) 1 *African Human Rights Yearbook* 311-336
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abstenue d'accorder des demandes efficaces aux requérants dont elle a conclu que les droits à un procès équitable avaient été violés. En outre, une évaluation de la jurisprudence donne l'impression que les autorités judiciaires et celle en charges des poursuites de l'Etat concerné sont imprudentes et négligentes dans l'application des normes du procès équitable. Il est donc nécessaire de renforcer le droit national en matière de procès équitable.

KEYWORDS: African Court on Human and Peoples' Rights, fair trial rights,

CONTENT:

1 INTRODUCTION

The right to a fair trial is a foundational principle of democratic societies. This norm facilitates due legal processes and manifests the rule of law in all aspects of the administration of justice. That is why various national and international legal regimes establish safeguards for guaranteeing fair trials. Universally accepted for some time now, the right to a fair trial is fundamental to humankind,[1] and is closely associated with the principles of natural justice. In fact, some have gone as far as endorsing the right to a fair trial as a candidate for having acquired the status of customary international law.[2]

Fair trial rights apply in both civil and criminal matters.[3] Notwithstanding the commonality of application, fair trial rights possess an 'inherent inclination towards criminal trials.'[4] Being a fundamental right, the right to a fair trial contains immutable principles which law enforcers have to strictly abide by.[5] These principles, accompanied by rules and procedures, are implemented during the entire process of a court trial.'[6] It is worth stating that the

1 D Harris 'The right to a fair trial in criminal proceedings as a human right' (1967) 16 *International and Comparative Law Quarterly* 352.

2 J Dugard *International law: a South African perspective* (2001) 241.

3 *Ringeisen v Austria* (1971) 1 EHRR 455.

4 CS Namakula 'The court record and the right to a fair trial: Botswana and Uganda' (2016) 16 *African Human Rights Law Journal* 178.

5 HN Muhammad 'Due process of law for persons accused of crime' in L Henkin (ed) *The international bill of rights: the Covenant on Civil and Political Rights* (1981) 139.

6 *Avocats Sans Frontie `res (on behalf of Bwampamye) v Burundi* (2000) AHRLR 48 (AHRLR 2000) para 16.

realisation of fair trial rights is dependent on the existence of certain conditions, and are impeded by others.[7] To that effect, well-defined elements aimed at safeguarding the rights of accused persons are in place within different legal regimes.[8]

When depriving a criminal accused of a just and fair trial, other rights, such as the right to life and liberty, are also at a high risk of infringement.[9] Essentially, fairness in the administration of justice accommodates the rule of law and the maintenance of public confidence in the legal system. Significantly, fair trial norms facilitate due legal processes aimed at preventing unlawful and arbitrary curtailment of individual rights. In emphasising the importance of observing fair trial norms, the South African Constitutional Court noted that the consequences of disregarding the right to a fair trial may be as dire as cancelling an election.[10]

In the quest to instil fairness and credible ends of justice, a number of international instruments, heavily influenced by the Universal Declaration of Human Rights (Universal Declaration), accord numerous fair trial rights.[11] Alongside the existing normative framework, international judicial and quasi-judicial bodies are instrumental in upholding the norm within their respective spheres of jurisdiction.

The African Court on Human and Peoples' Rights (African Court) is a adjudicative body designed to ensure the protection of human and peoples' rights in Africa.[12] Its foundational edifice was established in June 1998, with the adoption of its Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol or Court Protocol) by the Member States of the then Organization of African Unity (OAU), in Ouagadougou, Burkina Faso.[13] The date 25 January 2004, when the Protocol entered into force, marks the completion of the establishment of a long awaited human rights bastion within the continent. However, delay in the appointment of Judges stalled the start of its functioning. Eventually, on 12 July 2006, the first batch of Court Judges took their oath of office, marking the official commencement of the operationalisation of the African Court. It delivered its first decision in 2009,[14] and its first

7 R Murray 'The right to a fair trial: The Dakar Declaration' (2001) 45 *Journal of African Law* 140.

8 Namakula (n 4 above) 178.

9 See *International Pen and Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998).

10 *S v Jaipal* 2005 (4) SA 581 (CC) para 56 ('To compromise the right to a fair trial may in principle be as dangerous as to cancel or postpone democratic elections because of a lack of facilities or resources.').

11 J Zhang 'Fair trial rights in ICCPR' (2009) 2 *Journal of Politics and Law* 39. See articles 10-11 of the Universal Declaration of Human Rights, 1948.

12 For more information on the Court's decisions, publications and statistical information, see http://en.african-court.org/index.php/12-homepage1/1-welcome-to-the-african-court (accessed 12 June 2017). See also generally, F Viljoen *International human rights law in Africa* (2012) 426-448.

13 Article 1 of the African Court Protocol.

14 *Yogogombaye v Senegal*, Application 1/2008.

decision on the merits in the case of *Mtikila v Tanzania* (the *Mtikila* case), in 2013.[15] In this case, the African Court found that Tanzania had violated the African Charter on Human and Peoples' Rights (African Charter) by not allowing independent candidates to contest for elected office in its general elections. The decision was seen as a 'watershed moment' in Africa's political and legal fortunes: a prophesy awaiting to be realised.[16]

The African Court enjoys two forms of jurisdiction: contentious and advisory. When exercising its mandate, the African Court interprets and applies the African Charter, the Court Protocol and any other instrument which a state involved in the dispute has ratified.[17] By 31 October 2017, 30 states have accepted the Court's authority by ratifying the Court Protocol.[18] Accessibility by natural and legal persons to the Court is subject to a declaration entered by a state party, accepting to be taken to the Court by its citizens and non-governmental organisations in accordance with article 34(6) of the Court Protocol.[19] The Court is not an appellate Court.[20] When exercising its authority in determining matters such as the right to a fair trial, it examines relevant proceedings in the national courts and assesses whether such proceedings comply with the African Charter and other relevant human rights instruments.

Having adhered to the African Charter as far back as 9 March 1984, Tanzania ratified the African Court Protocol on 10 January 2006, and formally accepted direct individuals access to the Court, in accordance with article 34(6) of the Protocol, on 29 March 2010. It therefore follows that Tanzania should be prominent on the radar of potential individual litigants in Tanzania.

Lately, the registry-docket of the Court has piled up with applications against Tanzania, all of them alleging the violations of fair trial rights. As of 20 September 2017, there were 78 pending cases, all contending that Tanzania is in violation of fair trial standards provided

15 *Mtikila v Tanzania,* Application 11/2011. For a general discussion on the case, see O Windridge 'A watershed moment for African human rights: *Mtikila & Others v Tanzania at the African Court on Human and Peoples' Rights*' (2015) 15 *African Human Rights Law Journal* 299.

16 See AO Enabulele 'Incompatibility of national law with the African Charter on Human and Peoples' Rights: does the African Court on Human and Peoples' Rights have the final say?' (2016) 16 *African Human Rights Law Journal* 1.

17 Article 3 of the Court Protocol.

18 These states are Algeria, Benin, Burkina Faso, Burundi, Cameroon, Chad, Cote d'Ivoire, Comoros, Congo, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Malawi, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, Sahrawi Arab Democratic Republic, South Africa, Senegal, Tanzania, Togo, Tunisia and Uganda. See the status of ratification on https://au.int/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 21 October 2017).

19 As of the date of preparing this article, eight states have made a declaration. These are: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Mali, Malawi, Tanzania and Rep. of Tunisia. See the list at http://en.african-court.org/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-jan_2017.pdf (accessed 12 June 2017). Rwanda initially accepted its private litigants to access the Court, but it withdrew its acceptance in February 2016, and became effective from March 2017.

20 *Mtingwi v Malawi,* Application 1/2013.

for in various international human rights instruments.[21] So far, five fair trial cases concerning Tanzania have been decided on the merits, namely, *Abubakari v Tanzania* (the *Abubakari* case),[22] *Jonas v Tanzania* (the *Jonas* case),[23] *Nganyi v Tanzania* (the *Nganyi* case),[24] *Onyachi v Tanzania* (the *Onyachi* case),[25] and *Thomas v Tanzania* (the *Thomas* case).[26] Two further cases, also dealing with fair trial rights, namely, the *Chacha* case[27] and *Omary v Tanzania*,[28] were dismissed as inadmissible.

The *Chacha* case[29] is the first matter that alleged a violation of fair trial rights against Tanzania. Chacha, remanded without trial for over five years, alleged a violation of his right to liberty and also complained about the seizure of his property.[30] Within the domestic system, there was a long fought legal battle between the applicant and the prosecutors. The applicant took legal and administrative measures to claim his rights. He persistently filed a number of applications to the High Court claiming a violation of his rights in the eight overlapping criminal charges against him, which were pending before the Arusha District Court. It is also a matter of record that the applicant wrote a number of letters to the judiciary, including the Chief Justice, complaining about unlawful arrest and detention, without any response. On the eight overlapping charges, the prosecuting authority consistently withdrew and reinstated the charges contrary to the *non bis in idem* principle, one of the fair trial safeguards.[31] Eventually, the Tanzanian authorities released the applicant, after he had spent five years behind bars, on the basis of what turned out to be frivolous charges against him.

The African Court controversially dismissed the matter for want of exhaustion of domestic remedies. It would appear that, in this case, the African Court was not aware of the gravity of challenges associated with the country's criminal justice system. At the national level, the applicant's efforts to question the constitutionality of his arrest, detention and seizure of his properties proved futile. In one of the cases, the High Court declined to grant the applicant's prayers on the premises that there were other pending charges against him. In the circumstances of the applicant's case, after his release, he ought to file a fresh case in the local courts. Such a case would have been for claiming his violated constitutional rights, or alternatively, a civil claim for

[21] The list of pending cases at http://www.african-court.org/en/index.php/cases#pending-cases (accessed 20 September 2017).
[22] Application 7/2013.
[23] Application 11/2015.
[24] Application 6/2013.
[25] Application 3/2015.
[26] Application 5/2013.
[27] Application 3/2012.
[28] Application 1/2012.
[29] *Chacha* (n 27 above).
[30] *Chacha* (n 27 above) para 65.
[31] Article 14(7) of the ICCPR. An expansive interpretation of article 6 of the African Charter fits well with the principle.

damages against the government. All these are obviously extraordinary remedies, taking into account of the already made claims to the High Court and the time the applicant had spent in the domestic courts seeking for his rights.

In a minority opinion, Judge Ouguergouz expressed the view that the application ought to be adjudicated, on the grounds that the remedies before the national courts were inaccessibility and unduly prolonged.[32] He noted that the rule of exhausting domestic remedies ought to be examined in light of the right claimed to be violated.[33] He further remarked that the rule is to 'be applied with a certain degree of flexibility and without excessive formalities' in respect of the rights alleged to be violated.[34]

Following the filing of Chacha's application, a string of similar applications was lodged to the African Court. Seemingly, news of the Chacha application spread to other inmates in Arusha, where the Court has its seat, and the Kilimanjaro region, a few kilometres from Arusha. This is due to the fact that most applications in subsequently submitted cases are from these two regions, where inmates have become aware of the avenues and possibilities of reaching the African Court, apparently to a much greater extent than in other regions of the country. The large number of fair trial cases against Tanzania before the African Court is a reflection of the extent to which fair trial rights are overlooked in the country by those involved in the administration of criminal justice.

The main objective of this article is to reveal the current trend in the functioning of the African Court, associated with its unique experience of having an influx of fair trial allegations against one country in particular, Tanzania. Its objective is attained by identifying some elements of fair trial rights that have been dealt with by the African Court in applications involving Tanzania. This article has five sections. The first section introduces fair trial norm as well as outlining the scope of this paper. The second section illustrates the place of fair trial safeguards under contemporary international human rights law. Essentially, the section demonstrates the extent to which fair trial rights are guaranteed in various international human rights law instruments. Being a party to a number of international human rights treaties, the manner in which Tanzania domesticates fair trial norms is highlighted in the third section of this article. The section looks at the normative framework and the approach of the national courts in upholding fair trial rights. The fourth section analyses and critiques the current fair trial jurisprudence of the African Court in five matters decided on the merits against Tanzania. This section may assist in setting the tone for the application of fair trial norms in other parts of Africa. The last section provides some concluding remarks and recommendations.

32 Joint Dissenting Opinion of Judge ABS Akufo, EN Thomson, and B Kioko (28 March 2014) para 26.

33 Dissenting Opinion of Judge F Ouguergouz para 2.

34 Dissenting Opinion of Judge F Ouguergouz para 20.

2 FAIR TRIAL UNDER INTERNATIONAL LEGAL REGIME

Ever since World War II, human rights have shaped the international community.[35] The right to a fair trial is one of the norms recognised under international human rights law.[36] In 1948, the Universal Declaration initially acknowledged the right to a fair trial;[37] later, this right was replicated and expanded upon in other human rights instruments,[38] as well as rules of procedure of judicial and quasi-judicial bodies.[39] Article 14 of the International Covenant on Civil and Political Rights (ICCPR) constitutes a set of elements aimed at safeguarding fair trial rights. In its general context, the article reconciles the safeguards with divergent scope of application. Such safeguards include: equality of all persons before courts and tribunals;[40] fair hearing before an independent and impartial body;[41] the presumption of innocence;[42] the right for an appeal or review;[43] compensation;[44] and *non bis in idem*.[45] Article 14 also covers juvenile justice, by emphasising the relevance of age and the need for rehabilitating to accused persons of a tender age.[46]

In Africa, where there are frequent reports of criminal injustice, all the three major human rights instruments provide for the right to a fair trial.[47]

Article 7 of the African Charter outlines the components necessary to accommodate one's right to be heard. These include the right to

35 Dugard (n 2 above) 234.

36 T van der Walt & S de la Harpe 'The right to pre-trial silence as part of the right to a free and fair trial: an overview' (2005) 5 *African Human Rights Law Journal* 70.

37 Article 10 of the Universal Declaration.

38 Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, as amended by Protocol No, 1998; articles 7 & 26 of the African Charter. There are international guidelines adopted by the United Nations (UN) safeguarding means of treating criminal offenders, see: Guidelines on the Role of Prosecutors and Basic Principles on the Role of Lawyers, both adopted on 1990, by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx and http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx respectively (accessed on 10 June 2017).

39 Article 20(2) of the Statute of the International Criminal Tribunal for Rwanda; Article 21 of the Statute of the International Criminal Tribunal for Yugoslavia; article 67 of the International Criminal Court.

40 Article 14(1) of the ICCPR.

41 As above.

42 Article 14(2) of the ICCPR.

43 Article 14(5) of the ICCPR.

44 Article 14(6) of the ICCPR.

45 Article 14(7) of the ICCPR.

46 Article 14(4) of the ICCPR.

47 Article 8 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (African Women's Rights Protocol); article 17 of the African Charter on the Rights and Welfare of the Child adopted 11 July 1990 entry into force 28 November 1999 (African Children's Rights Charter).

appeal, the presumption of innocence, the right to defence, and the right to be tried within a reasonable time.[48] Further, the Charter prohibits *ex post facto* laws.[49] Notably, article 7 is not as expansive as article 14 of the ICCPR. Worth mentioning, however, is that fair trial norms in the Charter are non-derogable.

A glance at the Charter might mislead one to conclude that article 7 is the only provision dedicated to protect fair trial rights.[50] This impression is incorrect, as the Charter represents a tapestry of rights essential to the dispensation of justice. For instance, it reaffirms the equal protection of every person, without any form of discrimination.[51] Individuals whose fair trial rights have been violated are often victims of arbitrary treatment, to the extent of their humanity being degraded. To that effect, the Charter prohibits any form of arbitrary treatment that diminishes the dignity of a person.[52] In the *Onyachi* case, the African Court adopted an expansive approach in interpreting article 7 of the African Charter, by stating as follows:

> The term 'comprises' in article 7(1) of the Charter predicates that the list is not exhaustive and the right to be heard may also include other entitlements available for individuals both in international law and the domestic law of the concerned state.[53]

The African Charter on the Rights and Welfare of the Child (African Children's Rights Charter)[54] deals with the administration of juvenile justice.[55] Whenever a child is involved in a trial, due care is needed. [56] Testimony by a child needs to be corroborated. A key feature of article 17 of the Children's Rights Charter is the prohibition of the press and the public during juvenile trials.[57] The main purpose of treating children with due care when facing trials is their reformation, reintegration, and social rehabilitation.[58] The mental status of children in understanding issues is the major test in administering juvenile justice. States are required to set a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'[59]

48 Article 7(1)(a) & (d) of the African Charter.

49 Article 7(2) of the African Charter.

50 NJ Udombana 'The African Commission on Human and Peoples' Rights and the development of fair trial norms in Africa' (2006) 6 *African Human Rights Law Journal* 302.

51 Article 3 read together with article 2 of the African Charter.

52 Articles 4, 5 & 6 of the African Charter.

53 *Onyachi* case, para 117.

54 For an overview of the African Children's Charter, see T Kaime 'The foundations of rights in the African Charter on the Rights of the Child: A historical and philosophical account' (2009) 3 *African Journal of Legal Studies* 120.

55 Article 17 of the African Children's Rights Charter.

56 Article 17(1) of the African Children's Rights Charter.

57 Article 17(2)(d) of the African Children's Rights Charter.

58 Article 17(3) of the African Children's Rights Charter.

59 Article 17(4) of the African Children's Rights Charter.

Along with other fair trial standards, the African Women's Rights Protocol gives special attention to access to justice.[60] It does so by upholding the equality in accessing justice with gender consciousness. Access to legal services has also emerged as a point of emphasis in the African Women's Rights Protocol.[61]

At the institutional level, the African Commission on Human and Peoples' Rights (African Commission) has, to its credit, for some time now 'steered the ship' in realising fair trial rights in Africa.[62] This is justified by its rich jurisprudence on fair trial rights.[63] Apart from the jurisprudence, the Commission has adopted a number of resolutions, declarations, principles and guidelines for modelling the scope of application of fair trial rules.[64] In contrast, the Committee of Experts on the Rights and Welfare of the Child is yet to provide a telling contribution in the administration of juvenile justice. On the African Court, the focus of this article, it has recently joined forces with the Commission in grappling with fair trial rights on the continent.

Tanzania is committed to adhere to human rights standards accorded by various human rights treaties. A perusal of the website of the Office of the UN High Commissioner for Human Rights shows that Tanzania has ratified and acceded to six out of the nine main human rights treaties.[65] At the AU level, Tanzania has ratified all three major human rights instruments.[66] Therefore, Tanzania is responsible to fulfil whatever it has committed itself before these human rights instruments. Thus, the next section looks at the extent to which

60 For a general reflection on the African Women's Rights Protocol see F Viljoen 'An introduction to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2009) 16 *Washington and Lee Journal of Civil Rights and Social Justice* 11-45.

61 Article 8(a) and (b) of the African Women's Rights Protocol.

62 Udombana (n 50 above) 299-332.

63 *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999); *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999); *Civil Liberties Organisation v Nigeria* (2001) AHRLR 75 (ACHPR 2001); *Courson v Equatorial Guinea* (2000) AHRLR 93 (ACHPR 1997); *Jawara v The Gambia*, 2000) AHRLR 107 (ACHPR 2000).

64 See African Commission, Resolution 4 on the Right to Recourse and Fair Trial, adopted March 1992 http://www.achpr.org/sessions/11th/resolutions/4/ (accessed 11 June 2017); Resolution 21 on the Respect and the Strengthening on the Independence of the Judiciary, adopted April 1996 http://www.achpr.org/sessions/19th/resolutions/21/ (accessed 11 June 2017); Resolution 41 on the Right to Fair Trial and Legal Aid in Africa, adopted November 1999 http://www.achpr.org/sessions/26th/resolutions/41/ (accessed 11 June 2017. The Commission also adopted Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, November 1999 http://www.achpr.org/instruments/principles-guidelines-right-fair-trial/ (accessed 11 June 2017).

65 See http://www.tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=186&Lang=EN (accessed 21 June 2017). These treaties are: CCPR, Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW); Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Economic, Social and Cultural Rights (CESCR), Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).

66 The African Charter was ratified on 05 November 1982, the African Children's Rights Charter on 16 March 2003, and the African Women's Rights Protocol on 3 March 2007.

Tanzania has domesticated fair trial norms provided in the country's Constitution as well as international instruments.

3 DOMESTICATED FAIR TRIAL NORMS IN TANZANIA

The constitutions of almost all countries guarantee a right to fair trial. The Constitution of Tanzania ensures the equality of all persons and respect for an individual's dignity.[67] Article 13(6) codifies elements that safeguard fair trial in the administration of criminal justice. Apart from the Constitution, fair trial is promulgated in other domestic legislation,[68] such as the Penal Code and the Criminal Procedure Act, which serve as the legal basis for the administration of criminal justice in Tanzania.

As for the judiciary, the role of the old generation High Court and Court of Appeal judges in upholding fair trial rights is acknowledged.[69] A few of their cases deserve mention. In *DPP v Pete*,[70] the first case decided by the apex of the Tanzanian judiciary, the Court of Appeal affirmed the right of the accused to bail in conformity with the presumption of innocence principle. Similarly, in *Nwangunule v Republic*, the Court of Appeal ruled that appellant's conviction and sentencing for an offence he did not commit was a travesty of justice. In *Dibagula v Republic*,[71] the Court of Appeal quashed the decision and set aside a conviction of 18 months' imprisonment in favour of the appellant, after the trial District Court and later the High Court failed to observe the right to a fair hearing. The Tanzanian judiciary has also treated the issue of legal representation with much weight. In Tanzanian jurisprudence, a trial is a nullity whenever an accused is convicted without legal representation.[72]

Yet, despite the existence of necessary laws and the required institutions, undue legal process in criminal prosecution is a prevalent concern in Tanzania. A large number of Tanzanians have lost confidence on the country's criminal justice system, and even more in the judiciary. Whether the perception against the system is correct or not, there are serious concerns in the country's criminal justice system that need urgent intervention.

Applicants who have been claiming for fair trial rights against Tanzania before the African Court had previously attempted to free themselves before the Tanzanian national courts, faulting national laws

67 Articles 12 and 13 of the Constitution of the United Republic of Tanzania of 1977.

68 The Penal Code (CAP 16 RE 2001); the Criminal Procedure Act (CAP 20 RE 2002) and the newly enacted Legal Aid Act, No 1 of 2017, repealing the Legal Aid Criminal Proceedings Act (CAP 21 RE 2002).

69 See *Ndyanabo v Attorney General* (Civil Appeal No 64 of 2001) CAT.

70 Criminal Appeal No 28 of 1990 [1991] TZCA 1 (16 May 1991).

71 *Dibagula v Republic* (Criminal Appeal No 53 of 2001) [2003] TZCA 1.

72 *Laurent s/o Joseph v R*. [1981] T.L.R 352. Also see *Haruna Said v R* 1991 TLR 124 (HC).

to contravene articles 13 and 15 of the constitution. For instance, before Chacha approached African Court for his right to liberty, he contested prosecuting authorities actions of depriving his right to liberty were contrary to sections 32, 33, 50(1), 51(1), 52(1) & (2) &(3), of the Criminal Procedure Act.[73] Unfortunately, Chacha like most lay applicants had his constitutional applications struck out by the Tanzanian High Court, due to the procedural technicalities provided under section 5 of the Basic Rights and Duties Enforcement Act.[74] When attempting to reach the African Court, his application was deemed incompetent for want of exhaustion of domestic remedy requirement, a fate likely to be experienced by most applicants whose fair trial cases against Tanzania are pending before the African Court.

On a light note, fair trial rights includes rights of those in remand awaiting trials as well as convicted prisoners. Conditions of Tanzanian custodies seem to be a forgotten agenda. In a way, prison conditions have turned to be an additional punishment, which is a violation of fair trial standards. Prisoners' dignity needs to be respected and maintained. On the contrary, correction officers treat inmates harshly as additional punishment of their guilt. Accommodation, food, water, sanitation and healthcare are issues that need special engagement for improving humane prison standards.[75]

4 AFRICAN COURT NURTURING FAIR TRIAL RIGHTS IN TANZANIA

This section explores the extent to which the African Court has dealt with, and in the process nurtured fair trial norms in Tanzania. It does so by identifying eight essential elements of fair trial safeguards, and by assessing the five merits decisions (the *Abubakari*, *Jonas*, *Nganyi, Onyachi* and *Thomas* decisions) by the African Court against Tanzania, to determine the extent to which these eight elements feature and are used in these decisions to nurture fair trial rights in Tanzania.

4.1 Equality of arms

The 'equality of arms' principle is an integral part of the broader fair trial phenomenon. The principle is the bedrock for ensuring fairness in the dispensation of justice. Article 14(1) of the ICCPR expressly entitles everyone to a fair trial and a public hearing. In the process, parties must be treated equally. This principle is most applicable in the adversarial judicial system, where two parties are involved in a dispute. The rule

73 *Chacha* case, para 61.

74 The Basic Rights and Duties Enforcement Act, No 3 RE: 2002; Basic Rights and Duties Enforcement (Practice and Procedure) Rules 2014, G.N No 304.

75 In *Abubakari,* police posts were alleged not to be in a favourable conditions to accommodate detainees. See para 95-99 of the case.

seeks to strike a balance between the opposing parties, demanding that they be treated with substantial and procedural equality.[76]

Article 7 of the African Charter affirms the equality of arms principle, by guaranteeing accused persons the right to be heard before a competent court,[77] the right to defence,[78] as well as the right to be tried before an independent and impartial court.[79] In a broader sense of interpreting the Charter, the equality principle overlaps with other fair trial rights. For instance, the African Charter guarantees the equality of all persons before the law,[80] as well as prohibiting any form of discrimination emanating from, among others, the 'fortune' or 'status' of an individual.[81]

Equilibrium in the opportunities afforded to parties in a criminal trial is a major test of this rule. In the cases decided by the African Court against Tanzania, applicants have managed to successfully establish a violation of the equality of arms principle. In the *Abubakari* case, particularly, there were a number of omissions that persuaded the African Court to find a violation of this principle. One of them was the failure by the prosecution to promptly avail the accused with the indictment and witness statements, causing the applicant to be in an unequal position to prepare his defence. Lack of adequate stationary was used as an excuse by the respondent state in justifying the delay, which the Court strongly condemned.[82] The African Court found that failure to provide the accused with indictment and witness statements, basing a convicted on a single prosecution witness, and disregarding an alibi defence contradict the principle of 'equality of arms between the parties in matters of evidence'.[83]

4.2 Fair hearing before a competent, independent and impartial tribunal

Accused persons are entitled to a public hearing before a competent, independent and an impartial tribunal.[84] In exceptional circumstances, the public may be excused from the whole or part of a trial.[85] These circumstances might be due to public order, morality and national security.[86] Also, it is established that an atmosphere in a court

76 ICCPR General Comment 32 para 13.

77 Article 7(1)(b) of the African Charter.

78 Article 7(1)(c) of the African Charter.

79 Article 7(1)(d) of the African Charter; *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 191 (ACHPR 1998).

80 Articles 3 and 19 of the African Charter.

81 Article 2 of the African Charter.

82 *Abubakari* case, para 159.

83 As above, para 193; *Onyachi* case, paras 82–89.

84 *Axen v Federal Republic of Germany* ECHR (8 December 1983) Series A 72 para 25.

85 Article 6 of the European Convention; *Fischer v Austria* ECHR (26 April 1995) Series A 31 para 44.

86 Article 14(1) of the ICCPR.

room is an important factor determining the fairness of a public hearing,[87] especially when a particular atmosphere is likely to damage the accused's defence. It is also within the scope of the right to a fair trial that a judgment should be delivered in public.[88] Transparency and judicial integrity are some of the reasons for having a public eye on both trials and judgments.[89] Other grounds might be for protecting the accused's interests, or enhancing public confidence in the criminal justice system. In the *Abubakari* case, the African Court considers a judgment to be made public when 'it is rendered in a premises or open area, provided the public is notified of the place, and the latter can have free access to the same'.[90]

A competent, independent and impartial tribunal is indispensable for a fair hearing. Criminal proceedings are considered to be fair when carried without any form of inducement or influence. The notion of independence and impartiality in the administration of criminal justice extends also to the prosecuting authority. Article 7 of the African Charter guarantees the right to a fair hearing before a competent, independent and impartial tribunal. Article 7(1)(d) of the Charter expressly makes mention of 'competent national organs', referring to the level of expertise of the adjudicators, as well as the legitimacy of the laws under which they adjudicate.[91] With respect to the phrase 'court or tribunal', the Charter reaches out to all ordinary and specialised judicial bodies.[92]

in the *Abubakari* case,[93] the applicant had gone through a criminal trial presided over by a prosecutor who allegedly had a relationship with one of the complainants. Court records revealed that the applicant had requested that the prosecutor be replaced. The African Court found Tanzania to be in breach of the accused's rights to a fair trial, due to the failure of the national courts to adequately consider the prosecutor's conflict of interest.[94] The African Court's finding complements the African Commission's earlier ruling which had found that the failure to enable courts to be presided over with qualified persons is a denial of the right to be tried by a competent and an impartial body.[95]

87 See Communication 770/1997, *Gridin v Russian Federation*, UNHR Committee (18 July 2000), UN Doc CCPR/C/69/D/770/1997 (1996) para 8.2.

88 Article 14(1) of the ICCPR.

89 Human Rights Committee General Comment 32 para 29.

90 *Abubakari* case, para 225.

91 See *Amnesty International & Others v Sudan* (the *Amnesty International* case) (2000) AHRLR 297 (ACHPR 1999) para 69.

92 Udombana (n 49 above) 312. Also see *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001); ICCPR General Comment No 13 para 4.

93 Application 7/2013.

94 *Abubakari* case, para 111. Also see *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001); para 4 of the UN Human Rights Committee General Comment No 13 (XXI/ 1984).

95 The *Amnesty International* case (n 91 above) para 69.

An accused person will adequately make a defence against the charges upon being accommodated a fair and just hearing. The process of preparing a defence is time consuming.[96] Defence statements of an accused are issued immediately after the commencement of the prosecution process. In *Abubakari* case,[97] the African Court established that denying an accused to make statement while being at the police station is a violation of the right to a fair hearing under the African Charter.[98] Further, an accused is entitled to be represented by an attorney of personal preference.[99] A denial to accessing important documents necessary for the defence team, may amount to a violation of the right to a fair hearing, specifically the right to defence.[100]

Another aspect in connection with the right to fair hearing is a requirement not to be tried in absentia. A criminal accused must be present during the trial hearing.[101] The presence of an accused can be in person or through legal representation.[102] An accused however, may wave the right to appear only if such a waver is 'attended by minimum safeguards commensurate to its importance'.[103] In the *Thomas* case, the trial magistrate convicted the applicant in absentia after the applicant's non-appearance to the court in a number of occasions. The trial magistrate was however aware of the health issues that the applicant had to the extent of granting bail. The Court found Tanzania to be in violation of the applicant's right to a fair hearing which did not afford the applicant an opportunity to defend himself.[104]

Prosecutors are prohibited from adopting coercive and oppressive means of gathering evidence against the will of the accused. A trial will be considered a nullity if an accused is compelled to confess on the charges against him or her.[105] An accused is entitled to remain silent during the integration and trial proceedings. The rule intends to protect accused persons from improper prosecution. However, a court arguably may draw some adverse inferences from the silence of an accused, whenever the accused is required to provide innocent explanations in relation to the charges against.[106]

Moreover, in the *Abubakari* case, the African Court established that a charge that does not mention other co-accused specifically does not for that reason infringe on the right to a fair hearing under article 7 of the African Charter.[107] The Court also stated that discrepancies in a

96 Article 14(3)(b) of the ICCPR.
97 *Abubakari* case, para 119.
98 *Abubakari* case, para 118.
99 Article 7(1)(c) of the African Charter.
100 *International Pen v Nigeria* (2000) AHRLR 212 (ACHPR 1998) para 101.
101 *Ekbatani v Sweden* ECHR (26 May 1988) Series A 154, para 25.
102 See *Sanchez-Reisse v Switzerland* (1986) 9 EHRR, para 71.
103 See *Pelladoah v The Netherlands* ECHR (22 September 1994) Series A 297 paras 32-42.
104 *Thomas* case, para 99.
105 Article 14(3)(g) of the ICCPR.
106 See for example, *Condron v The United Kingdom* (2 May 2000) ECHR.
107 *Abubakari* case, para 105.

charge sheet, for example in the description of stolen property, may have a bearing on the accused's right to a fair hearing.[108]

Non bis in idem and prohibition of *ex post facto law* are two principles often invoked in conjunction with fair hearing concepts. While the former prohibits the possibility of an individual to be prosecuted or punished repeatedly,[109] the latter ensures that no one is to be punished based on the criminalising of a previously legitimate act.[110] In the *Onyachi* case, the African Court was clearly displeased with the tendency of the Tanzanian prosecutors of re-arresting and filling new charges against acquitted individuals based on substaially similar facts. In its decision, the African Court stated that

> it is inappropriate, unjust, and thus arbitrary to re-arrest an individual and file new charges based on the same facts without justification after s/he has been acquitted of a particular crime by a court of law. The right to liberty becomes illusory and due process of law ends up being unpredictable if individuals can anytime be re-arrested and charged with new crimes after a court of law has declared their innocence.[111]

4.3 Right to free legal aid

Legal representation through free legal aid is paramount to the realisation of the right to a fair trial.[112] The availability of legal representation facilitates due legal process when dispensing justice.[113] States are urged to guarantee the right to free legal aid at the highest level possible, including in their Constitutions.[114] Ideally, states should ensure that all accused persons who cannot afford legal representation are provided with legal aid at each stage of the criminal justice process.[115] Individuals facing serious criminal charges who cannot afford the services of a lawyer are mostly granted free legal assistance. Legal aid is pivotal to any country claiming to observe the rule of law. In stressing this point, a South African Commission of Inquiry into the Structure and Functioning of the Courts remarked as follows:

> Any state that prides itself on a democratic way of life should not regard legal representation of parties before its court as pure luxury or a fortuitous benefaction of the Government, but as an essential service. Indispensable to the achievement of the democratic ideal in any modem state is access to its courts for all its inhabitants

[108] *Thomas* case, para 131.

[109] Article 14(7) of the ICCPR; JAE Vervaele '*Ne bis in idem*: towards a transnational constitutional principle in the EU?' (2013) 9 *Utrecht Law Review* 211; WB Van Bockel 'The *ne bis in idem* principle in the EU legal order: between scope and substance' (2012) 13 *Journal of the Academy of European Law* 325-347.

[110] See article 7(2) of the African Charter.

[111] *Onyachi* case, para 137. The African Court found Tanzania to be in violation of the right to liberty under article 6 of the African Charter, after re-arresting and charging the applicants with fresh crimes based on the same facts, after being acquitted by a court of law.

[112] A Flynn *et al* 'Legal aid and access to legal representation: redefining the right to a fair trial' (2016) 40 *Melbourne University Law Review* 215.

[113] As above, 209.

[114] UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Principle 1, para 14.

[115] As above, Principle 3, para 20.

> ... For any person who has to appear in count without counsel ... the excellence of his country's judicial system is small comfort and any claim by the state that the courts are open to all has a hollow ring.[116]

The African Charter does not expressly recognise the right to free legal assistance. However, article 7(1)(c), read together with article 2 of the Charter, could be construed as guaranteeing the right to free legal assistance. Article 7(1)(c) establishes the right to defence and article 2 mandates member states to ensure the enjoyment of rights provided under the Charter without any form of discrimination based upon, among other factors, 'fortune'. The term 'fortune' in the Charter may include an individual's financial status, which is key in determining eligibility for the provision of free legal assistance. Thus, states arguably have an obligation of ensuring that the right to defence is realised regardless of one's fortune.

In the *Thomas* case, the African Court read article 7(1)(c) of the African Charter, which does not expressly accord the right to have free legal assistance, together with article 14(3)(d) of the ICCPR, to include the right of an accused to have legal aid.[117] The African Court made it clear that the onus is on the judicial authority to ensure that an accused is given legal assistance by first informing that particular accused of the right.[118] The African Court emphasised that an accused need not to complain of the lack of legal representation or desertion of a counsel.[119]

As a general rule, accused persons are entitled to the legal counsel of their choice.[120] Whenever it is established that an accused person cannot afford legal services, such person has to be informed of the right to have free legal assistance.[121] The right should be practical and effective. States are not responsible for the shortcomings of a lawyer providing legal assistance. When a legal aid counsel fails to effectively represent a client, judicial authorities have to intervene for ensuring effectiveness of the right.[122] The Tanzanian Constitution, legislation and numerous High Court and Court of Appeal decisions have accorded for the right to have free legal assistance.[123]

Inadequate resources to hire a lawyer, seriousness of any possible sanction, as well as interest of justice are major factors that may lead for an accused to be given legal aid by state authorities.[124] In *Benham v the United Kingdom*, the European Court of Human Rights stated that 'where the deprivation of liberty is at stake, the interests of justice in

[116] GG Hoexter *Commission of Inquiry into the structure and functioning of the courts* (1983) 197.

[117] *Thomas* case, para 114.

[118] *Nganyi* case, para 182.

[119] *Nganyi* case, para 182.

[120] Article 14(3)(d) of the ICCPR; article 7(c) of the African Charter.

[121] Article 14(3)(d) of the ICCPR. Also see PM Bekker 'The right to legal representation, including effective assistance, for an accused in the criminal justice system of South Africa' (2004) 37 *Comparative and International Law Journal of Southern Africa* 173.

[122] *Kamasinski v Austria* ECHR (19 December 1989) Series A 168, para 65.

[123] Arts 15(2) & 13(6) of the Tanzanian Constitution; Sec 310 of the Criminal Procedure Act.

[124] *Onyachi* case, para 106; *Abubakari* case, para 138-139; *Thomas* case, para 118.

principle call for legal representation".[125] A mere nomination of an attorney to represent an indigenous accused is not adequate. The expected representation must be effective. When being notified of a non-committed legal aid attorney, appropriate authorities are supposed to take prompt measures to remedy the situation.

Free legal assistance is applicable in all stages of criminal proceedings, regardless whether a matter is at the pre-trial, trial or appellate stage,[126] 'as long as conditions which would warrant legal assistance exist'.[127] When it comes to the knowledge of the authorities that an accused is unable to have legal representation on a serious criminal offence or whenever there is a likelihood of injustice, it is the obligation of the authority to provide the accused with legal assistance. In the *Jonas* case, the African Court emphasised that states should offer *proprio motu* and free of charge legal services to an indigent individual who is under criminal prosecution where the offence is serious and the law prescribes a severe punishment.[128]

An accused does not need to request for legal aid, when it is clear that there is inability to have legal representation.[129] Administrators of justice should be alert on that regard.

In an attempt to remedy the situation, Tanzania has recently enacted the Legal Aid Act.[130] The Act envisages regulating and coordinating the provision of legal aid services to indigent persons, as well as formalising paralegals. One of the complained issues from legal aid providers is remuneration. Looking at the new Act, it establishes a number of disjointed offices of which their coordination might be a challenge. The established board by the Act ought to be given an expansive role in administering legal aid services. The board should also have been entrusted with a fund-base for remunerating legal aid providers, a role which is still left to the judiciary, which time and then is under budgeted.

4.4 Trials without an inordinate delay

Criminal trials should not be unduly prolonged.[131] An inordinate delay during criminal proceedings is in conflict with international human rights standards. Rendering justice through excessive delays may undermine the effectiveness and credibility of any judicial process.[132] Prosecutors have developed a habit of not being mindful of the time spent in dispensing with criminal matters.

[125] *Benham v UK* (1996) EHRR 293.
[126] *Nganyi* case, para 181.
[127] *Onyachi* case, para 106.
[128] *Jonas* case, para 78.
[129] *Nganyi* case, para 182.
[130] Legal Aid Act No. 1 of 2017.
[131] Article 14(2)(c) of the ICCPR.
[132] *Stögmüller v Austria* ECHR (10 November 1969) Ser A 9 para 5.

Under article 7(1)(d), the African Charter expressly affirms for the right to be tried within a reasonable time. However, the Charter does not contain elements for determining the reasonableness of time. Nevertheless, there is flexibility when considering a reasonable time in disposing of criminal matters.[133] Computation of time commences as soon as a charge is issued against the accused,[134] and ends when the execution of a judgment from the highest body is successful.[135] Various human rights bodies have established the following factors that a court can use to determine the reasonableness of time: 'complexity of the case, the conduct of the applicant, the conduct of the judicial and administrative authorities of the State, and what is at stake for the applicant' are.[136] The African Court is of the view that many accused persons in one criminal charge does not necessarily render a matter complex.[137]

In the *Nganyi* case,[138] the African Court held that 'the lack of due diligence by the national judicial authorities', leading to the prolonging of a matter, is a violation of article 7(1)(d) of the African Charter.[139] Highlighting the importance of the speedy determination of criminal matters, the African Court stressed that 'the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time'.[140] Innocent suspects, in particular, have a huge interest in the speedy determination of their innocence.[141]

In the *Thomas* case, the applicant claimed that his fair trial rights were infringed after delays in appellate and review proceedings in the national courts, when battling to quash a 30 years' sentence of imprisonment.[142] The applicant spent a great deal of time struggling to properly lodge an appeal to the Tanzanian Court of Appeal: It took him eight years to process an appeal of a decision of the High Court to the Court of Appeal.[143] During the hearing before the African Court, counsel for the state responded to the allegations by shifting the blame to the applicant's technical inability to file the required document.[144] When determining the matter, the African Court found that there were inordinate delays in processing the applicant's appeal contrary to the letter and spirit of the African Charter. In its judgment, the Court observed as follows:

133 As above, para 135.
134 *Scopelliti v Italy* ECHR (23 November 1993) Ser A 278, para 18.
135 As above, para 18; *Proszak v Poland* (16 December 1997) ECHR paras 30-31.
136 *Buchholz v the Federal Republic of Germany* ECHR (6 May 1981) Ser A 42 para 49.
137 *Nganyi* case, para 144.
138 Application 6/2013.
139 *Nganyi* case, para 155.
140 As above, para 127.
141 As above.
142 *Thomas* case, paras 100-110.
143 *Thomas* case, paras 105-110.
144 *Thomas* case, para 101.

> It was the responsibility of the courts of the respondent to provide the applicant with the court record he required to pursue his appeal. Failure to do so and then maintain that the delay in the hearing of the applicant's appeal was the applicant's fault is unacceptable. The applicant's case was not a complex one, the applicant made several attempts to obtain the relevant records of proceedings but the judicial authorities unduly delayed in providing him with these records.[145]

The African Court faulted the way Tanzanian domestic courts handled the applicant's matter, finding that the Tanzanian courts violated Alex Thomas's fair trial rights. Thomas had done more than enough to ensure his appeal and review proceedings were not prolonged. Thus, it is submitted that it is at the court of law where justice is dispensed. Courts are noble institutions of which their acts should reflect that nobility. The *Thomas* case has exposed a chronic problem within the Tanzanian judiciary, with delays having become a normal occurrence.

4.5 Presumption of innocence

The presumption of innocence is a cardinal principle in criminal law. An accused is presumed innocent until found guilty.[146] The guilt must be determined through fair and just proceedings, as well as established law. The responsibility is vested upon the prosecuting authority to prove the charge against an accused beyond reasonable doubt. This principle not to condemn an accused when not yet proven guilty extends to the general public and the press.[147] Importantly, public officials should refrain from making statements which will or are likely to prejudice the rights of an accused.[148]

Article 7(1)(b) of the African Charter recognises the presumption of innocence principle as fundamental in the realisation of the right to a fair trial.[149] Prosecution must prove a criminal charge without leaving any doubt about the accused's guilt. Failure to do so will grant the accused the 'benefit of doubt', as a result of the 'burden of proof' resting on the prosecution.[150] Thus, it is tantamount for judicial officers presiding in a criminal trial to strictly adhere to the principle.

There are incidences in which Tanzanian courts had failed to adhere to the principle, until the African Court was granted the opportunity to enforce its application to the benefit of the victims. In the *Abubakari* case,[151] it was discovered that the evidence relied upon to convict and sentence the applicant in the national courts was based

[145] *Thomas* case, para 106. Also see *Onyachi* case, para 120.

[146] Article 14(2) of the ICCPR.

[147] Human Rights Committee (n 89 above) para 30.

[148] *Ribemont v France* (1995) EHRR 557.

[149] Also see *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998); Communication 301/05, *Haregewoin Gabre Selassie and IHRDA (on behalf of former Dergue Officials) v Ethiopia*, 50th Ordinary Session.

[150] *Barberá, Messegué and Jabardo v Spain* ECHR (6 December 1988) Ser A 46 para 77.

[151] Application 7/2013.

on the testimony of a single witness; the evidence was riddled with inconsistencies and no attempt was made to obtain corroboration.[152] Such an oversight was held to be against the presumption of innocence principle. Another anomaly from the same matter relates to an alibi defence. The applicant unsuccessfully invoked the defence of alibi before the national courts. Before the African Court, the applicant argued that he was admitted at the hospital during the dates stated in the charge sheet, a fact that was ignored by the national courts.[153] A perusal of national court records by the African Court revealed that a discharge sheet from the hospital and a bus ticket from Dar es Salaam to Moshi was tendered during trial as evidence before the national courts, which was unfortunately treated by a trial magistrate as an 'afterthought'.[154] In fact, the applicant started to raise the defence of alibi at the time of the police investigation. In its decision, finding that the applicant's fair trail rights had been violated, the Court observed that judicial authorities and the prosecution ought to seriously consider any alibi defence, since it is key when determining the guilt of the accused.[155]

Further, the African Court had established that the mere fact that the accused was charged alone, while witness testimony points to multiple suspects, does not render a violation of fair trial rights against the charged accused person.[156] It further established that the failure to find weapons that an accused person is alleged to have used to commit an armed robbery does not amount to a violation of a fair trial under article 7 of the African Charter. The Court stressed that an armed robbery could be proved by other factors with high probative value – not necessarily by physical evidence.[157]

4.6 Right to appeal or review

Any person who disagrees with a court's judgment has the right to an appeal or review before a higher body.[158] Article 14(5) of the ICCPR does not explicitly mention 'appeal' as a right, but the phrase 'according to the law' in the provision acknowledges the modalities established by domestic laws under which a review or an appeal is exercised.[159] In instances where review by a higher body is possible after several appeals, an accused is entitled to have access to each stage without restrictions.[160]

[152] *Abubakari* case, paras 162-185.
[153] *Abubakari* case, para 186.
[154] *Abubakari* case, para 186.
[155] *Abubakari* case, para 190.
[156] *Abubakari* case, para 105.
[157] *Abubakari* case, paras 195-199.
[158] Article 14(5) of the ICCPR.
[159] ICCPR General Comment No 32 para 45.
[160] As above, citing Communication No. 230/1987, *Henry v Jamaica*, UNHR Committee (1 November 1991) UN Doc CCPR/C/43/D/230/l987 (1987) para 8.4.

Article 7 of the African Charter identifies the right to appeal as the first safeguard in ensuring one's cause to be heard.[161] However, article 7(1)(a) of the African Charter does not expressly recognise the right to appeal against a criminal conviction, unlike article 14(5) of the ICCPR.[162] Further, article 7(1)(d) of the Charter requires trials to be conducted within a 'reasonable time',[163] which should also be considered when determining an appeal or review.

The right to have a conviction appealed or reviewed is effective and efficient upon the availability of all the required documents.[164] Such documents have to be obtained without inordinate delays. In the *Thomas* case, as already indicated above, it took the applicant a period of eight years and three months to be able to file an appeal before the Court of Appeal of Tanzania, and a couple of years to beg for a review of his appeal decision.[165] The applicant spent most of the time struggling to get the record of the court proceedings necessary for determining an appeal, which he consistently demanded, but was not availed with on time.[166] The African Court found that the applicant's right to appeal and review had been contravened following inordinate delays in the processing of the record of the court proceedings by the officers of the court.[167]

4.7 Right to be informed of the charges

Understanding the charges and court proceedings is essential in ensuring that an accused person has a fair and equal trial. An accused needs to be promptly informed of the nature and context of the charges in a language he or she understands. States are encouraged to provide an interpreter, when the language in use before courts is not familiar to the accused.[168]

Although the African Charter does not expressly recognise the right of an accused person to be informed of the charges against him or her, this right is integral to the right to defence provided for under article 7(1)(c) of the Charter.

In the *Abubakari* case, records presented to the African Court could not reveal any efforts from the national courts in tracing a police report detailing the information concerning the applicant's rights while being held in custody. Consequently, the African Court held that Tanzania

[161] Article 7(1)(a) of the African Charter; *Egyptian Initiative for Personal Rights and Interights v Egypt*, Communication 334/06, 20th Annual Activity Report.

[162] Udombana (n 49 above) 321. Also see *Constitutional Rights Project & Another v Nigeria* (2000) AHRLR 235 (ACHPR 1999).

[163] Article 6(1) of the European Convention.

[164] Namakula (n 4 above) 192.

[165] *Thomas* case, para 28-33.

[166] *Thomas* case, para 107-108.

[167] *Thomas* case, para 106.

[168] Article 14(3)(f) of the ICCPR; Communication 135/94, *Márques de Morais v Angola*, UNHR Committee (29 March 2005), UN Doc CCPR/C/83/D/1128/2002, para 5.4.

had violated the African Charter due to the failure to inform the applicant of his fundamental rights while being held in remand. The Court went on to rule that the failure of the police and judicial authorities to diligently and promptly communicate to the applicant all the elements of the charge, amounted to a violation of the applicant's right to a defence.[169] The African Court recognised that the right of the accused to be promptly informed of the charges against him or her is a 'corollary of the right to defence' provided by article 7(1)(c) of the African Charter.[170]

4.8 Right to an effective remedy

Remedies remain a subject of a general discussion under international law.[171] International bodies grant remedies in favour of a litigant whose rights have been found to be violated.[172] Appropriate remedies are mostly granted following a reasoned judgment. It is then up to states to comply with decisions of international bodies. The obligation to provide for an effective and appropriate remedy lies in the hands of every court of law. Human rights victims are entitled to benefit from appropriate remedies and reparations granted by a human rights institution.[173] A successful party in a judicial dispute has a right to have an appropriate remedy, capable of redressing the prejudice suffered by the complainant.[174]

Although the African Charter does not explicitly accord the right to an effective remedy, article 1 provides a basis for enforcing rights provided by the Charter at the domestic level. Through the African Charter, the right to an effective remedy is implicitly established under article 3(2). An individual is to have effective remedies through the equal protection of the law, which article 3(2) of the Charter guarantees. The Court Protocol unequivocally states that the Court may make 'appropriate orders to remedy the violation', whenever it finds that there is a violation of human and peoples' rights.[175] The African Court is also required to deliver a reasoned judgment.[176]

In the *Thomas* case, the African Court found that Tanzania violated the applicant's fair trial rights, but left it to the imagination of the

[169] *Abubakari* case, para 161.

[170] *Abubakari* case, para 158.

[171] GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 445.

[172] Article 13 of the European Convention; article 47 of the European Union Charter of Fundamental Rights of 2000.

[173] See General Assembly, Resolution 60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted 16 December 2005 http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx (accessed on 12 July 2015).

[174] *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

[175] Article 27(1) of the Court Protocol.

[176] Article 28(6) of the Court Protocol.

respondent state to remedy the situation. In determining the matter, the Court observed that an order for release can be granted upon the existence of 'specific and/or compelling circumstances'.[177] In the African Court's opinion, the applicant did not substantiate any 'specific or compelling' circumstances that would persuade it to grant such an order. In deliberating the matter, the Court held as follows:

> The Court recalls that it has already found violations of various aspects of the applicant's rights to a fair trial contrary to article 7(1)(a),(c), and (d) of the Charter and article 14(3)(d) of the ICCPR. The appropriate recourse in the circumstances would have been to avail the applicant an opportunity to reopening of the defence case or a retrial. However, considering the length of the sentence he has served so far, being about twenty (20) years out of thirty (30) years, both remedies would result in prejudice and occasion a miscarriage of justice.[178]

The Court then instructed Tanzania to take all the appropriate measures to remedy the situation, taking into account the above stated concerns.[179] Under similar circumstances, in the *Abubakari* case, the Court observed that reopening local procedures could jeopardise the applicant's rights, given the fact that the applicant had already served a half of the 30 years' imprisonment sentence.[180]

The Court's reasoning in the above two decisions is problematic due to its lack of clarity. It seems, on the one hand, to find 'special and compelling circumstances' that could have triggered an order for release. On the other hand, it refrains from directly making such an order, thus relinquishing its autonomous powers to order the release of the applicants after finding that their fair trial rights had been violated. The question is: What would amount an appropriate remedy, apart from release, where a convict, tried unfairly, had already served a great deal of his wrongfully imposed term of imprisonment? Apart from creating a distinct impression of a Court too lenient towards the state, the ambiguity of the orders in the two stated cases has already caused legal uncertainty, which is in itself contrary to the principle of the rule of law. While the Court is trying to be deferential in its approach, it should be cautious that it does not lose relevance.

The ambiguity on the issued orders in the *Abubakari* and *Thomas* cases caused Tanzania to seek clarification from the African Court on the implementation of the two decisions, in accordance with article 28(4) of the Court Protocol and Rule 66(1) of the Court Rules.[181] In clarifying the phrase 'all necessary measures' found in the two judgments, the African Court claimed to have offerred Tanzania a 'room for evaluation' to enable it to correct all the effects caused by the violations as decided by the Court.[182] In what looks like an effort to

[177] *Abubakari* case, para 234.

[178] *Thomas* case, para 158.

[179] *Thomas* case, para 159.

[180] *Abubakari* case, para 235.

[181] *Interpretation of Judgment of Alex Thomas v Tanzania*, Application 1/2017; *Interpretation of Judgment of Mohamed Abubakari v Tanzania*, Application 2/2017. The two applications along with the application on *the Interpretation of the Judgment of Actions pour la protection des droits de l'homme v Côte D'Ivoire*, Application 3/2017, is a worrying sign that the African Court judgments lack clarity.

[182] Application 1/2017, para 35.

correct its position of reluctance to give effective remedies to the applicants in the two referred cases, the African Court stated that it did not reject the applicants' request of being set free; rather, it could have made such an order directly only if the applicants established special and compelling circumstances.[183] Then, the African Court went on to clarify that the expression 'all necessary measures' includes the release of the applicants and any other remedy which would assist in correcting the effects of violations pronounced by the Court and re-establish the rights of the applicants.[184]

While the above clarification gives the applicants an opportunity to have effective remedies, in my view the clarification itself contradicts the African Court's own decisions in the respective two cases. In both the *Abubakari and Thomas* cases there were dissenting opinions ruling unequivocally in favour of the release of the applicants, thus implying that the phrase 'all reasonable measures' in the majority judgment did not specify release of the applicants. Also, there seems to be no good reason to explain why the African Court failed to initially clarify in the two cases that the phrase 'all reasonable measures' means release of the applicants, as it has subsequently done in the *Onyachi* case.[185] Perhaps the African Court felt the need to make such a clarification in the more recent decision after realising that the previous two related decisions caused legal uncertainty. Still, the release order in the *Onyachi* judgment is not compelling. The African Court simply directs Tanzania to take all necessary measures which 'could' include the release of the applicants. The apprehension remains that, by giving a respondent state 'room' to digest what an appropriate remedy is, the African Court gives an opportunity to that state to provide the least effective of a range of possible remedies, contrary to the expectations of the applicant and even the African Court itself.

5 CONCLUSION

Recent trends in the African Court give an impression that the administration of criminal justice in Tanzania is not functioning optimally. The African Court had become overwhelmed with identical allegations alleging that Tanzania has violated fair trial rights. This article has shown the extent to which the African Court has dealt with some of these matters. The nurturing of fair trial rights in Tanzania by the African Court is commendable. However, the Court should not shy away from ordering concrete remedial measures such as the release of the applicant, whenever the respondent state is found to have violated some fundamental fair trial norms, such as the right to legal representation. The Judges of the African Court should be aware of the importance of their decisions on the continent; particularly at this early stage when the Court is still establishing its own authority. If the Court does not order effective and efficient remedies, Africans will lose faith

[183] Application 1/2017, para 36.
[184] Application 1/2017, para 39.
[185] Application 3/2015, para 169(vii).

in the Court, and as a result, the whole purpose of establishing it will be called into question.

Tanzania is under constitutional and international obligations to ensure that fair trial rights are realised in theory as well as in practice. Article 26 of the African Charter instructs states to improve appropriate institutions responsible for dispensing human rights. The anomalies revealed by the African Court necessitate some major reforms in running the country's criminal justice system. The injection of adequate financial resource is a starting point for the reformation process. Even more, this article calls upon judges, magistrates, prosecutors and all those dealing with the administration of criminal justice to strictly and diligently abide by fair trial standards. As Blackstone wrote, the demand of a fair trial should be informed by the notion that fairness overrides pragmatic justifications: 'it is better that ten guilty persons escape than that one innocent suffer'.[186]

Article 7 of the African Charter might not be as expansive as article 14 of the ICCPR; however, its broad interpretation and a supplement of other Charter provisions should be 'neem' for guaranteeing fair trial rights in Africa. The African Commission is enriched with fair trial jurisprudence, which as for now should provide guidance to other human rights institutions in Africa, including the African Court. Still, notwithstanding the Commission's potential role in guiding fair trial standards, there will be circumstances which there would not be precedence from the Commission to rely upon. Notably, the current trend in the African Court of large number of cases of a similar nature from one country is quite a new experience. It is from such experience that the Court should discern itself from the rest and take an authoritative lead. There are genuine concerns over the Court's failure to provide adequate remedies to victims whose human rights have been violated as indicated in the above cases, which might diminish the Court's authority in the Continent. In essence, the Court in these early stages of its authority should do whatever it can to ensure the level of its legitimacy is not undermined.

As of June 2017, there is yet to be any compliance by Tanzania to the decisions rendered by the African Court.[187] As if that is not worrying enough, Tanzania has also in no uncertain terms reported that it is unable to implement some of the orders on provisional measure pronounced by the Court.[188] If the Court would condone noncompliance at this early stage, the African Court risks losing its relevance, and, thus, also its legitimacy.

[186] William Blackstone's *Commentaries on the laws of England* (1765) at 352, cited in A Volokh 'n guilty men' (1997) 146 *University of Pennsylvania Law Review* 173 174.

[187] See AU Executive Council, Report on the activities of the African Court on Human and Peoples Rights, adopted January 2017 http://en.african-court.org/index.php/publications/activity-reports/994-executive-council-thirtieth-ordinary-session-22-27-january-2017-addis-ababa-ethiopia-report-on-the-activities-of-the-african-court-on-human-and-peoples-rights (accessed 20 June 2017).

[188] See the response of Tanzania in the provisional measures in *Ally Rajabu v Tanzania,* Application 7/2015.

As this article concludes, the record should be set straight: it is not its intention to tarnish the image of Tanzania's criminal justice system. Rather, it is a gentle reminder to all those involved in the administration of justice in Tanzania to be mindful of fair trial rights. The following words from the Constitutional Court of South Africa, in *Key v Attorney General*, capture the spirit behind this article:

> In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by State agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial.[189]

[189] *Key v AG* 1996 4 SA 187 (CC) para 13.

Du 'droit de la force' à la force du droit: pour la dépénalisation de l'avortement à Madagascar

*Mireille Rabenoro**

RÉSUMÉ: D'après les estimations de l'Organisation mondiale de la santé, 67 800 femmes meurent chaque année dans le monde de complications d'un avortement non sécurisé. L'Afrique a le taux le plus élevé de décès maternels liés aux avortements non sécurisés. Cette mortalité élevée est due principalement à la pénalisation de l'avortement qui limite l'accès à l'avortement sécurisé et aux soins post avortement. Madagascar est l'un des pays criminalisant l'avortement au moyen d'une législation très restrictive en matière d'interruption volontaire de la grossesse. A travers une description historique et sociale, cet article montre que la pénalisation de l'avortement à Madagascar s'inscrit dans un environnement général d'inégalité et de violation des droits des femmes. Il présente l'impact négatif de l'avortement sur la santé et les droits des femmes contrairement aux engagements internationaux de Madagascar prévus dans les textes universels et régionaux consacrant le droit à la santé sexuelle et reproductive des femmes et filles. L'article appelle donc à une évolution du droit malgache en vue de consacrer sa force à une meilleure protection des droits des femmes et des filles.

TITLE AND ABSTRACT IN ENGLISH:

From the 'law of force' to the force of law: an argument for the decriminalisation of abortion in Madagascar

ABSTRACT: According to estimates by the World Health Organization, worldwide, 67,800 women die annually from complications of unsafe abortion. Africa has the highest rate of maternal mortality related to unsafe abortions. This high mortality rate is due mainly to the criminalisation of abortion, which limits access to safe abortion and post-abortion care. Madagascar is one of the countries that criminalises abortion through very restrictive legislation on the voluntary termination of pregnancy. Adopting a historical and social approach, this article shows that the criminalisation of abortion in Madagascar is part of a general climate of inequality and women's rights violation. It presents the negative impact of abortion on the health and on the rights of the women, in violation with Madagascar's international commitments set out in global and regional texts recognising the sexual and reproductive health rights of women and girls. The article accordingly calls for the development of Malagasy law to achieve improved protection of women's and girls' rights.

MOTS CLÉS: avortement non sécurisé, dépénalisation, l'accès à l'avortement sécurisé, droits des femmes, santé sexuelle et reproductive, Protocole de Maputo

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SOMMAIRE:

1 INTRODUCTION

Madagascar, état partie à la Charte africaine des droits de l'homme et des peuples (Charte africaine) depuis 1992, s'est abstenue jusqu'ici de ratifier le Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique (Protocole de Maputo).[1] La raison plus ou moins avouée en serait le contenu de l'article 14(2), par lequel les états parties s'engagent à

> protéger les droits reproductifs des femmes, particulièrement en autorisant l'avortement médicalisé, en cas d'agression sexuelle, de viol, d'inceste et lorsque la grossesse met en danger la santé mentale et physique de la mère ou la vie de la mère ou du fœtus.[2]

Les décideurs, tant au niveau de l'exécutif que du législatif, se sont en effet montrés réticents, parfois violemment opposés à l'idée d'un élargissement des conditions dans lesquelles l'avortement peut être autorisé. De fait, l'idée même que les femmes puissent avoir des 'droits reproductifs' tels qu'énoncés par le Protocole de Maputo est encore peu familière aux décideurs comme aux citoyen-ne-s malgaches, dont la grande majorité reste imprégnée d'une conception patriarcale de la famille et de la société. Celle-ci est d'ailleurs consacrée par la loi, qui énonce clairement que 'le mari est le chef de la famille', bien qu'un aménagement récent ait ajouté que 'la femme concourt avec lui à la direction du ménage'.[3] Dans ce cadre, la femme, loin d'avoir des droits reproductifs, a surtout des devoirs reproductifs, comme le montre par exemple le triste sort généralement réservé aux femmes réputées stériles, qui sont considérées incapables de remplir leurs devoirs envers leur mari et la communauté.

1 Protocole à la Charte africaine des droits de l'homme et des peuples relatif aux droits des femmes en Afrique, adopté le 11 juillet 2003 et entré en vigueur le 25 novembre 2005 (Protocole de Maputo).

2 Article 14(2) du Protocole de Maputo.

3 Article 54 de la Loi N° 2007-022 du 20 août 2007 relative au mariage et aux régimes matrimoniaux de Madagascar.

Le contexte juridique et social à Madagascar reste ainsi résolument hostile à la légalisation de l'interruption volontaire de la grossesse, que la loi considère comme un crime et punit comme tel.[4] Seul le code de déontologie médicale – qui n'a pas force de loi – l'autorise dans un cas unique: lorsque la poursuite de la grossesse met la vie de la mère en danger. Même dans ce cas, les conditions sont difficiles à remplir, nécessitant par exemple l'avis de plusieurs médecins.[5] Les peines relatives à l'avortement sont également lourdes: emprisonnement assorti d'amendes, touchant tant la personne qui aura procuré l'avortement que ses 'complices', et surtout la femme elle-même, à laquelle aucun droit n'est donc reconnu concernant son propre corps.[6] Dans ces conditions, l'avortement se fait nécessairement dans la clandestinité, car il est réputé illégal, comme l'a constaté par exemple une étude réalisée dans la région Sud-Ouest de Madagascar.[7] Effectué dans des conditions souvent inhumaines, l'avortement clandestin coûte la vie à plus de 575 femmes par an, selon une estimation.[8]

Le fait est en contradiction avec l'adhésion de Madagascar, depuis l'Indépendance en 1960, aux principaux instruments internationaux et régionaux de promotion des droits de l'homme, dont la Déclaration universelle des droits de l'homme (Déclaration universelle)[9] et la Charte africaine,[10] qui placent le droit à la vie parmi les droits fondamentaux de tous les êtres humains. Bien que la constitution de la République de Madagascar actuellement en vigueur (depuis 2010) stipule en son article 137 que 'les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois',[11] sur la question de l'avortement provoqué c'est la loi nationale le criminalisant qui continue à faire autorité. Depuis quelques années pourtant, la recherche a montré les liens sans équivoque entre criminalisation de l'avortement et mortalité maternelle.[12] Parallèlement, sur le plan du droit, les organes de suivi des instruments internationaux et régionaux de droits de l'homme se sont prononcés, à travers des observations générales et des recommandations aux états

4 Article 317 du Code pénal de Madagascar de 1960 mis à jour au 30 mars 2005.

5 Voir DW Brinkerhoff *et al* 'L'environnement légal pour la planification familiale et la santé de la reproduction à Madagascar' (2017) 11 http://www.healthpolicyplus.com/ns/pubs/7146-7260_LegalEnvrnmentAssessmentMadagascarFRJune.pdf (consulté le 28 octobre 2017).

6 Article 317 du Code pénal de Madagascar.

7 Focus Development Association 'Etude sur l'avortement clandestin à Madagascar' (2007).

8 B Gastineau & S Rajaonarisoa 'Santé de la reproduction et avortement à Antananarivo (Madagascar). Résultats d'une recherche originale' (2010) 14 *African Journal of Reproductive Health* 226.

9 Adoptée le 10 décembre 1948.

10 Adoptée le 27 juin 1981 et entrée en vigueur le 21 octobre 1986.

11 Article 137 de la Constitution de Madagascar du 11 décembre 2010.

12 DA Grimes *et al* 'Unsafe abortion: the preventable pandemic' (2006) 368 *Lancet* 1908-1919.

parties, en faveur de l'avortement médicalisé qui est considéré comme faisant partie intégrante du droit à la santé reproductive.[13]

Le présent article a pour ambition de déconstruire le blocage, de mettre au jour les éléments constitutifs des rapports de force, généralement défavorables à la femme, qui déterminent tant le recours à l'avortement que sa criminalisation; d'autre part, l'article s'attachera à explorer les conditions requises pour assurer la transition, du 'droit de la force' qui caractérise l'environnement actuel de l'avortement, vers la réalisation de la force du droit que représenterait sa dépénalisation. La démarche adoptée pour ce faire est essentiellement d'ordre sociologique, et se base sur les rares études réalisées directement sur l'avortement à Madagascar, y compris le profil des femmes qui y ont recours et de celles qui en meurent, leurs motivations décrites dans des études antérieures.[14] L'étude s'appuie également sur des questions connexes comme celle de la sexualité des adolescents dans la région Sud-Ouest de Madagascar, qui contribue à faire comprendre les contradictions qui entourent le phénomène de l'avortement.[15] Les données recueillies par ces études spécifiques sur l'avortement et son contexte à Madagascar ne peuvent pas prétendre à la représentativité, comme le souligne Guillaume à propos du phénomène de l'avortement en Afrique.[16] Les enquêtes en effet sont principalement d'ordre qualitatif, et portent sur des échantillons nécessairement restreints, sans commune mesure avec les données autrement plus complètes qu'aurait pu obtenir une institution de statistiques dans un contexte où l'avortement aurait été légal. Quoi qu'il en soit, les données disponibles sont mises en perspective par celles portant sur les rapports entre législation et incidence de l'avortement d'une part, entre législation et mortalité maternelle d'autre part, au niveau international et particulièrement au niveau continental africain.

La première partie de l'étude s'attache à montrer en quoi la criminalisation de l'avortement est une expression du 'droit de la force'. Depuis son entrée dans la législation, la répression de l'avortement apparait en effet comme une forme de violence institutionnelle: imposée dans le cadre général de la colonisation, elle ignore les inégalités au détriment des femmes, pourtant partie intégrante du phénomène de l'avortement. On peut parler d'une législation rigide, aveugle, qui ne tient aucun compte des mutations sociales au cœur de l'expansion actuelle de l'avortement, et qui accentuent davantage la victimisation des femmes, en ajoutant à l'inégalité de genre l'inégalité économique. La deuxième partie montre en quoi la dépénalisation de l'avortement contribuerait à rétablir la force du droit, en réhabilitant à

[13] Haut-Commissariat des nations unies aux droits de l'homme (HCDH) `L'avortement'. Série d'information sur la santé sexuelle et reproductive et les droits associés http://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_Abortion_FR_WEB.pdf (consulté le 19 septembre 2017).

[14] Voir Focus Development Association (n 7 ci-dessus) et Gastineau & Rajaonarisoa (n 8 ci-dessus).

[15] Focus Development Association 'Etude sur les facteurs qui sous-tendent l'activité sexuelle des adolescents dans la région d'Atsimo Andrefana à Madagascar' (2012).

[16] A Guillaume *L'avortement provoqué en Afrique: un problème mal connu, lourd de conséquences* (2005).

la fois son efficacité sociale et son efficacité normative. En se rapprochant des réalités vécues, notamment par les femmes et les jeunes filles, la loi cessera d'être une force de répression anti productive, qui n'a jamais réussi, malgré les menaces qu'elle fait peser sur les femmes en quête d'avortement, à les en dissuader. Plus réaliste et plus juste, la loi sera aussi plus respectée, ce qui contribuera à faire de l'Etat de droit revendiqué par les gouvernants une réalité plus concrète.

2 L'AVORTEMENT CRIMINALISE, EXPRESSION DU 'DROIT DE LA FORCE'

Dès l'ère précoloniale, l'interruption volontaire de la grossesse est considérée comme un délit à Madagascar, comme en atteste par exemple le Code des 305 Articles, à la fois code pénal et code de procédure pénale promulgué par la reine Ranavalona II en 1881.[17] Le Code, en effet, punissait l'avortement d'une peine d'amende unique, mais sans préciser qui l'encourait, de la femme qui se faisait avorter elle-même ou ceux que la loi coloniale allait qualifier plus tard de complices. La répression de l'avortement était probablement liée à la nécessité de favoriser la croissance démographique, dans un contexte où l'accès aux soins médicaux était quasiment exceptionnel, et la mortalité infantile conséquemment élevée.[18] Il est également possible que cette disposition ait été inspirée par les missionnaires britanniques de la *London Missionary Society*, très influents auprès de la reine Ranavalona II, et dont les positions étaient à leur tour fortement influencées par les idées et les pratiques de leur temps en Europe. Cependant, il semble que, contrairement aux législations européennes de l'époque, le Code des 305 Articles ait considéré l'avortement comme un délit et non un crime, au vu de la relative légèreté des peines encourues.[19] Il n'en demeure pas moins que dès ce premier acte de codification à l'européenne des lois et règlements à Madagascar, l'avortement a été introduit comme acte répréhensible, ce qui retirait aux femmes tout droit, toute initiative concernant leur propre corps, et faisait d'elles un instrument de reproduction sociale sur lequel la société, représentée par la loi, avait un droit de regard et de jugement.

[17] Code des 305 articles: promulgué par la Reine Ranavalona II, le 29 mars 1881: texte malgache intégral avec traduction français et notes bibliographiques, 1960.

[18] En ce dernier quart du 19ème siècle, seule la capitale, Antananarivo, disposait d'un hôpital créé par le Dr Davidson, missionnaire de la London Missionary Society.

[19] Cette relative indulgence était peut-être due au fait que la Société des Missionnaires de Londres, fondée en 1795 par des groupes dits non conformistes, sans rattachement aux églises établies, avait généralement des positions plutôt progressistes pour son époque.

2.1 La perpétuation d'une violence institutionnelle

C'est avec l'avènement de la colonisation, cependant, que la pression sur les fonctions reproductrices des femmes malgaches, comme de toutes les femmes des pays colonisés vers la fin du 19ème siècle, s'accentue jusqu'à devenir une forme d'oppression spécifique à l'intérieur du système d'oppression systématique que représente la colonisation.

2.1.1 Un vestige du droit colonial

En 1896, année de l'annexion de Madagascar par la France, c'est toujours le code pénal de 1810 qui a cours en France, et se trouve donc applicable dans la nouvelle colonie. En son article 317, ce code pénal se montrait sévère envers toutes les personnes impliquées dans un acte d'avortement:

> Quiconque, par aliments, breuvages, médicaments, violences, ou par tout autre moyen, aura procuré l'avortement d'une femme enceinte, soit qu'elle y ait consenti ou non, sera puni de la réclusion.
>
> La même peine sera prononcée contre la femme qui se sera procuré l'avortement à elle-même, ou qui aura consenti à faire usage des moyens à elle indiqués ou administrés à cet effet, si l'avortement s'en est ensuivi.
>
> Les médecins, chirurgiens et autres officiers de santé, ainsi que les pharmaciens qui auront indiqué ou administré ces moyens, seront condamnés à la peine des travaux forcés à temps, dans le cas où l'avortement aurait eu lieu.[20]

Pour les féministes françaises, qui dans les années 1960 allaient choisir pour mot d'ordre la formule 'un enfant si je veux, quand je veux' dans la lutte pour la libéralisation de la contraception, jusque-là interdite par la loi du 31 juillet 1920 'réprimant la provocation à l'avortement et à la propagande anticonceptionnelle',[21] c'est surtout la déshumanisation des femmes, par la formule 'soit qu'elle y ait consenti ou non', qui choquait, en ce qu'elle ne semblait accorder aucune valeur aux sentiments ou aux décisions des femmes concernées. Cette négation de l'individualité des femmes était aggravée par le fait qu'elles encouraient la même peine de réclusion en se faisant avorter elles-mêmes, comme si elles étaient aussi étrangères à leur propre corps que 'les médecins, chirurgiens et autres officiers de santé' visés par la loi.

Ce sont ces lois, aujourd'hui vieilles respectivement de deux siècles (en ce qui concerne le code pénal de 1810) et d'un siècle (la loi de 1920), qui ont été imposées à la société malgache colonisée. Si la seconde ne figure plus dans le code pénal, ayant été abrogée de fait par la loi portant sur la Politique Nationale de Population en 1990, la première a

[20] Code pénal français de 1810 http://ledroitcriminel.fr/la_legislation_criminelle/anciens_textes/code_penal_1810/code_penal_1810_1.htm (consulté le 28 avril 2017).

[21] Loi française réprimant la provocation à l'avortement et à la propagande anticonceptionnelle du 31 juillet 1920 https://socialhistory.org/tr/exhibitions/neomalthusianisme-en-france/loi-du-31-juillet-1920 (consulté le 28 octobre 2017).

toujours cours aujourd'hui à Madagascar. Les transpositions mot pour mot[22] du code pénal français de 1810, réalisées au début des années 1960 pour doter les états africains nouvellement indépendants d'un code pénal censé leur être propre, étaient significatives de la nature de ces indépendances. L'apparente pérennité de ces lois répressives soulève néanmoins des interrogations. Il est inattendu, par exemple, que des lois aussi conservatrices aient pu traverser tous les régimes à Madagascar. De même, le code pénal sénégalais non seulement reprend mot pour mot, comme le fait le code pénal malgache, les termes du code pénal français de 1810, il introduit tardivement, en 1980, un article numéroté 305bis qui complète l'article 305 réprimant l'avortement, et reproduit les termes exacts de la loi française de 1920 réprimant la propagande anticonceptionnelle, en remplaçant seulement l'expression 'crime d'avortement' par celle de 'délit d'avortement'.[23]

2.1.2 Le conservatisme postcolonial

L'attachement du législateur africain aux lois les plus répressives de l'ancien colonisateur est manifeste : plus de quarante ans après la loi Veil qui a dépénalisé l'avortement en France en 1975, aucune des anciennes colonies françaises en Afrique n'a libéralisé sa législation, à l'exception de la Tunisie qui en fait a précédé la France dans ce domaine puisqu'elle l'a fait dès 1973.[24] D'après les défenseurs de la criminalisation de l'avortement, la parfaite similarité des termes du code pénal napoléonien de 1810 et du code pénal malgache actuel ne serait que coïncidence: l'esprit du code pénal français, les valeurs qui le sous-tendaient, en l'occurrence le respect de la vie, qui commencerait dès la conception in utero, seraient des valeurs universelles que partagerait la culture malgache.

D'après une étude du Centre français d'Etudes sur la Population et le Développement (CEPED) sur 'les conditions du droit à l'avortement en 1994 et 1999', sur les 53 pays du continent africain, en 1999, bien qu'aucun n'interdise totalement l'avortement, trois seulement, le Cap-Vert, la Tunisie et l'Afrique du Sud, l'autorisaient à la demande de la femme.[25] Seize ans après, et dix ans après l'adoption du Protocole de Maputo, dont l'article 14(2)(c) appelle les états parties à autoriser l'avortement médicalisé dans certains cas, ces trois pays étaient toujours les seuls en 2015 à autoriser l'avortement à la demande de la femme, bien que 36 pays aient ratifié le Protocole. Cette lenteur de l'évolution de la situation illustre les difficultés que rencontrent les pays

[22] On parlerait aujourd'hui de 'copier-coller'; la similarité est au point que les articles portant sur la répression de l'avortement dans le code pénal français de 1810 et le code pénal malgache de 1960, mis à jour en 2005, portent le même numéro 317.

[23] Art 305 & 305 bis du Code pénal du Sénégal de 1965 http://www.wipo.int/edocs/lexdocs/laws/fr/sn/sn010fr.pdf (consulté le 28 octobre 2017).

[24] Centre population et développement 'Les conditions du droit à l'avortement en 1994 et 1999' http://www.ceped.org/avortement/fr/chap1/800/chapitre1-800.htm (consulté le 28 octobre 2017).

[25] Sus-cité.

pour traduire en lois nationales les engagements pris au niveau international ou régional.

Madagascar fait partie des 15 pays africains qui ont signé le Protocole de Maputo, mais se sont abstenus de le ratifier jusqu'ici. Plusieurs tentatives ont été menées par des organisations de femmes pour pousser l'Assemblée Nationale et le Sénat à le ratifier, mais se sont heurtées au fil des ans aux mêmes réactions soutenues par les mêmes arguments, selon lesquels l'avortement serait contraire aux valeurs malgaches, ou aux valeurs chrétiennes, ou encore sa libéralisation encouragerait davantage les femmes à le pratiquer.[26]

Ainsi, la violence institutionnelle initialement introduite par la colonisation se perpétue à travers le maintien dans les législations nationales des pays africains, un demi-siècle après les Indépendances, de la loi réprimant sévèrement l'avortement, qui prive les femmes en situation de grossesse non désirée de leurs droits à la santé reproductive et même, dans certains cas, à la vie.

2.2 La spirale de la violence sociale

Selon une étude menée par UNFPA en 2005: 'En Afrique subsaharienne [...], les données en provenance de sept pays ont révélé que 39 à 79 pour cent des patientes traitées pour des complications de l'avortement étaient des adolescentes'.[27] Une fois de plus, Madagascar ne fait pas exception. L'étude de *Focus Development Association* sur la 'sexualité des adolescents dans la région Sud-Ouest' a mis en évidence des rapports de force, généralement au détriment des jeunes filles, déterminant l'apparition de grossesses imprévues qui se révèlent le plus souvent indésirables et sont donc interrompues par un avortement.[28]

2.2.1 La question sous-jacente de l'égalité homme-femme

Le premier de ces déterminants, le statut inférieur des femmes par rapport aux hommes, se manifeste à divers niveaux. Dans la sphère publique, la plus évidente, le déficit de statut apparait à travers les proportions de femmes aux postes de décision, qui n'ont globalement pas atteint les objectifs du Protocole de la SADC sur le Genre et Développement, c'est-à-dire 50 pour cent de femmes dans tous les domaines en 2015.[29] Il est à noter que des progrès significatifs ont été enregistrés aux niveaux intermédiaires, avec par exemple 20 pour cent

[26] 'Madagascar: refus catégorique d'une loi autorisant l'avortement' 16 juin 2008 http://www.avortementivg.com/article-20494764.html (consulté le 28 octobre 2017).

[27] Etude citée par C Binet *et al* 'Fécondité précoce à Madagascar: quel impact sur la santé maternelle et infantile ?' in B Gastineau *et al* (eds) *Madagascar face au défi des objectifs du Millénaire pour le Développement* (2010) 270.

[28] Focus Development Association (n 15 ci-dessus).

[29] Adopté le 17 août 2008 et entré en vigueur le 22 février 2013. Madagascar a signé le Protocole de la SADC sur le Genre et Développement dès 2008, mais ne l'a toujours pas ratifié à ce jour.

de femmes parlementaires ou directrices générales dans les ministères, et 38,2 pour cent de femmes responsables d'ONG d'une certaine envergure, mais très faibles aux niveaux de base, avec moins de 5 pour cent de femmes maires et conseillères communales en 2015-2016, ainsi que parmi les dirigeants d'associations communautaires.[30] Dans la sphère privée, la loi accorde au mari le statut de chef de famille.[31] A la différence de statut juridique répond celles des bénéfices économiques: par exemple la superficie économique moyenne exploitée par les ménages agricoles dirigés par une femme est de 1.3 Ha contre 1.8 Ha chez ceux dirigés par un homme.[32] De même, en 2013 la valeur des revenus salariaux annuels moyens des femmes était de 1 462 000 Malagasy Ariary (USD 473) contre 2 025 000 Malagasy Ariary (USD 656) chez les hommes. En outre, au sein des ménages dirigés par un homme, le travail de production des femmes est rarement reconnu et comptabilisé.[33] Il résulte de ces écarts des situations objectives ainsi que des sentiments profondément ancrés de dépendance économique des femmes par rapport aux hommes, avec des répercussions sur les attitudes et les comportements en matière de sexualité. Le schéma est le même dans bien des situations, de la jeune fille issue de famille pauvre que les parents proposent, même comme seconde épouse, à un homme réputé riche censé lui donner tout ce dont elle aura besoin, à la mère de famille nombreuse qui s'abstient d'adopter le planning familial parce que son mari le lui interdit, craignant selon une croyance tenace que la contraception moderne ne favorise l'infidélité de son épouse. En outre, la dépendance économique est l'une des raisons le plus souvent avancées par les femmes victimes de violence conjugale pour ne pas quitter leur mari ni porter plainte contre lui. Le statut inférieur des femmes peut ainsi les conduire à des situations où leur liberté d'initiative et de défense de leurs propres intérêts se trouve constamment réduite, notamment en ce qui concerne le contrôle de leur fonction reproductrice.

Ainsi, en criminalisant l'avortement, la loi malgache consacre et renforce les inégalités entre les hommes et les femmes, notamment les adolescentes mal informées et pauvres, qui n'ont pas accès à un service médicalisé d'autant plus onéreux qu'il est illégal, et supportent le plus souvent les conséquences fatales de la clandestinité de l'avortement. La loi ignore aussi les mutations en cours dans la société, les contradictions nées de la coexistence d'une part d'un passé nataliste encore bien présent, même chez certains professionnels de la santé, et d'autre part d'une forme de modernité où l'on assiste au déclin de la procréation comme valeur en soi. Ce changement de paradigme se traduit chez les hommes, particulièrement les adolescents par le fait que la satisfaction du besoin sexuel et le prestige social dérivé du nombre et de la qualité des partenaires sexuelles l'emportent souvent sur le désir de descendance qui était si fort chez leurs ainés; chez les femmes, l'aspiration à la stabilité, au mariage, contrariée par le refus de

30 Focus Development Association 'Profil Genre de Madagascar' (2017).
31 Article 54 de la loi relative au mariage et aux régimes matrimoniaux (n 3 ci-dessus).
32 Focus Development Association (n 30 ci-dessus).
33 Sus-cité.

prise en charge de la part du père biologique, peut l'emporter sur la fierté de devenir mère et conduire à une décision d'interruption volontaire de la grossesse.[34] D'autre part, le communautarisme qui fait d'une naissance en milieu traditionnel, même hors mariage, un événement relativement gérable, perd du terrain face à l'individualisme qui envahit les milieux urbains et déborde vers les milieux ruraux. En outre, la domination des cultures du Nord, à travers les films vidéo qui circulent jusque dans les villages, a été signalée comme facteur de permissivité irresponsable : les jeunes regarderaient avidement les scènes d'amour, mais sans comprendre le contexte du fait de la barrière linguistique.[35] Il y a bien là un ensemble de situations nouvelles, complexes, qui favorisent tant les grossesses imprévues que la décision d'y mettre fin, avec des motivations suffisamment fortes pour rendre la loi, si répressive qu'elle soit, impuissante à contenir le phénomène.

2.2.2 Une question de violation des droits humains des femmes

Ces différentes situations d'inégalités hommes – femmes, associées à la pénalisation de l'avortement, ont un impact grave sur un droit fondamental des femmes: le droit à la vie. D'après les estimations de l'Organisation mondiale de la santé, sur les 67 800 femmes qui meurent chaque année dans le monde de complications d'un avortement non sécurisé, 67 500 se trouvent dans un pays en développement ; et de toutes les régions du monde, c'est l'Afrique qui a le taux le plus élevé de décès maternels, avec 680 décès pour 100 000 avortements non sécurisés, contre 0.7 dans les pays développés.[36] Madagascar se situe plus ou moins dans la moyenne africaine, avec 575 décès pour 75 000 avortements non sécurisés par an, d'après une estimation du ministère de la Santé.[37] Tous les pays africains, pourtant, sont parties prenantes à la Déclaration Universelle, ainsi qu'à la Charte africaine, qui posent le droit à la vie comme l'un des tout premiers des droits fondamentaux de l'être humain. C'est dans cette optique que le Plan décennal de mise en œuvre de l'Agenda 2063 pour la période 2014-2023 engage les états africains à réduire de moitié le nombre de cas de mortalité maternelle.[38]

Outre les traités fondamentaux des droits de l'homme juridiquement contraignants pour les états africains, la Recommandation Générale 19 du Comité sur l'Elimination des

34 Focus Development Association (n 15 ci-dessus).

35 Sus-cité.

36 World Health Organisation 'Unsafe abortion: global and regional estimates of incidence and mortality due to abortion, with a listing of available country data' cité dans E F Okonofua 'Contribution of anti-abortion laws to maternal mortality in developing countries' (2008) 3 *Expert Review of Obstetrics & Gynecology* 147-149.

37 Gastineau & Rajaonarisoa (n 8 ci-dessus).

38 Commission de l'Union Africaine 'Agenda 2063: Premier plan décennal de mise en œuvre 2014-2023' Septembre 2015 http://www.nepad.org/fr/resource/agenda-2063-premier-plan-d%C3%A9cennal-de-mise-en-oeuvre-2014-2023 (consulté le 28 octobre 2018).

Discriminations à l'égard des Femmes (CEDEF) relative à la violence à l'égard des femmes stipule au paragraphe 7:

> La violence fondée sur le sexe, qui compromet ou rend nulle la jouissance des droits individuels et des libertés fondamentales par les femmes en vertu des principes généraux du droit international ou des conventions particulières relatives aux droits de l'homme, constitue une discrimination, au sens de l'article premier de la Convention. Parmi ces droits et libertés, on peut citer notamment:
>
> a) Le droit à la vie;
>
> b) Le droit à ne pas être soumis à la torture et à d'autres peines ou traitements cruels, inhumains ou dégradants.[39]

Des formes de violence fondée sur le sexe telles que le viol et l'inceste constituent en soi une atteinte directe aux droits des femmes, qui peut être aggravée encore à deux niveaux: lorsqu'une grossesse résulte du rapport sexuel forcé, et que la loi en interdit l'interruption, obligeant la femme victime de viol et/ou d'inceste à rechercher un avortement clandestin dans des conditions habituellement cruelles ou dégradantes, en plus d'être dangereuses pour sa santé ou sa vie.

Au-delà du droit à la vie, la Stratégie africaine de la santé 2016-2030 reconnaît le droit à la santé en tant que droit de l'homme.[40] Cette approche est complétée par les recommandations du Comité sur les Droits Economiques, Sociaux et Culturels et du CEDEF, selon lesquelles le droit des femmes à la santé inclut leur santé sexuelle et reproductive. Celle-ci est souvent sujette à des violations diverses, notamment lorsque la loi fait de l'avortement provoqué un crime. Ainsi, le CEDEF spécifie qu'il est 'discriminatoire pour un État membre de refuser de pourvoir légalement la prestation de certains services de santé reproductive pour les femmes'.[41] Le caractère discriminatoire apparait encore plus clairement lorsque l'on considère les contextes sociaux du refus de prestation de services d'avortement sécurisé dans les pays où il est illégal: les adolescentes, du fait de l'absence de ressources indépendantes, et les femmes pauvres sont habituellement celles qui meurent le plus souvent des complications d'un avortement clandestin, parce qu'elles n'auront pas eu les moyens de payer les services d'un médecin qualifié. C'est donc bien de la pénalisation de l'avortement provoqué que découle la discrimination. De plus, le Comité déclare que 'les lois qui criminalisent les procédures médicales dont seules les femmes ont besoin et qui punissent les femmes qui subissent ces procédures' sont un frein à leur accès aux soins de santé.[42] Il en est ainsi de la criminalisation de l'avortement: parce qu'elles craignent de subir la rigueur de la loi, après un avortement les femmes et les jeunes filles n'approchent un centre de santé qu'en dernier

39 CEDEF 'Recommandation générale No 19, Violence à l'égard des femmes' (onzième session, 1992) http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm-fr.htm (consulté le 28 octobre 2017).

40 African Union 'Africa health strategy 2016-2030' 2016 https://au.int/en/document/africa-health-strategy-2016-%E2%80%93-2030 (consulté le 28 octobre 2017).

41 CEDEF 'Recommandation générale 24, Les femmes et la santé - Article 12' (Vingtième session, 1999) UN Doc A/54/38/Rev.1, para 11 http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm-fr.htm (consulté le 28 octobre 2017).

42 CEDEF (n 41 ci-dessus) para 14.

recours, lorsqu'elles sont en danger de mort; en outre, aussitôt après les soins d'urgence le personnel médical les laissera partir parce qu'il est censé ignorer qu'il s'agissait d'un avortement provoqué. Les survivantes d'un avortement clandestin ne seront donc pas conseillées en matière de contraception, ce qui est contraire au 'droit des femmes et des hommes', tel que défini par la Plateforme d'action de Beijing adoptée à la suite de la Conférence mondiale sur les femmes en 1995, 'd'être informés sur les méthodes de planification familiale qui soient sûres, efficaces, abordables et acceptables, et d'utiliser celle qui leur convient, ainsi que toute autre méthode de régulation des naissances qui ne soit pas illégale'.[43]

D'après le Haut Commissariat des Nations Unies aux Droits de l'Homme, la santé sexuelle et reproductive des femmes est étroitement liée à de multiples droits humains, dont le droit à la vie, le droit de ne pas subir la torture, le droit à la santé, le droit à la vie privée, le droit à l'éducation et l'interdiction de la discrimination.[44] Ce sont tous ces droits qui sont refusés aux femmes et aux jeunes filles en situation de grossesse non désirée dans les pays dont la législation criminalise l'avortement provoqué.

3 LA DEPENALISATION DE L'AVORTEMENT: REHABILITER LA FORCE DU DROIT

La criminalisation de l'avortement apparait ainsi comme source de drames au niveau individuel et de problèmes de santé publique au niveau national, autant que de violations des droits humains. Au cours des vingt dernières années cependant, la communauté internationale, au niveau des Nations Unies comme au niveau de l'Union Africaine, a tracé le chemin vers la reconnaissance du droit à l'accès à l'avortement sécurisé comme un droit humain des femmes.

3.1 Du Caire à Maputo: les droits des femmes renforcés

En une décennie, de la Déclaration de la Conférence mondiale sur les droits de l'homme (1993)[45] au Protocole de Maputo (2003), la conception de la communauté internationale concernant les droits des femmes en matière de santé sexuelle et reproductive a considérablement évolué.

43 Quatrième Conférence mondiale sur les femmes 'Déclaration et programme d'action de Beijing' 15 Septembre 1995, para 97 http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20F.pdf (consulté le 28 octobre 2017).

44 HCDH (n 13 ci-dessus).

45 Conférence mondiale sur les droits de l'homme 'Déclaration et du Programme d'action de Vienne' 25 juin 1993 http://www.ohchr.org/FR/AboutUs/Pages/ViennaWC.aspx (consulté le 28 octobre 2017).

3.1.1 La santé sexuelle et génésique selon la CIPD et la Plateforme de Beijing

En son paragraphe 41, la Déclaration et le Programme d'action de Vienne adoptée par la Conférence mondiale sur les droits de l'homme réaffirmait,

> en se fondant sur le principe de l'égalité de l'homme et de la femme, le droit de la femme à des soins de santé accessibles et suffisants et à la gamme la plus large possible de services de planification familiale.[46]

Ainsi, l'accès aux soins de santé et à la contraception était déjà présenté comme un droit. Le principe allait être repris et développé par la Conférence internationale sur la population et le développement du Caire en 1994, dont le Programme d'action, pour la première fois dans un texte international de cette envergure, traitait de la question des 'avortements pratiqués dans de mauvaises conditions de sécurité'.[47] Tout en évitant soigneusement d'utiliser le mot 'droit' dans l'ensemble du paragraphe, et en soulignant que

> la plus haute priorité doit toujours être accordée à la prévention des grossesses non désirées et (que) tout devrait être fait pour éliminer la nécessité de recourir à l'avortement', le texte n'en traitait pas moins de l'avortement clandestin et de ses conséquences comme d'un 'problème majeur de santé publique.[48]

Ceci était important en ce sens que la question sortait pour la première fois, dans un contexte international, du ghetto des opinions personnelles et des jugements moraux ou religieux pour accéder à la sphère publique. De même, le texte, tout en recherchant le consensus propre aux conférences mondiales, préconisait l'accès des femmes, 'dans tous les cas, … à des services de qualité pour remédier aux complications découlant d'un avortement',[49] là où ce genre de situation était – et est encore – traité, dans les pays où l'avortement est illégal, dans le secret, la honte et le danger. Cependant, le Programme d'action du Caire préconisait que 'toute mesure ou toute modification relative à l'avortement au sein du système de santé ne peuvent être arrêtées qu'à l'échelon national ou local conformément aux procédures législatives nationales',[50] de manière sans doute à ce que les pays hostiles au changement n'aient pas l'impression que la libéralisation de l'avortement leur était imposée.

Un an seulement après le Caire, la Conférence mondiale sur les femmes de Beijing reprenait les idées forces de la CIPD, mais en adoptant des termes plus fermes et en parlant du 'droit des femmes et des hommes d'être informés sur les méthodes de planification familiale

46 Conférence mondiale sur les droits de l'homme (n 45 ci-dessus) para 41.

47 Conférence internationale sur la population et le développement 'Programme d'action de la Conférence internationale sur la population et le développement' Septembre 1994, para 8.25 https://www.unfpa.org/sites/default/files/event-pdf/icpd_fre.pdf (consulté le 28 octobre 2017).

48 Sus-cité.

49 Sus-cité.

50 Sus-cité.

qui soient sûres, efficaces, abordables et acceptables, et d'utiliser celle qui leur convient'.[51] Les 'avortements faits dans de mauvaises conditions, (qui) menacent la vie de nombreuses femmes', y sont présentés comme 'un grave problème de santé publique'.[52] Ainsi, le Programme d'action de la CIPD et celui de Beijing posaient conjointement les bases d'une action à mener pour faire baisser le nombre des décès maternels dus à l'avortement clandestin, le premier évoquant sans les nommer d'éventuelles mesures de libéralisation de l'avortement à l'intérieur des pays.

3.1.2 L'accès à l'avortement sécurisé érigé en droit: le Protocole de Maputo

Les conférences mondiales de Vienne, du Caire et de Beijing ayant jeté les bases de l'affirmation de la santé sexuelle et génésique des femmes comme un droit, le Protocole de Maputo n'apparaissait pas comme novateur en consacrant son article 14 au 'Droit à la santé et au contrôle des fonctions de reproduction'. Cependant, le Protocole de Maputo à la différence des autres documents est un traité produisant des obligations à l'égard des états l'ayant ratifié. Par ailleurs, c'est en appelant les états parties à 'prendre toutes les mesures appropriées' pour 'protéger les droits reproductifs des femmes, particulièrement en autorisant l'avortement médicalisé en cas d'agression sexuelle, de viol, d'inceste et lorsque la grossesse met en danger la santé mentale et physique de la mère ou la vie de la mère ou du fœtus' que le Protocole apparaissait comme révolutionnaire.[53] La légalisation de l'avortement y est présentée comme un moyen dont disposent les états pour accomplir leur devoir de protection des droits reproductifs des femmes.

Bien que le tiers des 54 pays membres de l'Union Africaine, dont Madagascar, n'aient pas encore ratifié le Protocole de Maputo, essentiellement au motif qu'ils ne sauraient accepter d'autoriser l'avortement médicalisé, même dans les conditions prévues en son article 14(2)(c), et que nombre de ceux qui l'ont ratifié n'aient toujours pas pris à ce jour les mesures législatives nécessaires à sa mise en œuvre effective, le Protocole constitue un jalon essentiel vers la considération de l'avortement médicalisé comme partie intégrante de la protection des droits des femmes. Pour ne citer qu'un exemple, le Plan d'action pour la mise en œuvre du Cadre d'orientation continental pour la promotion des droits et de la santé en matière de sexualité et de reproduction en Afrique (2007-2010) adopté par la Conférence des ministres de la Santé de l'Union Africaine en 2006 prévoyait la prestation de 'services d'avortement sans risque dans le cadre des

51 Déclaration et Programme d'action de Beijing (n 43 ci-dessus) para 97.
52 Sus-cité.
53 Article 14(2)(c) du Protocole de Maputo.

dispositions de la loi'.[54] Bien qu'il s'agisse d'un simple plan d'action sans valeur contraignante pour les états, une telle disposition n'aurait sans doute pas été possible sans la référence essentielle que constitue le Protocole de Maputo.

La Commission africaine des droits de l'homme et des peuples (Commission africaine) a élaboré en 2014 les 'Observations Générales 2 relatives aux articles 14(1)(a), (b), (c) et (f) ainsi qu'à l'article 14(2)(a) et (c) du Protocole de Maputo', qui préconisent une approche holistique des droits de la femme.[55] Elles précisent en effet que les dispositions de l'article 14,

> doivent être lues et interprétées à la lumière d'autres dispositions du Protocole portant sur des aspects transversaux des droits humains de la femme, y compris le droit de ne pas faire l'objet de discrimination, le droit à la dignité, le droit à l'intégrité et à la sécurité, l'accès à la justice et le droit à l'éducation.[56]

La Commission africaine constate cependant que

> ces droits restent encore caractérisés par le faible accès des femmes et des adolescentes à la planification familiale; la pénalisation de l'avortement et les obstacles que rencontrent celles-ci pour accéder à des services d'avortement sûrs et disponibles, y compris dans les cas autorisés par la loi nationale.[57]

C'est donc pour aider à inverser cette tendance que la Commission a élaboré les Observations Générales 2.

3.2 Le droit au service de la protection des droits humains en Afrique

Avec le Protocole de Maputo, et les Observations Générales 2 de la Commission africaine pour en guider la mise en œuvre, ainsi que les recommandations des organes de suivi des traités, tels le Comité des Droits de l'Homme chargé du suivi de l'application du Pacte International relatif aux Droits Civils et Politiques, ou le CEDEF, le cadre juridique est désormais en place au niveau continental pour permettre aux états de l'Union Africaine d'être plus efficaces dans la protection des droits humains des femmes en Afrique, et notamment de leur droit à la santé sexuelle et génésique.

54 Union Africaine 'Plan d'action de Maputo pour la mise en oeuvre du Cadre d'orientation continental pour la promotion des droits et de la santé en matière de sexualité et de reproduction en Afrique 2007-2010', http://hivhealthclearinghouse.unesco.org/sites/default/files/resources/iiep_maputoplansrhr_fr.pdf (consulté le 28 octobre 2017).

55 Commission africaine des droits de l'homme et des peuples 'Observations Générales N ° 2 sur l'Aticle 14(1)(a), (b), (c) et (f) et Article 14(2)(a) et (c)) du Protocole à la Charte Africaine des Droits de l'Homme et des Peuples relatif aux Droits de la Femme en Afrique' http://www.achpr.org/fr/instruments/general-comment-two-rights-women/ (consulté le 28 octobre 2017).

56 Commission africaine (n 55 ci-dessus) para 11.

57 Sus-cité, préface.

3.2.1 Reconnecter le droit aux réalités en Afrique

Une étude de l'Institut Guttmacher effectuée en 1999 estime que 30 pour cent environ des 40 millions de grossesses en Afrique n'étaient pas prévues, et que 12 pour cent ont été interrompues par un avortement.[58]

La criminalisation de l'avortement est directement mise en cause dans ce qu'un document publié par l'Organisation Mondiale de la Santé a appelé une 'pandémie évitable'.[59] Dès 1998 Blayo soulignait que 'les risques de l'avortement dépendent beaucoup plus de son statut juridique que du niveau de développement des pays'.[60] A Madagascar, s'il est vrai que la mortalité maternelle élevée est due principalement au faible taux des accouchements assistés par un personnel qualifié, ainsi qu'aux premières consultations prénatales tardives (vers le cinquième mois seulement à Madagascar), la part attribuable aux avortements (13 pour cent) est rarement mentionnée dans les rapports nationaux. Selon Gastineau et Rajaonarisoa, le ministère de la Santé estime, en l'absence de statistiques officielles, à 75 000 le nombre d'avortements pratiqués chaque année, soit 'environ un avortement pour dix naissances vivantes'.[61] En outre, d'après une 'Etude sur l'avortement clandestin à Madagascar', les récidives, c'est-à-dire le fait pour une femme d'avoir pratiqué plus d'un avortement au moment de l'enquête, ne sont pas rares: parmi les femmes qui ont déclaré avoir eu recours à l'avortement, elles sont 34,7 pour cent dans l'ensemble des centres urbains, 29,3 pour cent dans la capitale et 5,1 pour cent dans l'ensemble des centres ruraux, sites de l'enquête.[62] Ces chiffres attestent qu'il y a bien là un problème de société, et en tout cas de santé publique: si le tiers des femmes qui ont déjà eu recours à l'avortement l'ont fait plus d'une fois, c'est qu'il y a, même en milieu urbain, une grave carence de services de contraception, y compris sous forme de conseils post-abortum. Ceci est corroboré par l'Enquête nationale sur le suivi des OMD (ENSOMD 2012-2013), selon laquelle le taux de femmes en union utilisant les méthodes contraceptives modernes est de 33,3 pour cent.[63] Selon la même enquête, 17,8 pour cent des femmes malgaches qui ont besoin d'espacer ou de limiter les naissances n'utilisent aucune méthode contraceptive'.[64]

Ces réalités sont ignorées par la loi, qui continue de criminaliser l'avortement sans se soucier de ce que le recours à l'avortement traduit à la fois un besoin non satisfait et un droit non respecté à une contraception efficace. Décrites dans les rapports nationaux, notamment ceux de la société civile, concernant la mise en œuvre des

58 Guillaume (n 16 ci-dessus).
59 Grimes *et al* (n 12 ci-dessus).
60 Voir Centre population et développement (n 24 ci-dessus).
61 Gastineau & Rajaonarisoa (n 8 ci-dessus).
62 Focus Development Association (n 7 ci-dessus).
63 UNFPA 'Rapport annuel Océan Indien 2015' http://madagascar.unfpa.org/sites/default/files/pub-pdf/Rapport%20Annuel%20UNFPA%20MDG%20 (consulté le 2 mai 2017).
64 Sus-cité.

traités ratifiés par Madagascar, parmi les données relatives à la mortalité maternelle, ce sont probablement ces réalités qui ont poussé les organes de suivi des droits de l'homme à formuler des recommandations demandant à l'état malgache de prendre en compte la réalité de l'avortement, tant dans la législation que dans les pratiques. Ainsi, le Comité pour l'élimination de la discrimination à l'égard des femmes, dans ses 'Observations finales concernant les sixième et septième rapports périodiques de Madagascar', appelait l'état à 'légaliser l'avortement, au minimum dans les cas où la grossesse est préjudiciable à la santé de la mère ainsi que dans les cas d'inceste, de viol ou de graves malformations fœtales'.[65] Le Comité demandait aussi à l'état 'd'abroger les mesures punitives applicables aux femmes qui recourent à l'avortement'; et d' 'améliorer l'accès des femmes à des soins post-abortifs de qualité, en particulier dans les cas de complications résultant d'avortements illégaux, conformément à la recommandation générale 24 (1999) du Comité sur les femmes et la santé'.[66] Ces recommandations n'ont pas été prises en compte jusqu'ici, le gouvernement s'étant abstenu de préparer un projet de loi légalisant l'avortement, ou même de diffuser les recommandations du Comité CEDEF. Parmi les motifs de réticence a été évoquée, tant au niveau de certains membres du gouvernement et du parlement que de la société civile, la crainte que la libéralisation n'ait pour résultat la pratique plus répandue encore de l'avortement. Pourtant, comme l'a indiqué la Commission africaine dans ses Observations Générales 2,

> il a été démontré que dans un contexte où les lois nationales autorisent l'avortement thérapeutique lorsqu'il s'avère nécessaire, et où les services de santé sont disponibles, accessibles, acceptables et de bonne qualité, la prévalence ainsi que les complications résultant des avortements dangereux sont généralement moins élevées que dans les pays où les conditions légales de l'avortement sont restreintes.[67]

Au vu des réticences par rapport à la légalisation de l'avortement, nées de la méconnaissance des réalités dans le monde, mais aussi dans le pays même, la recommandation 37(e) du Comité CEDEF à l'endroit de Madagascar s'avère particulièrement pertinente.[68] Le Comité appelait en effet l'état à 'missionner, soutenir et financer des études et la collecte de données sur l'ampleur, les causes et les conséquences des avortements illégaux et pratiqués dans des conditions dangereuses ainsi que leur incidence sur la santé et la vie des jeunes filles et des femmes afin de recueillir des éléments factuels à l'appui de l'élargissement des motifs justifiant la légalisation de l'avortement.[69] Une telle action ne peut que contribuer à la légalisation de l'avortement,

[65] Comité pour l'élimination de la discrimination à l'égard des femmes 'Observations finales concernant les sixième et septième rapports périodiques de Madagascar' CEDAW/C/MDG/CO/6-7, para 37(d), 24 Novembre 2015.

[66] Comité pour l'élimination de la discrimination à l'égard des femmes (n 65 ci-dessus) para 37(d) & (g).

[67] Commission africaine (n 55 ci-dessus) para 19.

[68] Comité pour l'élimination de la discrimination à l'égard des femmes (n 65 ci-dessus) para 37(e).

[69] Sus-cité.

par la production de données objectives qui devraient faire évoluer l'attitude des politiques vers davantage de réalisme.

3.2.2 Réconcilier les citoyen-ne-s avec la loi

La complexité des attitudes par rapport à la pratique de l'avortement est révélée entre autres par le nombre relativement faible de femmes et d'autres personnes en détention pour avoir pratiqué un avortement. Une enquête menée auprès des chefs de trois maisons d'arrêt dans trois villes de Madagascar a par exemple montré qu'aucune des détenues n'avait été placée là pour avortement.[70] Cette situation diffère de celle d'autres pays tels que le Rwanda par exemple, où une détenue sur quatre est emprisonnée du fait de l'avortement, malgré sa dépénalisation en 2012 dans ce pays.[71] Cette absence de poursuites pénales, rapportée aux 75 000 avortements clandestins pratiqués chaque année, selon les estimations du ministère de la Santé citées plus haut, est significative d'un rapport ambigu à la loi criminalisant l'avortement: plutôt que de se battre pour changer la loi, les femmes, le personnel de santé, les matrones semblent en effet préférer aider les femmes en quête d'avortement à le faire tout en échappant à la loi, et les dénonciations sont quasi inexistantes. Comme l'a montré l'étude de Focus, bien que la quasi-totalité des personnes interrogées se soient prononcées contre l'avortement, la grande majorité se sont également montrées compréhensives à l'égard des femmes qui peuvent en avoir besoin, les aidant selon leurs possibilités à se le procurer dans la discrétion.[72]

C'est là l'une des caractéristiques essentielles des rapports des citoyen-ne-s malgaches à la loi en général. Une sorte de pacte tacite s'établit généralement entre les diverses parties à une même entreprise pour contourner la loi. Celle-ci est unanimement respectée, ou même acceptée, mais seulement verbalement, pour se donner une apparence de conformité, voire de conformisme; mais peu de gens croient au bien-fondé d'une loi, ou de la loi d'une manière générale. Cette prise de distance par rapport à la loi tient sans doute à ce qu'un ensemble de lois étrangères ont été imposées en bloc, de manière brutale et sans concession, dès le début et tout au long de la période coloniale. En outre, le système de conception, d'adoption et d'application des lois n'a que peu changé à l'avènement de l'indépendance: une petite minorité d'hommes politiques se le sont approprié, au détriment de la majorité de la population, et notamment des femmes. Les assemblées provinciales réunies pour voter l'indépendance ne comptaient en effet aucune femme, non plus que la première version de l'Assemblée Nationale qui votait les lois, ou le premier gouvernement, auteur des projets de loi après l'indépendance. La magistrature chargée

[70] Visites de prisons menées par les membres de la Commission Nationale Indépendante des Droits de l'Homme (CNIDH) de Madagascar. L'auteure du présent article a participé à ces visites en sa qualité de membre de la CNIDH.

[71] M Umukunzi '1 Rwandaise sur 4 en prison pour avortement illégal' *JamboNews.net* 19 octobre 2015 (consulté le 28 octobre 2017).

[72] Focus Development Association (n 7 ci-dessus).

d'appliquer les lois non plus ne comprenait aucune femme. Cet état de choses a lentement changé au cours du demi-siècle depuis l'indépendance en 1960, mais les femmes ne sont que 20 pour cent au Parlement, et en moyenne 6 sur 30 au gouvernement.[73] La magistrature constitue une exception, avec cinq femmes successives ministres de la Justice entre 2002 et 2014, et des magistrates à de nombreux postes clé comme chefs de cour ou de juridiction. Néanmoins les taux de présence dérisoires des députés à l'Assemblée Nationale pendant les sessions, même pour adopter des lois importantes, témoignent du faible niveau d'appropriation du système parlementaire par les élus eux-mêmes.[74] Les Observations Générales 2 de la Commission africaine rappellent que

> le Plan d'action de Maputo engage les gouvernements à adopter des politiques et cadres juridiques, en vue de réduire les cas d'avortement dans des conditions insalubres, ainsi qu'à élaborer et mettre en œuvre des plans d'action nationaux pour atténuer la prévalence des grossesses non désirées et des avortements pratiqués dans des conditions insalubres.[75]

Le gouvernement malgache, tout en adhérant au Plan d'action de Maputo, n'a pas réussi jusqu'ici à réduire les cas d'avortement pratiqués dans des conditions insalubres. Les réalités d'autres pays ont montré que ce ne serait possible que si l'avortement est décriminalisé, et que la loi, au lieu d'être perçue comme une menace à esquiver, devient aux yeux des femmes en quête d'avortement un instrument de protection de leurs droits.

4 CONCLUSION

Au-delà des intérêts immédiats, dont la protection, en toutes circonstances, du droit de toutes les femmes à la vie, la dépénalisation de l'avortement permettrait, entre autres effets bénéfiques, de renforcer l'effectivité de la loi par l'amélioration de sa perception par les citoyen-nes. D'après Hans Kelsen, 'lorsqu'une norme juridique demeure dépourvue d'efficacité d'une façon durable, elle n'est plus considérée comme valable. Ainsi l'efficacité est une condition de la validité des normes juridiques'.[76] La loi française de 1810 criminalisant l'avortement est manifestement devenue inefficace à Madagascar, au vu à la fois du taux élevé de mortalité maternelle due aux complications de l'avortement et de la très faible incidence des inculpations et des condamnations pour crime d'avortement. Ces données suggèrent que ni les sujets ni les autorités chargées de faire respecter la loi ne sont

73 'Dossier: Les femmes qui occupent des postes politiques à Madagascar' *Midi Madagasikara* 9 janvier 2017 http://www.midi-madagasikara.mg/dossiers/2017/01/09/dossier-les-femmes-qui-occupent-des-postes-politiques-a-madagascar/ (consulté le 28 octobre 2017).

74 La presse a par exemple rapporté qu'une loi aussi controversée que le Code de la communication médiatisée a été votée en novembre 2016 par 18 députés présents sur 151. 'Code de la communication – Une minorité de députés vote le crime' *L'Express de Madagascar* 15 juillet 2016 http://www.lexpressmada.com/blog/actualites/code-de-la-communication-une-minorite-de-deputes-vote-le-crime/ (consulté le 28 octobre 2017).

75 Commission africaine (n 55 ci-dessus) para 20.

76 H Kelsen *Théorie pure du droit* (1962).

convaincus du bien-fondé de cette loi, malgré la quasi unanimité de façade contre sa dépénalisation. Pourtant, celle-ci non seulement rétablirait l'équité bafouée par l'accablement de la mère et la déresponsabilisation du père biologique du fœtus, elle contribuerait aussi à la nécessaire modernisation du droit malgache, en reconnaissant que 'le droit n'est plus seulement un ensemble de normes impératives visant à encadrer les comportements, mais aussi un instrument de plus en plus complexe ayant pour fonction de promouvoir le changement social'.[77] Encore faut-il pour cela que nos juristes et nos législateurs soient convaincus de ce qu'il est 'logique, sinon nécessaire, que l'on s'attache à apprécier les effets concrets ou l'efficience de ces instruments juridiques de changement ou d'amélioration des données socio-économiques que constituent les règles de droit, au lieu de les laisser à l'état de normes aveugles, indifférentes à leur impact social et économique.[78] Même indépendamment du principe fondamental du droit humain des femmes à la vie, l'amélioration de cette donnée socio-économique de 469 décès maternels en 1996-2003 et de 363 en 2008 pour 100 000 naissances vivantes devrait constituer une motivation pour l'état malgache.[79] Des leçons peuvent être tirées de la libéralisation de l'avortement en Afrique du Sud, où en dix ans d'application de la loi décriminalisant l'avortement, le taux de mortalité maternelle liée aux complications de l'avortement a connu une baisse spectaculaire de 91 pour cent qui place ce pays au même niveau que les pays européens qui l'ont fait il y a un demi-siècle.

La communauté internationale, et particulièrement la communauté régionale africaine, avec les organisations de la société civile œuvrant pour les droits des femmes, a la capacité et le devoir d'encourager l'état malgache dans ce sens, qui constitue non seulement un pas de plus vers une décolonisation encore à parfaire, mais également un progrès social et une étape importante dans le respect des droits humains des femmes.

77 F Rangeon 'Réflexions sur l'effectivité du droit' https://www.u-picardie.fr/curapp-revues/root/23/rangeon.pdf (consulté le 23 juin 2017).

78 A Jeammaud & E Serverin 'Evaluer le droit' (1992) *Recueil Dalloz* 264 cité dans Y Leroy 'La notion d'effectivité du droit' (2011) 79 *Droit et société* 715-732.

79 D Waltisperger & V Delaunay 'Evolution de la mortalité des enfants et des mères à Madagascar: l'échéance 2015' in Gastineau *et al* (eds) (n 27 ci-dessus).

La Cour et la Commission africaines des droits de l'homme et des peuples: noces constructives ou cohabitation ombrageuse?

*Samir Séro Zime Yerima**

RÉSUMÉ: La création de la Cour africaine des droits de l'homme et des peuples a marqué l'avènement d'une nouvelle ère des droits de l'homme sur le continent. S'est cependant posée à la naissance de cette juridiction, la question de ses rapports avec son aînée: la Commission, alors déjà vielle de plus de 20 ans. La solution fût trouvée dans le principe de 'complémentarité'. Ce principe de complémentarité consacré par le Protocole à la Charte africaine des droits de l'homme et des peuples portant création d'une Cour africaine des droits de l'homme et des peuples (Protocole) est assurément de bon aloi. Mais force est de reconnaître, qu'il souffre de nombreuses difficultés qui entravent sa mise en œuvre. S'il est vrai que les deux institutions poursuivent des objectifs semblables, qu'en outre, leur spécificité ne fait 'guère de doute', la question de l'articulation de leurs fonctionnements concurrents et de leur coexistence pratique n'était pas pour autant résolue dans le Protocole consacrant la complémentarité. De nombreuses problématiques ont donc germé, dont celles relatives à la concurrence, la hiérarchie, ou encore l'enchevêtrement des compétences. Il ressort cependant de la présente étude, que bien que ces insuffisances originelles du principe de la complémentarité produisent des effets déplorables sur la relation entre les deux institutions, celles-ci semblent avoir opté pour une approche pragmatique et empirique de la mise en œuvre de leur complémentarité. En se fondant entre autres sur une approche comparée au regard des expériences européenne et américaine, cet article se propose d'analyser la relation entre la Commission et la Cour africaines à lumière du principe de complémentarité.

TITLE AND ABSTRACT IN ENGLISH:

The African Court and Commission on Human and Peoples' Rights: a worthwhile wedding or a curious cohabitation?

ABSTRACT: The establishment of the African Court on Human and Peoples' Rights (African Court) marked the beginning of a new era for human rights protection on the continent. However, with the advent of the Court, uncertainty arose about its relationship with the African Commission on Human and Peoples' Rights (African Commission), its predecessor that had been in existence for the previous 20 years. The solution to his uncertainty was found in the principle of 'complementarity'. The principle of complementarity, which is enshrined in the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Protocol), is undoubtedly sound. Nevertheless, it must be acknowledged that several issues hinder the smooth implementation of this principle. While it is correct that the two institutions pursue similar objectives, and that each also exists as a distinct entity, the Protocol while introducing complementarity did not address the question of their competing functions and

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practical coexistence. Many issues have therefore emerged, including those relating to competition, hierarchy, and overlapping jurisdiction between the Commission and Court. However, it this article reveals that while these inadequacies in the principle of complementarity produce debilitating effects on the relationship between the two institutions, the latter seem to have opted for a pragmatic and empirical approach in implementing their complementarity. Based, amongst others, on a comparison with the European and Inter-American experiences, this article analyses the relationship between the African Commission and the African Court in light of the principle of complementarity.

MOTS CLÉS : Cour africaine des droits de l'homme et des peuples, Commission africaines des droits de l'homme et des peuples, complémentarité

SOMMAIRE:

1 INTRODUCTION

Le système africain des droits de l'homme s'est pendant plus de vingt ans articulé autour de la Commission africaine des droits de l'homme et des peuples (la Commission africaine) qui était, alors, la seule institution africaine chargée de veiller à la protection et à la promotion des droits de l'homme. Mais moins de deux décennies après l'opérationnalisation de la Commission africaine, ce paysage uni-institutionnel sera bouleversé par l'entrée en vigueur le 25 janvier 2004, 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 (Protocole). Cette parturition de la Cour africaine des droits de l'homme et des peuples (Cour africaine) fût le résultat d'une ambition nourrie de longue date mais dont la concrétisation a dû faire face à des objections idéologiques et philosophiques.[1] L'idée de la création d'une entité juridictionnelle chargée de veiller de manière contentieuse à la protection des droits de l'homme s'est en effet heurtée à la supposée 'conception africaine des droits de l'homme' qui selon ses

[1] Dès l'aube des indépendances des pays africains, l'idée de la création d'une juridiction continentale chargée de veiller au respect des droits de l'homme a germé. C'est à Lagos en 1961 que la Commission internationale des juristes (CIJ), émit pour la première fois la nécessité de la création d'un tel organe à l'issue du congrès dont la déclaration finale appelée 'Loi de Lagos' proposait l'adoption d'une 'Convention africaine des droits de l'homme' prévoyant la mise sur pied d'une juridiction régionale.

partisans n'admettait point le contentieux. Le juge Kéba Mbaye faisait ainsi valoir qu'en Afrique, 'Nous avons recours à la justice pour régler des conflits à l'amiable, mais nous sommes rarement en conflit au sens contentieux du terme'.[2] Ce fût le même son de cloche du côté du Professeur Maurice Ahanhanzo Glélé qui justifiait ainsi la création de la Commission africaine: [3]

> Le dynamisme et le doigté de la Commission africaine feront que cette dernière aide au règlement amiable, sans éclat, des litiges relatifs à la violation des droits de l'homme, ce qui aura peut-être pour conséquence de faire oublier la création d'une Cour Africaine des droits dont la nécessité ne s'imposera plus. L'Afrique ne préfère-t-elle pas la palabre?

L'expérience a pourtant fini par avoir raison de cette conception monocéphale du système africain des droits de l'homme fondée sur une philosophie non contentieuse du règlement des litiges. A l'origine de cette terrible désillusion : le constat palpable de l'inefficacité de la Commission africaine. En dix ans d'existence, la Commission africaine aura en effet fait l'objet des critiques les plus acerbes. 'Bouledogue sans crocs,[4] 'tigre de papier',[5] 'éléphant blanc',[6] les qualificatifs les moins élogieux n'ont pas manqué pour désigner l'impuissance de la Commission africaine à assurer sa mission de protection et de promotion des droits de l'homme. C'est dans ce contexte, que la Conférence des Chefs d'Etat et de Gouvernement lors de sa 34ème session tenue à Ouagadougou au Burkina Faso du 8 au 10 juin 1998 approuva le Protocole portant création de la Cour. Le Protocole entrera finalement en vigueur six ans plus tard avec le dépôt de l'instrument de ratification par les Comores.[7]

La juridiction ainsi créée n'intervenait pas dans un paysage institutionnel vierge, étant donné qu'elle n'est en réalité que la benjamine de la Commission africaine. Se posait alors la question de ses rapports avec celle-ci. Pour venir à bout des inquiétudes qui pourraient résulter de la coexistence de la Cour et de la Commission africaines, une solution fût trouvée. Elle fût gravée dans les dispositions du Protocole instituant la Cour, et elle a pour nom: 'la complémentarité'. Principe dont on dit qu'elle aurait des vertus harmonisatrices. Aux termes de l'article 2 régissant les relations entre la Cour et la Commission africaines: 'La Cour, tenant dûment compte

2 K M'Baye 'Rapport introductif sur la Charte africaine des droits de l'homme et des peuples' in Commission Internationale de Juristes *Droits de l'homme et des peuples en Afrique et la Charte africaine* (1986) 28.

3 M Ahanhanzo Glélé 'La Charte africaine des droits de l'homme et des peuples: ses virtualités et ses limites' (1985) 1 *Revue de droit africain* 37.

4 NJ Udombana 'Towards the African Court on Human and Peoples' Rights: better later than never' (2000) 3 *Yale Human Rights and Development Law Journal* 64.

5 AE Anthony 'Beyond the paper tiger: the challenge of a Human Rights Court in Africa' (1997) 32 *Texas International Law Journal* 511.

6 R Eno 'The place of the African Commission in the new African dispensation' (2002) 11 *African Security Review* 70.

7 A ce jour, 24 pays ont signé et ratifié le protocole, 25 ont signé sans le ratifier et 5 n'ont fait ni l'un ni l'autre. Voir Le tableau de ratification du Protocole à l'adresse suivante: http://www.achpr.org/fr/instruments/court-establishment/ratification/ (consulté le 8 octobre 2017).

des dispositions du présent Protocole, complète les fonctions de protection que la Charte Africaine des Droits de l'Homme et des Peuples a conférées à la Commission africaine (Charte africaine)'. En frappant la relation entre la Cour et la Commission africaines du sceau optimiste de la complémentarité, le Protocole entendait se protéger des éclaboussures potentielles d'une relation tendue entre les deux institutions. Cependant, force est de constater qu'aujourd'hui, après plus d'une décennie de coexistence, les craintes appréhendées n'ont pas été entièrement conjurées.

La relation entre la Cour et la Commission africaines souffre en réalité de nombreux maux qui viennent entraver les noces heureuses que les rédacteurs du Protocole ont pensées. Dans les faits, ce principe s'est heurté aux dispositions laconiques du Protocole consacrant son existence. Le Protocole en effet, s'est contenté de consacrer de manière parcimonieuse le principe, laissant le soin aux règlements intérieurs des deux institutions de préciser les conditions de sa mise en œuvre. Cette fragilité normative du principe de complémentarité a abouti aux conséquences qui pouvaient résulter logiquement de l'existence parallèle de deux institutions dotées de mandats semblables. Des questions de hiérarchie, de chevauchements, d'articulation des compétences n'ont ainsi pas manqué de surgir. Un regard moins incisif permet cependant de ressortir que la relation entre la Cour et la Commission africaines est en perpétuel apprentissage. Les deux institutions semblent en effet surmonter les insuffisances du Protocole pour adapter leur relation et construire la complémentarité qui les régit au fil des circonstances. Les progrès et les succès enregistrés dans le cadre de la relation entre les deux institutions autour de la complémentarité indiquent que ce principe constitue ou constituera le socle de l'efficacité du système africain des droits de l'homme.

Si les balbutiements du principe de complémentarité éprouvent la relation entre la Cour et la Commission africaines, les deux entités n'en construisent donc pas moins leur coexistence dans un élan d'apprentissage de ce principe évolutif.

2 LES PÉRIPÉTIES D'UNE RELATION FONDÉE SUR UN PRINCIPE DE COMPLÉMENTARITÉ BALBUTIANT

L'idée de consacrer concomitamment à la création de la Cour africaine, l'exigence qu'elle complète et renforce le rôle de promotion et de protection des droits de l'homme dévolu à la Commission africaine est assurément de bon aloi. Mais force est de reconnaître ainsi que le signale Dan Juma, que ce principe théoriquement posé de 'complémentarité est en souffrance'.[8] Une telle conclusion est liée à plusieurs facteurs. Pour peu qu'on s'attarde à analyser les rapports entre la Cour et la Commission africaines, on se rend bien vite à

8 D Juma 'Lost (or found) in transition? the anatomy of the African Court of Justice and Human Rights' (2009) 13 *Max Planck Yearbook of United Nations Law* Online 283.

l'évidence que certaines embûches handicapent ou handicaperont la coexistence constructive souhaitée dans le Protocole. Le péché originel de cette situation ne situe ailleurs que dans le Protocole lui-même. Dressant furtivement l'exigence de complémentarité entre les deux institutions, les rédacteurs du Protocole se sont contentés de mettre à la charge des règlements intérieurs respectifs des deux institutions les précisions pouvant résulter de la mise en œuvre de cette complémentarité; d'où ses déboires normatifs. Les craintes appréhendées à travers cette exigence de complémentarité dans le Protocole n'ont finalement pas été conjurées. Les termes lacunaires du Protocole quant à l'aspect pratique de ce principe de complémentarité n'ont pas permis de résoudre les questions de chevauchement et de rapports institutionnels qui pouvaient à coup sûr découler de l'existence parallèle de ces deux entités.

2.1 La faible charge normative du principe de complémentarité

Au plan de sa fondation normative, le principe de complémentarité a souffert du caractère évanescent du Protocole sur les aspects pratiques de sa mise en œuvre. Les Règlements intérieurs des deux institutions qui sont censés apporter une solution à ce vide n'ont pas entièrement répondu aux attentes.

2.1.1 L'esquive manifeste du Protocole fondateur

Comme nous le signalions plus haut, le Protocole porte en lui-même les germes des vicissitudes du principe de complémentarité entre la Cour et la Commission africaines. Eu égard aux enjeux que représente ce principe de complémentarité, on s'attendait à ce que le Protocole énonce clairement le lien entre la Commission africaine et la Cour. Le Protocole n'a, hélas, traité la relation entre la Cour et la Commission africaines que de façon très vague de sorte que la lumière n'a pas été faite sur la nature de leur rapport et les modalités de leur coexistence.[9] Pourtant, un très long chemin a conduit à la consécration de ce principe.[10] Les premières batailles pour la création d'une cour à côté de la Commission africaine furent non pas l'œuvre de l'OUA, mais plutôt celle des ONG et des diverses organisations de juristes régionales et internationales. Ces efforts ont par la suite conduit au premier projet de Protocole additionnel à la Charte africaine.[11] Déjà en 1994, ce premier Projet de Protocole additionnel préparé par les experts réunis par le Secrétariat général de l'OUA mettait au cœur de ses objectifs, le

9 A O'Shea 'A critical reflection on the proposed African Court on Human and People's Rights' (2001) 1 *African Human Rights Law Journal* 293.

10 NB Pityana 'Reflections on the African Court on Human and Peoples' Rights' (2004) 4 *African Human Rights Law Journal* 121.

11 J Matringe *Tradition et modernité dans la Charte africaine des droits et devoirs de l'Homme et des peuples. Étude du contenu normatif de la Charte et de son apport à la théorie du droit international des droits de l'homme* (1996) 24.

principe de complémentarité entre la Commission africaine et la future Cour.[12] Aux termes de l'article 2 du projet de Protocole de 1994, la Cour africaine devrait compléter le mandat de protection de la Commission africaine. Son préambule considérait déjà que: [13]

> *The objectives of the African Charter on Human and Peoples' Rights to ensure protection and promotion of human and peoples' rights can best be realised by the establishment of an African Court of Human and Peoples' Rights to supplement the efforts of the African Commission on Human and Peoples' Rights.*

Il en est de même du deuxième projet, celui de Cape Town dont l'article 2 reprenait que 'la Cour devrait compléter le mandat de protection de la Commission africaine qui lui est conféré par la Charte africaine'. Le troisième projet, celui de Nouakchott dont l'article 2 est la reproduction substantielle des deux premiers, ne déroge pas à cette reconnaissance de l'intérêt de la complémentarité dans la perspective d'une plus grande efficacité du système africain de protection des droits de l'homme.[14]

Si ces projets de Protocoles ont successivement consacré le principe de la complémentarité entre les deux institutions, ouvrant ainsi la voie au Protocole définitif, il faut par contre remarquer que pour précurseurs qu'ils aient été, leurs dispositions ont néanmoins été assez lacunaires sur la mise en œuvre de ce principe de complémentarité. Le mérite, non pas celui de la précision, mais plutôt celui de l'aveu d'imprécision revient au Protocole définitif. La notion de complémentarité intervient à trois reprises dans le Protocole définitif.[15] D'abord dans le préambule comme dans les projets précédents puis dans deux autres articles, à savoir l'article 2 traitant de la relation entre les deux institutions puis l'article 8 relatif à l'examen des requêtes. En renvoyant à chaque fois que de besoin la mise en œuvre de la complémentarité à la charge des règlements intérieurs respectifs des deux entités, le Protocole définitif a reconnu le caractère évanescent de ses dispositions quant à ce principe pourtant mis en avant. Il apparaît clairement que durant tout le processus, la question de la clarification de la complémentarité a été éludée.[16] Ainsi que le soutient Rudman Annika, '*The final Protocol establishing the Court cements the importance of complementarity but defers the problem of defining it*'. Ce procédé marque une rupture avec l'option qui prévaut dans le système européen des droits de l'Homme où dès le départ, le principe

[12] A Rudman 'The Commission as a party before the Court – reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 7.

[13] Projet de Protocole additionnel à la Charte Africaine des droits de l'Homme et des peuples (version anglaise). Projet préparé par les experts de l'OUA en collaboration avec la Commission Africaine et la Commission Internationale de Juristes (CIJ), 26-28 Janvier 1994.

[14] Projet de Protocole à la Charte africaine des droits de l'homme et des peuples sur l'établissement d'une Cour africaine des droits de l'homme et des peuples (version anglaise). Projet préparé par la seconde rencontre des experts gouvernementaux sur l'établissement d'une Cour africaine des droits de l'homme et des peuples. 11-14 Avril 1997, Nouakchott, Mauritanie OAU/LEG/EXP/AFCHPR/PRO(2).

[15] ST Ebobrah 'Towards a positive application of complementarity in the African human rights system' (2011) 22 *European Journal of International Law* 671.

[16] Rudman (n 12 ci-dessus) 11.

de la complémentarité fût fondé sur des postulats de cohérence institutionnelle.[17]

L'intérêt comparatif du système européen nous permet de comprendre que consacrer théoriquement le principe de complémentarité ne suffit pas à résoudre les rapports entre les institutions. En Europe, le terme 'complémentarité' n'est pas expressément mentionné, il suffit cependant de peu d'imagination pour déceler que cet esprit de complémentarité inonde tous les textes relatifs aux institutions européennes aussi bien judiciaires que non ou quasi-judiciaires de protection ou de promotion des droits de l'homme. La Convention Européenne des droits de l'homme n'hésite pas ainsi à intégrer dans ses dispositions les conditions propices à l'existence d'un profond lien de complémentarité entre la Cour Européenne des droits de l'Homme et le Comité des Ministres.[18] Il en est ainsi également des rapports entre la Cour Européenne des droits de l'Homme et d'autres institutions et organes de surveillance des droits de l'homme.

Dans le système africain, le Protocole ne s'est pas aventuré à en dire plus sur la nature concrète de la relation entre la Cour et la Commission africaines. Il y a certes une idée qui sous-tend qu'un Protocole est plus habilité à poser des règles générales et donc n'a pas vocation à s'étendre en précision au point de priver les règlements intérieurs ou d'autres normes d'application de leur portée pratique. Il y a cependant, un seuil de précision ou de clarification textuelle qu'on est en droit d'attendre d'un Protocole surtout dans ce contexte spécifique où les risques d'enlisement ne sont pas moindres. Cette insuffisance textuelle a pour conséquence, l'instabilité normative de ce principe de complémentarité. Car le fait de s'en référer aux règlements intérieurs ne milite pas en faveur de l'efficacité du système africain des droits de l'homme. Il s'agit ici d'une esquive à peine voilée du Protocole. Ceci fait parfaitement écho aux propos du juge Fatsah Ouguergouz qui soutient que:[19]

> Les rédacteurs du Protocole auraient en conséquence été mieux avisés d'arbitrer eux-mêmes cette répartition des compétences en insérant des dispositions à cet effet dans le Protocole lui-même, amendant ainsi au besoin la Charte africaine, plutôt que d'en laisser le soin à deux organes juridiquement souverains.

On peut alors comprendre que certains auteurs tels Nsongurua Udombana s'en offusquent en déplorant les termes 'obscurs' des dispositions du Protocole relatives à la relation entre la Cour et la Commission africaines.[20] Le Protocole d'une manière générale a été très laconique sur de nombreuses questions liées à la répartition des tâches entre les deux entités.

[17] A Clapham 'On complementarity: human rights in the European legal orders' (2000) 21 *Human Rights Law Journal* 33.

[18] P-H Imbert 'Complementarity of mechanisms within the Council of Europe/ Perspectives of the Directorate of Human Rights' (2000) 21 *Human Rights Law Journal* 292.

[19] F Ouguergouz 'La Cour africaine des droits de l'homme et des peuples – gros plan sur le premier organe judiciare africain à vocation continental' (2006) 52 *Annuaire francais de droit international* 213 224.

[20] Udombana (n 4 ci-dessus) 97.

Malgré que ce Protocole définitif a brillé par son imprécision quant à la nature de l'exigence de complémentarité qui est censée régir les relations entre les deux institutions, il faut tout de même admettre que contrairement aux différents projets de Protocole, il a eu le mérite d'avoir au moins compris que la complémentarité méritait d'être précisée et davantage développée. Mais en laissant le soin de cette précision aux règlements intérieurs des deux institutions, les rédacteurs du Protocole semblent n'avoir pas fait le meilleur choix.

2.1.2 La rescousse relative des Règlements intérieurs

Les rédacteurs du Protocole ont essayé de contrebalancer les insuffisances textuelles du principe de complémentarité à travers le renvoi aux règlements intérieurs respectifs de la Commission africaine et de la Cour africaine. Aux termes de l'article 8 du Protocole, 'La Cour fixe dans son Règlement intérieur les conditions d'examen des requêtes dont elle est saisie en tenant compte de la complémentarité entre elle et la Commission africaine'. De même, l'article 33 du même Protocole dispose que: ' La Cour établit son Règlement intérieur et détermine sa propre procédure. La Cour consulte la Commission africaine chaque fois que de besoin'. Il découle de ces deux dispositions, une volonté sans équivoque des rédacteurs du Protocole de faire des règlements intérieurs la solution aux problèmes de mise en œuvre pratique de la complémentarité entre les deux institutions. L'option de laisser une certaine marge de manœuvre aux institutions elles-mêmes quant à leur relation, n'est pas en soi dépourvue de portée. Seulement, dans le contexte du système africain des droits de l'homme, cette exigence fût dès le départ faussée par le Protocole. Celui-ci devrait baliser le terrain ou au moins créer un contexte favorable à l'appropriation du principe de complémentarité qu'il a lui-même posé. La légitimité du Protocole à suivre cette voie est d'autant plus accrue qu'au-delà de la force normative dont elle entourerait la complémentarité entre les deux institutions, elle assurerait aussi sa praticabilité en réduisant profondément la zone d'incertitude des règlements intérieurs. Ainsi que le soutient Andreas O'Shea:[21]

> Where a matter is structural in nature and goes to the very heart of the rationale for the machinery, one would expect the matter to be clearly thought out and set out in the founding document.

C'est dans ce contexte que les deux institutions ont été appelées à harmoniser leurs règlements intérieurs. Le travail d'harmonisation desdits règlements intérieurs fût très tôt entrepris. Mais comme on pouvait s'y attendre, la composition des deux institutions pour l'arrangement et la mise à niveau de leurs règlements intérieurs respectifs n'a pas largement tenu la promesse des fleurs. Comme l'a très tôt signalé le juge Fatsah Ouguergouz:[22]

> La coopération espérée entre la Cour et la Commission risque d'être difficile en pratique. En effet, la Commission tient également son mandat d'un traité international - la Charte africaine - et il n'est pas exclu que ses membres n'acceptent

[21] O'Shea (n 9 ci-dessus) 296.

[22] Ouguergouz (n 19 ci-dessus) 224.

> pas facilement de consentir à des restrictions de leurs attributions en matière contentieuse.

L'espoir fût néanmoins maintenu sur les règlements intérieurs, augurant qu'ils iraient au-delà de la brièveté[23] du Protocole pour établir de manière concrète les conditions de mise en œuvre du principe de complémentarité.[24]

Textuellement, le principe fût effectivement consacré dans les règlements intérieurs des deux institutions[25] mais à des degrés différents. Ainsi, il sied de remarquer qu'au niveau du parallélisme des formes, règne un déséquilibre palpable du niveau de développement sur la question. Le Règlement intérieur de la Commission africaine semble être davantage porté sur la notion de 'complémentarité'.[26] Dès le début de sa partie consacrée aux 'Relations avec la Cour', il précise en se référant aux dispositions du Protocole et de la Charte africaine, que les relations entre les deux institutions sont fondées sur le principe de complémentarité. Il ne va pas cependant plus loin quant à sa définition. Le Règlement intérieur de la Cour africaine est quant à lui encore plus évasif sur ce principe de complémentarité laissant, semble-t-il, le soin au lecteur avisé de deviner que son article 29 n'est rien d'autre que le déploiement dudit principe. Il en découle, que des deux côtés, l'élucidation conceptuelle de la notion n'a pas été entreprise. On pourrait à leur décharge admettre que cette tâche revenait au Protocole qui a institué ce principe de complémentarité et qu'en conséquence ils leur revenaient d'en assurer la mise en œuvre. Seulement, ils sont héritiers de ce transfert de responsabilité que le Protocole par son caractère lacunaire a opéré. C'est ce que déplore à juste titre Solomon Ebobrah:[27]

> While it would be expected that the rules of procedures of the various institutions would be used to give more concrete meaning to the concept, this has not been the case. As this article will argue, the rules have not gone too far beyond the instruments in explaining how the concept is to be applied in practice.

Si les propos de l'auteur ne manquent pas de justesse, il faut quand même reconnaître que les règlements intérieurs ont beaucoup plus détaillé la nature et les aspects des relations entre les deux institutions. Cependant, compte tenu de la marge de manœuvre qui leur a été laissée par le Protocole, les règlements intérieurs ont adopté certaines dispositions dont l'utilité pour le principe de complémentarité peut être mise en doute. Il en est ainsi des règles applicables en matière de saisine de la Cour africaine par la Commission africaine. Une frange de la doctrine considère que des dispositions du Règlement intérieur de la Commission africaine traitant de cette saisine peuvent être à certains

[23] IA Elsheikh 'The future of relationship between the African Court and the African Commission' (2002) 2 *African Human Rights Law Journal* 254.

[24] Ebobrah (n 15 ci-dessus) 673.

[25] Article 29 du Règlement Intérieur de la Cour, article 114 et suivants du Règlement intérieur de la Commission africaine

[26] CA Odinkalu 'From architecture to geometry: the relationship between the African Commission on Human and Peoples' Rights and organs of the African Union' (2013) 35 *Human Rights Quarterly* 10.

[27] Ebobrah (n 15 ci-dessus) 665.

égards contre-productives pour l'éclosion prospère de ce principe.[28] A titre illustratif, la possibilité offerte à la Commission africaine par les dispositions de l'article 118 de son Règlement intérieur de saisir à n'importe quelle étape de la procédure la Cour africaine ne militerait pas en faveur d'un déploiement constructif des rapports de complémentarité qui sont censés relier les deux institutions.[29] Selon Annika Rudman, une telle démarche du Règlement intérieur n'exclurait pas la possibilité pour la Commission africaine de saisir la Cour africaine avant même l'examen de la recevabilité de la requête. Un tel cas de figure serait incompatible avec le principe de complémentarité qui suppose une gestion optimale du temps et des ressources matérielles qui font à l'évidence défaut au système africain de protection des droits de l'homme.[30]

Tous ces déboires normatifs du principe de complémentarité ont logiquement abouti à des difficultés dans sa mise en œuvre.

2.2 L'application problématique de la complémentarité

La consécration théorique du principe de complémentarité ne suffit pas à son application effective. Les insuffisances du Protocole et des règlements intérieurs ont influé négativement sur son application. Les difficultés d'application de la complémentarité sont aussi bien d'ordre fonctionnel qu'institutionnel.

2.2.1 Les vicissitudes de la complémentarité au plan fonctionnel

La principale raison d'être de la Cour africaine est de 'compléter' et 'renforcer' la mission de protection de la Commission. Cette idée d'associer à la Commission africaine une cour qui la renforce et la complète n'est pas en soi problématique, elle procède de l'efficacité d'ensemble du système africain des droits de l'homme. Le système américain tout comme autrefois le système européen pratique ce bicéphalisme organique. Seulement, cette option requiert une certaine ' ingénierie institutionnelle ' quant à la répartition des tâches entre les différents organes.

Lors de sa création en 1986, la Commission africaine été chargée d'un double mandat, celui de promouvoir les droits de l'homme et d'assurer leur protection sur le continent. Si au plan de la promotion, la Commission africaine peut se targuer d'avoir eu du mérite, on ne peut pas en dire autant de son office contentieux. Nombreux sont les

28 Rudman (n 12 ci-dessus) 6.
29 Article 118(4) du Règlement intérieur de la Commission africaine.
30 Rudman (n 12 ci-dessus) 5.

facteurs qui expliquent cette faiblesse de la Commission africaine à mener à bien cette mission.[31] Parmi les plus significatifs, figure au premier plan l'absence de force contraignante de ses recommandations.[32]

La mise sur pied de la Cour africaine n'a pourtant rien changé à l'architecture initiale du couple de missions assignées à la Commission africaine. Contrairement aux vœux de certains commentateurs, le mandat de protection de la Commission africaine n'a point disparu. Au contraire, il est réaffirmé aux termes de l'article 2 du Protocole. On peut légitimement s'interroger sur les vertus de maintenir une compétence contentieuse en vertu de son mandat de protection au profit de la Commission africaine alors même qu'un organe judicaire fût institué. Le principe de complémentarité suppose que l'harmonisation des activités d'un ensemble d'institutions poursuivant des objectifs communs passe par l'octroi d'un mandat donné à l'institution la plus compétente et la plus habilitée. Il s'agit ici, d'une exigence de répartition optimale des tâches. Pour ce qui est du système africain des droits de l'homme, compte tenu de l'expérience peu reluisante de la Commission africaine, il semble acquis, que le mandat de protection ne devrait pas être sa mission de prédilection. Ainsi que le soutient Andreas O'Shea la Commission africaine est un outil utile pour la promotion des droits de l'homme, mais un mécanisme largement inefficace pour leur protection.[33] Il aurait été ainsi souhaitable que le mandat de protection soit exclusivement dévolu à la Cour, tandis que celui de promotion laissé à part entière à la discrétion de la Commission africaine. Cette rationalité organisationnelle aurait constitué à coup sûr un facteur de performance des activités des deux institutions.

Le Protocole prévoit également la possibilité pour la Cour africaine 'de régler à l'amiable les cas qui lui sont soumis conformément aux dispositions de la Charte africaine'.[34] Cette option du système africain qui s'éloigne de la pratique américaine et européenne d'avant-fusion mettait la Cour africaine dans une situation pour le moins délicate. En effet, au-delà du fait d'accorder à une entité judicaire des compétences en matière de règlement à l'amiable, démarche qui foncièrement n'est pas dépourvue de rationalité, l'idée que les mêmes juges intervenant dans le processus du règlement amiable soient également compétents en matière contentieuse, soulève des questions.[35]

D'une manière générale, la complémentarité restera une entreprise vaine si les rôles, les mandats et les tâches ne sont pas clairement définis.[36] L'architecture actuelle de la répartition des mandats constitue un terrain propice à l'éclosion des chevauchements qui

31 Ebobrah (n 15 ci-dessus) 671.

32 F Viljoen 'A Human Rights Courts for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 11.

33 O'Shea (n 9 ci-dessus) 285.

34 Article 9 du Protocole.

35 Ebobrah (n 15 ci-dessus) 676.

36 Rudman (n 12 ci-dessus) 24.

handicaperont le système de manière globale. C'est sans doute fort de ce constat que Chidi Anselm Odinkalu soutient que:[37]

> Despite the requirement that the Court complement the Commission, there are still significant and potentially problematic overlaps in the scope of the subject matter jurisdiction of both the Commission and the Court.

Les risques de chevauchement entre la Cour et la Commission africaines dans la mise en œuvre de leurs missions respectives ne sont en effet pas moindres. Le domaine le plus susceptible de donner lieu à ces enchevêtrements fonctionnels est sans doute celui relatif à la compétence consultative reconnue aux deux institutions. Aux termes de l'article 45(3) de la Charte africaine, la Commission africaine a pour mission 'd'Interpréter toute disposition de la présente Charte à la demande d'un Etat partie, d'une Institution de l'OUA ou d'une Organisation africaine reconnue par l'OUA'. Or, la Cour africaine *à l'imag*e de ses homologues américaine et européenne, fût elle aussi pourvue de véritables pouvoirs en matière consultative. Le mode d'expression principal de cette compétence consultative prend la forme d'avis consultatifs tel qu'il est d'usage. Quant à la Commission africaine, la Charte africaine ne donne pas de précisions sur la forme que doit revêtir sa compétence en matière consultative. S'il est vrai qu'il ne saurait à l'instar de la Cour africaine s'agir d'avis consultatifs,[38] il n'en demeure pas moins que la Commission africaine *fût dotée* de réels pouvoirs en matière consultative.[39] Il découle cependant des dispositions du Protocole que le champ consultatif de la Cour africaine est plus large que celui de la Commission africaine. Cela ne réduit en rien les risques de chevauchements entre la Cour et la Commission africaines. Ainsi que le soutiennent Andreas Zimmermann et Jelena Bäumler, malgré la différence d'approches méthodiques entre la Cour et la Commission africaines, il existe de nombreux chevauchements dans leurs champs d'activité matériels.[40] Ainsi, en dépit des moyens différents par lesquels elles s'y prennent, toutes deux peuvent interpréter la Charte africaine. Cette coïncidence de compétences au

37 Odinkalu (n 26 ci-dessus) 857.

38 Si comme le signalent Patrick Daillier et Alain Pellet, en matière d'actes des organisations internationales, 'l'incertitude terminologique et l'ambiguïté textuelle sont la règle', il est tout de même acquis en droit international, que les avis consultatifs ne peuvent émaner formellement que d'un organe juridictionnel. C'est ainsi que Jean Salmon en donne la définition suivante: 'opinion émise par une juridiction internationale à la demande d'un organe qualifié à cet effet pour éclairer cet organe sur une question juridique'. La Commission africaine n'étant pas une juridiction au sens propre, on ne saurait attribuer le qualificatif d'avis aux actes résultant de sa compétence consultative. Ce qui est valable aussi bien dans le système américain, européen qu'onusien. Voir en ce sens, J Salmon *Dictionnaire de droit international public* (2001) 116; N Quoc Dinh & autres, *Droit international public* (2002) 367. Voir aussi, A Ondoua D Szymczak *La fonction consultative des juridictions internationales* (2009); MC Runavot JM Sorel *La compétence consultative des juridictions internationales: reflet des vicissitudes de la fonction judiciaire internationale* (2010).

39 F Quilleré-Majzoub 'L'option juridictionnelle de la protection des droits de l'homme en Afrique' (2008) 73 *Revue trimestrielle des droits de l'homme* 752.

40 A Zimmermann & J Bäumler 'Current challenges facing the African Court on Human and Peoples' Rights' (2010) 7 *KAS International Reports* 50.

sujet de la Charte africaine serait de nature *à nuire à l'efficacité du mécanisme de la Charte africaine*[41] car, le scénario de la divergence de solutions entre la Commission africaine et la Cour africaine pourrait à tout moment se réaliser.[42]

A côté de ces vicissitudes fonctionnelles du principe de complémentarité, règnent également des embûches au plan institutionnel ou relationnel.

2.2.2 Les embûches de la complémentarité au plan relationnel

Le principe de la complémentarité au-delà de ses objectifs d'efficacité fonctionnelle, se voulait dès le départ un bouclier aux diverses hypothèses de cohabitation litigieuse entre les deux institutions. Cette exigence de complémentarité ainsi définie *était la manifestation d'une* volonté des rédacteurs du Protocole de dissiper les inquiétudes qui pouvaient résulter de la 'bicéphalisation' du système africain de protection des droits de l'homme. Des interrogations ont très tôt émergé sur la tension dont la future coexistence des deux entités pouvait être l'objet.

Au premier rang des interrogations récurrentes figurait celle de la hiérarchie. Compte tenu de sa mission de 'compléter' et de 'renforcer' le mandat de la Commission africaine, la Cour africaine ne serait-elle pas de facto assignée au rang d'institution secondaire et la Commission *à celui de principale ? L'idée ici* était de soutenir que l'institution qui vient compléter n'existe que par celle qui l'a précédée. En conséquence de quoi, elle ne saurait hiérarchiquement que lui être subsidiaire. Cette théorie n'a pas prospéré au sein de la doctrine. Et si la majorité des observateurs ont retenu une horizontalité des rapports entre la Cour et la Commission africaines, certains ont *néanmoins* vu dans la nouvelle architecture, une part de verticalité dans les rapports entre les deux institutions.

Ainsi, des observateurs ont pu estimer tels Sitsofé Kowouvih qu'un lien 'd'accessoire' pouvait lier la Cour à la Commission africaines. En admettant que 'compléter et renforcer ne veut pas toujours dire devenir 'l'accessoire', il infère le caractère accessoire de la Cour africaine de la 'prépondérance de la compétence non juridictionnelle'[43] dans le système africain de protection des droits de l'homme. Le fait que le contentieux 'judiciaire' occupe une place dérisoire dans le système africain des droits de l'homme, traduirait une plus grande considération accordée à la principale entité dotée de compétences non juridictionnelles en l'occurrence, la Commission africaine; et ce

41 Odinkalu (n 26 ci-dessus) 858.

42 Zimmermann & Bäumler (n 40 ci-dessus) 50.

43 S Kowouvih 'La Cour africaine des droits de l'homme et des peuples: une rectification institutionnelle du concept de "spécificité africaine" en matière des droits de l'homme' (2004) 59 *Revue trimestrielle des droits de l'homme* 767.

indépendamment de la part de fonction non contentieuse de la Cour africaine.[44]

Parallèlement, sur le plan normatif, la Cour africaine pourrait se prévaloir d'une certaine supériorité sur la Commission africaine au regard de la portée de ses décisions. C'est sans doute la raison pour laquelle Solomon Ebobrah rappelait que parmi les juristes, la tendance naturelle est de considérer que la Cour africaine est supérieure à toute autre institution.[45] Car, en définitive, seules les décisions de la Cour africaine sont revêtues d'une force contraignante.[46] Le statut d'entité quasi judiciaire de la Commission africaine sur ce chapitre semble la disqualifier en termes d'autorité. D'ailleurs, certains ont même pu voir dans la Cour africaine, une sorte de juridiction de degré supérieur par rapport à la Commission africaine.[47] Ce serait pourtant, une démarche hâtive que de considérer que les décisions de la Commission africaine sont dépourvues d'office de l'autorité de la chose jugée. Si pour certains, 'les décisions de la Commission africaine ne sont pas obligatoires en ce qu'elles n'ont pas l'autorité de la chose jugée',[48] il n'en demeure pas moins que le sujet reste à débat. Une partie de la doctrine se fondant sur un faisceau d'indices considère en effet qu'en droit international, les décisions d'une entité telle que la Commission africaine ne peuvent qu'être dotées d'une force obligatoire.[49] Qu'elles prennent le qualificatif 'd'autorité de la chose constatée',[50] 'd'autorité de la chose interprétée',[51] ou même 'd'autorité extraordinaire',[52] les décisions de la Commission africaine revêtent indiscutablement une charge juridique dont l'origine organique ne saurait anéantir la portée contraignante.[53] Néanmoins, même si l'autorité de la chose jugée en droit international reste elle-même, 'un principe en quête d'identité',[54] il sied de reconnaître que la force contraignante qui pourrait résulter du *res judicata* des décisions de la Commission africaine reste déductive et moins acquise que celle d'une juridiction traditionnelle.[55]

44 Kowouvih (n 43 ci-dessus) 770.

45 Ebobrah (n 15 ci-dessus) 680.

46 SN Tall *Droit des organisations internationales africaines* (2015) 383.

47 Zimmermann & Bäumler (n 40 ci-dessus) 50.

48 M Mubiala *Le système africaine de protection des droits de l'homme* (2005) 87.

49 Voir C Santulli *Droit du contentieux international* (2015); MG Schmidt 'Portée et suivi des constatations du Comité des droits de l'homme de l'ONU' in F Sudre *La protection des droits de l'homme par le Comité des droits de l'homme des nations unies* (1995) 157; R Illa Maikassoua *La Commission africaine des droits de l'homme et des peuples* (2013).

50 F Sudre *Droit européen et international des droits de l'homme* (2012) 654.

51 Illa Maikassoua (n 49 ci-dessus) 67.

52 LN Brant *L'autorité de la chose jugée en droit international public* (2003) 341.

53 Se fondant, par exemple sur la règle du *pacta sund servanda,* Illa Maikassoua soutient que les États sont liés par les décisions de la Commission africaine du fait de la ratification par eux de la Charte reconnaissant la compétence de la Commission africaine. Voir Illa Maikassoua précité.

54 Brant (n 52 ci-dessus) 11.

55 H Gros-Espiell 'La Cour et la Commission interaméricaines des droits de l'homme. Situation actuelle et perspectives d'avenir' in *Mélanges en hommage à Louis Edmond Pettiti* (1998) 437.

Au-delà de ces supputations textuelles sur les liens de hiérarchie entre les deux institutions, la coexistence concrète de la Cour et de la Commission africaines a révélé parfois l'existence d'une certaine dose de tension.

Déjà à la création de la Cour africaine, d'aucuns ont pu déceler une crainte de la Commission africaine quant à une potentielle hégémonie de sa cadette jeune et forte. Cette crainte s'est manifestée par la volonté de la Commission africaine de clarifier sa position de supériorité vis-à-vis de la Cour. La lecture du Règlement intérieur intérimaire de 2009 de la Commission africaine témoigne de cette tendance. Dans le cadre de la garantie de l'exécution de ses décisions,[56] la Commission africaine prévoyait aux termes de l'article 119 de ce règlement intérimaire que:

> Lorsque la Commission a rendu une décision contre un État partie ayant ratifié le Protocole sur la Cour dans une communication soumise à la Commission conformément à l'article 48, 49 ou 55 de la Charte, et que la Commission estime que l'État n'a pas suivi ou n'est pas disposé à suivre ses recommandations, pendant la période visée à l'article 115, elle réfère l'affaire à la Cour et informe les parties en conséquence.

De même, 'lorsque la Commission décide de référer une décision à la Cour conformément à l'article 119(1), la Cour doit adopter les mesures nécessaires pour la mise en œuvre de la décision'.[57] Les termes de cet article semblaient offrir à la Commission africaine un pouvoir d'injonction[58] sur la Cour africaine et donc une position logique de supériorité. La réaction de la Cour africaine ne s'est pas fait attendre et lors de la réunion conjointe des deux organes de 2009 à Arusha, elle a veillé à signaler le caractère autoritaire de cette disposition qui tendait à faire d'elle une 'subordonnée' de la Commission africaine car se trouvant soumise à des obligations.

La Cour africaine par le biais de son Règlement intérieur laisse également penser qu'elle se considère aussi comme 'la partie principale'[59] dans la relation entre les deux institutions. Le droit que la Cour africaine s'arroge aux termes de l'article 29(1) d'entendre les Commissaires instillerait l'existence d'une hiérarchie en sa faveur. Il en est de même de la liberté dont elle dispose de fixer de manière unilatérale, les délais dans lesquels elle désire recevoir l'avis de la Commission africaine en matière de recevabilité des requêtes.[60]

En définitive, si la question de la hiérarchie a pu germer au début de la relation entre la Cour et la Commission africaines, il faut admettre qu'aujourd'hui, elle n'est plus une question prégnante et tel que le fait

56 G Baricaco 'La mise en œuvre des décisions de la Commission africaine des droits de l'Homme et des peuples par les autorités nationales' in J-F Flauss & E Lambert-Abdelgawad (eds) *L'application nationale de la Charte africaine des droits de l'Homme et des peuples* (2004) 22.

57 Article 119(2) du Règlement intérieur intérimaire.

58 R Illa Maikassoua *La commission africaine des droits de l'homme et des peuples; un organe de contrôle au service de la Charte africaine* (2013) 168.

59 Ebobrah (n 15 ci-dessus) 680.

60 Article 29(2) du Règlement intérieur de la Cour

valoir Solomon Ebobrah, il n'y a pas de justification valable pour imposer une hiérarchie dans cette relation de complémentarité.[61] En réalité, il ne saurait y avoir de hiérarchie entre la Cour et la Commission africaines en l'état actuel de l'arsenal juridique qui les régit. Ni le droit positif de l'Union africaine, ni les principes du droit international général ne militent en faveur de la verticalité de leur rapport.[62] La hiérarchie suppose en effet l'existence d'un lien de subordination qui se traduit par l'utilisation 'd'instruments de direction et de correction'[63] d'une entité sur une autre. En l'absence de tels moyens, aucune d'elles ne pourrait se prévaloir d'une quelconque supériorité. Elles restent des entités distinctes et autonomes instituées par des textes différents et dont la saine collaboration devrait être la marque la plus expressive de leurs indépendances respectives.

Au-delà des tensions qui peuvent découler de la coexistence des deux entités, des inquiétudes demeurent quant à la mise en œuvre de leur relation. On peut noter ici la faculté que la Commission africaine tient de l'article 118(4) de son Règlement intérieur de saisir la Cour africaine à toute étape de l'examen d'une communication[64] quand elle le juge nécessaire. Une telle liberté pourrait avoir pour conséquence de frapper la procédure devant la Cour africaine d'une certaine imprévisibilité.[65]

Les obstacles auxquels est confrontée la relation entre la Cour et la Commission africaines ne sont en réalité que la manifestation d'un apprentissage pratique du principe de la complémentarité.

3 LA CONSTRUCTION D'UNE RELATION FONDÉE SUR UN PRINCIPE DE COMPLÉMENTARITÉ PROGRESSIF ET APPRENANT

Pour nombreuses et importantes que puissent être les difficultés liées à la coexistence des deux institutions, la relation entre la Cour et la Commission africaines ne doit pas être confinée dans ce décor exclusif de tumultes et de tensions. Une analyse approfondie de leur relation indique que la complémentarité entre la Cour et la Commission africaines est en réalité évolutive ou en ' mouvement ' pour reprendre les termes de Andrew Clapham.[66] Le principe de la complémentarité se développe en même temps qu'il s'apprend. C'est dans cette logique que la collaboration entre la Cour et la Commission africaines s'épanouit et

61 Ebobrah (n 15 ci-dessus) 681.

62 RJ Dupuys 'Le droit des relations entre Organisations internationales' (1960) in *Recueil des Cours de droit international de la Haye* (1960) 529.

63 C Chauvet *Le pouvoir hiérarchique* (2013) 14.

64 N Eba Nguema 'Recevabilité des communications par la Commission africaine des droits de l'homme et des peuples' (2014) 5 *La revue des droits de l'homme* disponible à l'adresse http://revdh.revues.org/803 (consulté le 10 juin 2017)

65 Odinkalu (n 26 ci-dessus) 859.

66 Clapham (n 17 ci-dessus) 313.

s'améliore en fonction du temps et de l'expérience. Aujourd'hui, la complémentarité relationnelle entre les deux entités est indéniablement positive et productive. Ces progrès ont abouti à des résultats significatifs et encourageants pour le système africain des droits de l'homme. Cette complémentarité entre la Cour et la Commission africaines est aujourd'hui un socle de l'efficacité du système dans son ensemble. Il lui reste cependant encore de nombreux défis à relever.[67] L'avenir de leur relation dépend de la prise en considération de plusieurs paramètres. La réussite de la complémentarité est d'abord principalement liée à l'efficacité propre de chacune des deux institutions. De même, une mise en perspective globale de la complémentarité s'impose, car elle est en définitive tributaire d'un système global dont elle n'est qu'un simple maillon. Le succès de la complémentarité entre la Cour et la Commission africaines dépendra donc aussi en partie de la santé globale du système africain de protection des droits de l'homme.[68]

Nous aborderons successivement, le développement empirique de la complémentarité et son avenir dans le système africain des droits de l'homme.

3.1 Le développement empirique de la complémentarité

Ce développement s'est traduit dans la collaboration productive entre la Cour et la Commission africaines mais aussi dans les nombreux succès communément acquis par les deux entités en termes de protection des droits de l'homme.

3.1.1 L'essor d'une collaboration productive

Conscientes de ce que la distance peut constituer dans bien des cas, un danger pour les couples, elles décidèrent d'abolir l'éloignement. Cette démarche prit la forme de réunions conjointes et de séances de consultation.[69] C'est ainsi qu'on peut lire aux termes de l'article 115(1) du Règlement intérieur de la Commission africaine que celle-ci: 'se réunit avec la Cour au moins une fois par an et, en cas de besoin, s'assure des bonnes relations de travail qui existent entre les deux institutions'. De l'avis de la Commissaire Sylvie Kayitesi Zainabo, ces consultations inter-organes ont pour objectif de:[70]

> Créer une plateforme destinée à améliorer la coordination et les consultations sur des affaires communes ayant trait aux mandats de ces institutions, de renforcer la

[67] G Niyungeko 'La Cour africaine des droits de l'homme et des peuples: défis et perspectives' (2009) 29 *Revue trimestrielle des droits de l'homme* 735.

[68] M Chemillier-Gendreau 'L'Afrique et les conditions générales de réalisation des droits de l'homme' (1999) 11 *Revue africaine de droit international et comparé* 1-13.

[69] Article 28(5) du Règlement intérieur de la Commission africaine aux termes duquel, 'La Commission peut tenir des sessions conjointes en consultation avec la Cour africaine des droits de l'homme et des peuples'.

> visibilité des organes et d'articuler leurs intérêts et préoccupations aux fins de leur permettre de remplir leur mission respective.

Par exemple, à la fin 2015, cette institutionnalisation du principe de la complémentarité avait déjà donné lieu à six réunions des bureaux de la Cour et de la Commission africaines fin 2015. De même, entre 2012 et 2015, les membres de la Commission africaine et les juges de la Cour africaine ont organisé quatre rencontres.[71] Ces différentes rencontres constituent un cadre pratique de discussion sur les questions d'intérêts communs des deux institutions. A titre illustratif, la huitième réunion conjointe des bureaux des deux entités eut pour objet de discuter ' du Projet 2016 et du Fonds d'aide juridique pour les Organes de l'Union africaine dotés d'un mandat des droits de l'homme '.[72] En s'asseyant autour d'une table pour penser leur relation, la Cour et la Commission africaines ont opté pour une approche réaliste des exigences qu'impliquait le principe de complémentarité.

Les premières consultations datent de 2009, et avaient principalement pour objectif, l'harmonisation des règlements intérieurs des deux entités. Les rencontres qui ont eu lieu du 27 au 29 avril 2010 à Arusha en Tanzanie, ont abouti aux premières conclusions sur les éléments susceptibles d'être l'objet d'arrangement.

S'il est vrai que les Règlements intérieurs n'ont pas réglé toutes les questions liées à la complémentarité, il faut tout de même admettre qu'aujourd'hui, les apports de l'harmonisation de ces règlements intérieurs sont significatifs. Ils ont en effet prouvé qu'ils peuvent constituer un cadre intéressant de réglementation des rapports entre les deux institutions.[73]

Des garde-fous ont été ainsi mis en place pour prévenir les chevauchements qui menacent la coexistence de la Cour et de la Commission africaines. C'est dans cette perspective qu'en matière d'avis consultatif, pour prévenir des enchevêtrements qui pourraient nuire à l'efficacité du système, l'article 116 du Règlement intérieur de la

[70] S Kayitesi Zainabo, Rapport d'activités d'intersession, Avril 2013, p.3. Disponible à l'adresse https://www.google.sn/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjOi7Xz9_LUAhWsDMAKHTCYBgEQFgglMAA&url=http%3A%2F%2Fwww.achpr.org%2Ffr%2Fsessions%2F53rd%2Fintersession-activity-reports%2Fzainabo-sylvie-kayitesi%2F&usg=AFQjCNE_udHdvlgEXsUJfki_Z8UmGx5_Vg Consulté le 10 octobre 2017. Ainsi, qu'il découle, dudit rapport, à l'issue de cette réunion, les deux institutions ont pu prendre conscience des avancées et des progrès dans leurs relations et leurs missions communes.

[71] R Alapini Gansou 'Aperçu des mécanismes régionaux et sous régionaux ; accès et relations entre les cours et les commissions; coopération existante avec d'autres mécanismes' Communication présentée dans le cadre de l'Atelier des cours/ Commissions régionale et sous régionales des droits de l'homme, Strasbourg Octobre 2015, disponible à l'adresse https://www.google.sn/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwj5i6uB-fLUAhUBDMAKHbFzAI8QFggIMAA&url=http%3A%2F%2Fwww.ohchr.org%2FDocuments%2FCountries%2FNHRI%2FStrasbourgPresentations%2FMs._Reine_Alapini-Gansou_session1.docx&usg=AFQjCNEW5qWvt8WDaGeHU6BNjwQq78WYvA (consulté le 10 octobre 2017).

[72] 40ème Rapport d'activité de la Commission Africaine disponible à l'adresse: http://www.achpr.org/files/activity-reports/40/actrep40_2016_fre.pdf (consulté le 10 octobre 2017).

[73] Amnesty international *African Court on Human and Peoples' Rights: an opportunity to strengthen human rights protection in Africa* (2002) 18.

Commission africaine lui impose l'obligation d'information immédiate de la Cour africaine en cas de demande d'interprétation de la Charte africaine. Elle s'engage également à transmettre à la Cour africaine des interprétations qu'elle serait amenée à faire de la Charte africaine. De la même manière, elle peut demander à être entendue par la Cour africaine après requête d'un avis consultatif de cette dernière.[74]

Au-delà de la question des avis consultatifs, les règlements intérieurs se sont évertués à combler le vide du Protocole sur certains aspects des relations entre les deux institutions.[75] Il en est ainsi des conditions de saisine de la Cour africaine par la Commission africaine. Face à l'imprécision du Protocole, le Règlement intérieur de la Commission africaine est intervenue pour préciser les modalités de cette saisine. L'article 118 instruit ainsi le lecteur que la saisine de la Cour africaine par la Commission africaine ne peut intervenir que dans un certain nombre de situations précises. Il s'agit brièvement des cas où un Etat ne se conforme pas ou est peu disposé à se conformer aux recommandations de la Commission africaine, en cas de non application par un Etat partie, des mesures conservatoires demandées par la Commission africaine et enfin dans des situations de violations graves ou massives des droits de l'homme.

De la même manière les règlements intérieurs ont fait montre d'un certain réalisme là où le Protocole a pu parfois manquer de conséquence. Il en est ainsi de la compétence accordée à la Cour africaine en matière de règlement à l'amiable des litiges. Face à cette situation, la Cour prenant elle-même acte du fait que le règlement à l'amiable s'éloigne de son panthéon familier, a dans son Règlement intérieur laissé entrevoir sa volonté de confirmer la prééminence de la fonction contentieuse dans le cercle de ses attributs, évitant ainsi tout amalgame. C'est ainsi qu'aux termes de l'article 57(4) dudit texte, ' La Cour peut, eu égard aux responsabilités qui lui incombent aux termes du Protocole, décider de poursuivre l'examen de l'affaire nonobstant la notification du règlement amiable '.

Cette collaboration de la Cour et de la Commission africaines dans l'harmonisation de leurs Règlements intérieurs est assurément à l'origine des succès considérables et encourageants notés dans la protection des droits de l'homme.

3.1.2 Des succès significatifs

Le pari de la consécration du principe de complémentarité était d'en finir avec l'atonie du système et de renouer résolument avec l'efficacité et l'efficience pour une plus grande crédibilité. Ainsi que le soutient Dan Juma: 'l'objectif principal de la complémentarité est fonctionnel, son but consiste à améliorer l'efficacité et l'efficience du système'.[76] Aujourd'hui, on ne saurait dire que l'objectif ait été définitivement

74 Article 117 du Règlement intérieur de la Commission africaine

75 Juma (n 8 ci-dessus) 350.

76 D Juma 'Complémentarité entre la Commission et la Cour africaines' in *Guide de complémentarité dans le système africain des droits de l'homme* (2014) 15.

atteint. En revanche, de remarquables progrès ont été faits et témoignent du caractère productif de la relation entre la Cour et la Commission africaines. Ces progrès sont palpables surtout au niveau de leur mandat de protection.

Le mandat de protection des droits de l'homme a assurément enregistré l'une des meilleures avancées et fût l'un des plus grands bénéficiaires de la coopération. La complémentarité entre la Cour et la Commission africaines a déjà abouti en matière de protection des droits de l'homme, à des cas concrets. Il en est ainsi de la compétence de saisine de la Cour africaine par la Commission africaine que cette dernière tire de l'article 5 du Protocole. La Commission africaine fût ainsi partie devant la Cour africaine dans déjà deux affaires finalisées. La première est l'affaire Commission africaine c. Grande Jamarihiya Arabe Libyenne Populaire et Socialiste.[77] Dans ce litige, la Commission africaine par une requête datée du 3 mars 2011 a conformément à l'article 118(3) de son Règlement intérieur intenté une action contre la Grande Jamarihiya Arabe Libyenne Populaire et Socialiste alléguant des ' violations graves et massives des droits de l'homme '. Indépendamment de l'issue ' infructueuse ' de cette procédure, la Commission africaine à travers cette requête concrétisait ainsi véritablement cet aspect des relations complémentaires entre elle et la Cour africaine.

La seconde affaire à laquelle la Commission africaine fût partie est encore plus symptomatique de l'application positive de la complémentarité. Il s'agit de l'affaire Commission africaine c. Libye. A l'occasion de ce contentieux, la Commission africaine par une requête en date du 28 février 2013 a introduit un recours contre l'Etat libyen au nom de Monsieur Saïf Al-lslam Kadhafi alléguant 'la violation des droits' de ce denier par la Libye. Cette affaire qui a abouti à la condamnation de l'Etat Libyen glorifie le principe de complémentarité à deux titres. Il s'agit d'abord, du simple constat de l'effectivité de la relation constructive entre les deux institutions à travers l'utilisation par la Commission africaine de son droit de saisine. La complémentarité est par ailleurs révélée en raison de l'origine individuelle de la saisine effectuée par la Commission africaine. Cette requête est dès lors, le signe non seulement de la vitalité du principe de complémentarité, mais aussi la preuve de la rationalité et de l'applicabilité de la parade à la limitation du droit d'accès direct des individus à la Cour africaine.[78] La même portée découle de la décision de la Cour africaine en date du 26 Mai 2017, *Commission africaine c* République du Kenya.[79]

De la même manière, la Cour africaine, en vertu de l'article 6(3) du Protocole et de l'article 29(3) de son Règlement intérieur, a déjà à

77 Requête 004-2011 *Commission africaine c Grande Jamarihiya Arabe Libyenne Populaire et Socialiste* (Affaire relative aux violations massives des droits de l'homme commises durant la révolution libyenne).

78 MF Diop' Plaidoyer pour l'accès direct des individus à la Cour africaine des droits de l'homme et des peuples et à la future Cour africaine de justice, des droits de l'homme et des peuples' (2016) 2 *Revue du droit public* 653.

79 *Commission africaine c Libye*, Requête 004-2011.

plusieurs occasions renvoyé des affaires devant la Commission africaine. Il en est ainsi de l'affaire *Soufiane ABABOU c République Algérienne Démocratique et Populaire*.[80] Dans cette affaire, la Cour africaine après le constat de son incompétence pour les motifs prévus à l'article 34(6) du Protocole relatif à l'exigence de la déclaration préalable des Etats pour les candidatures individuelles considère néanmoins: 'qu'au vu des allégations contenues dans la requête, il serait approprié de renvoyer l'affaire à la Commission africaine'. La Cour africaine a abouti aux mêmes conclusions dans plusieurs autres affaires.[81] Par une telle démarche de renvoi spontané de certaines affaires à l'égard desquelles elle se juge incompétente, la Cour africaine paraît craindre un verrouillage des voies de recours au préjudice des requérants.[82] Malgré les critiques dont elle peut faire l'objet,[83] il demeure qu'elle est une preuve de la confiance de la Cour africaine envers la Commission africaine en tant que mécanisme de soutien et de renfort.

En matière d'avis consultatifs, tout semble indiquer le succès de l'harmonisation des règlements intérieurs des deux institutions. En effet, la crainte d'enchevêtrement ou de divergences liée à la compétence concourante de la Cour et de la Commission africaines en matière consultative est restée à l'état hypothétique. La Cour africaine s'est accommodée de sa compétence consultative en veillant au respect du principe de la complémentarité. Notamment à travers le respect des articles 68(3) de son Règlement intérieur et 4(1) du Protocole qui lui défendent d'intervenir sur des questions dont l'objet se rapporte à une affaire pendante devant la Commission africaine. Elle a, à ce jour, fait preuve d'une application stricte de ce précepte. C'est le cas entre autres dans la Requête 1/2012 *Socio-Economic Rights and Accountability Project* (SERAP) où la Cour précise que:

> Par lettre datée du 10 juin 2013, le Greffier a demandé à la Commission si l'objet de la requête se rapportait à une affaire pendante devant elle. Par lettre datée du 25 juin 2013, la Secrétaire exécutive de la Commission a confirmé que l'objet de la requête ne se rapporte à aucune affaire pendante devant la Commission.

Le recours par la Cour africaine à la jurisprudence de la Commission africaine constitue également une des marques les plus significatives de la confiance entre les deux entités. La Haute juridiction n'hésite pas à se fonder sur la jurisprudence de la Commission africaine pour appuyer ses analyses et apporter ses solutions. C'est ainsi qu'en matière de limitation des droits pour intérêt légitime, la Cour africaine convoque spontanément les Communications[84] de la Commission africaine dans l'affaire 9-11/2011 *Mtikila c République-Unie de Tanzanie*. La Cour

[80] *Soufiane Abadou c Algérie*, Requête 2/2011.

[81] *Alexandre c Cameroun et la République fédérale du Nigeria*, Requête 8/2011; *Association des Juristes d'Afrique pour la Bonne Gouvernance c République de la Côte d'ivoire*, Requête 6/2011 et *Daniel Amare et Mulugeta Amare c République du Mozambique et Mozambican Airlines*, Requête 5/2011.

[82] Odinkalu (n 26 ci-dessus) 859.

[83] Voir l'Opinion dissidente du Juge Fatsah Ouguergouz sur la Requête 008-2011 *Alexandre c République du Cameroun et la Nigéria*.

[84] *Media Rights Agenda et autres c Nigeria,* Communications 105/1993, 128/1994, 130/1994 et 152/1996 en jonction; *Prince c Afrique du Sud*, Communication 255/2002.

africaine se fonde sur la technique de mesure de la proportionnalité utilisée par la Commission africaine pour 'évaluer l'impact, la nature et la portée de la limitation par rapport à l'intérêt légitime de l'État à certaines fins'.[85] Cette démarche constitue assurément un facteur de développement et de densification du droit africain des droits de l'homme.

Sur la question de la hiérarchie quoi de mieux qu'une solution pourvue de l'autorité de la chose jugée pour clore définitivement les débats et les inquiétudes? C'est l'idée que semble avoir eu la Cour africaine quand, au hasard d'une requête, elle a saisi l'occasion de donner un développement pédagogique du principe de la complémentarité. La Cour africaine conclut ainsi au terme de l'affaire *Falana c Commission Africaine*:[86]

> La relation entre la Cour et le Défendeur [La Commission africaine] est fondée sur la complémentarité. En conséquence, la Cour et le Défendeur sont des institutions partenaires autonomes mais qui œuvrent de concert pour le renforcement de leur partenariat en vue de protéger les droits de l'homme sur tout le continent. Aucune de ces deux institutions n'a le pouvoir d'obliger l'autre à prendre une mesure quelconque.

Tout semble être dit à l'issue de cette conclusion. Dans cette affaire pour le moins surréaliste, la Cour africaine paraît avoir mis de côté un pur juridisme pour trancher judiciairement une fois pour de bon, la question de sa relation avec la Commission africaine. Le requérant sollicitait en réalité que la Cour africaine enjoigne la Commission africaine de la saisir d'une communication. Cette requête dont l'issue naturelle devrait être un rejet administratif pur et simple,[87] compte tenu de l'incompétence manifeste de la Cour africaine a pourtant fait l'objet d'un traitement judiciaire. Au-delà des remarques de pur juridisme,[88] cette décision paraît importante au regard de ses conclusions. On s'instruit à sa lecture, que la Cour africaine non seulement réaffirme la complémentarité comme principe directeur de ses relations avec la Commission africaine, mais énumère également les conséquences qui y sont attachées. La complémentarité exclurait ainsi tout rapport de hiérarchie étant donné qu'elle implique 'l'autonomie' des deux institutions, 'l'absence de pouvoir d'injonction' réciproque et la nécessité d'un ' partenariat renforcé'.

La collaboration des deux institutions a également donné naissance à des projets communs. Il en est ainsi du projet relatif à l'établissement

85 *Mtikila c Tanzanie,* Affaire 9/2011-2011.

86 *Falana c Commission africaine*, Requête 19/2015.

87 Voir Opinion individuelle du Juge Ouguergouz sur l'affaire *Falana c Commission africaine*, Requête 19/2015.

88 Plutôt qu'une analyse strictement positiviste de cette décision, un regard métajuridique ou téléologique mérite d'y être jeté. L'option prise par la Cour africaine de statuer judiciairement sur ce litige doit être considérée moins comme une prise de liberté avec les règles élémentaires de procédure que comme la manifestation d'une volonté de saisir l'occasion de trancher sur une question intimement liée à la vie des deux institutions.

d'un institut panafricain des droits de l'homme, de même que celui relatif aux publications conjointes.

Le destin de la complémentarité entre la Cour et la Commission africaines est intimement lié au système africain des droits de l'homme dans son ensemble.[89] Le succès de la complémentarité est assurément gage de l'efficacité du système qui lui-même conditionne le succès de la complémentarité.

3.2 Vers un système plus efficace fondé sur la complémentarité

L'efficacité commune ou binaire de la relation entre la Cour et la Commission africaines à travers le principe de la complémentarité suppose préalablement, l'efficacité propre ou singulière de chacune des deux institutions, mais aussi celle du système dans sa globalité.

3.2.1 L'efficacité singulière: clef de l'efficacité binaire

La complémentarité entre la Cour et la Commission africaines n'abolit nullement leurs singularités respectives. Loin de là, la gestion efficace de leurs autonomies propres constitue le préalable à l'éclosion d'une véritable culture de la complémentarité. A cet effet, les deux institutions doivent pouvoir juguler les maux qui gangrènent leurs fonctionnements spécifiques.

La Commission africaine depuis sa création est confrontée à un certain nombre de handicaps qui de l'avis des commentateurs constituent un frein dirimant à son efficience.[90] Au nombre de ceux-ci, on ne saurait faire l'impasse sur la question de la dépendance de la Commission africaine vis-à-vis de certaines institutions. Il en est ainsi, du joug exercé par la Conférence des chefs d'Etat et de gouvernement de l'Union africaine. Cette influence se situe à tous les niveaux de son fonctionnement.[91] Que dire aussi de son pouvoir discrétionnaire quant au sort réservé aux rapports de la Commission africaine?[92] Cette procédure qui permet aux Etats[93] d'être en définitive juges et parties

89 S Kaba *L'avenir des droits de l'homme en Afrique à l'aube du XXIe siècle* (1996) 36.

90 N Kabeya Ilunga, De L'OUA à l'Union Africaine: évolution, limites et défis de la protection des droits de l'homme en Afrique' (non publié).

91 N Luaba Lumu 'Le système africain de protection et de promotion des droits de l'homme' in *Droits de l'homme et droit international humanitaire* (1999) 124.

92 Article 33 de la Charte.

93 Chemillier-Gendreau (n 68 ci-dessus) 8.

nuit considérablement aux chances d'exécution des recommandations[94] de la Commission africaine.[95] C'est à juste titre que Max du Plessis et Lee Stone soutiennent:[96]

> Human rights in Africa are at the behest of states. [...] Within the African regional human rights system, political good-will and diplomacy between states have often placed a dampener on the protection of human rights.

La question des moyens techniques, humains et financiers n'est pas à négliger. L'insuffisance de ressources financières est la plainte récurrente des institutions africaines dans leur généralité. La Cour et la Commission africaines n'échappent pas à ce destin tragique. Pour peu qu'on considère les moyens qui leur sont alloués au regard des missions qui sont les leurs, on est très tôt frappé du fossé profond existant. S'agissant de la Commission africaine, le besoin est d'autant plus évident quand on considère sa double mission. Aussi bien celle de promotion que de protection nécessitent des ressources quantitatives. Les études, le travail de documentation, les colloques, les séminaires[97] sont autant d'activités qui appellent la mobilisation de ressources conséquentes. C'est tout le sens de la complainte de la Commission africaine dans son dernier rapport:[98]

> Le financement insuffisant de la Commission par le budget des États membres entrave également la capacité de la Commission à assurer le suivi de la mise en œuvre, vu que cela empêche la Commission d'assurer un suivi efficace de ses conclusions lors des visites de pays et des recommandations découlant de ses conclusions, d'où la réduction globale de l'efficacité de la Commission.

La Cour africaine quant à elle, a vu son budget passer de 7 121 414 dollars[99] en 2008 à 10 386 101 dollars[100] en 2016. Cette augmentation d'environ 50% de son budget est le signe évident de l'accroissement considérable de ses charges. Pourtant, la contribution des Etats membres à ce budget n'est toujours pas satisfaisante. A titre illustratif, pour le compte du budget de l'exercice 2016, la Cour africaine n'a reçu des Etats membres que 7 823 931 dollars sur les 7 934 615 dollars prévus initialement. Dans ces conditions, la contribution des partenaires est souvent indispensable pour les deux institutions. La situation est davantage déplorable s'agissant de la Commission africaine. La maigreur quasi systématique de son budget d'année en année la laisse presque dépendante des ressources extérieures. En 2013 par exemple, aucun financement n'a été affecté aux activités des programmes de la Commission africaine au titre de cette année

94 Article 59 de la Charte africaine.

95 Anthony (n 5 ci-dessus) 517.

96 M du Plessis & L Stone 'A court not found?' (2007) 7 *African Human Rights Law Journal* 529.

97 Article 45 de la Charte Africaine.

98 42ème Rapport d'activités de la Commission. Disponible à l'adresse http://www.achpr.org/fr/activity-reports/42/ (consulté le 3 octobre 2017).

99 Rapport annuel d'activité de la Cour africaine 2008. Disponible à l'adresse http://fr.african-court.org/index.php/publications/activity-reports/212-conseil-executif-quatorzieme-session-ordinaire-26-30-janvier-2009-addis-abeba-ethiopie-des-droits-de-l-homme-et-des-peuples-pour-l-annee-2008 (consulté le 3 octobre 2017).

100 Rapport d'activités de la Cour africaine pour la période allant du 1er janvier au 31 décembre 2016. Disponible à l'adresse http://fr.african-court.org/images/Activity%20Reports/AfCHPR_Activity_Report_2016_F.pdf (consulté le 3 octobre 2017).

d'exercice.[101] En dépit de l'urgence de la situation, les Etats affichent une certaine désinvolture. Pourtant, la question du financement entretient un lien direct avec la complémentarité. Un financement adéquat des deux institutions aboutirait en réalité à une gestion plus saine et efficace des affaires. La navette des affaires entre la Cour et la Commission africaine nécessite en réalité des ressources conséquentes. L'issue parfois insatisfaisante de certaines affaires est en réalité liée au défaut de moyens financiers. C'est notamment le cas dans l'affaire Requête N° 004-2011 Commission africaine c Libye où la Commission africaine aurait dû diligenter de manière plus approfondie des enquêtes, mobiliser des éléments supplémentaires avant de soumettre l'affaire à la Cour africaine. Dans ces conditions, l'idée d'un fonds budgétaire destiné spécifiquement à la complémentarité est une piste sérieusement envisageable.

On ne saurait également faire l'impasse sur la question du personnel. Non pas qu'il s'agisse d'un problème de compétences, bien au contraire, l'Afrique a de quoi s'enorgueillir en matière d'expertise juridique. Seulement, une fois de plus, le rapport entre la ressource humaine disponible et les besoins réels est symptomatique d'une profonde carence en personnel.[102] Si depuis quelques années des efforts semblent être faits, il faut admettre qu'il y a encore du chemin à parcourir.

L'absence de portée dissuasive de la Commission africaine en raison du caractère non contraignant de ses décisions a constitué en partie, l'une des raisons qui ont porté la Cour africaine sur les fonts baptismaux. La force contraignante des décisions de la Cour africaine est donc censée se présenter comme un palliatif à cette faiblesse de la Commission africaine. Pourtant, cette solution peut s'avérer vaine au regard de sa finalité. Eu égard à la latitude laissée au Conseil des Ministres pour le suivi des décisions de la Cour africaine,[103] le pouvoir dissuasif de la Cour africaine ne restera en définitive, qu'un vulgaire mirage. La bonne foi des Etats ne peut en aucun cas être considérée comme une garantie de l'exécution des décisions de la Cour africaine.[104]

A cet effet, un mécanisme dissuasif de sanction aurait été de nature à en assurer une meilleure garantie. Le constat de l'inexécution d'une décision de la Cour africaine résultant conformément au droit international, du manquement à sa triple obligation de cessation de l'illicite, de réparation (*restitutio in integrum*) et de non répétition du fait illicite doit donc être assujetti à une sanction conséquente. Si la question de l'inexécution des décisions de justice est récurrente en Afrique, il faut admettre que cette problématique ne lui est pas

[101] 34ème Rapport d'activités de la Commission africaine. Disponible à l'adresse http://www.achpr.org/files/activity-reports/34/achpr53eos13_actrep34_2013_fr.pdf (consulté le 3 octobre 2017).

[102] M Hansungule 'African courts and the African Commission on Human and Peoples' Rights' in A Bösl & J Diescho (eds) *Human rights in Africa. Legal perspectives on their protection and promotion* 254.

[103] Article 30 du Protocole.

[104] Article 30 du Protocole.

exclusive. Les systèmes européen et américain y sont aussi confrontés.[105] C'est la raison pour laquelle de nombreuses pistes de réflexions ont foisonné au sein de la doctrine afin de lui apporter une réponse pragmatique. La menace de suspension ou d'expulsion étant une solution extrême dont l'application demeure chimérique, l'une des pistes les plus réalistes concernant le système africain des droits de l'homme pourrait être[106] la pénalité pécuniaire. Ainsi, qu'on pourrait légitimement l'objecter, une simple sanction pécuniaire n'a pas une portée aussi dissuasive qu'on pourrait l'espérer. C'est la raison pour laquelle, elle devrait prendre plus concrètement la forme d'une astreinte.[107] L'astreinte a en effet des effets psychologiques insoupçonnés. Un Etat qui violerait les dispositions de l'article 30 du Protocole devrait tomber sous le coup de cette contrainte pécuniaire qui devra au demeurant être sévère.

La restriction de l'accès direct des individus à la Cour africaine demeure un aspect fondamental de ses faiblesses.[108] Tel que le soutient Mamadou Falilou DIOP: [109]

> Les restrictions relatives à l'accès direct des individus au prétoire de la Cour ne se justifient pas. De plus, elles ne sauraient avoir comme explication que la volonté manifeste des États de ne pas répondre des violations graves des droits de l'Homme dont ils sont souvent accusés.

Au total, il sied de retenir qu'associer deux entités dysfonctionnelles, c'est conjuguer dans un cadre commun, leurs défauts respectifs et donc rajouter aux maux du système. La complémentarité entre la Cour et la Commission africaines ne sera jamais effective qu'à la condition de l'autonomie et de l'efficacité propre de chaque entité. De même, cette complémentarité s'inscrit dans un ensemble dont il faudra tenir compte.

3.2.2 L'efficacité binaire: maillon de l'efficacité globale

La Cour et la Commission africaines des droits de l'homme n'évoluent pas dans un univers isolé. Le système africain des droits de l'homme s'est complexifié avec la multiplication des structures et des acteurs appelés à intervenir dans la promotion et la protection des droits de l'homme sur le continent.[110] Face à cette situation, la relation entre les deux institutions ne doit pas être considérée indépendamment des réalités les transcendant. Les différents maux qui peuvent entraver le

[105] E Lambert-Abdelgawad 'L'exécution des arrêts de la Cour européenne des droits de l'homme' (2002) 19 *Dossiers sur les droits de l'homme* 10.

[106] F Tulkens et autres 'Brèves réflexions sur une nouvelle proposition en matière d'exécution des arrêts de la Cour Européenne des Droits de l'Homme' in G Cohen-Jonathan et C Petit (eds) *La réforme de la Cour Européenne des droits de l'Homme* (2003) 176.

[107] Tulkens (n 106 ci-dessus) 182.

[108] M Mubiala 'L'accès de l'individu à la Cour africaine des droits de l'homme et des peuples' in MG Kohen (ed) *La promotion de la justice, des droits de l'homme et du règlement des conflits par le droit international* (2006) 369.

[109] Diop (n 78 ci-dessus) 653.

[110] J Dubois de Gaudusson 'La Justice en Afrique: nouveaux défis, nouveaux acteurs' (2014) 2 *Afrique Contemporaine* 13.

système dans sa globalité se répercutent irrémédiablement sur l'existence et la coexistence des deux entités. Aujourd'hui, nombreux sont les paramètres généraux à prendre en compte.

D'abord, le principe de complémentarité ne doit pas être l'apanage du seul couple Commission africaine-Cour africaine. Loin de là, la Cour et la Commission africaines doivent élargir ce principe constructif à toutes les institutions intervenant dans le champ des droits de l'homme en Afrique et même au-delà. D'ailleurs, s'agissant de la Commission africaine, l'article 45 de la Charte africaine lui impose de 'coopérer avec les autres institutions africaines ou internationales qui s'intéressent à la promotion et à la protection des droits de l'homme et des peuples'. Cette complémentarité doit prendre effet avec les institutions les plus immédiates dont le Comité africain d'experts sur les droits et le bien-être de l'enfant.[111] Comme l'a noté Solomon Ebobrah, une relation poussée de complémentarité ne semble pas exister entre cette structure et les deux autres.[112] Ce que déplore d'ailleurs la Cour elle-même en rappelant la nécessité d'une relation plus étroite avec le Comité dans son avis consultatif N° 002-2013 où elle reconnaît:

> Qu'il est souhaitable, dans l'intérêt de la protection des droits de l'homme sur le continent, que le mandat du Comité soit renforcé au même titre que celui de la Commission est renforcé dans sa relation de complémentarité avec la Cour.

Cette exhortation de la Cour est le résultat de l'inaptitude du Comité à la saisir conformément aux dispositions de l'article 5(1) du Protocole dont la démarche énumérative l'écartait des entités habilitées à la saisir d'une requête. Cette situation fût cependant corrigée dans le protocole de 2008 portant fusion entre la Cour africaine des droits de l'homme et Cour africaine de justice qui reconnaît la faculté au Comité d'ester devant la nouvelle juridiction (article 30). D'ailleurs, l'article 27(2) du protocole précité précise expressément que 'Dans l'élaboration de son règlement, la Cour doit garder à l'esprit les relations de complémentarité qu'elle entretient avec la Commission africaine et le Comité africain d'experts'.

Dans la même perspective, l'approfondissement de la coopération de la Cour et de la Commission africaines avec les juridictions régionales africaines serait d'un insoupçonnable atout pour le système africain des droits de l'homme. Les juridictions constitutionnelles et suprêmes nationales ne sont pas en reste.[113] La Cour et la Commission africaines gagneraient à asseoir un véritable dialogue avec elles afin de s'assurer une meilleure prise en compte de leur logique jurisprudentielle.[114] Un grand pas a déjà été franchi en ce sens avec l'institutionnalisation du Dialogue judiciaire continental dont l'objectif est d'harmoniser les pratiques judiciaires en Afrique à travers 'le

[111] JD Boukongou 'Le système africain de protection des droits de l'enfant. Exigences universelles et prétentions africaines' (2006) 5 *Les cahiers de la recherche sur les droits fondamentaux* 97.

[112] Ebobrah (n 15 ci-dessus) 682.

[113] Voir en ce sens H Adjolohoun *Droit de l'homme et justice constitutionnelle en Afrique: le modèle béninois* (2011).

[114] G Niyungeko 'La Cour africaine des droits de l'homme et des peuples: défis et perspectives' (2009) 79 *Revue trimestrielle des droits de l'homme* 737.

renforcement des liens entre la Cour africaine d'une part, et les Cours régionales et nationales, d'autre part'.[115] Depuis l'éclosion de cette idée en 2010, deux Dialogues judiciaires ont eu lieu, tous à Arusha.[116] Le troisième organisé conjointement par la Cour et l'Union africaine aura pour thème ' Améliorer l'efficacité du judiciaire en Afrique ' et se tiendra à Abidjan. De telles initiatives méritent d'être encouragées et renforcées quant à leur fréquence afin de propulser une véritable culture d'appropriation du droit international des droits de l'homme par les juridictions nationales.[117]

La rationalisation générale de l'environnement institutionnel des droits de l'homme constitue un facteur clef de l'efficacité du système africain des droits de l'homme et partant de l'épanouissement du principe de complémentarité. Les relations entre les deux structures principales que sont: la Cour et la Commission africaines sont le reflet du fonctionnement d'un mécanisme plus large. Les autres structures principales de l'Union africaine que sont: la Conférence des Chefs d'Etat et de Gouvernement, le Conseil des Ministres, le Secrétariat de l'Union Africaine sont des maillons avec lesquels il faudra substantiellement compter.

Dans ce contexte, le principe de complémentarité entre la Cour et la Commission africaines doit s'ajuster à des paramètres globaux. La prise en considération de ces paramètres globaux commande une attention particulière à l'égard des destinataires finaux du système à savoir, les populations.[118] Cette posture téléologique des droits de l'homme en Afrique commande de véritables mesures de promotion et d'éducation des populations.[119] Le premier pas vers l'accessibilité de la justice est la prise de conscience par les populations elles-mêmes, de l'existence de droits à revendiquer ainsi que des voies de recours qui s'offrent à elles.[120] L'aveu fait par le juge Gérard Niyungeko à cet égard s'agissant de la Cour africaine est éloquent:[121]

> En dehors des spécialistes, peu de gens savent que la Cour existe, et parmi ceux qui sont au courant de son existence, peu savent comment elle est conçue, comment l'on peut y accéder, quel est précisément son rôle, ce que l'on peut attendre d'elle.

Ce n'est qu'à la condition d'une démarche inclusive que le système africain des droits de l'homme prendra véritablement son envol.

[115] Discours de bienvenue du Président de la Cour africaine en prélude du second dialogue judiciaire continental, Arusha le 19 Octobre 2016. http://fr.african-court.org/index.php/news/press-releases/item/52-arusha-to-host-the-second-african-judicial-dialogue-4-6-november. Consulté le 8 octobre 2017.

[116] S Hanffou Nana *La Cour africaine des droits de l'Homme et des peuples: étude à la lumière de l'expérience européenne* (20026) 429.

[117] M Killander & H Adjolohoun 'International law and domestic human rights litigation in Africa: an introduction' in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 4.

[118] Eno (n 6 ci-dessus) 71.

[119] M Seck 'Plaidoyer pour l'éducation en matière des droits de l'Homme en Afrique' (1989) 1 *Revue universelle des droits de l'homme* 36.

[120] AB Fall 'L'accessibilité à la justice en Afrique' in OIF *Justice et droit de l'Homme, XXIIIe Congrès de l'Institut international de droit d'expressions et d'inspirations françaises* (2003) 333.

[121] Niyungeko (n 114 ci-dessus) 735.

4 CONCLUSION

La relation entre la Cour et la Commission africaines semble avoir eu raison des pronostics pessimistes des uns et des autres quant au tumulte qui pourrait précipiter le sort tragique de leur coexistence. Leur relation n'a certes pas été à l'image d'un long fleuve tranquille, mais elle a largement de quoi nourrir les perspectives les plus optimistes quant à la trajectoire qu'elle semble prendre irréversiblement. Les deux institutions ont en effet, très tôt eu beau jeu de comprendre que la destinée de leur relation dépendait du degré de coordination et de coopération dont elles devraient faire preuve. A cet effet, elles se sont armées de pragmatisme dans les rapports qui devraient les unir. De manière empirique et au gré des situations, elles s'attachent à apporter des solutions aux différents maux qui peuvent entraver la complémentarité qui les unit. Toute cette expérience constitue un acquis fondamental dans un contexte de mutations permanentes et surtout de l'opérationnalisation future de la Cour africaine de justice et des droits de l'homme. De nombreux défis restent cependant encore à relever pour faire de la 'complémentarité', la clé absolue de l'efficacité du système africain des droits de l'homme.