RAOUL WALLENBERG INSTITUTE

OF HUMAN RIGHTS AND HUMANITARIAN LAW

The collection of chapters contained in this book originates from the first Raoul Wallenberg Institute Regional Africa Academic Network Conference held at the University of Zimbabwe, Harare, Zimbabwe in October 2022. The main aim of this book is to advance an understanding of the way Africa regional and sub-regional human rights systems contribute to access to justice on the continent and to generate further knowledge about the institutions that make up the African human rights adjudication system, the African Court on Human and Peoples' Rights, the African Commission on Human and Peoples' Rights, the African Committee of Experts on the Rights and Welfare of the Child and sub-regional courts, such as the Economic Community of West African States Community Court of Justice.

Pretoria University Law Press
PULP
www.pulp.up.ac.za

ISBN 978-1-7764485-0-0

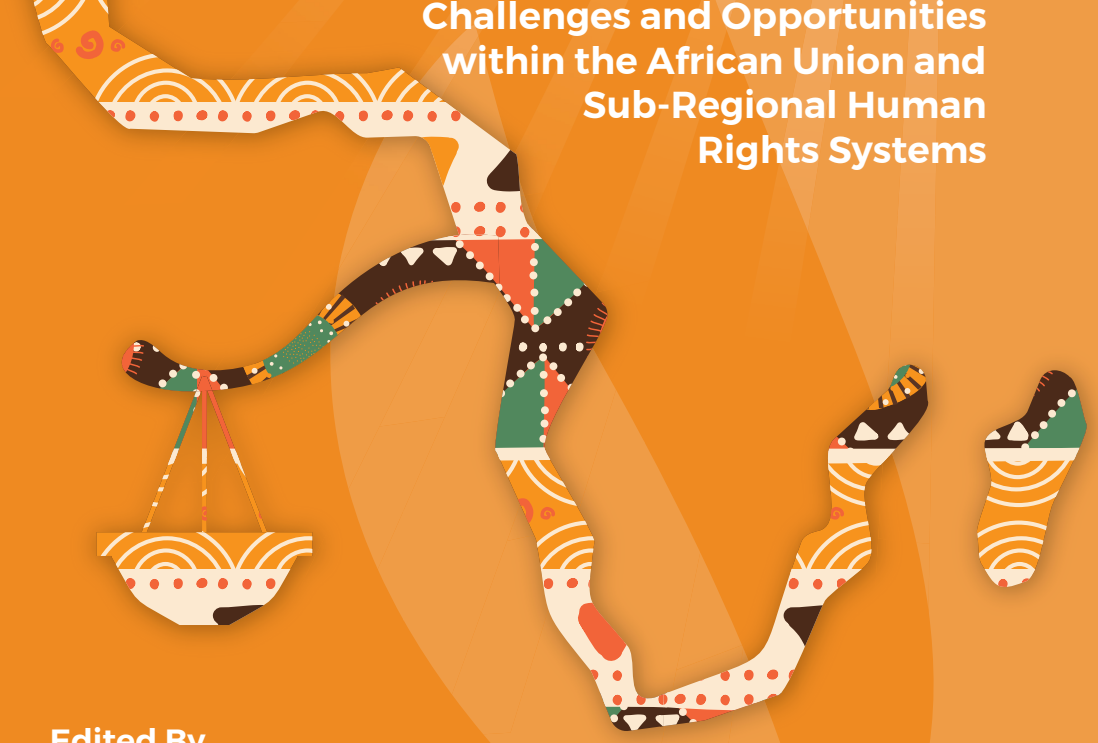
Human Rights Adjudication in Africa:
Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems

Fuentes & Rudman (eds)

PULP

Human Rights Adjudication in Africa

Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems



Edited By
Alejandro Fuentes
Annika Rudman

Human Rights Adjudication in Africa

Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems

Edited By
Alejandro Fuentes
Annika Rudman

Pretoria University Law Press
PULP
publishing African scholarship that matters
www.pulp.up.ac.za

2023

Human rights adjudication in Africa: Challenges and opportunities within the African Union and sub-regional human rights systems

Published by:
Pretoria University Law Press (PULP)
The Pretoria University Law Press (PULP) is a publisher at the Faculty of Law, University of Pretoria, South Africa. PULP endeavours to publish and make available innovative, high-quality scholarly texts on law in Africa. PULP also publishes a series of collections of legal documents related to public law in Africa, as well as text books from African countries other than South Africa. This book was peer reviewed prior to publication.

For more information on PULP, see www.pulp.up.ac.za

To order, contact:
PULP
Faculty of Law
University of Pretoria
South Africa
0002
pulp@up.ac.za
www.pulp.up.ac.za

Cover design:
Lilian Mulaa

ISBN: 978-1-7764485-0-0

This book is published within the Raoul Wallenberg Institute's (RWI) Regional Africa Programme, which is financially supported by the Swedish International Development Cooperation Agency (Sida). The views and opinions expressed in this publication are those of the authors and do not necessarily reflect the views of either RWI or Sida.

RAOUL WALLENBERG INSTITUTE
OF HUMAN RIGHTS AND HUMANITARIAN LAW

Sweden
Sverige

Table of contents

Preface

Established at Lund University, Sweden in 1984, the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI) is an independent academic institution promoting human rights through education, research, and institutional development. Through cooperation with primarily governments and academic and national human rights institutions in Europe, Africa, Asia, the Middle East, and Latin America, the RWI has been active in the human rights domain for almost 40 years.

In Africa, the RWI works towards developing human rights capacity through regional, sub-regional and bilateral cooperation programmes with bodies of the African Union and the Regional Economic Blocs, academic institutions, national human rights institutions, and civil society organisations. In 2017, to further expand and develop its cooperation in Africa, the RWI, with funding from the Swedish International Development Cooperation Agency, started the Regional Africa Programme (RAP). The overall objective of the RAP is to secure a demonstrable improvement in access to justice and implementation of human rights commitments in Africa for all. This objective is framed by the premise that the key challenge for increased respect for human rights regionally is not primarily a lack of standards and institutions, but rather making existing standards and institutions work.

Within the framework of the RAP, the Regional Africa Academic Network (Academic Network) was further established to bring together universities from across the African continent to generate research and resources, build capacity, and develop spaces for inter-sectoral dialogue. One of the key activities of the Academic Network is the organisation of an annual conference which creates a space for reflection, dialogue, and knowledge sharing between members of the academic community, representatives of civil society organisations, bar associations, and regional bodies that contribute to the advancement of human rights adjudication in Africa.

The collection of chapters contained in this book originates from the first Academic Network conference held at the University of Zimbabwe, Harare, in October 2022. The conference, like this book, is titled *Human Rights Adjudication in Africa: Challenges and Opportunities within the African Union and Sub-Regional Human Rights Systems*. Aligning with the overarching objectives of the RWI and the RAP, the main aim of the 2022 Academic Network conference was to advance an understanding of the way the regional and sub-regional human rights systems in Africa contribute to access to justice on the continent. Thus, the conference, and by extension, this book, aims to generate further knowledge on both procedural and material aspects of the institutions that make up the system of African human rights adjudication. This particularly relates to the practice, methods, and jurisprudence of human rights adjudication that take place before the African Court on Human and Peoples' Rights (African Court), the African Commission on Human and Peoples' Rights (African Commission), the African Committee of Experts on the Rights and Welfare of the Child (African Committee of Experts) and the sub-regional courts, such as the East African Court of Justice and the Economic Community of West African States Community Court of Justice (ECOWAS Court).

Successful adjudication before these institutions depends on whether a matter falls within the courts' and quasi-judicial bodies' material, personal, temporal, and geographical jurisdiction. It is also dependent on the fulfilment of the applicable admissibility criteria. In this regard, it is fair to suggest that the material jurisdiction of the abovementioned courts and quasi-judicial bodies differs greatly, both in terms of scope and how and where their mandates are presented. There are furthermore significant differences regarding personal jurisdiction, that is, in the access to the courts and quasi-judicial bodies, as well as the admissibility criteria applied. In terms of the application of admissibility criteria, while exhaustion of local remedies is essential before the African Court, the ECOWAS Court, as an example, does not apply such a criterion. These, and other considerations have, as discussed throughout the eight chapters, a direct effect on where, how, and when human rights adjudication takes place, and it also influences the subject matter of the claims presented as well as the outcome.

As is also debated throughout this book, we have witnessed many challenges to human rights adjudication on the African continent in recent years. For instance, access to the African Court has been limited through the withdrawal of the article 34(6) declaration made by states parties to the African Court Protocol, preventing individuals and non-governmental organisations (NGOs) from directly accessing the African Court. Access

to the African Court by NGOs has also been restricted by the withdrawal of observer status of some NGOs before the African Commission, more restrictive criteria in obtaining such status and the denial of access by NGOs with observer status before the African Commission to the advisory jurisdiction of the Court.

As the different parts of the African regional and sub-regional human rights develop, there is palpable tension between the desire to have regional and sub-regional bodies establish and enforce uniform human rights standards and the need to respect the sovereignty and diversity of the different member states. Related to this are the issues of uniform interpretation of treaties across a multitude of courts and quasi-judicial bodies, a standardised approach to the limitations of rights, and the achievement of a suitable balance between individual rights and the general interests of member states.

Considering this complex topic, the call to present papers at the Harare inaugural Academic Network conference was extended to senior and early career researchers, scholars and academic staff affiliated with academic institutions[1] and non-academic institutions[2] partners within the RAP. To foster and promote the advancement of early career researchers, they were invited to participate in a research methodology workshop held in Nairobi, Kenya, in June 2022. This workshop, put together and presented by representatives of the Academic Network, aimed at supporting the development of their papers, strengthening their research, and increasing the potential for their publication in this edited volume. As a result of this parallel process, four out of the eight chapters presented in this book involve the contributions of early career researchers and constitute a milestone in their academic careers.

1 The following institutions make up the RWI Regional Africa Academic Network: School of Law, Kenyatta University; Faculty of Law, University of Nigeria-Nsukka; Faculty of Law, University of Zimbabwe; College of Business, Peace, Leadership and Governance, African University; Gender, Health and Justice Research Unit, University of Cape Town; Faculty of Law, Stellenbosch University; Centre for Human Rights, Addis Ababa University; and Faculty of Law, British University in Egypt.

2 The following non-academic partners are part of the RAP: Pan African Lawyers Union, East Africa Law Society, African Court Coalition, Equality Now, the Network of African National Human Rights Institutions, the African Policing Civilian Oversight Forum, Centre for Human Rights-University of Pretoria, the East African Court of Justice, the ECOWAS Community Court of Justice and the African Court on Human and People's Rights.

To kick-start the exploration of the nature, scope, and challenges to human rights adjudication in Africa, chapter 1, titled *Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of Mtikila, Zongo and Konate*, authored by Tarisai Mutangi, interrogates the remedial approach of the African Court, as demonstrated in its first reparations cases. This chapter forms part of a growing and intensified African scholarship on implementing human rights obligations, especially decisions of human rights courts and tribunals in Africa. It is premised on the basis that a remedy reflects the remedial approach a tribunal takes in its adjudication role, and because it is the remedy that stands to be executed or implemented, it has a bearing on the impact it will have on victims of human rights violation as well as national legal and policy frameworks in general. Thus, as the chapter suggests, it is necessary to commit time to learn about the remedial approach the African Court has preferred with a view to establishing the remedial philosophy of the Court in the long run.

Chapter 2, titled *The ultimate withdrawal: A critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights*, authored by Derick de Klerk and Annika Rudman, then explores the impact and legitimacy of the African Court by forwarding the premise that the involvement of individuals before African Court is critical to its ability to fulfil its mandate adequately. As the African Court relies on individuals and NGOs with observer status before the African Commission to file cases before it to develop its jurisprudence, the withdrawal of optional declarations made by states under article 34(6) of the African Court Protocol, disabling direct access of individuals and NGOs to the African Court, deprives it of an adequate pool of cases to adjudicate. This in turn, as is argued in this chapter, negatively affects the authority of the African Court along with its legitimacy and continuing ability to operate.

Chapter 3, titled *The law and politics of access to the ECOWAS Court in human rights cases*, authored by Christopher Nyinevi and Apraku Nketiah, directs attention to the ECOWAS and investigates the human rights mandate of the ECOWAS Court. Access to the human rights jurisdiction of the ECOWAS Court is not, contrary to the position of the African Court, predicated on the exhaustion of local remedies or deference to national courts to avoid parallel proceedings. As discussed in this chapter, this has generated resistance from some member states. In response to recurrent concerns from such member states, the ECOWAS Court in 2022 decided to clarify and regulate access to its human rights

mandate by adopting Supplementary Rules of Procedure, subject to the approval of the ECOWAS Council of Ministers. This chapter discusses the human rights mandate of the ECOWAS Court, evaluates the proposed Supplementary Rules, and considers the extent to which the Rules may impact individuals' access to the Court.

Focusing specifically on the adjudication and implementation of women's rights, chapter 4, titled *Rape as manifestation of gender-based discrimination: An exploration of state responsibility for sexual and gender-based violence in the jurisprudence of the ECOWAS Community Court of Justice*, authored by Annika Rudman, analyses the effects of not classifying rape, a form of sexual and gender-based violence (SGBV), as gender-based discrimination from the vantage point of feminist jurisprudence. It engages with states' obligation to prevent rape and, linked thereto, state responsibility for omissions to prevent rape. The discussion traces state responsibility in cases where a non-state actor has perpetrated acts of SGBV within an environment where rape is common and normalised. The arguments presented explore the complexities of SGBV litigation before international human rights bodies, such as the ECOWAS Court, which does not possess the jurisdiction to hold individuals criminally responsible for human rights violations. Ultimately, the arguments and methods crafted aim to encourage supranational litigation in SGBV cases, which, to date, have not garnered much attention.

Along the line of women's rights chapter 5, titled *A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice* by Anisa Mahmoudi and Annika Rudman then further analyses the gendered aspects of the African human rights system. It explores articles 2(2) and 5 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), which set out member states' obligations to modify the social and cultural behaviour of women and men through education, information, and communication strategies. These obligations are, as argued in this chapter, key to achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes or on gender stereotypes. This chapter aims to draw attention to the potential of the modification provisions in the Maputo Protocol and to provide examples of best practices emerging from the Committee on the Elimination of Discrimination against Women, the African and the ECOWAS Courts.

The final three chapters, chapters 6, 7 and 8, all have in common a specific focus on intersecting vulnerabilities such as age, socio-economic status and indigenousness. Chapter 6, titled *Africa is ageing: Prospects in the implementation of the Protocol on the Rights of Older Persons in Africa* by Faith Kabata, concerns itself with ageism and the prospects of the implementation of the Protocol to the African Charter on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons) by reviewing evolving norms and jurisprudence on the rights of older persons. Drawing from the normative content and jurisprudence of the European and Inter-American Courts of Human Rights (Inter-American Court), this chapter highlights comparative, evolving jurisprudence that can be contextualised to the application and interpretation of the Protocol on the Rights of Older Persons.

Chapter 7, titled *'Fortune' as a ground of discrimination under the African Charter on Human and Peoples' Rights*, authored by Gideon Basson, then considers what insights a teleological interpretation of the African Charter on Human and Peoples Rights (African Charter), rooted in its 'object and purpose', could give to the content of fortune as a ground of discrimination. The chapter demonstrates that a teleological interpretation of fortune furthers a regionally sensitive account of a substantive conception of equality in law that seeks to transform the political marginalisation, material deprivation and disadvantage, and social stigma, harm, and prejudice vulnerable groups such as impoverished people encounter. It develops normative standards to interpret impoverished people's guarantee not to be discriminated against based on their fortune. Ultimately, it argues that fortune as an expressed ground of discrimination is an untapped legal tool to contest the multiple manifestations of discrimination impoverished people face.

The final chapter, chapter 8, titled *Comparative jurisprudential developments and adjudication of indigenous peoples' rights: Integration of international human rights law in the Americas and Africa*, by Alejandro Fuentes, proposes a critical comparative analysis of the jurisprudence of the Inter-American Court, the African Commission and the African Court regarding the recognition of indigenous peoples' rights. In particular, it focuses on the cross-fertilisation jurisprudential processes between these regional bodies and the role that this jurisprudential dialogue has played in the recognition of indigenous peoples' right to communal property over their traditional lands and natural resources and deliver protection to their culture and cultural identity.

In conclusion, as is evident from the range of topics and the deep analysis presented in this book, a substantial amount of work went into preparing these chapters. Therefore, we are certain that this edited volume will make a substantive contribution to the scholarly debate regarding human rights adjudication in Africa. Finally, sincere thanks and appreciation go to the nine authors and the sixteen reviewers involved in peer-reviewing this book's eight chapters. Their dedication to the writing and reviewing process is admirable, and together, they made the editorial process both smooth and successful.

Professor Alejandro Fuentes
Senior Researcher, Raoul Wallenberg Institute; Professor of International Human Rights Law, Africa University

Professor Annika Rudman
Faculty of Law, Stellenbosch University

Lund and Stellenbosch October 2023

Acknowledgments

This book is the culmination of concerted efforts and contributions from various individuals and groups of people.

First, we would like to thank the contributing authors – young, budding scholars as well as seasoned writers – who heeded the call for papers and remained committed to it till the culmination of the process. Their research and expertise will enrich and advance discourse on access to justice and adjudication of rights within the African human rights system. Without them, this publication would not have been possible.

This publication is the brainchild of members of Raoul Wallenberg Institute (RWI)'s Academic Network, represented by: Prof Joy Ezeilo – University of Nigeria, Nsukka; Prof Pamela Machakanja – Africa University; Prof Annika Rudman – Stellenbosch University; Prof Lillian Artz – University of Cape Town; Prof Alejandro Fuentes – RWI; Dr Tarisai Mutangi – University of Zimbabwe; Dr Faith Kabata – Kenyatta University; Dr Fasil Mulatu – Centre for Human Rights, Addis Ababa University; and Mahmoud Hazem – British University of Egypt. Their forward-thinking insights, mentorship to young scholars and vision steered all who were part of this publication.

Working closely with the Academic Network members was the RWI Regional Africa Programme team, led by the Deputy Director, RWI Regional office in Nairobi Chris Muthuri, Kasiva Mulli, Gilford Kimathi and Lilian Mulaa. Their role in leading the programmatic components of the publication was invaluable from the start to the end. A special note of appreciation is addressed to Kasiva Mulli and Lilian Mulaa for their role in opening and maintaining crucial lines of communication between the contributing authors and the editors, coordinating meetings (including the conference that birthed the publication) and promptly addressing all administrative and logistical concerns.

This book would not have attained its quality without the guidance of our meticulous editors, Prof Annika Rudman and Prof Alejandro Fuentes, our technical editor Chantelle Hough Louw and the peer reviewers. This publication is a result of insightful exchanges between them and the

authors, careful handling of manuscripts and an outpouring of their many years of experience in the field of human rights adjudication.

Finally, we wish to thankfully acknowledge the Swedish International Development Cooperation Agency (Sida) for their financial support which made this publication possible.

Rakel Larsen
Director, RWI Regional Office in Nairobi

Contributors

Dr Tarisai Mutangi

Tarisai Mutangi is a Zimbabwean human rights practitioner and academic based in Harare. He is currently the Head of the Postgraduate Department, Faculty of Law, University of Zimbabwe. He has research interests in international human rights law, access to justice, law and religion, electoral law, refugee law and institutional reform and has published and consulted widely in these areas. Dr Mutangi has specific interest in the area of implementation of international human rights standards at the national level, and human rights decisions of international courts and tribunals in particular. He has previously sat on various boards, committees and commissions working in the area of law reform, penal reform as well as transparency and accountability. His expertise in capacity building has seen him working with state and non-state actors to build their capacity in various aspects of the law. In his practice of the law, he also has audience before the African Court on Human and Peoples' Rights based in Arusha, Tanzania.

Prof Annika Rudman

Annika Rudman is a Professor at the Department of Public Law at the Faculty of Law. She specialises in International Human Rights Law with specific focus on the African human rights system, women's rights, rights of sexual minorities, gendered rights, Feminist Legal Theory, African Feminism and Queer Theory. Her research focuses mainly on the procedural aspects of the African Court on Human and Peoples' Rights, the interpretation and application of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa alongside a keen interest in the jurisprudence of the African Court on Human Peoples' Rights and the ECOWAS Court of Justice.

Mr Derick de Klerk

Derick de Klerk is a cum laude LLM graduate from Stellenbosch University. His thesis, focused on individuals' access to the African Court of justice, the withdrawals of Rwanda, Tanzania, Benin and Côte d'Ivoire and the impact these withdrawals have on the legitimacy of the African Court of Human and Peoples' Rights. Before completing his LLM, Derick obtained BA(International Studies) and LLB degrees from Stellenbosch University. Derick is passionate about the development and protection of human rights in Africa and hopes his thesis and chapter, co-authored with his supervisor, Prof Annika Rudman, is only the beginning of a long career in African Regional Human Rights Law.

Dr Christopher Nyinevi

Christopher Nyinevi has teaching and research interests in Public International Law, African Union Law, and International Economic Law. He has published articles and book chapters and made conference presentations on topics including international business transactions under the constitutional law of Ghana, the African Union's prohibition of unconstitutional changes of government, and the liability of corporations for the human rights, environmental, and social impacts of foreign investment activities.

He taught at the Faculty of Law, Kwame Nkrumah University of Science and Technology in Kumasi, Ghana (KNUST) from August 2013 until he left for his doctoral research in March 2019. He later became a resource person for the ECOWAS Court of Justice and was invited to present papers at the Court's 2021 and 2022 International Conferences before assuming the role of Executive Assistant to the President of the Court in October 2022. Dr Nyinevi holds an LLB from KNUST (Ghana), an LLM from Fordham Law School (USA), and a PhD in International Law from Monash University, Australia.

Mr Apraku Nketiah

Apraku Nketiah is a lawyer, legal academic, and international public servant who has been in the service of the ECOWAS Court of Justice since 2018. He served as the Executive Assistant to the President of the Court from September 2018 until October 2022, when he was promoted as Head of Legal Services at the Court. Prior to joining the ECOWAS Court, Mr Nketiah held a lectureship at the Faculty of Law, Kwame Nkrumah University of Science and Technology in Kumasi, Ghana, from 2010 to 2018, where he taught subjects including International Humanitarian Law.

Mr Nketiah obtained an LLB from the University of Ghana School of Law in 2002. He was admitted to the Ghana Bar in 2004 after completing the professional legal training at the Ghana School of Law. He subsequently earned an LLM in Public International Law from the University of Oslo in 2009. Mr Nketiah has teaching and research interests, as well as legal practice experience, in Public International Law, International Human Rights Law, and the Practice and Procedures of International Courts.

Authors' Statement

This chapter is the culmination of earlier ideas and drafts on the topic, which were presented at the International Conference of the ECOWAS Court in Praia, Cape Verde (May 2022), the RWI Research Writing Workshop in Nairobi, Kenya (June 2022), and the RWI Academic Network Human Rights Conference in Harare, Zimbabwe (October 2022). We express gratitude to the participants of these events, as well as to the editors and reviewers of this book, for their valuable comments and suggestions.

Dr Anisa Mahmoudi

ORCHID 0009-0002-2271-4808.

Anisa Mahmoudi, a South African attorney, is currently a postdoctoral fellow to the H.F. Oppenheimer Chair of Human Rights at the Department of Public Law, Stellenbosch University. She obtained her LLD degree at Stellenbosch University in 2023 and her doctoral research focusses on the rights of women and the resocialisation obligation contained in both international and African regional human rights law. Her co-authored chapter draws from this doctoral research. She holds an LLM from University College London (UCL) and an LLB degree from the University of Cape Town (UCT). Her research interests include women's rights.

Dr Faith Kabata

Faith Kabata is a post-doctoral researcher at the University of KwaZulu Natal, DSI-LAW Africa Project since August 2022 and a lecturer in the Department of Public Law in Kenyatta University School of Law. Her teaching and research interests are in international human rights law, human rights law and public international law. She has published on law and religion, human rights and culture, right to development and on community land rights in Africa. In 2005 she received the Notre Dame Human Rights Award Fellowship and was in 2020 cited among 106 Model Students by the University of Nairobi, School of Law.

Prior to joining Kenyatta University, she served as a Governance Advisor in the Presidency in Kenya, as an Assistant Executive Director in the Office of the Ombudsman in Kenya and as a Project Advisor on Good Governance in the German Technical Cooperation Programmes in Kenya. She has also conducted policy research for the World Bank, United Nations Development Fund, GIZ and SIDA. She obtained her Bachelor of Laws Degree from University of Nairobi, Master of Laws Degree (magna cum laude) from University of Notre Dame, IN, USA and Doctor of Laws from the University of Pretoria and Bar qualifications from the Kenya School of Law.

Mr Gideon Basson

Gideon is currently pursuing his full-time DPhil in Law studies at the University of Oxford through the Mandela Rhodes Foundation's Shaun Johnson Memorial Scholarship. He is a research resident at the Bonavero Institute for Human Rights and the convener of the Postgraduate Research Forum. Additionally, Gideon holds an extraordinary research fellowship at the Department of Public Law at Stellenbosch University. He is also one of the expert drafting members of the commentary on the Maastricht Principles (IV) on the Human Rights of Future Generations.

Prof Alejandro Fuentes

Alejandro Fuentes is a Senior Researcher at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law (Sweden) and recently appointed as a Professor of International Human Rights Law at Africa University (Zimbabwe). He earned his Doctor of Laws (PhD) in international law and a Master's degree (LLM) in Comparative and European Legal Studies from Trento University (Italy), and a Law degree from the University of Córdoba (Argentina). He lectures at the Master's Programme in International Human Rights Law at the Faculty of Law, Lund University, where he directs the course on Human Rights and Cultural Diversity, teaches various courses related to International Human Rights Law, and supervises master theses. Prof Fuentes is a regular guest lecturer at universities in Zimbabwe, Armenia, and Cuba. He also possesses extensive experience in developing and implementing international development programs, aiming to devolve and strengthen institutional capacities in partnership with local academic institutions and stakeholders, including governmental institutions and judicial actors across the globe. He is currently closely collaborating with institutional partners in Africa (Kenya, Egypt, Ethiopia, Nigeria, South Africa, Botswana, Zambia, Zimbabwe); in Europe (Belarus, Poland, Armenia, Ukraine, Italy, Spain); and in the Americas (Argentina, Colombia, Peru, Cuba, Mexico). His scientific interests and research publications are highly diversified, focusing on international human rights law, particularly on international and regional systems of human rights protection; cultural diversity and identity; group, minority, and indigenous people's rights; children's rights; local governance and human rights cities; and human rights education in general, and clinical legal education in particular. Prof Fuentes began his career in the Judicial Power of the Province of Córdoba (Argentina), where he worked for seven years as a judge's assistant. He is fluent in five languages: English, Spanish, Italian, French, and Swedish.

1 Tracing the developing reparations jurisprudence of African Court on Human and Peoples' Rights as reflected in its first cases of *Mtikila*, *Zongo* and *Konate*

Tarisai Mutangi

Abstract:

This Chapter traces the development of the reparations jurisprudence of the African Court with a view to understanding the scope of reparations, their alignment with the human rights jurisprudence of other regional human rights tribunals, as well any peculiarities the Court has horned that shed light on the reparations philosophy of this Court. Anchored in the metaphor that the first cut is the deepest, the trace is limited to the first three reparations judgments of the African Court in *Mtikila*, *Konate* and *Zongo*. Through these foundational cases, the Court laid down its reparations approach such that a few conclusions were drawn. First, that the Court's reparations competence is unlimited in scope. Second, the Court has been increasingly developing the reparations approach, building on the cases as they came. Third, the Court has laid the foundation of its reparations approach in sync with the practice of other regional courts, such as the Inter-American Court of Human Rights, but also followed the practice of other African Union human rights bodies, such as the African Commission on Human and Peoples' Rights. Fourth, the Court has adopted a five-fold framework, which reparations should reflect, namely, compensation, restitution, rehabilitation, just satisfaction and guarantee of non-recurrence. Fifth, the Court has abandoned its initial innovative approach in interpreting its competence in favour of a lukewarm approach, such as restricting itself to granting only remedies that the party has requested. Nevertheless, by and large, the Court's approach is generally pointing in a

good direction having established the foundation upon which its reparations stand today and in the future.

1 Introduction

This chapter aims to contribute to the development of jurisprudence around the question of the impact of the African Court on Human and Peoples' Rights' (African Court) reparations approach to changing the circumstances of persons who fell victim to violations of fundamental rights and freedoms. It aims to set out the remedial approach the African Court has charted, as demonstrated in its first reparations cases. It will be for subsequent scholarship to examine how this Court's remedial approach enhances or undermines, albeit unintentionally, the positive impact of the African Court's decisions at the national level as it is generally the understanding that the success of an international tribunal such as the African Court should be measured by the extent to which it has influenced change within the national legal systems of member states.

The chapter is part of the growing and intensification of African scholarship on implementing human rights obligations, especially decisions of human rights courts and tribunals (HRCTs) in Africa.[1] It is premised on the basis that a remedy reflects the remedial approach a tribunal takes in its adjudication role, and because it is the remedy that stands to be executed or implemented, it has a bearing on the impact it will make on victims of human rights violation as well as national legal and policy frameworks in general. Thus, it is necessary to commit time to learning the remedial approach the African Court has preferred with a view to establishing the remedial philosophy of the Court in the long run.

The chapter also partly contributes to the work of the 'general assembly of African writers,' otherwise known as the 'implementation of commitments scholars,' who have generated so much momentum that gave credence to the proposition that the human rights discourse continues to plod along the implementation of obligations, as opposed to the erstwhile standard-setting phase that saw the adoption of general and thematic human rights obligation at national, regional and international levels.[2] A wave of studies, surveys, and analyses continues to generate answers to intriguing questions on the implementation of HRCT decisions. However, the author believes that much as the scholarship is getting traction on implementation, it would appear that more attention should also be

1 For the most recent publication on implementation, see A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022).

2 See generally Adeola (n 1).

devoted to analysing the scope of reparation measures ordered by HRCTs that stand to be implemented.

To achieve the above, this chapter retreats a few paces backwards from the implementation discourse to expose the remedial approach as reflected in the remedies rendered by the African Court. Some of the questions that exercise one's mind when assessing the remedial approach of any tribunal, such as the African Court, include the following: *What is the philosophy behind the Court's remedies? How does the Court's remedial approach align with other international HRCTs? To what extent does the remedial approach consider the context? What is the level of clarity of the reparations so far given by the Court?*

In answering the above questions, scholarship has identified remedies given by a human rights court or tribunal as a key piece of the puzzle in understanding the impact that tribunal will have on the lives of victims of human rights violations as well the general changes in the national legal order of member states against whom such decisions were rendered.[3] For this reason, there is a need to analyse the tribunal's remedial approach closely, as reflected in the reparations so far rendered, for more insight.

In its role as an adjudicator, a court or tribunal needs to be inclined to issue clear orders when rendering decisions post-adjudication. Such a tribunal or court sets the tone for the provision of remedies to victims of the decision based on the language used and the particularity with which the remedial aspects of the orders awarded to the victim(s) are articulated. Thus, the specificity of the order is critical to its execution by the state concerned and impacts the circumstances of the victim and the national systems in general. In that sense, remedial aspects of a court order offer guidance to the state party concerned in terms of the adoption of appropriate measures to ensure the entire order is executed to the expectation of the court as contained in its decision, more so in achieving the objective of the court's remedial order.

Despite the clear facilitation role an HRCT plays when rendering a decision, the process raises further questions concerning the extent to which an international court would prescribe specific measures the respondent state should adopt to implement a court order against it in the light of the state's exercise of sovereignty when choosing the manner

3 For a discussion on the role of impact of a decision on implementation, see generally T Mutangi, 'Enforcing compliance with judgments of the African Court on Human and Peoples' Rights: prospects and challenges' in Adeola (n 1) 183 & 189.

of execution.[4] The argument justifies this approach by insisting that it is the sovereign prerogative of a state to choose the means by which it complies with or fulfils its international obligations. In that sense, the state obligation is one of result instead of process.

This fundamental question is illuminated even more considering the invariable mix of the civil and common law legal traditions often represented in supra-national adjudicatory institutions worldwide. The African Court is no exception. It is usually the case that the former is less prescriptive while the latter literally enumerates the measures a state should take to remedy the international wrongful act. While little space will be committed to this question in this chapter, it nevertheless needs to be addressed to inform conclusions and suggestions made at the end of the chapter.

When HRCTs, including the African Court, render decisions on reparations, this act perpetuates a principle respected in international dispute resolution for a long time. This is the principle of reparations. It reinforces the state's obligation to pay reparations following an international wrongful act, such as violating international human rights rules or norms. This responsibility of a state has remained one of the pillars of public international law, which eventually found residence in international human rights law as well. In fact, payment of reparations to remedy an international wrongful act is now a rule of customary international law.

This principle of 'full reparation', albeit as applicable only between states at that time, was affirmed by the then Permanent Court of International Justice in the famed *Chorzow Factory* case in 1928.[5] The finding of the Court affirmed that:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be

4 See the African Court's interpretation in *Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258 para 108.

5 *Factory at Chorzów, Germany v Poland, Judgment, Claim for Indemnity* (merits) (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928) 47.

> covered by restitution in kind or payment in place of it -such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.[6]

It is generally accepted that the approach to reparations in terms of the quote above tended to take 'a retributive view', hence the emphasis on measures such as restitution and compensation as a form of providing redress. It is further acknowledged in the literature that the concept of reparations has been 'interpreted in different ways by international tribunals and other bodies' in the course of determining the 'forms and quantity of reparations' awarded in each particular case.[7] Due to the diversity of interpretations of the reparations standard, some scholarship continues to emerge seeking to revisit the application of the standard to reparations scenarios, especially in the context of compensation following nationalisation or expropriation. In this regard, Torres is one of those scholars who question 'the extent to which the standard of reparation depicted in Chorzów and reshaped in the ARSIWA reflects international practice'.[8] Be that as it may, as will be discussed below, the 'full reparation' standard from *Chorzow Factory* has been accepted in international human rights adjudication.

However, as will be demonstrated in relation to the African Court, legal instruments establishing and defining the boundaries of the mandate of the Court provide for this principle of full reparation, albeit partly, provide for this in its traditional formation of *restitutio in integrum* and compensation.[9] The inclusion of the principle in key African Union (AU) instruments represents its formal adoption and application in human rights adjudication in Africa.

Thus, this chapter has four parts, the first one being this introduction. The second part locates reparations within the African human rights legal framework, while the third part traces the evolution of reparations in Africa, albeit briefly to put into context the remedial competence or jurisdiction of the African Court, mainly focusing on the reparations

6 As above.

7 As above.

8 FE Torres 'Revisiting the *Chorzów Factory* standard of reparation – its relevance in contemporary international law and practice' (2021) 90 *Nordic Journal of International Law* at 190 & 192. See also J McIntyre 'The declaratory judgement in recent jurisprudence of the ICJ: conflicting approaches to state responsibility?' (2016) 29 *Leiden Journal of International Law* at 189.

9 See art 29 of the Protocol Establishing the African Court, which mentions 'reparations' and offers restitution and compensation as examples of redress in cases of violation of human rights.

regime the African Court has taken since it adopted its first decision on reparations in 2014. Again, it is stressed that the contribution seeks only to reveal the remedial approach the African Court has so far taken, benchmarking it against good practice within and outside Africa. The chapter avoids a systematic comparative approach with other human rights systems and courts. Rather, it makes *ad hoc* references by drawing inspiration from those systems where such is necessary to affirm the African Court's approach to reparations where it clearly follows good practice or to show where it may need to innovate and improve in future cases.

2 Reparations in the African human rights system

For as long as there are human rights violations, remedies will always be needed. The adoption of human rights standards at all levels and the establishment of human rights oversight institutions have not ended violations. To the extent that societal vices such as disease, corruption, bad governance, poverty, conflict, and harmful traditional and cultural practices are still part of African anthropology, violations of human rights will continue, and so will the need to redeem the victims of violations and discourage the recurrence of these violations.[10]

Yet due care should be exercised when dealing with the concepts of 'remedies' and 'reparations'. Literature and scholarship abound that refer to these interchangeably and, in some cases, separately. In its traditional meaning, a 'remedy' is often understood to refer to the procedural recourse a victim should have in order to seek substantive relief. It is the substantive relief that often insinuates 'reparations'. For the reason that it is difficult conceptually to drive a wage between these two concepts, the Human Rights Committee has interpreted the nature of state obligations in General Comment 31.[11] It held that 'without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, para 3, is not discharged'. It would appear the Human Rights Committee interpreted the right to an effective remedy as incorporating the right to reparations. When referring to reparations in this chapter, the idea is to mention the specific measures a court or tribunal requires of the state concerned to repair the violation of an international human rights obligation.

10 D Shelton *Remedies in international human rights law* 2 ed (2005) 113.

11 African Commission on Human and Peoples' Rights, General Comment 31 on the Nature of the general legal obligation imposed on states parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13 para 16.

On their part, state parties to the African human rights system have the primary duty to provide redress to victims of human rights violations (wrongful conduct), with tribunals such as the African Court only intervening to affirm the same position where a state party has failed to do so. Such intervention does not create the obligation to repair but simply to confirm and enforce one that already exists. The obligation already exists under customary international law and specific treaty provisions. The insistence by a tribunal is meant to preserve the integrity of the human rights system, especially where non-compliance with human rights obligations is likely to create a state of impunity.

The provision of reparations to repair violations of human and people's rights is well established in the legal texts of the African human rights system, though some scholars doubt its clarity.[12] This is documented in the key human rights instruments such as the African Charter on Human and Peoples' Rights (African Charter). However, Musila proffered two reasons for the African Charter's lack of clarity on the right to remedy. These are first, the right to a remedy is one of the many 'substantive rights that should have been included in the Charter but were not' when regard is had to the proposition that the Charter is a 'tentative, sparsely drafted instrument' often described as 'opaque' and 'difficult to interpret'.[13]

While article 30 of the African Charter establishes the African Commission, article 53 allows the Commission to prepare for the AU Assembly of Heads of State and Government (AU Assembly) recommendations it deems fit at the end of dealing with each case to provide a remedy to victims of human rights violations. Based on this and other provisions of the African Charter,[14] the African Commission has provided remedies to victims of violations since 1987, though 'provided with relatively weak powers of investigation and enforcement under the terms of the Charter'.[15]

12 GM Musila 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) *2 African Human Rights Law Journal* at 441-464.

13 As above.

14 Musila (n 12) posits that the Commission relies on provisions 'scattered' throughout the African Charter such as art 1 on the universal obligation of states to implement rights and freedoms and art 7 on the right to fair trial and the fact that the Commission was established as the premier institution to oversee the promotion and protection of human rights on the continent. While the authors agree with reliance on treaty provisions on the 'implied' right to a remedy, the one on the Commission being the premier body has lost significance with the entry into operation of the African Court and African Committee of Experts on the Rights and Welfare of the Child (ACERWC).

15 GJ Naldi 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* at 681-694 & 682.

Nonetheless, the African Commission, perhaps taking the Human Rights Committee approach to remedies and reparations, should be credited for setting off the jurisprudence on principles of effective remedies in *Jawara*,[16] where it postulated the now famed tripartite elements of a remedy, namely, 'availability', 'effectiveness' and 'sufficiency'. The Commission held that a 'remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint'.[17]

It would appear no controversy turns on this view by the Commission regarding the conceptualisation of an 'effective remedy'. The concern only concern is that the African Commission does not seem to elucidate any of the three elements in the post-decision context. Merely characterising a remedy as 'capable of redressing the complaint' is ambiguous as it is formalistic. That capacity is conditional on other factors. The Commission ought to treat the concept of an effective remedy as mutable. It could draw inspiration from the normative framework where the right to a remedy has become clear in article 25 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Article 25 of the Maputo Protocol imposes an obligation on state parties to provide 'appropriate remedies to any woman whose rights and freedoms, as herein recognised, have been violated'. The change in drafting parlance could have been prompted by scholarship that persisted in pointing out the deficiencies in the legal framework on remedies in the African human rights systems. A similar clear reference to remedies is present in article 27 of the African Court Protocol, supporting the view that the legislative tradition in the African system is moving towards the embodiment of the right to a remedy in clear terms.[18]

However, as if to address deficiencies in the remedial framework in the African legal instruments, the African Commission adopted General

16 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

17 *Jawara* (n 16) para 32.

18 Article 27(1) of the African Protocol provides: 'If the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'. The view here is that the drafting of earlier human rights instruments, such as the African Charter, had not been specific in terms of articulating the remedial competencies of adjudicatory institutions they established. However, there now appears to be a shift to more express reference to the right of victims to remedies in order to address the violation and to guarantee non-recurrence of violation going forward.

Comment 4.[19] This Comment and its principles, though written with specific reference to victims of torture and other cruel, inhuman or degrading punishment or treatment, are applicable to all types of human rights violations just as freedom from torture, which is provided for under article 5 of the African Charter is a human right.

Much as the African Commission made the commentary on remedies specific to victims or survivors of torture in General Comment 4,[20] it is possible to extract specific elements therefrom that are universally applicable to several cases of violation of other human rights and freedoms. For instance, the Commission elucidated on the right to redress as encompassing 'the right to an effective remedy and to adequate, effective and comprehensive reparation', and the 'ultimate goal of redress' being

19 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) adopted at the 21st extra-ordinary session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia (African Commission General Comment 4). In para 4, it provides that it is founded and guided by existing regional and international norms and standards regarding the right to redress for victims of torture and other ill-treatment. It reaffirms and elaborates the jurisprudence of the African Commission and relevant instruments adopted by AU member states, including the African Charter, the AU Constitutive Act, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. It is also based on soft law developed in the African human rights system and elsewhere, such as the Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (the Robben Island Guidelines); the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa; the Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights, held from 28 April to 12 May 2014 in Luanda, Angola; African Commission General Comment 3 on the African Charter on Human and Peoples' Rights on the Right to Life (Article 4) adopted at the 57th ordinary session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia; and the Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa, among others. As for other systems, General Comment 4 builds on the United Nations Committee against Torture's General Comment 3 on the Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13 December 2012, UN Doc CAT/C/GC/3 (UN CAT General Comment 3) and the United Nations 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, 21 March 2006, UN Doc A/RES/60/147.

20 In African Commission General Comment 4 (n 19) para 7, the African Commission commented that the purpose of the General Comment is 'authoritative interpretation on the scope and content of the right to redress for victims of torture and other ill-treatment in specific contexts pertinent to the African continent'. It also highlighted national actors responsible for ensuring that redress is availed to victims at national level.

long-term and sustainable socio-political and economic 'transformation' of structures and relationships in a manner that promotes observance of human rights and restoration of human dignity.[21] In the final analysis, the state obligations remain to put in place 'legal, administrative and institutional frameworks to give effect to the right to redress'.[22]

The Commission also weighed in on the normative content of the concept of 'reparations', which it defined to include 'restitution, compensation, rehabilitation, satisfaction – including the right to the truth, and guarantees of non-repetition'.[23] This reparations regime appears to mirror the five-fold regime developed and being implemented in the Inter-American human rights system.[24] This is commendable to the extent that African states are held to a standard similar to the one applicable in other parts of the world, subject to the prevailing context that would make such reparations 'appropriate'. The deficiency in the Commission's approach is that it did not commit sufficient time to elucidate the principle of reparations in light of its contribution as a general comment guiding states on the implementation of article 5 of the African Charter.

The other element of universal application is the definition of a 'victim' of violation in article 5 and, by extension, other provisions of African human rights instruments. In this regard, the Commission defined 'victims' or 'survivors' as:

> persons who individually or collectively suffer harm, including physical or psychological harm, through acts or omissions that constitute violations of the African Charter.[25]

The Commission further expounded on the definitional aspects of a victim as one 'regardless of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted'. It also underscored the point that one is a victim of violation 'regardless of any familial or other relationship between the perpetrator and the victim'.[26] Furthermore, it is the Commission's considered view that a victim should also include 'affected immediate family or dependants of the victim as well as persons

21 African Commission General Comment 4 (n 19) para 8.

22 As above.

23 African Commission General Comment 4 (n 19) para 10.

24 G Donoso 'Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach' (2009) 49 *Instituto Interamericano de Derechos Humanos* at 30.

25 African Commission General Comment 4 (n 19) para 16.

26 African Commission General Comment 4 (n 19) para 17.

who have suffered harm while intervening to assist victims or to prevent victimisation'.[27] The author notes here that the Commission adopted an approach preferred by other systems, such as the European[28] and Inter-American[29] human rights systems, that have benevolently interpreted the term 'victim' beginning with the actual recipient of injury due to violation and extended it to family members that include siblings and descendants, and further to non-relatives whose injury can be traced to the conduct of the perpetrator.

One should also note that the wider the definition of a victim is, the more imaginative a tribunal should be in couching relief appropriate to the violation or injury felt by victims in each case. This is more important considering the communal way of life prevalent on the continent, where one does not need to be a descendant or sibling of the victim to qualify for reparations. In matters of procedure, especially for the purpose of proving damages for injury suffered, evidential burdens of proof may vary between victims depending on their respective profiles.

In all this, the African Commission exhorted states to 'protect the dignity of victims' and to take a 'victim-centred' approach to redress, with participation laying at the core of this process.[30] This involves the state investigating the extent and nature of the violation that has taken place and the needs of the victims as lived realities that are consequences of a violation. By so doing, the remedial measures would respond to the needs of the victim, and in our view, they constitute 'appropriate' remedy in such circumstances.

Concerning the type of reparations constituting redress in each case, the Commission briefly commented on the five-pronged approach to reparations but aligned them to the 'particular context of victims on the African continent'.[31] This means that as the approach to reparations is gaining universal momentum based on its provision in several texts and practice in different human rights systems, the same criteria should be

27 As above.

28 The European system of human rights has long defined a victim to include 'any person' who would indirectly suffer prejudice or has an interest in seeking cessation of the violation. See eg *X v Federal Republic of Germany* ECHR Appl No 4185/69 (1970) 140, 142.

29 See eg, *Trujillo v Bolivia (Reparations)* IHRL 1475 (IACHR 2002) para 54, quoted by JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (2003) 235-236.

30 African Commission General Comment 4 (n 19) para 18.

31 African Commission General Comment 4 (n 19) paras 36-49.

interrogated based on its application in a context such as the African human rights system.

First is restitution, which, according to the Commission, is meant to put the victim back to the situation they were in before the violation, which may include the restoration of citizenship, employment, land or property rights, accommodations, the release of persons arbitrarily detained or restoration of the ability for victims to exercise the right to return.[32]

Second is compensation, a specie of reparations, which, together with restitution presents the concept of reparations in its original and historical but deficient form. The African Commission stresses that this reparation should be 'fair, adequate and proportionate' to the harm suffered at the hands of violation of human rights.[33] A point is made that while compensation in the true sense may be for 'reimbursement of medical expenses', it may be awarded to take care of 'future medical or rehabilitative services needed by the victim to ensure as full rehabilitation as possible' and 'cover damage caused to a victim's anticipated personal and professional development' as a result of the violation.[34]

Thirdly, through rehabilitation as another form of reparation, the Commission commented that it seeks to achieve 'restoration of function or the acquisition of new skills required by the changed circumstances of a victim in the aftermath of torture and other ill-treatment' to ensure 'maximum possible self-sufficiency'. Rehabilitation further seeks to restore, as far as possible, victims' independence and physical, mental, social, cultural, spiritual and vocational ability, aiming to achieve full inclusion and participation of victims in society.

Yet satisfaction as the fourth tentacle of the five-pronged reparations regime in Africa has a substantial component allocated to truth-telling, the state's acceptance of its responsibility over the violation, the effective recording of complaints, and the investigation and prosecution of perpetrators.[35] Satisfaction also entails efforts seeking 'cessation of continuing violations; verification of the facts and full and public disclosure of the truth to the extent that such disclosure' is necessary and applicable to the violation in question. Public apologies, acceptance of responsibility and commemoration of victims become public declarations of facts.

32 African Commission General Comment 4 (n 19) para 36.

33 African Commission General Comment 4 (n 19) para 37.

34 As above.

35 African Commission General Comment 4 (n 19) para 44.

Finally, the African Commission offers a commentary on the guarantee of non-recurrence as the final leg of the reparation's regime.[36] States could adopt several measures to satisfy this requirement. However, it should entail 'institutional and social transformation that may be required to address the underlying causes of violence'. In its simplified form, non-recurrence means adopting measures to ensure that similar violations do not take place in the future. Non-recurrence is at the heart of human rights remedies, where general measures are adopted to deal with root causes of violations, such as legislative amendments to eliminate offending provisions. Taken conjunctively, the five tentacles of reparations outlined regarding torture can be argued to define the boundaries of the reparations regime applicable to the African human rights system.

Having outlined the Commission's regime, the chapter now traces the broader reparations approach taken by the African Court. Such a discussion provides a comprehensive understanding of how these two premier human rights bodies, the Commission and the Court, continue to develop jurisprudence on reparations and lessons and patterns that can be drawn from its practice. Moreover, the discussion will give an assessment of the extent to which the African human rights system interacts and cooperates judicially with other human rights systems that have adopted the same reparations regime.

3 The reparations practice in the African Court

In addition to the scattered provisions of the African Charter discussed above,[37] the African Court's remedial competence is provided for in article 27 of the African Court Protocol. This fulcrum provision on the remedial competence of this Court provides as follows:

36 African Commission General Comment 4 (n 19) paras 45-49.

37 KT Sánchez 'The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: a comparative analysis on account of the revised rules of court' (2021) 21 *African Human Rights Law Journal* at 812-835, 814. The author believes that art 21(2), which reads: 'In case of spoliation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation' is a provision that can be cited as a basis of state parties to the African Charter to provide effective remedies for violation of their obligations thereunder. See, Maputo Protocol art 26.

(1) **If the Court finds that there has been violation of a human or peoples' rights**, it shall make **appropriate orders to remedy the violation**, **including the payment of fair compensation or reparation**.
(2) In cases of **extreme gravity and urgency**, and when necessary to avoid irreparable harm to persons, the **Court shall adopt such provisional measures** as it deems necessary.[38]

There is a conceptual debate from the outset. While it is now almost common cause that compensation is a form of reparation, the Protocol seems to treat the two as distinct resolutions. *Chorzow Factory* restated the original and historical conception of reparations as *restitutio in integrum* and compensation. As will be seen later, the African Court has clarified this issue in its reparation's jurisprudence. However, one key aspect of the provision is its total trust in the Court to be able to consider what amounts to 'appropriate' remedies. In so doing, the Court does not suffer from any limitation of power in this regard. The only rider or condition is that whatever remedy the Court gives must meet the 'appropriate' requirement.

It is important to note that the provision uses the term 'appropriate orders to remedy the violation'. This makes a case for the proposition that the remedy must be 'effective' in the sense that it is capable of changing the circumstances of the victim when the order is fully executed.[39] The author is of the view that the use of the term 'appropriate' in the African Court Protocol appears to have been deliberate from a drafting point of view. The drafters did not want to make reference to any remedy but 'appropriate remedy'. In terms of the English language, the synonyms of 'appropriate' which include 'suitable', 'apt' or 'fitting', go further to reinforce the author's interpretation that the remedy ought to be fit for purpose. As the African Court held in *Zongo* effective remedy refers to 'that which produces the expected result …' and thus measurable through its 'ability to solve the problem'.[40]

It is also noteworthy that the African Court adopted a *Comparative Study on the Law and Practice of Reparations for Human Rights Violations* in 2019 (African Court Reparations Study),[41] with the objective of providing

38 African Court Protocol art 27 (own emphasis).

39 On the effectiveness of remedies, see generally the jurisprudence of the African Commission in *Jawara* (n 16) para 46, where the Commission was addressing the 'effectiveness' of remedies for purposes of exhaustion of local remedies.

40 *Zongo* (n 4).

41 African Court on Human and Peoples' Rights *Comparative study on the law and practice of reparations for human rights violations* (2019) https://www.african-court.org/wpafc/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf (accessed 18 September 2023).

'a comparative analysis on the law and practice of reparations for human rights violations to underpin the elaboration of guidelines on reparations' for the African Court.[42] Consequently, the African Court Reparations Study covers various aspects of reparations, such as the legal and theoretical foundations, the definition of a 'victim', procedural requirements such as the burden of proof, causal link between conduct and injury, evidentiary standards, quantum of reparations; type of reparations; comparative practice in the European, Economic Community of West African States (ECOWAS), Inter-American and UN systems, among others things. The Study makes the overall point that the question of reparations is one that each tribunal should approach in its own way, although it may draw inspiration from the practice and procedure of others.[43]

4 The African Court's reparations framework

It is on record that the African Court has so far issued reparations decisions in more than 20 cases that have come before it.[44] Procedurally, the practice of the Court is guided by Rule 63 of its Rules of Procedure, which allows it to render a decision on the merits together with reparations, or if 'circumstances require', by convening a separate hearing for purposes of dealing with reparations and rendering a judgment to that effect in due course.[45] It is the content and philosophy driving or informing reparations judgments that are the focus of this chapter.

4.1 *Reverend Christopher Mtikila v Tanzania*

The African Court laid the foundational stone for its reparations jurisprudence in the joined cases of *Mtikila.*[46] The essence of the complaint was that the constitution of the respondent state required that a person should be a member of or sponsored by a political party for them to qualify for candidature in any presidential, parliamentary or local government elections. Having found violations of the African Charter, the African

42 As above, vi. See also the African Court *Fact sheet on filing reparation claims* (2019) https://www.african-court.org/en/images/Basic%20Documents/Reparations_Fact_Sheet-FINAL_25_Nov_2019.pdf (accessed 18 September 2023).

43 African Court Reparations Study (n 41) 12-13.

44 See African Court 'ACtHPR cases' https://www.african-court.org/cpmt/finalised (accessed on 11 June 2023).

45 See Rule 63 of the African Court Rules of Procedure (2020). Sánchez (n 37) discusses in detail the Rules of Procedure of the African Court and their implications on the right to reparations.

46 *Reverend Christopher Mtikila v Tanzania* (reparations) (2014) 1 AfCLR 72.

Court granted the applicant leave to apply for reparations in separate proceedings.[47]

The *Mtikila* decision makes several contributions to the reparations dialogue in Africa. First, it links and locates African approaches to reparations in *Chorzow Factory* jurisprudence, restating the rule of customary international law that 'any violation of an international obligation that has caused harm entails the obligation to provide adequate reparation'.[48] The Court elaborated on the link between African and international principles on reparations (state responsibility) by positing that article 27(1) of the African Court Protocol reflects the international law position.[49] This shows that the Court does not only pursue judicial cooperation in normative or substantive jurisprudence but also in reparations, essentially ensuring African states are held to the same standards as other state parties across the globe.

Second, and from the onset, the Court harmonises its own jurisprudence and that of the African Commission in terms of adopting the five-fold approach to reparations elaborated in the African Commission General Comment 4. This harmony between the two AU human rights bodies is critical to a unified development of standards on reparations. In fact, as demonstrated earlier, the Court goes further to benchmark its approach with that of the African Commission.[50]

Third, and connected to the second point, the African Court structures its reparations decisions with headings recalling the five-fold typology of human rights reparations and reaffirming its acceptance, leaving no room for doubt as to which category a reparation belongs to. This is important in so far as it clarifies the relief granted and hints to the state party concerned on the manner of its implementation.

Fourth, under the reparation tentacle of 'compensation', the African Court introduced the 'causal nexus' principle when it held as follows:

> It is not enough to show that the Respondent State has violated a provision of the Charter; it is also necessary to prove the damages that the State is being required by the Applicant to indemnify. In principle, the existence

47 As above.

48 *Mtikila* (n 46) para 27.

49 As above.

50 The African Court relied on the African Commission's findings in Consolidated Communications 279/03 and 296/05 *Sudan Human Rights Organisation v Sudan* (2009) AHRLR 153 (ACHPR 2009).

> of a violation of the Charter is not sufficient, per se, to establish a material damage.[51]

In other words, the Court underscored the point that a violation does not always give rise to damages unless the same can be linked to the state's conduct, thus invoking state responsibility in that case. The other point embodied in the quote above is that the applicant bears the onus of proof or evidentiary burden to demonstrate to the satisfaction of the Court that the conduct violating rights caused pecuniary damages that have been particularised before the Court. The evidentiary burden is also applicable to non-pecuniary damages such as 'damages for the suffering and afflictions caused to the direct victim, the emotional distress of the family members and non-material changes in the living conditions of the victim, if alive, and the family', which are non-economic in nature.[52]

Although it acknowledged that legal costs and expenses incurred in litigation form part of reparation, the Court again declined to award the applicant costs and expenses on the basis that he 'failed to develop the arguments relating the evidence to the facts under consideration, the Court cannot grant his claims'.[53] In such cases the applicant must provide 'probative documents and to develop arguments relating the evidence to the facts under consideration'.[54] Where one is dealing with alleged financial disbursements, 'clearly describe the items and justification thereof'.[55]

Fifth, the Court demonstrated remedial acumen, competence and duty within the ambit of article 27(1) of the Court Protocol when it remarked that despite none of the parties in *Mtikila* making submissions on measures of satisfaction, based on the 'inherent powers of the Court', the Court is to consider reparation of satisfaction. This is a very important interpretation of its remedial competence in so far as the Court leaned on the practice of a human rights court giving a remedy the parties did not request, thus, giving full effect to the principle of 'appropriate' relief.[56]

Finally, the Court introduced the practice of requiring the state party involved in reparations proceedings to submit a report to the Court on the measures it has taken to implement the operative parts of its judgment. This is another demonstration of an interpretation of article 27 that gives

51 *Mtikila* (n 46) para 31.

52 *Mtikila* (n 46) para 39.

53 *Mtikila* (n 46) para 40.

54 As above.

55 As above.

56 *Mtikila* (n 46) para 44.

the Court a post-judgment responsibility to monitor the implementation of its decisions and not simply to exist as an entity of *functus officio*. The Court gave the respondent state nine months to make this report. While this aspect of reporting may not stand on its own as a sub-category of the reparation typology, it supports the implementation of all reparations ordered, or the Court may order by ensuring that they are implemented. We should add here that all remedial orders the Court gave, such as the order for publication of the judgment in a daily newspaper publication, were clearly articulated so much as to make them crystal clear to the state party for purposes of implementation.

However, the nature of *Mtikila* was that the scope of reparations was inevitably narrow as there were not many issues for determination by the Court. It would be interesting to analyse reparations in other cases where violations were more complex, thus triggering wide-ranging reparations and their implications on implementation.

4.2 *Norbert Zongo v Burkina Faso*

Having laid its foundation on reparations in *Mtikila*, it is interesting to trace the trajectory taken by the Court in its subsequent decisions. The one decision that followed on the heels of *Mtikila* was *Zongo*.[57] This case dealt with the extrajudicial killing of an investigative journalist and his companions in 1998, who were investigating various political, economic and social scandals in Burkina Faso during that period. Their burnt corpses were found in a car. The Court held that the state had failed to act with due diligence in arresting, detaining and prosecuting the perpetrators in violation of article 7 of the African Charter. Arguments on reparations were heard and determined in subsequent proceedings.

Notably, the Court commenced its ruling on reparations by referring to general legal principles of international law that affirm the basis for payment of reparation, namely, in the *Chorzow Factory* decision. However, this time, the Court added another layer of a legal basis for state responsibility to pay reparations, namely, the International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts – principles on payment of full reparations.[58] The Court would again rely on the Draft Articles to underscore the causal link between a state's wrongful

57 *Zongo* (n 4) above.

58 International Law Commission Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10) chp. IV.E.1 (ILC Draft Articles).

conduct and harm or prejudice suffered[59] and to justify the consideration of material and moral damages in terms of article 31(2) of the ILC Draft Articles. The Court made a distinction between these two types of damages, making it clear that one is material and monetary in nature while moral damages 'affect the reputation, sentiments or affection of a natural person'.[60]

Finally, relying on article 34 of the ILC Draft Articles,[61] the Court motivated its interpretation of 'full reparations' to include 'restitution, compensation and satisfaction'. Reference to the ILC Draft Articles authenticates the Court's approach to reparation, again linking African human rights jurisprudence to the rest of the world. It plants the roots of the African reparation jurisprudence in the realm of universally acceptable principles to ensure that no violation of international law goes 'unpunished'.

The nature of violations in *Zongo* gave the Court an opportunity to reflect deeply on some aspects it glossed over in the *Mtikila* case. One of these aspects is the question of whether a victim is entitled to moral damages. As expected, the respondent state challenged the applicants' evidence as insufficient to 'justify their status as beneficiaries' and, therefore, entitled to reparations.[62] The Court had to answer this question in its journey of determining the question of reparations.

In defining a 'victim', the Court opened that discussion with a master stroke. It held that 'the notion of victim must not necessarily be limited to that of the first line heirs of a deceased person under national law' since it is possible that 'other close relatives of the deceased' might have suffered the impact of the violation.[63] Relying on the *UN 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*, the Court took the definition consistent with what would be the African Commission's position in General Comment 4. The Court indicated that there is a lack of harmony in the

59 As above.

60 *Zongo* (n 4) para 27.

61 ILC Draft Articles art 34 reads: 'Full reparation for the injury caused by the international wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter'.

62 *Zongo* (n 4) para 43.

63 *Zongo* (n 4) para 46.

approach of different HRCTs across the human rights systems on the level of affinity needed for a relative to qualify as a victim.[64]

In the final analysis, the Court adduced a criterion based on the fact that 'those who acted (directly or by representation) on the very front line in this respect and suffered the most from the situation are the spouses, children, fathers and mothers of the deceased' and accordingly, adjudged them as legible beneficiaries of reparations in that case.[65] As to proof of relations, the Court introduced the 'principle of free admissibility of evidence', which meant that the Court is the master of the evidentiary procedure with the final say in terms of which evidence to admit in proof of certain aspects of the dispute before it. Thus, the Court is not hamstrung by rules of national law or other strict approaches.

Still, on evidentiary requirements, especially on the causal link between violation and damage suffered, the Court seemed to step up its approach by declining to simply dismiss the lack of evidence as it did in *Mtikila*. In *Zongo*, the Court adopted the Inter-American Court approach, namely, that there is a presumption that prejudice may be an automatic consequence of a violation of a human right, in which case no proof of causal link will be required.[66] The Court accepted the presumption, thus finding that the violation itself (failure to investigate and prosecute perpetrators) was the cause of the victims' anguish.

The Court also had the chance to deal with the quantification of damages for the first time in *Zongo,* having dismissed all applications for damages in *Mtikila* for lack of evidence. In *Zongo*, the African Court alluded to the principle that when it comes to the quantum of damages, there must be 'full reparation, commensurate with the prejudice suffered' in an attempt to 'wipe out all the consequences of the illegal act and re-establish the situation', which would probably have existed but for the wrongful act.[67] Nonetheless, ascribing monetary value to moral injury is no mean task. Accordingly, it is dependent on the Court determining this value by the reasonable exercise of 'judicial discretion' and 'equity'.[68]

As for satisfaction and guarantees of non-repetition, the Court did not pursue any new line of reasoning except giving reparations consistent with the manner of violation. Regarding the latter, the Court ordered

64 *Zongo* (n 4) para 48.
65 *Zongo* (n 4) para 50.
66 *Zongo* (n 4) para 55.
67 *Zongo* (n 4) para 60.
68 *Zongo* (n 4) para 61.

that the state re-open investigations to bring to book those responsible for the heinous murders. However, as an issue incidental to this chapter, the Court made reference to an aspect that could undermine its control in monitoring the execution of its decisions when it held as follows:

> The Court would also like to emphasise that whereas it may indeed order the state to adopt certain measures, the Court does not, however, deem it necessary to indicate to the state how it should comply with the Court's decision, that being left to the discretion of the said state.[69]

The author has already expressed his reservations about such an approach to post-judgment competencies. This chapter applauded the Court in the *Mtikila* decision for inserting a part in the order that required the state to report on measures adopted to implement the order. Yet, in this case, the Court expresses its doubt as to whether it previously took the better approach. In *Zongo*, the Court defers to the state party the choice of complying with its remedial orders, probably leaving room for the state to either conduct superficial implementation or none at all. The Court should remain in firm control of the implementation process even as it seeks the cooperation of state parties in complying with its judgments. The irony, however, is that *Zongo* is regarded as one of the best implemented decisions of the Court to date, probably because the majority of the reparations, other than publishing the judgment and re-opening of investigations, sounded in money which has since been paid in full.

4.3 *Lohé Issa Konaté v Burkina Faso*

The one case that followed on the heels of *Zongo* was *Konaté*.[70] Here, the complaint was that the applicant had been charged and convicted of defamation, sentenced to a prison term, paid an excessive fine, and had his tabloid suspended from operating. The African Court found a violation of the African Charter, the International Covenant on Civil and Political Rights and the ECOWAS Treaty.[71]

The Court structured this reparations judgment in an interesting way. It first summed up the legal principles underpinning reparations, which it established in *Mtikila* and *Zongo* as follows:[72]

69 *Zongo* (n 4) para 108.

70 *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346 (*Konaté*).

71 As above.

72 *Konaté* (n 70) para 15.

(a) A state found liable of an internationally wrongful act is required to make full reparation for the damage caused.
(b) Such reparation shall include all the damages suffered by the victim and, in particular, includes restitution, compensation, and rehabilitation of the victim, as well as measures deemed appropriate to ensure the non-repetition of the violations, taking into account the circumstances of each case.
(c) For reparation to accrue, there must be a causal link between the established wrongful act and the alleged prejudice.
(d) The burden of proof lies with the applicant to show justification for the amounts claimed.

In *Konate,* the Court first confronted claims of *restitutio in integrum* as one of the prayers. In particular, the victim wanted his criminal record to be quashed and fines to be set aside as part of the restitution process. Rather than dealing with the principle of 'restitution' with a bit of commitment and in detail, the Court was quick to endorse the agreement between the parties concerning the quashing of records but declined the request to set aside exorbitant fines imposed on the victim by national courts. The Court reasoned that it is not an appellate court and hence has no competence to set aside decisions of national courts, but it nevertheless 'urged' Burkina Faso to revise its scale of fines.

The main criticism this chapter advances against the Court in *Konate* is that the Court abandoned the progressive and courageous interpretation of article 27(1) of the African Court Protocol when it previously ordered satisfaction to the application *proprio motu* without the applicant asking for this remedy. This chapter commented that this was the way to go for the Court as parties may miss some 'appropriate' reparations that have a far-reaching impact on the protection of human rights on the continent. Yet in *Konate*, the Court contradicted its previous approach when it held that it 'cannot rule *ultra petita*, it will limit itself to the amount claimed'. [73] The Court was simply declining to grant an amount that was more than what the applicant had indicated in court papers, yet the Court acknowledged that the receipts filed of record supported a higher amount.

The African Court should abandon the *ultra petita* approach in reparations. This is unnecessary adherence to proceduralism. The Court must accept and acquiesce with the nature of human rights litigation, which serves in some instances to protect the rights of people not before

73 This means *beyond that which is sought*. It is used to refer to a decision of a court that grants more than what is asked for. A judgment which is *ultra petita* may be successfully appealed as it is not good at law.

the Court. For instance, the reparation of guaranteeing non-reoccurrence is not meant to protect the victim only from future violations. It is a general measure meant to dismantle and uproot the cause of the current violation so that no one, the victim or anyone else, has to suffer from the same violation in the future. There is public interest in human rights litigation. Those who submit cases to the Court have the privilege to go before the Court. On a continent plagued with economic challenges, applicants with economic access to adjudication mechanisms such as the African Court should ensure that they seek reparations, the benefit of which extends to other similarly placed people. The Court should equally understand the context in which it conducts its judicial mandate and prefer a purposive interpretation of the law as opposed to committing itself to a narrow approach that limits the scope of beneficiaries of its decisions.

As for the rest of the reparations, the Court has remained on the same path. For it has maintained the same stance on the causal link and the evidentiary burden to prove material and moral damages as resting with the applicant. However, the Court lacks a commitment to engage in sustained analysis of issues and justification of decision making. For instance, in *Konate*, the Court simply concluded that 'the claim is exaggerated and on the basis of equity, decides to reduce the amount'.[74] It was necessary for the Court to demonstrate the exaggeration by making such factual findings as would lead to that conclusion. That approach would guide future applications grappling with the issue of proving costs before the African Court for purposes of reimbursement.

5 Conclusion

The purpose of this chapter was to trace the developing jurisprudence of the African Court on reparations as reflected in its earlier decisions. Having scanned through the Court jurisprudence, several conclusions could be made.

First, the legal framework of the African human rights system recognises reparations as an important tool to guarantee the protection of human and people's rights and has directly incorporated the concept of reparations in AU human rights instruments. Thus, article 21(2) of the African Charter and article 27(1) of the African Court Protocol, read together with article 25 of the Maputo Protocol, expressly provide for the right of victims of violation of rights to an effective remedy, which invariably includes payment of reparations to correct the harm.

74 *Konaté* (n 70) para 59.

Second, the reparation regime adopted by the Court is consistent with international practice in terms of its content; it being founded on established international legal frameworks such as the trailblazing jurisprudence on reparations, namely, *Chorzow Factory* as well as ILC Draft Articles. These legal bases concur in affirming the consequential obligation of a state to pay reparations following a wrongful act, which now includes the violation of fundamental rights and freedoms. In this regard, the Court has embraced the five-fold typology of reparations as practised by the Inter-American Court. This presents the Court with an opportunity to continue to draw inspiration from that human rights system where necessary as it plods along honing its own context-specific approach.

Third, the Court has correctly interpreted its remedial competence under article 27(1) of the Court Protocol as unlimited, provided that the remedies or orders it gives are appropriate in view of the violation established in particular legal proceedings. We will add that it could be necessary for the Court to be more aggressive to the extent of awarding certain remedies even where the applicant did not request them. This can be especially pertinent with general measures that seek to preserve the integrity of the African human rights system. This approach is recommended for remedies that, for instance, seek to guarantee non-recurrence of the same violation with respect to the victim or any other similarly placed person.

Fourth, the Court is commended for issuing clear remedial orders, thus presenting no difficulty in understanding them. However, the Court needs to commit more time and effort to explain legal principles as it applies them to the facts before reaching conclusions. The process of adjudication is as important as the outcome. So far, some findings appear to be abruptly arrived at even if they have a solid legal basis.

Finally, when it comes to the common reparation of compensation for expenses incurred by the applicant in prosecuting their case before the African Court, the Court initially took a pro-victim or applicant approach before it changed the approach to one where it sticks to the amounts claimed in the papers before it. This has happened even in cases where the victim or applicant has now tendered incontrovertible evidence showing that the expenses were, in fact, higher than the amount requested in papers. The hope is that the Court will overcome this formalistic approach and ensure that victims obtain actual reparations as proven throughout the hearing of reparations proceedings.

Nonetheless, the Court is proving through its developing jurisprudence that it is committed to ensuring that those entitled to reparations through its generous interpretation of the term 'victim' can receive them. Such a generous interpretation of 'victim' underscores the African philosophy of a family in its expanded definition.

Table of abbreviations

AU	African Union
ECOWAS	Economic Community of West African States
HRCT	Human rights courts and tribunals
ICCPR	International Covenant on Civil and Political Rights
ILC	International Law Commission
PCIJ	Permanent Court of International Justice

Literature

Adeola, A (ed) *Compliance with international human rights law in Africa: essays in honour of Frans Viljoen* (OUP 2022)

African Commission on Human and Peoples' Rights *Principles and Guidelines on Human and Peoples' Rights While Countering Terrorism in Africa* (ACHPR 2016)

African Commission on Human and Peoples' Rights *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (ACHPR 1992)

African Court 'ACtHPR cases' https://www.african-court.org/cpmt/finalised

African Court *Fact sheet on filing reparation claims* (2019) https://www.african-court.org/en/images/Basic%20Documents/Reparations_Fact_Sheet-FINAL_25_Nov_2019.pdf

African Court on Human and Peoples' Rights *Comparative study on the law and practice of reparations for human rights violations* (2019) https://www.african-court.org/wpafc/wp-content/uploads/2020/11/Comparative-Study-on-the-Law-and-Practice-of-Reparations-for-Human-Rights-Violations.pdf

Donoso G 'Inter-American Court of Human Rights' reparation judgments. Strengths and challenges for a comprehensive approach' (2009) 49 *Instituto Interamericano de Derechos Humanos* 29-68

McIntyre J 'The declaratory judgement in recent jurisprudence of the ICJ: conflicting approaches to state responsibility?' (2016) 29 *Leiden Journal of International Law* 177-195

Musila GM 'The right to an effective remedy under the African Charter on Human and Peoples' Rights' (2006) *2 African Human Rights Law Journal* 441-464

Mutangi T 'Enforcing compliance with judgments of the African Court on Human and Peoples' Rights: prospects and challenges' in Adeola A (ed) *Compliance with international human rights law in Africa: essays in honour of Frans Viljoen* (OUP 2022)

Naldi GJ 'Reparations in the practice of the African Commission on Human and Peoples' Rights' (2001) 14 *Leiden Journal of International Law* 681-693

Pasqualucci JM *The practice and procedure of the Inter-American Court of Human Rights* (CUP 2003)

Sánchez KT 'The right to reparations in the contentious process before the African Court on Human and Peoples' Rights: a comparative analysis on account of the revised rules of court' (2021) 21 *African Human Rights Law Journal* 812-835

Shelton D *Remedies in international human rights law* 2 ed (OUP 2005)

Torres FE 'Revisiting the *Chorzów Factory* standard of reparation – its relevance in contemporary international law and practice' (2021) 90 *Nordic Journal of International Law* 190-227

International, Regional and Other Rights Instruments

African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990)

African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5) adopted at the 21st extra-ordinary session of the African Commission on Human and Peoples' Rights, held from 23 February to 4 March 2017 in Banjul, The Gambia

African Commission on Human and Peoples' Rights, General Comment 31 on the nature of the general legal obligation imposed on states parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13

General Comment 3 on the African Charter on Human and Peoples' Rights on the Right to Life (Article 4) adopted at the 57th ordinary session of the African Commission on Human and Peoples' Rights held from 4 to 18 November 2015 in Banjul, The Gambia

Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (The Robben Island Guidelines), African Commission on Human and Peoples' Rights adopted at the 32nd Session, 17-23 October

2002: Banjul, The Gambia

Guidelines on the Conditions of Arrest, Police Custody and Pre-trial Detention in Africa adopted at the 55th ordinary session of the African Commission on Human and Peoples' Rights, held from 28 April to 12 May 2014 in Luanda, Angola

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10) chp.IV.E.1

Organization of African Unity Constitutive Act of the African Union, 1 July 2000

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 13 September, entered into force 25 November 2005) CAB/LEG/66.6.

United Nations 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, 21 March 2006, UN Doc A/RES/60/147

United Nations Committee against Torture's General Comment 3 on the Implementation of Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 13 December 2012, UN Doc CAT/C/GC/3

Cases

Factory at Chorzów, Germany v Poland, Judgment, Claim for Indemnity (merits) (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928)

Jawara v The Gambia (2000) AHRLR 107 (ACHPR 2000)

Norbert Zongo v Burkina Faso (reparations) (2015) 1 AfCLR 258

Reverend Christopher Mtikila v Tanzania (reparations) (2014) 1 AfCLR 72

Sudan Human Rights Organisation v Sudan (2009) AHRLR 153 (ACHPR 2009).

Trujillo v Bolivia (reparations) IHRL 1475 (IACHR 2002)

X v Federal Republic of Germany ECHR Appl No 4185/69 (1970)

2 The ultimate withdrawal: A critical analysis of the jurisprudence of the African Court on Human and Peoples' Rights

Derick de Klerk & Annika Rudman

Abstract:

This chapter originates from the idea that the involvement of individuals before the African Court on Human and Peoples' Rights (African Court or Court) is vital to its ability to adequately fulfil its protective human rights mandate. Currently, 99 per cent of cases submitted to the Court have been submitted by individuals or non-governmental organisations (NGOs) with observer status before the African Commission on Human and Peoples' Rights. Thus, the African Court relies on individuals and NGOs to file cases before it to fulfil its mandate and develop its jurisprudence. From this perspective, the withdrawal, to date, by four states of their declarations under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), disabling direct access of individuals and NGOs to the African Court, is problematic as without cases the Court's authority, legitimacy and ability to operate is at risk.

For the African Court to continue to exist meaningfully and make an impact where domestic systems have failed, it is essential to prevent further withdrawals and encourage more states to make declarations under article 34(6) of the Court Protocol. In this regard, the contribution of this chapter is in its exploration of 'why' some states have reacted in such an extreme way to the authority of the African Court. As discussed and substantiated throughout this chapter, states arguably act on different motivations regarding their withdrawals, both legal and political. The aim of this chapter, however, is not to justify or discredit these withdrawals but rather to contribute to the existing and ongoing analysis of what may have triggered them.

As such, this chapter presents the different ways that states resist the authority of supranational human rights courts, such as the African Court, to contextualise the 'why' behind the withdrawals and characterise them as different types of 'reactions' for further discussion. It further presents an analysis of the jurisprudence of the African Court from a procedural perspective to pinpoint decisions that may assist in explaining the withdrawals. Together, this analysis is key to offering insight into what, if anything, could be done differently to avoid further withdrawals.

1 Introduction

This chapter originates from the idea that the involvement of individuals before the African Court on Human and Peoples' Rights (African Court or Court) is vital to its ability to adequately fulfil its protective human rights mandate. Currently, 99 per cent of cases submitted to the Court have been submitted by individuals or non-governmental organisations (NGOs) with observer status before the African Commission on Human and Peoples' Rights (African Commission or Commission).[1] Thus, the African Court relies on individuals and NGOs to file cases before it to fulfil its mandate and develop its jurisprudence.

From this perspective, the withdrawal to date by four states of their declarations under article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol), disabling direct access of individuals and NGOs to the African Court, is problematic.[2] As argued

1 African Court 'ACtHPR cases' https://www.african-court.org/cpmt/statistic (accessed 27 July 2023).

2 The four states that have withdrawn are Rwanda (2016), Tanzania (2019), Benin (2020) and Côte d'Ivoire (2020); African Court 'Declarations' https://www.african-court.org/wpafc/declarations/ (accessed 27 July 2023). To limit the scope of this chapter, the analysis is focused on two of these states, namely the withdrawals of Tanzania and Benin. The African Court has confirmed a state's right to withdraw its declaration

by Cirimwami, 'without a sufficient number of cases to adjudicate the Court's authority, legitimacy and continuing ability to operate could be seriously endangered'.[3]

For the African Court to continue to exist meaningfully and to make an impact where domestic systems have failed, it is essential to prevent further withdrawals and to encourage more states to make declarations under article 34(6) of the Court Protocol. In this regard, the contribution of this chapter is in its exploration of 'why' some states have reacted in such an extreme way to the authority of the African Court.

As discussed, and substantiated throughout this chapter, states arguably act on different motivations regarding their withdrawals, both legal and political. The aim of this chapter, however, is not to justify or discredit these withdrawals but rather to contribute to the existing and ongoing analysis of what may have triggered them.[4]

As such, this chapter's objective is twofold: First, to flesh out the different ways that states resist the authority of supranational human rights courts, such as the African Court, to contextualise the 'why' behind the withdrawals and characterise them as different types of 'reactions' for further discussion. In *Ingabire*,[5] the African Court held that Rwanda's withdrawal from article 34(6) was valid based on 'rules governing declarations of recognition of jurisdiction as well as the international law principle of state sovereignty'.[6] However, relying merely on these considerations as justification for 'why' states withdraw is arguably an oversimplification of a complex situation.[7] Secondly, the Court's jurisprudence will be analysed from a procedural perspective to pinpoint decisions that may assist in explaining the withdrawals. Together, this

under art 34(6) in *Umuhoza v Rwanda* (merits) (2017) 2 AfCLR 165 as well as *Adelakoun v Republic of Benin* [2021] AfCHPR 39.

3 African Court on Human and Peoples' Rights 'A publication of the coalition for an effective African Court on Human and Peoples' (2020) 1 *ACC Publication* available at https://www.african-court.org/wpafc/wp-content/uploads/2020/11/ACC-Publication_Volume-1_2020_ENG.pdf (accessed 12 June 2023).

4 See eg, SH Adjolohoun 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* at 10.

5 *Ingabire v Rwanda* (jurisdiction) (2016) 1 AfCLR 562.

6 *Ingabire* (n 5) paras 53-59.

7 The analysis in this chapter draws reference to the work of Madsen et al, particularly as it relates to the different types of state resistance to international courts. See discussion in sec 2.

analysis is key to offering insight into what, if anything, could be done differently to avoid further withdrawals.[8]

With this in mind, this chapter adopts the following structure: Section 2 discusses the relevant theoretical framework.[9] Thereafter, sections 3 and 4 provide an in-depth analysis of the withdrawals of Tanzania and Benin. However, since this chapter is not an empirical study, an in-depth discussion on the withdrawals of Rwanda and Côte d'Ivoire is not necessary. Furthermore, Rwanda's withdrawal has been extensively covered in academia. Regarding Côte d'Ivoire, the African Court only received two applications against the state during the period between filing their declaration in terms of the Optional Jurisdictional Clause and withdrawing therefrom.[10] As such, there are limited sources available to gain alternative insight into the reasons for Côte d'Ivoire's decision to withdraw.[11] Section 5 concludes the chapter and suggests alternative practices.

2 Resisting the authority of the African Court

To understand the unilateral act of withdrawal from the jurisdiction of the African Court, it is, as a point of departure, important to appreciate the source of the Court's authority in enforcing relevant international human rights instruments. Generally, there are two categories of authority in this regard. The first is the African Court's formal or *de jure* authority, that is, the legal powers ascribed to the institution by its founding treaty.[12] The

8 It should be noted that the withdrawal of acceptance of the jurisdiction of international human rights courts has not only been effected on the African continent. See eg the withdrawal of the declaration consenting to the optional clause concerning the recognition of the contentious jurisdiction of the Inter-American Court of Human Rights (Inter-American Court) by Peru in relation to the case of *Ivcher Brontein v Peru* IHRL 1457 (IACHR 2001). It is outside the scope of this article to discuss in any detail the possible comparative notions of the withdrawal mechanism. As such, case law from the Inter-American Court will only be briefly referenced with specific points in dispute.

9 The analytical framework discussed in this chapter was first introduced in MR Madsen, P Cebulak & M Wiebusch 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* at 197-220. This was applied to the African Court in T Daly & M Wiebusch 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* at 294-313. This chapter attempts to add to the discussion presented by Daly & Wiebusch (n 9) by applying their theories to address further contextual considerations and by presenting a discussion on the circumstances surrounding the withdrawal of Benin.

10 Adjolohoun (n 4) 17.

11 For a detailed discussion on Côte d'Ivoire's withdrawal, see Adjolohoun (n 4) 16-18.

12 Daly & Wiebusch (n 9) 10.

second is the African Court's *de facto* authority which, in general terms, as described by Daly et al:

> [R]elates to the kind and number of actors who act on the Court's judgments, and the overall impact of the Court's judgments on litigants, government and the other State actors such as the NGOs and businesses, and the general public, which may vary from state to state and from time to time.[13]

The *de jure* authority of the African Court is derived from the Court Protocol. In terms of article 3(1), the Court's jurisdiction extends to 'all cases and disputes submitted to it concerning the interpretation and application of the [African Charter], [the Court Protocol] and any other relevant human rights instrument ratified by the States concerned'. Furthermore, in terms of article 4, the Court has the authority to deliver advisory opinions upon request from an African Union (AU) member state, the AU, any of its organs or any organisation recognised by the AU.[14] The *de jure* authority of the Court also relates to its power to deliver enforceable decisions. To that end, article 27(1) of the Court Protocol provides that the Court may make orders to remedy a human rights violation in instances where such a violation is found. It further has the power to make provisional orders in cases of 'extreme gravity and urgency, and when necessary to avoid irreparable harm to persons' in terms of article 27(2) of the Court Protocol. In terms of article 30, state parties undertake to comply with the judgment of the Court in which they are a party within the time stipulated by the Court and guarantee its execution. As such, the African Court can make binding decisions where it deems fit, and states that have ratified the Protocol accept the *de jure* authority of the Court to make these decisions.

Against the backdrop of this broad understanding of the authority of the African Court, it is possible to identify two essential forms of resistance: one that 'seeks to reverse developments within a system', while the other 'ultimately gives up on that system'.[15] These forms of resistance can, using the arguments of Madsen et al be divided into two categories, labelled: *ordinary resistance* or *pushback* and *extraordinary resistance* or *backlash*.[16]

13 As above.

14 In addition, as set out in arts 9 and 28 of the Court Protocol and rules 26 and 67 of the Final Rules of Court 2020, the Court also has the mandate to promote an amicable settlement, to interpret a judgment rendered by itself and to review its own judgment in light of new evidence in conformity.

15 Madsen et al (n 9) 202.

16 As above.

Pushback occurs 'within the playing field of the international court' in the sense that the resisting state generally accepts the authority of the institution but reacts to specific judgments or developments of law and attempts to overturn that development to return to the *status quo*.[17] In the international system, this form of resistance is not uncommon. As noted, it is often a necessary dynamic of international legal systems.[18] After all, the law would remain stagnant if there were no such criticism.[19] It is, however, crucial to acknowledge that in the case of *pushback*, the *de facto* authority of the Court is not challenged.[20] The following sub-sections, 2.1 and 2.2, discuss the different forms of pushback experienced by the African Court, while sub-section 2.3 further elaborates on the concept of *backlash* and contextualises this by referring to the termination of the Southern African Development Community (SADC) Tribunal.

2.1 Pushback against the constitution of the African Court

The African Court's first experience of *pushback* against its *de jure a*uthority arose even before it was officially constituted. The establishment of the African Court was realised after extensive external pressure from international human rights NGOs and European states over the course of nearly 20 years.[21] After this pressure, the process of establishing the African Court was set in motion by the AU adopting the Court Protocol in 1998. However, it was not until 2004 that a sufficient number of ratifications had been deposited for the Protocol to enter into force, and it was not until 2006 that the first 11 judges of the African Court were appointed.[22] The eight years that passed between the adoption of the Court Protocol and the establishment of the Court, arguably, shows the ambivalence of some AU member states towards the African Court. In commenting on the protracted process of establishing the Court, Faix et al suggest that

17 Madsen et al (n 9) 202.

18 As above.

19 P Bourdieu 'The force of law: toward a sociology of the judicial field' (1987) 38 *Hastings Law Journal* at 821. Bourdieu describes the practical meaning of the law as being determined in the confrontation between different bodies moved by divergent interests. As such, the law is, in general, beholden to conflicts and disagreements flowing from the field.

20 Madsen et al (n 9) 202.

21 M Faix & A Jamali 'Is the African Court on Human and Peoples' Rights in an existential crisis?' (2022) 40 *Netherlands Quarterly of Human Rights* at 61.

22 See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (accessed 10 April 2023).

'[t]he decades-long movement towards the establishment of the African Court reflects one of the first forms of resistance against it'.[23]

2.2 Low-level of compliance with the judgments and orders of the African Court

Throughout its existence, the African Court has struggled with state party compliance with its orders and judgments. Reporting to the AU Executive Council at its 38th Ordinary session in February 2021 over the 2020 cycle (2020 Activity Report), the Court acknowledged that one of the major challenges it faces is the perceived lack of cooperation from member states, especially with the low level of compliance with its decisions.[24] At that point, the African Court had rendered over 100 judgments and orders.[25] However, only Burkina Faso fully complied with the judgments[26] of the Court, while Tanzania partially complied with some of the judgments and orders against it.[27]

Furthermore, in February 2021, Côte d'Ivoire filed a compliance report in relation to the Court's judgment in *APDH*.[28] However, the applicants in *APDH* disputed the facts of this report, indicating that although the law relating to the composition of the electoral management body had

23 Faix & Jamali (n 21).

24 Activity Report of the African Court on Human and Peoples' Rights, Executive Council Thirty-Eight Ordinary Session Videoconference 3-4 February 2021 Addis Ababa, Ethiopia EX.CL/1258(XXXVIII) para 37.

25 As above.

26 See *Norbert Zongo v Burkina Faso* (reparations) (2015) 1 AfCLR 258 as well as *Lohé Issa Konaté v Burkina Faso* (reparations) (2016) 1 AfCLR 346. In both instances, the respondent state fully complied with the African Court's judgment.

27 See Faix & Jamali (n 21). Also, when analysing the African Court on Human and Peoples' Rights Activity Report of the African Court on Human and Peoples' Rights 1 January-31 December 2021' (2022) EX.CL/1323(XL) Annex II, it is evident that Tanzania partially complied with some judgments but has not complied with some judgments at all. In *Abubakari v Tanzania* (reparations) (2019) 3 AfCLR 334, Tanzania reported to the court that various orders were complied with, such as passing the Legal Aid Act of 2017 in accordance with the judgment and requested an interpretation from the African Court on the remedy of the violations which was provided by the Court on 28 September 2018. However, Tanzania had not filed any report on the implementation of reparations despite the time to do so having elapsed on 5 July 2020. The cases of *Thomas v Tanzania* (interpretation) (2017) 2 AfCLR 126 and *Nganyi v Tanzania* (reparations) (2019) 3 AfCLR 308 follow the same trend of partial compliance. Tanzania has also been guilty of complete non-compliance, which can be seen in cases such as *Paulo v Tanzania* (merits) (2018) 2 AfCLR 446; *Evarist v Tanzania* (merits) (2018) 2 AfCLR 402; *Guehi v Tanzania* (merits and reparations) (2018) 2 AfCLR 477 and *Rashidi v Tanzania* (merits and reparations) (2019) 3 AfCLR 13, to name a few.

28 See *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (merits) (2016) AHRLR 668 (ACHPR 2016).

been revised to include more non-governmental members, it had, in its opinion, not sufficiently addressed the issue of impartiality of the electoral commission, which was one of the core issues in the application.[29] In addition, Benin, Libya and Rwanda had, at this point, not complied at all with the judgments and orders rendered against them.[30]

Reporting to the AU Executive Council at its 40th Ordinary session in January/February 2022 over the 2021 cycle (2021 Activity Report), the Court once again stressed the lack of compliance as a major challenge, indicating that '[a]s at July 2021, only 7% of judgments had been fully complied with 18% partially complied and 75% non-compliance'.[31] In addition, in its 2021 Activity Report, the Court reiterated its statement in the 2020 Activity Report that some states had continuously and openly stated before the AU Executive Council that they would not comply with the Court's decisions.[32] Such statements are arguably a clear violation of article 30 of the Court Protocol, which stipulates that 'parties to the … Protocol undertake to comply with the judgement in any case to which they are parties within the time stipulated by the Court and to guarantee its execution'.

As evidenced in the 2020 and 2021 Activity Reports, a low level of compliance or non-compliance with the judgments of the African Court and open defiance of its authority before the AU Executive Council are forms of *pushback* against the *de jure* authority of the Court.[33] While it is too early to establish a systemic problem of non-compliance, which would classify it as a form of *backlash*, Faix and Jamali opine that 'the overall lack of compliance with the decisions of the African Court is undeniable and constitutes a form of *pushback* that challenges its development and authority'.[34] Moreover, undermining the Court's *de jure* authority through repeated non-compliance will ultimately speak to the status of the Court's *de facto* authority. The fact that non-compliance with African Court judgments is so rife can be viewed as an indication that the African Court's *de facto* authority is under threat.

29 See Activity Report (n 27) para 30.

30 Activity Report (n 27) para 37.

31 Activity Report (n 27) para 72.

32 As above. Article 30 of the Court Protocol holds that '[t]he States parties to the present Protocol 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'.

33 C Rickard 'African Court's existence threatened by lack of cooperation from AU states' 25 March 2021 https://africanlii.org/article/20210325/african-court's-existence-threatened-lack-cooperation-au-states (accessed 3 June 2023).

34 Faix & Jamali (n 21) 61.

2.3 Termination as the ultimate backlash – the fate of the SADC Tribunal

As briefly introduced in the introduction to section 2, *backlash*, as the other form of resistance, occurs when the contents of the law are challenged with the Court's *de facto* authority, aiming to substantially transform the targeted court or terminate it. This is described as when 'the critique is no longer being played out within the playing field of the game – instead it is seeking to change the rules of the game'.[35] Arguably, the most glaring example of *backlash* is the termination of the SADC Tribunal in 2011.

In 2008, the SADC Tribunal heard the matter of *Campbell*,[36] which kickstarted a swift and intense negative response by SADC member states towards the Tribunal's existence. *Campbell* concerned the validity of an amendment to the Zimbabwean Constitution in 2005 pertaining to agricultural land acquired for resettlement.[37] The new section immediately vested identified land with the Zimbabwean government and effectively entitled the government to expropriate any land which it identified through the so-called 'acquiring authority' without compensation.[38] Furthermore, the amendment provided that a person having any right or interest in the identified land could 'not apply to a court to challenge the acquisition of the land by the State, and no court [would] entertain any such challenge'. The relevant section introduced by the amendment, section 16B(3)(*a*), was arguably the crux of the *Campbell* case, as it directly violates the rule of law. As held by the SADC Tribunal:

> It is settled law that the concept of the rule of law embraces at least two fundamental rights, namely, the right of access to the courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation.[39]

The SADC Tribunal took issue with section 16B(3)(*a*) based on articles 4 and 6(1) of the SADC Treaty, which provides that SADC members are to 'respect the foundational principles, which include the sovereign

35 Madsen et al (n 9) 203.

36 *Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008).

37 Seventeenth Amendment of the Constitution of the Republic of Zimbabwe, which inserted sec 16B 'Agricultural land acquired for resettlement and other purposes'.

38 For further reading, please see sec 16B of the Seventeenth Amendment of the Constitution of the Republic of Zimbabwe, 2005, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/72087/90494/F1340885370/ZWE72087.pdf (accessed 3 June 2023).

39 *Campbell* (n 36) 26.

equality of all members, human rights democracy and the rule of law' and 'refrain from taking any measures likely to jeopardise the sustenance of its principles, objectives, and implementation of the Treaty provisions' respectively. Based on these provisions, the SADC Tribunal held that SADC member states, including Zimbabwe, were under a legal obligation to respect, protect and promote the twin foundations of the rule of law.[40] Because section 16B(3) ousted the jurisdiction of the Zimbabwean courts with regard to land expropriated in terms of section 16B(2), those affected by the expropriation effectively had no access to recourse and were deprived of their rights without having their case heard by an independent court or tribunal. As such, the SADC Tribunal unanimously found that the land reform programme undertaken by the government of Zimbabwe violated the applicant's right of access to justice and, therefore, the rule of law.[41]

Based on the violations found, the Tribunal ordered Zimbabwe to take all necessary measures to protect the possession, occupation and ownership of the lands of the applicants and to guarantee that no action was taken to evict the applicants from or interfere with the peaceful residence on, and, of the applicant's farms.[42] Despite the SADC Tribunal's decision, the government of Zimbabwe continued with its land expropriation programme and launched a campaign to emasculate the SADC Tribunal and nullify its rulings.[43] As noted by Nathan, the Zimbabwean government viewed the Tribunal's decision as 'intolerable interference in the country's domestic affairs'.[44] As such, Zimbabwe did not comply with the orders, which led to the Tribunal referring the failure to comply to the SADC Summit for appropriate action on three different occasions.[45] On all three occasions, the Summit declined to act, arguably showing their support for the Zimbabwean government despite its disregard for the obligations undertaken by all SADC members.[46] However, as argued by Nathan, the Summit's passivity was not enough; Zimbabwe went on to successfully lobby other SADC member states to actively support their stance on the Tribunal.[47]

40 *Campbell* (n 36) 27.

41 *Campbell* (n 36) 4.

42 *Campbell* (n 36) 59.

43 L Nathan 'The disbanding of the SADC Tribunal: A cautionary tale' (2013) 35 *Human Rights Quarterly* at 876.

44 As above.

45 As above.

46 Nathan (n 43) 877.

47 As above.

The cumulative effect of Zimbabwe's actions resulted in the SADC Summit provisionally suspending the SADC Tribunal in 2010, pending a review of the role and functions of the Tribunal.[48] It is outside the scope of this chapter to discuss the details of the review process, and as argued by Naldi et al, '[t]he whole review process appears [in any event] to have been an exercise in futility, with the Summit determined to undo the Tribunal and ignoring all recommendations to the contrary… [t]he outcome was predetermined'.[49] In May 2011, the Summit mandated the Committee of Ministers of Justice to initiate the process aimed at amending the relevant SADC legal instruments.[50] It resolved not to reappoint the judges or replace the judges whose terms of office ended by the end of 2011 and to prolong the suspension of the Tribunal receiving new cases or hearing existing ones until the new SADC Tribunal Protocol had been approved.[51] The suspension of the SADC Tribunal paints a worrying picture of the possible effects of state resistance to international courts. As such, it is imperative that further resistance to the African Court is limited so that a similar fate can be avoided.[52]

2.4 Article 34(6) withdrawals – pushback or backlash?

When the recent article 34(6) withdrawals are considered, it may, at face value, seem like a form of *pushback* in that the states, arguably, accept the African Court's authority but simply resist a specific development in its case law. The African Court's authority is accepted by the withdrawing states in that they are resisting an aspect of the Court's jurisdiction that

48 G Naldi & K Magliveras 'The new SADC tribunal: Or the emasculation of an international tribunal' (2016) 63 *Netherlands International Law Review* at 138.

49 As above.

50 As above.

51 As above.

52 It should be borne in mind, however, that there have been domestic repercussions for the actions of the heads of state in the SADC Tribunal's suspension. In this regard, see *Law Society of South Africa v President of the Republic of South Africa* 2019 (3) SA 30 (CC), where the South African Constitutional Court found that the president's participation in the decision-making process, his decision to suspend the SADC Tribunal and his signature of the 2014 SADC Protocol was unconstitutional, unlawful and irrational and ordered that his signature be withdrawn. Also see *Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania* [2013] AfCHPR 8 (14 June 2013), where the suspension of the operations of the SADC Tribunal and failure or refusal to appoint judges was held to be contrary to the clear Treaty provisions, inimical to the rule of law as a foundational principle inherent to the legitimacy of the Community, and expressly entrenched in the SADC Treaty. The High Court of Tanzania further held that, pending the reopening of the suspended SADC Tribunal, the High Court has inherent powers to entertain all adjudicative disputes between individual and legal persons against the Tanzanian Government in matters arising out of the SADC Treaty.

is, its jurisdiction *ratione personae* relating to individuals and NGOs, while remaining a party to the Court, albeit to a more limited extent. This is further supported by the fact that a specific case, or tipping point, can be pointed to as the reason for withdrawal in each instance of withdrawal. This is further elaborated on under sections 3 and 4 below, referring to Tanzania and Benin, respectively.

However, when scrutinised, as is further done below, this resistance more closely resembles a form of *backlash.* As suggested by Daly et al, the 'partial withdrawal from the Court's jurisdiction carried not only the express charge of illegitimate use of the Court but also an implicit attack on the Court's legitimacy overall'.[53] It is argued that the attack on the Court's legitimacy can be seen in both instances of withdrawal as it restricts the most important stream of cases to the African Court. Without the involvement of individuals in the submission of applications, the African Court would effectively receive no cases to adjudicate, resulting in it losing its legitimacy as a human rights protector. The withdrawals are thus a form of *backlash,* given the severe risk they pose to the Court's authority as a regional human rights court on the continent and the message it sends to human rights defenders nationally and regionally. Therefore, withdrawals from article 34(6) pose a serious risk to the future operation of the African Court. As such, it is important to analyse the possible reasons for the withdrawals further to establish possible avenues for avoiding such withdrawals.

3 Tanzania's withdrawal

As background to the discussion on Tanzania's withdrawal below, it is important to note the 2022 Report on 'The Global Expansion of Authoritarian Rule', where Freedom House concluded that Tanzania had experienced the fourth largest decline in freedom over the last decade.[54] Taking into consideration that background, Faix et al. argue that '[t]he change of government in Tanzania and its subsequent crackdown on human rights defenders and media explain its decision to restrict the jurisdiction of the Court in individual communications'.[55]

A further reason put forward for Tanzania's withdrawal is 'litigation fatigue'.[56] At the time of withdrawal, Tanzania had been the respondent

53 Daly & Wiebusch (n 9) 27.

54 Freedom House *Freedom in the world 2022: The global expansion of authoritarian rule* (2022) 16.

55 Faix & Jamali (n 21) 67; see also Daly & Wiebusch (n 9) 30.

56 Adjolohoun (n 4) 10.

in 138 of the total 255 applications submitted to the African Court.[57] In relation to the judgments against it, Tanzania had to implement over 60 administrative, legislative, judicial, and pecuniary orders and had to pay upwards of US$106 000 in damages.[58] However, to fully appreciate Tanzania's withdrawal, there is far more context and many more legal issues to be acknowledged and analysed.

3.1 The 'fake reservation'

On 21 November 2019, Tanzania became the second state to withdraw its declaration under article 34(6). According to the notice posted in this regard, Tanzania withdrew its declaration because it perceived that it 'ha[d] been implemented contrary to the reservations submitted by the United Republic of Tanzania when making its decision'.[59] In terms of Tanzania's declaration and what it referred to as a 'reservation', it stated that 'the Court may entitle NGOs with observer status and individuals to submit an application directly to the African Court on condition that such individuals and NGOs have exhausted all domestic legal remedies in adherence to the Constitution of Tanzania'.[60]

The 'reservation' referred to by Tanzania raises a number of questions. First, the rule that an applicant must exhaust local remedies before approaching an international forum is part and parcel of the admissibility criteria before most regional and international human rights courts and quasi-judicial bodies.[61] Under article 6(2) of the Court Protocol, referring to article 56(5) of the African Charter, all available, effective, and sufficient remedies must be exhausted before the Court can be approached.[62] Furthermore, the Court has specified that the victims or their representative must be able to pursue the remedies in question without impediment, that the remedies must offer prospects of success, and that the victims must be able to redress the complaint.[63] Thus, as

57 ACtHPR cases (n 1).

58 Adjolohoun (n 4) 10.

59 African Court Withdrawals: Tanzania https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf (accessed 20 March 2023).

60 As above.

61 See also L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* at 374-398.

62 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) para 31; *APDH* (n 28) para 93.

63 *Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (2013) 1 AfCLR 197 para 88.

submitted by Tanzania, the 'reservation' argument arguably carried little weight.

Second, to expand on this argument, if the Vienna Convention on the Law of Treaties (VCLT) is considered, the timing of the reservation can be called into question. According to article 2(1)(d), a reservation means:

> [A] unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

Therefore, a state may only make a reservation when signing, ratifying, accepting, approving or acceding to a treaty. This is further confirmed in article 19 of the VCLT.[64] Tanzania signed the Court Protocol in 1998 and ratified it in 2006. In both instances, no reservation was deposited with regard to the Protocol.[65]

However, if it is accepted that a reservation was duly made, contrary to the argument presented above, the 'reservation' argument could, in the alternative, be considered invalid from the perspective of the validity test contained in article 19 of the VCLT. It provides three instances in which case a reservation is deemed invalid, namely: (1) when the treaty prohibits the reservation, (2) when the treaty provides that only specified reservations which do not include the reservation in question may be made, and (3) if the reservation is not invalid in terms of (1) and (2), the reservation is incompatible with the object and purpose of the treaty. The Court Protocol does not contain any provisions regarding reservations made to it, and (1) and (2) are, therefore, not applicable. Thus, the only relevant provision in this regard refers to the 'object and purpose', in this case, referring to the object and purpose of the Court Protocol.

The object and purpose discussion relating to Tanzania's reservation can be divided into two parts. The first part pertains to the assertion that individuals and NGOs may only approach the African Court after exhausting all domestic remedies, as addressed above. At face value, this arguably does not offend the object and purpose of the Court Protocol, as this is contained in article 6(2) of the Court Protocol with further reference

64 Article 19 (Formulation of reservations) of the VCLT provides that '[a] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation …'.

65 African Union 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5.

to article 56(5) of the African Charter. However, Adjolohoun argues that the first part is invalid as it constitutes a 'fake' reservation, as referred to in the sub-heading above, that is, a reservation that is 'superfluous because it provides for an exception that is inherent in the applicable law'.[66]

The second part refers to the requirement added by Tanzania that direct access to individuals and NGOs should only be granted 'in adherence with the Constitution' of Tanzania. Arguably, the second part is invalid as it is not compatible with the object and purpose of the Court Protocol. Again, as argued by Adjolohoun, 'it annihilates the very purpose of the declaration, which is to allow direct individual access to the Court, including challenging the conformity of the Constitution with international law ratified by the concerned state'.[67] The purpose of the Court Protocol is, arguably, to establish the African Court with the objective of promoting and protecting human and peoples' rights in Africa. Limiting the ability of individuals to access the Court more than the Protocol already does is contrary to the object and purpose of the Court Protocol as it limits the Court's ability to uphold its mandate: to protect human rights.

Comparatively, a similar set of facts was presented before the Inter-American Court in *Hilaire*.[68] The Inter-American Court was tasked to determine the validity of a reservation made by Trinidad and Tobago when depositing their instrument of adherence to the American Convention on Human Rights (ACHR), which provided that:

> [T]he Government of the Republic of Trinidad and Tobago, recognizes the compulsory jurisdiction of the Inter-American Court of Human Rights, as stated in [article 62], only to such extent that recognition is consistent with the relevant sections of the Constitution of the Republic of Trinidad and Tobago; and provided that Judgment of the Court does not infringe, create or abolish any existing rights or duties of any private citizen.[69]

In this case, the respondent state argued that the reservation was not in contravention with the object and purpose of the ACHR as it did not deny the exercise of any rights provided for in the ACHR.[70]

66 Adjolohoun (n 4) 8.

67 Adjolohoun (n 4) 9.

68 *Hilaire v Trinidad and Tobago* IHRL 1463 (IACHR 2001).

69 *Hilaire* (n 68) para 43.

70 *Hilaire* (n 68) para 46.

However, the Inter-American Court held that accepting the reservation made by Trinidad and Tobago would lead to a situation in which the state's Constitution would be the first point of reference for the Court, with the *ACHR* rendered a subsidiary parameter.[71] According to the Inter-American Court, this would 'cause a fragmentation of the international legal order for the protection of human rights, … which … render illusory the object and purpose of the [*ACHR*]'.[72] The Court further held that the nature of international obligations arising from human rights treaties have a special character that sets them apart from other treaties in that they do not govern the mutual interests between states.[73] According to the Inter-American Court, the object and purpose of treaties with a human rights mandate is the protection of the basic rights of individuals, and states undertake to submit themselves to a legal order within which they assume various obligations towards all individuals within their jurisdiction.[74] Based on the arguments put forth by the Inter-American Court in *Hilaire,* it is argued that a 'reservation' aiming to limit the scope of the jurisdiction of an international human rights court on the basis of domestic law would be incompatible with the object and purpose of the founding treaty of that international court. This is so as it would go against the object and purpose of that founding treaty to establish such jurisdiction.

Furthermore, article 27 of the VCLT provides that '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Arguably, requiring access to be granted in terms of domestic law falls within the purview of a prohibited justification in terms of article 27. In making a declaration under article 34(6), Tanzania undertook to allow its citizens to access the Court after exhausting domestic remedies. As such, using the Tanzanian Constitution as a reason to prohibit the access of their citizens contravenes article 27.

3.2 The 'court of first instance' or 'appellate court' arguments

Another major point of contention for Tanzania was the assertion that the African Court repeatedly acted as a court of first instance or as an appellate court, which falls outside the jurisdiction of the African Court in terms of the Court Protocol. In *Thomas,*[75] the applicant alleged that there were grave inconsistencies regarding the evidence used by the Tanzanian Court of first instance and the appellate courts, which affected his right

71 *Hilaire* (n 68) para 93.

72 As above.

73 *Hilaire* (n 68) para 94.

74 *Hilaire* (n 68) para 95.

75 *Alex Thomas v Tanzania* (2015) 1 AfCLR 465.

to a fair hearing.[76] Tanzania responded to these allegations by stating that these are matters that are not within the purview of the African Court, as the Tanzanian Court of Appeal is the final court of appeal in this regard and has already adjudicated upon them.[77] However, the African Court rejected these arguments, holding that '[t]hough this Court is not an appellate body with respect to decisions of national courts, this does not preclude it from examining relevant proceedings in the national courts in order to determine whether they are in accordance with the standards set out in the Charter or any other human rights instrument ratified by the State concerned'.[78] The Court further held that it would examine the inconsistencies at national courts to establish whether appropriate principles and international standards were applied in resolving them.[79] Tanzania effectively echoed the unsuccessful arguments made in *Thomas* in *Onyachi & Njoka*,[80] *Guehi*[81] and *Rutakikirwa*,[82] to name a few.

3.3 The 'disregard of the authority of the apex court' argument

Another area in which Tanzania has taken issue with the African Court's authority is the alleged 'overstepping' of the authority of the domestic apex court on socio-political issues such as the death penalty and nationality.[83]

With regard to the death penalty, Tanzania has consistently affirmed that its sentencing law is valid under international law.[84] As argued by Faix et al., based on the timing of Tanzania's withdrawal notice, their

76 *Alex Thomas* (n 75) para 4.

77 *Alex Thomas* (n 75) para 126.

78 *Alex Thomas* (n 75) para 130.

79 As above. The Court further notes that this approach is consistent with the approach implemented by similar international courts, making special mention to *Baumann v Austria* [2004] ECHR 488 (7 October 2004); *Echaria v Kenya* [2011] ACHPR 89 (5 November 2011); *Marzioni v Argentina* OEA/Ser. UV/11.95 Doc. 7 rev 76; *Garcia Ruiz v Spain* IHRL 3226 (ECHR 1999); *Perez v France* Judgment of 12 February 2004 (Grand Chamber); and *Dufaurans v France* Judgment of 21 March 2000.

80 *Kennedy Owino Onyachi & Charles John Mwanini Njoka v Tanzania* (merits) (2017) 2 AfCLR 65.

81 *Guehi* (n 27).

82 *Rutakikirwa v United Republic of Tanzania* (merits and reparations) [2022] AfCHPR 77 (24 March 2022).

83 Adjolohoun (n 4) 9. See also *Anudo Ochieng Anudo v United Republic of Tanzania* (merits) (2018) 2 AfCLR 248, where the African Court ordered Tanzania to provide individuals with judicial remedies in the event of a dispute over their citizenship.

84 Adjolohoun (n 4) 9.

withdrawal was prompted by the African Court's decision in *Rajabu*, which dealt with the validity of Tanzania's death penalty laws.[85]

The *Rajabu* case concerned two applicants who were sentenced to death by the High Court of Tanzania in Arusha in 2011.[86] After their Appeals were dismissed by the Tanzanian Court of Appeal in Criminal Appeals. They had filed an application for review, which was still pending at the time of their application to the African Court.[87] The applicant alleged various violations relating to procedural errors and inconsistencies committed by the local authorities and a violation of their right to life and dignity under the African Charter.[88] *Rajabu* dealt with a serious and politically controversial topic, namely, the validity of the death penalty in terms of article 4 of the African Charter. The African Court confirmed that the imposition of the death penalty may limit the right to life if it conforms to three criteria: it is (1) provided by law, (2) imposed by a competent court, and (3) abides by the principles of due process.[89] Section 197 of the Tanzanian penal code provides that '[a]ny person convicted of murder shall be sentenced to death'. As such, the African Court was satisfied that the death penalty complied with the first two requirements. However, the African Court held that section 197 does not uphold fairness and due process as guaranteed in article 7(1) of the African Charter.[90] As argued by the Court, the mandatory nature of the death penalty, coupled with the fact that those convicted are not permitted to bring mitigating evidence to possibly avoid such a sentence, renders section 197 unfair and arbitrary.[91] Furthermore, it strips the trial judge of any discretion in this regard, not allowing them to consider important contextual factors when deciding on the applicability of the death sentence in any given case.[92] As such, the African Court found section 197 of the Tanzanian penal code to violate article 4 of the African Charter and thus invalid, ordering Tanzania to take all necessary measures to remove the mandatory imposition of the death penalty from its penal code within one year of receiving judgment.[93] Tanzania is yet to submit a report regarding its compliance with the

85 *Rajabus v United Republic of Tanzania* (merits and reparations) (2019) 3 AfCLR 539. See further Faix & Jamali (n 21) 66.

86 *Ally Rajabu* (n 85) para 4.

87 *Ally Rajabu* (n 85) para 5.

88 *Ally Rajabu* (n 85) para 6.

89 *Ally Rajabu* (n 85) para 104.

90 *Ally Rajabu* (n 85) para 111.

91 *Ally Rajabu* (n 85) paras 109-112.

92 *Ally Rajabu* (n 85) para 109.

93 *Ally Rajabu* (n 85) paras 114 & 171 xv.

Rajabu judgment.[94] Furthermore, shortly after the judgment, the Attorney General of Tanzania stated that the government was unhappy about the judgment and that 'Tanzania is governed by laws, the Constitution of the United Republic of Tanzania taking the lead'.[95]

While *Rajabu* is not the only or direct cause for the withdrawal, it may have just been the straw that broke the camel's back as the judgment was one of many in which the African Court ordered the Tanzanian government to amend domestic laws to comply with its international obligations.[96] On 11 March 2022, the Deputy Minister for Foreign Affairs and East African Cooperation of Tanzania stated that '[t]he decision [to withdraw its article 34(6) declaration] was arrived at following thorough consultations and discussions for the good of the country's sovereignty and not politically motivated'.[97] Arguably, Tanzania has shown its hesitance towards the African Court's authority for years.[98] The statement from the Deputy Minister merely affirms that it was an issue of protecting state sovereignty.

3.4 The 'bundle of rights' argument

In relation to the protection of state sovereignty and in reference to the admissibility of a case, Tanzania has repeatedly taken issue with the application of the theory of a 'bundle of rights'.[99] This issue is closely related to the exhaustion of local remedies, as referred to in section 3.1 above. As is evidenced in *Thomas*,[100] *Nguza*,[101] *Onyachi & Njoka*[102] and *Guehi*,[103] this theory, as applied by the African Court, entails declaring a case admissible on the sum total of issues raised by the applicant by

94 Activity Report (n 27) at 9.

95 F Kapama 'Tanzania: state unhappy with death penalty ruling' 30 November 2019 https://allafrica.com/stories/201911300077.html (accessed 29 April 2023).

96 See *Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania* [2013] AfCHPR 8 (14 June 2013); *Reverend Christopher R Mtikila v The United Republic of Tanzania* (2011) 1 AfCLR 32 (Judgment); and *Rajabu v The United Republic of Tanzania (merits and reparations)* (2019) 3 AfCLR 539.

97 E Qorro 'Tanzania: Dar sets record clear on African Court withdrawal' 11 March 2022 https://allafrica.com/stories/202203110421.html (accessed 29 April 2023).

98 See African Court on Human and Peoples' Rights activity reports for low compliance levels displayed by Tanzania https://www.african-court.org/wpafc/activity-report/ (accessed 29 April 2023).

99 For further discussion, see Adjolohoun (n 4) 28.

100 *Alex Thomas* (n 75) para 60.

101 *Nguza v Tanzania* (merits) (2018) 2 AfCLR 287 para 53.

102 *Onyachi & Njoka* (n 80) para 53.

103 *Guehi* (n 27) para 50.

clustering them together. The argument established by the Court in this regard, strictly in relation to the admissibility of the case, is that although a specific issue brought to the Court by an applicant may not have been raised before domestic courts, as such, courts ought to have known of other, related, issues while attending to the issue that was actually brought before it. Adjolohoun aptly highlights the problematic nature of the bundle of rights approach by pointing out its inherent flaw in that the practice consists of declaring an application admissible on all the issues raised by bundling them together mainly on the grounds that 'domestic courts *ought* to have been aware of other issues while examining only the one issue that was *actually* brought to their purview [emphasis added]'.[104]

This approach by the Court arguably waters down the scope of article 56(5) of the African Charter, which creates subsidiarity between the domestic and supranational judicial systems. In applying this theory, and in light of the way Tanzania has closely guarded its sovereignty before the African Court, it is not surprising that Tanzania took issue with what Adjolohoun refers to as an 'unprincipled' application of the theory of a 'bundle of rights'.[105]

4 Benin's withdrawal

The minister of foreign affairs and cooperation of Benin deposited Benin's withdrawal notice at the AU Commission on 24 March 2020. Much like Tanzania, Benin has been guilty of violating the right to freedom of expression to an egregious extent in recent years. According to Freedom House, Benin experienced the fifth largest decline in political rights and civil liberties in 2021 and the seventh largest decline in freedom over the last decade.[106] Faix et al. argue that Benin's decision to withdraw 'can be seen as a strategy by the authorities to increase impunity and block human rights scrutiny by an independent judicial body'.[107]

4.1 The 'interfering in the municipal legal order' argument

In its withdrawal notice, Benin claimed that the reason for withdrawal was that the African Court implemented the jurisdiction brought about by article 34(6) in a manner that was 'perceived as a licence to interfere with matters that escape its competence causing serious disturbance to

104 Adjolohoun (n 4) 28.

105 As above.

106 Freedom House 'Countries and territories' https://freedomhouse.org/countries/freedom-world/scores (accessed 13 August 2022).

107 Faix & Jamali (n 21) 68.

the municipal legal order and legal uncertainty that is fully detrimental to the necessary economic attractiveness of State Parties'.[108] The notice specifically refers to the judgment on provisional orders in *Kodeih*, describing this order as a regrettable interference and unfortunate intrusion.[109] The order suspended the enforcement of a domestic court judgment for the seizure of property to honour a bank loan in a commercial deal between private persons. However, the *Kodeih* matter was only on provisional measures, as is further discussed in section 4.2 below. When the Court heard the matter on the merits, it found that the matter was inadmissible because the applicants did not exhaust all local remedies.[110] However, the withdrawal notice mentions that the *Kodeih* matter was only 'one of the instances of interference', which suggests that Benin had further reasons for withdrawing.

Between 2018 and 2020, the African Court delivered several critical judgments against Benin. The most important of these is *Ajavon*.[111] The matter concerned Mr Ajavon, a Beninese political figure and businessman who was sentenced to 20 years in prison and fined five million CFA Francs for drug trafficking.[112] Mr Ajavon was sentenced by a newly formed 'Anti-Economic Crimes and Terrorism Court' (CRIET) after he had already been acquitted by the Criminal Chamber of the First Class Court of First Instance on the same facts.[113] In the judgment on provisional measures, the African Court ordered a stay in the execution of the sentence delivered by the CRIET Court, despite the acknowledgement by the African Court that the decisions of the CRIET Court are subject to appeal, according to the Court, there was still a risk that the judgment would be executed, notwithstanding this fact.[114] Based on this, the African Court found that the circumstances of the case were a situation of extreme gravity and presented a risk of irreparable harm to the applicant if the CRIET judgment was executed prior to the Court's decision in the matter pending before it.[115] Benin challenged the African Court's jurisdiction by arguing that the African Court lacked material jurisdiction on the grounds that the violations alleged were political and economic in nature, 'and [were]

108 African Court withdrawals: Benin https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Benin.pdf (accessed 26 July 2023).

109 African Court withdrawals: Benin (n 108).

110 *Ghaby Kodeih v Republic of Benin* (jurisdiction and admissibility) (2020) 4 AfCLR 24 paras 61-70.

111 *Ajavon v Benin* (provisional measures) (2018) 2 AfCLR 470.

112 *Ajavon* (provisional measures) (n 111) 470.

113 *Ajavon v Benin* (reparations) (2019) 3 AfCLR 196 para 8.

114 *Ajavon* (reparations) (n 113) paras 43-44.

115 *Ajavon* (reparations) (n 113) para 45.

in no way related to a fundamental law contained in the Charter, the Protocol or any other relevant human rights instrument'.[116] The African Court rebuked the arguments made by Benin and held, much like it did in *Thomas, Onyachi & Njoka* and *Guehi*, that 'as long as the rights allegedly violated come under the purview of the Charter or any other human rights instrument ratified by the State concerned, the Court will exercise its jurisdiction'.[117] Despite the precedent set by the African Court in this matter, Benin continued with these arguments. In this regard, Adjolohoun aptly suggests that 'Benin's report to the Court already indicated a posture of defiance and hence foretold a looming crisis … [t]he following decisions appeared to have turned the looming crisis into direct confrontation and, finally, into divorce'.[118]

In the *Avajon* merits judgment, the African Court found various violations of Mr Ajavon's human rights. Thus, it ordered Benin to take all necessary measures to annul the judgment delivered by the CRIET Court.[119] Later, the African Court delivered its judgment on reparations in *Avajon* and ordered Benin to pay US$ 66 000 000 in reparations to Mr Avajon.[120] Less than three months after this order, the African Court made the ruling in *Kodeih,* as discussed above, after which Benin submitted its notice of withdrawal.[121]

4.2 Provisional orders: Unreasonable practices?

The specific reference to the *Kodeih* matter in Benin's withdrawal notice raises some important questions relating to the African Court's practices regarding provisional orders. It is beyond question that the ability to issue provisional orders is a valuable tool available to the African Court in its effort to fulfil its mandate of human rights protection on the continent. Provisional orders grant the African Court a protective mechanism for preventing and/or remedying human rights violations in grave or urgent situations.[122] Furthermore, as argued by Juma, provisional orders have the potential to 'provide not only individual justice for specific applicants but also protect populations in situations involving large-scale or gross

116 *Ajavon* (reparations) (n 113) para 31.

117 *Ajavon* (reparations) (n 113) para 42.

118 Adjolohoun (n 4) 14.

119 *Ajavon* (reparations) (n 113) para 292.

120 Adjolohoun (n 4) 15.

121 As above.

122 D Juma 'Provisional measures under the African human rights system: the African Court's order against Lybia' (2012) 30 *Wisconsin International Law Journal* at 346.

violations of international human rights and humanitarian law'.[123] However, the African Court has arguably unjustifiably utilised its provisional orders with a detrimental effect on the state parties involved. As noted by Adjolohoun, '[t]he practice of the African Court in relation to provisional orders raises issues'.[124]

The African Court was first called upon to make a provisional order in *Libya*[125] after the African Commission found gross violations of human rights enshrined in articles 1, 2, 4, 5, 9, 11, 12, 13, and 23 of the African Charter committed by the Great Socialist People's Libyan Arab Jamahiriya (Libya).[126] Essentially, the Court held that it had to decide on whether it had jurisdiction in each case in terms of articles 3 and 5 of the Court Protocol, that is, the material jurisdiction (article 3) and personal jurisdiction (article 5) when deciding on a matter on provisional measures.[127] Furthermore, it was held that the Court need not decide its jurisdiction based on the merits of the case; instead, it would have sufficient jurisdiction if it is satisfied that it has *prima facie* jurisdiction based on the facts of the case.[128]

The practice of international courts merely satisfying *prima facie* jurisdiction is not controversial at face value, as noted by Worster,

> It is well accepted that courts, and even human rights bodies, can issue orders for provisional (or 'interim') measures, including situations of proposed expulsion. The standards for issuing such measures are fairly consistent in looking for *prima facie* jurisdiction over the merits and serious and/or irreversible harm.[129]

However, within the unique context of the African Court, it is argued that following the same practice as other international courts is not to its benefit when state resistance is considered. While the Court determines *prima facie* jurisdiction in provisional orders, it does not consider the *prima facie* admissibility of the matter, resulting in instances where provisional orders are given, only for the case to be deemed inadmissible at the merits stage. Adjolohoun argues that being concerned with the *prima facie* jurisdiction of the matter, but not the admissibility thereof, may result in

123 Juma (n 122) 346.

124 Adjolohoun (n 4) 29.

125 *African Commission on Human and Peoples' Rights v Libya* IHRL 3934 (ACtHPR 2016).

126 Juma (n 122) para 3.

127 Juma (n 122) para 14.

128 Juma (n 122) para 15.

129 W Worster 'Unilateral diplomatic assurances as an alternative to provisional measures' (2016) 15 *Law and Practice of International Courts and Tribunals* at 460.

the Court's provisional order overriding admissibility 'in a way that causes unnecessary and unfair damage to the respondent'.[130] The African Court may issue provisional orders that are both financially and bureaucratically burdensome for the respondent state, only to find that the matter was never admissible when the Court reaches the merits phase.

This scenario is not just hypothetical, as is seen in *Kodeih*. The African Court ordered a stay in execution of a judgment rendered by the First Class Court of Benin, which ordered two Beninese businessmen to demolish a hotel in violation of local building permits.[131] The reasoning behind the African Court's order was that the execution of the radical judgment would cause irreparable harm to the applicants as they invested a large sum of capital and would not be compensated if the judgment was implemented. However, when the matter reached the merits stage, the African Court determined that the applicants could have appealed the matter to the Common Court of Justice and Arbitration, which was deemed to be a local and effective remedy in the circumstances.[132] Accordingly, the Court ruled that the case was inadmissible as the applicants did not exhaust all local remedies, as noted in section 4 1 above.[133] Arguably, it could have been determined that the applicants had not exhausted all local remedies at the provisional order stage with relative ease, resulting in a more effective result for all parties involved. The reason for the African Court applying the *prima facie* approach to jurisdiction but not to admissibility is unclear.[134] Applying the same approach to admissibility, as the Court does to jurisdiction, at the provisional order stage would save time and money for the Court, respondent state, and the applicant.

Another concern arising from the use of provisional orders in this way is that they may be utilised systemically and frequently, which may have such a far-reaching impact that they supersede the impact of the eventual merits decision.[135] An example of this in practice is *Local Elections,*[136] which dealt with alleged irregularities in election rules for the local municipal councillors elections scheduled for 17 May 2020 in Benin.[137] The applicant alleged that he was being excluded from running in the aforementioned elections, which violated various rights contained in International

130 Adjolohoun (n 4) 29.

131 *Kodeih v Benin* (provisional measures) (2020) 4 AfCLR 24 paras 1-6, 34.

132 *Kodeih v Benin* (jurisdiction and admissibility) (2020) 4 AfCLR 18 paras 61-68.

133 *Kodeih* (jurisdiction and admissibility) (n 132) para 70.

134 Adjolohoun (n 4) 29.

135 As above.

136 *Sebastien Germain Marie Aikoue Ajavon v Republic of Benin* (2020) 4 AfCLR 123.

137 *Local Elections* (n 136) para 6.

Treaties.[138] The reason for his exclusion from the elections was that Benin had never stayed the execution of the warrant issued against the applicant, despite the Court's provisional order in *Ajavon*, as discussed under 4 1*;* as such, the applicant had a criminal record that prohibited him from participating in government in terms of Benin's domestic laws.[139] The Court held that, based on the facts presented, there exists a real risk of the applicant being forced to be absent from the 17 May 2020 elections, thus rendering the harm irreparable.[140] As such, the Court ordered the suspension of the elections until the matter has been decided on merits.[141]

Compliance with the provisional order in *Ajavon – Local Elections* would undoubtedly require a substantial financial and administrative contribution from Benin. It is thus not surprising that days after the order, the Minister of Communication stated that '[s]afeguarding the rights of a Beninese national cannot outweigh the normal functioning of our institutions and the application of the provisional order 'would be a miracle'.[142] The order to suspend the elections came exactly one month before the elections were scheduled to take place. Arguably, the African Court acted unreasonably in this regard, regardless of the fact that the African Court eventually found various violations committed by Benin in the merits judgment delivered on 4 December 2020.[143] The extreme burden placed on Benin in this regard only cemented its position in withdrawing its article 34(6) declaration. As argued by Adjolohoun, the approach by the Court is 'counter-productive in the framework of international human rights adjudication involving sovereign states'.[144]

5 Conclusion

As noted under section 2.4, the withdrawals from the Court's personal jurisdiction are of serious concern for the continued operation of

138 *Local Elections* (n 136) para 4. The applicant alleged violations of the African Charter, arts 3,4,5,6,7(1)(c), 10, 11, 13, 15, and 26; the African Charter on Democracy, arts 2(2), 3(2), 4(1), 10(2), 23(5) and 32(8); art 25 of the International Covenant on Civil and Political Rights; and the International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3, art 22.

139 *Local Elections* (n 136) paras 66-67.

140 *Local Elections* (n 136) para 68.

141 *Local Elections* (n 136) para 69 & VII (4).

142 V Agué 'CADHP: Le Bénin retire le droit de saisine directe aux citoyens et Ong' 23 April 2020 https://ortb.bj/politique/le-benin-ne-permet-plus-a-ses-citoyens-de-saisir-directement-la-cour-africaine-des-droits-de-lhomme/ (accessed 1 August 2023).

143 *Ajavon v Republic of Benin* (merits) (2019) 3 AfCLR 130 para 369 vi-xix.

144 Adjolohoun (n 4) 29.

the African Court. The limitation of the most important stream of applications will negatively affect the African Court's ability to adequately fulfil its mandate as a human rights protector. Given the serious risk these withdrawals pose to the legitimacy of the African Court, from the victim's perspective, it is clearly a form of backlash. In this regard, there are two possible outcomes: the development of the law and the institution or no such developments.[145] As such, the *backlash* could limit the institution's powers, either procedurally or substantially, or it could lead to the international court having diminished authority or no authority.[146] While both Tanzania and Benin are still parties to the Court Protocol and subject to the African Court's jurisdiction if a case is submitted outside the ambit of article 34(6), the adverse effect of a lack of cases is detrimental to the African Court's authority. It is too early to establish the long-term effects for the African Court in a general sense; however, it is clear that the ability of the Court to protect victims of human rights violations in Tanzania and Benin has been severely limited.

The socio-political circumstances of both states are also cause for concern. The identifiable pattern seen in each instance is indicative of a move towards authoritarianism. Authoritarian states tend to disregard international obligations and resist the authority of supranational judicial organs.[147] This trend can be noticed in the withdrawing states' reluctance to be held accountable by the African Court.

Some reasons discerned in the article are of no fault of the Court, such as the so-called reservation made by Tanzania, the 'disregard of the authority of the apex court' argument perpetuated by Tanzania and the 'interfering of the municipal legal order' argument perpetuated by Benin. Arguably, the withdrawing states are more interested in protecting their state sovereignty in these instances than in complying with their international obligations concerning the African Court.

However, it is also clear that the African Court can improve on some of its practices to make the article 34(6) declaration more appealing to states that have yet to make it and to convince withdrawing states to reconsider their decision. In this regard, it is imperative that the African Court reconsider its application of the 'bundle of rights' approach with regard to admissibility. The African Court should only consider issues

145 Madsen et al (n 9) 206.

146 Madsen et al (n 9) 207.

147 O Chyzh 'Can you trust a dictator: A strategic model of authoritarian regimes' signing and compliance with international treaties' (2014) 31 *Conflict Management and Peace Science* at 5.

that have actually been considered and addressed by domestic courts in order for an issue to be deemed admissible for the Court to adjudicate thereon. Furthermore, the African Court should reconsider its approach to its *prima facie* considerations in the provisional order stage of a case. The admissibility of the case should also be considered *prima facie* to avoid what happened in the *Kodeih* matter. Considering the *prima facie* admissibility of a case would arguably result in a more just process and save time and money for both the applicants and respondents.

Table of abbreviations

ACHR	American Convention on Human Rights
AU	African Union
CRIET	Anti-Economic Crimes and Terrorism Court
NGO	Non-governmental organisations
SADC	Southern African Development Community
VCLT	Vienna Convention on the Law of Treaties

Literature

Adjolohoun SH 'A crisis of design and judicial practice? Curbing state disengagement from the African Court on Human and Peoples' Rights' (2020) 20 *African Human Rights Law Journal* 1-40

African Court on Human and Peoples' Rights 'A publication of the coalition for an effective African Court on Human and Peoples' Rights' (2020) 1 *ACC Publication* https://www.african-court.org/wpafc/wp-content/uploads/2020/11/ACC-Publication_Volume-1_2020_ENG.pdf

African Court on Human and Peoples' Rights 'ACtHPR cases' https://www.african-court.org/cpmt/statistic

African Court on Human and Peoples' Rights 'Declarations' https://www.african-court.org/wpafc/declarations/

African Court on Human and Peoples' Rights activity reports for low compliance levels displayed by Tanzania https://www.african-court.org/wpafc/activity-report/

African Court Withdrawals: Benin https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Benin.pdf

African Court Withdrawals: Tanzania https://www.african-court.org/wpafc/wp-content/uploads/2020/10/Withdrawal-Tanzania_E.pdf

Agué v 'CADHP: Le Bénin retire le droit de saisine directe aux citoyens et Ong' 23 April 2020 https://ortb.bj/politique/le-benin-ne-permet-plus-a-ses-citoyens-de-saisir-directement-la-cour-africaine-des-droits-de-lhomme/

Bourdieu P 'The force of law: toward a sociology of the judicial field' (1987) 38 *Hastings Law Journal* 805-853

Chenwi L 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374-398

Chyzh O 'Can you trust a dictator: A strategic model of authoritarian regimes' signing and compliance with international treaties' (2014) 31 *Conflict Management and Peace Science* 3-27

Daly T & Wiebusch M 'The African Court on Human and Peoples' Rights: mapping resistance against a young court' (2018) 14 *International Journal of Law in Context* 294-313

Faix M & Jamali A 'Is the African Court on Human and Peoples' Rights in an existential crisis?' (2022) 40 *Netherlands Quarterly of Human Rights* 56-74

Freedom House 'Countries and territories' https://freedomhouse.org/countries/freedom-world/scores

Freedom House *Freedom in the world 2022: The global expansion of authoritarian rule* (2022)

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and-peoples-rughts

Juma D 'Provisional measures under the African human rights system: the African Court's order against Libya' (Libya) (2012) 30 *Wisconsin International Law Journal* 344-373

Kapama F 'Tanzania: state unhappy with death penalty ruling' 30 November 2019

Madsen MR, Cebulak P & Wiebusch M 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197-220

Naldi G & Magliveras K 'The new SADC tribunal: or the emasculation of an international tribunal' (2016) 63 *Netherlands International Law* Review 133-159

Nathan L 'The disbanding of the SADC Tribunal: a cautionary tale' (2013) 35 *Human Rights Quarterly* 870-892

Qorro E 'Tanzania: Dar sets record clear on African Court withdrawal' 11 March 2022 https://allafrica.com/stories/202203110421.html.

Rickard C 'African Court's existence threatened by lack of cooperation from AU states' 25 March 2021 https://africanlii.org/article/20210325/african-court's-existence-threatened-lack-cooperation-au-states

Worster W 'Unilateral diplomatic assurances as an alternative to provisional measures' (2016) 15 *Law and Practice of International Courts and Tribunals* 445-471

International, Regional and Other Rights Instruments

Activity Report of the African Court on Human and Peoples' Rights, Executive Council Thirty-Eight Ordinary Session Videoconference 3-4 February 2021 Addis Ababa, Ethiopia EX.CL/1258(XXXVIII)

African Charter on Democracy Adopted by the eighth ordinary session of the Assembly, held in Addis Ababa, Ethiopia, on 30 January 2007

African Court on Human and Peoples Rights 'Activity Report of the African Court on Human and Peoples' Rights 1 January-31 December 2021' (2022) EX.CL/1323(XL) Annex II

International Convention on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5

Treaty of the Southern Africa Development Community (adopted 17 August 1992, entered into force 30 September 1993)

Seventeenth Amendment of the Constitution of the Republic of Zimbabwe, 2005, https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/72087/90494/F1340885370/ZWE72087.pdf

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Cases

Abubakari v Tanzania (reparations) (2019) 3 AfCLR 334

Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire (merits) (2016) AHRLR 668 (ACHPR 2016)

Adelakoun v Republic of Benin [2021] AfCHPR 39

African Commission on Human and Peoples' Rights v Libya IHRL 3934 (ACtHPR 2016)

Ajavon v Benin (provisional measures) (2018) 2 AfCLR 470

Ajavon v Benin (reparations) (2019) 3 AfCLR 196

Ajavon v Republic of Benin (merits) (2019) 3 AfCLR 130

Anudo Ochieng Anudo v United Republic of Tanzania (merits) (2018) 2 AfCLR 248

Baumann v Austria [2004] ECHR 488 (7 October 2004)

Dufaurans v France Judgment of 21 March 2000

Echaria v Kenya [2011] ACHPR 89 (5 November 2011)

Evarist v Tanzania (merits) (2018) 2 AfCLR 402

Garcia Ruiz v Spain IHRL 3226 (ECHR 1999)

Ghaby Kodeih v Republic of Benin (jurisdiction and admissibility) (2020) 4 AfCLR 24

Guehi v Tanzania (merits and reparations) (2018) 2 AfCLR 477

Hilaire v Trinidad and Tobago IHRL 1463 (IACHR 2001)

Ivcher Brontein v Peru IHRL 1457 (IACHR 2001)

Jawara v The Gambia (2000) AHRLR 107 (ACHPR 2000)

Kennedy Owino Onyachi & Charles John Mwanini Njoka v Tanzania (merits) (2017) 2 AfCLR 65

Kodeih v Benin (jurisdiction and admissibility) (2020) 4 AfCLR 18

Kodeih v Benin (provisional measures) (2020) 4 AfCLR 24

Law Society of South Africa v President of the Republic of South Africa 2019 (3) SA 30 (CC)

Lohé Issa Konaté v Burkina Faso (reparations) (2016) 1 AfCLR 346

Marzioni v Argentina OEA/Ser. UV/11.95 Doc. 7 rev 76

Mike Campbell (Pvt) Ltd. v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)

Nguza v Tanzania (merits) (2018) 2 AfCLR 287

Norbert Zongo v Burkina Faso (reparations) (2015) 1 AfCLR 258

Paulo v Tanzania (merits) (2018) 2 AfCLR 446

Perez v France Judgment of 12 February 2004 (Grand Chamber)

Rajabu v The United Republic of Tanzania (merits and reparations) (2019) 3 AfCLR 53

Rashidi v Tanzania (merits and reparations) (2019) 3 AfCLR 13

Reverend Christopher R Mtikila v The United Republic of Tanzania (2011) 1 AfCLR 32 (judgment)

Rutakikirwa v United Republic of Tanzania (merits and reparations) [2022] AfCHPR 77 (24 March 2022)

Sebastien Germain Marie Aikoue Ajavon v Republic of Benin (2020) 4 AfCLR 123

Tanganyika Law Society and The Legal and Human Rights Law Centre v The United Republic of Tanzania [2013] AfCHPR 8 (14 June 2013)

Tanganyika Law Society v Ministry of Foreign Affairs and International Cooperation of the United Republic of Tanzania [2013] AfCHPR 8 (14 June 2013)

Thomas v Tanzania (interpretation) (2017) 2 AfCLR 126

Umuhoza v Rwanda (merits) (2017) 2 AfCLR 165

Zongo v Burkina Faso (2013) 1 AfCLR 19*Ingabire v Rwanda* (jurisdiction) (2016) 1 AfCLR 562

Nganyi v Tanzania (reparations) (2019) 3 AfCLR 308

3 The law and politics of access to the ECOWAS Court in human rights cases*

Christopher Nyinevi & Apraku Nketiah

Abstract:

As part of the Economic Community of West African States (ECOWAS) Revised Treaty commitment to respect, promote and protect human rights within the ECOWAS, the ECOWAS Court of Justice was mandated to determine human rights cases in 2005. Access to the Court's human rights jurisdiction, which is not predicated on the exhaustion of local remedies or deference to national courts to avoid parallel proceedings, has generated resistance from member states and has been criticised in some academic writings. In response to recurrent concerns from member states, the Court has

* This chapter is the culmination of earlier ideas and drafts on the topic, which were presented at the International Conference of the ECOWAS Court in Praia, Cape Verde (May 2022), the RWI Research Writing Workshop in Nairobi, Kenya (June 2022), and the RWI Academic Network Human Rights Conference in Harare, Zimbabwe (October 2022). We express gratitude to the participants of these events, as well as to the editors and reviewers of this book, for their valuable comments and suggestions.

decided to clarify and regulate access to its human rights mandate by adopting Supplementary Rules of Procedure, subject to the approval of the ECOWAS Council of Ministers. This paper discusses the human rights mandate of the ECOWAS Court, evaluates the proposed Supplementary Rules and considers the extent to which the Rules may impact individuals' access to the Court.

1 Introduction

The Economic Community of West African States Treaty (Lagos Treaty) created 'ECOWAS' as a vehicle for economic cooperation and development to raise the standard of living of their peoples, maintain economic stability in the region, and foster closer ties among themselves.[1] The Lagos Treaty made no reference to human rights, whether expressly or impliedly. The closest it came was a carve-out clause permitting member states to implement trade restrictions necessary for the 'protection of human, animal or plant life'[2] modelled on a similar general exception in the General Agreement on Tariffs and Trade (GATT).[3]

Nevertheless, ECOWAS eventually began to lean towards respect and protection of human rights.[4] A major contributing factor was the outbreak of conflicts in the region, beginning with the Liberian Civil War in 1989, followed in 1991 by the conflict in Sierra Leone.[5] The gross human rights violations and dire humanitarian crises that came with the conflicts meant that ECOWAS could no longer remain a mere economic organisation.[6] It began to take on an increasingly political role in the sub-region, including commitments to respect and protect human rights.

It created the ECOWAS Monitoring Group (ECOMOG), a subregional security initiative under which peacekeeping forces were deployed to troubled areas. On the legal front, ECOWAS adopted the Declaration of Political Principles 1991, in which it declared that it would promote peace, stability and democracy in West Africa based on political pluralism and

1 Lagos Treaty art 2.

2 Lagos Treaty art 18(3)(c).

3 GATT art XX(b).

4 E Nwauche 'Regional economic communities and human rights in West Africa and African Arabic countries' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (2009) 319 at 321-322.

5 ST Ebobrah 'Court of Justice of the Economic Community of West African States (ECOWAS)' in *Max Planck Encyclopedia of International Law* (2019) para 2; Nwauche (n 4) 321-322.

6 See Nwauche (n 4) 321-322.

respect for human rights.[7] The Economic Community of West African States Revised Treaty 1993 (ECOWAS Revised Treaty) firmly established this new commitment to respect human rights. Article 4 of the Revised Treaty states that 'the recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter' is a fundamental principle of ECOWAS.[8]

The legal foundation for the protection of human rights within ECOWAS was consolidated in 2005 when the Protocol Relating to the Community Court of Justice 1991 (Court Protocol) was amended to allow individuals and non-governmental organisations (NGOs) to bring member states before the Court for human rights violations.[9] Cumulatively, these developments have created what is now an active human rights regime within a (sub)-regional economic integration arrangement.

Despite its relatively short period of existence, the ECOWAS human rights system has made significant contributions to the protection of human rights. The ECOWAS Court is arguably the most active (sub)-regional court on the continent.[10] Since the expansion of the Court's mandate in 2005 that granted it jurisdiction in human rights cases, it has received over 500 cases on its docket.[11] It has given about 130 rulings and rendered about 300 judgments, most of which relate to protecting and enforcing the human rights of groups and individuals.[12] Beyond the immediate provision of remedies or reparations to victims of human rights violations, the Court has, through its judgments, contributed to an impressive body of human rights jurisprudence in Africa,[13] especially on socio-economic rights.[14] Not surprisingly, the Court appears to be known

7 ECOWAS Declaration of Political Principles A/DCL.1/7/91, 4-6 July 1991.

8 ECOWAS Revised Treaty art 4(g).

9 Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005.

10 Ebobrah (n 5) para 2.

11 MT Ladan *ECOWAS Community Court of Justice as a supranational court and engine of integration in West Africa: Achievements, challenges and prospects* (Paper presented at the International Conference of the ECOWAS Court of Justice) Lomé, Togo, 22-25 November 2021.

12 Ladan (n 11).

13 F Falana *Achievements, challenges and prospects of the ECOWAS Court of Justice* (Paper presented at the International Conference of the Ecowas Court of Justice) Lomé, Togo, 22-25 November 2021 and Ladan (n 11).

14 O Okafor & O Effoduh 'The ECOWAS Court as a (promising) resource for pro-poor activist forces' in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (2021) 106 at 108.

more for its human rights mandate than its traditional role as a regional economic community court.[15]

The reasons for the Court's popularity are not hard to find. First, an applicant may bypass national courts and submit cases to the ECOWAS Court directly without first exhausting local remedies.[16] Second, the *lis pendens* rule under the Court's Protocol does not apply to national courts, meaning that an applicant's case will be admissible despite the pendency of the same or substantially the same matter before a national court.[17] Together, these rules have created a policy of unrestricted access to the Court that has been responsible for its expanding docket. In a few cases, the Court has acknowledged the problematic nature of the policy of unrestricted access by declining admissibility.[18] But overall, it has stuck firmly to its position that exhaustion of local remedies is not a pre-condition to seizing the Court in human rights cases.[19] It has also confirmed that 'the pendency of a case before a domestic court does not oust its jurisdiction to entertain a matter'.[20]

The policy of unrestricted access has won the support of human rights activists and NGOs.[21] But it has been strongly criticised in academic writings[22] and drawn the ire of some ECOWAS member states who have pressed for amendments to the Court's Protocol to formally require the exhaustion of local remedies.[23] Therefore, there was always the likelihood that if the Court persisted in that direction with no deference to national jurisdictions, it risked setting itself up for confrontation with national courts and political authorities whose cooperation it requires to enforce its decisions.[24]

15 Ladan (n 11).

16 ECOWAS Court Protocol art 10.

17 As above.

18 *Aziagbede Kokou v Togo* [2013] CCJELR 167 paras 42 & 70.

19 *Hadijatou Mani Koraou v Niger* ECW/CCJ/JUD/06/08 (2008) paras 36-45.

20 *Nosa Ehanire Osaghae v Nigeria* ECW/CCJ/JUD/03/17 (2017) 22.

21 Amnesty International 'West Africa: Proposed amendment to ECOWAS Court jurisdiction is a step backward' 28 September 2009 https://www.amnesty.org/en/documents/afr05/005/2009/en/ (accessed 20 August 2023).

22 A Enabulele 'Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56 *Journal of African Law* at 268; ST Ebobrah *A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (Research Partnership Paper No 1/2008) Danish Institute for Human Rights https://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (2008).

23 Amnesty International (n 21).

24 Ebobrah (n 22) 25-26.

Concerns about the policy of unrestricted access to the Court in human rights cases have persisted.[25] This may have contributed to the low compliance rate with the Court's judgments which currently stands at 30 per cent.[26] Accordingly, the Court has realised it ought to meet dissatisfied member states halfway by being responsive to concerns about the non-exhaustion of local remedies, and the non-application of *the lis pendens* rule to cases before national courts. In a move that goes beyond its approach of judicially regulating access to the Court in some cases, the Court decided, in May 2022, to issue Supplementary Rules of Procedure on the human rights practice of the Court to 'avoid forum shopping and conflict with the national courts of Member States'.[27]

Using a doctrinal approach, this chapter analyses the ECOWAS human rights system with particular attention to the rules around access to the ECOWAS Court in human rights cases. The discussions review the Court's approach to the admissibility of cases, the criticisms that have been levelled against it and the resistance it has generated. The discussions then consider whether the proposed Supplementary Rules of Procedure adequately address the concerns about access to the Court.

The chapter is organised into six parts, with Part 1 being this introduction. Part 2 considers the unique features of the ECOWAS human rights system focusing on the policy of unrestricted access. Part 3 evaluates the policy of unrestricted access, pointing out its legal and practical challenges, while Part 4 recounts the resistance the Court's approach has generated. In Part 5, the extent to which the Supplementary Rules address the concerns around the local remedies and *lis pendens* rules is evaluated, and the impact of the Rules on individuals' access to the Court is considered. Part 6 concludes by presenting some recommendations.

2 The unique human rights mandate of the ECOWAS Court

The idea of an ECOWAS court or tribunal dates back to the inception of the organisation in 1975. Article 11 of the Lagos Treaty provided for the establishment of a Community Tribunal to settle disputes relating to

25 DA Dapatem & EE Hawkson 'President tells ECOWAS Court to reform procedures' *The Daily Graphic*, 22 March 2022 https://www.graphic.com.gh/news/general-news/president-tells-ecowas-court-to-reform-procedures-2.html (accessed 19 June 2023).

26 Justice A Asante, President of the Ecowas Court, *Speech delivered at the International Conference of the Ecowas Court of Justice*, Lomé, Togo, 22-25 November 2021.

27 Memorandum on the supplementary rules of procedure for the human rights practice of the Community Court of Justice, ECOWAS for the approval of the ECOWAS Council of Ministers (5 May 2022) para 10.

the interpretation and application of the Treaty.[28] That Tribunal was not created until July 1991 when the ECOWAS Authority adopted a Protocol to establish what is now the Community Court of Justice.[29] Even so, the Court would not become operational until ten years later. Meanwhile, the Lagos Treaty was terminated and replaced with the ECOWAS Revised Treaty 1993. Articles 6(e) and 15(1) of the Revised Treaty provide for a Community Court of Justice as the principal judicial organ of ECOWAS.[30] However, since the Revised Treaty preserved existing ECOWAS Protocols, including the 1991 Protocol on the Community Court of Justice, the ECOWAS Court is deemed to be established pursuant to articles 6(e) and 15(1) of the Revised Treaty, although its Protocol predates the Treaty.[31]

Under the 1991 Protocol, the Court was designed to comprise seven judges appointed from among nationals of the member states.[32] The first judges appointed to the Court were sworn into office on 30 January 2001, marking the official start of the operations of the Court. The initial years of the Court's operation were, however, uneventful. No cases were filed by member states and ECOWAS organs that had direct access to the Court. By 2005, the only cases that had reached the Court's docket were two individual complaints that were ruled inadmissible.[33] A 2005 Supplementary Protocol amended the 1991 Protocol of the Court and expanded the Court's jurisdiction to cover matters including human rights.[34] Since then, access to the Court has been open to 'individuals on application for relief for violation of their human rights'.[35] This essentially makes the ECOWAS Court the human rights court of the West African sub-region with the jurisdiction to determine cases of human rights violations occurring in member states.[36] It, arguably, breathed life into what was hitherto a dormant Court.[37]

28 Lagos Treaty arts 11 & 56.

29 Protocol A/P.1/7/91 of 6 July 1991, as amended by 2005 Supplementary Protocol (Amended Protocol of the Court).

30 ECOWAS Revised Treaty art 15(2) provides that 'the status, composition, powers, procedure and other issues concerning the Court shall be set out in a Protocol relating thereto'.

31 ECOWAS Revised Treaty art 92(3).

32 ECOWAS Court Protocol (as amended) art 3(2).

33 *Olajide Afolabi v Nigeria* ECW/CCJ/JUD/01/04 (2004) and *Frank Ukor v Rachad Laleye* ECW/CCJ/APP/01/04 (2005).

34 Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol adopted on 19 January 2005 art 3. Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol art 3.

35 ECOWAS Court Protocol (as amended) art 10(d).

36 ECOWAS Court Protocol (as amended) art 9(4).

37 Since the addition of the human rights mandate, over 500 cases have been filed with the Court most of which complaints of human rights violations. See Ladan (n 11) and Falana (n 13).

After the 2005 expansion, the Court maintained four broad heads of jurisdiction or mandates. At the same time, it is a Community Court of Justice, a Community Arbitration Tribunal, a Community Public Service Court, and a Community Human Rights Court. While the Court is more known for its human rights work, it is fundamentally a (sub)-regional economic community court that has been re-purposed for international human rights protection.[38] Nevertheless, the re-purposing of the ECOWAS Court for human rights protection is a bit different from how the two other subregional courts with human rights jurisdiction, the East African Court of Justice (EACJ)[39] and the erstwhile Southern African Development Community (SADC) Tribunal,[40] attained their human rights protection mandates. Whereas the ECOWAS Court is expressly vested with the jurisdiction to hear human rights cases (under the 2005 Supplementary Protocol), the EACJ and the SADC Tribunal took on their roles through an expansive interpretation of their jurisdiction.[41]

ECOWAS does not have a human rights protocol. Therefore, the ECOWAS human rights system is not founded on a specific human rights charter. The sources of human rights law that the ECOWAS Court may apply vary, depending on the case and the relevant international human rights obligations that the respondent state has accepted. That said, because all ECOWAS member states are parties to the African Charter on Human and People's Rights (African Charter) and have also bound themselves by article 4(g) of the ECOWAS Revised Treaty to respect, promote and protect human rights in accordance with the African Charter, the African Charter is essentially the primary source of human rights law for the ECOWAS Court.

Article 10 of the Court Protocol governs the admissibility of human rights cases. It provides that an application alleging a violation of human rights must not be anonymous or be the subject of proceedings before another international court. These requirements are supplemented by Rule 33 of the Rules of the Court, which provide that human right applications brought under article 10 of the Court Protocol should indicate:

38 J Gathii & H Mbori 'Reference guide to Africa's international courts: An introduction' in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (2021) 300, 302.

39 MT Taye 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the court' (2019) 27 *African Journal of International and Comparative Law* at 359.

40 HB Asmelash 'Southern African Development Community Tribunal' in *Max Planck Encyclopedia of International Procedural Law* (last updated February 2016).

41 Gathii & Mbori (n 38) 302.

(a) the name and address of the applicant;
(b) particulars of the respondent;
(c) the summary of facts constituting the alleged violations and points (or pleas) of law on which they are based;
(d) the reliefs sought by the applicant; and
(e) if relevant, the nature of evidence to be led.

The net effect of rule 33 and article 10 is that a 'vague and ghost' application (which does not disclose the subject matter of the dispute, the parties involved, the summary of the arguments and the prayers of the applicant) is inadmissible before the Court.[42] On the other hand, if the application discloses the identity of the applicant and states sufficient facts and legal points to demonstrate a *prima facie* violation of human rights, then the requirements of Rule 33 are met.[43]

Apart from the above, the only other admissibility requirement evident from article 10 of the ECOWAS Court Protocol is that the application should not be pending before another international court.[44] Conspicuously missing from its admissibility rules is the general requirement to exhaust local remedies. In due regard to the sovereignty of states and their role as the primary implementers of international law, including human rights norms, international human rights bodies are considered to have a subsidiary and complementary role to domestic courts in the enforcement of human rights.[45] This is why international human rights mechanisms require that local remedies in a state are exhausted or proven to be unduly prolonged or unavailable before the state is sued in an international court.[46]

Yet, unlike other human rights regimes, access to the ECOWAS Court in human rights cases (whether by individuals or NGOs) is not predicated

42 ECOWAS Court Protocol (as amended) art 10(d); *Ocean King Nigeria Limited v Senegal* [2011] CCJELR 139 (ECOWAS Court); *Aziagbede Kokou* (n 18) 174.

43 *El Hadji Aboubacar v BCEAO and the Republic of Niger* [2011] CCJELR 8 para 25.

44 The Court held that it has jurisdiction to hear a case pending before a national court as article 11 of the Protocol only renders inadmissible cases before international courts. See *Valentine Ayika v Liberia* [2011] CCJELR 237 para 13.

45 *Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jéhovah v Zaire* (2000) AHRLR 74 (ACHPR 1995) para 36; *Rencontre Africaine pour la De´fense des Droits de l'Homme v Zambia* (2000) AHRLR 321 (ACHPR 1996) para 10; and H Onoria 'The African Commission on Human and People's Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* at 1, 3-5.

46 African Charter art 56(5); Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 1717 art 5(2)(b); and *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) para 25.

on the exhaustion of local remedies. The Court has reasoned that the lack of a local remedies requirement is neither an inadvertent omission nor a flaw in the Court's human rights mandate but a deliberately chosen element of its judicial architecture that can only be changed by amending the Court's Protocol.[47]

Relatedly, the Court has also held that the pendency of a suit in a national court regarding the same or substantially the same matter between the parties does not render a parallel suit in the ECOWAS Court inadmissible.[48] In some cases, factors such as the applicant's standing or victim status and the application's international character have been considered admissibility requirements to regulate access to the Court. However, the net effect of the two major admissibility rules, as interpreted by the Court, is that individuals and NGOs practically have unrestricted access to the Court in human rights cases.

3 Critical evaluation of the policy of unrestricted access

3.1 The local remedies rule

As noted above, the Court has held that exhaustion of local remedies is not a pre-condition to seizing the Court in human rights cases.[49] It has justified this position on the basis that the Court's Protocol contains no such requirement. The Court reiterated that justification in *Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation*, where it held that 'it cannot impose other extraneous conditions on litigants other than the ones provided for in [the Court's] Protocol'.[50] With no local remedies requirement or deference to national courts concerning pending suits, applicants can simply bypass national courts and proceed directly to the ECOWAS Court with their human rights claims. The link between this approach to admissibility and the high volume of human rights cases on the Court's docket could not be clearer. However, as the existing literature bears out, this approach to the exercise of the Court's human rights mandate does not seem to be sufficiently supported in law or practically

47 See *Hadijatou Mani Koraou* (n 19) paras 36-45. See also *The Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation v Nigeria* ECW/CCJ/JUD/18/16 (2016) at 19 where the Court held that 'it cannot impose other extraneous conditions on litigants other than the ones provided for in [the Court's] Protocol'.

48 See *Valentine Ayika* (n 44) para 13 and *Nosa Ehanire Osaghae* (n 20) 22.

49 See *Hadijatou Mani Koraou* (n 19) paras 36-45.

50 *Incorporated Trustees* (n 47) 19.

sustainable in the long term.[51] International human rights jurisdiction rests on the principle of subsidiarity.[52] This means that the jurisdiction of an international human rights body is designed and intended to complement the role of domestic courts in enforcing human rights rather than supplanting them. This is the *raison d'être* of the local remedies rule. The state against whom a charge of human rights violation is laid must be afforded the opportunity to redress it.[53] Recourse may be made to the international forum if local remedies are unavailable in the state or if they exist, they are insufficient, ineffective, or unduly prolonged.[54]

The local remedies rule is a principle of customary international law.[55] In *ELSI*, the International Court of Justice (ICJ) observed that the parties to a treaty are free to 'either agree that the local remedies rule shall *not apply* to claims based on alleged breaches of that treaty; or confirm that it shall apply [emphasis added]'[56] However, given that it is a fundamental rule of customary international law, the Court held that the requirement to exhaust local remedies cannot be dispensed with 'in the absence of any words [in the treaty] making clear an intention to do so'.[57] In other words, the mere silence of a treaty on the local remedies rule cannot be taken to mean that the parties have excluded its application to claims brought by individuals under the treaty.

Regardless, the ECOWAS Court has taken the view that the absence of the local remedies requirement in its Protocol implies that ECOWAS members have waived it.[58] Yet, the evidence would seem to suggest otherwise. As Enabulele notes, ECOWAS members such as The Gambia and Niger have invoked the application of the rule in cases before the Court, a development that undercuts the waiver argument.[59] Moreover,

51 See Enabulele (n 22); Ebobrah (n 22).

52 See generally S Besson 'Subsidiarity in international human rights law – What is subsidiary about human rights?' (2016) 61 *American Journal of Jurisprudence* 69.

53 L Chenwi 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374 at 376-378; D Shelton *Remedies in international human rights law* (2015) 91-94.

54 Shelton (n 55) 91-94.

55 See International Law Commission, Draft Articles on Diplomatic Protection with Commentaries art 15.

56 Case concerning *Electtronica Sicula S.p.A. (ELSI) (United States v Italy)* 1989 ICJ Rep 15 para 50.

57 *ELSI* (n 56).

58 *Hadjiatou Mani Koraou* (n 19) paras 39-40.

59 Enabulele (n 22) 291. Ordinarily, the text of the treaty would be the best evidence of waiver of a relevant principle of international law. Yet where, as with the ECOWAS Court Protocol, the treaty is silent on the principle, subsequent practice under the treaty

article 4(g) of the ECOWAS Revised Treaty, which is the fountainhead of the ECOWAS human rights system, states that the state parties 'solemnly affirm and declare their adherence to [the] recognition, promotion and protection of human and people's rights in accordance with the provisions of the African Charter'. Those provisions of the African Charter include a codification of the local remedies rule. None of the state parties to the African Charter (including ECOWAS members) has made a reservation or deposited a declaration excluding the applicability of the rule.[60]

Therefore, absent a clear intention to the contrary, it seems incongruous to presume that the same states agree to the exhaustion of local remedies within the African Charter's human rights system but reject it within the ECOWAS human rights regime that draws its lifeblood from the African Charter via article 4(g) of the ECOWAS Revised Treaty.[61] Some may argue that article 4(g) of the ECOWAS Revised Treaty only incorporates the catalogue of rights in the first part of the African Charter, but not the institutional and procedural mechanisms of the Charter, including the local remedies rule. That argument may be true, but only to the extent that we are dealing with those procedural provisions of the Charter that are *lex specialis* within the meaning of the Charter and intended to apply exclusively to the Charter institutions.

may (in accordance with the Vienna Convention on the Law of Treaties (VCLT) art 32) be a relevant supplementary means of determining whether the principle was in fact waived under the treaty. According to the International Law Commission, subsequent practice of the parties includes 'statements in the course of a legal dispute'; Report of the work of the 70th session of the International Law Commission, 30 April-1 June and 2 July-10 August 2018 UN Doc A/73/10 (8 Aug 2018) (ILC Report) conclusion 4, commentary, paras 16-18, 23-24.

60 Enabulele (n 22) 291.

61 Admittedly, apart from the 2005 amendment of the Court's Protocol, which created the Court's human rights jurisdiction, there has been at least one other amendment in 2006. This latter amendment addressed issues relating to the number of judges of the Court, their qualifications, tenure, and discipline (see Supplementary Protocol A/SP.2/06/06 of 14 June 2006). The argument could, therefore, be made that if the member states really wanted the local remedies rule, they would have included it the 2006 amendment, if not the 2005 amendment, which created the Court's human rights mandate. Such an argument would, however, miss a point. That point is that at the time of the last amendment to the Court's Protocol in June 2006, the cases of the Court beginning with *Hadijatou Mani Koraou* (n 19), in which the Court would reject the application of the local remedies rule, had not been decided. Thus, the non-applicability of the local remedies rule, which has since become a source of debate, was not a live issue at the time. Also, given that article 20 of the Protocol of the Court requires that the Court should apply relevant rules of customary international law, member states would have been entitled to assume (as evidenced by later arguments in cases before the Court) that the Court would interpret access to its human rights jurisdiction consistent with the local remedies rule, even if such a requirement was not legislated.

While the requirement to exhaust local remedies is procedural, it is not a mere procedural rule that can be offhandedly dispensed with. Nor can it be seriously argued that it is a Charter-created rule whose application is limited to only the institutions of the African Charter system. As a rule of customary law, it exists and applies despite the African Charter.[62] Accordingly, its inclusion in the Charter would seem to put beyond doubt the parties' intention that it is a general requirement that should govern the enforcement of the rights in the Charter. Based on this, it is legitimate for the state parties to expect that apart from those provisions of the Charter which are intended to apply exclusively to Charter institutions, a court or body that applies the African Charter must do so consistently with the generally applicable principles that the parties intended to govern it. Any other approach would mean that institutions outside the African Charter system are free to interpret and apply the Charter in a manner inconsistent with the parties' intention.

Besides, upholding the local remedies rule does not mean that access to the Court would be unduly restricted. It is not an inexorable command that admits no exceptions. Indeed, under the African Charter and its jurisprudence, for instance, there are at least eight exceptions to the local remedies rule.[63] In effect, the rule is quite flexible. It allows an international court to give due respect or deference to courts of the respondent state while ensuring, at the same time, that the state does not escape international accountability in appropriate cases. By upholding the rule, international courts send a message that they are there to complement the role of national courts in protecting human rights rather than to supplant or compete with them. If an international human rights body disregards the rule where it should have upheld it, it sets itself up for confrontation with national courts and political authorities in the respondent state whose cooperation it requires to enforce its decisions.[64] These would seem to explain why the ECOWAS Court decisions ruling

62 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)* (merits) [1986] ICJ Rep 14 at para 77.

63 Centre for Human Rights, University of Pretoria, *A guide to the African human rights system: celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016* (2016) 19-20. (The local remedies requirement need not be satisfied if (i) the victim-applicants are indigent; (ii) the complaint alleges serious or massive violations of human rights; (iii) the jurisdiction of national courts in the matter has been ousted by law; (iv) the rights asserted in the application are not provided for in national law; (v) exhausting local remedies in the state poses a threat to the life of the applicant; (vi) the victim-applicants are too numerous making exhaustion of local remedies impractical; (viii) the domestic processes or procedures make local remedies unduly prolonged; or (viii) exhaustion of local remedies will be illogical or an exercise in futility.)

64 Enabulele (n 22) 293-294; Ebobrah (n 22) 26.

out the applicability of the local remedies rule merely by its absence in the Court's Protocol have been met with resistance by ECOWAS members and viewed in the literature as troubling.[65]

3.2 The *lis pendens* rule

The other limb of the policy of unrestricted access is the Court's position that it has jurisdiction to hear a claim even if substantially the same matter is pending in a national court.[66] In *Osaghae* the Court reaffirmed this position stating that 'the pendency of a case before a domestic court does not oust its jurisdiction to entertain a matter … [a]s long as the matter is not before another international court, this Court has the competence to entertain same'.[67] In doing so, the Court recalled its decision in *Valentine Ayika*,[68] where it assumed jurisdiction despite the subject matter's pendency before the Supreme Court of Liberia.[69] The Court has justified this line of cases on the basis that article 10 of the Court's Protocol only renders inadmissible cases pending before other international courts.

Admittedly, the admissibility requirement of article 10(d)(ii) of the Court Protocol only covers matters before other international courts. This reflects the doctrine of *lis pendens,* which requires a Court to decline or at least suspend the exercise of its jurisdiction if there is a parallel proceeding before another court involving the same parties on the same matter and there is, therefore, a likelihood of conflicting decisions.[70] In the *MOX Plant case*, the Arbitral Tribunal for the law of the sea cautioned that 'a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties'.[71] However, there is doubt about whether the *lis pendens* rule requires an international court to decline or suspend its jurisdiction if the parties are litigating the same matter before a national court.[72] On that point, the ECOWAS Court

65 Ebobrah (n 22) 26; Enabulele (n 22) 293-294.

66 *Valentine Ayika* (n 44) para 13.

67 *Nosa Ehanire Osaghae* (n 20) 22

68 *Valentine Ayika* (n 44) para 13

69 *Nosa Ehanire Osaghae* (n 20) 22.

70 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* (provisional measures) (2019) ICJ Reports 361 at 402-409 (Dissenting Opinion of judge ad hoc Cot).

71 *MOX Plant* case *(Ireland v United Kingdom)* (order on suspension of proceedings on jurisdiction and merits and request for provision measures) PCA Case No. 2002-01 (24 June 2003) para 28.

72 K Yannaca-Small 'Chapter 25: Parallel proceedings' in P Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (2008) 1008 at 1021-1025.

is arguably right in its view that article 10(d)(ii) of the Court Protocol is inapplicable to proceedings before a national court.

Nevertheless, the Court's rationalisation that it is *ipso facto* allowed to determine claims pending before national courts may not be entirely correct. Treaty law, that is, the Court Protocol and other ECOWAS instruments, are not the only sources of law the Court should apply. As an international court, the Court is expected to also apply relevant rules of customary international law and general principles of law.[73] In addition, and where appropriate, it should also apply international judicial best practices.[74] Thus, even if there is no rule of international law that requires it to abstain from exercising jurisdiction in a matter pending before a national court, it seems that at least best practice would require deference to national courts in such matters.[75] In any event, the underlying value of the *lis pendens* doctrine is the idea that courts should avoid situations of parallel proceedings and conflicting outcomes. That value reflects in the principle of subsidiarity that governs the jurisdiction and role of international human rights bodies.[76] Within the context of international human rights law, the principle of subsidiarity defines the structural relationship between states and the international institutions they establish for the protection of human rights. Subsidiarity emphasises

73 ECOWAS Court Protocol (as amended) art 20; *Jerry Ugokwe v Nigeria* [2004-2009] CCJELR 37, paras 30-31; and Enabulele (n 22) 292-293.

74 C Brown *A common law of international adjudication* (2007) 3-5 and particularly at 240 where he states: '[I]f a party applies for the exercise of a power which is not expressly conferred by the relevant international court's constitutive instrument, that party can argue that just because this procedure or power is not expressly provided for, does not mean that it is excluded. Rather, the party can argue that the international court might be able to apply the procedure, or exercise the power, either because the procedure is applicable as a general principle of judicial procedure, or because the power is an inherent power. Further, in determining whether the exercise of a particular power is necessary in order to carry out their functions, international courts might turn to the practice of other international tribunals for guidance.'

75 *Southern Pacific Properties Ltd (SPP) v Egypt* (Decision on Preliminary Objections of Jurisdiction) ICSID Case No ARB/84/3 (27 November 1985). In that case a question whether the parties had consented to arbitration before the International Chamber of Commerce, which was before the Tribunal, was simultaneous also being considered by the Cour de Cassation of France. Acknowledging need to avoid parallel proceedings and potential conflicting outcomes, the Tribunal stated at para 84: 'When the jurisdictions of two unrelated and independent tribunals extend to the same dispute, there is no rule of international law which prevents either tribunal from exercising its jurisdiction. However, in the interests of judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal.' Guided by these considerations, the Tribunal decided to stay its proceedings until the conclusion of the 'the proceedings in the French courts' (para 88).

76 See generally Besson (n 52).

the primary role of the state to protect human rights while granting international institutions the auxiliary role of 'providing guidance, assistance, monitoring, and back-up, but without replacing states as the primary guarantors'.[77] It, therefore, explains the commitment states make to take all necessary measures to guarantee the enjoyment of the rights in treaties they ratify, at least in the first instance.[78] It further explains the imposition of admissibility rules, such as the requirement to exhaust local remedies before recourse to international human rights mechanisms.[79] In other words, it creates a presumption in favour of national jurisdiction regarding human rights protection.[80] Under article 1 of the African Charter, ECOWAS members, all of whom double as parties to the African Charter, have committed themselves to implementing and enforcing the rights guaranteed in the Charter. They have reinforced that undertaking by their additional human rights commitments in the ECOWAS Revised Treaty.[81] It follows that the principle of subsidiarity broadly defines the relationship between ECOWAS states and the regional or subregional human rights institutions (including the ECOWAS Court) they have created to protect human rights consistent with the African Charter.[82] A proper appreciation of this structural relationship as defined by the principle of subsidiarity would require that the ECOWAS Court exercise its jurisdiction in a way that is complementary to national jurisdictions rather than in a manner that attempts to supplant or compete with them.[83] Thus, despite the non-applicability of the *lis pendens* rule to national courts within the express terms of article 10 of the Court Protocol, in fidelity to

77 G Neuman 'Subsidiarity' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (2013) at 363-364.

78 Besson (n 52) 78

79 B Duhaime 'Subsidiarity in the Americas: What is there for deference in the Inter-American system?' in L Gruszczynski & W Werner (eds) *Deference in international courts and tribunals: Standard of review and margin of appreciation* (2014) 289, 290; Besson (n 52) 79-80.

80 Ebobrah (n 22) 27.

81 ECOWAS Revised Treaty arts 4(g) & 5.

82 *Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) para 50.

83 Besson (n 52) 78. The principle of subsidiarity may be descriptive in that it describes the relationship between regional or international human rights mechanisms and national jurisdictions in the protection of human rights. However, it does not merely describe the layered structure of human rights protection, in which national jurisdictions have a primary role and international mechanisms provide surveillance and assistance. Instead, it provides a justification for why this layered structure exists and establishes a presumption in favour of national jurisdiction when it comes to human rights protection. Additionally, it serves as the foundation for principles such as the requirement to exhaust local remedies, which determine the conditions and appropriateness of interventions by regional or international human rights mechanisms. Therefore, at its core, the principle of subsidiarity is normative and should inform how an international or regional human rights body defines its relationship with national jurisdictions.

the principle of subsidiarity, the Court would still have a basis to defer to national jurisdiction.

3.3 Insufficient attempts at regulating access in human rights cases

The ECOWAS Court has acknowledged the need to regulate access to its human rights mandate in some cases, but it has not done so consistently and coherently to assuage the concerns about access to its jurisdiction. For example, in *Aziagbede Kokou*, the Court held that the admissibility requirements of article 10(d) of the Court Protocol are not exhaustive and that in appropriate cases, the Court may consider 'other criteria of admissibility'.[84] It noted, for instance, that a case may be deemed inadmissible if it does not 'exhibit any international nature and proves to be premature or precocious'.[85] Applying these judicially distilled (and obviously pragmatic) admissibility requirements, the Court declared as inadmissible applicants' claims alleging violations of the right to life, security of the person and freedom from torture.[86] The Court reasoned that those claims of human rights violations which arose from alleged violence visited on applicants by Togolese security forces during an election were matters pending before the domestic courts in Togo. The court noted that ordinarily, it would be entitled to make its own assessment of facts in exercising its mandate. However, in this case, it could not do so without interfering with criminal proceedings that had been initiated regarding the same events upon which the application was based. Therefore, the court concluded that the claims were premature and inadmissible since determining them would interfere with the proceedings before the Togolese courts.[87]

While the approach of the Court in *Aziagbede* is prudent and pragmatic, it has not always been followed in other cases with similar facts, resulting in inconsistencies.[88] For these reasons, the concerns about access to the Court's human rights jurisdiction remain alive for ECOWAS members.

84 *Aziagbede* (n 18) para 19.

85 *Aziagbede* (n 18) para 20.

86 *Aziagbede* (n 18) para 70.

87 *Aziagbede* (n 18) para 42.

88 Research Directorate, ECOWAS Court 'Study on the regulation of access to the Court in matters of human rights violations with regard to the need for the harmonious development of the Community Legal Order' (April 2022) at para 9. (Study on Regulation of Access to ECOWAS Court). See also Nosa *Ehanire Osaghae* (n 20) 22 and *Valentine Ayika* (n 44) para 13.

4 Resistance to the policy of unrestricted access

Resistance to unrestricted access to the Court in human rights cases began almost immediately after the Court obtained its human rights mandate in 2005.[89] This was, however, not an isolated development as far as subregional courts in Africa were concerned. Similar negative political reactions against subregional courts in East Africa and Southern Africa precipitated by unfavourable rulings against states had been recorded.[90] In the East African Community, Kenya launched a bid to abolish the EACJ or have the judges removed after the Court upheld a challenge to the process by which the government selected Kenya's delegates to the East African Legislative Assembly.[91] Kenya could not garner the support to abolish the Court. However, it succeeded in getting reforms, including creating an appellate division of the Court to allow for appeals, the imposition of strict timelines for filing complaints, and a change in disciplinary rules enabling judges to be removed for accusations of corruption in their home states.[92] Within the SADC, Zimbabwe (under President Mugabe) was similarly infuriated when the SADC Tribunal decided in favour of a white Zimbabwean landowner who challenged the seizure of his land as part of Mugabe's signature land reform programme.[93] Through a campaign of vilification and refusal to agree to the filling of judge and staff vacancies

89 MR Madsen, P Cebulak & M Wiebusch 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* at 197. Madsen and others observe that 'backlash' is the term predominantly used in the literature to refer to negative or adverse reactions to international courts. However, they note that it is not necessarily an analytical concept, but rather a common language that typically denotes a negative reaction in the realm of politics. Therefore, they use the descriptor 'resistance' as the umbrella term for the spectrum of negative or adverse reactions to international courts. In their view, this encompasses different forms of negative reactions that can be broadly classified as pushback or backlash. They define pushback as 'ordinary resistance occurring within the confines of the system but with the goal of reversing developments in law,' and backlash as 'extraordinary resistance challenging the authority of an [international court] with the goal of not only reverting to an earlier situation of the law but also transforming or closing the [international court.]' at 203. In agreement with Madsen and others, 'resistance' is used in this section and other parts of the paper as the generic term for negative or adverse reactions to the ECOWAS Court, while 'pushback' or 'backlash' is used where the facts and context warrant such nuance.

90 L Helfer 'Backlash against International Courts in West, East and Southern Africa (2015) 109 *Proceedings of the Annual Meeting (America Society of International Law)* 27-30.

91 *Anyang Nyong'o v Attorney General of Kenya* Ref No 1/2006 (29 March 2007).

92 KJ Alter, JT Gathii & LR Helfer 'Backlash against international courts in West, East, and Southern Africa: Causes and consequences' in J Gathii (ed) *The performance of Africa's international courts* (2020) 254.

93 *Mike Campbell (Pvt) Ltd v Zimbabwe* 2008 AHRLR (SADC 2008).

on the Court, Zimbabwe practically achieved its mission of getting the SADC Tribunal suspended.[94] With the leverage gained from suspending the Tribunal's operations, Zimbabwe then negotiated the abolition of the individual complaint procedure when the Tribunal was later reconstituted under a new protocol.[95]

Within ECOWAS, the resistance to the Court's approach was launched by The Gambia, whose government under Yahyah Jammeh was notorious for intimidating and harassing the media, opposition parties and the judiciary.[96] It was within this context that two cases came to the ECOWAS Court against The Gambia. The first was *Manneh*, where the applicant, a journalist, alleged unlawful arrest, detention and torture by Gambia's Intelligence Agency.[97] Despite several notifications about the suit and the hearing, the government refused to defend the claims.[98] The Court found The Gambia liable, ordered the applicant's release, and awarded him compensation of $100,000.[99] The ruling embarrassed the Gambian government as condemnation and demands for compliance poured in from foreign governments, international organisations, human rights NGOs and other civil society organisations.[100]

In a second suit by exiled journalist Musa Saidykhan also alleging unlawful detention and torture,[101] the government decided to respond after apparently regretting its strategy in the *Manneh case*.[102] Among others, it objected to the jurisdiction of the Court and admissibility of the claim for non-exhaustion of local remedies.[103] Following the Court's rejection of the objections in a preliminary ruling in June 2009, The Gambia switched strategies to defeat the claim to avoid another embarrassment.[104] It mounted a public attack on the Court and submitted a proposal to the ECOWAS Commission in September 2009 for a revision of the Court's Protocol to, *inter alia*, require: (i) the exhaustion of local remedies; (ii) the

94 Alter, Gathii & Helfer (n 92) 274-282.

95 Alter, Gathii & Helfer (n 92) 254, 282.

96 Alter, Gathii & Helfer (n 92) 258.

97 *Chief Ebrimah Manneh v The Gambia* ECW/CCJ/JUD/03/08 (2008).

98 *Manneh* (n 97).

99 As above.

100 Alter, Gathii & Helfer (n 92) 258; Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to the Gambia (3-7 November 2014) UN Doc A/HRC/29/37/Add.2

101 *Musa Saidykhan v The Gambia* ECW/CCJ/JUD/08/10 (2010).

102 Alter, Gathii & Helfer (n 92) 258.

103 *Musa Saidykhan* (n 101).

104 Alter, Gathii & Helfer (n 92) 259.

filing of cases within 12 months of exhausting local remedies; and (iii) the rejection of claims filed by anonymous parties.[105] The Gambia also demanded an amendment to the ECOWAS Revised Treaty to establish an appellate procedure for all decisions of the Court.[106]

While The Gambia's proposal was seemingly modest and uncontroversial, the antecedents to the proposal betrayed a disguised attempt to 'clip the wings' of the Court.[107] For this reason, the proposal was fiercely denounced and resisted by civil society organisations.[108] In the face of stiff opposition, the ECOWAS Committee of Legal Experts, who considered the proposal, recommended against its adoption.[109] The ECOWAS Council of Ministers endorsed the Committee's recommendation and thereby defeated The Gambia's attempt at a backlash against the Court.[110]

The Council of Ministers' decision to reject The Gambia's proposal has been described as 'striking'.[111] Whatever the reasons were, three factors appear to have been decisive. First, there was a motivation to distance ECOWAS from The Gambia, which was widely perceived as a bad actor under the Jammeh regime.[112] Second, civil society mobilisation in support of the Court and its mandate, including legal challenges to The Gambia's proposals played a key role.[113] And thirdly, the Court enjoyed international goodwill and the support of the bureaucrats at the ECOWAS Commission.[114] Although it was still in its early years, the Court had rendered decisions that attracted international attention and goodwill. Apart from the cases against The Gambia, it also upheld a challenge to modern slavery in Niger that was internationally praised.[115] For these and other reasons, officials at the ECOWAS Commission did not favour the

105 Alter, Gathii & Helfer (n 92) 259.

106 As above.

107 Alter, Gathii & Helfer (n 92) 259-260.

108 Alter, Gathii & Helfer (n 92) 259-261.

109 Alter, Gathii & Helfer (n 92) 261.

110 Alter, Gathii & Helfer (n 92) 261; see also Madsen, Cebulak & Wiebusch (n 89) 215-216.

111 Alter, Gathii & Helfer (n 92) 261.

112 See Alter, Gathii & Helfer (n 92) 261, 285 and Report of the Special Rapporteur, Christof Heyns (n 100).

113 See Alter, Gathii & Helfer (n 92) 261-262.

114 Alter, Gathii & Helfer (n 92) 262.

115 *Hadijatou Mani Koraou* (n 19); Alter, Gathii & Helfer (n 92) 262.

imposition of restraints that would undercut the progress the Court was making as a fledgling judicial body.[116]

Nevertheless, the rejection of The Gambia's proposal was, to a large extent, an act of 'shooting the messenger', even if it had a veiled agenda. It was a victory for the Court and its supporters, no doubt. But equally true is the fact that it merely postponed the resolution of the question of unrestricted access to a later date. Thus, because the real issue was never dealt with, it keeps coming up whenever member states have unfavourable rulings issued against them. Most recently, an ECOWAS Court judgment against Côte d'Ivoire that resulted in the execution of a legal process against an Air Côte d'Ivoire plane in Mali appeared to have incensed the Ivorian government.[117] Apparently, other member states that have investigating magistrate procedures for criminal investigations have also been worried about potential interference in such proceedings arising from the Court's practice of hearing human rights applications of accused persons who are under investigation by national courts.[118]

At the opening of an External Session of the ECOWAS Court in Accra in March 2022, then Chairman of the ECOWAS Authority, President Akufo-Addo of Ghana, echoed the concerns of member states about the above issues when he stressed the need for access to the Court to be regulated.[119] He observed that the prevailing unrestricted access to the Court in human rights cases sometimes 'results in judgments that Member States find difficult to enforce, or [that] are inconsistent with the concerned Member State's municipal laws'.[120] He added that '[s]ome judgments have even led to efforts to attach state assets in satisfaction of the judgments … [h]owever, this is not the practice in other international courts'.[121] Citing these concerns, he suggested that without amending Court Protocol, the Court itself could 'impose a rule of judicial self-restraint that would insist that an applicant for the exercise of the Court's expanded jurisdiction

116 Alter, Gathii & Helfer (n 92) 262.

117 J Afrique 'Why an Air Côte d'Ivoire Plane was seized by businessman Diawara' *The Africa Report*, 24 November https://www.theafricareport.com/149582/why-an-air-cote-divoire-plane-was-seized-by-businessman-diawara/ (accessed 19 June 2023).

118 See Study on regulation of access to ECOWAS Court (n 88) paras 21-22, and, below, Draft Supplementary Rules (n 139) art 7 which identify and seek address these concerns.

119 See Address by the President of the Republic of Ghana and Chairman of the Authority of Heads of State and Government of ECOWAS, Nana Addo Dankwa Akufo-Addo, at the External Court Session of the ECOWAS Court of Justice in Accra, Ghana (21 March 2022).

120 Address by President of Ghana and Chairman of ECOWAS Authority (n 119).

121 As above.

satisfy the requirement of the exhaustion of domestic remedies'.[122] He considered that such a rule which the Court could possibly introduce under a practice direction, 'would obviate any potential conflict between the Court and national government[s]'.[123] Ghana's Attorney-General and Minister of Justice echoed similar sentiments noting that 'there is no justification for member states with strong human rights record and formidable judicial institutions, like the Republic of Ghana, to be denied the opportunity to redress an alleged wrong within the framework of its own domestic legal system before international responsibility may be called into question'.[124] He suggested that 'the time has come' for the relevant legal texts to be amended to incorporate the local remedies rule to align 'the practice of the Court with prevailing customary international law'.[125] As an alternative, he re-suggested the old proposal for an appellate division of the Court to be established to provide 'an assurance against any serious or grave errors in rulings'. [126]

Evidently, from a political standpoint, the adverse reactions of member states to decisions of the Court do not necessarily indicate a divorce between dissatisfaction with the outcome and the process by which the case was initiated. The thinking, at least from these recent negative reactions, appears to be that without unrestricted access to the Court, a member state would likely not be saddled with an eventual unfavourable ruling.[127]

In light of these recurrent concerns, the Presidency of the ECOWAS Court convened a meeting in Abidjan, Côte d'Ivoire, from 10 to 15 April 2022 to conduct a self-evaluation of the Court's approach and find an appropriate solution. Accordingly, the objective of the meeting, in relevant part, was to 'consider the concerns of the Member States that are advocating for the amendment of the Texts of the Court to include

122 Address by President of Ghana and Chairman of ECOWAS Authority (n 119).

123 As above.

124 'Remarks by Godfred Yeboah Dame Hon. Attorney-General & Minister for Justice of the Republic of Ghana at Opening of the External Sitting of the ECOWAS Community Court of Justice, Monday, 21 March 2022, Accra.'

125 Remarks by Attorney General of Ghana (n 124).

126 As above.

127 See Remarks by Attorney General of Ghana (n 124): 'The omission of a requirement to exhaust local remedies is undoubtedly, also responsible for the ever-recurring difficulties in securing enforcement of decisions emanating from the ECOWAS Community Court of Justice. Legitimate questions about the sovereignty of nations and the supremacy of a Republic's Constitution are raised when a citizen of one country sidesteps all the avenues for resolution of a dispute available under the Constitution of his own country and directly accesses the ECOWAS Community Court.'

the exhaustion of local remedies' and to specifically 'examine the need to regulate access to the Court in human rights violations'.[128]

The Research Directorate of the Court prepared a background paper which informed the deliberations at the meeting.[129] The paper acknowledged the concerns that have been raised about unrestricted access to the Court. It noted that, generally, the current model of unrestricted access presents the real risk that the mandate of the ECOWAS Court will conflict with national jurisdictions and that such a risk is 'highly plausible if not almost certain'.[130] Regarding the non-exhaustion of local remedies, the paper acknowledged that since an applicant is free to bypass national courts, it puts the ECOWAS Court in a situation where it essentially competes with domestic institutions of member states 'in the field of remedies for human rights violations'.[131] Together with the non-applicability of the *lis pendens* rule to national courts,[132] the risks of conflict between the ECOWAS Court and national jurisdictions are 'not purely speculative'.[133]

Against the backdrop of this critical, internal review, the Court concluded the Abidjan meeting with a decision to regulate access to its jurisdiction in human rights cases by adopting Draft Practice Directions for the purpose.[134] However, later developments after the Abidjan meeting, including a proposed meeting by ECOWAS Ministers of Justice to consider proposals to regulate access to the Court, prompted a different strategy. In an apparent move to own the process and beat the competition, the Draft Practice Directions adopted at the Abidjan meeting was repackaged as draft Supplementary Rules of the Court (Draft Supplementary Rules) and submitted for the approval of the ECOWAS Council of Ministers who

128 'Report of the meeting on the regulation of access to the Community Court of Justice, ECOWAS, in matters of human rights violations with regard to the need for the harmonious development of the community legal order', 10-15 April 2022, Abidjan, Côte d'Ivoire ('Report of ECOWAS Court meeting on regulation of access in human rights cases') para 3.

129 Report of ECOWAS Court meeting on regulation of access in human rights cases (n 88). See Study on regulation of access to ECOWAS Court (n 88).

130 Study on regulation of access to ECOWAS Court (n 88) para 4.

131 Study on regulation of access to ECOWAS Court (n 88) para 5.

132 See Study on regulation of access to ECOWAS Court (n 88) para 7: 'The Community Court of Justice, in the exercise of its mission to protect human rights, has been seized with numerous actions even though proceedings were underway at the national level.'

133 Study on Regulation of Access to ECOWAS Court (n 88) para 7.

134 Report of ECOWAS Court meeting on regulation of access in human rights cases (n 128) para 5.

were scheduled to meet from 30 June to 1 July 2022 in Accra, Ghana.[135] The Council, however, deferred consideration of the draft Supplementary Rules.

The developments leading up to this decision by the ECOWAS Court somehow reflect what Alter and others describe as the 'wily politics' approach of African states to influencing their subregional courts. They observe that more democratic states in subregional economic communities are often uneasy about radically changing the mandates of courts and therefore act as a buffer against such moves by their more authoritarian counterparts.[136] But at the same time, they do not relish the idea of having policies of governments, including their own, questioned or reversed at a subregional court.[137] The result of this internal conflict is that they avoid full-blown attacks on regional courts and instead focus on areas they can more easily control, such as limiting access to the court and imposing stricter time limits for filing claims.[138] This crafty political approach to influencing subregional courts appears to be what is playing out in ECOWAS, seemingly aided by the instinct of the Court to self-preserve by leading the process to reform itself.

5 Evaluation of the proposed Supplementary Rules on the Human Rights Practice of the ECOWAS Court

The draft Supplementary Rules begin with an introduction setting out their necessity and purpose, followed by an operative part comprising eleven articles. The introduction outlines three main objectives for the issuance of the draft Supplementary Rules:

(i) to clarify the scope of access and admissibility requirements for human rights cases for the guidance of agents or legal counsel who represent parties before the court;
(ii) to explain and supplement the settled jurisprudence of the Court regarding access to its human rights jurisdiction; and

135 See Memorandum on the supplementary rules (n 27).

136 Alter, Gathii & Helfer (n 92) 298.

137 As above.

138 As above.

(iii) to highlight 'the need to respect the national sovereignties of Member States' by enacting measures to prevent forum shopping and/or conflict with national courts.[139]

The relevant provisions of the operative part that bear on the discussions in this chapter are article 3, which deals with the admissibility of cases generally; article 4, which addresses the non-appellate character of the Court; and article 6, which addresses the issue of forum shopping. A close examination of these provisions reveals that the Court's attempt to regulate access to its human rights jurisdiction revolves around three thematic issues: (a) the local remedies rule; (b) the *lis pendens* rule; and (c) the non-appellate character of the court.

5.1 The local remedies rule

Article 3 of the draft Supplementary Rules reiterates the two basic requirements of admissibility of cases under article 10(d) of the Court's Protocol which are 'non-anonymity and non-pendency before another international court'. But despite the Court's consistent position that article 10(d) does not require exhaustion of local remedies or bar the court from concurrently considering a matter that may be pending in a national court, the Supplementary Rules are signalling a different approach. Accordingly, article 3 further provides that while the Court is not bound by the local remedies rule, it 'shall only entertain applications that have international character'.[140] The concept of 'international character' is not necessarily new at the Court. There have been references to it in some decisions of the Court, although without sufficient elucidation of its content or practical application.[141]

Thus, it is not exactly clear what is meant by 'applications that have international character' in the context of the 'exception' the draft Supplementary Rules seek to create to the Court's non-exhaustion of local remedies position. However, it could be understood to mean that where an applicant alleges breaches of an international human rights instrument ratified by the state, the case is international and, therefore, properly (and perhaps exclusively) within the Court's jurisdiction as an international human rights body, making the possibility of conflicts with national

139 Draft supplementary rules of procedure on the human rights practice of the Community Court of Justice, ECOWAS (May 2022).

140 Draft Supplementary Rules 2022 (n 139) art 3(2).

141 *Registered Trustees of Jama'a Foundation v Nigeria* ECW/CCJ/JUD/04/20 (2020) paras 57-58.

jurisdiction unlikely.[142] Such a position would, however, be erroneous since the requirement to exhaust local remedies is not limited to cases that implicate only domestic law. In other words, national courts may equally have jurisdiction to determine 'applications that have international character', especially if the state has domesticated the relevant international human rights instrument. Therefore, limiting the human rights mandate of the ECOWAS Court to applications with international character does not necessarily resolve issues concerning the local remedies rule.

5.2 The *lis pendens* rule

To prevent forum shopping, the draft Supplementary Rules now seek to extend the *lis pendens* rule to national courts. Article 6 of the Supplementary Rules provides that '[a]ny application for human rights violation lodged before the Court while pending before a national court, shall be ruled inadmissible.'

However, the clarity of the lis pendens provisions in article 6 is muddied by article 3(3) of the draft Supplementary Rules. Article 3(3) also affirms the Court's new approach that '[a]n application pending before a national court shall not be admissible before the Community Court of Justice'. Yet, it adds a caveat: 'unless it relates to procedural violations that have human rights connotations, by the trial municipal court in the course of proceedings'.[143]

The caveat can be understood in at least two ways. First, it could mean that despite the application of the *lis pendens* rule to national courts, if an applicant's international human rights are breached by or during a judicial proceeding of a national court (for example, a breach of the right to a fair trial), the ECOWAS Court can entertain the violation caused by or during the domestic proceedings. But secondly, it could also mean that despite extending the *lis pendens* rule to a national court, the ECOWAS Court may *concurrently entertain* an application if 'it relates to procedural violations that have human rights connotations, by the trial municipal court in the course of proceedings'.[144] The susceptibility of article 3(3) to two contradictory meanings does not help with the clarity the Court wishes to bring to issues around access to its jurisdiction through the

142 This view is supported by art 1(1) of the Supplementary Rules which provides that the mandate of the Court 'is in respect of International Human Rights Law and the obligations of Member States to respect, protect and fulfil human rights in accordance with the African Charter on Human and Peoples Rights (ACHPR) and any other International human rights Instruments that a Member State is party to'.

143 Supplementary Rules 2022 (n 142) art 3(3).

144 As above.

Supplementary Rules. A redraft of the provisions relating to the *lis pendens* rule would be necessary.

5.3 Non-appellate character of the Court

Article 4(1) of the draft Supplementary Rules restates the Court's jurisprudence to the effect that it has no jurisdiction to act as an appellate court over decisions of national courts. It then provides in more specific terms under article 4(2) that:

> Any party that is not satisfied by the decision of a national Court or that is aggrieved by the decision of a national court, cannot challenge such decision before the ECOWAS Court of Justice, but should follow the appeal channels within the national court system of the Member State concerned.

The non-appellate nature of the Court's jurisdiction is further addressed by article 3(4). It states that the Court 'shall uphold the principle of *res judicata* concerning any application already decided by a national court and will therefore not entertain an application, if the same application has already been decided by a national court of a Member State'.

These provisions generate some concerns that require a couple of observations. First, it is generally accepted that international courts, such as the ECOWAS Court, do not exercise appellate jurisdiction over national courts; they can, therefore, not grant orders reversing national court decisions as such.[145] However, this does not rule out the fact that as organs of a state, the national courts may incur international responsibility for their states by rendering judgments that breach the state's international obligations, including those on human rights. Where that is the case, an international court, while it cannot directly reverse the national court decision, will nevertheless have jurisdiction to determine whether that national court decision breaches the international obligations of the state.

Similar to article 4(1) of the draft Supplementary Rules, the African Court held in *Mtingwi* that it was not an appellate court relative to decisions of national courts.[146] However, realising it would be erroneous to maintain such an unqualified position, the Court clarified in *Thomas* that the non-appellate nature of its jurisdiction did not preclude it from

145 See cases such as *Jerry Ugokwe v Nigeria and Dr Christian Okeke* (intervener) ECW/CCJ/Jud/03/05 (2005) and *Moussa Leo Keita v Mali* ECW/CCJ/Jud/03/07 (2007) where the Court has stressed that its mandate is not one of appellate jurisdiction over national court decisions. See also *Kennedy Ivan v Tanzania* (merits and reparations) (2019) 3 AfCLR 48 para 26 where the African Court took a similar position.

146 *Mtingwi v Malawi* (jurisdiction) 15 March 2013 (2016) 1 AfCLR 190 para 14.

examining national court proceedings to 'determine whether they are in accordance with the standards set out in the Charter or any other human rights instruments ratified by the State'.[147] Thus, properly understood, the idea that an international court does not have appellate jurisdiction mainly relates to the fact that the Court cannot issue orders directly invalidating or reversing national court decisions. The correct approach, as evidenced in the practice of the ICJ in particular, is for the international court to order the state to adopt means of its own choosing to reverse decisions of its courts that violate its international obligations.[148] But that should not be confused with the propriety or mandate of an international court to review a national court decision to determine whether it implicates the responsibility of the state for internationally wrongful acts.

In light of this, the unqualified rule barring aggrieved persons from 'challenging' national court decisions at the ECOWAS Court seems inadvisable given its unintended consequences. It would effectively foreclose all applications to the ECOWAS Court hinged on a national court decision without any consideration for those decisions that implicate the responsibility of the state for human rights violations.

Second, article 4(2) of the draft Supplementary Rules creates an absurdity. This is because, for a Court that has consistently held on to the position that applicants need not exhaust local remedies before accessing its human rights jurisdiction, it now appears to be consigning a class of cases and applicants permanently to local remedies (that is, 'the appeal channels within the national court system of the Member State concerned') without the possibility of recourse to an international remedy. This outcome is reinforced by the overly broad *res judicata* rule in article 3(4) of the draft Supplementary Rules. Without any indication as to when the rule becomes effective after a national court decision is delivered and no exception for cases where a national court decision may be the cause of a human rights violation, article 3(4) effectively excludes applications grounded on national court decisions from the Court's mandate.

147 *Alex Thomas v Tanzania* Judgment (merits) 20 November 2015 (2015) 1 AfCLR 465 para 130.

148 *Jurisdictional Immunities of the State; Germany v Italy: Greece intervening* (23 February 2012) (2012) ICJ Rep 99 at para 137 where the Court held: '[T]he fact that some of the violations may have been committed by judicial organs, and some of the legal decisions in question have become final in Italian domestic law, does not lift the obligation incumbent upon Italy to make restitution. On the other hand, the Respondent has the right to choose the means it considers best suited to achieve the required result. Thus, the Respondent is under an obligation to achieve this result by enacting appropriate legislation or by resorting to other methods of its choosing having the same effect'.

In fact, the combined effect of these two provisions put applicants in a worse position than if there were a requirement to exhaust local remedies. This is because the local remedies rule allows an applicant to pursue their case in an international forum if the domestic remedy is ineffective or did not sufficiently redress the violation. Under the draft Supplementary Rules, the *res judicata* and *non-appellate* provisions would foreclose recourse to the ECOWAS Court if the matter has been heard in a domestic court, but without any regard for whether the domestic remedy was effective or sufficient. An applicant may therefore be better off under a requirement to exhaust local remedies than these rules.

5.4 The legal basis of the Supplementary Rules

A more fundamental concern that may be raised is the method that has been chosen to regulate access to the Court's human rights mandate, that is, the adoption of Supplementary Rules. The Court's power to adopt Supplementary Rules is derived from article 99 of its Rules of Procedure.[149] Article 99 provides that the Court 'shall adopt supplementary rules concerning its practice in relation to (a) letters rogatory; [or] (b) reports of perjury by witnesses or experts'. The Court does not act unilaterally in these matters. All rules adopted by the Court are ultimately subject to the approval of the ECOWAS Council of Ministers.[150]

Nevertheless, an ordinary and fair reading of article 99 would suggest that Supplementary Rules, even if approved by the Council, may not address substantive issues of law. Instead, their purpose is to address only matters of form (formalities) relating to how requests for cooperation and judicial assistance (that is, letters rogatory) and expert reports or other reports on witness perjury may be prepared and filed with the Court. If this reading of article 99 is correct, then it raises questions about whether Supplementary Rules could be deployed to regulate the admissibility of cases and access to its human rights mandate. These are important and substantive legal issues covered by the Court's Protocol. To be sure, the Rules of the Court (whether main or supplementary) are subsidiary to the Court's Protocol. Thus, besides the question of whether article 99 of the Court's Rules can be the basis of these particular Supplementary Rules, there is a much deeper question of whether the procedural rules of the court can regulate and, in some cases, exclude access to the Court. Given that access to the Court's mandate is covered under the Court's Protocol, the unimpeachable legal approach to regulate access to the Court would be to amend the Protocol.

149 Rules of the ECOWAS Court of Justice 2002.

150 Court Protocol (as amended) art 34.

An alternative and legitimate approach that may not require amendment of the Protocol would be for the Court to interpret its mandate under the Protocol and the ECOWAS Revised Treaty in line with the principle of subsidiarity. As argued earlier, the human rights commitments of ECOWAS states under the African Charter and the ECOWAS Revised Treaty create a structural relationship between the states and the Court based on the principle of subsidiarity. Interpreting its mandate in line with the subsidiarity principle will give the Court a legitimate basis to judicially define access to its jurisdiction along the lines of its approach in *Aziagbede.* By that approach, it would be able to apply the *lis pendens* rule to national courts without calling into question the basis of its authority to do so.

Arguably, the Court could use the same approach to apply the local remedies rule since an important offshoot of subsidiarity is the requirement to exhaust local remedies. As has been argued in this chapter and by others, that should be possible if the Court is willing to re-evaluate its position and accept that the absence of the local remedies requirement in the Court's Protocol does not imply a waiver by the states.[151] Indeed, as has been demonstrated above, a victim of a human rights violation may be better off under a requirement to exhaust local remedies than under some of the draft Supplementary Rules due to their effect of consigning certain cases permanently to the domestic forum. While such a turnabout will be legally defensible on the grounds that there is strictly speaking no rule of *stare decisis* in international law, there is admittedly the risk of appearing as inconsistent.[152]

That leaves us with the only non-amendment option that will not damage the Court's reputation: an interpretative note or guidance by the ECOWAS Authority or Council of Ministers. Under the Vienna Convention on the Law of Treaties (VCLT), one of the aids to interpreting a treaty is 'any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions'.[153] This provision, which arguably reflects customary law,[154] provides a basis for the ECOWAS members, as represented in the ECOWAS Authority or Council of Ministers, to adopt an agreed interpretative note on how the Court should interpret its existing human rights mandate.[155] Given

151 See generally Enabulele (n 22).

152 It could be argued that a turn-about is a lower risk to the reputation of the Court compared to the risks of adopting Supplementary Rules that constrict access, appear internally inconsistent and are arguably outside the Court's legislative mandate.

153 Art 31(3)(a).

154 ILC Report (n 59) conclusion 2, commentary, para 2.

155 ILC Report (n 59) conclusion 4, commentaries, paras 4-15.

the position of the Court that ECOWAS members have waived the local remedies rule, which some member states have disputed, the interpretative note or guidance could be used to clarify the position of member states on the issue by stating that access to the Court's human rights mandate should conform to the local remedies rule, and other relevant rules of admissibility applicable under the African Charter system. An interpretative note or guidance, couched in such general terms, would allow the Court enough discretion to legitimately apply and develop, on a case-by-case basis, admissibility rules to regulate access to its human rights mandate.

6 Concluding remarks

This chapter discussed the human rights mandate of the ECOWAS Court with a particular focus on access to the Court in human rights cases. It examined the Court's approach to the admissibility of cases and concerns that have been raised about it by ECOWAS members and scholars. It also assessed how the Court responded to these concerns judicially, in some cases, and how it now seeks to regulate access to its human rights mandate with a draft Supplementary Rules in view of recurrent concerns.

The attempt of the Court to address the concerns of member states is a welcome development, considering the flaws with the current model of unrestricted access, as argued throughout this chapter. That said, the draft Supplementary Rules have some challenges, as the discussions have demonstrated. Some of its provisions have contradictions and internal inconsistencies, particularly those on the local remedies and *lis pendens* rules. The provisions addressing the non-appellate character of the Court also seem to have the unintended consequence of excluding from the Court's mandate applications that allege human rights violations caused by national court decisions.

More fundamentally, it is doubtful that there is a legal basis to adopt Supplementary Rules of this kind under article 99 of the Rules of Procedure of the Court or to generally regulate access to the Court's human rights mandate by procedural rules, whether main or supplementary. The argument advanced in this chapter is that the unimpeachable means to regulate access to the Court's human rights mandate would be for the Court's Protocol to be amended. Alternative and legitimate means, not involving legislative intervention, would be for the Court to interpret its mandate in line with the principle of subsidiarity. That approach could then serve as a basis to apply the local remedies requirement or defer to national courts, consistent with the *lis pendens* rule. However, such a turnabout in the Court's jurisprudence risks reputational damage. Therefore, it appears that the best alternative to amending the Protocol of

the Court would be for the ECOWAS Authority or Council of Ministers to adopt an interpretative note or guidance. The note or guidance would clarify that access to the Court in human rights cases should conform to the local remedies rule and other relevant admissibility requirements in the African Charter. The Court can then apply this new approach without risking damage to its legitimacy and reputation, which could result from a reversal of its jurisprudence on unrestricted access to the Court.

Table of abbreviations

ACHPR	African Charter on Human and Peoples Rights
EACJ	East African Court of Justice
ECOMOG	ECOWAS Monitoring Group
ECOWAS	Economic Community of West African States
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
NGO	Non-governmental organisations
NGO	Non-governmental organisations
SADC	Southern African Development Community
VCLT	Vienna Convention on the Law of Treaties

Literature

African Union 'Address by the President of the Republic of Ghana and Chairman of the ECOWAS Authority of Heads of State and Government, Nana Addo Dankwa Akufo-Addo' 15 March au.int/en/speeches/20220315/address-president-republic-ghana-and-chairman-ecowas-authority-heads-state-and accessed 21 August 2023

Afrique J 'Why an Air Côte d'Ivoire Plane was seized by businessman Diawara' *The Africa Report*, 24 November https://www.theafricareport.com/149582/why-an-air-cote-divoire-plane-was-seized-by-businessman-diawara/

Alter KJ, Gathii JT & Helfer LR 'Backlash against international courts in West, East, and Southern Africa: Causes and consequences' in J Gathii (ed) *The performance of Africa's international courts* (OUP 2020)

Amnesty International 'West Africa: Proposed amendment to ECOWAS Court jurisdiction is a step backward' 28 September 2009 https://www.amnesty.org/en/documents/afr05/005/2009/en/

Asmelash HB 'Southern African Development Community Tribunal' in *Max Planck Encyclopedia of International Procedural Law* (last updated February 2016)

Besson S 'Subsidiarity in international human rights law – What is subsidiary about human rights?' (2016) 61 *American Journal of Jurisprudence* 69-84.

Brown C *A common law of international adjudication* (OUP 2007).

Centre for Human Rights *University of Pretoria, A guide to the African human rights system: celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986-2016* (PULP 2016)

Chenwi L 'Exhaustion of local remedies rule in the jurisprudence of the African Court on Human and Peoples' Rights' (2019) 41 *Human Rights Quarterly* 374-398

Dapatem DA & Hawkson EE 'President tells ECOWAS Court to reform procedures' *The Daily Graphic*, 22 March 2022 https://www.graphic.com.gh/news/general-news/president-tells-ecowas-court-to-reform-procedures-2.html

Draft supplementary rules of procedure on the human rights practice of the Community Court of Justice, ECOWAS (May 2022)

Duhaime D 'Subsidiarity in the Americas: What is there for deference in the Inter-American system?' in Gruszczynski L & Werner W (eds) *Deference in international courts and tribunals: Standard of review and margin of appreciation* (OUP 2014)

Ebobrah ST 'Court of Justice of the Economic Community of West African States (ECOWAS)' in *Max Planck Encyclopedia of International Law* (OUP 2019)

Ebobrah ST *A critical analysis of the human rights mandate of the ECOWAS Community Court of Justice* (Research Partnership Paper No 1/2008) Danish Institute for Human Rights https://docs.escr-net.org/usr_doc/S_Ebobrah.pdf (2008)

Enabulele A 'Sailing against the tide: Exhaustion of domestic remedies and the ECOWAS Community Court of Justice' (2012) 56 *Journal of African Law* 268-295

Falana F *Achievements, challenges and prospects of the ECOWAS Court of Justice* (Paper presented at the International Conference of the ECOWAS Court of Justice) Lomé, Togo, 22–25 November 2021

Gathii J & Mbori H 'Reference guide to Africa's international courts: An introduction' in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (OUP 2021)

Helfer L 'Backlash against International Courts in West, East and Southern Africa (2015) 109 *Proceedings of the Annual Meeting (America Society of International Law)* 27-30

Justice A Asante President of the ECOWAS Court, *Speech delivered at the International Conference of the ECOWAS Court of Justice*, Lomé, Togo, 22-25 November 2021

Ladan MT *ECOWAS Community Court of Justice as a supranational court and engine of integration in West Africa: Achievements, challenges and prospects* (Paper presented at the International Conference of the ECOWAS Court of Justice) Lomé, Togo, 22–25 November 2021

Madsen MR, Cebulak P & Wiebusch M 'Backlash against international courts: explaining the forms and patterns of resistance to international courts' (2018) 14 *International Journal of Law in Context* 197-220

Memorandum on the supplementary rules of procedure for the human rights practice of the Community Court of Justice, ECOWAS for the approval of the ECOWAS Council of Ministers (5 May 2022)

Neuman G 'Subsidiarity' in Dinah Shelton (ed) *The Oxford Handbook of International Human Rights Law* (OUP 2013)

Nwauche E 'Regional economic communities and human rights in West Africa and African Arabic countries' in A Bosl & J Diescho (eds) *Human rights in Africa: Legal perspectives in their protection and promotion* (Macmillan Education 2009)

Okafor O & Effoduh O 'The ECOWAS Court as a (promising) resource for pro-poor activist forces in J Gathii (ed) *The performance of Africa's international courts: Using litigation for political, legal, and social change* (OUP 2021)

Onoria H 'The African Commission on Human and People's Rights and the Exhaustion of Local Remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1-24

Remarks by Godfred Yeboah Dame Hon. Attorney-General & Minister for Justice of the Republic of Ghana at Opening of the External Sitting of the ECOWAS Community Court of Justice, Monday, 21 March 2022, Accra

Research Directorate, ECOWAS Court 'Study on the regulation of access to the Court in matters of human rights violations with regard to the need for the harmonious development of the Community Legal Order' (April 2022)

Shelton D *Remedies in international human rights law* (OUP 2015)

Taye MT 'The role of the East African Court of Justice in the advancement of human rights: Reflections on the creation and practice of the court' (2019) 27 *African Journal of International and Comparative Law* 359-377

Yannaca-Small K 'Chapter 25: Parallel proceedings' in P Muchlinski et al (eds) *The Oxford Handbook of International Investment Law* (OUP 2008)

International, Regional and Other Rights Instruments, Resolutions and Reports

African Charter on Human and People's Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

ECOWAS Declaration of Political Principles A/DCL.1/7/91, 4-6 July 1991

Economic Community of West African States Treaty (adopted 28 May 1975) 14 ILM 1200

Optional Protocol to the International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171

Protocol A/P.1/7/91 of 6 July 1991, Supplementary Protocol A/SP.1/01/05 of 19 January 2005

Report of the meeting on the regulation of access to the Community Court of Justice, ECOWAS, in matters of human rights violations with regard to the need for the harmonious development of the community legal order', 10-15 April 2022, Abidjan, Côte d'Ivoire

Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, on his mission to the Gambia (3-7 November 2014) UN Doc A/HRC/29/37/Add.2

Report of the work of the 70th session of the International Law Commission, 30 April-1 June and 2 July-10 August 2018 UN Doc A/73/10 (8 Aug 2018)

Rules of the ECOWAS Court of Justice 2002

Supplementary Protocol A/SP.2/06/06 of 14 June 2006

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Cases

Application of the International Convention on the Elimination of All Forms of Racial Discrimination; Qatar v United Arab Emirates (provisional measures) (2019) ICJ Reports 361

Aziagbede Kokou v Togo [2013] CCJELR 167

Case concerning *Electtronica Sicula S.p.A. (ELSI) (United States v Italy)* 1989 ICJ Rep 15

El Hadji Aboubacar v BCEAO and the Republic of Niger [2011] CCJELR 8

Free Legal Assistance Group, Lawyers' Committee for Human Rights, Union interafricaine des droits de l'Homme, Les témoins de Jéhovah v Zaire (2000) AHRLR 74 (ACHPR 1995)

Jerry Ugokwe v Nigeria [2004-2009] CCJELR 37

Jerry Ugokwe v Nigeria and Dr Christian Okeke (intervener) ECW/CCJ/Jud/03/05 (2005)

Jurisdictional Immunities of the State; Germany v Italy: Greece intervening (23 February 2012) (2012) ICJ Rep 99

Mike Campbell (Pvt) Ltd v Zimbabwe 2008 AHRLR (SADC 2008)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) (Merits) [1986] ICJ Rep 14

MOX Plant Case (Ireland v United Kingdom) (order on suspension of proceedings on jurisdiction and merits and request for provision measures) PCA Case No. 2002-01 (24 June 2003)

Mtingwi v Malawi (jurisdiction) (2016)1 AfCLR 190

Ocean King Nigeria Limited v Senegal [2011] CCJELR 139 (ECOWAS Court)

Prince v South Africa (2004) AHRLR 105 (ACHPR 2004)

Purohit and Moore v The Gambia (2003) AHRLR 96 (ACHPR 2003)

Registered Trustees of Jama'a Foundation v Nigeria ECW/CCJ/JUD/04/20 (2020)

Rencontre Africaine pour la De´fense des Droits de l'Homme v Zambia (2000) AHRLR 321

Southern Pacific Properties Ltd (SPP) v Egypt (Decision on Preliminary Objections of Jurisdiction) ICSID Case No ARB/84/3 (27 November 1985)

The Incorporated Trustees of Fiscal and Civic Rights Enlightenment Foundation v Nigeria ECW/CCJ/JUD/18/16 (2016)

Valentine Ayika v Liberia [2011] CCJELR 237

Ernest Francis Mtingwi v Republic of Malawi Decision (jurisdiction) 15 March 2013 (2016) 1 AfCLR 190

Kennedy Ivan v Tanzania (merits and reparations) (2019) 3 AfCLR 48

Anyang Nyong'o v Attorney General of Kenya Ref No 1/2006 (29 March 2007)

Alex Thomas v Tanzania Judgment (merits) 20 November 2015 (2015) 1 AfCLR 465

Nosa Ehanire Osaghae v Nigeria ECW/CCJ/JUD/03/17 (2017)

Frank Ukor v Rachad Laleye ECW/CCJ/APP/01/04 (2005)

Olajide Afolabi v Nigeria ECW/CCJ/JUD/01/04 (2004)

Moussa Leo Keita v Mali ECW/CCJ/Jud/03/07 (2007)

Chief Ebrimah Manneh v The Gambia ECW/CCJ/JUD/03/08 (2008)

Hadijatou Mani Koraou v Niger ECW/CCJ/JUD/06/08 (2008)

Musa Saidykhan v The Gambia ECW/CCJ/JUD/08/10 (2010)

4 Rape as manifestation of gender-based discrimination: An exploration of state responsibility for sexual and gender-based violence in the jurisprudence of the ECOWAS Community Court of Justice

Annika Rudman

Abstract:

From the vantage point of feminist jurisprudence, this chapter analyses the effects of not classifying rape, a form of sexual and gender-based violence

(SGBV), as gender-based discrimination (GBD). It further analyses states' obligation to prevent rape and, linked thereto, state responsibility for omissions to prevent rape. The discussion traces state responsibility in cases where acts of SGBV have been perpetrated by a non-state actor within an environment where rape is common and normalised. The arguments presented explore the complexities of SGBV litigation before international human rights bodies, such as the ECOWAS Court, which does not possess the jurisdiction to hold individuals criminally responsible for human rights violations.

The objective of this chapter is to show that under certain circumstances, it is possible to attract state responsibility for acts of SGBV perpetrated by non-state actors based on the provisions of the Maputo Protocol, the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles) and the principle of due diligence. However, it is only possible to establish such responsibility if, first, SGBV is classified as an act of GBD, and second, the obligation of states to 'prevent' SGBV is considered in its totality.

The arguments and findings presented in this chapter have a bearing on how acts of SGBV are evaluated and understood by litigants and courts and how state responsibility is delineated with regard to any and all of the 44 member states to the Maputo Protocol. Ultimately, the arguments and methods crafted are presented to encourage supranational litigation in SGBV cases, which, to date, have not garnered much attention.

1 Introduction

Rape culture is a social environment that allows sexual and gender-based violence (SGBV) to be justified and normalised. It is fuelled by persistent gender inequalities and stereotyped attitudes about gender and sexuality.[1] The patriarchal, cultural, and religious structures that support a culture of rape perpetuating systematic rapes across communities exist in all 55 member states of the African Union (AU) and beyond.[2] In the first half of 2022, the ECOWAS Community Court of Justice (ECOWAS Court) provided the first jurisprudence related to acts of rape under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of

1 UN Women https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture (accessed 27 April 2023).

2 This is not a perspective unique to Africa alone but as this research focuses on the regional African human rights system the chapter takes this point of departure.

Women in Africa (Maputo Protocol or Protocol)[3] in *EI* and *Adama Vandi*.[4] However, while the litigants in these cases had their rights to access to justice confirmed, the responsibility of the respective states for the acts of SGBV was not established.

As SGBV is a worldwide crisis, the situations in Nigeria and Sierra Leone, the respondent states in the two cases in the focus of the discussion in this chapter, are not unique.[5] From the vantage point of feminist jurisprudence, this chapter analyses the effects of not classifying rape, a form of SGBV, as gender-based discrimination (GBD). It further analyses states' obligation to prevent rape and, linked thereto, state responsibility for omissions to prevent rape. The discussion traces state responsibility in cases where acts of SGBV, as is often the case, have been perpetrated by a non-state actor within an environment where rape is common and normalised. The arguments presented explore the complexities of SGBV litigation before international human rights bodies, such as the ECOWAS Court, which does not possess the jurisdiction to hold individuals criminally responsible for human rights violations.

In circumstances where individuals are subjected to violations of their rights because they are women, feminist jurisprudence contributes to the recognition of the impact of patriarchy and masculinist norms in the relevant legal structures.[6] Thus, it enables the identification of social environments that enable SGBV and the gendered responses to it by law enforcement agencies and courts, for example. The purpose of feminist jurisprudence is to study the problems that occur at the intersection of gender and law to develop methodologies that correct gender injustice and related restrictions.[7] This theoretical outlook essentially allows a consideration and redress of more traditional legal theory and practice, such as the limited reach of traditional state responsibility within the context of SGBV. It further enables a consideration of less empowered narratives, such as rape narratives. In this regard, feminist jurisprudence assists in analysing courts' approaches to pleadings and related legal

3 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 11 July, entered into force 25 November 2005) CAB/LEG/66.6 (Maputo Protocol).

4 *EI v The Federal Republic of Nigeria* ECW/CCJ/JUD/09/22 (2022); *Adama Vandi v State of Sierra Leone* ECW/CCJ/JUD/32/2022.

5 Amnesty International 'Nigeria: Failure to tackle rape crisis emboldens perpetrators and silences survivors' 17 November 2021 https://www.amnesty.org/en/latest/news/2021/11/nigeria-failure-to-tackle-rape-crisis-emboldens-perpetrators-and-silences-survivors/ (accessed 27 April 2023).

6 H Barnett *Introduction to feminist jurisprudence* (1998) 57-58.

7 Barnett (n 6) 14.

grounds for such pleadings and aids in suggesting alternative practices and outcomes.[8]

Contemporary feminist jurisprudence derives from different scholarly viewpoints, such as international human rights theory, which is the main legal framework of the analysis presented in this chapter. In this regard, the progressive protection against SGBV and the substantive and transformative approach to equality presented in the Maputo Protocol are critical as they entail far-reaching legal obligations on state parties. As further argued throughout this chapter, these obligations necessitate that any court faced with a complaint of SGBV based on the Maputo Protocol must undertake a complex analysis of the matter at hand to establish the appropriate state responsibility under the many and diverse state obligations.

The objective of this chapter is to show that under certain circumstances, it is possible to attract state responsibility for acts of SGBV perpetrated by non-state actors based on the provisions of the Maputo Protocol, the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft Articles)[9] and the principle of due diligence. However, it is only possible to establish such responsibility if, first, SGBV is classified as an act of GBD, and second, the obligation of states to 'prevent' SGBV is considered in its totality.

The arguments and findings presented in this chapter have a bearing on how acts of SGBV are evaluated and understood by litigants and courts and how state responsibility is delineated with regard to any and all of the 44 member states to the Maputo Protocol.[10] Ultimately, the arguments and methods crafted are presented to encourage supranational litigation in SGBV cases, which, to date, have not garnered much attention.

To explore the arguments posited, this chapter is divided into six sections. Section 2 briefly presents the concept and value of a substantive transformative approach to equality and further argues that the Maputo Protocol supports this approach to equality. Section 3 presents the arguments, analysis, and findings of the ECOWAS Courts in *EI* and *Adama Vandi* pertaining to the claims of GBD made by the victims of

8 Barnett (n 6) 17, 275-280.

9 International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10) ch. IV. E.1.

10 For a full list of states that have ratified the Maputo Protocol, see https://au.int/sites/default/files/treaties/37077-sl-protocol to the african charter on human and people%27s rights on the rights of women in africa.pdf (accessed 23 January 2024).

rape in these cases. This discussion focuses on classifying SGBV as GBD and the importance of the correct legal framing of the act of rape. Section 4 conceptualises rape under international law and further provides context to rape as a grave, systematic and widespread violation of international human rights law. This discussion further contextualises rape as a violation of the Maputo Protocol. Section 5 takes on the task of delineating the scope and meaning of an 'omission to act' under international law, situating this discussion within the context of a 'foreseeable threat' and defining rape as systemic and predictable. Section 5 analyses the obligation to 'prevent' SGBV under the Maputo Protocol in light of the Niamey Guidelines[11] and relevant case law from the Inter-American human rights system. This analysis also conceptualises the meaning of due diligence within the context of endemic rape. The final section, section six, offers some recommendations and conclusions.

2 The substantive and transformative nature of equality under the Maputo Protocol

One of this chapter's main concerns is the ECOWAS Court's failure in *EI* and *Adama Vandi* to classify the SGBV meted out against the victims as GBD. This failure is further addressed in section 3 below. To explore this further, the argument presented in this section suggests that an approach to equality that is both substantive and transformative is required, as reflected by the comprehensive definition of non-discrimination in article 1(f) and the non-discrimination clause in article 2 of the Maputo Protocol. This approach to equality is furthermore supported by the reference to 'effective application', 'effective measures', 'effective information', 'effective access', 'effective representation' and 'effective implementation' throughout the Maputo Protocol.[12] Such an approach to equality further assists in distinguishing between individual reparations and reparations targeted at systematic failures in SGBV cases.[13]

Equality, in its generic form, is a 'treacherously simple concept'.[14] In articles 7 and 8 of the Universal Declaration of Human Rights (Universal

11 Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines), adopted during the 60th ordinary session of the African Commission held in Niamey, Niger from 8 to 22 May 2017.

12 Maputo Protocol (n 3) arts 2, 4, 8, 9 13 & 26.

13 XA Ibanez 'The role of international and national courts: human rights litigation as a strategy to hold states accountable for maternal deaths' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013) 54. See also sec 4.5 below.

14 R Holtmaat 'The concept of discrimination' (2004) *Academy of European Law Conference Paper* http://www.era-comm.eu/oldoku/Adiskri/02_Key_concepts/2004_Holtmaat_EN.pdf (accessed 27 April 2023).

Declaration), equality and the associated concept of non-discrimination, found in Article 2 of the Universal Declaration, form a universal legal principle.[15] However, although often referred to as a progressive principle, formal equality arguably does little to change the experience of women sufferers of SGBV. Therefore, the application of formal equality in the context of SGBV does not uphold the obligations under the Maputo Protocol. Furthermore, a formal approach to equality does not support adequate redress for victims of SGBV. Without recognising rape as GBD and applying a substantive and transformative equality analysis, the harm caused, necessitating reparations, both individually and collectively, is not recognised.[16]

At a glance, the wording of the Preamble and some provisions in the Maputo Protocol, for example, articles 2(2) and 8, may create the impression that the Protocol protects formal, rather than substantive equality as equality between men and women and 'equality before the law' imply an absence of special privileges that favour, in this context, men over women. On the face of it, these provisions draw on the 'sameness and difference' approach used to establish formal equality.[17]

Under Article 3 of the African Charter on Human and Peoples' Rights (African Charter), the African Commission on Human and Peoples' Rights (African Commission) has provided a strictly formalistic interpretation of equality.[18] However, although we might be able to agree on whether 'two individuals are relevantly alike, we may still have doubts as to whether they should always be treated alike'.[19] Reaching an equal

15 UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice (23 July 2015), CEDAW/C/GC/33 (General Recommendation 33) para 6. See also the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) art 5; International Covenant on Civil and Political Rights (ICCPR) arts 2 & 14; International Covenant on Economic, Social and Cultural Rights (CESCR), arts 2(2) & 3; European Convention on Human Rights (ECHR) art 14; Protocol 12 ECHR and American Convention on Human Rights (ACHR) art 24.

16 See Universal Declaration arts 2, 3.3 and 3.4.

17 For a further discussion on the 'sameness and difference' approach, see C MacKinnon 'Difference and dominance: on sex discrimination' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 276-287. See also C Littleton 'Reconstruction sexual equality' in Weisberg (n 18) 248-263; and J Capps 'Pragmatism, feminism, and the sameness-difference' (1996) 32 *Transactions of the Charles S Peirce Society* at 1, 65-105.

18 *Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe*, Communication 294/2004, African Commission on Human and Peoples' Rights, Twenty-sixth Annual Activity Report (2009) paras 96 & 99.

19 S Fredman *Discrimination law* (2011) 2.

outcome in cases of SGBV by applying a formal approach to equality is not possible.[20] With regard to the rights of women, practice implies that equal treatment of men and women may, in reality, especially when it comes to SGBV, preserve existing inequalities.[21] Thus, in contrast, the substantive approach to equality is founded on and demonstrated by the lived inequalities of women.[22] This refers to the prevention of SGBV, the construction of norms (promulgating and reforming the law), their use by judicial institutions and the context within which laws are formulated and applied.[23]

As was highlighted above, the African Charter seemingly focuses on formal equality. However, when considering the many references to 'effective' protection and the 'modification' of harmful practices and stereotypes, the message of the Maputo Protocol is clear: it does away with the formal notion of equality. In this regard, the Maputo Protocol does not approach women as if they are a homogenous group where all are similarly situated. Furthermore, it does not translate present benefits into rights, promoting the imposition of an unequal *status quo ante.*[24] Instead, the Maputo Protocol unambiguously pursues inequalities of gender, hereditary from society's patriarchal past, which, as an example, normalises and justifies SGBV. By disassembling the public and private divide in articles 1(j) and 4, by prescribing economic and welfare rights in article 13, and by applying an intersectional lens throughout, recognising the implication of, for example, refugee status, age and disability, the Maputo Protocol consistently refers to and prescribes a substantive *and* transformative approach to equality, not a formal one.

Departing from its more formalistic stance, as referenced above, the African Commission has, in General Comment 6, developed and defined substantive equality within the context of the Maputo Protocol. The African Commission refers to substantive equality as a form of equality that requires measures that 'go beyond formal equality and seek to redress existing disadvantage; remove socio-economic and sociocultural

20 Fredman (n 19) 1.

21 Fredman (n 19) 2.

22 C MacKinnon 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 14 *International Journal of Constitutional Law* at 739.

23 MLP Loenen 'Towards a common standard of achievement? Developments in international equality law' (2001) *Acta Juridica* at 197.

24 C Albertyn 'Contested substantive equality in the South African Constitution: Beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* at 442.

impediments for equal enjoyment of rights'.[25] The African Commission goes on to say that such measures must 'tackle stigma, prejudice and violence; leading to the promotion of participation and achievement of structural change of social norms, culture and law'.[26] From this characterisation, it is clear that the objective of the Maputo Protocol is to achieve substantive equality alongside transforming women's status in society. This situates transformation at the centre of the endeavour to accomplish substantive equality.

The concept of 'transformative, substantive equality' has been established by Goldblatt and Albertyn. Although developed within the context of the transformation taking place in South Africa after the fall of apartheid, it equally well defines the Maputo Protocol's approach to transform African women's lives. In this context, transformative, substantive equality means a 'complete reconstruction of the state and society, including a redistribution of power and resources along egalitarian lines'.[27] The challenge of realising gender equality (referred to by Goldblatt and Albertyn as the transformation after Apartheid but equally relevant within the context of gender inequalities in a patriarchal context) involves the 'eradication of systemic forms of domination and material disadvantage based on race, gender, class and other grounds of inequality… [i]t also entails the development of opportunities [that] allow [women] to realise their full human potential within positive social relationships'.[28] Therefore, transformative substantive equality necessitates a concern with 'recognition, redistribution and redress, and an eradication of actual, "real-life" inequalities'.[29] As an example relevant to the discussion in this chapter, the obligations to 'identify the causes and consequences of violence against women' and 'take appropriate measures to prevent and eliminate such violence' in article 4(2)(c) of the Maputo Protocol aim to address inequality in a substantive and transformative manner to target systemic forms of discrimination such as SGBV.

25 African Commission General Comment 6 on the Protocol to the African Charter on Human and Peoples Rights on The Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D)), adopted during the 27th extraordinary session of the African Commission held in Banjul, The Gambia in February 2020 (General Comment 6) para 14.

26 African Commission General Comment 6 (n 25) para 14.

27 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 S*outh African Journal on Human Rights* at 249.

28 Albertyn & Goldblatt (n 27) 249.

29 Albertyn (n 24) 442.

However, as is evident in the analysis in section 3 below, the ECOWAS Court's approach to GBD is a strictly formalistic one, applying the most restrictive form of the sameness/difference test.

3 Rape as an act of gender-based discrimination

How an act of rape is framed within the context of the Maputo Protocol is critical. A failure to define SGBV as an act of GBD violates international law and keeps women's experiences of SGBV outside the realm of state accountability.[30] A successful claim of rape as an act of GBD signals that the state must prevent SGBV and actively engage with the enablers of such discrimination to fulfil its obligations under the Maputo Protocol. It also follows that the remedies invoked will differ considerably from a scenario where the matter is viewed as 'only' a private/criminal matter between two parties without any state involvement. The discussion in the following sections highlights the facts of the two cases in focus. It further points to the drastic reduction in state responsibility that occurs when the grounds for a complaint are not correctly contextualised, framed, analysed, and understood.

3.1 The power of pleadings

In *EI*, the applicant alleged that at the age of 17, she was violently raped by an assailant known to her in Lagos State, Nigeria.[31] A medical examination confirmed that she had been raped, and she subsequently reported the rape to the police. After the police investigated the complaint, the alleged perpetrator was charged with the offence of rape and was arraigned before the Lagos State Magistrate's Court in September 2011. Almost seven years had passed since the case was handed over to the domestic court when the applicant approached the ECOWAS Court, and no conclusion had been reached.[32]

Before the ECOWAS Court, the defence of the respondent state, Nigeria, centred on its lack of responsibility because, in its opinion, none of the officials of any of its institutions had prior knowledge of the rape of the applicant before she was admitted to a state hospital in the aftermath of being raped.[33]

30 Human Rights Council (HRC) Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, (28 May 2014) UN Doc A/HRC/26/38 (2014) at 63.

31 *EI* (n 4) paras 4 & 14.

32 *EI* (n 4) para 77.

33 *EI* (n 4) para 22.

In the judgment, the applicant's narrative starts with a detailed account of the rape and then moves through the various attempts made to obtain justice. She rested her case on, among others, articles 2(1), 3, 4 and 25 of the Maputo Protocol with further reference to articles 1, 2, 5, and 7 of the African Charter.[34] Importantly, she sought four *separate* declarations that Nigeria had violated her right to (i) a fair hearing, (ii) a remedy, (iii) her right to be free from GBD, and (iv) her right to dignity and freedom from ill-treatment.[35]

In *Adama Vandi*, the applicant, Ms Vandi, alleged that in January 2019, her village was raided by hundreds of members of the Poro secret society. The raid was led by the Chief of the society and a masked man referred to as the 'Poro devil'.[36] In the judgment, the Poro society is described as a secret society of the Mende culture, composed of men only. The ceremonies of the Poro society are presided over by a masked man known as the 'Poro Devil'.[37] Women are not allowed to see him. It is believed that women who see the masked man will never be able to bear children. Also, it is believed that if the 'Poro Devil' catches a woman, she will disappear.[38]

On the night in question, the Chief and fifteen of his men invaded Ms Vandi's home. She tried to hide, but the Chief managed to find her and grabbed her. When he tried to forcibly remove her clothes, she resisted. However, he threatened her and told her he was going to bring the 'Poro Devil' into the house. Out of fear of what would happen to her if she encountered the 'Poro Devil', Ms Vandi was coerced by the Chief into allowing him to take her clothes off. The Chief then proceeded to rape her. While he was raping her, the other members of the Poro society guarded the house outside.[39] When the Chief finished raping Ms Vandi, he threatened to kill her if she told anyone that he had raped her. Not discouraged by these threats, Ms Vandi filed a report of the rape. However, the police report gave few details about the rape and trivialised the rape while focusing on the attack on the village.[40]

34 *EI* (n 4) paras 20(i) & (ii).

35 *EI* (n 4) paras 21(i), (ii), (iii), & (iv).

36 *Adama Vandi* (n 4) para 10.

37 *Adama Vandi* (n 4) para 11.

38 *Adama Vandi* (n 4) para 13.

39 *Adama Vandi* (n 4) paras 15-17.

40 *Adama Vandi* (n 4) paras 18-20.

The respondent state Sierra Leone, although duly served with notice, neither contested any of the claims made nor participated in the hearings. The judgment was, therefore, rendered in default.[41]

Similar to the applicant's narrative in EI, Ms Vandi's narrative starts with a recount of the rape and moves on through the various attempts she made to obtain justice. Ms Vandi, taking an approach similar to that of the applicant in *EI*, also rested her case on, amongst others, articles 2(1), 3, 4 and 4(2) of the Maputo Protocol with further reference to articles 1, 2, 5, and 7 of the African Charter.[42] She furthermore specifically referred to General Recommendation 19.[43] In addition, Ms Vandi sought the same four separate declarations as the applicant in *EI*.[44]

3.2 The mischaracterisation of the act of gender-based discrimination

In *EI and Adama Vandi*, the claims of GBD and violations of the right to dignity were imputed by the Court to the failure of the state to stage a fair trial, to provide access to justice and an appropriate remedy.[45] In *EI,* the violations were framed in the following way:

> The Applicant contends that by virtue of the failure to conduct a speedy and effective trial against the perpetrator of the sexual violence she suffered, the Respondent is legally responsible for violation of her right to dignity, to a fair hearing, to remedy, freedom from cruel, inhuman or degrading treatment, freedom from discrimination as guaranteed under the relevant human right instruments.[46]

Similarly, in *Adama Vandi*, the plea is described in the following way:

41 *Adama Vandi* (n 4) para 27.

42 *Adama Vandi* (n 4) para 24.

43 *Adama Vandi* (n 4). In para 24 of the case, reference is made to General Recommendation 9 of the CEDAW Committee. But as General Recommendation 9 refers to statistical data concerning the situation of women this reference must be understood to refer to UN Committee on the Elimination of Discrimination Against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, UN Doc A/47/38 (General Recommendation 19).

44 *Adama Vandi* (n 4) paras 26(i), (ii) & (iii).

45 In attempting a feminist reading of this jurisprudence, it is, as a point of departure, important to note that the only information available for analysis is the final judgment of the Court. The separate pleadings of the applicants are not accessible through the Court's official website, and thus, the framing of the issues such as they are presented in the respective judgments, was the basis for the analysis.

46 *EI* (n 4) para 5.

> [T]he Applicant contends that, by failing to investigate the facts relating to the sexual assault of which she was a victim, in order to allow the perpetrator to be prosecuted and tried, the Respondent has become liable for the violation of her human rights, namely the right to a remedy and access to justice, not to be discriminated against and not to be offended in her dignity and not to be subjected to cruel and degrading treatment.[47]

However, as discussed above, the scope of the narratives arguably provided an opportunity for the Court to frame these issues differently.[48] Such a reading would have been possible based on the four separate grounds provided for in the applications related to the facts of the cases, which did not only relate to a violation of the applicant's rights to a fair trial and of access to justice. In *Adama Vandi*, the applicant narrates that she,

> [c]ame to plead violation of her human rights, namely the right to a remedy and access to justice, the right not to be subjected to discrimination, the right to dignity and not to be subjected to cruel, inhuman or degrading treatment, alleging that on January 26, 2019, Subu Village of Nongoba-Bulum Chiefdom in Bonthe District was invaded at about 1 am by about five hundred (500) members of the Poro secret society; that the Sovereign Chief who led the invasion, Chief [XX], invaded the home of the Bondo Society together with about fifteen men, where Adama Vandi was staying and the one forcibly raped her and she made an official report of the crime to the police, that however, to date the Paramount Chief has not been prosecuted for raping Adama Vandi.[49]

The applicant in *EI* describes that,

> [s]he was violently raped by one [XX] on 20th August 2011 at Olokonla Area of Lagos State, Nigeria at the age of 17 years…. on that day, she had gone to see [XX] to collect some money for her elder sister. While discussing with him at a roadside, [XX] and eight other accomplices dragged her forcefully to a wooden building where she was forcefully and violently raped by [XX], after tearing her entire clothes. She stated that after the rape, [XX] warned her not to tell anyone else he would send kidnappers to kidnap her.[50]

Ms Vandi describes her rape as part of a pervasive patriarchal cultural practice where 15 men were witnessing her rape without coming to her assistance. At the same time, the applicant in *EI* narrates a scenario where she, in broad daylight, in a densely populated area in Lagos State, is raped.

47 *Adama Vandi* (n 4) para 62.

48 See sec 3.1.

49 *Adama Vandi* (n 4) para 4.

50 *EI* (n 4) para 14.

In comparison, at least eight other men witness the rape equally without coming to her assistance.

These acts took place within a specific context, a context where the respective states had acknowledged the endemic nature of SGBV.[51] With this context in mind, it was arguably possible for the Court, based on the narratives and the additional grounds presented by the applicants, to pinpoint other violations than those of the rights to a fair trial, access to justice and a remedy. In this regard, it is of specific interest to note that in the *EI* and *Adama Vandi* cases, the applicants specifically requested the Court to adjudicate and declare that the SGBV they had been subjected to amounted to GBD, and they provided the legal grounds thereof. They also referred to violations of their rights to dignity and freedom emanating from the cruel, inhumane, and degrading treatment (ill-treatment). Neither of these grounds was arguably necessary to substantiate the argument that the state had not upheld its obligation to provide a fair trial and access to justice. In fact, if strictly arguing for a violation of their fair trial rights and the right of access to justice, these grounds would only have complicated the applicants' pleadings. Thus, it is of interest to analyse the victims' arguments and the Court's reasoning further.

Violations of the rights to a fair trial and of access to justice can arguably be justified merely on the facts of the case, such as a *prima facie* violation brought together with a claim of a prolonged procedure,[52] as in *EI*, or the failure to initiate criminal procedures[53] as in Ms Vandi's case. Such a case can be brought regardless of the gender of the victim and the nature of the act that led a victim to rely on the justice system. The applicants presented clear evidence that the justice system had failed them; however, they never argued that it had failed them because they were women. Had this been the intention of the victims, they would arguably have presented some evidence as to how the discrimination based on their gender took place; they did not.

Although gender stereotypes and biases often negatively influence how victims of SGBV are treated by the justice system, the GBD, the victims in these cases, argued for was related to the act of rape they had been subjected to, not how the justice system perceived or received them.[54]

51 See sec 4.2.

52 As a violation of art 7(1)(a) of the African Charter to have her cause heard.

53 As a violation of arts 1 & 7(1)(a) of the African Charter, art 2(3a) of the CCPR, and art 25 of the Maputo Protocol of the rights to a remedy and access to justice.

54 For a further discussion on judicial stereotyping, see S Cusack 'Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases'

This is not to say that these victims were not subjected to GBD in their encounters with the justice system, but rather, as such discrimination is inherently difficult to prove, the victims presented claims that the rapes were acts of GBD in themselves.

Before the approach of the ECOWAS Court to GBD in the *EI* and *Adama Vandi* cases is further explored, the following section presents a brief precursory discussion on how the Court approached claims of GBD in cases involving SGBV prior to its engagements in the aforementioned *cases* so as to further contextualise its methods.

3.3 Sexual and gender-based violence as gender-based violence – a precursory discussion

Before its engagements in the *EI* and *Adama Vandi* cases, the ECOWAS Court had heard two landmark cases where the issue of SGBV as GBD arose. The applicants in *Mani Koraou*[55] and *Mary Sunday*[56] had both requested the Court to classify the abuse they had endured as GBD attributable to the state; the Court declined both requests.

In the *Mani Koraou* case, the applicant, Ms Koraou, was sold at the age of 12 to a 46-year-old tribal Chief to become his fifth wife under a local custom.[57] The applicant spent nine years of her life as a sexual and domestic slave.[58] In the *Mary Sunday* case, Ms Sunday suffered a brutal attack on her life in her home by her fiancé, which left her disabled and with little opportunity to work.[59]

In the *Mani Koraou* case, the ECOWAS Court held that although the applicant was subjected to a misogynistic custom that the state was well aware of, the Court viewed this part of Ms Koraou's claim as a strictly private matter. Notwithstanding the fact that Ms Koraou had spent nine years in sexual servitude, that the state knew of such practices and that Ms Koraou had repeatedly attempted to seek justice without success, the

OHCHR, 9 June 2014, https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc (accessed 27 April 2023).

55 *Hadijatou Mani Koraou v The Republic of Niger* ECW/CCJ/JUD/06/08 (2008). There is no official English version available of this case. Therefore, the unofficial translation of the original French text provided by INTERIGHTS was used in this analysis.

56 *Mary Sunday v Nigeria* ECW/CCJ/JUD/11/18 (2018). There is no official English version available of this case. Therefore, the author relied on the original French text and her own translation of the original text in this analysis.

57 *Mani Koraou* (n 55) para 8.

58 *Mani Koraou* (n 55) para 12.

59 *Mary Sunday* (n 56) para II.

Court found that while Ms Koraou was discriminated against, this action was not attributable to the state, but only to the non-state actor and as such no claim of GBD was actionable.[60]

Ten years later, in 2018, the Court took the same approach in the *Mary Sunday* case. On Ms Sunday's claim that she had suffered GBD, the Court held that such an offence must refer to 'one or more acts directed against the female sex, at least against a category of people determined by their affiliation to the female sex'.[61] In other words, the facts must be endowed with a certain generality and a certain systematicity that makes asserting their deliberately discriminatory character possible. Based on this, the Court found that as the facts of the case 'remain[ed] confined to a private, family sphere', those actions 'did not present any "general" or systematic character'.[62] It added that the facts of the case apply 'to a person, not to a "genre", a concept that by definition includes a plurality'.[63] The ECOWAS Court concluded that the 'strictly private nature of the acts criticised, the very framework of their commission – the home of the couple – forbid any connection with the public power'.[64] These conclusions evidently do not consider the common approach in international human rights law that qualifies all acts of SGBV as acts of GBD.[65]

3.4 The power of framing and attribution of legal issues

In returning to the Court's approach to the claims of GBD in the *EI* and *Adama Vandi* cases, two inter-linked issues are noticeable: first that GBD, while not being a self-standing violation, is wrongfully imputed to the claim of a violation of the rights to a fair trial and of access to justice; and while a substantial and transformative equality test should have been applied, as was argued under 2, the Court applies a formal equality test which narrows the test to a question of whether the victims could prove

60 *Mani Koraou* (n 55) para 71.

61 *Mary Sunday* (n 56) para IV 4.

62 *Mary Sunday* (n 56) para IV, pp 4-5.

63 *Mary Sunday* (n 56) para IV, p 5.

64 *Mary Sunday* (n 56) para IV, p 5.

65 General Recommendation 19 (n 43); UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General recommendation 35 on gender-based violence against women, updating General Recommendation 19, 26 July 2017, UN Doc CEDAW/C/GC/35 (General Recommendation 35); Communication 2/2003, *AT v Hungary* CEDAW Committee (26 January 2005); Communication 5/2005, Şahide *Goekce v Austria* CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007); and Communication 6/2005, *Fatma Yildirim v Austria* CEDAW Committee (1 October 2007) UN Doc CEDAW/C/39/D/6/2005 (2007).

that the group of 'women' was disadvantaged in the legal systems of the respective states. Notwithstanding the fact that the arguments presented by Ms Vandi were more elaborate in terms of what constituted the act of GBD, the result of the Court's analysis is the same.[66]

In the *EI* case, the Court departs from the idea that the applicant is claiming that the state has failed to 'conduct effective and speedy trial against her perpetrator' and that this 'violates her right of freedom from discrimination'. From this point of origin, the Court then proceeds to set out the legal test for such discrimination, indicating that 'it must be proven that the Applicant has been treated differently in the same analogous situation with another person in similar circumstances or same situation'.[67] In applying this test, the Court concludes that the applicant in *EI* was not able to:

> [S]ubstantiate that the alleged delay in the handling of her case speedily is peculiar to only her compared to other litigants of the same predicament of rape and similar sexual violence cases in the Respondent's courts to justify the allegation of discrimination on any ground.[68]

Therefore, the Court concludes that the claim of GBD 'fails on the basis that it has not been substantiated in view of the available evidence'.[69]

From the submissions made in the *Adama Vandi* case, it is clear that she presented a much broader argument on SGBV. She argued that the SGBV she suffered 'qualifie[d] as gender-based violence and gender-based discrimination' and that although the SGBV she suffered was 'perpetrated by a non-state actor, the state is responsible for the lack of due diligence on its part to prevent the violation'.[70] In her submissions, she invoked that 'rape and sexual violence constitute gender violence, that is, violence against a woman because she is a woman, or that affects women disproportionately'; and that sexual violence, such as the rape she suffered, is directed against women in the vast majority of cases.[71]

Notwithstanding these critical arguments, the Court misses the point that the SGBV experienced substantiates the claim of GBD. Instead, it

66 *EI* (n 4) XII Operative clause para (iv); *Adama Vandi* (n 4) XIV Operative clause para 159 (iv).

67 *EI* (n 4) para 54.

68 *EI* (n 4) para 62.

69 As above.

70 *Adama Vandi* (n 4) paras 92 & 93.

71 *Adama Vandi* (n 4) para 95.

proceeds to investigate the claim of GBD concerning the state's alleged failure to effectively investigate the SGBV to prosecute and punish the abuser. From this point on, the Court applies the same test as in the *Mani Koraou*, *Mary Sunday* and *EI* cases. Relying on its findings in the *Mary Sunday* case, as referred to above, as well as its conclusions in the *Dorothy Njemanze* case[72] that only 'a systematic operation directed against only the female gender furnished evidence of discrimination', the Court notes that Ms Vandi did not 'allege or demonstrate that the Police Department failed to investigate and prosecute the complainant for the alleged rape because the complainant was a woman and that such a position was taken generally and systematically whenever the victim was female'.[73] The Court further noted that Ms Vandi also failed to make any

> comparison of her case with that of another person involved in the same or similar situation of rape or victim of sexual crimes, who has been treated differently by the Respondent, to her disadvantage, so as to justify the allegation of discrimination.[74]

Therefore, the Court finds that the allegation of a violation of a right not to be subjected to GBD is 'unfounded as not proven'.[75]

4 Rape as a violation of the Maputo Protocol

As part of a broader approach by international human rights law, the Maputo Protocol provides a substantial, primary legal basis for state responsibility for acts of SGBV. It carries with it a threefold obligation on behalf of state parties to *prevent* SGBV in the public and private sphere, to *regulate* and *control* state and private actors, and to *investigate* violations, *punish* perpetrators and *provide effective remedies* to victims of SGBV.[76] The following discussion situates the act of rape as a violation of international human rights law generally and as a violation of the Maputo Protocol specifically. It further highlights the obligation to prevent SGBV under the Protocol.

72 *Dorothy Chioma Njemanze & 3 Ors v Federal Republic of Nigeria* (*Dorothy Njemanze*) ECWICCJ/JUD/08/17.

73 *Adama Vandi* (n 4) para 114.

74 *Adama Vandi* (n 4) para 115.

75 *Adama Vandi* (n 4) para 116.

76 DH Chirwa 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) *Melbourne Journal of International Law* 4.

4.1 Rape narratives in international law: 'conflict', 'torturous' and 'everyday' rape

Rape is characterised and treated differently depending on the context in which it is committed. In some contexts, state responsibility is more easily established than in others. With regard to rape as a violation of international law, two main perspectives, or narratives, exist: The occurrence of rape in conflict situations (generally state guided), where for example, the United Nations Department of Political and Peacebuilding Affairs' Women, Peace and Security Policy refers to rape as a 'tactic of war';[77] and the occurrence of rape in 'everyday life' (generally not state guided). This terminology arguably heightens the perceived impact of conflict rapes and thus state responsibility for such rapes, while lessening the same in relation to 'everyday' rape. In between these two characterisations, the development of rape as a form of torture or ill-treatment can be located.[78]

These classifications carry with them a label of gravity: the highest level of gravity is awarded to 'conflict' rape and, in descending order, rape as 'torture' or 'ill-treatment' and 'everyday' rape. With regard to 'conflict' rape, liability is sought through the application of individual criminal liability; while rape as a form of 'torture', 'ill-treatment' and 'everyday' rape as violations of human rights law rely on attaching responsibility for the rape to a state. As acts of rape in the latter contexts are more often than not committed by non-state actors such responsibility is heavily reliant on the due diligence principle.[79]

4.2 Rape as a 'grave, systematic and widespread' violation of human rights

The Special Rapporteur on Violence against Women (Special Rapporteur on VAW) frames rape as a 'grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls'.[80] She further concludes that rape is the most common and widespread violation of the rights to 'bodily integrity, the rights to autonomy and to sexual autonomy, the right to privacy, the

77 United Nations Department of Political and Peacebuilding Affairs' Women, Peace and Security Policy June 2019, https://dppa.un.org/sites/default/files/190604_dppa_wps_policy_-_final.pdf (accessed 27 April 2023) 2.

78 See sec 4.4.

79 See sec 5.4.

80 Report of the special rapporteur on violence against women (VAW), its causes and consequences, Dubravka Šimonović, *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, A/HRC/47/26 para I 1.

right to the highest attainable standard of physical and mental health, women's right to equality before the law and the rights to be free from violence, discrimination, torture and other cruel or inhuman treatment'.[81] Moreover, the Special Rapporteur on VAW has confirmed that the international human rights framework, together with jurisprudence from different international and regional human rights courts recognises that rape is a human rights violation and that it is a manifestation of SGBV, which can amount to torture.[82] This latter statement is important because it acknowledges that any and *every* rape is an act of GBD. It further indicates that there is a threshold to be met for rape to qualify as 'torture' or 'ill-treatment'.[83]

To briefly contextualise this in relation to the cases under purview, in 2021, Amnesty International reported that '[r]ape continues to be one of the most prevalent human rights violations in Nigeria'.[84] Similarly, with reference to Sierra Leone, it was reported that SGBV against women and girls is pervasive.[85] Emphasising this crisis, both governments declared 'a State of Public Emergency over rape and sexual violence', which affects tens of thousands of women and girls in these countries each year.[86] In 2020 Nigeria's National Human Rights Commission received 11 200 reported cases of rape.[87] While in Sierra Leone, the Rainbo [sic] Initiative

81 Report of the Special Rapporteur on VAW (n 80) para II A 20.

82 Report of the Special Rapporteur on VAW (n 80) para I B 9.

83 See sec 4.4.

84 Amnesty International 'Nigeria: Failure to tackle rape crisis emboldens perpetrators and silences survivors' https://www.amnesty.org/en/latest/news/2021/11/nigeria-failure-to-tackle-rape-crisis-emboldens-perpetrators-and-silences-survivors/ (accessed 27 April 2023).

85 Amnesty International 'Sierra Leone: Rape and murder of child must be catalyst for real change' https://www.amnesty.org/en/latest/news/2020/06/sierra-leone-rape-and-murder-of-child-must-be-catalyst-for-realchange/#:~:text=Sexual%20violence%20against%20women%20and,over%20rape%20and%20sexual%20violence%E2%80%9D (accessed 27 April 2023)

86 Amnesty International Nigeria (n 84); Amnesty International Sierra Leone (n 87). On 19 February 2019, President Bio of Sierra Leone declared a State of Public Emergency over rape and sexual violence. The announcement came amid growing outrage following a series of cases involving minors. On 19 June 2019, the Parliament revoked the measure.

87 National Human Rights Commission, 2020 Annual Report at 53.

reported 3292 cases of SGBV in 2021.[88] However, as is common cause, acts of rape are most often seriously under-reported due to, amongst others, stigma and victim blaming. As a relevant example, the Human Rights Committee (HRC) has expressed concern over the low level of reporting of SGBV in Nigeria. The HRC pointed to factors such as a 'culture of silence perpetuated by persistent societal stereotypes; the lack of prompt and effective investigations of such cases; the low level of prosecution and conviction of perpetrators; and the insufficient level of assistance for victims'.[89] Thus, although the above-cited figures are alarmingly high, they do not reflect the number of rapes that occur daily in these countries and elsewhere.

4.3 Rape as a violation of the Maputo Protocol

As has already been referred to, any analysis of the prohibition of SGBV under international law must commence from an understanding that SGBV is a form of GBD. The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) cemented this understanding more than 30 years ago.[90] General Recommendation 19 confirms that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[91] This definition includes rape.[92] Moreover, the Special Rapporteur on VAW confirmed this, defining rape as 'a manifestation of gender-based violence'.[93]

Discrimination against women is defined in article 1(f) of the Maputo Protocol.[94] When classifying SGBV as a form of GBD, this comprehensive definition, read together with article 2, activates detailed state obligations, including the obligation to 'prevent'. Furthermore, the Maputo Protocol presents a comprehensive set of rights and obligations created to protect women against different forms of SGBV. Article 1(j) defines violence

88 Rainbo Initiative https://rainboinitiative.org/wp-content/uploads/2022/01/Rainbo-Centre-GBV-Data-2021.pdf (accessed 27 April 2023).

89 UN Human Rights Committee (HRC), Concluding observations: Nigeria (29 August 2019), UN Doc CCPR/C/NGA/CO/2 para 20.

90 General Recommendation 19 (n 43) as reconfirmed in General Recommendation 35 (n 65).

91 General Recommendation 19 (n 43) para 1.

92 General Recommendation 19 (n 43) paras 11-12.

93 Report of the Special Rapporteur on VAW (n 80) para 1.

94 GBD is defined as 'any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life'.

against women. This definition importantly does not distinguish between SGBV committed in private or in public. It prohibits all acts of violence, sexual or non-sexual, everywhere, at all times.[95] This approach is carried through articles 3, 4, 5, 11, 20, 22 and 23, which provide substantial protection against violence and, as mentioned under 2, situates violence within the everyday experiences of African women.[96]

Relevant to the cases in focus, article 3 of the Maputo Protocol stipulates that '[e]very 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(4), as specifically referred to by the victims in the *EI* and *Adama Vandi* cases, furthermore links dignity with freedom from violence by obligating states to 'adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence'.

Article 4(1) furthermore establishes that every woman is entitled to 'respect for her life and the integrity and security of her person'. Article 4(2)(c) obligates states to 'identify the causes and consequences of violence against women and take appropriate measures to *prevent and eliminate* such violence'.[97] In lieu of the discussion on the remedies below, it is furthermore important to highlight the provision in article 4(2)(d), as reiterated in article 5(a), to 'actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women'. These key obligations can only be implemented through the provision in article 4(2)(i): to 'provide adequate budgetary … resources for the implementation and monitoring of actions aimed at *preventing and eradicating* violence against women'.[98] The latter provision is intimately linked with article 26(2), which provides that member states must 'provide budgetary and other resources for the full and effective implementation of the rights'. The reference to

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

96 For a further discussion on the intersectionality approach of the Maputo Protocol see A Rudman 'A feminist reading of the emerging jurisprudence of the African and ECOWAS courts evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 429.

97 My emphasis.

98 My emphasis.

'full' and 'effective' in article 26(2) also supports the idea of substantial transformative equality as discussed in section 2.

4.4 Rape as torture, cruel, inhuman and degrading treatment

Both the applicant in *EI* and Ms Vandi brought forward a claim that what they had been subjected to amounted to ill-treatment in violation of their human dignity. The applicant in *EI* sought a general declaration from the Court that Nigeria was responsible for these violations under article 5 of the African Charter,[99] while Ms Vandi alleged that Sierra Leone, by virtue of the failure to effectively investigate and prosecute the perpetrators of rape and other acts of violence, inflicted against her, was liable for the violations.[100] However, in addition, Ms Vandi importantly stated that the 'sexual abuse she suffered constitutes torture, cruel, inhuman and degrading treatment since it consisted of so much physical and emotional pain and suffering',[101] directly linking this violation to the act of rape.

The international legal concepts of torture and ill-treatment are made up of two distinct components, a 'substantive' and an 'attributive'. The 'substantive' component describes the conduct that amounts to torture or ill-treatment. The 'attributive' component specifies the degree of state involvement in torture or ill-treatment to incur state responsibility. International human rights law widely recognises that 'ill-treatment at the hands of private perpetrators can trigger a wide range of positive state obligations'.[102] The substantive aspect of torture and ill-treatment is discussed in this section, while the attributive aspect is discussed in section 5.

The right to be free from torture or ill-treatment is often clustered together with the right to dignity, as in article 5 of the African Charter and the right to security, as in article 4 of the Maputo Protocol. These rights are often collectively referred to as 'integrity rights'.[103] Different from other

99 *EI* (n 4) para 40.

100 *Adama Vandi* (n 4) para 117.

101 *Adama Vandi* (n 4) para 118.

102 UNGA Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on '*Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence*' A/74/148 (12 July 2019), para II-A 6.

103 NS Rodley 'Integrity of the person' (2018) 3 *International Human Rights Law* 174.

rights, these rights can never be restricted, and states cannot derogate from these rights in times of public emergency.[104]

The key features of article 4, for the purpose of an analysis of state responsibility for acts of rape of non-state actors, were set out above. In this section, the focus is on the specific application of article 4 in cases of rape, where rape is defined as an act of torture or ill-treatment.

Article 4(1) stipulates that '[e]very woman shall be entitled to respect for her life and the integrity and security of her person … [a]ll forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited'. In this regard, it is important to note that unlike other human rights treaties, such as the Universal Declaration,[105] ICCPR,[106] Convention Against Torture (CAT)[107] and the African Charter,[108] article 4(1) of the Maputo Protocol does not reference 'torture' in the framing of the integrity rights. This is an outcome of the fact that torture is primarily understood as violations 'committed by public officials or other person acting in an official capacity', which is generally for the purposes of extracting information. While women experience violence in such circumstances[109], this framing captures violations that men are more likely to experience in the public sphere: as prisoners of war or in police custody. Women, as in the cases discussed in this chapter, are more likely to suffer SGBV, which, if passing the threshold for such acts, is defined as either torture or ill-treatment at the hands of non-state actors.[110]

The Committee Against Torture has, importantly, contributed to expanding the meaning of torture and ill-treatment to better apply to women's lived experiences. In this regard, it has been confirmed that state responsibility ensues where:

> State authorities or others acting in official capacity know or have reasonable ground to believe that acts of torture or ill-treatment are being committed by

104 *Article 19 v State of Eritrea* Communication 275/2003, [2007] ACHPR 79, 30 May 2007; see also *Selmouni v France* (2000) 29 EHRR 403. For further discussion see N Mavronicola 'Is the prohibition against torture and cruel, inhuman and degrading treatment absolute in international human rights law? A reply to Steven Greer' (2017) 17 *Human Rights Law Review* 479-498.

105 African Charter art 5.

106 African Charter art 7.

107 African Charter art 1.

108 African Charter art 5.

109 Women may be tortured via rape or threats of rape. Also, their rape, or threat of rape may be used to obtain information from associated persons.

110 C Benninger-Budel *Due diligence and its application to protect women from violence* (2008) 4.

> non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute, and punish such non-State officials or private actors.[111]

The Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (Special Rapporteur on Torture) has provided important input on the relevance of the prohibition of torture and ill-treatment in the context of SGBV. In the view of the Special Rapporteur on Torture, any form of SGBV 'constitutes cruel, inhuman or degrading treatment or punishment, and amounts to torture when it intentionally inflicts severe pain or suffering on a powerless person for purposes such as obtaining information, coercion, punishment or intimidation, or for any reason based on discrimination of any kind, including mere sexual or sadistic gratification or unequal gender power relations'.[112] To this end, the Special Rapporteur on Torture sets out that under articles 2 and 16 of CAT:

> States must take effective legislative, administrative, judicial or other measures to prevent acts of torture or ill-treatment in any territory under their jurisdiction …[f]ailure to exercise due diligence to prevent, investigate, prosecute and redress torture and ill-treatment by private perpetrators, including in the context of domestic violence, amounts to consent or acquiescence in torture or ill-treatment.[113]

Moreover, referring to CAT General Comment 2, the Interim Report of the Special Rapporteur on Torture confirms states' due diligence obligations to 'prevent, investigate, prosecute and punish acts of torture or other cruel, inhuman or degrading treatment by non-State actors, including gender-based violence, such as rape'.[114]

In the two cases under purview, it is clear that the right to be free from torture finds no application. However, both applicants referred to the fact that the rape they had suffered constituted ill-treatment. The analysis in section 5 further traces the Court's findings with regard to the

111 UN Committee Against Torture, General Comment 2: Implementation of article 2 by states parties (CAT General Comment 2), 24 January 2008, UN Doc CAT/C/GC/2 para 18.

112 UNGA Interim report of the Special Rapporteur on torture (n 102) para 31.

113 UNGA Interim report of the Special Rapporteur on torture (n 102) para 22, referring to CAT General Comment 2 (n 111) para 18.

114 UNGA Interim report of the Special Rapporteur on torture (n 102) para 22, referring to CAT General Comment 2 (n 111) paras 18 & 19.

responsibility of the respective states for the ill-treatment of the applicant in *EI* and Ms Vandi.

4.5 Reparations targeted at systematic failures conditioning rape

Classifying rape as a systematic violation of human rights does not only have a bearing on states' obligation to 'prevent', but also on the reparations awarded. Reparation can take many different forms and includes restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[115] When adequate reparations measures are ordered, they can assist victims in coping with the tangible effects of the violation.[116] As suggested by Rubio-Marfn and Sandoval, '[b]ecause some of the effects may be gender-specific, special attention should be given to the need to articulate reparations that do justice to women, avoiding different possible forms of gender bias'.[117]

The African Commission has confirmed that restitutive measures 'aim to put the victim back to the situation they were in before the violation'.[118] However, where the cause of the violation is systematic in nature, such as the rapes discussed in this chapter, this approach may not result in the repair of the harm or injury caused by the violation. In such cases, the African Commission has importantly provided that 'where the violation results from the victims' position of vulnerability and marginalisation which predated the violation, restitutive measures shall be complemented by measures designed to address the structural causes of the vulnerability and marginalisation, including any kind of discrimination'.[119] Thus, a distinction must be drawn between individual reparations and reparations targeted at systematic failures.[120]

115 African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted during the 21st extra-ordinary session of the African Commission, held in Banjul, The Gambia, from 22 October to 5 November 2013. (African Commission General Comment 4) para 10.

116 R Rubio-Marfn & C Sandoval 'Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: The promise of the Cotton Field judgment' (2011) 33 *Human Rights Quarterly* at 1070.

117 Rubio-Marfn & Sandoval (n 116) at 1070.

118 African Commission General Comment 4 (n 115) para 36.

119 As above.

120 Ibanez (n 13) 54.

Reparations targeted at systematic failures aim to guarantee non-repetition of the violation.[121] As substantiated under 2, the Maputo Protocol is transformative in nature.[122] Therefore, reparation for a violation of the Maputo Protocol should not aim to return victims to a position that predated the violation.[123] The facts that result in a violation, as in the *EI* and *Adama Vandi* cases, are often indicators of the root causes of discrimination, such as negative stereotypes or harmful cultural practices.[124] Reparative measures will not serve their purpose if they merely restore the circumstances that perpetuated the initial violation without addressing these root causes.[125] Meeting the requirements of the Maputo Protocol, therefore, requires that restitutive measures address the enablers of discrimination and are thus determined with a gendered lens.

As an example, Ms Vandi sought an order requiring Sierra Leone to adopt the 'necessary legislative, administrative, social and economic resources to ensure the protection, punishment and eradication of all forms of sexual violence against women' and to further 'provide support services to victims of sexual violence against women, including information, legal services, health services, and counselling'.[126] The Court concluded that it found 'the scope of these requests … outside the scope of [the] human rights effectively violated'.[127] Further, the Court found that Sierra Leone did not lack the legislative, administrative, social and economic resources necessary to ensure the protection, punishment and eradication of all forms of sexual violence against women and that it did provide support services to victims of SGBV.[128] This conclusion was based upon the fact that the victim had 'admitted that she received medical care at the Rainbo [sic] Center an entity that provides medical services to victims of sexual or gender-based violence'.[129] The Rainbo Centre is a Non-governmental Organisation supported by the Government of Sierra Leone, local authorities, donors, partner NGOs and supporters.[130]

121 As above.

122 See Chapter 9 for a discussion on the transformative goal of the Maputo Protocol and attaining substantive equality for women in Africa.

123 Rubio-Marfn & Sandoval (116) 1070.

124 As above.

125 As above.

126 *Adama Vandi* (n 4) para 26 (v) & (vi).

127 *Adama Vandi* (n 4) para 151.

128 *Adama Vandi* (n 4) para 152.

129 *Adama Vandi* (n 4) para 153.

130 Rainbo Initiative https://rainboinitiative.org/history/ (accessed 27 April 2023).

The Court's conclusion on this request for remedies is problematic from two perspectives: On the one hand, in only viewing the violations as one isolated act against the victim herself and not classifying these as GBD, the Court failed to see the systemic issues involved in the matter and thus failed to order the appropriate remedies. On the other hand, the fact that the victim was cared for by an NGO and not a state institution should have been an indication in itself that the state lacked the legislative, administrative, social and economic resources needed in support of Ms Vandi's claim to further the protection of other survivors of SGBV.

5 State responsibility for rape as a violation of the rights to dignity and freedom from cruel, inhuman or degrading treatment

The analysis in this pre-final part importantly focuses on the attribution of state responsibility for acts of rape by non-state actors in relation to claims of violations of dignity and freedom from ill-treatment. Without a link between an act or omission and the state attributing the harm caused, victims will have no redress for their sufferings. This discussion is based on the substantive and transformative approach to equality discussed in section 2 and the qualification of rape as a human rights violation, as discussed in sections 3 and 4. This analysis specifically explores the importance of the responsibility to 'prevent' in the context of SGBV, an obligation specifically detailed in section 4.4.

5.1 State responsibility for cases of rape by non-state actors – a precursory discussion

Article 12 of the ILC Draft Articles determines that there is a breach of an international obligation when an act of the state 'is not in conformity with what is required of it by that obligation, regardless of its origin or character'. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice (ICJ) confirmed that 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect'.[131] Similarly, in the *Rainbow Warrior* case, the International Arbitration Tribunal, led by the UN Secretary-General, held that 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility and consequently, to the duty of reparation'.[132] Thus, it is possible to conclude that any violation of an international obligation, including a violation of the state obligations invested in the Maputo Protocol, will

131 *Gabčikovo-Nagymaros Project case, Hungary v Slovakia* [1997] ICJ Rep 92 para 47.

132 *Case of New Zealand v France, United Nations* (1990) 20 RIAA 217 251 para 75.

give rise to state responsibility if the criteria in the ILC Draft Articles are fulfilled. These criteria are set out and discussed below.[133]

Key to unlocking state responsibility, especially in SGBV cases, as is further argued in this section, is to appropriately understand states' obligations under international treaties such as the Maputo Protocol. The ECOWAS Court in *EI* and *Adama Vandi* wrongfully departed from the idea that the respective states only had obligations to *apprehend*, *investigate* and *prosecute* the alleged offender, rendering a breach of the rights to dignity and freedom from ill-treatment possible only if the state had not *apprehended*, *investigated,* and *prosecuted* the alleged offender. This was the faith of the pleadings of the applicant in *Adama Vandi*. The analysis in this section, however, shows that the state obligation under the relevant provisions in the Maputo Protocol, as discussed in section 4, also includes a broad obligation and, thus, a responsibility to *prevent* acts of SGBV.

When there is an obligation to 'prevent' this has a direct effect on the commission and attribution of an internationally wrongful act as prevention naturally means some level of foreseeability and the acknowledgement of the risk of harm. The analysis in section 5.3 refers to the discussion in section 3.3 and the characterisation of rape as a grave and systematic violation of international human rights law. Where states have openly acknowledged that SGBV persists as a state of emergency, or where such violence is so frequent that it is reasonable to presume that state authorities are or should be aware of it, acts of SGBV, such as rape, cannot be viewed as singular, isolated events but rather as foreseeable outcomes of a pervasive culture of systemic rapes and as acts of GBD. Thus, states have an obligation to protect individuals within their territories against such known, 'foreseeable' threats. To uphold the obligation to protect, that is, shielding itself from responsibility for an omission to protect, a state must take specific measures to try to prevent women from being raped. In this regard, the principle of due diligence discussed below can be applied to establish the threshold for what can be regarded as reasonable preventative measures within a specific context.[134]

5.2 The International Law Commission's Draft Principles on State Responsibility

The ILC Draft Articles codify the basic rules of international law regarding the responsibility of states for their internationally wrongful acts. It is common cause that the ILC Draft Articles establish secondary

133 See sec 5.2.

134 See sec 5.4.

rules of state responsibility. Thus, the ILC Draft Articles do not elaborate on the material content of international obligations that give rise to state responsibility. This is the function of primary rules, such as the Maputo Protocol, in the context of SGBV meted out on African women within the territory of any of the 44 member states to this treaty.

Article 1 of the ILC Draft Articles stipulates the basic principle that '[e]very internationally wrongful act of a State entails the international responsibility of that State'. The determination of whether an internationally wrongful act exists depends on the requirements of the primary obligation and the conditions for such an act, which mainly relates to the principles of attributability in the ILC Draft Articles.[135] It then follows from article 2 that an internationally wrongful act exists when conduct consisting of an action or omission is attributable to the state under international law and constitutes a breach of an international obligation of that state. The legal test for an 'omission to act' is further set out below.[136] The characterisation of an act of a state as internationally wrongful is, as stipulated under article 3, governed by international law, for example, an international treaty, such as the Maputo Protocol. In this regard, it is important to note that such characterisation is not affected by the characterisation of the same act as lawful by internal law.[137]

As the acts of rape in the *EI* and *Adama Vandi* cases were not directly imputable to the state, as was the case in *Aircraftwoman*,[138] the only way to substantiate state responsibility was through the 'omission to act' provision in article 2. The following section sets out the legal requirements for an omission to act and situate this within the facts of the *EI* and *Adama Vandi* cases.

135 As set out in part 1 of the ILC Draft Articles.

136 See sec 5.3.

137 ILC Draft art 3. This principle is furthermore captured in the Vienna Convention on the Law of Treaties (1969) stipulating in art 27 that, '[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'. Art 28 of the ILC Draft Articles, moreover, stipulates that 'the international responsibility of a State which is entailed by an internationally wrongful act in accordance with the provisions of part one [of the ILC Draft Articles] involves legal consequences'. In relation to this, art 34 prescribes that full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination.

138 *Aircraft Woman Beauty Igbobie Uzezi v Federal Republic of Nigeria* ECW/CCJ/JUD/11/21 (2021).

5.3 An 'omission' to act

When conduct consisting of an omission to act is attributable to a state under international law and constitutes a breach of an international obligation of the state, there is a wrongful act which renders reparation necessary. The discussion in section 4 about the state obligations related to rape as torture or ill-treatment clearly showed that 'prevention' is a legal obligation. As averred by the ECOWAS Court, to demand the responsibility of a state by its inaction or omission, 'there must be a known and foreseeable threat for which the state failed to take appropriate steps to avert'.[139] This 'foreseeability' is intimately linked with the principle of due diligence as discussed below.[140]

In *Corfu Channel*, the ICJ held that it was a sufficient basis for state responsibility that the state knew, or must have known, of the presence of the mines in its territorial waters and did nothing to warn third states of their presence'.[141] In the *United States Diplomatic and Consular Staff* case, the ICJ similarly concluded that the responsibility of Iran was entailed by the 'inaction' of its authorities, which 'failed to take appropriate steps' in circumstances where such steps were evidently called for.[142] The European Court of Human Rights (European Court) have similarly concluded under Article 2 of the ECHR that a failure to protect against a known and foreseeable threat to life entailed responsibility for the loss of life.[143]

5.4 Responsibility to act with due diligence to prevent rape

To *prevent* something is essentially the act of stopping something negative or bad from happening.[144] In both the *EI* and *Adama Vandi* cases, the ECOWAS Court makes reference to the definition of the obligation to *prevent* as the obligation of the state to 'carry out an effective investigation into acts amounting to human rights violations, intending to prosecute the perpetrators and redress the victims'.[145] None of these measures has as its objective to stop SGBV from happening, and thus, as a first reflection, these are not preventative measures *per se* but measures that are there to, at best, limit the further sufferings of survivors of SGBV.

139 *EI* (n 4) para 49.

140 See sec 5.4.

141 *Corfu Channel Case (United Kingdom v Albania) (merits)* [1949] ICJ Rep 244 paras 22-23.

142 *Case Concerning United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) [1981] ICJ Rep 45 paras 63 & 67. See also *EI* (n 4) para 47.

143 *Case of T v Russia* Application No 2656/07 (2017) EHRR 206, para 611.

144 Oxford English Dictionary.

145 *EI* (n 4) para 67. See also *Adama Vandi* (n 4) para 86.

This section further elaborates on the obligation to *prevent* and shows that the measures involved reach far beyond the fair trial and access to justice-related aspects of prevention in cases of SGBV.

The due diligence standard gives guidance to establish state responsibility when a state has failed to act in relation to acts of SGBV committed by non-state actors. The Niamey Guidelines were adopted by the African Commission on Human and Peoples' Rights in 2017. The goal of the Niamey Guidelines is to guide and support member states of the AU in effectively implementing their obligations to combat sexual violence. Thus, these principles are essential to state parties in their implementation of the African Charter and the Maputo Protocol. The Niamey Guidelines stipulate that to fulfil their due diligence obligation, states must '*prevent* … acts of sexual violence committed by State and non-State actors'.[146] With regard to the due diligence principle, the HRC further explains that:

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights … would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures *or* to exercise due diligence to *prevent*, punish, investigate or redress the harm caused by such acts by private persons or entities.[147]

As referred to above, the CEDAW Committee has established that '[s]tates may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.[148] Furthermore, the Declaration on the Elimination of Violence against Women urges states to '[e]xercise due diligence to *prevent*, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons '.[149]

146 My emphasis.

147 UN Human Rights Committee (HRC) General Comment 31(80) The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13 para 8.

148 General Recommendation 19 (n 43) para 9.

149 United Nations, Declaration on the Elimination of Violence against Women. General Assembly resolution 48/104 of 20 December 1993, UN Doc A/RES/48/104, February 23, 1994, Article 4.c. See also the Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995 para 124(b) (my emphasis).

The Special Rapporteur on VAW has moreover stated that '[b]ased on practice and the *opinio juris* […] it may be concluded that there is a norm of customary international law that obliges States to *prevent* and respond with due diligence to acts of violence against women'.[150] Furthermore, following the United Nations General Assembly's in-depth study on all forms of violence against women, the UN Secretary-General concluded that:

> It is good practice to make the physical environment safer for women and community safety audits have been used to identify dangerous locations, discuss women's fears and obtain women's recommendations for improving their safety. Prevention of violence against women should be an explicit element in urban and rural planning and in the design of buildings and residential dwellings. Improving the safety of public transport and routes travelled by women, such as to schools and educational institutions or to wells, fields and factories, is part of prevention work.[151]

Furthermore, the Inter-American Commission of Human Rights (Inter-American Commission) and Inter-American Court of Human Rights (Inter-American Court) have provided much important jurisprudence on the due diligence obligation to prevent SGBV. In *Maria Da Penha,* the Inter-American Commission applied the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) for the first time to a case of domestic violence. It held that Brazil had violated its obligation under article 7 to exercise due diligence to prevent, punish and eliminate domestic violence by failing to convict and punish the perpetrator.[152] For the purposes of the analysis in this chapter, the Inter-American Commission, importantly, held that because the violation was part of a 'general pattern of negligence and lack of effectiveness of the State' this was a breach of the obligation to prosecute and convict but also a breach of the obligation to prevent this practice.[153]

150 United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of the human rights of women and a gender perspective: violence against women, Mission to Mexico, UN Doc E/CN.4/2006/61/Add.4, January 13, 2006 (my emphasis).

151 United Nations General Assembly *In-depth study on all forms of violence against women*. Report of the Secretary-General, sixty-first session, UN Doc A/61/122/Add.1 (July 6, 2006) para 352.

152 *Maria Da Penha Maia Fernandes v Brazil* case 12051, Report No 54/01, OEA/SerL/V/II111 Doc 20 Rev 704 (2000) paras 20 & 60.

153 *Maria Da Penha* (n 152) para 56.

In *González*,[154] the Inter-American Court provided further input in this regard. In this case, the Inter-American Court also based its findings on, amongst others, article 7 of the Convention of Belém do Pará, which stipulates that 'States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to … apply due diligence to prevent, investigate and impose penalties for violence against women'. In *Cotton Fields*, the Inter-American Court established that although the obligation to prevent is one of means and not results, Mexico had not demonstrated that the creation of a special Office of the Prosecutor and some additions to its legislative framework were sufficient and effective to prevent the serious manifestations of violence against women displayed in this case.[155]

The jurisprudence from the Inter-American system reveals that states must adopt comprehensive measures to comply with the due diligence principle in SGBV cases. In this regard, the state is obligated to put in place explicit preventative measures in cases where it is evident that specific women or groups of women may be prone to SGBV.[156]

However, it is important to note that the Inter-American Commission and Court both affirm that states cannot be held responsible for all human rights violations committed by private individuals on its territory, and as such, acting with due diligence does not mean unlimited responsibility for any act of private actors. Instead, measures of prevention are qualified on the awareness of the state of a situation of 'real and imminent danger for a specific individual or group of individuals and the reasonable possibility of preventing or avoiding that danger'.[157] This approach is arguably similar to the approach of the ICJ and the European Court, as mentioned above, focusing on the foreseeability of a risk and the measures taken to eliminate harm.[158]

5.5 Specific measures to prevent rape

Rape is preventable, but it requires serious efforts and resources. The prevention of rape begins with tackling cultural values and norms that enable SGBV as a form of GBD. Responsibility for the eradication of

154 *González et al (Cotton Field) v Mexico* preliminary objection, merits, reparations and costs, judgment of 16 November 2009, Series C No. 205.

155 *Cotton Field* (n 154) para 279.

156 *Cotton Field* (n 154) para 258.

157 *Cotton Field* (n 154) para 280.

158 See sec 5.3.

rape rests with the state together with every community. All echelons of government, such as the health, education, justice, and crime prevention sectors, together with NGOs, can contribute; however, the primary responsibility for the prevention of SGBV always rests on the state.

In this regard, the Niamey Guidelines stipulate that states must take the necessary measures to:

> [P]revent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls, and/or preconceptions and stereotypes based on gender identity, real or perceived sexual orientation, and/or certain preconceptions of masculinity and virility, irrespective of their source.[159]

Preventative measures can take many forms and have different objectives. Such measures can be implemented to try to prevent rapes altogether, to prevent further consequences when a rape has already occurred, and to prevent rapes from reoccurring or escalating once they have occurred in a specific location in a specific way. Thus, prevention can focus on the eradication of the enablers of GBD, it can entail practical and structural changes to make women safer, and it can focus on preparing women who are specifically vulnerable to rape. It is outside the scope of this chapter to detail the various preventative measures available to states. However, measures such as sensitisation, education, creating institutional frameworks focusing specifically on rape and rape prevention, changing physical environments, engaging in early interventions targeted to individuals and groups who exhibit signs of violent behaviour, providing self-defence and assertiveness training and recognising vulnerable groups are measures that would arguably fall within the legal obligation of states under the Maputo Protocol.

6 Conclusion

EI and *Adama Vandi* presented a renewed opportunity to analyse the public/private dichotomy in relation to SGBV. These cases also presented an occasion to suggest developments of state responsibility related to SGBV in consideration of the principle of due diligence where victims rely on the Maputo Protocol. It is clear from the analysis in this chapter that the ECOWAS Court took a very narrow approach to the harm suffered by the victims of SGBV and that its method neither fulfils the substantial

159 Niamey Guidelines, Part B General Principles and Obligations of States, *7 Obligation to prevent sexual violence and its consequences*.

and transformative equality test as obligated by the Maputo Protocol nor upholds the incurred state obligations to prevent, as prevention is not only about investigation and punishment but also about the implementation of preventative measures to eliminate GBD. For the latter to take place, states and courts must first recognise that all acts of SGBV are acts of GBD.

The main assumptions traced in this chapter were that in cases of SGBV, the traditional attribution of responsibility back to the state for acts of non-state actors is not helpful and that the key to unlocking state responsibility in this regard is an appropriate understanding of the obligation to act with due diligence to prevent (stopping something bad from happening) in cases of SGBV. Prevention of any harmful act is ultimately a state function, and as such, an omission to prevent it is a breach of this obligation.

In the *EI* case, the applicant claimed that she had been ill-treated, and the Court ran through the motion of the methodology of state responsibility. It concluded that the state did not mistreat the applicant as it, through its agents, did not rape her. It further acknowledged that an omission to act could potentially institute state responsibility; however, it did not view this obligation from the vantage point of (full) prevention. If the Court had applied the obligation to 'prevent' as it has been defined by the African Commission, the Special Rapporteurs on VAW and Torture and by the Inter-American Court and Commission, the ill-treatment of the applicant in *EI* could have been imputed to the state by an omission to prevent her rape. This argument is especially powerful within contexts where the state has acknowledged that a rape culture prevails.

Moreover, as established in this chapter, a failure to classify SGBV as GBD alongside the application of a formal equality analysis can also have a serious impact on the remedies ordered by a court. This is evident in the *EI* case, where the applicant received no compensation for the physical and psychological pain, emotional distress, and post-traumatic stress she suffered, as the Court found that her claim with regard to the pain and suffering arose from the alleged rape. As the Court found that the rape did not constitute GBD and as there was only, in its opinion, a breach of her right to a fair trial, on account of a lack of a speedy and effective prosecution of her perpetrator, the only declaration upheld was to direct the state to carry out an effective prosecution. In the same vein, Ms Vandi only received one-tenth of the damages she claimed and none of the systemic reparations that she claimed, such as education, health services and counselling, were granted by the Court.

In conclusion, as the analysis in this chapter has shown, by applying a transformative and substantive equality analysis in rape cases, by classifying rape a grave violation of human rights law, as ill-treatment and as a form of GBD, by contextualising rape within a culture of rape and by focusing on states' responsibility to prevent SGBV, states such as Nigeria and Sierra Leone can be held responsible for acts of rape by non-state actors beyond rights related to access to justice and a fair trial. Applying the Maputo Protocol and the ILC Draft Articles in this manner enables courts to prescribe a wider range of remedies, for example, targeted at the enablers of SGBV, such as gendered stereotypes and cultural beliefs, to appropriately compensate victims of SGBV.

Table of Abbreviations

AU	African Union
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of Discrimination Against Women
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
GBD	Gender-based discrimination
HRC	Human Rights Committee
ICJ	International Court of Justice
ILC	International Law Commission
SGBV	Sexual and gender-based violence
VAW	Violence against women

Literature

Albertyn C & Goldblatt B 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 S*outh African Journal on Human Rights* 249-276

Albertyn C 'Contested substantive equality in the South African Constitution: beyond social inclusion towards systemic justice' (2018) 34 *South African Journal on Human Rights* 441-468

Amnesty International 'Nigeria: Failure to tackle rape crisis emboldens perpetrators and silences survivors' https://www.amnesty.org/en/latest/news/2021/11/nigeria-failure-to-tackle-rape-crisis-emboldens-perpetrators-and-silences-survivors/

Amnesty International 'Sierra Leone: Rape and murder of child must be catalyst for real change' https://www.amnesty.org/en/latest/news/2020/06/sierra-leone-rape-and-murder-of-child-must-be-catalyst-for-realchange/#:~:text=Sexual%20violence%20against%20women%20and,over%20rape%20and%20sexual%20violence%E2%80%9D

Barnett H *Introduction to feminist jurisprudence* (Taylor & Francis 1998)

Benninger-Budel C *Due diligence and its application to protect women from violence* (Brill 2008)

Capps J 'Pragmatism, feminism, and the sameness-difference' (1996) 32 *Transactions of the Charles S Peirce Society* 65-105

Chirwa DH 'The doctrine of state responsibility as a potential means of holding private actors accountable for human rights' (2004) *Melbourne Journal of International Law* 1-36

Cusack S 'Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases' OHCHR, 9 June 2014, https://www.ohchr.org/Documents/Issues/Women/WRGS/StudyGenderStereotyping.doc

Fredman S *Discrimination law* (OUP 2011)

Holtmaat R 'The concept of discrimination' (2004) *Academy of European Law Conference Paper* http://www.era-comm.eu/oldoku/Adiskri/02_Key_concepts/2004_Holtmaat_EN.pdf

https://au.int/sites/default/files/treaties/37077-sl-protocol to the african charter on human and people%27s rights on the rights of women in africa.pdf

https://www.amnesty.org/en/latest/news/2021/11/nigeria-failure-to-tackle-rape-crisis-emboldens-perpetrators-and-silences-survivors/

Human Rights Council Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo (28 May 2014) UN Doc A/HRC/26/38 (2014)

Ibanez XA 'The role of international and national courts: human rights litigation as a strategy to hold states accountable for maternal deaths' in P Hunt & T Gray (eds) *Maternal mortality, human rights and accountability* (2013)

Littleton C 'Reconstruction Sexual Equality in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 248-263

Loenen MLP 'Towards a common standard of achievement? Developments in international equality law' (2001) *Acta Juridica* 197

MacKinnon C 'Difference and dominance: on sex discrimination' in K Weisberg (ed) *Feminist legal theory: foundations* (1993) 276-287

MacKinnon C 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 14 *International Journal of Constitutional Law* 739-746

Mavronicola N 'Is the prohibition against torture and cruel, inhuman and degrading treatment absolute in international human rights law? A reply to Steven Greer' (2017) 17 *Human Rights Law Review* 479-498

Rainbo Initiative https://rainboinitiative.org/history/

Rainbo Initiative https://rainboinitiative.org/wp-content/uploads/2022/01/Rainbo-Centre-GBV-Data-2021.pdf

Report of the special rapporteur on violence against women (VAW), its causes and consequences, Dubravka Šimonović, *Rape as a grave, systematic and widespread human rights violation, a crime and a manifestation of gender-based violence against women and girls, and its prevention*, A/HRC/47/26

Rodley NS 'Integrity of the person' in *International Human Rights Law* (2018) 174-194

Rubio-Marfn R & Sandoval C 'Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: The promise of the Cotton Field judgment' (2011) 33 *Human Rights Quarterly* 1062-1091

Rudman A 'A feminist reading of the emerging jurisprudence of the African and ECOWAS courts evaluating their responsiveness to victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 424-454

United Nations Women https://www.unwomen.org/en/news/stories/2019/11/compilation-ways-you-can-stand-against-rape-culture

United Nations General Assembly Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment on '*Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence'* A/74/148 (12 July 2019)

United Nations Department of Political and Peacebuilding Affairs' Women, Peace and Security Policy June 2019, https://dppa.un.org/sites/default/files/190604_dppa_wps_policy_-_final.pdf

United Nations General Assembly *In-depth study on all forms of violence against women*. Report of the Secretary-General, sixty-first session, UN Doc A/61/122/Add.1 (6 July 2006)

United Nations, Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Integration of the human rights of women and a gender perspective: violence against women, Mission to Mexico, UN Doc E/CN.4/2006/61/Add.4, 13 January 2006

International, Regional and Other Rights Instruments

African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

African Commission General Comment 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), adopted during the 21st extra-ordinary session of the African Commission, held in Banjul, The Gambia, from 22 October to 5 November 2013

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143

European Convention on Human Rights and Fundamental Freedoms (adopted 4 November 1950 entered into force 3 September 1953) 213 UNTS 221

General Comment 6 on the Protocol to the African Charter on Human and Peoples Right on The Rights Of Women In Africa (Maputo Protocol): The Right To Property During Separation, Divorce or Annulment of Marriage (Article 7(D)), adopted during the 27th extra-ordinary session of the African Commission held in Banjul, The Gambia in February 2020

Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines), adopted during the 60th ordinary session of the African Commission held in Niamey, Niger from 8 to 22 May 2017

International Convention on the Elimination of All Forms of Racial Discrimination (adopted on 21 December 1965, entered into force 4 January 1969) 660 UNTS 195

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 3 January 1976) 999 UNTS 171

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 23 March 1976) 993 UNTS 3

International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10) ch. IV. E.1

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), (adopted 11 July, entered into force 25 November 2005.) CAB/LEG/66.6

United Nations Committee Against Torture, General Comment 2: Implementation of article 2 by states parties, 24 January 2008, UN Doc CAT/C/GC/2

United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, UN Doc A/47/38

United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) General recommendation 35 on gender-based violence against women, updating General Recommendation 19, 26 July 2017, UN Doc CEDAW/C/GC/35

United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 33: on women's access to justice, 23 July 2015, UN Doc CEDAW/C/GC/33

United Nations Human Rights Committee General Comment 31(80) the nature of the general legal obligation imposed on states parties to the Covenant, 26 May 2004, UN Doc CCPR/C/21/Rev.1/Add.13

United Nations Human Rights Committee Concluding observations: Nigeria (29 August 2019), UN Doc CCPR/C/NGA/CO/2

Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 (III)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Declaration on the Elimination of Violence against Women General Assembly resolution 48/104 of 20 December 1993, UN Doc A/RES/48/104, February 23, 1994

Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995

Cases

Adama Vandi v State of Sierra Leone ECW/CCJ/JUD/32/2022

Aircraft Woman Beauty Igbobie Uzezi v Federal Republic of Nigeria ECW/CCJ/JUD/11/21 (2021)

Article 19 v State of Eritrea Communication 275/2003, [2007] ACHPR 79, 30 May 2007

AT v Hungary Communication 2/2003, CEDAW Committee (26 January 2005)

Corfu Channel Case (United Kingdom v Albania) (merits) [1949] ICJ Rep 244

Dorothy Chioma Njemanze & 3 Ors v Federal Republic of Nigeria (*Dorothy Njemanze*) ECWICCJ/JUD/08/17

EI v The Federal Republic of Nigeria ECW/CCJ/JUD/09/22 (2022)

Fatma Yildirim v Austria Communication 6/2005, CEDAW Committee (1 October 2007) UN Doc CEDAW/C/39/D/6/2005 (2007)

Gabcikovo-Nagymaros Project case, Hungary v Slovakia [1997] ICJ Rep 92 para 47

González et al (Cotton Field) v Mexico preliminary objection, merits, reparations and costs, Judgment of 16 November 2009, Series C No 205

Hadijatou Mani Koraou v The Republic of Niger ECW/CCJ/JUD/06/08 (2008)

Maria Da Penha Maia Fernandes v Brazil 12051, Report No 54/01, OEA/SerL/V/II111 Doc 20 Rev 704 (2000)

Mary Sunday v Nigeria ECW/CCJ/JUD/11/18 (2018)

New Zealand v France, United Nations (1990) 20 RIAA 217 251

Şahide Goekce v Austria Communication 5/2005, CEDAW Committee (6 August 2007) UN Doc CEDAW/C/39/D/5/2005 (2007)

Selmouni v France (2000) 29 EHRR 403

T v Russia Application No 2656/07 (2017) EHRR 206 *United States Diplomatic and Consular Staff in Tehran* (*United States of America v Iran*) [1981] ICJ Rep 45

Zimbabwe Lawyers for Human Rights and the Institute for Human Rights and Development (on behalf of Andrew Barclay Meldrum) v Republic of Zimbabwe, Communication 294/2004, African Commission on Human and Peoples' Rights, Twenty-sixth Annual Activity Report (2009)

5 A critical analysis of resocialisation as an obligation, right and remedy under the Maputo Protocol in the jurisprudence of the African Court on Human and Peoples' Rights and the ECOWAS Court of Justice

Anisa Mahmoudi & Annika Rudman

Abstract:

This chapter explores articles 2(2) and 5 the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which set out member states' obligations to modify the social and cultural behaviour of women and men through education, information, and communication strategies. These obligations are, as argued in this chapter, key to achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes or on gender stereotypes.

The analysis in this chapter departs from a three-pronged assumption: (i) that the position of women will not improve unless the underlying causes of discrimination are addressed; (ii) that modification or resocialisation, as it is referred to in this chapter, can play a key role in eliminating the root causes of gender-based discrimination; and (iii) that resocialisation as it is provided in the Maputo Protocol is underutilised by states and continental and sub-regional courts alike in the pursuit of the realisation of the rights of African women. This chapter aims to draw attention to the potential of the modification provisions in the Maputo protocol, and to provide examples of best practices emerging from the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the African Court

on Human and Peoples' Rights (African Court) and the ECOWAS Court of Justice (ECOWAS Court).

1 Introduction

The realisation of women's rights has long been the subject of advocacy and debate. While safeguarded by international and regional law, the privilege of living a life free from discrimination remains a distant reality for most women and girls the world over.[1] Varied in substance and form, gender-based discrimination (GBD) continues to influence all aspects of women's lives. However, many legal advances have been made thus far to protect women's rights.[2] To a large extent, however, these legal advances remain paper tigers. This is so because patriarchal oppression expressed through cultural and religious practices, stereotyping, and other forms of harmful behaviour – the root causes of GBD – continue to impede the acceleration of gender equality when left unaddressed.[3]

In essence, international and regional human rights law provides comprehensive protection for women. However, these provisions alone are insufficient to effect meaningful change to the lived realities of women if they remain 'filtered through the biases and limitations of the individuals and institutions, public and private, responsible for grounding [them] in reality'.[4]

In recognition of the negative influence that societal behaviours, stereotypes, attitudes, and practices have on the rights of women, international human rights law emphasises the importance of modifying those harms that comprise the root causes of GBD. Both CEDAW[5] and

1 World Economic Forum 'Global Gender Gao Report 2020' https://www3.weforum.org/docs/WEF_GGGR_2020.pdf (accessed 19 September 2023).

2 For instance, the UN Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); African Union Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005) CAB/LEG/66.6 (Maputo Protocol).

3 UN Committee on the Elimination of Discrimination against Women and UN Committee on the Rights of the Child 'Joint General Recommendation 31 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' (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (2019) paras 6-7.

4 UN General Assembly 'Report of the Working Group on the issue of discrimination against women in law and in practice' (19 April 2017) UN Doc A/HRC/35/29 (2017) para 20.

5 CEDAW (n 2) art 5.

the Maputo Protocol[6] incorporate specific legal provisions that aim to modify harmful behaviour.

Notwithstanding the fact that CEDAW was adopted some 40 years ago, its drafters were seemingly alive to the reality that any meaningful attempts at the realisation of the rights of women remain contingent upon the modification of harmful socio-cultural patterns of thought and action. Resocialisation, therefore, is deeply embedded within international law through the adoption of CEDAW and, more specifically, through its transformative equality provisions. Article 5, read in conjunction with article 2(f), provides the necessary legislative authority to states to implement resocialisation methods to re-orient people away from harmful notions and practices towards those that acknowledge the equal humanity of women. Similarly, article 2(2) of the Maputo Protocol, read in conjunction with articles 4, 5, 8, 12 and 25, have for almost 20 years provided the same scope in the regional domain. While these provisions do not employ the term 'resocialisation', the reference to the obligation to 'modify the social and cultural patterns of conduct of women and men' implies a shift from harmful conceptions of women legitimising discrimination to one which gives effect to the overall object and purpose of CEDAW and the Maputo Protocol, namely equality. This process of modification is referred to as resocialisation in this chapter.[7]

Considered through the lens of feminist legal theory, which asserts that the law is not neutral, legitimating patriarchal oppression,[8] this chapter suggests that until a greater emphasis is placed on the modification provisions through active resocialisation, understood as an obligation, right and remedy, the underlying root causes of GBD will remain intact, making the realisation of the rights of women unattainable. Thus, the analysis departs from a three-pronged assumption: first, that the position of women will not improve unless the underlying causes of GBD are addressed; second, that resocialisation can play a key role in eliminating the root causes of GBD; and third, that resocialisation as it is provided for in the Maputo Protocol is underutilised by states and continental and sub-regional courts alike in pursuit of the realisation of the rights of African women.[9]

6 Maputo Protocol (n 2) arts 2(2) & 5.

7 See sec 2.1 for a further discussion on the term 'resocialisation' and secs 4 and 5 for the relevant case law.

8 MA Fineman 'Gender and law: feminist legal theory's role in new legal realism' (2005) *Wisconsin Law Review* 407. The framework acknowledges the influence of intersectional vectors of harm as well as the substantive and transformative equality of the Maputo Protocol.

9 See sec 2.

To elaborate on the options and opportunities for resocialisation, this chapter analyses the (un)responsiveness of the African Court on Human and Peoples' Rights (African Court) and the Economic Community of West African States Court of Justice (ECOWAS Court) to applying the legal provisions of modification through resocialisation. The aim is to analyse how the African and ECOWAS Courts have approached applications where victims of different forms of GBD, predominantly gender-based violence (GBV), have requested the courts to apply the resocialisation provisions or where resocialisation remedies have been prescribed by the courts as a remedy to harmful practices.[10] Furthermore, this chapter contrasts the approach to resocialisation in continental and sub-regional African jurisprudence with that of the CEDAW Committee to demonstrate how the interpretation and application of resocialisation can be improved to give full effect to women's rights.

In light of the above, section 2 explains resocialisation as a legal standard grounded in international and regional law, together with its aim, scope and target. This is followed by a discussion about the importance of establishing resocialisation as an obligation, right and remedy to eliminate prejudices and harmful traditional, religious, or customary practices. Section 3 examines cultural relativism as justification for the violation of women's rights, together with arguments situated within the ambit of other competing rights. Thereafter, section 4 presents the relevant international law to provide the necessary and overarching framework within which arguments in favour of resocialisation are made. Section 5 considers the African regional legislative framework, analysing the triple approach to resocialisation, as evidenced in the case law of the African and ECOWAS Courts. In conclusion, section 6 demonstrates how the interpretation and application of resocialisation can be improved to give full effect to the rights of African women.

2 Objectives of resocialisation

The influence of existing patriarchal culture on undermining women's rights and freedoms remains largely undisputed. Few, however, have considered the role that resocialisation – by way of the modification obligations – can and arguably should play in accelerating gender equality.[11]

10 See sec 5.1.

11 E Sepper 'Confronting the "sacred and unchangeable": the obligation to modify cultural patterns under the women's discrimination treaty' (2008) 30 *University of Pennsylvania Journal of International Law* at 585; S Cusack & H Timmer 'Gender stereotyping in rape cases: the CEDAW Committee's decision in *Vertido v The Philippines*' (2011) *Human Rights Law Review* at 329; R Holtmaat 'Article 5' in MA Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against*

Patriarchal culture and dominance came about as a result of long periods of socialisation.[12] Socialisation is the 'process by which individuals internalize the norms, values and culture of their society and learn to behave in socially acceptable ways'.[13] Feminist legal scholar MacKinnon notes that societal power includes 'the power to determine decisive socialization processes and therefore the power to produce reality'.[14] Societal power continues to remain within the grasp of men. Where societal narratives exist, which serve to place groups hierarchically superior to one another, socialisation allows those narratives to thrive from generation to generation. Thus, because men have retained societal powers for centuries, they have also retained the power to produce social reality. Such realities include harmful conceptions of women and stereotyping, and because these notions are so deeply embedded in societal functioning, they remain uncritiqued, informing behaviours and practices of women and men that ultimately undermine the rights and freedoms of women.[15]

Resocialisation is concerned with changing dominant patriarchal narratives, those dominant narratives that speak to the value and worth of women and girls, dictating the extent to which women and girls are afforded the right to live lives free from the harms emanating therefrom. Such deeply embedded and internalised narratives are, in fact, rooted in fallacious conceptions about women and their gendered roles in society. Yet despite its flawed premise, these conceptions continue to heavily influence the extent to which the humanity of women is respected. Resocialisation for the benefit of women and girls seeks to alter those dominant narratives to those recognising the inherent dignity and value of women and girls. Resocialisation is about relearning and, instead, offering humanity-affirming narratives while disrupting masculine constructs in all arena of society. It seeks to modify harmful norms and cultural practices underpinning discrimination, looking to all individuals as subjects of change.[16] The act of resocialisation seeks to address the root causes of gender inequality, working in tandem with efforts made towards

Women: A commentary (2011); S Cusack & L Pusey 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* at 1.

12 AL Mtenje 'Patriarch and socialization in Chimamanda Ngozi Adichie's Purple Hibiscus and Jamaica Kincaid's Lucy' (2016) 27 *Marang: Journal of Language and Literature* at 63.

13 Z O'Leary *The social science jargon buster* (2007) 266.

14 CA MacKinnon *Toward a feminist theory of the state* (1991) 230.

15 United Nations Development Programme 'Tackling social norms: a game changer for gender inequalities' (2020) https://www.un-ilibrary.org/content/books/9789210051705 (accessed 5 July 2023).

16 See CEDAW (n 2) art 5.

the realisation of substantive and formal gender equality.[17] Resocialisation in this context, therefore, refers to the legal obligations resting on states to modify those harms underpinning gender discrimination.[18]

The United Nations Development Fund confirms the value of resocialisation by stating that '[s]ince gender remains one of the most prevalent bases of discrimination, policies addressing deep-seated discriminatory norms and harmful gender stereotypes, prejudices and practices are key for the full realization of women's human rights'.[19] States parties, therefore, have an obligation to implement measures aimed at modifying harmful attitudes, behaviours and practices underlying gender discrimination.

Legal socialisation, as suggested by Trinkner and Tyler, 'assumes the law is an essential institution within the fabric of the social environment, one that is just as important in terms of ordering society, guiding human behaviour, and facilitating interpersonal interactions as the home, the school, and other social institutions'.[20] In this regard, article 5 of CEDAW serves as the point of departure for resocialisation, reinforcing the important role the law plays in guiding human behaviour.[21]

17 In this regard it is worth a brief mention here that resocialisation and indoctrination are not synonymous. Indeed, within international human rights law, states are required to educate their population on internationally accepted human rights norms and standards for the purposes of ensuring the alignment of individual behaviour with those norms and standards. Such education is one way in which resocialisation finds expression. Indoctrination implies brainwashing to effect change in a manner that does not usually align itself with international law standards and practices. It has negative connotations to it and is not protected by international law, unlike resocialisation, which is.

18 See CEDAW (n 2) art 5.

19 UN Development Programme 'Tackling social norms: a game changer for gender inequalities' (2020) 6 https://www.un-ilibrary.org/content/books/9789210051705 (accessed 14 July 2023).

20 R Trinkner & TR Tyler 'Legal socialization: coercion versus consent in an era of mistrust' (2016) 12 *Annual Review of Law and Social Science* at 418.

21 CEDAW (n 2) art 5. It states that:
State Parties shall take all appropriate measures:
(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotypes roles for men and women;
(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

In General Recommendation 25, the Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW Committee) affirms articles 1 to 5 of CEDAW as forming the general interpretive framework for all substantive provisions.[22] Here, three central obligations arise comprising *de facto*, *de jure* and transformative equality. As noted by the CEDAW Committee, transformative equality requires addressing 'prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through acts by individuals but also in law, and legal and societal structures and institutions'.[23] It further notes that states must implement temporary special measures to accelerate resocialisation.[24] As article 5 stipulates, such modification is targeted at both women and men, implying the entirety of the population.[25] This includes those responsible for the conceptualisation and implementation of laws and policies to ensure that they remain free from biased and harmful conceptions regarding women and their perceived role in society. Similarly, it mandates the altering and transformation of the attitudes and behaviours of ordinary people.[26]

2.1 Resocialisation as an obligation, right and remedy

Resocialisation as an *obligation* mandates states to respect, fulfil and protect the human rights of women. The *obligation to respect* requires that states

22 UN Committee on the Elimination of Discrimination against Women, 'General Recommendation 25: Article 4, paragraph 1 on the Convention (Temporary Special Measures)' (2004) UN Doc HRI/GEN/1/Rev.1 para 6.

23 General Recommendation 25 (n 22) para 7.

24 General Recommendation 25 (n 22) para 38.

25 Indeed, as noted in the case African Court in *Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali* (merits) (2018) 2 AfCLR 380, the Court notes at para 126 the request for reparations being the education and enlightenment of the *population*. As the cases below also illustrate, the target of resocialisation is context-specific and will largely be determined on the facts of the case. Thus, in some instances, resocialisation as a remedy may only target parts of society, such as the police force, judicial officers and the like, rather than the entire population. This narrow application of resocialisation as a remedy to targeted audiences only simply demonstrates that gaps exist insofar as the interpretation of resocialisation as a remedy is concerned.

26 The CEDAW Committee makes specific reference to the importance of eliminating the root causes of gendered discrimination, such as patriarchal attitudes, in several of its reports to states. See, eg, UN GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (1999) UN Doc A/54/38/Rev.1, where the role of prevailing attitudes serves to impede the realisation of women's rights. See also, UN GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (2004) UN Doc A/59/38; Committee on the Elimination of Discrimination against Women 'Concluding comments: Italy' (2005) UN Doc CEDAW/C/ITA/CC/4-5. See also UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against

refrain from developing and implementing laws, policies, programmes and the like, resulting in the denial of rights.[27] The *obligation to fulfil* mandates the implementation of measures, including temporary special measures, to guarantee *de jure* and *de facto* equality.[28] Thus, the fulfilment of resocialisation requires the adoption of measures targeting harmful social and cultural norms, attitudes and practices, including stereotypes, in an effort to eliminate the root causes of gendered discrimination. Finally, the *obligation to protect* calls on states to exercise due diligence and prevent discrimination at the hands of the state and private actors through resocialisation.[29] Therefore, resocialisation as an obligation implies the implementation of positive steps to prevent violations of rights both at the hands of state and non-state actors and to refrain from actions undermining the rights of women.

Resocialisation as a *right* finds expression with women asserting this right. Within international law, this is made possible through the CEDAW Committee's individual complaints mechanism, which allows for complaints by individuals from states that are party to the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women.[30] As noted by Holtmaat, 'within the

women, 1992, UN Doc A/47/38 as well as 'General Recommendation 35 on Gender-Based Violence against Women, updating General Recommendation 19' (2017) UN Doc CEDAW/C/GC/35.

27 UN Committee on the Elimination of Discrimination against Women, 'General Recommendation 28: Core obligations of state parties under article 2 of the Convention on Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28 para 9.

28 General Recommendation 28 (n 27) para 9.

29 Cusack & Timmer (n 11) 339. Here the authors note that the Committee of CEDAW affirms 'that there is a due diligence obligation inherent in Article 2(f) and 5(a) of CEDAW to address wrongful gender stereotyping by private actors'. See also, African Commission on Human and Peoples' Rights 'Guidelines on Combating Sexual Violence and its Consequences in Africa' (2017) https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf (accessed 19 September 2023) para 7 which provides that '[s]tates must take the necessary measures to prevent all forms of sexual violence and its consequences, particularly by eliminating the root causes of that violence, including sexist and homophobic discrimination, patriarchal preconceptions and stereotypes about women and girls …' This provision refers to the general international law framework that seeks to address sexual violence against women, including CEDAW. See also para 11, which provides that:
'States must conduct campaigns to raise awareness – paying particular attention to the most vulnerable populations – about the causes of sexual violence, the different forms it takes and its consequences. These campaigns must address the root causes of sexual violence, combat gender-stereotypes, raise awareness of unacceptable nature of this violence, and help people to understand that it represents a grave violation of the rights of victims, especially those of women and girls'.

30 UN Optional Protocol to the Convention on the Elimination of All Forms of

framework of the individual complaints procedure, article 5 is conceived of as a right that an individual can invoke against her own government'.[31] This position is confirmed by the CEDAW Committee in several cases, where it finds violations of the right to resocialisation based on the merits of the case.[32]

At a regional level, article 2(2) of the Maputo Protocol is justiciable through the African Commission on Human and Peoples' Rights (African Commission) and the African Court. The latter is only accessible to individuals from states that have made an article 34(6) Declaration in terms of the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol).[33] At present, only eight such declarations are in effect.[34] At a sub-regional level, the ECOWAS Court allows broader access to individuals within member states to file complaints directly with the Court.[35]

Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) UN Doc A/RES/54/4.

31 Holtmaat (n 11) 167.

32 See Communication 138/2018, *SFM v Spain* (28 February 2020) UN Doc CEDAW/C/75/D/138/2018 (2018). Here the CEDAW Committee in considering the merits of the case, notes at para 7.6 a 'violation of the rights of the author under articles … 5 … of the Convention'. See also, Communication 18/2008, *Vertido v Philippines* (22 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010) para 8.9. Note, further, the distinction in language in Communication 47/2012, *Angela González Carreño v Spain* (15 August 2014) UN Doc CEDAW/C/58/D/47/2012 (2014) para 9.7, where the Committee finds that the state 'applied stereotyped and therefore discriminatory notions in a context of domestic violence and failed to provide due supervision, infringing their *obligations* under articles … 5(a) … of the Convention' (emphasis added). Later, at para 10, the Committee notes a violation of *rights* in terms of Article 5(a). This difference in language further supports the position that resocialisation exists as right, just as resocialisation is an obligation.

33 AU Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5 (Protocol on the Establishment of an African Court) See art 5(3) of the Court Protocol, which provides for direct individual access to the African Court where states make such an art 34(6) declaration. Individual access is not provided by default in the Protocol.

34 These are Burkina Faso, Malawi, Mali, Ghana, Tunisia, Gambia, Niger, and Guinea Bissau. See African Court 'Declarations' https://www.african-court.org/wpafc/declarations/ (accessed 13 August 2023).

35 Economic Community of West African States (ECOWAS) 'Supplementary Protocol Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol' (2005) art 10(d). Here, it states that access to the Court is open to '(d) individuals on application for relief for violation of their human rights'.

Finally, the right to a *remedy*, while not explicitly provided for in CEDAW is, according to the CEDAW Committee, implied through article 2(c).[36] Here states are required to 'establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals, and other public institutions the effective protection of women against any act of discrimination'.[37] Remedies take many forms and, in the case of a violation of resocialisation rights, could take the form of resocialisation as a remedy.[38] These remedies are most often expressed through the pleading of applicants in individual complaints, though sometimes by the CEDAW Committee *mero motu*.[39]

While no established pattern is discernible insofar as the CEDAW Committee's approach to resocialisation as a remedy is concerned and while it seemingly takes its cue from the pleadings of individual complaints, the CEDAW Committee, similarly to the African and ECOWAS Courts as further discussed under 5, could benefit from an enhanced understanding and implementation of resocialisation as a remedy. For instance, in *VK*,[40] the author made no requests in terms of resocialisation as a remedy. This is reflected in the CEDAW Committee's omission of resocialisation as a remedy in its findings, missing an opportunity to engage with resocialisation as a remedy and to see the potential thereof. In contrast, the author in *Vertido*[41] provides detailed resocialisation requests to which the CEDAW Committee, in response, provides detailed resocialisation remedies. In *AT*,[42] while the complainant requests resocialisation as a remedy, the CEDAW Committee provides a vague and general remedy instead. Regardless of a lacking pattern, resocialisation as a remedy operates as a means for the enforcement of the right to resocialisation, holding states accountable for their failure to uphold their obligation to modify harmful behavioural and societal patterns of action while aiming to ensure the prevention of future such violations.

36 Communication 22/2009, *LC v Peru* (4 November 2011) UN Doc CEDAW/C/50/D/22/2009 (2011). This is similarly reflected in the Maputo Protocol arts 2, 8 & 25.

37 CEDAW (n 2) art 2(c).

38 See, eg, the cases cited in secs 5.1 and 5.2.

39 For instance, Communication 99/2016, *SL v Bulgaria* (10 September 2019) UN Doc CEDAW/C/73/D/99/2016 (2019).

40 Communication 20/2008, *VK v Bulgaria* (27 September 2011) UN Doc CEDAW/C/49/D/20/2008 (2011).

41 *Vertido* (n 32)

42 Communication 2/2003, *AT v Hungary* (26 January 2005) UN Doc CEDAW/C/36/D/2/2003 (2005).

3 Competing rights

It is trite that, in general terms, human rights are not absolute, with the balancing of rights often a necessity. Women's rights are, however, frequently afforded lesser significance than competing rights, exemplified in the frequent appeals to cultural relativism operating as a prevalent source of oppression.[43] This is true, too, of oppressive patriarchal behaviour in the name of religion.[44] If the purpose of international human rights law is to safeguard the rights and freedoms of all, including those of women, the current default practice of discounting women's rights in favour of other rights cannot survive critical scrutiny.[45]

The point of departure when balancing rights is that '[a]ll human rights are universal, indivisible and interdependent and interrelated'.[46] States are required to promote and protect all human rights in 'a fair and equal manner, on the same footing, and with the same emphasis'.[47] As the former Special Rapporteur on Freedom of Religion and Belief suggests, 'on a normative level, human rights norms must be interpreted in such a way that they are not corrosive of one another but rather reinforce each other'.[48] Despite this view, however, harmful cultural practices and oppression in the name of religion continue to undermine efforts at realising the rights of women, contrary to international human rights law.

Harmful cultural practices in this regard not only refer to practices steeped in years of tradition and custom, or those practices of a religious nature, but equally refer to behaviours characterising societies considered 'westernised', those assumed to be lacking a singular dominating, or motivating cultural or religious tradition.[49] Insofar as women's rights are

43 UN General Assembly Report of the Special Rapporteur in the field of cultural rights 'Cultural rights' (2012) UN Doc A/67/287 para 3; UN Human Rights Council, 'Freedom of religion or belief' (2020) UN Doc A/HRC/43/48.

44 UN General Assembly Report of the Special Rapporteur in the field of cultural rights (n 43) para 3; UN Human Rights Council (n 43) para 8.

45 UN General Assembly Report of the Special Rapporteur in the field of cultural rights (n 43); UN Human Rights Council (n 43).

46 The World Conference on Human Rights 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23 para 5.

47 UN General Assembly Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance* (2013) UN Doc A/68/290 para 19.

48 As above.

49 Sepper (n 11). Some examples include the gender pay gap, motherhood penalty and parental leave rights.

concerned, the culture of discrimination against women does not solely manifest itself in GBV such as female genital mutilation, child marriages or honour killings, practices egregious in nature, often justified as discipline for women violating patriarchal constructs and norms relating to the role of women in society. They similarly find expression in normalised 'lesser' infringements such as degrading language found in music lyrics[50], sexual harassment in the workplace, online harassment of women on social media, the gender pay gap and other such examples, which speak to common perception and belief in the inferiority of women. These, too, constitute a cultural practice of discrimination and violence against women.[51] Failure to include all cultural practices within the rubric of discrimination against women for which resocialisation is required inevitably results in the demonising of groups that have historically faced imperialism and criticism for their differences while providing other states with an out insofar as their own obligations to modify harms is concerned. Caution ought to be exercised, therefore, that the dominant and inaccurate view of the 'West' as progressive and the rest as backward does not infiltrate and influence the discourse on women's rights.[52] In the African context, a dominating and singular focus on egregious, harmful practices to the exclusion of other infringements fails to consider the impact that all forms of harmful cultural practices have on the rights and freedoms of African women, implicating pockets of society while absolving others.

Women's rights and cultural or religious rights do not always operate in conflict with one another. The contemporary view of cultural and religious rights as inherently oppressive to women is, therefore, inaccurate. As Xanthaki notes, 'the binary vision of culture versus women's rights is

50 A Rudman "'Whores, sluts, bitches and retards" – what do we tolerate in the name of freedom of expression?' (2012) 26 *Agenda* at 72. While it remains beyond the scope of this paper, it is worth noting that the right to freedom of expression is limited where expression manifests in harm, which is often the case when normalised, derogatory lyrics perpetuate harmful narratives about the worth and value of women, legitimising discrimination on the basis of inferiority to men.

51 Joint General Recommendation (n 3). At para 15, the CEDAW Committee notes that '[h]armful practices are persistent practices and forms of behaviour that are grounded in discrimination on the basis of, among other things, sex, gender and age, in addition to multiple and/or intersecting forms of discrimination that often involve violence and cause physical and/or psychological harm or suffering. The harm that such practices cause to the victims surpasses the immediate physical and mental consequences and often has the purpose or effect of impairing the recognition, enjoyment and exercise of human rights and fundamental freedoms of women and children'.

52 As an example, focusing attention only on states where female genital mutilation and child marriage is dominant overlooks the egregious harms states such as the United States of America inflict on women through their anti-abortion stance. See RJ Cook 'Women's international human rights law: the way forward' in RJ Cook (ed) *Human rights of women: national and international perspectives* (1994) 7.

overly simplistic and ultimately harms women's rights'.[53] The same is true of rights to freedom of religion and belief, where religion is conceived of in predominantly negative terms insofar as women are concerned, resulting in the marginalisation of women from religious groups.[54] Taking an intersectional approach,[55] which understands that human beings comprise multiple identities, often resulting in compounded discrimination, the value of recognising the importance of religious and cultural freedoms as a crucial component of the rights of some women becomes that much more acute. Notwithstanding, however, oppression in the name of culture and religion remains a reality, often employed as a shield against criticism of harmful practices that violate the rights of women.

In this regard, it is useful to note that the right to culture includes the right to choose a particular culture and the right not to participate in specific traditions.[56] The violence and discrimination women experience due to harmful practices in the name of culture, therefore, is antithetical to the right to culture and falls outside of its ambit.

The Maputo Protocol is reflective of the positive aspect of the right to culture with its inclusion of article 17.[57] This provision speaks to the right of women to a positive cultural context, which necessarily excludes those contexts threatening the integrity of women's rights. The legal guarantee given to women through article 17 enjoins states to ensure that women possess the necessary freedom to choose cultural contexts that suit their greater good, discarding those that do not. It also guarantees the right of women to participate in the formulation of cultural policies based on African values without fear of intimidation or retribution.[58] The

53 A Xanthaki 'When universalism becomes a bully: revisiting the interplay between cultural rights and women's rights' (2019) 41 *Human Rights Quarterly* at 702.

54 UN General Assembly Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt (n 47) para 17.

55 K Crenshaw 'Demarginalizing the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *The University of Chicago Legal Forum* art 8.

56 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 3 UNTS 993. Article 15 stipulates that 'everyone has the right to freely participate in the cultural life of the community'. See also UN General Assembly Report of the Special Rapporteur in the field of cultural rights (n 43) para 25.

57 Maputo Protocol (n 2) art 17.

58 The Maputo Protocol's Preamble ensures that African values are determined 'based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy'. In this regard, it is useful to briefly note that no margin of appreciation exists with respect to how states balance rights. Aside from the fact that the theory of the margin appreciation finds its origins in Europe, finding little equivalence and emphasis in the

African Commission interprets the right to culture as 'positive African values consistent with international human rights standards, and implies an obligation on the state to ensure the eradication of harmful traditional practices that negatively affect human rights'.[59] Thus, appeals to cultural rights as justification for discrimination are untenable given that the right to culture protects positive practices and the rights of individuals to choose whether and if they want to participate in such cultures. This is similarly true for the right to freedom of religion and belief. This right does not allow harmful practices against women and girls to be undertaken in the name of religion. As the former Special Rapporteur on Freedom of Religion and Belief notes, '[i]t can no longer be taboo to demand that women's rights take priority over intolerant beliefs that are used to justify gender discrimination'.[60]

Cultural and religious rights remain the rights most frequently employed as justification for discrimination against women.[61] International law does not, however, protect harmful practices in the name of culture and religion.[62] In addition to the fundamental right of individuals to choose their own culture and religion, the very nature and existence of resocialisation as a tool to modify harmful socio-cultural patterns of conduct, attitudes and stereotypes underlying harmful practices confirms

African context, states are required to operate within the bounds of cultural rights as a choice, and the African values as defined by the Maputo Protocol's Preamble, amongst others. Equality remains at the heart of African values, dictating the realisation of the rights of women including their rights to positive cultural contexts over harmful cultural and religious practices. No room exists for states to suggest otherwise. While beyond the scope of this chapter, it is helpful to note the findings of the African Commission on Human and Peoples' Rights with regard to the margin of appreciation. In the case of *Garreth Anver Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004), the Commission at 4, takes exception to the South African state's restrictive construction of this doctrine as permitting wide discretionary decision-making powers based on its intimate knowledge of societal functioning 'and the fine balance that need[s] to be struck between the competing and sometimes conflicting forces that shape a society'. It notes at 7, in this regard, that whatever discretion the margin of appreciation does confer on the state, it does not remove the promotional and protectional mandate of the Commission in instances where 'domestic practices [are found] wanting'.

59 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' (November 2010) https://www.achpr.org/legalinstruments/detail?id=30 (accessed 14 August 2023) para 75.

60 UN General Assembly, Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangi, 'Elimination of all forms of religious intolerance' (2010) UN Doc A/65/207 para 69.

61 MR Abdulla 'Culture, religion, and freedom of religion or belief' (2018) 16 *The Review of Faith and International Affair*s at 102.

62 Joint General Recommendation (n 3) para 7.

the position that such practices are unprotected, even if in the name of cultural or religious rights.[63]

4 The CEDAW Committee on resocialisation

The significant role that resocialisation plays in international human rights law is aptly displayed in the General Recommendations of the CEDAW Committee and in its decisions. The CEDAW Committee has long been vocal on the barriers to gender equality, including those due to 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes'.[64] The CEDAW Committee notes that:

> the causes of harmful practices are multidimensional and include stereotyped sex – and gender-based roles, the presumed superiority or inferiority of either of the sexes, attempts to exert control over the bodies and sexuality of women and girls, social inequalities and the prevalence of male-dominated power structures. Efforts to change the practices must address those underlying systemic and structural cases of traditional, re-emerging and emerging harmful practices, empower girls and women and boys and men to contribute to the transformation of traditional cultural attitudes that condone harmful practices, act as agents of such change and strengthen the capacity of communities to support such processes.[65]

As evidenced by the above statement, the CEDAW Committee supports and encourages resocialisation. Similarly, in its General Recommendation 35, which updates General Recommendation 19 on violence against women, the Committee notes that states are required to 'address the underlying causes of gender-based violence against women, including patriarchal attitudes and stereotypes'.[66]

The individual complaints mechanism has also provided insight into the importance placed on resocialisation as a means for the realisation of the substantive rights of women. For instance, in *SFM*,[67] the CEDAW Committee was faced with a matter involving obstetric violence. Here the author experienced discrimination at the hands of health professionals

63 UN Educational, Scientific and Cultural Organisation (UNESCO) 'UNESCO Universal Declaration on Cultural Diversity' (2001) art 4. See also Joint General Recommendation (n 3).

64 CEDAW (n 2) art 5(a).

65 Joint General Recommendation (n 3) para 17.

66 General Recommendation 35 (n 26) para 24.

67 *SFM* (n 32).

who forced her to undergo unnecessary medical interventions, resulting in trauma. The harms the author experienced resulted from dominant stereotypes, including those that perpetuate the narrative of women being valuable only insofar as their reproductive roles are concerned. Her voice and wishes were disregarded entirely and substituted for those of biased healthcare professionals who believed that women are not only incapable of making their own decisions but should, as a result, simply follow the orders of doctors without question.[68] In *Belousova*,[69] a case involving sexual harassment in the workplace, the Committee emphasises that states have an obligation to 'modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and a consequence of discrimination against women'.[70] *Carreño*[71] is yet another example of how resocialisation could have prevented violence against women. Here the CEDAW Committee notes the lack of protection afforded to the author who, despite lodging several complaints against the perpetrator for verbal, physical and psychological abuse, was ignored by authorities.[72] The Committee confirms that the 'unresponsiveness of the administration and courts to the violence suffered by the author points to the persistence of prejudices and negative stereotypes, taking the form of an inadequate appreciation of the seriousness of her situation'.[73] Resocialisation may have prevented the authorities from applying stereotyped and discriminatory notions to the facts of the case, prohibiting unsupervised visitation rights to the author's daughter, thereby preventing her death.[74] Instead, those harmful notions and conceptions about women dictated a lack of action, resulting in a failure to protect the author and her daughter.

Moreover, harmful practices have the potential to result in the denial of other substantive rights of women, such as access to justice. In this regard, several cases have been brought before the CEDAW Committee that highlight the impact that harms such as gender stereotyping have on

68 *SFM* (n 32) para 3.7.

69 Communication 45/2012, *Belousova v Kazakhstan* (25 August 2015) UN Doc CEDAW/C/61/D/45/2012 (2015).

70 *Belousova* (n 69) para 10.10.

71 *Carreño* (n 32).

72 *Carreño* (n 32) para 3.3.

73 *Carreño* (n 32) para 3.5.

74 *Carreño* (n 32) para 9.7.

women's rights to access to justice.[75] In *X&Y*,[76] the CEDAW Committee engages with the problematic nature of stereotyping and the impact such have on the right to access to justice, noting that:

> [t]he Committee also emphasizes that the full implementation of the Convention requires State parties … to modify and transform gender stereotypes and eliminate wrongful gender stereotyping, a root cause and a consequence of discrimination against women … The Committee also stresses that stereotyping affects the right of women to a fair trial and that the judiciary must be careful not to create inflexible standards on the basis of preconceived notions of what constitutes domestic or gender-based violence.[77]

Again, the Committee notes the indispensable role of resocialisation in ensuring substantive gender equality. The rights of women to equal inheritance and to protection from unfair dismissal are similarly implicated in cases brought before the CEDAW Committee. In *RKB*,[78] the Committee confirms that the domestic court allowed stereotypes to influence its reasoning and judgment, all while remaining silent on the inclusion of discriminatory and gender-biased evidence provided by the employer in defence of the dismissal in question. In particular, it notes the problematic nature of the Court examining 'the evidence adduced by the employer and scrutiniz[ing] only the moral integrity of the author, 'female' employees and not that of male employees'.[79] In *ES & SC*,[80] which dealt with inheritance rights, the CEDAW Committee importantly held that 'the application of discriminatory customs perpetuates gender stereotypes and discriminatory attitudes about the roles and responsibilities of women and prevents women from enjoying equality of status in the family and in society at large'.[81]

75 See, eg, *Vertido* (n 32) paras 3.5.1-3.5.7; Communication 34/2011, *RPB* (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014) para 3.3; *Carreño* (n 32) para 3.10; Communication 32/2011, *Jallow v Bulgaria* (28 August 2012) UN Doc CEDAW/C/52/D/32/2011 (2012) para 8.6.

76 Communication 100/2016, *X & Y v Russian Federation* (9 August 2019) UN Doc CEDAW/C/73/D/100/2016 (2019).

77 *X & Y* (n 76) para 9.9.

78 Communication 28/2010, *RKB v Turkey* (13 April 2012) UN Doc CEDAW/C/51/D/28/2010 (2012).

79 *RKB* (n 78) para 8.7.

80 Communication 48/2013, *ES & SC v Tanzania* (13 April 2015) UN Doc CEDAW/C/60/D/48/2013 (2015).

81 *ES & SC* (n 80) para 7.5

5 The African regional legislative framework

Article 18(3) of the African Charter[82] enjoins states to ensure the elimination of discrimination against women.[83] This is the point of departure insofar as resocialisation on the continent is concerned. Additionally, article 25 provides a general duty to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms'. Such an exercise implies resocialising people, through teaching, education, and publication, on rights and freedoms contained in the African Charter, including the rights conferred by article 18(3). While this provision is general and unspecific in scope, the promotion of respect for the rights and freedoms contained in the African Charter implies an ongoing process of resocialisation targeted at everyone. This provision provides credence to the assertion that resocialisation is a legislatively mandated requirement.

Supplementing the protection afforded by the African Charter by providing more comprehensive protections, the Maputo Protocol is a notable advancement in the field of women's rights on the continent. As referred to in the introduction, it refers to resocialisation in several provisions, the central provision being article 2(2), which largely echoes article 5 of CEDAW.[84]

In addition to article 2(2), article 5 of the Maputo Protocol targets harmful practices, defined as 'all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls'.[85] Moreover, article 4(2)(d) speaks to the obligation of states to uphold the rights of women to life, integrity, and security of person. In doing so, it mandates the implementation of measures to 'actively promote peace education through curricula and social communication in order to eradicate elements in traditional and cultural beliefs, practices and

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

83 Over and above this regional obligation on states, CEDAW remains almost universally applicable to African states too. Thus, its provisions, including art 5's resocialisation provision, must influence the manner in which African states engage with the rights of women as contained in the African Charter.

84 Maputo Protocol (n 2) art 2(2) which states that:
States Parties shall commit themselves to modify the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies, with a view to achieving the elimination of harmful cultural and traditional practices and all other practices which are based on the idea of the inferiority or superiority of either of the sexes, or on stereotyped roles for women and men.

85 Maputo Protocol (n 2) art 1(g).

stereotypes which legitimise and exacerbate the persistence and tolerance of violence against women'.[86] Article 8 protects women's access to justice, with article 8(c) specifically referring to the establishment of educational and other structures with a view to sensitising everyone on the rights of women, while article 8(d) proscribes that law enforcement organs at all levels must be 'equipped to effectively interpret and enforce gender equality rights' clearly implying an educational process. Article 12 provides for the right to education, with article 12(b) obligating states to 'eliminate all stereotypes in textbooks, syllabuses and the media, that perpetuate … discrimination'.[87] Article 17, as mentioned under section 3 above, protects the rights of women to a positive cultural context.[88] Finally, article 25 refers to the right to a remedy involving both a procedural and substantive right.

The inclusion of resocialisation in multiple provisions in the African Charter and the Maputo Protocol underscores the prevalence of deeply embedded harmful conceptions and stereotypes regarding the role and value of women in society and the critical yet overlooked role that resocialisation plays in addressing the root causes of discrimination, impacting the lived realities of women. The following sub-sections reference and discuss claims of GBD and GBV against women and relate these violations to claims of resocialisation made before the African and ECOWAS Courts.

5.1 The African Court

5.1.1 APDF v Mali

The African Court had, at the time of writing this chapter, only decided one matter based on the Maputo Protocol, in *APDF*.[89] The respondent state, Mali ratified the Maputo Protocol in 2005. Therefore, the point of departure in *APDF* was an effort from Mali's side to bring its family laws in line with the Maputo Protocol.[90] To accomplish this, the Malian

86 Maputo Protocol (n 2) art 4(2)(d).

87 Maputo Protocol (n 2) art 12(3).

88 Maputo Protocol (n 2) art 17.

89 *APDF* (n 25). For a further discussion on this case see A Rudman 'The responsiveness of continental and regional courts in providing redress to African women as victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* at 437-440.

90 African Union List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2019) https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20

government made a wide-ranging attempt to codify existing family rights. After broad popular consultation, a draft bill establishing the Persons and Family Code (2009 Code) was adopted. However, the 2009 Code was not promulgated due to extensive protests by Islamic organisations.[91] These protests eventually swayed the government to abandon the 2009 Code and draft a new Code, which was adopted in December 2011 (2011 Code).

The applicants, in this case, approached the Court with claims that sections of the 2011 Code violated articles 2(2), 6(a) and (b) and 21(2) of the Maputo Protocol.[92] In this regard, they set out four main arguments. First, the stipulated minimum age for marriage was different for boys (18 years) than for girls (16 years).[93] Second, the 2011 Code preserved religious and customary law by default as the applicable legal regime with regard to inheritance. Third, the consent from the parties to a marriage differed between civil marriages and traditional/religious marriages. Finally, the argument that is of most interest to the discussion in this chapter is that these breaches represented an unwillingness on the part of Mali to eradicate harmful cultural practices common within Malian society.

Two parts of the judgment can be used to highlight Mali's position on the impact of the social construct and, arguably, resocialisation in Mali. First, as a response to the applicants' question about why Mali shelved the 2009 Code, it stated that:

> [A] mass protest movement against the [2009] Family Code halted the process; … the State was faced with a huge threat of social disruption, disintegration of the nation and upsurge of violence, the consequence of which could have been detrimental to peace, harmonious living and social cohesion; that the mobilisation of religious forces attained such a level that no amount of resistance action could contain it.[94]

Second, against this background, Mali tried to justify its failure to uphold the rights in the Maputo Protocol. In this regard, Mali brought forward arguments as to why it should have been allowed to deviate from the legal obligations in articles 6 and 21 of the Maputo Protocol. Regarding

WOMEN%20IN%20AFRICA.pdf (accessed 14 August 2023).

91 *APDF* (n 25) para 6.

92 The applicants also submitted claims under other international instruments not further discussed in this chapter. See *APDF* (n 25) para 9.

93 The applicants further indicated, at para 60, that the 2011 Family Code allows for special exemption for marriage from 15 years, with the father's or mother's consent for the boy, and only the father's consent, for the girl.

94 *APDF* (n 25) para 64.

the visible discrimination against girls in relation to marriable age, Mali suggested that:

> [T]he established rules must not eclipse social, cultural and religious realities; that the distinction contained in … the Family Code should not be seen as a lowering of the marriage age or a discrimination against girls, but should rather be regarded as a provision that is more in line with the realities in Mali; that it would serve no purpose to enact a legislation which would never be implemented or would be difficult to implement to say the least; that the law should be in harmony with sociocultural realities; that it would serve no useful purpose creating a gap between the two realities, especially as, according to the Respondent State, at the age of fifteen (15), the biological and psychological conditions of marriage are in place, and this, in all objectivity, without taking sides in terms of the stance adopted by certain Islamist circles.[95]

From these submissions, it can be concluded that rather than harmonising social and cultural practices with existing legal obligations under the Maputo Protocol, Mali suggested that legal obligations be harmonised with its sociocultural 'realities'. This shows a limited understanding of the position of international obligations, alongside a complete disregard for women's experiences of these sociocultural realities and the state's responsibilities under the Maputo Protocol to resocialise the populace in furtherance of women's rights.[96]

After interpreting and applying the relevant provisions of the Maputo Protocol, the African Court found that some sections of the 2011 Family Code[97] indeed violated the minimum age for marriage, the right to consent to marriage and the right to inheritance for women.[98] It held that by adopting the 2011 Code, the Respondent maintained discriminatory practices protected therein, which in turn undermined the rights of women in Mali.[99] For the purposes of the analysis in this chapter and in relation to the violation of article 2(2) of the Maputo Protocol, the applicants requested Mali to introduce a:[100]

95 *APDF* (n 25) para 66.

96 *APDF* (n 25).

97 2011 Family Code, secs 283-287.

98 Maputo Protocol (n 2) arts 6(d), 6(a) & 21(2).

99 *APDF* (n 25) para 124.

100 *APDF* (n 25) para 16.

(i) sensitisation programme on the dangers of early marriage;
(ii) training programme for religious ministers on the procedure for contracting a marriage;
(iii) sensitisation and educational programme to ensure equal share of inheritance; and,
(iv) strategy to eradicate unequal share of inheritance between men and women.

In this regard, article 2(2) refers to state parties' obligations to 'modify social and cultural patterns … through public education'. As such, this is a clear legal obligation resting on the state party. In *APDF* the Court determined that such obligations require state parties to 'promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights, as well as corresponding obligations and duties, are understood'.[101] From this perspective, *APDF* is not only a landmark case with respect to the material findings but also with regard to its interpretation and application of article 27(1) on the remedies of the Court.[102]

5.2 The ECOWAS Court

5.2.1 Hadijatou Mani Koraou v Niger

Compared to the African Court, the ECOWAS Court has produced a larger number of judgments that involve women's rights.[103] In *Hadijatou Mani Koraou*,[104] the issue of slavery under the guise of traditional practices was dealt with. Although this case does not refer to the Maputo Protocol, the ECOWAS Court was confronted with the applicant's supplicates for resocialisation, situating this case within the ambit of the discussion in this chapter.

101 *APDF* (n 25) para 131, referring to the African Charter art 25.

102 Protocol on the Establishment of an African Court (n 33) art 27(1) stipulates that: '[i]f the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation'.

103 In addition to the cases discussed in this chapter see for example *Mary Sunday* v *Federal Republic of Nigeria* Judgment No ECW/CCJ/JUD/11/18 (2018); *Aircraftwoman Beauty Igbobie Uzezi v The Federal Republic of Nigeria* ECW/CCJ/JUD/11/21 (2021); *Ekundayo Idris v Federal Republic of Nigeria* ECW/CCJ/JUD/09/22 (2022) and *Adama Vandi v State of Sierra Leone* ECW/CCJ/JUD/32/22 (2022).

104 *Hadijatou Mani Koraou v Republic of Niger* ECW/CCJ/JUD/06/08 (2008). There is no official English version available of this case. Therefore, the unofficial translation of the original French text was used in this analysis, available at https://www.refworld.org/cases,ECOWAS_CCJ,496b41fa2.html (accessed 14 August 2023). For a further discussion on this case see Rudman (n 89).

On the merits of the case, in 1996, the then 12-year-old Hadijatou Mani Koraou (Ms Koraou or applicant) was sold to a 46-year-old tribal chief (Chief). Ms Koraou was to become his fifth wife under the *Wahiya* custom.[105] Under this custom, a '*Sadaka*' or 'fifth wife' is a wife who is not one of the legally married wives.[106] The *Sadaka* traditionally takes care of the housework and 'services' the 'master'.[107] The Chief could, at any time, have sexual relations with Ms Koraou. The first sexual act was imposed on her shortly after she became a Sadaka.[108] Nine years later, the Chief terminated the 'agreement'. However, he declared that she was still his wife and that she was not allowed to leave his house.

Before the ECOWAS Court Ms Koraou argued that she had been subjected to slavery, GBD and that she had been deprived of her right of access to justice.[109] Ms Koraou submitted that she was a victim of slavery, violence, and discrimination through the application of customary law because she is a woman and that she, as a woman, could find no remedy before the domestic courts. Niger argued that Ms Koraou was not a slave but rather the wife of her enslaver, with 'whom she lived with more or less in happiness as any couple'.[110]

As with the statements of Mali in *APDF* as quoted above in section 5.1.2 this statement demonstrates Niger's complete lack of appreciation for the position of women within the context of harmful social practices. On the issue of slavery, the ECOWAS Court found in favour of Ms Koraou.[111] Importantly, the court held that Niger had not done enough to protect Ms Koraou against the Wahiya custom as a form of harmful cultural practice, stating that this responsibility resulted from 'the tolerance, passiveness, inaction, and abstention'[112] of the authorities. In relation to these violations, Ms Koraou requested the ECOWAS Court to prescribe the following remedies:[113]

105 *Hadijatou Mani Koraou* (n 104) para 8.

106 *Hadijatou Mani Koraou* (n 104) para 9.

107 *Hadijatou Mani Koraou* (n 104) para 10.

108 *Hadijatou Mani Koraou* (n 104) para 11.

109 In violation of the African Charter arts 1, 2, 3, 5, 6 & 18(3).

110 *Hadijatou Mani Koraou* (n 104) para 78.

111 *Hadijatou Mani Koraou* (n 104) para 85.

112 As above.

113 *Hadijatou Mani Koraou* (n 104) para 28.

(a) Condemn the Republic of Niger for violation of Articles 1, 2, 3, 5, 6 and 18(3) of the African Charter of Human and Peoples' Rights;
(b) Request Niger authorities to adopt legislation that effectively protects women against discriminatory customs relating to marriage and divorce;
(c) Ask Niger authorities to revise the legislation relating to Courts and Tribunals in order to enable justice to fully play its part in order to safeguard victims of slavery;
(d) Urge the Republic of Niger to abolish harmful customs and practices founded on the idea of women's inferiority;
(e) Grant Hadijatou Mani Koraou a fair reparation for the wrong she was victim of during the 9 years of her captivity.

The ECOWAS Court only responded to the applicant's compensation claim.[114] Thus, it rejected the requests for the adoption of legislation and importantly for the discussion in this chapter it ignored the plea to instruct the state to abolish harmful practices. In rejecting this aspect of Ms Koraou's request, the ECOWAS Court arguably failed to apply the obligation under articles 1, 2 and 25 of the African Charter to resocialise the relevant societies to abolish harmful customs and practices founded on the idea of women's inferiority.

5.2.2 Dorothy Njimenze v Nigeria

Nigeria became a party to the Maputo Protocol in 2005.[115] When the ECOWAS Court handed down its judgment in *Dorothy Njemanze*[116] it became the first international court to pronounce on violations of the Maputo Protocol. Dorothy Njemanze, Edu Oroko,[117] Justina Etim, and Amarachi Jessyford brought claims of sexual and GBV, cruel, inhuman, degrading, and discriminatory treatment. They complained about having been abducted, arbitrarily arrested, beaten, sexually harassed, sexually violated, humiliated, and degraded at the hands of the Abuja Environmental Protection Board and the Society against Prostitution and Child Labour as agents of the Nigerian state.

The underlying reason for their ordeals, as confirmed by the state, was that they were perceived (by the state) to be 'prostitutes' or at least

114 The ECOWAS Court awarded 10 000 000 CFA francs in damages.

115 African Union List of countries (n 90).

116 *Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v The Federal Government of Nigeria* ECW/CCJ/JUD/08/17 (2017). For a further discussion on this case see Rudman (n 89).

117 The second applicant's action was statute barred for not having been brought within the three-year period stipulated by Supplementary Protocol art 9(3).

perceived to be related to prostitution either by involving themselves with women that were branded by the authorities as 'prostitutes' or by being in the wrong place at the wrong time.[118] In this regard, the applicants pleaded for two types of remedies under the Maputo Protocol: financial compensation for the pain, suffering and harm to their dignity; and orders to:[119]

(a) enact laws eliminating all forms of violence against women;
(b) train police, prosecutors, judges on laws on violence against women and provide gender sensitivity training to the same;
(c) create specialised police units and courts dealing with cases of violence against women;
(d) provide support services for victims of SGBV; and
(e) implement awareness-raising education and communication strategies aimed at the eradication of beliefs, practices and stereotypes which legitimize and exacerbate the persistence and tolerance of violence against women.

The ECOWAS Court awarded damages for the breach of the applicants' human rights.[120] It, however, did not engage with any of the five broad-based, educational, and preventative measures requested by the applicants, failing in its obligation to uphold the state's responsibility towards resocialisation.

5.2.3 Aminata Diantou Diane v Mali

In *Aminata Diantou*,[121] the ECOWAS Court was faced with deep-rooted patriarchal structures set within the context of a male-dominated household and the influence of men within the extended family.

Here, the applicant was subjected to various forms of abuse by her family-in-law following a stroke that rendered her husband incapacitated. Ms Aminata claimed that after her husband fell ill, she was physically assaulted by her brothers-in-law, who also confiscated most of her and her husband's property. Ms Aminata's in-laws then proceeded to abduct her husband, taking him to an unknown location, leaving Aminata alone with their five children, the youngest aged 4.[122] After the abduction, Ms

118 *Dorothy Njemanze* (n 116) 15, para 5.3.

119 *Dorothy Njemanze* (n 116) 12-13.

120 The ECOWAS Court awarded 6 000 000 Naira in damages.

121 *Aminata Diantou Diane v Mali* ECW/CCJ/JUD/14/18 (2018). For a further discussion on this case see Rudman (n 89) 449-452. *Hadijatou Mani Koraou* (n 104) para 8.

122 *Aminata Diantou* (n 121) para 10.

Aminata's brothers-in-law presented her with a power of attorney, giving them the power to administer Ms Aminata's and her husband's property. At the same time, the three brothers initiated divorce proceedings between Ms Aminata and her husband.

On the merits, the applicant raised two principal issues. First, the violation of the right to the protection of Ms Aminata's person as a wife and that of her family (including her rights to dignity and property).[123] Second, the right to a fair hearing within a reasonable time is violated.[124] As with the applicants in Mani Koraou and Dorothy Njemanze, Aminata requests the Court to take a broader, systemic view – to acknowledge that her experience was not an isolated event. In this regard, Aminata, similar to the victims in Mani Koraou and Dorothy Njemanze, pleaded with the ECOWAS Court to order the state to:[125]

(a) enact a law repressing all forms of violence against women;
(b) organise the training of the police, prosecutors, judges on the effective implementation of the laws protecting women's rights against violence;
(c) create specialised units within the police and courts to deal with cases of violence against women;
(d) adopt other legislative, administrative, social and economic measures necessary for the elimination of violence and all forms of discrimination against women;
(e) provide support services to women victims of violence; and
(f) develop and implement awareness, education, and communication strategies for the eradication of the customs, practices, and stereotypes that legitimise and exacerbate the persistence and tolerance of violence and discrimination against women.

As in *Hadijatou Mani Koraou* and *Dorothy Njemanze* the Court took no notice of these remedies and dismissed them without further engagement. The ECOWAS Court only upheld the claim of compensation in relation to the breach of Aminata's right to access to justice.[126]

6 Conclusion

Feminist legal theory asserts that the law is not neutral. On the contrary, it legitimates patriarchal oppression. Thus, it is unsurprising that the

123 In violation of the African Charter arts 1, 3 & 18(3) and the Maputo Protocol arts 2, 3, 4, 6.

124 In violation of the Maputo Protocol arts 8 & 25.

125 *Aminata Diantou* (n 121) para 11.

126 The ECOWAS Court awarded 15 000 000 CFA francs in damages.

rights and freedoms of women, which have traditionally been viewed with comparatively less concern *vis-à-vis* other rights, remain out of reach despite the existence of progressive laws seeking to protect women. Laws, regulations, policies and the like, while often reflective of the equal humanity and dignity of women, fail to impact the lived realities of women in a meaningful way because their utility remains subject to the attitudes, norms, and stereotypes that inform their application. Thus, the position of women will not improve until such time as a greater emphasis is placed on resocialisation.

Resocialisation seeks to address the underlying causes of gendered discrimination by modifying existing harms in favour of those acknowledging the inherent dignity and value of women and girls. This internationally and regionally mandated requirement finds expression in measures taken by the state in fulfilment of this obligation as well as through individuals asserting their rights to resocialisation. Resocialisation as a remedy provides yet another means with which to hold states accountable for their inaction. Viewing resocialisation through this triple approach – as an obligation, right and remedy – not only bolsters the utility of resocialisation but also acknowledges the approach taken by the CEDAW Committee thus far.

The transformative potential of resocialisation finds its roots in the General Recommendations of the CEDAW Committee, signals the significant role that resocialisation plays in the realisation of the rights of women, and finds expression in the decisions of the CEDAW Committee. Noting the prevalence of wrongful gender stereotyping as well as those of harmful notions and conceptions about women as underpinning acts of discrimination, the CEDAW Committee emphasises that the adequate implementation of CEDAW and the realisation of rights requires the active engagement of states with resocialisation. In the cases discussed in this chapter, relating to GBV, access to justice, equal inheritance, unfair labour practices and the right to health, the CEDAW Committee draws on resocialisation to encourage state compliance with general CEDAW obligations to reinforce resocialisation as a right belonging to women and employs resocialisation as a remedy in cases where its absence has notably impacted the rights and freedoms of women. Through such an analysis, the emergence of best practices becomes apparent and instructional at a regional level.

In analysing the responsiveness of the African and ECOWAS Courts to resocialisation through the relevant case law, it is clear that the scope for enhancing the capacity to understand the value and import of resocialisation remains vast. Indeed, its application is similarly capable

of enhancement. *APDF,* the only case at the African Court to refer to resocialisation, provides an illuminating example of the effects of harmful socio-cultural norms, attitudes, and stereotypes on the rights of women. Whereas the Court was given an opportunity to deeply engage with resocialisation in terms of the Maputo Protocol, it refers to resocialisation only in terms of the remedy and, even then, in terms of article 25 of the African Charter. Thus, it failed to engage with resocialisation as contained in the Maputo Protocol, arguably missing an opportunity for meaningful engagement with resocialisation.

The ECOWAS Court has, in contrast, been faced with more than one case where resocialisation featured in the pleadings of the applicants. In *Mani Koraou*, while the Court found the state had failed to protect Ms Koraou against a harmful cultural practice, it overlooked the necessity of ordering resocialisation as a remedy, as prayed for, and simply responded to the claim for monetary compensation. This act of overlooking resocialisation arguably demonstrates a lack of appreciation regarding the necessity of resocialisation to realising the rights of women in terms of the African Charter. The Court in *Dorothy Njimenze* was given the first opportunity to pronounce on violations to the Maputo Protocol and yet failed to engage with any of the broad-based, educational, and preventative measures requested by the applicants. This, too, demonstrates an underutilisation of resocialisation and a lack of appreciation of its utility. Equally, in the case of *Aminata Diantou*, the Court again missed an opportunity to engage with resocialisation, dismissing any requests for resocialisation as a remedy.

Evidently, the responsiveness of the African and ECOWAS Courts to resocialisation could be enhanced. Notwithstanding these missed opportunities, the African regional system is presented with a unique opportunity to address resocialisation using the Maputo Protocol as its point of departure and to do so correctly while still in its comparatively early stages of jurisprudence. No formula exists for the African and ECOWAS Courts to implement when resocialisation surfaces. Often the facts of a case dictate the content and scope of resocialisation measures on a more practical level. However, this chapter provides conceptual clarity on the legal requirements of an overlooked concept by raising it out from obscurity into the discourse on gender equality. While the topic of resocialisation is given comparatively less attention than the other substantive rights of women, the practice of the CEDAW Committee provides ample scope for the development of resocialisation at a regional level. Where a greater emphasis is placed on resocialisation, the capacity to engage with it develops. The realisation of women's rights remains contingent upon this.

Table of abbreviations

CEDAW	Convention on the Elimination of Discrimination against Women
ECOWAS	Economic Community of West African States
GBD	Gender-based discrimination
GBV	Gender-based violence
IHRDA	Institute for Human Rights and Development in Africa
SGBV	Sexual and gender-based violence

Literature

Abdulla MR 'Culture, religion, and freedom of religion or belief' (2018) 16 *The Review of Faith and International Affair*s 102-115

African Commission on Human and Peoples' Rights 'Guidelines on Combating Sexual Violence and its Consequences in Africa' (2017) https://www.achpr.org/public/Document/file/English/achpr_eng_guidelines_on_combating_sexual_violence_and_its_consequences.pdf

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' (November 2010) https://wwaw.achpr.aorg/legalinstruments/detail?id=30

African Union 'List of countries which have signed, ratified/acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (2019) https://au.int/sites/default/files/treaties/37077-sl-PROTOCOL%20TO%20THE%20AFRICAN%20CHARTER%20ON%20HUMAN%20AND%20PEOPLE%27S%20RIGHTS%20ON%20THE%20RIGHTS%20OF%20WOMEN%20IN%20AFRICA.pdf

Cook RJ 'Women's international human rights law: the way forward' in RJ Cook (ed) *Human rights of women: national and international perspectives* (UPenn Press 1994)

Crenshaw K 'Demarginalizing the intersection of race and sex: a Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *The University of Chicago Legal Forum* Article 139-168

Cusack S & Pusey L 'CEDAW and the rights to non-discrimination and equality' (2013) 14 *Melbourne Journal of International Law* 54-92

Cusack S & Timmer H 'Gender stereotyping in rape cases: the CEDAW Committee's decision in *Vertido v The Philippines*' (2011) *Human Rights Law Review* 329-342

Economic Community of West African States (ECOWAS) 'Supplementary Protocol Amending the Preamble and Articles 1, 2, 9 and 30 of Protocol A/P.1/7/91 Relating to the Community Court of Justice and Article 4 Paragraph 1 of the English Version of the Said Protocol' (2005) art 10(d)

Fineman MA 'Gender and law: feminist legal theory's role in new legal realism' (2005) *Wisconsin Law Review* 405-432

Holtmaat R 'Article 5' in MA Freeman, C Chinkin & B Rudolf (eds) *The UN Convention on the Elimination of All Forms of Discrimination against Women: A commentary* (OUP 2011)

African Court 'Declarations' https://www.african-court.org/wpafc/declarations/

MacKinnon CA *Toward a feminist theory of the state* (Harvard University Press 1991)

Mtenje AL 'Patriarch and socialization in Chimamanda Ngozi Adichie's Purple Hibiscus and Jamaica Kincaid's Lucy' (2016) 27 *Marang: Journal of Language and Literature* 17-26

O'Leary Z *The social science jargon buster* (SAGE 2007)

Rudman A 'The responsiveness of continental and regional courts in providing redress to African women as victims of sexual and gender-based violence' (2020) 31 *Stellenbosch Law Review* 437-440

Rudman A '"Whores, sluts, bitches and retards" – what do we tolerate in the name of freedom of expression?' (2012) 26 *Agenda* 72-80

Sepper E 'Confronting the "sacred and unchangeable": the obligation to modify cultural patterns under the women's discrimination treaty' (2008) 30 *University of Pennsylvania Journal of International Law* 585-639

Trinkner R & Tyler TR 'Legal socialization: coercion versus consent in an era of mistrust' (2016) 12 *Annual Review of Law and Social Science* 417-439

United Nations General Assembly 'Report of the Working Group on the issue of discrimination against women in law and in practice' (19 April 2017) UN Doc A/HRC/35/29 (2017)

United Nations Development Programme 'Tackling social norms: a game changer for gender inequalities' (2020) 6 https://www.un-ilibrary.org/content/books/9789210051705

United Nations Development Programme 'Tackling social norms: a game changer for gender inequalities' (2020) https://www.un-ilibrary.org/content/books/9789210051705

United Nations Educational, Scientific and Cultural Organisation (UNESCO) 'UNESCO Universal Declaration on Cultural Diversity' (2001)

United Nations GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (1999) UN Doc A/54/38/Rev.1

United Nations GAOR 'Report of the Committee on the Elimination of Discrimination against Women' (2004) UN Doc A/59/38. Committee on the Elimination of Discrimination against Women 'Concluding comments: Italy' (2005) UN Doc CEDAW/C/ITA/CC/4-5

United Nations General Assembly Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Heiner Bielefeldt, *Elimination of all forms of religious intolerance* (2013) UN Doc A/68/290

United Nations General Assembly Report of the Special Rapporteur in the field of cultural rights 'Cultural rights' (2012) UN Doc A/67/287

United Nations General Assembly, Interim Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangi, 'Elimination of all forms of religious intolerance' (2010) UN Doc A/65/207

United Nations Human Rights Council, 'Freedom of religion or belief' (2020) UN Doc A/HRC/43/48

World Conference on Human Rights 'Vienna Declaration and Programme of Action' (1993) UN Doc A/CONF.157/23

World Economic Forum 'Global Gender Gao Report 2020' https://www3.weforum.org/docs/WEF_GGGR_2020.pdf

Xanthaki A 'When universalism becomes a bully: revisiting the interplay between cultural rights and women's rights' (2019) 41 *Human Rights Quarterly* 701-724

International, Regional and Other Rights Instruments

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

African Union Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) CAB/LEG/66.5

Convention on the Elimination of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13

General Recommendation 35 on Gender-Based Violence against Women, updating General Recommendation 19' (2017) UN Doc CEDAW/C/GC/35

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 3 UNTS 993

Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Maputo Protocol), adopted 11 July 2003, entered into force 25 November 2005, CAB/LEG/66.6

United Nations Committee on the Elimination of Discrimination against Women and United Nations Committee on the Rights of the Child 'Joint General Recommendation 31 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' (8 May 2019) UN Doc CEDAW/C/GC/31/Rev.1-CRC/C/GC/18/Rev.1 (2019)

United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation 25: Article 4, paragraph 1 on the Convention (Temporary Special Measures)' (2004) UN Doc HRI/GEN/1/Rev.1

United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation 28: Core obligations of state parties under article 2 of the Convention on Discrimination against Women' (2010) UN Doc CEDAW/C/GC/28

United Nations Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 6 October 1999, entered into force 22 December 2000) UN Doc A/RES/54/4

United Nations Committee on the Elimination of Discrimination against Women (CEDAW Committee) General Recommendation 19: Violence against women, 1992, UN Doc A/47/38

Cases

Adama Vandi v State of Sierra Leone ECW/CCJ/JUD/32/22 (2022)

Aircraftwoman Beauty Igbobie Uzezi v The Federal Republic of Nigeria ECW/CCJ/JUD/11/21 (2021)

Aminata Diantou Diane v Mali ECW/CCJ/JUD/14/18 (2018)

Angela González Carreño v Spain Communication 47/2012 (15 August 2014) UN Doc CEDAW/C/58/D/47/2012 (2014)

Association Pour Le Progrès et la Défense des droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Republic of Mali (merits) (2018) 2 AfCLR 380

AT v Hungary Communication 2/2003 (26 January 2005) UN Doc CEDAW/C/36/D/2/2003 (2005)

Belousova v Kazakhstan Communication 45/2012 (25 August 2015) UN Doc CEDAW/C/61/D/45/2012 (2015)

Dorothy Njemanze, Edu Oroko, Justina Etim and Amarachi Jessyford v The Federal Government of of Nigeria ECW/CCJ/JUD/08/17 (2017)

Ekundayo Idris v Federal Republic of Nigeria ECW/CCJ/JUD/09/22 (2022)

ES & SC v Tanzania Communication 48/2013 (13 April 2015) UN Doc CEDAW/C/60/D/48/2013 (2015)

Garreth Anver Prince v South Africa (2004) AHRLR 105 (ACHPR 2004)

Hadijatou Mani Koraou v Republic of Niger ECW/CCJ/JUD/06/08 (2008)

Jallow v Bulgaria Communication 32/2011 (28 August 2012) UN Doc CEDAW/C/52/D/32/2011 (2012)

LC v Peru Communication 22/2009 (4 November 2011) UN Doc CEDAW/C/50/D/22/2009 (2011)

Mary Sunday v Federal Republic of Nigeria Judgment No ECW/CCJ/JUD/11/18 (2018)

RPB v Philippines Communication 34/2011 (12 March 2014) UN Doc CEDAW/C/57/D/34/2011 (2014)

RKB v Turkey Communication 28/2010 (13 April 2012) UN Doc CEDAW/C/51/D/28/2010 (2012)

SFM v Spain Communication 138/2018 (28 February 2020) UN Doc CEDAW/C/75/D/138/2018 (2018)

SL v Bulgaria Communication 99/2016 (10 September 2019) UN Doc CEDAW/C/73/D/99/2016 (2019)

Vertido v Philippines Communication 18/2008 (22 September 2010) UN Doc CEDAW/C/46/D/18/2008 (2010)

VK v Bulgaria Communication 20/2008 (27 September 2011) UN Doc CEDAW/C/49/D/20/2008 (2011)

X & Y v Russian Federation Communication 100/2016 (9 August 2019) UN Doc CEDAW/C/73/D/100/2016 (2019)

6 Africa is ageing: Prospects in the implementation of the Protocol on the Rights of Older Persons in Africa

Faith Kabata

Abstract:

Africa's demographic aspects are variously described as 'the youngest continent', 'the youth bulge' and 'the children's continent'. Lost in this terminology is the issue of older persons in Africa. Recent data shows a projected increase in life expectancy in Africa by 2050, pointing to a significant rise in the number of older persons on the continent and bringing to the fore their recognition as a vulnerable group in society, meriting special protection.

At the global level, despite considerable debate on the vulnerability of older persons, initiatives toward a legally binding treaty to protect the rights of older persons have been slow-paced. At the regional level, progress has been made in Africa and the Inter-Americas with the adoption of legally binding treaties. Pointedly, these treaties signify a nuanced appreciation of the contextual realities of older persons in different regions of the world in the normative framework. Conversely, the European Court of Human Rights (European Court) has, over the years, adjudicated cases relating to the rights of older persons and thus evolving jurisprudence on rights relating to older persons. At the national level, a number of countries in Africa, such as Ethiopia, Ghana,

Kenya, South Africa, Uganda, Tanzania, and Zimbabwe protect the rights of older persons in their domestic legal and policy framework.

In light of the above, this chapter concerns itself with the Protocol to the African Charter on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons), adopted in 2016, while acknowledging the delayed entry into force. The chapter explores the prospects for the implementation of the Protocol on the Rights of Older Persons by reviewing evolving norms and jurisprudence on the rights of older persons. The chapter further analyses the Protocol's normative framework and comparatively examines the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention on Older Persons) and the European Union. It also explores the jurisprudence of the European Court on cases touching on the rights of older persons. Drawing from the European Court and the Inter-American Court's normative content and jurisprudence, this chapter highlights the evolving jurisprudence that can be contextualised to the application and interpretation of the Protocol on the Rights of Older Persons.

1 Introduction

The plight of elderly persons in society has occupied international debates since 1948, including in policy documents of the United Nations (UN) General Assembly.[1] Pointedly, the Universal Declaration of Human Rights referenced elderly people's rights.[2] Even then, within the UN, attention to the welfare of the aged in society remained incidental and sporadic until the 1978 adoption of a UN Resolution to convene 'a World Assembly on Ageing'.[3] The 1982 World Assembly culminated in the Vienna International Plan of Action on Ageing (Vienna Plan of Action), which urged states to take action on the socio-economic aspects of elderly persons, including housing, food and nutrition, social security, and employment.[4] The second 'World Assembly on Ageing' was held in 2002, where the Political Declaration and Madrid Plan of Action on Ageing (Madrid Plan of Action) was adopted. It recognises as its goal the promotion and protection of all rights of older persons and urges states to prioritise the development of older persons and their well-being in old age.[5] In between the two World Assemblies, the UN undertook

1 United Nations General Assembly Declaration of Old Age Rights (4 December 1948) UN Doc A/RES/213 (1948) (Declaration of Old Age Rights).

2 Declaration of Old Age Rights (n 1) art 25.

3 United Nations Report of the World Assembly on Aging (6 August 1982) UN Doc A/CONF.113/31 (1982).

4 As above.

5 Political Declaration and Madrid Plan of Action on Ageing, adopted at the 2nd

several initiatives, including the UN Principles for Older Persons, the Proclamation on Ageing, and the UN declaring 1999 as the International Year of Older Persons. The Proclamation on Ageing was launched on 1 October 1998, the International Day of Older Persons.[6] It is also worth mentioning the Committee on Economic, Social and Cultural Rights (CESCR) General Comment 6, which elaborates on the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR) to older persons.[7]

Turning to Africa, the drafters of the African Charter on Human and Peoples' Rights (African Charter) sought to embrace the African legal philosophy and tradition by anchoring the protection of rights in African values and civilisation.[8] Drawing from this, the drafters of the African Charter recognised the collectivism of African societies and sense of kinship and expressly incorporated a right to the protection of the aged within the context of the family,[9] with a corresponding individual duty for the respect of elders.[10] Africa was thus the first to protect the rights of older persons in a legally binding document. Nonetheless, the provisions of the African Charter have been criticised for seemingly bundling the rights of older persons with kinship and culture.[11] Moreover, from a practical standpoint, these provisions are questioned since the African Commission has never explicitly referenced the rights of the elderly in its application.[12]

World Assembly on Ageing, held at Madrid, Spain 8-12 April 2002, www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf (accessed 24 July 2023).

6 United Nations Principles for Older Persons, adopted pursuant to UNGA Res 46/91, Implementation of the International Plan of Action on Ageing and related activities (16 December 1991) UN Doc A/RES/46/91 (UN Principles); United Nations General Assembly Proclamation on Ageing (16 October 1992) UN Doc A/RES/47/5 (1992) para 3; United Nations General Assembly Implementation of the International Plan of Action on Aging and Related Activities (14 December 1990) UN Doc A/RES/45/106.

7 United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 6, Rights of Older Persons, 13th session, 1995, E/C.12/1995/16/Rev.1 (General Comment 6).

8 African Charter (n 7) Preamble.

9 African Charter (n 7) art 18 (4).

10 African Charter (n 7) art 27 (1).

11 PE Oamen & EK Okhator, 'The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons in Africa' (2021) 21 *African Human Rights Law Journal* at 796.

12 MA Taher & MAZ Kanak, 'Are the rights of elderly people well-protected? Revisiting the existing global and regional human rights frameworks' (2020) 3 *Southeast University Journal of Arts and Social Sciences* at 109.

In the last three decades, a demographic shift in the world population has pointed to an increase in the number of older persons. For instance, for the first time in 2018, the number of persons older than 65 surpassed the number of children younger than 5,[13] while globally, life expectancy increased by 7 years in the last three decades.[14] In Africa, life expectancy increased by eight years from 1990 to 2021. In addition, the 2015 UN projections indicated that most of the growth in the ageing population is in Africa and that the aged population will triple by 2050 to an estimated 220 million persons.[15] These numbers disrupted the settled understanding of Africa as a young continent and called into question the adequacy of the existing legal framework to protect older persons. The various reasons for this demographic shift are varied and outside the scope of this chapter.

This shift renewed interest in older persons as a vulnerable group within society requiring protection of their rights, akin to other vulnerable groups such as indigenous persons, women, children, and persons with disabilities. At the UN level, a number of measures were implemented to enhance the protection of the rights of older persons. For example, in 2010, an open-ended Working Group on Ageing (Working Group) was established to study aspects of strengthening the protection of older persons' rights.[16] Further, in 2013, the UN established the mandate of the Independent Expert on the Enjoyment of All Human Rights by Older Persons.[17] Even so, this renewed interest has not resulted in a global treaty on the rights of older persons, despite enduring debate within the UN.

At the African regional level, despite the above-mentioned provisions of the African Charter, the African human rights institutions variously identified normative gaps in the protection of the rights of elderly persons in Africa. For instance, in the 1999 and 2000 Final Communiques, the African Commission on Human and Peoples' Rights (African Commission) noted the human rights violations of vulnerable groups,

13 United Nations Population Division 'World population prospects 2022: Summary of results' 7 www.un.org/development/desa/pd/content/World-Population-Prospects-2022 (World Population Prospects 2022) (accessed 24 July 2023).

14 World Population Prospects 2022 (n 13) 19.

15 United Nations Department of Economic and Social Affairs 'World population prospects: The 2015 revision, key findings and advance tables' 6-7 https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf (accessed 8 July 2023).

16 United Nations General Assembly Follow-up to the Second World Assembly on Ageing (4 February 2011) UN Doc A/RES/65/182 (2011).

17 Office of the High Commissioner for Human Rights, Independent Expert on the Enjoyment of All Human Rights by Older Persons (27 September 2013) A/HRC/Res/24/20 para 5.

including the aged, in countries experiencing armed conflicts.[18] At the political level, two initiatives were undertaken. First, in response to the Madrid Plan of Action, the African Union (AU) developed the 2007 AU Policy Framework and Plan of Action on Ageing. Second, the 2003 AU Ministerial Conference on Human Rights in Africa noted the human rights violations of elderly persons in situations of armed conflict and called for a specific protocol to elaborate on their rights.[19] Against this background, the AU adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (Protocol on the Rights of Older Persons or Protocol), which is the subject of this article.

This chapter examines the prospects for the implementation of the Protocol on the Rights of Older Persons. It proceeds from the premise that this Protocol has not entered into force and that the African Court on Human and Peoples' Rights (African Court) and the African Commission have not adjudicated any cases on the rights of older persons. Thus, this chapter concerns itself with how existing jurisprudence from other human rights regional systems could be deployed and contextualised for the interpretation and application of the Protocol on the Rights of Older Persons. In view of the criticism directed at this Protocol for lacking to enumerate substantive rights for older persons, the main contribution of this chapter is distilling the other regional understandings and jurisprudence on the rights of older persons for contextualisation in the implementation of the Protocol on the Rights of Older Persons. In this endeavour, the chapter adopts a comparative approach. It explores, for instance, the rights provided in the Inter-American Convention on Protecting the Human Rights of Older Persons (Inter-American Convention on Older Persons) and the European Union Recommendation on the Rights of Older Persons (Recommendation on the Rights of Older Persons)[20] as well as the jurisprudence of the Inter-American Court of Human Rights (Inter-American Court) and the European Court of Human Rights (European

18 African Commission on Human and Peoples' Rights Final Communique of the 26th Ordinary Session of the African Commission on Human and Peoples Rights' 1st-11th November 1999, Kigali, https://www.achpr.org/public/Document/file/English/achpr26_fincom_1999_eng.pdf (accessed 24 July 2023) para 10; Final Communique of the 27th Ordinary Session of the African Commission on Human and Peoples' Rights 27th April - 11th May, 2000, Algiers, www.achpr.org/public/Document/file/English/achpr27_fincom_2000_eng.pdf (accessed 24 July 2023) para 6.

19 Kigali Declaration on Human Rights adopted by the 1st African Union (AU) Ministerial Conference on Human Rights in Africa held in Kigali, Rwanda 8 May 2003 paras 17 & 20.

20 European Union Recommendation CM/Rec (2014) 2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons, adopted by the Committee of Ministers on 19 February 2014 at the 1192 Meeting of the Ministers Deputies (Recommendation on the Rights of Older Persons).

Court) on aspects of rights of older persons. It is envisaged that the comparative approach will highlight the scope of rights for older persons and their interpretation and application.

To achieve the above, the chapter is structured as follows: Part two sets the background by reviewing the Protocol on the Rights of Older Persons and outlining its normative framework; part three provides a brief overview of the Inter-American Convention on Older Persons and the Recommendation on Rights of Older Persons and presents cases decided by the Inter-American and European Courts; part four conducts a comparative analysis of the normative provisions of the Inter-American Convention on Older Persons, the Recommendation on Rights of Older Persons and the Protocol on the Rights of Older Persons and of the case law from the Inter-American and European Courts and highlights good practices that the African system could adopt. Finally, part five concludes the chapter and presents some recommendations.

For clarity, while this chapter discusses the normative standards and jurisprudence of the European human rights system, the Recommendation on the Rights of Older Persons and the jurisprudence of the European Court represent a distinct institutional framework. The Recommendation on the Rights of Older Persons is an initiative of the European Union, while the European Court is established under the Council of Europe and monitors the implementation of the European Convention on Human Rights and Fundamental Freedoms. The chapter is moreover limited in that it does not analyse all the rights provided in the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons. The rights analysed in this chapter are limited to those resonating with the state obligations contained in the Protocol on the Rights of Older Persons. In addition, while acknowledging that the Protocol on the Rights of Older Persons uses the term older persons, scholarship on the subject uses the terms 'aged', 'elderly persons' and 'older persons' interchangeably. Therefore, this chapter also deploys these terms interchangeably.

2 Protocol to the African Charter on Rights of Older Persons in Africa: Substance and implications

As discussed earlier, the Protocol on the Rights of Older Persons has its roots in article 18(4) of the African Charter and the calls within the African human rights system and political institutions to fill the normative gaps in this provision. In 2007, the African Commission appointed a focal point to conduct studies on strengthening the rights of older persons

in Africa.[21] In 2009, the mandate of the focal point was expanded to a Working Group on the rights of older persons and persons with disabilities tasked with preparing a concept note which would guide the drafting of a protocol to the African Charter on the rights of older persons and persons with disabilities.[22] The draft Protocol on the Rights of Older Persons was submitted for approval by the AU Assembly in 2014 and adopted in January 2016.[23] However, as of July 2023, the Protocol on the Rights of Older Persons has yet to enter into force. It will only do so 30 days after the deposit of the 15th instrument of ratification by a member state.[24]

The significance of the Protocol on the Rights of Older Persons lies in its utility value. First, it liberates ageing from the private domain and makes it a public issue while requiring states to make structural and cultural changes for older persons in Africa. Viewed in light of the African Charter, the Protocol on the Rights of Older Persons dissociates the rights of the elderly from familial attachment and obligates states to guarantee their rights. Second, it reconceptualises old age as a human rights issue by emphasising the concepts of equality, non-discrimination, and self-autonomy. However, the text places more emphasis on the vulnerability of older persons; their incapacity, dependence, and weak status, thus portraying them as needy rather than as holders of rights. Doron points out that this portrayal of the elderly from a needs perspective is likely to perpetuate ageism, which is inimical to the human rights discourse.[25]

Notwithstanding, for the Protocol on the Rights of Older Persons to achieve its utility value, it must be enforceable within the continent. Since its adoption in 2016, it has received 11 ratifications against 20 signatures from the 55 AU member states.[26] Pointedly, less than half of the AU member states have neither signed nor ratified the Protocol. And of the

21 African Commission Resolution on the establishment of a focal point on the rights of older persons in Africa ACHPR/Res. 118 (XXXXII) 07 2007.

22 African Commission Resolution on the transformation of the focal point on the rights of older persons in Africa to the working group on the rights of older persons and persons with disabilities in Africa ACHPR/Res. 143 (XXXXV) 9 May 2009.

23 Decisions, Declarations and Resolutions, AU/Dec.588-604 (XXVI), as adopted by the Assembly of the African Union at the Twenty-Sixth Ordinary Session, Addis Ababa, Ethiopia, 30-31 January 2016, ; see also Protocol on the Rights of Older Persons.

24 As above art 26(1).

25 I Doron & I Apter 'The debate around the need for an International Convention on the Rights of Older Persons' (2010) 50 *The Gerontologist* at 592.

26 African Union 'List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons' 11 April 023 https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_OLDER_PERSONS.pdf (accessed 30 June 2023).

signatory states, a little less than half have not ratified it.[27] This disparate negative correlation between the number of signatures and ratifications implies a general acceptance by the signatory states of the recognition of the rights of older persons while not making binding commitments at the regional level.

Under international law, signature in treaty-making marks a first step towards ratification, and for the ratification process to be complete, the instrument of ratification must be deposited with the AU Commission.[28] Writing on the ratification of AU treaties by member states, Maluwa invites the AU to revisit history and draw from the practices of the League of Nations and the International Labour Organization (ILO) on closing the gap between signature and ratification.[29] He points to a resolution of the League of Nations that required member states to submit reports on their intentions to the Secretary-General for any treaty not ratified one year after signature.[30] Similarly, the ILO requires states to submit to their domestic structures on all ILO Conventions they sign for implementation as domestic legislation or any other action.[31] Undoubtedly, such measures would make an impact in closing the gap between the 20 signatures and 11 ratifications and ultimately result in the Protocol on the Rights of Older Persons entering into force to generate the intended impact.

In relation to the majority of the 55 AU member states that have yet to sign the Protocol on the Rights of Older Persons, there are continuous efforts by domestic players like non-governmental organisations and civil society groups. These entities are actively working to encourage AU members to ratify the Protocol from within their respective countries. The most notable and sustained initiative is the #AgeWithRights Campaign, which has been running since 2018.[32] While acknowledging that states are motivated by different factors in deciding whether or not to ratify treaties, it is interesting to note that all the ratifications have occurred after this campaign, thus giving credence to the role of advocacy campaigns for ratification.

27 As above.

28 Protocol on the Rights of Older Persons art 25 (2).

29 T Maluwa, 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* at 37-38.

30 Maluwa (n 29) 38-39.

31 Maluwa (n 29) 37-38.

32 University of Pretoria, Centre for Human Rights, #AgeWithRights Campaign, available at https://www.chr.up.ac.za/agewithrights (accessed 28 April 2023).

2.1 The nature and content of the rights of older persons in the Protocol on the Rights of Older Persons

The Protocol on the Rights of Older Persons consists of a Preamble, provisions articulating normative principles, and implementation mechanisms. The Preamble grounds the Protocol within the African human rights system by echoing the provisions of the African Charter and other African legal instruments on the rights of older persons. Further, the Preamble recognises article 18(4) of the African Charter, clearly signalling the intention of the Protocol to complement the African Charter and address the normative gaps in the existing framework. As pointed out, the provisions of the African Charter have been criticised for, on the face of it, appearing to vest the duty to care for the aged in individuals and the family unit.[33]

The Protocol on the Rights of Older Persons demarcates the group of persons whose rights it addresses by defining 'older persons' as persons 60 years old and above, drawing its definition from the Vienna Plan of Action.[34] At the outset, it is noteworthy to point out that the Protocol does not enumerate the rights of older persons; rather, it lays down state obligations. In article 2(1), it echoes the general obligations clause contained in the African Charter.[35] It further, in article 2(2), incorporates the UN Principles for Older Persons and directs states to make them legally binding under national law. The question that presents is whether incorporating the UN Principles in the framework of the Protocol on the Rights of Older Persons serves to address the substantive rights gap in the Protocol. The UN Principles for Older Persons are organised along the concepts of independence, participation, care, self-fulfilment, and dignity. Megret points out that although the Preamble to the UN Principles references human rights, its focus is on the concepts of independence, participation, care, self-fulfilment, and dignity, which are not *per se* reflective of known rights.[36]

The Protocol on the Rights of Older Persons enumerates state obligations in the context of both civil and political and economic, social and cultural rights and under the respect, protect and fulfil typology. In the realm of civil and political rights, states are required to prohibit discrimination against older persons and eradicate social and cultural

33 Oamen & Okhator (n 11) 766.

34 Vienna Plan of Action art 1.

35 Protocol on the Rights of Older Persons art 25(2).

36 F Megret 'The human rights of older persons: A growing challenge' (2011) 11 *Human Rights Law Review* at 48.

stereotypes that marginalise and stigmatise older persons.[37] Further, states have obligations to guarantee equal protection before the law and access to justice,[38] freedom of opinion and expression,[39] liberty and security of the person and physical integrity from any form of violence, including violence related to traditional harmful practices.[40] In the context of economic, social and cultural rights, the state obligations extend to the right to access to employment;[41] social security, including the requirement to universalise social protection to take into account persons who did not contribute to social protection schemes,[42] access to care,[43] health services,[44] education,[45] and recreational programmes.[46]

The Protocol on the Rights of Older Persons contextualises state obligations to African realities by addressing gender and poverty in old age and the weakened position of older persons in situations of conflict and natural disaster. Comparatively, the Recommendation on the Rights of Older Persons and the Inter-American Convention on Older Persons do not provide for such normative rights. In the context of gender, specifically older women, the Protocol on the Rights of Older Persons is awake to the reality that women in Africa live longer and often do not own property in their names. Furthermore, many women dedicate their lives to unpaid domestic work, which means they do not participate in contributory social security schemes.[47]

On poverty in old age, the Protocol on the Rights of Older Persons addresses older persons with caregiving responsibilities. Studies attest to this phenomenon in Africa, mainly occasioned by the inter-generational effects of the HIV/AIDS pandemic, thus relegating elders as the new caregivers to their grandchildren.[48] Further, in keeping with the conflict situations in Africa, the Protocol also enumerates specific state obligations towards older persons in conflict and disaster situations.

37 Protocol on the Rights of Older Persons art 3.

38 Protocol on the Rights of Older Persons art 4.

39 Protocol on the Rights of Older Persons art 5

40 Protocol on the Rights of Older Persons art 8

41 Protocol on the Rights of Older Persons art 6.

42 Protocol on the Rights of Older Persons art 8.

43 Protocol on the Rights of Older Persons art 10.

44 Protocol on the Rights of Older Persons art 15.

45 Protocol on the Rights of Older Persons art 16.

46 Protocol on the Rights of Older Persons art 17.

47 I Doron, B Spanier & O Lazar 'The rights of older persons within the African Union' (2016) 16 *Elder Review* at 14-16.

48 Doron et al (n 47) 17.

Finally, the Protocol on the Rights of Older Persons revisits the concept of duties and, in line with African values and civilisation, imposes a set of duties on older persons. Older persons have duties of inter-generational mentorship and passing knowledge to younger generations, conflict resolution, and fostering inter-generational dialogue and solidarity within the family and community.[49] While a debate on the concept of duties in the African human rights system is outside the scope of this chapter, it is worthwhile to note that African scholarship views these duties as both a consequence and a pre-requisite for community membership.[50] In this instance, older persons, as members of communities, have a duty to share their wealth through knowledge and traditions.

As stated earlier, while the Protocol on the Rights of Older Persons is significant for unshackling ageing from the private sphere and bringing it to the public domain by enumerating state obligations, the enduring question is whether its enumeration of state obligations rather than older persons' rights connotes a welfarist approach to older persons in Africa. First and contrastingly, the other Protocols to the African Charter – that is, the Protocol on the Rights of Persons with Disabilities in Africa and the Protocol on the Rights of Women in Africa – enumerate actual rights for these vulnerable groups.[51] Second, discussions on the construction of the elderly as a distinct group identify the power/vulnerability paradox. Megret points out that the elderly may be construed as a powerful group in society based on their wealthy status, societal networks and accomplishments in life, which inhere respect from society. On the other hand, the elderly may be viewed as a vulnerable group in society based on vulnerability to disease, need for support and care, increased susceptibility to poverty, consequences of armed conflict and political and social disruptions.[52] A review of the background documents informing the drafting of the Protocol on the Rights of Older Persons paints the vulnerable view as shaping and informing the conception of older persons in Africa. For instance, the African Charter refers to the need for 'special measures of protection'.[53] This may thus lend credence to the argument

49 Protocol on the Rights of Older Persons art 20.

50 A Devereux 'Should "duties" play a larger role in human rights? A critique and Western liberal and African human rights jurisprudence' (1995) 18 *University of New South Wales Law Journal* at 474-476.

51 See generally, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Protocol to the African Charter on Human and Peoples' Rights on Rights of Persons with Disabilities in Africa.

52 Megret (n 36) 46.

53 African Charter art 18 (4).

that the Protocol adopts a welfarist approach as opposed to a human rights approach.

Conversely, it is acknowledged that it is not old age that hinders the enjoyment of rights; instead, it is societal perceptions and attitudes towards ageing that deny older persons full enjoyment of rights. Developing this argument in relation to the Protocol on the Rights of Older Persons, what is then required is not the enumeration of their rights, but rather the elaboration of measures – in this case, what states should do to eliminate perceptions and attitudes which inhibit older persons from fully enjoying their rights. In addition, borrowing from the UN Convention on the Rights of Persons with Disabilities, there is a tendency to address the limitations of the human rights language by emphasising state obligations and rights for further clarity.[54]

2.2 Obligations to respect, protect and fulfil

As mentioned above, the Protocol on the Rights of Older Persons enumerates state obligations within the respect, protect and fulfil typology. In this regard, states must eliminate workplace discrimination in private sector institutions, guarantee freedom of expression and exercise political rights by older persons. In addition, states are to enact legislation to eliminate discrimination in the private spheres and criminalise violence and harmful traditional practices, including witchcraft accusations and dispossession of property of older women. Finally, in relation to the obligation to fulfil, states are to put in place measures for social security, education, health services and mobility for older persons. States are required to submit periodic reports to the African Commission to ensure the national implementation of these obligations. Additionally, if there are any complaints regarding the violation of the rights of older persons, they can be filed with both the African Commission and the African Court.[55]

3 Regional protection of the rights of older persons

As stated earlier, efforts towards a global convention for the protection of the rights of older persons have since 2009 remained shackled by polarising debates on whether a specific treaty is necessary. The arguments against this point to the fragmentation of the rights discourse,[56] the fact that there exist ample soft law instruments that address the rights of older persons[57]

54 Megret (n 36) 65.

55 Protocol on the Rights of Older Persons art 22.

56 Megret (n 36) 38-41.

57 Doron et al (n 47) 591.

and the implementation gap that characterises treaty implementation in international human rights law.[58]

At the regional level, akin to Africa, there is significant progress in the Inter-American and European regions in specific recognition and protection of the rights of older persons. In June 2015, the Organization of American States adopted a specialised treaty, the Inter-American Convention on Older Persons, which entered into force in January 2017.[59] Six member states have ratified this Convention.[60] In Europe, the European Union Council of Ministers in 2014 adopted the Recommendation on the Rights of Older Persons. Though not binding, this Recommendation is important as it normatively articulates the rights of older persons, which are not articulated in the European human rights treaties. In addition, it supplements the Charter of Fundamental Rights of the European Union, which has a provision respecting and recognising the rights of the elderly to live in dignity and participate in social and cultural life.[61]

The following part examines the normative provisions of the Inter-American Convention and the Recommendation on the Rights of Older Persons, as well as related judicial decisions with a view to distilling understandings that can be contextualised for Africa.

3.1 Normative provisions on the rights of older persons

3.1.1 Inter-American Convention on Older Persons

The Inter-American Convention on Older Persons lists a number of rights to which older persons are entitled and general and specific state obligations. With regard to the rights of older persons, the Convention guarantees the right to equality and non-discrimination. It defines age discrimination in old age as any distinction, exclusion or restriction based on age that restricts the enjoyment of human rights on an equal basis, whether occurring in the public or private sphere.[62] It further guarantees the right to safety and freedom from physical, mental and financial

58 Doron et al (n 47) 590.

59 Organization of American States 'Inter-American Convention on the Rights of Older Persons, Press Release' 12 December 2016, www.oas.org/en/media_center/preshttps://au.int/en/decisions-3s_release.asp?sCodigo=E-198/15 (accessed 18 July 2023).

60 Organization of American States 'Inter-American Commission on Human Rights, Rapporteurship on the Rights of Older Persons' https://www.oas.org/en/iachr/r/pm/bdocuments.asp (accessed 22 July 2023).

61 Charter of Fundamental Rights of the European Union art 25.

62 Inter-American Convention on Older Persons art 2.

violence, including protecting the inherent dignity of older persons.[63] In addition, it guarantees the right to receive long-term care, which should promote their right to health, the ability to live in their own home and autonomy and provision of specialised care.[64] The right requires states to guarantee that older persons exercise the right to free and express will in decisions on long-term care and the availability of specialised personnel. The scope of the right to work extends to non-discrimination in relation to rights, benefits, and protections in the workplace.[65] The right to health incorporates mental, physical and social health and a right to a healthy ageing process takes into account sexual and reproductive health, palliative care and integrated services for diseases that result in dependence.[66] The right to housing encompasses access to home loans, safety and healthy housing, and to be protected from illegal evictions. The right requires states to progressively ensure that architectural housing designs adapt to accommodate the needs of older persons.[67] The right to accessibility guarantees independence and participation in society in all aspects of life, touching on physical mobility and access to information, including electronic information.[68]

3.1.2 European Recommendation on the Rights of Older Persons

The Recommendation on the Rights of Older Persons guarantees older persons freedom from discrimination and requires states to outlaw discrimination by including age as a protected ground in their national anti-discrimination legislation.[69] It guarantees the right to inherent dignity the scope of which covers the self-determination of older persons in relation to their income, finances, place of residence, medical care and funeral arrangements and the enjoyment of legal capacity. The other limb of dignity encompasses privacy in their family life and sexual intimacy.[70] In addition, older persons are guaranteed the right to freedom from violence and abuse, which includes freedom from intentional and unintentional neglect, whether in the private or public sphere and the right from financial abuse through fraud and deception.[71] Further, older persons have a right to a fair trial, which extends to being tried within a reasonable time, taking

63 Inter-American Convention on Older Persons art 9.

64 Inter-American Convention on Older Persons art 12.

65 Inter-American Convention on Older Persons art 18.

66 Inter-American Convention on Older Persons art 20.

67 Inter-American Convention on Older Persons art 24.

68 Inter-American Convention on Older Persons art 26.

69 Recommendation on the Rights of Older Persons (n 20) paras 6 & 7.

70 Recommendation on the Rights of Older Persons (n 20) paras 9-12.

71 Recommendation on the Rights of Older Persons (n 20) paras 16 &17.

into account their age to accommodate them in judicial proceedings and in the event of detention, it should not amount to inhuman and degrading treatment.[72]

In the realm of socio-economic rights, older people have a right to social protection, which entitles them to receive resources for an adequate standard of living, adaptable housing, mobility and supplementary services such as adult day care and nursing services.[73] In addition, older persons have a right to employment, which protects them from discrimination in recruitment, training, working conditions such as dismissal and remuneration and trade union membership.[74] Finally, older persons are entitled to care, based on the principle of free and informed consent to medical care, to residential and institutional care in which freedom of movement is guaranteed and a right to access palliative services in the event of long-term or life-limiting illness.[75]

3.2 Interpretation and application of the normative provisions

In this part, the analysis focuses on the only case that the Inter-American Court has so far adjudicated based on the Inter-American Convention on Older Persons and three cases decided by the European Court that relate to the rights of older persons. The cases from the European Court are those where the Court found a breach of a state obligation, while cases in which the Court did not find a violation of the rights of older persons have been excluded.

3.2.1 Inter-American Court

In *Poblete*,[76] brought before the Inter-American Court in 2016, the victim, 76-year-old Poblete, died due to medical negligence in a public hospital in Chile. Poblete was admitted to the hospital on 17 January 2001, semi-conscious due to respiratory failure. Four days later, without his prior consent or that of his family, the hospital moved Poblete to the intensive care unit and performed a surgical procedure on him. He was discharged from the hospital on 2 February 2001. On 5 February 2001, he was readmitted to the same hospital in serious condition, with his clinical records indicating he needed an intensive care unit bed. However, as a result of what the hospital termed as a lack of an intensive care unit bed,

72 Recommendation on the Rights of Older Persons (n 20) paras 51-54.

73 Recommendation on the Rights of Older Persons (n 20) paras 21-24.

74 Recommendation on the Rights of Older Persons (n 20) para 26.

75 Recommendation on the Rights of Older Persons (n 20) paras 29-50.

76 *Poblete Vilches et al v Chile* (8 March 2018) Series C No 349.

Poblete was put in intermediate care. The hospital did not make any efforts to transfer him to another hospital where a bed was available. Poblete died on 7 February 2001 without receiving any intensive care.[77]

Notably, the case was brought before the Inter-American Court before the entry into force of the Inter-American Convention on Older Persons; hence, it was mainly on violation of the Inter-American Convention on Human Rights. It was, however, decided in March 2018 after the entry into force of the Convention on Older Persons, with Chile also having ratified. In its judgment, the Inter-American Court drew the definition of older persons from the Inter-American Convention on Older Persons and interpreted the violation of rights in the context of older persons.[78] The Inter-American Court found, among others, a violation of the right to health, freedom from discrimination, dignity, and social care for older persons. In relation to discrimination, the Inter-American Court found that Poblete's advanced age was a factor in the hospital denying him intensive care following his readmission. The Court stated that a person's age should not restrict their development and access to health care. It pointed out that older persons are vulnerable; hence, the state has increased obligations to protect and guarantee their right to health, directly correlating with their right to life. In addition, older persons, on account of their age, require increased protection, hence the need for the state to adopt differentiated measures.[79] The Court thus found that the state discriminated against Poblete on account of age and thus failed to guarantee the right to health.[80] On the right to dignity, the Court stated that the Inter-American Convention on Older Persons recognises a dignified old age, which extends to autonomy.[81] It enumerated the state obligation in this regard as prioritising policies that raise awareness and appreciation of older persons in society and adopting national plans to address ageing integrally.[82]

3.2.2 European Court of Human Rights

In *McDonald*[83] the applicant was a 71-year-old woman who suffered from severe immobility. She needed a caregiver to assist her in using the toilet. From March 2007, the local authority provided her with a night-time

77 *Poblete* (n 76) paras 42-55.

78 *Poblete* (n 76) para 125.

79 *Poblete* (n 76) para 127.

80 *Poblete* (n 76) paras 139-143.

81 *Poblete* (n 76) para 127.

82 As above.

83 *McDonald v UK* (2015) 60 EHRR 1.

caregiver to assist her in using the toilet. In November 2008, the local authority informed her that her night caregiver would be withdrawn due to funding constraints, and instead, she would be provided with incontinence pads. She petitioned the European Court, arguing that she was not incontinent. Thus, denying her a caregiver and providing her with incontinence pads violated her right to privacy and human dignity under article 8 of the European Convention on Human Rights. The court found that as an elderly person, she was entitled to a caregiver and that the alternative of providing her with incontinence pads violated her privacy and dignity.[84]

In relation to the right to a fair trial, the applicant in *Jablonská*[85] was 81 years old and complained that the length of proceedings in a civil case exceeded a reasonable time, hence a violation of her right to a fair trial provided in article 6 of the European Convention on Human Rights. She pointed out that the court appearances in her case required her to travel over long and tiring distances and that she had been required to appear in court numerous times. The court found that, in view of her age, the state should have exercised particular due diligence.[86]

In *Vasileva,*[87] the 67-year-old applicant had an altercation with a bus inspector regarding the validity of her ticket. The police were called, and she was arrested for failing to disclose her name, identity, and date of birth. The police detained her for more than 13 hours. Upon disclosing her identity, the police released her, after which she fainted and was hospitalised.[88] She petitioned the European Court, alleging a violation of her right to liberty and security of the persons as guaranteed under article 5 of the European Convention. She argued that detention was not the appropriate means to make her reveal her identity and that the police should have conducted an independent investigation. Further, the detention impaired her health and was not proportionate.[89] The European Court, while acknowledging the need for police to obtain the identity of persons of interest, noted that the police made no efforts to identify her independently or to call a doctor as had been promised.[90] In the court's opinion, the involvement of a third party by the police would have resolved the communication stalemate, thus avoiding the need to detain

84 *McDonald* (n 83) para 51.

85 *Jablonská v Poland* (2003) 36 EHRR 27.

86 *Jablonská* (n 85) para 43.

87 *Vasileva v Denmark* (2005) 40 EHRR 27.

88 *Vasileva* (n 87) paras 8 & 9.

89 *Vasileva* (n 87) paras 24-25.

90 *Vasileva* (n 87) para 41

the applicant.[91] The European Court thus found that the detention was disproportionate and a violation of the right to liberty.[92]

4 Analysis of the normative provisions of the judicial decisions

As earlier indicated, the Protocol on the Rights of Older Persons provides no substantive rights. Rather, it enumerates state obligations in relation to the rights of older persons. This part offers a comparative analysis of the three instruments: the Inter-American Convention on Older Persons, the Recommendation on the Rights of Older Persons, and the Protocol on the Rights of Older Persons. The interpretation of normative provisions in the judicial decisions under discussion is intricately woven into the text, with the aim of defining the extent and comprehension of the protected rights. This understanding is then applied within the context of the Protocol on the Rights of Older Persons.

A textual analysis of the Inter-American Convention on Older Persons, the Recommendation on the Rights of Older Persons, and the Protocol on the Rights of Older Persons indicates common features and differences in the normative provisions. This discussion focuses on the concept of ageing; non-discrimination and multiple discrimination; dignity; autonomy and independence; access to services, in particular health, employment/work, administration of justice; and care.

At the outset, on the concept of age, the three instruments define age to delimit their scope of application. The Inter-American Convention on Older Persons and the Protocol on the Rights of Older Persons define old age chronologically. The Protocol on the Rights of Older Persons sets a minimum age of 60 years,[93] while the Inter-American Convention on Older Persons provides more latitude to states to set it below 60 years but not over 65 years.[94] In contrast, the Recommendation on the Rights of Older Persons moves away from chronological age and instead adopts a more open approach that individualises age to personal and environmental circumstances.[95] The Inter-American Convention on Older Persons elaborates further by defining old age as a social construct of the

91 As above.

92 *Vasileva* (n 87) paras 42 & 43.

93 Protocol on the Rights of Older Persons art 1.

94 Inter-American Convention on Older Persons art 2.

95 Recommendation on the Rights of Older Persons (n 20) Explanatory Memorandum paras 8 & 9.

later stages of life.[96] As discussed earlier, the international instruments define old age chronologically at 60 years, hence providing clarity and a reasonable justification for the approach of the Protocol on the Rights of Older Persons and the Inter-American Convention on Older Persons.

The instruments also give primacy to freedom from discrimination, which is enumerated as the first right. Notably, the Protocol on the Rights of Older Persons does not define age discrimination or discrimination in the context of older persons. Similarly, the African Charter does not expressly provide for age as a protected ground for non-discrimination.[97] The Inter-American Convention on Older Persons provides a definition of age discrimination as any exclusion or restriction that has the effect of restricting the enjoyment of rights. The Inter-American Court in *Poblete* further developed the right not to be discriminated against by elaborating on the social and cultural prejudices and stereotypes that restrict older persons' enjoyment of human rights. In this case, the Inter-American Court argued that Poblete was denied priority for an intensive care bed and a ventilator during the second admission on account of his age, which amounted to age discrimination.[98] The Recommendation on the Rights of Older Persons broadens the breadth of state obligations by requiring that states include age as a protected ground in their anti-discrimination legislation. In addition, both the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons identify multiple discrimination as discrimination against an older person based on two or more grounds of discrimination.[99] It is instructive that one of the normative gaps that have been identified at the international level is that a number of human rights treaties do not expressly list age as a protected ground for discrimination.

The Protocol on the Rights of Older Persons is silent on the right to human dignity and only mentions dignity in the context of access to a pension. The Inter-American Convention on Older Persons provides for an express right to dignity in old age. In *Poblete,* the Inter-American Court referred to a 'dignified old age' and outlined measures that states should take to guarantee a 'dignified old age'. These measures point to breaking down social and cultural stereotypes against old persons, promoting appreciation and respect for older persons in society, and ensuring social

96 Inter-American Convention on Older Persons art 2.

97 African Charter art 2.

98 *Poblete* (n 76) paras 139 & 142.

99 Inter-American Convention on Older Persons art 2; Recommendation on the Rights of Older Persons (n 20) para 8.

security.[100] The Recommendation on the Rights of Older Persons links dignity with the right to privacy, including respect for sexual intimacy. It also includes intentional and unintentional neglect as a violation of the right to dignity. The issue of neglect for older persons is an ever-present reality. Further, the European Court in *McDonald* emphasised dignity and privacy and stated that even in the context of the right to care, states have an obligation to ensure that older persons' dignity is respected.

On autonomy and independence, the three instruments recognise that old age does equate to loss of or diminished capacity. They similarly provide the right and ability of older persons to make their decisions in their own personal affairs and their capacity on an equal basis with other persons and the right to appoint a person of their choice to make decisions on their behalf in case of incapacity.[101] The Protocol on the Rights of Older Persons extends the state obligation in this regard to include the right of older persons to participate in social and political life.[102] The Inter-American Convention on Older Persons links independence and autonomy specifically to the living arrangements of older persons and vests older persons with the right to decide their place of residence and with whom to live.[103]

In regard to access to services, specifically the right to health, the instruments include features that contextualise the right to health for older persons. The Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons emphasise free and informed consent to medical care. In this regard, both provide that older persons should freely agree to receive medical care and withdraw consent at any time.[104] In addition, they provide that consent should be obtained from authorised persons in case of medical emergencies.[105] The Protocol on the Rights of Older Persons requires states to guarantee access to health services for older persons in line with their needs.[106] The Inter-American Court in *Poblete* elaborated on the scope of the right to health in relation to older persons. First, it pointed out that older persons require increased protection; hence states are to adopt differentiated measures to fulfil their

100 *Poblete* (n 76) para 127.

101 See Protocol on the Rights of Older Persons art 5; Inter-American Convention art 7; and Recommendation on the Rights of Older Persons (n 20) paras 12-15.

102 Protocol on the Rights of Older Persons art 5 (3).

103 Inter-American Convention on Older Persons art 7 (a & b).

104 See Inter-American Convention on Older Persons art 11; Recommendation on the Rights of Older Persons (n 20) paras 36-39.

105 As above.

106 Protocol on the Rights of Older Persons art 15.

obligation on the right to health for older persons.[107] Second, it stated that increased protection also refers to comprehensive care that is efficient and continuous to ensure the quality of life.[108] Third, it tied the right to health to consent, autonomy, independence and accessibility for older persons noting the imbalance of power in doctor-patient relationships, hence the need for access to information, including medical records for older persons.[109] Finally, borrowing from General Comment 6 of the CESCR, it noted that the right to health for older persons encompassed 'preventive, curative and rehabilitative' elements to guarantee them functionality, autonomy and dignified old age.[110]

On the right to work, the common thread in all three instruments is the prohibition of employment discrimination. Inter-American Convention on Older Persons outlines the normative provisions of the right to extend the prohibition against discrimination in benefits and pay labour and union rights.[111] Similarly, the Recommendation on the Rights of Older Persons extends to the scope of the right to protection against discrimination in all aspects of work, including recruitment, training, trade union membership, remuneration, and retirement.[112] The Protocol on the Rights of Older Persons also requires states to eliminate discrimination in access to employment while taking into account specific job requirements.[113]

On the administration of justice and equal protection before the law, the Inter-American Convention on Older Persons provides for access to bank loans, financial credit and mortgages without discrimination on the basis of age as a component of the right to equality before the law.[114] The Recommendation on the Rights of Older Persons in the context of access to justice provides measures to accommodate older persons during judicial proceedings.[115] Further, it provides for particular diligence by law enforcement agencies in handling cases involving older persons.[116] In *Jablonská*, the European Court affirmed this requirement by finding that the law enforcement agencies in Poland should have put in place

107 *Poblete* (n 76) para 127.

108 *Poblete* (n 76) para 132.

109 *Poblete* (n 76) para 131.

110 *Poblete* (n 76) para 128.

111 Inter-American Convention on Older Persons art 18.

112 See Recommendation on the Rights of Older Persons (n 20) para 26.

113 Protocol on the Rights of Older Persons art 6.

114 Inter-American Convention on Older Persons art 30.

115 Recommendation on the Rights of Older Persons (n 20) para 51.

116 Recommendation on the Rights of Older Persons (n 20) para 52.

measures to accommodate the applicant in the case on account of her old age. The measures would have ensured that her case was adjudicated expeditiously to avoid the long and tedious travel. Further, the European Court emphasised the exercise of particular diligence by law enforcement agencies in *Vasileva*, in which the court found a violation of the right to liberty since the applicant was detained for 13 hours and the police officers did not conduct an independent investigation to establish her identity.[117]

Finally, in terms of care, both the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons contain elaborate provisions on the rights and state obligations. On the other hand, the Protocol on the Rights of Older Persons appears to shift the burden of care to families and the community, with the only tangible state obligation relating to preferential treatment in access to public services.[118] The Inter-American Convention on Older Persons obligates states to ensure specialised personnel, prevent abuse of older persons in long-term care, ensure access to information, and protect older persons' privacy and intimacy.[119] Equally, the Recommendation on the Rights of Older Persons requires states to provide adequate residential care for older persons unable to support themselves and to provide effective and accessible complaint mechanisms in the quality of care as well as remedies for deficiencies.[120]

The foregoing demonstrates similarities and differences in the rights of older persons as protected in the Inter-American and European systems and the state obligations provided in the Protocol on the Rights of Older Persons. Notably, while not introducing new rights, the three instruments provide for existing rights, and in relation to the Protocol on the Rights of Older Persons, it enumerates state obligations in the context of older persons. Based on the analysis, the normative provisions of the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons offer insights into the scope of rights of older persons, which correspond to the state obligations enumerated in the Protocol on the Rights of Older Persons.

5 Conclusion

This chapter set out to conduct a comparative analysis of the protection of the rights of older persons in the Protocol on the Rights of Older Persons, the

117 See *Vasileva* (n 87) para 41.

118 Protocol on the Rights of Older Persons art 10.

119 Inter-American Convention on Older Persons art 12.

120 Recommendation on the Rights of Older Persons (n 20) paras 40-43.

Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons. Starting from the premise that the Protocol on the Rights of Older Persons does not expressly provide for rights, rather it enumerates state obligations, the article aimed to analyse the normative rights provided by the Inter-American Convention on Older Persons and the Recommendation on the Rights of Older Persons and the jurisprudence from the European and the Inter-American Courts to determine the scope of rights envisaged in the state obligations enumerated in the Protocol.

The key finding of the analysis in terms of approaches is that the Inter-American Convention on Older Persons provides an elaborate set of rights with corresponding state obligations concerning older persons. Further, the Inter-American Convention on Older Persons defines important concepts such as age discrimination, old age, and multiple discrimination, providing a foundation for protected rights. In addition, each of the three instruments contextualises older persons' rights to the region's specific realities. For instance, as pointed out, the Protocol on the Rights of Older Persons contextualises the rights of older persons as caregivers to orphaned grandchildren, which is common on the African Continent. Further, the judicial interpretation of the rights of older persons also contextualises the rights to specific realities and circumstances of older persons. For instance, the interpretation of the right to health by the Inter-American Court considers the social prejudices that interfere with the enjoyment of rights by older persons. Similarly, the European Court's interpretation of the right to a fair trial in *Jablonská* considers the realities and environmental circumstances of older persons.

The analysis of the decisions of the European Court based on the European Convention on Human Rights implicitly invokes the protracted debate at the global level on whether there is a need for a specialised treaty on the rights of older persons. The normative provisions of the three instruments demonstrate the added value in actual contextualisation of the existing rights and state obligations in relation to older persons based on their unique and peculiar circumstances associated with old age. The interpretation of the Inter-American Court of the right to health under the Inter-American Convention on Older Persons in *Poblete* is also illustrative of this proposition. While acknowledging that the European Court's decisions show the possibility of adjudicating the rights of older persons within general human rights treaties, the value in elaborating rights and state obligations contextualised to the realities of old age should not be overlooked.

Returning to the Protocol on the Rights of Older Persons and what the African human rights system could draw from the Inter-American

and European systems, the elaborate enumeration of rights in both the Recommendation on the Rights of Older Persons and the Inter-American Convention on Older Persons and the judicial interpretation provides a good starting point. For instance, concepts such as age discrimination, multiple discrimination, and the broad application of the right to human dignity in relation to older persons are relevant to the African system. Importantly, the African Charter allows the African Commission to draw from other human rights instruments in interpreting and applying the rights in the African Charter.[121]

121 African Charter art 60.

Table of abbreviations

AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UN	United Nations

Literature

African Union 'List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons' 11 April 2023 https://au.int/sites/default/files/treaties/36438-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_OLDER_PERSONS.pdf (accessed 30 June 2023)

Devereux A 'Should "duties" play a larger role in human rights? A critique and Western liberal and African human rights jurisprudence' (1995) 18 *University of New South Wales Law Journal* at 474-476

Megret F 'The human rights of older persons: A growing challenge' (2011) 11 *Human Rights Law Review* 37-66

Doron I & Apter I 'The debate around the need for an International Convention on the Rights of Older Persons' (2010) 50 *The Gerontologist* 586-593

Doron I, Spanier B & Lazar O 'The rights of older persons within the African Union' (2016) 16 *Elder Review* 1-44

Taher MA & Kanak MAZ 'Are the rights of elderly people well-protected? Revisiting the existing global and regional human rights frameworks' (2020) 3 *Southeast University Journal of Arts and Social Sciences* 99-115

Organization of American States 'Inter-American Convention on the Rights of Older Persons, Press Release' 12 December 2016, www.oas.org/en/media_center/preshttps://au.int/en/decisions-3s_release.asp?sCodigo=E-198/15

Oamen PE & Okhator EK 'The impact of COVID-19 on the socio-economic rights of older persons in Africa: The urgency of operationalising the Protocol on the Rights of Older Persons in Africa' (2021) 21 *African Human Rights Law Journal* 782-811

Maluwa T 'Ratification of African Union treaties by member states: Law, policy and practice' (2012) 13 *Melbourne Journal of International Law* 636-684

Organization of American States 'Inter-American Commission on Human Rights, 'Rapporteurship on the Rights of Older Persons' February 2019 https://www.oas.org/en/iachr/r/pm/bdocuments.asp

International, Regional and Other Rights Instruments

African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

African Commission on Human and Peoples' Rights Final Communique of the 26th Ordinary Session of the African Commission on Human and Peoples Rights' 1st–11th November 1999, Kigali, https://www.achpr.org/public/Document/file/English/achpr26_fincom_1999_eng.pdf (accessed 24 July 2023)

Final Communique of the 27th Ordinary Session of the African Commission on Human and Peoples' Rights 27th April–11th May 2000, Algiers, www.achpr.org/public/Document/file/English/achpr27_fincom_2000_eng.pdf (accessed 24 July 2023)

African Commission Resolution on the establishment of a focal point on the rights of older persons in Africa ACHPR/Res. 118 (XXXXII) 07 2007

African Commission Resolution on the transformation of the focal point on the rights of older persons in Africa to the working group on the rights of older persons and persons with disabilities in Africa ACHPR/Res. 143 (XXXXV)09, May 2009

Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02

Decisions, Declarations and Resolutions, AU/Dec.588-604 (XXVI), as adopted by the Assembly of the African Union at the Twenty-Sixth Ordinary Session, Addis Ababa, Ethiopia, 30-31 January-2016

European Union Recommendation CM/Rec (2014) 2 of the Committee of Ministers to Member States on the Promotion of Human Rights of Older Persons, adopted by the Committee of Ministers on 19 February 2014 at the 1192 Meeting of the Ministers Deputies

Kigali Declaration on Human Rights adopted by the 1st African Union (AU) Ministerial Conference on Human Rights in Africa held in Kigali, Rwanda 8 May 2003

Office of the High Commissioner for Human Rights, Independent Expert on the Enjoyment of All Human Rights by Older Persons (27 September 2013) A/HRC/Res/24/20

Political Declaration and Madrid Plan of Action on Ageing, adopted at the 2nd World Assembly on Ageing, held at Madrid, Spain 8-12 April 2002, www.un.org/esa/socdev/documents/ageing/MIPAA/political-declaration-en.pdf (accessed 24 July 2023)

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

Protocol to the African Charter on Human and Peoples' Rights on Rights of Persons with Disabilities in Africa

United Nations Committee on Economic, Social and Cultural Rights (CESCR), General Comment 6, Rights of Older Persons, 13th session, 1995, E/C.12/1995/16/Rev.1

United Nations Department of Economic and Social Affairs 'World population prospects: The 2015 revision, key findings and advance tables' https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf (accessed 8 July 2023)

United Nations General Assembly Declaration of Old Age Rights (4 December 1948) UN Doc A/RES/213 (1948) (Declaration of Old Age Rights)

United Nations General Assembly Follow-up to the Second World Assembly on Ageing (4 February 2011) UN Doc A/RES/65/182 (2011)

United Nations Population Division 'World population prospects 2022: Summary of results' 7 www.un.org/development/desa/pd/content/World-Population-Prospects-2022 (World Population Prospects 2022) (accessed 24 July 2023)

United Nations Principles for Older Persons, adopted pursuant to UNGA Res 46/91, Implementation of the International Plan of Action on Ageing and related activities (16 December 1991) UN Doc A/RES/46/91

United Nations General Assembly Proclamation on Ageing (16 October 1992) UN Doc A/RES/47/5 (1992) para 3; United Nations General Assembly Implementation of the International Plan of Action on Aging and Related Activities (14 December 1990) UN Doc A/RES/45/106

University of Pretoria, Centre for Human Rights, #AgeWithRights Campaign, available at https://www.chr.up.ac.za/agewithrights (accessed 28 April 2023)

United Nations Report of the World Assembly on Aging (6 August 1982) UN Doc A/CONF.113/31 (1982)

Cases

McDonald v UK (2015) 60 EHRR 1

Vasileva v Denmark (2005) 40 EHRR 27

Jablonská v Poland (2003) 36 EHRR 27

Poblete Vilches et al v Chile (8 March 2018) Series C No 349

7 'Fortune' as a ground of discrimination under the African Charter on Human and Peoples' Rights

Gideon Basson

Abstract:

The African Charter on Human and Peoples' Rights (African Charter) has an enumerated ground of 'fortune' in its discrimination clause. This chapter considers what insights a teleological interpretation of the African Charter, rooted in its 'object and purpose', could give to the content of fortune as a ground of discrimination. The chapter demonstrates that a teleological interpretation of fortune furthers a regionally sensitive account of a substantive conception of equality in law that seeks to transform the political marginalisation, material deprivation and disadvantage, and social stigma, harm, and prejudice vulnerable groups such as impoverished people encounter. Drawing from a substantive conception of equality in law, this article argues that fortune refers to 'economic status' and that poverty is included in this listed ground of discrimination. The chapter then develops normative standards to interpret impoverished people's guarantee not to be discriminated against based on their fortune. Ultimately, it is argued that fortune as an expressed ground of discrimination is an untapped legal tool

to contest the multiple manifestations of discrimination impoverished people face.

1 Introduction

The African Charter on Human and Peoples' Rights (African Charter or Charter) contains the ground of 'fortune' in its discrimination clause.[1] To date, no interpretation of the meaning, content, obligations, and implications of fortune has been provided by the main supervisory organs of the African Charter, namely the African Commission on Human and Peoples' Rights (African Commission or Commission) and the African Court on Human and Peoples' Rights (African Court).[2]

In the latest report of the United Nations Special Rapporteur on Extreme Poverty and Human Rights (Special Rapporteur), fortune is aligned with the recent global interest in considering the inclusion of 'socio-economic disadvantage' as a ground of discrimination within human rights law as a tool to combat poverty.[3] The Special Rapporteur calls on international, regional and domestic human rights bodies to consider the inclusion of socio-economic disadvantage within '[a] comprehensive anti-discrimination framework'.[4] The African regional human rights system must heed this call as poverty in all its forms remains a big challenge.[5] The

1 African Charter art 2. See below under sec 2.2 for further regional human rights treaties that contain 'fortune' in their respective discrimination clauses.

2 See sec 2.1 below on the interpretative mandate of these organs and the specific instruments giving them legal force.

3 Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights* 'Banning discrimination on grounds of socio-economic disadvantage: An essential tool in the fight against poverty' UN Doc A/HRC/50/38/Add.5 (*UN SR Report on Socio-Economic Disadvantage 2022*) para 17 and the related footnotes.

4 *UN SR Report on Socio-Economic Disadvantage 2022* (n 3) part IV.

5 For a helpful illumination of the different manifestations of poverty from a human rights perspective, see O de Schutter 'A human rights-based approach to measuring poverty' in M Davis, M Kjaerum & A Lyons (eds) *Research handbook on human rights and poverty* (2021) 1 at 2-20. The United Nations Committee on Economic, Social and Cultural Rights (CESCR) has formulated an understanding of poverty that emphasises its intersecting conditions. They state that poverty may be defined as: '[A] sustained or chronic deprivation of resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights' in CESCR *Statement on the substantive issues arising in the implementation of ICESCR: Poverty and ICESCR* (2001) UN Doc E/C.12/2001/10 7. See a discussion in G Basson 'Poverty as a ground of unfair discrimination in post-apartheid South Africa' LLM thesis, Stellenbosch University, 2022 at 17-59 available at https://scholar.sun.ac.za/server/api/core/bitstreams/de0273a3-5c08-4549-aeef-e3ea423fe5d2/content (accessed 8 November 2023) for the different conceptions of poverty, such as absolute, relative, transient and chronic poverty and the implications for discrimination law.

majority of African people live in dire socio-economic conditions that are a significant source of the 'non-take-up' of rights.[6]

The structural conditions of stubborn poverty and widening inequality result in impoverished people in Africa facing pervasive forms of discrimination.[7] This includes discrimination in the form of political silencing, erasure and diminished democratic voice in influencing decisions that affect their lives.[8] Impoverished people are also met with invidious stereotypes, such as that they are poor because they want to be poor, are unhygienic, work avoidant, have low morals, and are an economic burden to states and better-off people.[9] Furthermore, the structural remnants of colonialism have morphed into neoliberal and global capitalist forces that continue to contribute to impoverished people on the African continent's material disadvantage,[10] such as discriminatory economic barriers to securing basic needs and services.[11] Together, these structural forms of discrimination impoverish people confront, intersect and manifest in, for example, brutal and unlawful incarcerations,[12] cruel evictions and dislocations,[13] and international unscrupulous lending practices that

6 *UN SR Report on Socio-Economic Disadvantage* (n 3) para 22; see also E Durojaye & G Mirugi-Mukindi *Exploring the link between poverty and human rights in Africa* (2020).

7 For some elaboration on the data pertaining to poverty and inequality and its concentration in sub-Saharan Africa, see Oxfam 'The tale of two continents: Fighting inequality in Africa' 19 September https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-tale-of-two-continents-fighting-inequality-africa-030919-en.pdf (accessed 20 August 2023); International Bank for Reconstruction and Development *Poverty and shared prosperity* (2022) 27-110; For specific data sets on African nation states' poverty and inequality levels, see World Inequality Lab 'World Inequality Report 2022' https://wir2022.wid.world/ (accessed 20 August 2023) at 179-229.

8 For one example of political suppression, see the #ENDSARS campaign in Nigeria, where citizens have contested the heightened police brutality toward socio-economically deprived people, see Amnesty International '"Welcome to hell fire": Torture and other ill-treatment in Nigeria' 18 September https://www.amnesty.org/en/documents/afr44/011/2014/en/ (accessed 20 August 2023); Basson (n 5) 28-39; R Cline-Cole & P Lawrence 'Extractive capitalism and hard and soft power in the age of Black Lives Matter' (2021) 48 *Review of African Political Economy* 497-508.

9 D Roman 'Guaranteeing human rights in situations of poverty' in *Redefining and combating poverty* (2012) 90; M Thornton 'Social status: The last bastion of discrimination' (2019) 5 *Anti-Discrimination Law Review* 1-19.

10 W Rodney *How Europe underdeveloped Africa* (2018); S Pillay (ed) *On the subject of citizenship: Late colonialism in the world today* (2023).

11 P Lawrence 'Global capitalism and Africa after Covid-19' (2020) 46 *Review of African Political Economy* 351-362.

12 For example, the recent by-laws of the City of Cape Town in South Africa that criminalises homelessness in W Holness W 'eThekwini's discriminatory by-laws: Criminalising homelessness' (2020) 24 *Law, Democracy & Development* 468-511.

13 See the case in South Africa where police dragged Bulelani Qolani out of his shack while he was naked in *South African Human Rights Commission v City of Cape Town* 2021 (2) SA 565 (WCC).

disproportionately impact impoverished populations in African states.[14] Discrimination also manifests in arbitrary police and military brutality,[15] vaccine apartheid,[16] and impoverished people on the African continent bearing the brunt of climate change catastrophes and environmental decline.[17] Considering these persistent forms of discrimination, the absence of an interpretation of fortune and the call of the Special Rapporteur, there is a need to develop a critical framework that can assist the African Charter's supervisory organs in interpreting the meaning, scope, content, and obligations of fortune as a ground of discrimination.

This chapter considers what insights a teleological interpretation of the African Charter, rooted in its 'object and purpose', could give to the meaning of fortune as a ground of discrimination.[18] The chapter examines the extent to which a teleological interpretation of fortune furthers a substantive conception of equality in law as a framework for determining the scope and nature of the right to non-discrimination based on fortune. It does so by looking at specific provisions under the African Charter and other international and regional human rights instruments, as well as relevant cases, resolutions, and communications of the African Commission and African Court. While a total consideration of other regional systems and international human rights instruments is beyond the scope of this chapter, relevant standards of grounds similar to fortune are referred to briefly.

Section 2 sets out the legal basis for a teleological approach to interpretation and briefly considers the various elements of such an approach. The chapter then examines the appropriateness of the teleological approach to interpretation for determining what interests fortune under the

14 T Zajontz 'Debt, distress, dispossession: Towards a critical political economy of Africa's financial dependency' (2021) 48 *Review of African Political Economy* 1-12.

15 African Commission *Principles on the decriminalisation of petty offences in Africa* (2021) (*Principles on Petty Offences)*; See the case in South Africa where the High Court of Pretoria ordered the South African National Defence Force to act in line with the rule of law after fatally beating an impoverished man, Collins Khosa, to impose lockdown restrictions of movement in *Khosa v Minister of Defence* 2020 (3) SA 190 (GP).

16 C Rodríguez-Garavito 'Human rights responses against vaccine apartheid' 12 June https://www.openglobalrights.org/up-close/vaccine-apartheid/#up-close (accessed 20 August 2023).

17 United Nations Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights: Climate Change and Poverty* (17 July 2019) UN Doc A/HRC/41/39 paras 49 & 58 specifically; P Lawrence 'Capitalism, resources and inequality in a climate emergency' (2021) 48 *Review of African Political Economy* 325-330.

18 See the references to the seminal texts on the teleological approach to treaty interpretation under sec 2.1 below.

African Charter seeks to protect and advance. Furthermore, the chapter analyses the characteristics of the elements of the teleological approach in the African Charter. In section 3, the chapter considers the basic tenets of a substantive approach to equality in law and evaluates its meaning in an African context in light of the elements of a teleological interpretation. The remainder of the chapter analyses the implications of a substantive understanding of equality in law for interpreting crucial components of the guarantee not to be discriminated against based on fortune.

2 A teleological interpretation of fortune

2.1 Teleological interpretation of human rights treaties

The African Commission is mandated to interpret the provisions of the African Charter.[19] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) also establishes the interpretative role of the African Court.[20] These supervisory bodies have numerous mechanisms through which they can develop human rights norms and standards.[21] In developing the norms and standards of the provisions contained in the Charter, the supervisory organs may draw from established interpretative canons within human rights law.[22]

The Vienna Convention on the Law of Treaties (VCLT)[23] codifies the authoritative rules for interpreting a treaty in 'good faith' to accord with the 'ordinary meaning' of the terms in their 'context' and 'in light of' its 'object and purpose'.[24] Distinct interpretative modes have emanated from the VCLT, respectively favouring different entry points to determining the

19 African Charter art 45(3).

20 Court Protocol arts 3(1) and 7.

21 The procedures and mechanisms include recommendations, concluding observations, general comments to specific provisions, opinions of an advisory nature, resolutions, judgments, and decisions on communications, all of which have different legal weight. For a thorough elaboration on the different functions of these mechanisms and their required procedures and processes, see F Viljoen *International human rights law in Africa* (2012) 213-410; M Ssenyonjo 'Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review* 1-42.

22 M Fitzmaurice 'Interpretation of human rights treaties' in D Shelton (ed) *International human rights law* (2013) 739 at 744-745.

23 VCLT arts 31-33.

24 GG Fitzmaurice 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 1-28.

meaning of the terms in a treaty.[25] The first interpretative mode favours the intention of the drafters of the treaty.[26] This approach has been criticised for assuming a common intention of the parties and its overreliance on the external work of the treaty drafting, adoption and ratification processes at the expense of the treaty's provisions.[27]

The second school of thought favours the textual construction of the treaty provisions with the assumption that the words of the text have a clear meaning.[28] The textual approach is frequently the dominant approach to treaty interpretation globally and specifically in the context of African human rights.[29] While the text of the African Charter is the logical commencement to interpretation, a purely textual approach to ascertain the meaning of fortune will not be favourable within a human rights paradigm, as fortune can mean many things.[30] The textual approach is, therefore, restrictive as it privileges a self-generating and inflexible meaning of broadly formulated terms and downplays the need for other interpretative methods to inform the meaning of the text.[31]

The third approach refers to the teleological mode of interpretation (also known as the 'generous' or 'purposive' approach) that relates to the *telos*, meaning the 'purpose' of the treaty.[32] The teleological approach focuses on the 'object and purpose' of the treaty to inform the meaning of the text in its context.[33] Importantly, the modes of interpretation are not mutually exclusive, and the teleological approach incorporates all

25 ME Villiger *Commentary on the 1969 Vienna Conventions on the Law of Treaties* (2009) 421-422.

26 Fitzmaurice (n 22) 745.

27 A Amin 'A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' LLD thesis, University of Stellenbosch, 2017 at 23-24 available at https://scholar.sun.ac.za/server/api/core/bitstreams/873c8f4b-253b-4b8c-b494-5151566b6b8a/content (accessed 8 November 2023).

28 Fitzmaurice (n 22) 1-2, 7.

29 Viljoen (n 21) 323-324; Amin (n 27) 25.

30 P Gaibazzi 'The quest for luck: Fate, fortune, work and the unexpected among Gambian Soninke Hustlers' (2015) 7 *Critical African Studies* 227-242. See further sec 4.1.1 below, excavating some diverging meanings of fortune.

31 M Killander 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 145 at 146.

32 Fitzmaurice (n 22) 4.

33 T Snyman & A Rudman 'Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33 *Stellenbosch Law Review* 57 at 66.

three approaches by looking at the textual provision in its context, not in isolation from but 'in light of' its 'object and purpose'.[34]

The task of the interpreter is to construe the provision in question in a manner that gives effect to the treaty's 'object and purpose'.[35] Importantly, the teleological approach does not reserve a once-off 'object and purpose' of a treaty but encourages the 'object and purpose' to be continuously revisited by interpreters to update and augment treaty provisions in its changing context.[36] Furthermore, the 'object and purpose' of a treaty provides a basis for interpreters to clear up the ambiguity of provisions, reconciling contradictory provisions and giving full effect to the specific provision within the treaty's text considered holistically.[37] The teleological approach is not confined to the text and utilises appropriate supplementary means outside of the text to determine the object and purpose of the treaty.[38]

As argued by Amin and Viljoen, the modes of interpretation followed by the supervisory bodies of the African Charter are inconsistent and not conducive to establishing a functional interpretation of fortune.[39] These inconsistencies could lead to several issues, such as self-generating assumptions of the meaning of, for example, fortune, restrictive protection of the human rights norms emanating from the prohibition of discrimination, formalistic and normatively thin limitation analyses, and ultimately resulting in unresponsive human rights instruments.[40] Thus, the teleological approach provides the basis not to impose any self-generated meaning within the ground of fortune but gives guidance to interpreters to infuse its meaning in line with the 'object and purpose' of the African Charter within its current context. Furthermore, as little is known about fortune, the teleological approach to interpretation uses various helpful sub-elements to carefully construct the meaning of fortune and the related human rights obligations in a legally binding manner.[41] These sub-elements are excavated and explained below within the African human

34 U Linderfalk *On the interpretation of treaties* (2007) 203-331; GG Fitzmaurice 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points' (1957) 28 *British Yearbook of International Law* 203 at 209.

35 Fitzmaurice (n 22) 2.

36 Fitzmaurice (n 22) 8.

37 As above.

38 Villiger (n 25) 421-422.

39 Amin (n 27) 20-21; Viljoen (n 21) 323-324.

40 As above.

41 VCLT art 32; Harvard Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971 art 19(a); Fitzmaurice (n 34) 207-209.

rights context to further argue for the appropriateness of the teleological approach to the interpretation of fortune as a ground of discrimination.

2.2 The elements of the teleological approach within an African human rights context

The first element of the teleological approach refers to the historical background of the treaty and the *travaux preparatoires* (preparatory works) of the treaty.[42] The preparatory work of a treaty is typically a supplementary means of interpretation that is only used when there is a need to confirm a meaning or clear up ambiguities in a relevant provision.[43] However, the preparatory works of human rights treaties, such as the African Charter, should be a central element of interpretation due to the historical import of the Charter.[44] Furthermore, the historical background and the preparatory work of the African Charter are significant for understanding the scope of the anti-discrimination protections. This is so as the African Charter establishes itself as an important political moment advancing universal human rights against the widespread institutionalised discrimination and colonisation of the African continent.[45] The Commission has alluded to colonialism as the historical inception of the Charter. The Commission highlighted:

> [C]olonialism, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. The drafters of the Charter obviously wanted to remind African governments of the continent's painful legacy and restore co-operative economic development to its traditional place at the heart of African Society.[46]

42 The historical background of the treaty is, to some extent, part of the context referred to in the VCLT art 31(2), together with the circumstances of the conclusion of the treaty and the preparatory work as a subsidiary means of interpretation recognised in the VCLT art 32.

43 M Fitzmaurice 'The practical working of the law of treaties' in M Evans (ed) *International law* (2014) 167 at 181.

44 SA Yeshanew *The justiciability of economic, social and cultural rights in the African regional human rights system: Theories, laws, practices and prospects* (2011) 52-53; Amin (n 27) 42.

45 M Killander 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) *Research handbook on international human rights law* 388 at 389-391; Viljoen (n 21) 323-324.

46 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 56 (*Ogoniland*).

Thus, examining the historical background and preparatory works of the African Charter gives insight into the object and purpose of the African Charter as well as fortune as a prohibited ground. Although the codification of the drafting history of the African Charter is patchy and mostly inaccessible,[47] which may result in omitting important information, the available preparatory preceding drafts to the African Charter are instructive to understanding fortune as different terminology was used.[48]

The second element of the teleological approach refers to the treaty as a whole. Such a comprehensive view utilises the Preamble together with the substantive provisions to inform a systematic construction and interpretation of the text in its entirety.[49] The Preamble to the African Charter contains contextual statements and substantive interpretative demands vital for understanding fortune in the Charter's discrimination clause. The Preamble to the African Charter stresses that the purpose of the African Charter is to 'promote and protect' the human rights of all persons.[50] The Preamble also emphasises the aspiration to achieve the 'total liberation of Africa' by placing a duty on 'everyone' to 'dismantle' '*all forms of discrimination*'.[51] Significantly, the Preamble reinforces a basic principle of international human rights law that all rights are indivisible and interdependent by highlighting the interrelationship between civil and political, socio-economic, group, and environmental rights.[52] The Preamble also provides interpretative guidelines in providing 'freedom, equality, justice and dignity' as 'essential *objectives* for achieving the legitimate aspirations of the African peoples'.[53] Furthermore, the Preamble commands that the African Charter must be considered in light of African values and philosophy that must 'inspire and characterize' a specific conception of human rights.[54]

The third element of the teleological approach relates to the subsequent application of the specific provisions of the treaty by interpretative organs

47 Viljoen (n 21) 323-325.

48 See further below sec 4.1.1.

49 Harvard Draft Convention on the Law of Treaties (n 41) art 19(a).

50 African Charter Preamble, para 10.

51 African Charter Preamble, para 8 (emphasis not in original text).

52 African Charter Preamble, para 7. Viljoen (n 21) 320-321. See sec 4.1.4 below on the significance of the interdependence of human rights and the interrelationship of equality and non-discrimination rights with other substantive rights under the African Charter.

53 African Charter Preamble, paras 3 & 8. (emphasis added).

54 African Charter Preamble, para 5. A Amin 'The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 23-51.

and states parties.[55] The subsequent application of the African Charter includes, for example, the decisions, resolutions and communications from the interpretative organs and the further development of other human rights instruments flowing from the African Charter.[56] In this respect, subsequent developments like the African Charter on the Rights and Welfare of the Child (African Children's Charter), the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), and the African Youth Charter (Youth Charter), and the body of human rights norms emanating from their operation become relevant in constructing a conception of equality envisioned by the African Charter that underlies discrimination protections.

The fourth element of the teleological approach refers to the prevailing conditions or context at the time of the interpretation of a treaty.[57] An awareness of these conditions will arguably enhance the responsiveness to the socio-economic conditions of people during the inception of the Charter and to the changing and prevailing living conditions of African peoples.[58] This element aims to enable the treaty as a 'living instrument' in being responsive to prevailing and changing socio-economic and political conditions. The African Charter as a 'living instrument' also recognises that people are differently situated, and human rights must find application in a context-sensitive manner.[59] In this respect, the African Commission has highlighted that human rights must be 'responsive to African circumstances'.[60] Significantly, the Commission held that 'the African Charter should be interpreted in a culturally sensitive way, taking into full account the differing legal traditions of Africa and finding its expression through the laws of each country'.[61]

The fifth element concerns the reliance on the relevant international, comparative regional and national human rights instruments and jurisprudence.[62] This element considers universal human rights norms and

55 Fitzmaurice (n 22) 9; F Viljoen 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 312 at 325-327.

56 Yeshanew (n 44) 46-49.

57 VCLT arts 31 & 32; Amin (n 27) 32-33.

58 Killander (n 31) 153 & 163. See the introduction and sec 3.2 below, elaborating on the discriminatory manifestations impoverished people encounter based on their fortune.

59 Killander (n 31) 150-152.

60 *Ogoniland* (n 46) para 68.

61 *Constitutional Rights Project v Nigeria* (2000) AHRLR 248 (ACHPR 1999) (*Constitutional Rights Project*) para 26.

62 A Amin 'A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 204 at 221-222.

standards and extends their application in the African regional human rights system through human rights monitoring bodies.[63] In this respect, the African Commission has held,

> [i]n interpreting and applying the African Charter, the African Commission relies on its own jurisprudence, and as provided by Articles 60 and 61 of the African Charter, on appropriate and relevant international and regional human rights instruments, principles and standards. ... The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms and standards taking into account the well recognised principle of universality which was established by the Vienna Declaration and Programme of Action of 1993 and which declares that 'all human rights are universal, indivisible, interdependent, and interrelated'.[64]

Furthermore, the African Commission has indicated that drawing from international and other regional human rights instruments is helpful for establishing 'benchmarks' to evaluate the application and interpretation of the African Charter.[65]

Lastly, all of the aforementioned elements are infused with the principle of effectiveness.[66] This principle requires the text to be interpreted in such a way that renders its object and purpose effective and consistent with the words of the text and the provisions of the treaty.[67] The principle of effectiveness advocates for internal and external effectiveness that harmonises the interpretation of a specific provision with the treaty as a whole, as well as its broader context within general international law of which it forms a part.[68] The Commission implicitly referred to the principle of effectiveness when it held, 'there is no right in the African Charter that cannot be made effective'.[69]

The analysis of the sub-elements of the teleological approach to the interpretation of the discrimination provisions within the African human

63 African Charter arts 30 & 31, as well as the Court Protocol arts 3 & 7.

64 *Purohit and Moore v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit*) paras 47-48.

65 African Commission on Human and Peoples' Rights 'General Comment 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c)' (General Comment 2), adopted at the 55th Ordinary Session of the African Commission, 28 April-12 May 2014 para 4.

66 Fitzmaurice (n 34) 203 & 211.

67 Fitzmaurice (n 43) 182.

68 Yeshanew (n 44) 51.

69 *Ogoniland* (n 46) para 68.

rights system showcases that the teleological approach is a significant means to assist interpreters in generating a functional and appropriate meaning of the purposes and values fortune as a prohibited ground of discrimination is intended to serve within the African Charter as a whole. Unfortunately, the teleological approach is still in its infancy under the African human rights system and indicates a mere 'tendency' as a preferred mode of treaty interpretation.[70] Nevertheless, supervisory organs have shown some willingness to interpret the provisions within the African regional human rights 'holistically' and within their 'context'.[71] The African Court has also confirmed that the VCLT applies to the African Charter by recognising that the 'purposive theory ... is one of the tools, if not the most important, of interpreting or construing a legal instrument'.[72] It becomes necessary to examine to what extent a teleological approach to interpretation could assist in developing a conception of equality that could and arguably should drive the operation of the rights to non-discrimination and equality under the African Charter.

3 Towards an 'African' substantive equality

3.1 From formal to substantive equality in law

A formal notion of equality decontextualises and depoliticises instances of discrimination through the belief that equality entails consistent treatment across differences, inequalities, and historical injustices.[73] The right of non-discrimination under the African human rights system has mostly been interpreted formalistically as a norm requiring 'equal treatment of an individual or group of persons irrespective of their particular characteristics'.[74] Chekera-Radu argues that the African

70 Viljoen (n 21) 324. For some examples indicating a tendency for preferring the teleological approach to interpretation, see *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (merits) (2013) 1 AfCLR 34 para 108; *Ingabire Victoire Umuhoza v Rwanda* (jurisdiction) (2016) 1 AfCLR 562 para 54.

71 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) (*Legal Resources Foundation*) para 70; *African Commission on Human and Peoples' Rights v Republic of Kenya* A (merits) (2017) 2 AfCLR 9 (*Ogiek*) para 197.

72 *Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child* (5 December 2014) 1 AfCLR 725 paras 84 & 92; *Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project* (2017) 2 AfCLR 572 para 57 relying on the VCLT art 31; *Urban Mkandawire v Malawi* (review and interpretation) (2014) 1 AfCLR 299, the separate opinion by Niyungeko at para 9, referred to the VCLT art 31.

73 J Whiteman 'Tackling socio-economic disadvantage: Making rights work' (2014) 12 *Equal Rights Review* 95-108.

74 *Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt* (2013) 85 (ACHPR 2013) (*Interights*) para 119.

Commission has largely chosen a formal conception of equality, which requires that people similarly situated should be treated alike.[75] Such an approach is not suitable for interpreting fortune-based discrimination as it is devoid of the context and the structural determinants that generate the different manifestations of discrimination, ultimately resulting in an under-inclusive and formalistic understanding of discrimination.

It is now undisputed that equality and non-discrimination guarantees in international human rights instruments must be interpreted and implemented through a substantive, as opposed to a formal, notion of equality.[76] Although the concept of substantive equality is contested,[77] critical legal theorists have introduced a substantive understanding of equality in law to contextualise instances of discrimination within its lived inequality and relationships between individuals and groups.[78] As there is currently no coherent approach to interpreting the equality and discrimination clauses in the African Charter, there is a clear need to examine and develop the substantive equality interpretative possibilities of discrimination based on fortune.

3.2 An 'African' conception of substantive equality in law

It is helpful to draw from the teleological approach to interpretation in establishing a regionally sensitive account of equality in law.[79] A regionally sensitive understanding of substantive equality should be aware of the limits of legal protections but, at the same time, view the law as an indispensable tool to facilitate transformation.[80] Therefore, a substantive

75 YT Chekera-Radu 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) *African Human Rights Yearbook* 41 at 57.

76 O de Schutter *International human rights law: Cases, materials, commentary* (2019) 625-666; for domestic application of substantive equality in African states to non-discrimination see, Basson (n 5) 28-39; V Miyandazi *Equality in Kenya's 2010 Constitution: Understanding the competing and interrelated conceptions* (2010).

77 See the texts of S Fredman 'Substantive equality revisited' (2016) 3 *International Journal of Constitutional Law* 713-738 and CA MacKinnon 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 3 *International Journal of Constitutional Law* 739-746 documenting the various seminal debates around substantive equality in law.

78 C Albertyn & B Goldblatt 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248 at 249.

79 See above under sec 2.2 on the 'living instrument' function of the teleological approach.

80 For some reflections of the limits of human rights on the African continent, and whether and to what extent it can align itself with a project of emancipation of structural disadvantage, see J Gathii, O Okafor & A Anghie 'Africa and TWAIL' (2013) *African Yearbook of International Law* 9-13; G Mohan & J Holland 'Human rights &

conception of law aims to facilitate transformation, especially for certain groups that would find it difficult, if not impossible, to overcome their exclusion without the law's assistance and intervention.[81]

Paragraphs 3 and 5 of the Preamble to the African Charter stipulate that the conception of human rights must be inspired by African philosophy to re-insert the aspirations of the African peoples' of 'freedom, equality, justice and dignity'.[82] These values are, therefore, crucial for the interpretation of impoverished peoples' rights to equality and non-discrimination as they inform African substantive equality that stresses the utilisation of law to transform structural disadvantage so that individuals and peoples can freely and equally relate to one another with the necessary just social, material and political preconditions.

As indicated in the introduction, the widespread 'non-take-up' of rights resulting from persistent poverty and rising inequality on the African continent starkly contrasts the African Charter's object and purpose to 'promote and protect' the full and equal enjoyment of all rights and freedoms.[83] The political marginalisation of impoverished people contradicts various provisions under the African Charter and other human rights instruments that seek to foster complementary forms of representative and participatory democracy.[84] Together, these forms of democracy envisage a form of equality of voice where people must deliberate and participate, sometimes embracing agonistic engagements

development in Africa: Moral intrusion or empowering opportunity?' (2007) 28 *Review of African Political Economy* 177-196; OC Okafor 'Poverty, agency and resistance in the future of international law: An African perspective' (2006) 27 *Third World Quarterly* 799-814.

81 S Fredman *Discrimination law* (2011) 31-34.

82 It should be emphasised that the notion of 'African philosophy' is subject to contestation and should not be epistemically stigmatised to encompass one strand or authoritative perspective. At the same time, drawing from precolonial African ways of doing and being should also not be romanticised to the extent that it generalises and loses sight of complexity and differences of current realities, just as one should not lose sight of the centuries of colonial ravages erasing (and continuing to in its neo-colonial forms) the impossibility of deeper justice. See T Fernyhough 'Human rights and precolonial Africa' in R Cohen, G Hyden & WP Nagan (eds) *Human rights and governance in Africa* (1993) 39-56; M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339-380.

83 African Charter Preamble, para 10.

84 African Charter art 13(1) referring to 'direct' participation and 'elected representatives'; African Charter on Democracy, Elections and Governance (adopted 30 January 2007 entered into force 5 February 2012) Preamble and arts 2(10), 4(2) & 8(3); Maputo Protocol Preamble and arts 9, 10 & 18.

and conflicting views, to enhance collective problem-solving.[85] Therefore, an African notion of substantive equality should aim to upend political exclusion and its related effects of diminished and silenced democratic voice and participation. The prevailing circumstances of poverty and inequality suggest that African nation-states, in varying degrees, rather mimic feudalistic, oligarchic, or plutocratic conditions that preclude impoverished people from the necessary political voice to shape their own life projects.[86]

The deeply undemocratic conditions are inimical to the African conception of political personhood, where the individual finds identity, belonging and solidarity through community participation.[87] Such a conception of political personhood strikes at the core of human dignity as one of the animating human rights norms under the African Charter.[88] In this respect, the African Commission has held that 'human dignity is an inherent basic right to which all human beings' are entitled without any qualifications.[89] Importantly, the Commission shed light on the interconnections between human dignity and equality by stating that human dignity is a context-sensitive right that everyone is entitled to 'without discrimination'.[90]

Recognising human dignity as an integral part of substantive equality is indispensable to combat discriminatory stereotypes, violence and prejudices impoverished people encounter.[91] The conceptual relationship between equality and human dignity also assists in coming to terms

85 For different accounts of democracy in Africa and proposals for a more participative and materially egalitarian idea of democracy, see C Ake 'The unique case of African democracy' (1993) 69 *International Affairs* at 239-244; H Brooks, T Ngwane & C Runciman 'Decolonising and re-theorising the meaning of democracy: A South African perspective' (2020) 68 *Sociological Review* 17-32; TW Bennet, AR Munro & PJ Jacobs *Ubuntu: An African jurisprudence* (2018) 124-158; MA Raufu 'The public sphere in 21st century Africa: Broadening the horizons of democratisation' (2012) 37 *Africa Development* 27-41.

86 MR Myambo 'Capitalism disguised as democracy: A theory of "belonging," not belonging in the new South Africa' (2011) 63 *Comparative Literature* 64-85; DE Uwizeyimana 'Democracy and pretend democracy in Africa: Myths of African democracies' (2012) 16 *Law, Democracy and Development* 139-161.

87 T Metz 'African conceptions of human dignity: Vitality and community as the ground of human rights' (2012) 13 *Human Rights Review* 19-37; A Nwoye 'An Afrocentric theory of human personhood' (2017) 54 *Psychology in Society* 42-66; SH Kumalo 'An Afro-communitarian compatibilist view on rights?' (2019) 66 *Theoria* 142-154.

88 African Charter Preamble and art 5.

89 *Purohit* (n 64) para 57.

90 As above.

91 Fredman (n 77) 730-731; Basson (n 5) 50-60.

with how poverty remains stubbornly gendered,[92] as well as leading to and exacerbating the discrimination experienced by other vulnerable groups, such as indigenous people and certain ethnic groups.[93] Substantive equality, therefore, aims to infuse legal protections with a heightened sensitivity to the socio-economic and political context in which it applies to consider differences within and between individuals and groups.[94] An intersectional understanding of disadvantage specifically enables such an infusion.[95] An intersectional view of disadvantage highlights that some groups and individuals encounter subordination and erasure because their disadvantage is constitutive of a combination of systems of domination pertaining to, amongst others, cis-hetero-patriarchy, white supremacy and privilege, ableism and neoliberal global capitalist exploitation.[96] In this sense, substantive equality must be historically sensitive in its efforts to disrupt the series of disadvantages that vulnerable and marginalised groups continue to encounter.[97]

Furthermore, as noted above, colonialism and its continuing neo-colonial and globalised capitalist forms continue to exploit and deprive most African peoples of their ability to access basic needs and resources.[98] It is critical for any understanding of fortune-based discrimination to be aware of the context of the conditions during the inception of the African Charter and the possible role this ground of discrimination sought to play in combatting poverty and inequality. The inception of the African Charter points to a deep commitment to liberating African states from the colonial strongholds that exploited the natural wealth and resources of the continent at the expense of catering for the basic needs of African peoples.[99]

92 SA Omotoso 'Hairiness and hairlessness: An African feminist view of poverty' in V Beck, H Hahn & R Lepenies (eds) *Dimensions of poverty* 115-130; L Debuysere 'Between feminism and unionism: The struggle for socio-economic dignity of working-class women in pre- and post-uprising Tunisia' (2018) 45 *Review of African Political Economy* 25-43; V Reddy & T Moletsane 'Gender and poverty reduction in its African feminist practice' (2009) 81 *Agenda: Empowering women for gender equity* 3-13.

93 BE Bedasso 'For richer, for poorer: why ethnicity often trumps economic cleavages in Kenya' (2016) 44 *Review of African Political Economy* 10-29.

94 C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253 at 259.

95 S Atrey 'Intersectionality from equality to human rights' in S Atrey & P Dunne (eds) *Intersectionality and human rights law* (2020) 1-17.

96 K Crenshaw 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *University of Chicago Law Review* 139 at 139-140; Atrey (n 95) 1-17.

97 Fredman (n 77) 728-729.

98 See above in the introduction in sec 1 with accompanying sources in footnotes 12 and 13.

99 C Robinson *Black Marxism: The making of the black radical tradition* (1983); Rodney (n 10).

The African Charter is clear in its object and purpose that people's basic needs must be fulfilled as it caters for a range of socio-economic rights.[100] Furthermore, African views on justice[101] would not tolerate basic needs being conflated with current survivalist human rights thresholds that set basic rights provisioning at limits not consonant with human dignity.[102] Importantly, African views on justice would enable any developmental efforts to be geared towards restructuring production and redistribution relations so that everyone's basic needs are systemically internalised and prioritised.[103] Thus, an African view of substantive equality in law strongly resists any manifestation of poverty and advocates for production and redistribution to fulfil basic needs.[104] Critically, basic needs fulfilment must accord with dignified human conditions and enable people to fully and equally participate in meaningful relationships and political life. As such, any deprivation of basic needs is an unjustifiable impediment to the full and equal enjoyment of all rights and freedoms as it stifles communal solidarity.[105]

Drawing from the African view of substantive equality in law highlighted above, the following part investigates whether a teleological interpretation of fortune under the African Charter could serve as a legal tool to hold relevant stakeholders accountable in terms of their obligations to halt, minimise or prevent, and redress discrimination based on fortune. To this end, the next section first briefly explains the general steps to a discrimination analysis in terms of the African Charter.

100 See below under 4.1.4 on the various recognised socio-economic rights under the African Charter.

101 For some examples pertaining to *ubuntu* and *ujamaa*, see L Praeg & S Madadla (eds) *Ubuntu: Curating the archive* (2014); PL Raikes 'Ujamaa and rural socialism' (1975) 3 *Review of African Political Economy* 33-52.

102 S Moyn *Not enough: Human rights in an unequal world* (2018) 295-359 where he criticises the global survivalist human rights thresholds; AM Fischer *Poverty as ideology: Rescuing social justice from global developmental agendas* (2018) 74-90.

103 Raikes (n 101); JT Gathii 'Africa and the radical origins of the right to development' (2020) 1 *Third World Approaches to International Law Review* 28-50.

104 See further below sec 4.1.4 on the interrelationship between the rights to equality and non-discrimination and the right of all peoples to freely dispose of their wealth and natural resources enumerated in the African Charter art 12(1).

105 J Nyerere *Ujamaa: Essays on socialism* (1968); A Mayer 'Ifeoma Okoye: Socialist-feminist political horizons in Nigerian literature' (2018) 45 *Review of African Political Economy* 335-344.

4 Discrimination based on 'fortune' within a reconsidered African conception of substantive equality established through a teleological interpretation

The rights to equality and prohibition of non-discrimination based on fortune are stipulated in articles 2 and 3 of the African Charter.[106] The African Commission has held that article 2 establishes the 'principle of non-discrimination' and article 3 the 'principle of equality'.[107] A broad two-step analysis of the rights to equality and non-discrimination can be distilled from the communications of the African Commission and jurisprudence of the African Court.[108]

The first step is to determine 'the recognition of the right and the fact that such a right has been violated'.[109] Thus, during various stages of a claim of discrimination based on fortune, the African Commission and/or[110] the African Court will have to interpret the content of fortune discrimination to determine whether the right has been violated. Such an interpretation would need elucidation on whether fortune could encapsulate poverty or socio-economic disadvantage. If it is found that fortune means something distinct from the latter, the possibility remains that poverty or socio-economic disadvantage could still be included under the African Charter. This is so since article 2 does not contain an exhaustive list of grounds but is 'merely indicative' of group-based exclusion.[111] Article 2 being non-exhaustive means that the catch-all criteria of group-based vulnerability

106 African Charter art 2 encompasses the following:
Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.
Furthermore, Article 3 of the African Charter sets out that:
1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

107 *Antonie Bissangou v Congo* (2006) AHRLR 80 (ACHPR 2006) (*Antonie Bissangou*) para 68.

108 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2020) 56; for one example utilising this two-step approach, see *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010) paras 219 & 222.

109 *Legal Resources Foundation* (n 71) para 67.

110 Court Protocol art 2; A Rudman 'The Commission as a Party before the Court: Reflections on the Complementarity Arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 3.

111 *Open Society Justice Initiative v Côte d'Ivoire* (2006) AHRLR 62 (ACHPR 2006) (*Open Society Justice Initiative*) para 145.

could recognise other grounds of discrimination.[112] Furthermore, during the first step of the interpretative process, interpreters must consider fortune's intersectional relationship with other prohibited grounds. Interpreters must also consider what constitutes *discrimination* based on fortune by examining the legal duties on state and non-state actors emanating from the right, as well as the equality and non-discrimination rights' interrelationship with other substantive provisions under the African Charter.

Once discrimination on the basis of fortune has been established, the discrimination is presumed to be unjustifiable, and the burden to prove that the discrimination was justifiable moves onto the state.[113] Therefore, the second step of the interpretative process considers whether the violation is justifiable in law.[114] Even though article 2 does not contain a limitation or 'clawback clause', it is not an absolute right.[115] Given the different standards postulated by jurisprudence, it is unclear how supervisory organs should scrutinise the reasons provided for fortune-based discrimination.[116] A substantive framework of equality informed by a teleological approach provides formidable insights into how any justifications for discrimination based on fortune should be reviewed. The following parts draw from the teleological approach to interpretation and the subsequent African substantive conception of equality in law to develop the normative content and evaluative standards of discrimination based on fortune.

112 For example, the African Commission has recognised disability, including albinism, HIV/AIDS, and age in terms of 'other status' under the African Charter art 2. See some references to these grounds of discrimination in African Commission Resolution on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa (2004) ACHPR/Res 343(LVIII); African Commission Resolution on the Appointment of the Chairperson and Members of the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and those at Risk, Vulnerable to and Affected by HIV (2011) ACHPR/Res 195; African Commission Resolution on the Rights of Older Persons in Africa, (2007) ACHPR/Res. 106; African Commission Resolution on the Right to Water Obligations (2015) ACHPR/Res 300 (EXT.OS/ XVII) para 8; M Heikkilä & M Mustaniemi-Laaksa 'Vulnerability as a human rights variable: African and European developments' (2020) 20 *African Human Rights Law Journal* 777-798.

113 *Thomas Kwoyelo v Uganda* (2018) ACHPR 129 (ACHPR 2018) para 164.

114 *Legal Resources Foundation* (n 71) para 67.

115 There is, therefore, a crucial distinction between a limitation of a right and a justification posed for its violation. The Commission has indicated that a limitation amounts to a lower threshold of the enjoyment or content of a right by, for example, a 'clawback clause' such as the African Charter art 27(2), whereas a justification refers to instances where a justification is sought to 'set perimeters on the enjoyment of the right', see *Legal Resources Foundation* (n 71) para 70.

116 Murray (n 108) 55-58.

4.1 Discrimination on the basis of fortune

4.1.1 The meaning of fortune

As is argued above, a purely textual approach to interpreting 'fortune' is undesirable as interpreters could self-generate any meaning to fortune as fortune has many meanings.[117] Some meanings are instilled in everyday linguistic expressions where people often refer to the 'less fortunate ones', the 'misfortune' of others or 'unfortunately' in its sentence function as an adverb.[118] Fortune is also captured in idiomatic expressions like 'fame and fortune', 'make a fortune', or 'we are very fortunate'. It can also simply refer to a 'large sum of money', 'good or bad luck' in 'telling someone's fortune', or it can be the corollary of 'wealth'.[119] Such expressions unhelpfully normalise[120] impoverishment and inequality as a natural outcome of neutral market principles, thereby hiding its legal, political, economic and social structural drivers that substantive equality in law must seek to expose and upend. The teleological approach's utilisation of the history of the African Charter and its preparatory documents become useful in elaborating on what fortune means within the context of the Charter.

In the first draft of the African Charter, namely the M'Baye Draft, the expressed ground was not fortune, but rather 'economic status'.[121] The subsequent draft of the African Charter, the Dakar Draft, replaced economic status with fortune. In the recorded preparatory documents, it is not clear why the formulation of the ground changed.[122] 'Economic status' in the M'Baye Draft is influential as it suggests that, at most, fortune and economic status are interchangeable, or at the very least, signal a strong denotation. As such, economic status in the M'Baye Draft indicates that fortune is aligned with the material resources people have to fulfil or

117 See sec 2.1 above.

118 M Gardini 'Where does fortune come from? Agrarian work ethics and luck in Togo' (2015) 7 *Critical African Studies* at 210-226.

119 P Gaibazzi & M Gardini 'The work of fate and fortune in Africa' (2015) 7 *Critical African Studies* at 203-209.

120 D Brand, S de Beer, I de Villiers & K van Marle 'Poverty as injustice' (2013) 17 *Law, Democracy & Development* at 273-297.

121 M'Baye Draft African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/1 (M'Baye Draft).

122 One explanation may be related to language and different drafters using the French of 'economic status' as 'defortuna' as documented in *UN SR Report on Socio-Economic Disadvantage* 2022 (n 4). However, to engage in a guessing endeavour would amount to speculation that would not clarify the meaning of fortune.

access various rights under the Charter aimed at creating the conditions for people to determine their self-chosen destinies.

Economic status is also the chosen ground of discrimination under article 1 of the American Convention on Human Rights.[123] Furthermore, the United Nations Committee on Economic, Social and Cultural Rights (CESCR) interpreted 'other status' under article 2(2) of the International Covenant on Economic, Social and Cultural Rights to include 'economic and social situation'.[124] Significantly, the CESCR defined 'economic and social situation' as: [125]

> Individuals and groups of individuals must not be arbitrarily treated on account of belonging to a certain economic or social group or strata within society. A person's social and economic situation when living in poverty or being homeless may result in pervasive discrimination, stigmatization and negative stereotyping which can lead to the refusal of, or unequal access to, the same quality of education and health care as others, as well as the denial of or unequal access to public places.

On the domestic level, as an example, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA), one of the legislative expressions of the right to equality and non-discrimination under the Constitution of the Republic of South Africa, 1996, has 'socio-economic status' as a directive principle. In this context, 'socio-economic status' is defined as:

> [Including] a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications.[126]

A South African High Court has recently elevated 'socio-economic status' from a directive principle to a prohibited ground of discrimination by finding that 'poverty' as part of 'socio-economic status' meets the test for analogous grounds of discrimination.[127] The High Court indicated that

123 American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143.

124 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3; UNCESCR General Comment 20 Non-discrimination in economic, social and cultural rights (art 2, para 2) (2009) UN Doc E/C.12/GC/20.

125 General Comment 20 (n 124) para 35.

126 PEPUDA sec 1(1)(xxvii).

127 *Social Justice Coalition v Minister of Police* 2019 (4) SA 82 (WCC) (*Social Justice Coalition*).

poverty is analogous to listed grounds of discrimination as poverty causes and perpetuates systemic disadvantage, severely undermines impoverished people's human dignity and seriously obstructs people's ability to fully and equally enjoy all rights and freedoms.[128]

The element of the teleological interpretation that stresses reliance on international law, other regional treaties, and relevant domestic sources attaches significant weight to the abovementioned grounds in understanding the meaning of fortune. The explicit reference to 'economic status', 'economic and social situation' and 'socio-economic status' strongly suggests that fortune is a pivotal ground under the African Charter to create an awareness of how peoples' fortune and, by implication, their material disadvantage and deprivation, impedes the enjoyment of all rights and freedoms contained in the African Charter. Murray also argues that poverty is implied in the expressed ground of fortune as the African Commission has stated that fortune may refer to the 'inequality of income and wealth' concerning human rights issues affecting youth.[129]

The acknowledgement that fortune refers to 'economic status' is further strengthened by a review of how the African Commission displays an awareness of the material deprivation and the connected discrimination marginalised groups encounter in the subsequent practice of the African Charter relating to two seminal decisions on communications.[130] In *Purohit*, the African Commission considered various rights violations experienced by mental health patients detained in a psychiatric unit under dire conditions managed by outdated laws governing health practices.[131] The Commission shed light on how disabled people, specifically poor, disabled people, experience intersecting dimensions of discrimination. Regarding their political exclusion, the Commission found that people detained under the impugned legislation 'are likely to be people picked up from the streets or people from poor backgrounds'.[132] The Commission emphasised that such a vulnerable group of people would need legal representation to have their cause heard otherwise, fundamental political

128 *Social Justice Coalition* (n 127) paras 56-65.

129 Murray (n 108) 76; African Commission Resolution on the human rights issues affecting the African youth (2015) ACHPR/Res. 347 (LVIII).

130 For a more sustained engagement with the responsiveness of the African human rights system's jurisprudence to impoverished people more generally, see O Okafor 'Have the norms and jurisprudence of the African human rights system been pro-poor' (2011) 11 *African Human Rights Law Journal* at 396-421.

131 *Purohit* (n 64) paras 3-8.

132 *Purohit* (n 64) para 53.

rights would 'only be available to the wealthy and those that can afford the services of private counsel'.[133]

Purohit also showcases the crucial relationship between human dignity and material deprivation, which are key characteristics of substantive equality.[134] The Commission held that labelling people with mental illnesses as 'lunatics' and 'idiots' has a dehumanising effect, and it denies them their right to human dignity, which encompasses being treated equally and with respect.[135] Significantly the Commission indicated that the denial of human dignity exacerbates the structural barriers to 'enjoy[ing] a decent life'.[136]

Regarding the basic need for healthcare entrenched as the human right to health, the Commission highlighted that impoverishment severely restricts access to fundamental resources, goods, services, and facilities. It stated that,

> [M]illions 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.[137]

The Commission, therefore, indicated that all human rights and freedoms must be guaranteed without discrimination.[138]

In *SERAC*, the Commission considered the violation of various rights enumerated under the African Charter of a small ethnic group in Nigeria, the Ogoni, through unlawful exploitation and extractive activities of the Ogoniland.[139] In terms of the political exclusion of the Ogoni, the communication alleged that the community's rights were violated as they were not consulted in developmental operations, directly threatening their communal and individual lands.[140] The Commission indicated that the Charter requires vulnerable communities to be informed of any activities that may affect them and that stakeholders are obligated to provide

133 As above.

134 See sec 3.2 above.

135 *Purohit* (n 64) para 59.

136 *Purohit* (n 64) para 61.

137 *Purohit* (n 64) para 84.

138 *Purohit* (n 64) para 80.

139 *Ogoniland* (n 46).

140 *Ogoniland* (n 46) para 6.

'meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[141]

Importantly, the *Ogoniland* decision also shows that the political marginalisation of the Ogoni has had a deleterious effect on the ability of the community to use their natural wealth and resources to meet their material needs. The applicants indicated that the destruction of indigenous farmlands, crops, rivers, and animals has led to 'malnutrition and starvation among certain Ogoni Communities'.[142] The Commission accentuated that the material exploitation of the community has led to the denial of the inherent worth and collective human dignity of the group. It held,

> The right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of such other rights as health, education, work and political participation.[143]

The above analysis demonstrates that a teleological approach to interpreting fortune as a prohibited ground appropriately harnesses the substantive equality impetus of the non-discrimination right under the African Charter. Substantive equality, therefore, gives substance to the overarching 'object and purpose' of the right not to be discriminated against based on fortune by providing poor people with a legal tool to challenge the material disadvantage and deprivation they encounter. It is therefore not necessary to consider whether poverty should rather be found as a ground of discrimination on 'other status' under article 2 of the Charter, as fortune already provides an appropriate and listed ground to contest the discriminatory manifestations impoverished people face on the basis of their fortune. However, fortune alone would not be able to faithfully reckon with, for example, the structural drivers of gendered poverty.[144] It is, therefore, necessary to consider fortune's relationship with other prohibited grounds of discrimination under the African Charter.

4.1.2 Intersectionality: fortune's intersection with other grounds

The political exclusion, material disadvantage, and social prejudices and violence that certain groups are disproportionately faced with often becomes

141 *Ogoniland* (n 46) para 53.

142 *Ogoniland* (n 46) para 9.

143 *Ogoniland* (n 46) para 65.

144 See sec 3.2 above elaborating on intersectional disadvantage and poverty and the related footnotes of gendered poverty.

a catalyst that moves them toward or into poverty.[145] In addition, poverty and inequality are significant contributors that enlarge or exacerbate the discrimination certain groups encounter.[146] Poverty, therefore, intersects with interrelated but different systems of subordination.[147] In this respect, intersectionality becomes vital in furthering substantive equality as it enables a greater awareness of how structural disadvantage converges for differently situated persons and groups.[148]

Bond argues that intersectionality in international discrimination law does not merely add different grounds on top of each other to show the depth of discrimination some groups face, but it is also a way of detecting how different grounds of discrimination converge for differently situated persons.[149] Such awareness has the potential to be more responsive and faithful to the context and lived experiences of impoverished people. For example, African women are often pushed into poverty due to their patriarchal subordination, resulting in discriminatory inheritance and divorce laws[150] or placing extra burdens of childrearing, domestic duties and the caretaking of the elderly overwhelmingly on women.[151] Other times, impoverished women struggle to overcome their patriarchal subordination because they often have to bear the brunt of living in poverty.[152] As an example, impoverished women disproportionately confront no or inadequate access to reproductive and gender-responsive healthcare services.[153] Or when they do have access to reproductive health

145 JA Thompson, SJ Gaskin & M Agbor 'Embodied intersections: Gender, water and sanitation in Cameroon' (2017) 31 *Agenda* at 140-155.

146 S Fredman 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) 22 *Stellenbosch Law Review* 556 at 584.

147 S Atrey 'The intersectional case of poverty in discrimination law' (2018) 18 *Human Rights Law Review* at 411-440.

148 See sec 3.2 above.

149 J Bond *Global intersectionality and contemporary human rights* (2021) 79.

150 For example, see para 24 of the African Commission General Comment 6 On the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D)) where the African Commission indicated that the discriminatory laws involved when women enter divorce proceedings 'can be a precursor to poverty and destitution for many women'.

151 S Valiani *The Africa care economy index* (2022) secs A & B.

152 B Goldblatt 'Violence against women and social and economic rights: Deepening the connections' in S Harris Rimmer & K Ogg (eds) *Research handbook on feminist engagements with international law* (2019) 359 at 368-372.

153 United Nations General Assembly *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng* 'Sexual and reproductive health rights: Challenges and opportunities during the COVID-19 pandemic' (2021) UN Doc A/76/172 (Mofokeng 'Sexual and reproductive health rights') parts I-II & V.

services, impoverished women are more exposed to being forcibly sterilised because of discriminatory assumptions that they are unable to provide for their children, they merely want the children for access to grants, or they are promiscuous without the intellect and education for family planning, and sex practices that prevent pregnancy.[154]

The African human rights system has not explicitly recognised intersectional discrimination within its textual protections. Furthermore, the African Commission and African Court have not fully grasped the challenges intersectional vulnerabilities pose to the realisation of human rights and freedoms for certain groups.[155] However, with a teleological interpretation that infuses a treaty with living qualities and looking at subsequent interpretative practices of supervisory organs and other treaty expressions, the intersectional potential of fortune as a ground of discrimination can be developed as follows.

The African Commission has expressed in its Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (Principles and Guidelines) that 'intersectional or multiple discrimination occurs where the effect of certain imposed requirements, conditions or practices has an adverse impact disproportionately on one group or other'.[156] The Principles and Guidelines also provide that '[s]tates should recognise and take steps to combat intersectional discrimination based on a combination of [grounds]'.[157] This acknowledgement is also expressed in subsequent human rights instruments focusing on specific marginalised groups, such as the Maputo Protocol.

The Maputo Protocol is an exemplary human rights instrument that captures the gendered dimensions of poverty. It significantly extends fortune as a prohibited ground of discrimination in its Preamble.[158] Article 24 of the Maputo Protocol further places a special duty on states parties to protect 'Women in Distress' and refers to women living in poverty in article 24(a):

154 Human Rights Council *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng* 'Violence and its impact on the right to health' (2022) UN Doc A/HRC/50/28.

155 Bond (n 149) 445.

156 As adopted on 24 October 2011 part 1 interpretation subsec l http://archives.au.int/handle/123456789/2063 (accessed 20 August 2023).

157 Principles and Guidelines (n 156) para 38.

158 Maputo Protocol Preamble, para 2.

> [E]nsure the protection of poor women and women heads of families including women from marginalized population groups and provide an environment suitable to their condition and their special physical, economic and social needs.

State parties are also obligated to promote women's access in various fields to 'provide women with a higher quality of life and reduce the level of poverty among women'.[159] The Protocol also implicitly furthers an intersectional awareness of discrimination as it places duties on states parties to be cognisant of women in rural areas, elderly women, and women with disabilities.[160]

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (Protocol on the Rights of Persons with Disabilities)[161] also finds its inception in an intersectional recognition of people living with disabilities 'which often lead[s] to consequences such as poverty, illiteracy and health issues'.[162] In its Preamble, the Protocol on the Rights of Persons with Disabilities notes that 'persons with disabilities experience extreme levels of poverty.'[163] The Preamble also initiates an intersectional awareness of vulnerability by expressing the concern of 'multiple forms of discrimination, high levels of poverty and the great risk of violence, exploitation, neglect and abuse that women and girls with disabilities face'.[164]

Fortune as an expressed ground of discrimination in article 5(1) of the Protocol on the Rights of Persons with Disabilities should be understood in light of the concerns expressed in the Preamble and direct various protections in the Protocol to ensure political voice, the eradication of material disadvantage and the recognition of poor people with disabilities' inherent human dignity. Although not litigated or decided explicitly on intersectional grounds, and before the adoption and entry into force of the Protocol on the Rights of Persons with Disabilities, the *Purohit* case illustrates how an awareness of intersectional discrimination on the grounds of disability and poverty enabled a contextual consideration of the various rights and freedoms that were violated of the patients in the psychiatric unit.[165]

159 Maputo Protocol art 19(d) on the right to sustainable development.

160 Maputo Protocol arts 14(2)(a) & 19(d), 22, 23 respectively.

161 Adopted 29 January 2018 and not yet entered into force.

162 Centre for Human Rights *A guide to the African human rights system* (2016) 19.

163 African Disability Protocol Preamble, para 15.

164 African Disability Protocol Preamble, para 19.

165 *Purohit* (n 64). See sec 4.1.1 above for a further exposition of the various rights' violations present in the case.

Other grounds of discrimination and group vulnerability also intersect with the discrimination impoverished people face based on their fortune, which have been acknowledged by the supervisory organs and other human rights forums to the African Charter. These groups include children, the youth, indigenous people, people with HIV/AIDS, the elderly, refugees, asylum seekers, internally displaced persons and migrants, victims of forced evictions and homelessness, women seeking abortions and poor people in the criminal justice system.[166]

4.1.3 Discrimination and equality and non-discrimination duties

The teleological approach to treaty interpretation is also advantageous to the extent that it provides a basis for distilling the concept of discrimination under the African human rights system. Furthermore, the teleological approach is imperative for determining the human rights duties that flow from the guarantee not to be discriminated against based on one's fortune. The following section first discusses the concept of discrimination and thereafter furthers the concept, considering the duties it imposes on relevant stakeholders.

Drawing from other international human rights standards, the African Commission held that 'discrimination can be defined as applying any distinction, exclusion, restriction or preference which is based on any ground'.[167] The African Commission also acknowledges that discrimination can manifest through 'any conduct or omission'.[168] Furthermore, any discriminatory conduct or omission must have the 'purpose or effect of nullifying or impairing the equal access to and enjoyment of economic, social and cultural rights'[169] or the 'purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by

166 African Commission Resolution on Indigenous Populations/Communities in Africa (2016) ACHPR/Res. 334 (EXT.OS/XIX) (Resolution on Indigenous Populations); African Commission Resolution on the Human Rights issues affecting the African Youth (2016) ACHPR/Res. 347(LVIII); African Commission Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa (2017) ACHPR/Res. 366 (EXT.OS/XX1); African Commission Resolution on Women's Right to Land and Productive Resources (2013) ACHPR/Res.262 (LIV); African Commission Resolution on the Situation of Women and Children in Africa (2021) ACHPR /Res.66 (XXXV).

167 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006) (*Zimbabwe Human Rights Forum*) para 169.

168 Principles and Guidelines (n 167) para 19.

169 As above.

all persons, on equal footing, of all rights and freedoms'.[170] Furthermore, direct and indirect discrimination is recognised, and there is, therefore, no need to show that the duty-bearer of the right had the intention to discriminate.[171] Indirect discrimination 'includes situations in which a law or a neutral or an apparently non-discriminatory measure produces the effects of an unjustified distinction'.[172] Recognising that discrimination based on fortune can manifest indirectly is imperative as various everyday laws, practices, and omissions reinforce the disadvantages of impoverished people, although they appear neutral.

These elements of discrimination suggest that the non-discrimination guarantee under the African Charter not only intends to combat differential treatment but also cast the net wider to challenge structural manifestations of discrimination relating to material disadvantage and political erasure. Although these elements give greater clarity to the determination of discrimination based on fortune, the specific duties that the non-discrimination guarantee places on states parties further expand on the substantive equality object and purpose of the ground of discrimination.

Article 2 of the African Charter places a combination of positive and negative duties on states parties. As a start, equality and freedom from discrimination are central features of international human rights law that bind all states parties and ensure that no discriminatory derogations on the basis of fortune are permitted.[173] The Preamble of the African codifies these commitments by expressing that states parties are:

> Firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa.[174]

The African Commission has subsequently adopted the well-established international human rights quartet of duties to protect, respect, promote and fulfil human rights.[175] In terms of non-discrimination, the African Commission called on states parties 'to strictly observe the provisions of the African Charter, in particular, Article 2 on the principles of non-

170 *Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009) (*Zimbabwe Lawyers for Human Rights*) para 91.

171 See the discriminatory manifestations elaborated in the introduction in sec 1.

172 *Open Society Justice Initiative* (n 111) para 144.

173 De Schutter (n 76) 655.

174 African Charter Preamble, para 10.

175 Principles and Guidelines (n 156); *Ogoniland* (n 46) paras 44-47.

discrimination and *take all necessary measures* to end all discriminatory practices'.[176]

Notably, the matrix of duties entails more than a traditional negative legal duty of non-interference. A substantive conception of equality also requires positive and redistributive duties to inform the duties to respect, fulfil, promote and protect.[177] The African Commission had implicitly denied a formal understanding of equality duties when it indicated that article 2 of the Charter does not require people in similar situations to be treated the same but that some circumstances will permit differential or favourable treatment to comply with human rights duties.[178] In subsequent human rights treaties and documents, 'positive measures' are also required to not only address the deprivation marginalised groups face but also to transform the structural inequalities that enable marginalisation and discrimination.[179] Importantly, the African conception of personhood, where people have inherent moral worth that is furthered through collective solidarity, would not mark redistributive efforts as a counter to African egalitarian efforts.[180] Rather, redistributive efforts would be considered indispensable for creating the necessary conditions where rights and freedoms can be exercised on an equal footing. Moreover, in instances where states parties ignore, neglect, or fail to prioritise impoverished people in redistributive measures to promote and protect their fundamental rights, it will constitute discrimination by omission.

Importantly, states parties must also show that they have harnessed their duties of international cooperation and assistance to fulfil impoverished people's rights to equality and non-discrimination.[181] Furthermore, the rights to equality and non-discrimination bind not only states parties but

176 African Commission Resolution on the General Human Rights Situation in Africa (2011) ACHPR/Res.207 para 8. (emphasis added).

177 S Fredman *Human rights transformed* (2008) 313-318.

178 *Dabalorivhuwa Patriotic Front v Republic of South Africa* [2013] ACHPR 115 (23 April 2013) (*Dabalorivhuma*) para 117.

179 Art 1(f) definition of discrimination in the Maputo Protocol read with art 2(1) detailing substantive equality entailing positive duties such as 'corrective and positive action' and art 26 requiring the provision of budgetary and other resources to effectively implement and monitor the Protocol. Also see the case of the High Court in Kenya at Nairobi *John Kabui Mwai v Kenya National Examination Council* Petition 15 of 2011 paras 5-11 where redistributive economic measures were held to be part of equality.

180 See sec 3.2 above; TW Bennett 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal* 30 at 49-51.

181 African Charter Preamble, para 4; O de Schutter 'The rights-based welfare state: Public budgets and economic and social rights' (2018) *Friederich Ebert Stiftung* 39.

also non-state actors.[182] The direct obligations of non-state actors need more development in the context of fortune-based discrimination.[183] However, at the very least, there is a duty placed on states parties to exercise 'due diligence' in regulating the affairs of non-state actors to ensure that discrimination based on fortune is not present.[184]

Given the description above that discrimination must have the effect of impairing any rights and freedoms under the Charter, a specific focus on the expressed standards of non-discrimination and impoverished people's rights will assist in further interpreting the matrix of duties emanating from the rights to equality and non-discrimination.

4.1.4 The rights to equality and non-discrimination and other rights

The African Commission has taken a cue from the stipulation in article 2 of the Charter that every individual shall be entitled to the enjoyment of the rights and freedoms that are entrenched in the African Charter in holding that article 2 does not establish a 'general ban' on discrimination, but rather 'only prohibits discrimination where it affects the enjoyment of a right or freedom guaranteed by the Charter'.[185] This means that article 2 does not necessarily confer a stand-alone right, but complainants will have to show that their enjoyment of a right or rights in the African Charter is 'hindered in a discriminatory way'.[186] Murray indicates that jurisprudence suggests that article 2 of the African Charter is mostly leveraged to show that there is discrimination against an identifiable group by excluding them from or impairing their enjoyment of a right.[187] This interrelationship between fortune discrimination and other rights is reinforced by a teleological approach to interpretation that recognises the treaty as a whole.[188] This indicates that where impoverished people encounter discriminatory barriers to fully enjoying their rights due to misfortune, it can be challenged in law.

182 Expressed through 'everyone' in the African Charter Preamble, para 7.

183 For some elaboration of non-state actors' influence in enabling global poverty and inequality with some proposals for legal intervention, see L Williams 'Beyond the state: Holding international institutions and private entities accountable for poverty alleviation' in Davis, Kjaerum & Lyons (n 5) 550-565.

184 *Zimbabwe Human Rights Forum* (n 178) para 158; African Commission Resolution on States' obligation to regulate private actors involved in the provision of health and education services (2019) ACHPR/Res.421 (LXIV).

185 *Antonie Bissangou* (n 107) para 69.

186 As above.

187 Murray (n 108) 48-53.

188 See sec 2.2 above.

In terms of the material disadvantage and the basic need deprivation of impoverishment, the recognised and implied socio-economic rights under the African Charter must be responsive to impoverished people's challenges to realise these rights based on their fortune.[189] In this respect, the Principles and Guidelines indicate that states parties have specific responsibilities to vulnerable groups by virtue of the non-discrimination principle.[190] The African Commission has also stated in the context of access to health and needed medicines that states parties should guarantee 'the full scope of access to needed medicines, including the accessibility of needed medicines to everyone without discrimination'.[191] In particular, states are required to protect access to needed medicines and regulate non-state actors to 'prevent unreasonably high prices for needed medicines in both the public and private sectors, through promotion of equity pricing in which the poor are not required to pay a disproportionate amount of their income for access'.[192] The standards that emerge from these statements suggest that states parties must eliminate the barriers to accessing these fundamental rights based on fortune.[193]

In terms of the various civil and political rights implicated by the condition of poverty, states parties will have to ensure direct participation by poorer communities and individuals to overcome their political exclusion. The right to freedom of expression may place special duties on states parties to promote, for example, community broadcasting, especially to 'broaden access by poor and rural communities to airwaves'.[194] The African Commission has also indicated that to effectively respond to the COVID-19 virus in Africa, special measures must be put in place for

189 Such as property, work, health, education, family, the collective socio-economic rights to freely dispose of wealth and natural resources, development and a general satisfactory environment. The African Commission have implicitly recognised other socio-economic rights is social security, an adequate standard of living including food, water and housing. See arts 14, 17, 18, 21, 22 & 24, and *Ogoniland* (n 46) paras 60-64 and *Sudan Human Rights Organisation v Sudan* (2009) AHRLR 153 (ACHPR 2009) para 209. For a strong argument for the potential of utilising socio-economic rights and the non-discrimination guarantees in the African Charter, see 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 at 152-154.

190 Principles and Guidelines (n 156) 13.

191 Resolution on access to health and needed medicines in Africa (2021) ACHPR/ Res.141(XXXXIV).

192 As above.

193 See sec 4.2 below on the justifications of limited resources.

194 African Commission Resolution on the adoption of the Declaration of principles on freedom of expression in Africa (2002) ACHPR/Res.62 (XXXII).

'vulnerable groups including the poor' to ensure their right to access to information on a non-discriminatory basis.[195]

The Commission has also expressed that adequate, strong and substantive legal and institutional frameworks must be put in place to address the increased poverty and social and economic disparities that violate the rights and freedoms of indigenous people.[196] The Commission has stressed that poor and vulnerable youths, prisoners, children, women, and people who are infected or affected by HIV/AIDS should be prioritised, on the basis of non-discrimination, in protection efforts during situations of violence, such as gender-based violence, forced removals and evictions, armed conflicts and terrorist activities, and harmful cultural practices.[197] Significantly, the African Commission has demanded that states parties must continuously monitor and prioritise efforts to address the disproportionate impact on vulnerable groups 'like the poor' during financial crises.[198] Furthermore, states parties must strengthen and adopt principles of good governance to enhance transparency and accountability to ensure economic equality and 'create a conducive environment for the reduction of poverty and underdevelopment'.[199]

Drawing from the above analysis, a teleological interpretation of the rights to equality and non-discrimination establishes a wide range of positive and negative duties on states parties to effectively promote and protect impoverished people's guarantee not to be discriminated against based on their fortune. However, the interpretation of fortune-based discrimination by monitoring bodies could raise concerns such as it would not allow states parties satisfactory leeway to employ sovereignty over

195 African Commission 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa' 24 May https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/RHRM/RHRMs.Covid-19.response.docx (accessed 20 August 2023) para 5.

196 Resolution on Indigenous Populations (n 166).

197 African Commission 'Statement by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants on the Violence in the Republic of Kenya' 29 January http://www.achpr.org/english/Press%20Release/Special%20Rapporteur_IDPs_Kenya.htm (accessed 20 August 2023); African Commission 'Statement by the Special Rapporteur on the Rights of Women in Africa commemorating the "Global Day of Action for Access to Safe and Legal Abortion"' 28 September https://achpr.au.int/en/news/press-releases/2022-09-28/rights-women-africa-global-day-action-access-safe-legal-abortion (accessed 20 August 2023).

198 African Commission Resolution on the impact of the ongoing global financial crisis on the enjoyment of social and economic rights in Africa (2009) ACHPR/Res.159(XLV1) paras 2-3.

199 As above.

their domestic budgetary and socio-economic policy choices.[200] However, these concerns should not be too readily accepted by interpreters at the expense of their promotional and interpretative mandate of human rights in the African Charter.[201] The following part analyses to what extent a teleological interpretation furthering a substantive conception of equality in law provides a sufficient basis for examining any justifications posed for the impugned discrimination by the duty-bearers of the right.

4.2 Justifications and proportionality assessment

Generally, the most robust level of judicial review entails a proportionality assessment.[202] In terms of such an assessment, any discriminatory act or omission could be justifiable if the purposes provided for the differential treatment are proportional to the material 'effect of the limitation' on the identifiable group.[203] The African Commission has developed some benchmarks that can be integrated with the features of a proportionality assessment to ensure that any justifications posed for the limitation of the rights to equality and non-discrimination based on fortune will not blunt the substantive equality aims of the right.

As a start, states must prove that the differentiating act or omission has a legitimate governmental aim or purpose.[204] The African Commission has reiterated that a legitimate purpose requires that the restriction of rights must be established in law.[205] The stated purpose must also not be based on 'vague and unsubstantiated reasons'.[206] Furthermore, the legitimate aim 'cannot be derived solely from popular will' to limit the duties and responsibilities of states parties.[207]

200 On a similar danger in terms of socio-economic rights, see S Liebenberg 'Between sovereignty and accountability: The emerging jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 *Human Rights Quarterly* 48-84.

201 See secs 2.1 and 2.2 above.

202 K Möller 'Proportionality: Challenging the critics' (2012) 10 *International Journal of Constitutional Law* 710-712; KG Young 'Proportionality, reasonableness, and economic and social rights' in VC Jackson & M Tushnet (eds) *Proportionality: New frontiers, new challenges* (2017) 250.

203 *Open Society Justice Initiative* (n 111) para 145; *Dabalorivhuma* (n 178) para 115.

204 *Interights* (n 74) para 146.

205 *Centre for the Minority Rights Development v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*) para 172.

206 *Zimbabwe Lawyers for Human Rights* (n 170) para 59.

207 *Legal Resources Foundation* (n 71) para 70.

The Commission has also stated that the legitimate aim must be 'objective' and 'rational'; any differentiation that is 'arbitrary' or leads to a 'manifest naked preference' would not be legitimate.[208] In this respect, the Commission has stated that the disregard for human dignity 'cannot serve as the basis for any state action'.[209] Thus, justifications posed for discrimination against impoverished people in the form of prejudice, stigma or violence on the basis of their fortune should not automatically be regarded as a legitimate justification. For example, supervisory organs and states should be alive to the reasons for the criminalisation of poverty that reflects stereotypical assumptions about and against poorer and more vulnerable communities.[210] In circumstances of petty offences and homelessness, the purpose of the criminalisation of such acts is usually to punish, segregate, control and undermine socially and economically vulnerable people.[211] Such a purpose cannot be considered legitimate and, therefore, cannot be considered to be justifiable.

When impoverished people's discrimination in the form of material disadvantage is implicated in any economic justifications, such as austerity measures with the ostensible legitimate aim for fiscal consolidation,[212] a substantive conception of equality should guide the proportionality assessment. For example, as stated above in *Purohit,* the African Commission stressed that African states face challenging circumstances of structural poverty where immediate access for everyone to basic goods and services will be difficult to achieve.[213] However, the Commission emphasised that states parties must show that they have taken 'concrete and targeted steps, while taking full advantage of its available resources, to ensure that the right to health is fully realised in all of its aspects without discrimination of any kind'.[214] State parties will therefore have to show that they have taken all measures, including legislative and other positive measures, to minimise or eliminate the economic exclusion impoverished people will face based on their fortune.

208 *Dabalorivhuwa* (n 178) para 117.

209 *Shumba v Zimbabwe* Communication No 288/04, African Commission on Human and Peoples' Rights (2017) para 137.

210 As was the case in *Interights* (n 74) paras 146-149.

211 *Principles on Petty Offences* (n 15) 12.

212 S Liebenberg 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 181-204.

213 *Purohit* (n 64) para 84.

214 As above.

Even if the justification is found to have a legitimate purpose, supervisory organs must also assess whether the proposed goal of the discrimination is suitable to the extent that it is reasonably capable of achieving the said aim.[215] Furthermore, the limitation must be necessary in so far as there are no other less restrictive options that would not unduly curtail impoverished people's guarantee of non-discrimination based on their fortune.[216]

Finally, the African Commission and Court have explained that no rights under the African Charter are absolute to the extent that the enjoyment of one's rights should not violate other human rights under the African Charter.[217] Thus, article 2 is not absolute and, in principle, not subject to the 'clawback' clauses of article 14 and the limitation clause in article 27(2) of the African Charter.[218] However, these clauses have been incorporated in cases concerning violations of article 2 in relation to other rights and have thus been incorporated in a proportionality assessment.[219] Article 14 of the African Charter inaugurates the so-called 'clawback' clause, where states can justify an encroachment on property if they can show that it is in 'the interest of public need or in the general interest of the community'.[220] Article 27(2) states that '[t]he rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and comment interest'. Article 27(2) has been understood as a form of limitation clause that sets clear standards for assessing the legitimacy of the limitation of rights.[221] In instances where impoverished people's rights are violated based on their fortune, articles 14 and 27(2) may launch an inappropriate 'balancing' exercise where individual interests are set up against broad public interest concerns.[222]

Article 27(2) has therefore enjoyed considerable academic and judicial debate as it is uncertain why duties owed to individuals are seen as conflicting with broader collective interests.[223] Given the pervasive forms of discrimination impoverished people face on the basis of their fortune, it is expected that states parties or wealthier individuals and groups will argue

215 *Endorois* (n 205) paras 213-214.

216 Möller (n 202) 713; *Constitutional Rights Project* (n 61) para 42.

217 *Gareth Anvar Prince v South Africa* (2004) AHRLR 105 (ACHPR 2004) (*Prince*) para 43.

218 See n 115 above.

219 Murray (n 108) 55-58.

220 Murray (n 108) 377-378.

221 Murray (n 108) 579.

222 Möller (n 202) 715-716; M Mutua *Human rights: A political & cultural critique* (2002) 82-84.

223 For a survey of these debates, see Murray (n 108) 581-582.

that positive measures are against their individual rights or broader societal interests. For example, states parties may argue that the exploitation and destitution of a few will have greater benefits to society at large as it will increase their revenue for redistribution to fulfil a larger poor population's socio-economic needs. Supervisory organs and states parties must tread cautiously in such circumstances as these arguments may deepen vulnerable groups' material disadvantage and blunt an African conception of substantive equality characterised by solidarity, mutual social and communal care and support. In this respect, the African Commission and Court have referred to the margin of appreciation doctrine that holds that a state party is often in a better position to determine the specific needs and the 'competing and sometimes conflicting forces that shape its society'.[224] However, the African Court emphasised that even though the margin of appreciation doctrine is acknowledged, the Court retains its supervisory jurisdiction to strike a 'fair balance' between the interests of the individual and society.[225]

Ultimately, any justification posed must be assessed against the effect the discriminatory measure or omission may have in furthering the material disadvantage, political vulnerability, and interpersonal indignity impoverished people face; otherwise, the right not to be discriminated against based on fortune will be rendered 'illusory'.[226] The teleological approach, therefore, also guides the proportionality assessment that stresses an interpretation that will give practical effect to the object and purpose of the African Charter.

5 Conclusion

This chapter has sought to demonstrate that 'fortune' as an expressed ground of discrimination under the African Charter is an untapped legal tool to contest the manifestations of discrimination impoverished people encounter. It argued that the purely textual approach to interpretation as the dominant approach followed by supervisory organs to the African Charter is not conducive to interpreting fortune as it will allow for self-generating and restrictive interpretations that may normalise the 'misfortunes' of impoverished people. The chapter argued that a teleological approach to treaty interpretation stressing the determination of the 'object and purpose' of fortune in its context holds the potential to come to terms with

224 *Prince* (n 217) para 51; *Jebra Kambole v Tanzania* (2020) 4 AfCLR 460 (*Jebra Kambole*) para 80.

225 *Jebra Kambole* (n 224) paras 43, 81.

226 *Media Rights Agenda v Nigeria* (2000) AHRLR 200 (ACHPR 1998) paras 68-70.

the normative content of the guarantee not to be discriminated against based on one's fortune as it allows for a holistic interpretation.

Furthermore, the chapter indicated the current interpretative approach to the equality and non-discrimination rights under the Charter is mainly interpreted in terms of a formalistic understanding of equality in law. It illustrated that a formal view of equality is not conducive to driving the interpretation and implementation of the non-discrimination principle as it will entrench the structural discrimination that underlies fortune-based discrimination. Specifically, it illustrated how a teleological interpretation could overcome such formalism and facilitate a more appropriate substantive conception of equality in law as an overarching object and purpose of the Charter. Furthermore, it showed that the teleological interpretation, which looks at the treaty as a whole, helps assert a regionally sensitive account of substantive equality which seeks to use the law as one tool to challenge the political erasure, material disadvantage and the violation of human dignity vulnerable and marginalised groups such as impoverished people on the African continent encounter. It was underscored that a teleological interpretation of fortune enables a historical awareness of the inception to the Charter seeking to eliminate all forms of colonial discrimination, as well as enabling the Charter to be a 'living instrument' to contest the continuing neo-colonial strongholds giving rise to current forms of discrimination.

Drawing from the sub-elements that characterise the teleological approach to treaty interpretation, such as the preparatory documents to the African Charter and other international, regional and domestic human rights instruments and jurisprudence, it was argued that 'fortune' refers to 'economic status' of which poverty forms part. The article further showcased that the African human rights system is weak in its intersectional understanding of disadvantage and therefore argued for an intersectional conception of discrimination. In this respect, the chapter showed how fortune could be utilised to ensure a more sophisticated intersectionality analysis on other expressed grounds relating to, for example, impoverished women, children, the disabled, youths and indigenous communities. Furthermore, it illustrated how the rights to equality and non-discrimination in the African Charter are leveraged to show a discriminatory exclusion or unequal enjoyment of other rights and freedoms in the African Charter. As such, it indicated that the guarantee against discrimination based on fortune is a powerful legal tool to challenge various civil and political, social and economic, environmental, and group rights that impoverished people are denied.

This chapter further developed a concept of discrimination in line with substantive equality that captures a wide range of direct and indirect discriminatory omissions and conduct that will allow responsiveness to structural discrimination. In furthering the substantive equality aims of prohibiting fortune-based discrimination, it established that states parties and non-state actors have a wide range of negative, positive and redistributive duties to effectively realise the guarantee not to be discriminated against. Finally, this chapter considered typical justifications posed for discrimination. It argued that a substantive understanding of equality provides states parties and supervisory organs with a vital framework to assess whether the proposed justifications are proportional to the effect it has on deepening impoverished people's material deprivation, political marginalisation and indignity based on their fortune.

Table of abbreviations

CESCR	United Nations Committee on Economic, Social and Cultural Rights
SERAC	Social and Economic Rights Action Centre
VCLT	Vienna Convention on the Law of Treaties

Literature

African Commission 'Press Statement on human rights based effective response to the novel COVID-19 virus in Africa' 24 May https://www.ohchr.org/sites/default/files/Documents/Countries/NHRI/RHRM/RHRMs.Covid-19.response.docx

African Commission 'Statement by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants on the Violence in the Republic of Kenya' 29 January http://www.achpr.org/english/Press%20Release/Special%20Rapporteur_IDPs_Kenya.htm

African Commission 'Statement by the Special Rapporteur on the Rights of Women in Africa commemorating the Global Day of Action for Access to Safe and Legal Abortion' 28 September https://achpr.au.int/en/news/press-releases/2022-09-28/rights-women-africa-global-day-action-access-safe-legal-abortion

Ake C 'The unique case of African democracy' (1993) 69 *International Affairs* 239-244

Albertyn C & Goldblatt B 'Facing the challenge of transformation: Difficulties in the development of an indigenous jurisprudence of equality' (1998) 14 *South African Journal on Human Rights* 248-276

Albertyn C 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal on Human Rights* 253-276

Amin A 'A teleological approach to the interpretation of socio-economic rights in the African Charter on Human and Peoples' Rights' LLD thesis, University of Stellenbosch, 2017 available at https://scholar.sun.ac.za/server/api/core/bitstreams/873c8f4b-253b-4b8c-b494-5151566b6b8a/content

Amin A 'A teleological approach to interpreting socio-economic rights in the African Charter: Appropriateness and methodology' (2021) 21 *African Human Rights Law Journal* 204-233

Amin A 'The potential of African philosophy in interpreting socio-economic rights in the African Charter on Human and Peoples' Rights' (2021) 5 *African Human Rights Yearbook* 23-51

Amnesty International '"Welcome to hell fire": Torture and other ill-treatment in Nigeria' 18 September https://www.amnesty.org/en/documents/afr44/011/2014/en/

Atrey S 'Intersectionality from equality to human rights' in S Atrey & P Dunne (eds) *Intersectionality and human rights law* (Bloomsbury Publishing 2020)

Atrey S 'The intersectional case of poverty in discrimination law' (2018) 18 *Human Rights Law Review* 411-440

Basson G 'Poverty as a ground of unfair discrimination in post-apartheid South Africa' LLM thesis, Stellenbosch University, 2022 available at https://scholar.sun.ac.za/server/api/core/bitstreams/de0273a3-5c08-4549-aeef-e3ea423fe5d2/content

Bedasso BE 'For richer, for poorer: why ethnicity often trumps economic cleavages in Kenya' (2016) 44 *Review of African Political Economy* 10-29

Bennett TW, Munro AR & Jacobs PJ *Ubuntu: An African jurisprudence* (Juta 2018)

Bennett TW 'Ubuntu: An African equity' (2011) 14 *Potchefstroom Electronic Law Journal* 30-51

Bond J *Global intersectionality and contemporary human rights* (OUP 2021)

Brand D, De Beer S, De Villiers I & Van Marle K 'Poverty as injustice' (2013) 17 *Law, Democracy & Development* 273-297

Brooks H, Ngwane T & Runciman C 'Decolonising and re-theorising the meaning of democracy: A South African perspective' (2020) 68 *Sociological Review* 17-32

Bulto TS '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* 142-154

Centre for Human Rights *A guide to the African human rights system* (Centre for Human Rights 2016)

Chekera-Radu YT 'The relevance of substantive equality in the African regional human rights system's jurisprudence to women's land and property rights' (2017) *African Human Rights Yearbook* 41-57

Cline-Cole R & Lawrence P 'Extractive capitalism and hard and soft power in the age of Black Lives Matter' (2021) 48 *Review of African Political Economy* 497-508

Crenshaw K 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) 1 *University of Chicago Law Review* 139-167

Davis M, Kjaerum M & Lyons A (eds) *Research handbook on human rights and poverty* (Edward Elgar 2021)

De Schutter O 'The rights-based welfare state: Public budgets and economic and social rights' (Friederich-Ebert Stiftung 2018)

De Schutter O *International human rights law: Cases, materials, commentary* (CUP 2019)

Debuysere L 'Between feminism and unionism: The struggle for socio-economic dignity of working-class women in pre- and post-uprising Tunisia' (2018) 45 *Review of African Political Economy* 25-43

Durojaye E & Mirugi-Mukindi G *Exploring the link between poverty and human rights in Africa* (PULP 2020)

Fernyhough T 'Human rights and precolonial Africa' in Cohen R, Hyden G & Nagan WP (eds) *Human rights and governance in Africa* (University Press of Florida 1993)

Fischer AM *Poverty as ideology: Rescuing social justice from global developmental agendas* (2018)

Fitzmaurice GG 'The law and procedure of the International Court of Justice: Treaty interpretation and certain other treaty points' (1951) 28 *British Yearbook of International Law* 1-28

Fitzmaurice GG 'The law and procedure of the International Court of Justice 1951-4: Treaty interpretation and other treaty points' (1957) 28 *British Yearbook of International Law* 203-229

Fitzmaurice M 'Interpretation of human rights treaties' in D Shelton (ed) *International human rights law* (Edgar Elgar 2013)

Fitzmaurice M 'The practical working of the law of treaties' in M Evans (ed) *International law* (OUP 2014)

Fredman S 'Substantive equality revisited' (2016) 3 *International Journal of Constitutional Law* 713-738

Fredman S 'The potential and limits of an equal rights paradigm in addressing poverty' (2011) 22 *Stellenbosch Law Review* 566-590

Fredman S *Discrimination law* (OUP 2011)

Fredman S *Human rights transformed* (OUP 2008)

Gaibazzi P & Gardini M 'The work of fate and fortune in Africa' (2015) 7 *Critical African Studies* 203-209

Gaibazzi P 'The quest for luck: Fate, fortune, work and the unexpected among Gambian Soninke Hustlers' (2015) 7 *Critical African Studies* 227-242

Gardini M 'Where does fortune come from? Agrarian work ethics and luck in Togo' (2015) 7 *Critical African Studies* 210-226

Gathii J, O Okafor & A Anghie 'Africa and TWAIL' (2013) *African Yearbook of International Law* 9-13

Gathii JT 'Africa and the radical origins of the right to development' (2020) 1 *Third World Approaches to International Law Review* 28-50

Goldblatt B 'Violence against women and social and economic rights: Deepening the connections' in S Harris Rimmer & K Ogg (eds) *Research handbook on feminist engagements with international law* (Edward Elgar 2019)

Heikkilä M & Mustaniemi-Laaksa M 'Vulnerability as a human rights variable: African and European developments' (2020) 20 *African Human Rights Law Journal* 777-798

Holness W 'eThekwini's discriminatory by-laws: Criminalising homelessness' (2020) 24 *Law, Democracy & Development* 468-511

Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights* 'Banning discrimination on grounds of socio-economic disadvantage: An essential tool in the fight against poverty' UN Doc A/HRC/50/38/Add.5

International Bank for Reconstruction and Development *Poverty and shared prosperity* (2022)

Killander M 'African human rights law in theory and practice' in S Joseph & A McBeth (eds) *Research handbook on international human rights law* (Edward Elgar 2011)

Killander M 'Interpreting regional human rights treaties' (2010) 7 *International Journal on Human Rights* 145-169

Kumalo SH 'An Afro-communitarian compatibilist view on rights?' (2019) 66 *Theoria* 142-154

Lawrence P 'Capitalism, resources and inequality in a climate emergency' (2021) 48 *Review of African Political Economy* 325-330

Lawrence P 'Global capitalism and Africa after Covid-19' (2020) 46 *Review of African Political Economy* 351-362

Liebenberg S 'Austerity in the midst of a pandemic: Pursuing accountability through the socio-economic rights doctrine of non-retrogression' (2021) 37 *South African Journal on Human Rights* 181-204

Liebenberg S 'Between sovereignty and accountability: The emerging jurisprudence of the United Nations Committee on Economic, Social and Cultural Rights under the Optional Protocol' (2020) 42 *Human Rights Quarterly* 48-84

Linderfalk U *On the interpretation of treaties* (Springer 2007)

MacKinnon CA 'Substantive equality revisited: A reply to Sandra Fredman' (2016) 3 *International Journal of Constitutional Law* 739-746

Mayer A 'Ifeoma Okoye: Socialist-feminist political horizons in Nigerian literature' (2018) 45 *Review of African Political Economy* 335-344

Metz T 'African conceptions of human dignity: Vitality and community as the ground of human rights' (2012) 13 *Human Rights Review* 19-37

Miyandazi v *Equality in Kenya's 2010 Constitution: Understanding the competing and interrelated conceptions* (Bloomsbury 2010)

Mohan G & Holland J 'Human rights & development in Africa: Moral intrusion or empowering opportunity?' (2007) 28 *Review of African Political Economy* 177-196

Möller K 'Proportionality: Challenging the critics' (2012) 10 *International Journal of Constitutional Law* 710-712

Moyn S *Not enough: Human rights in an unequal world* (Harvard University Press 2018)

Murray R *The African Charter on Human and Peoples' Rights: A commentary* (OUP 2020)

Mutua M 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339-380

Mutua M *Human rights: A political & cultural critique* (University of Pennsylvania Press 2002)

Myambo MR 'Capitalism disguised as democracy: A theory of "belonging", not belonging in the new South Africa' (2011) 63 *Comparative Literature* 64-85

Nwoye A 'An Afrocentric theory of human personhood' (2017) 54 *Psychology in Society* 42-66

Nyerere J *Ujamaa: Essays on socialism* (Galaxy Books 1968).

Okafor O 'Have the norms and jurisprudence of the African human rights system been pro-poor' (2011) 11 *African Human Rights Law Journal* 396-421

Okafor OC 'Poverty, agency and resistance in the future of international law: An African perspective' (2006) 27 *Third World Quarterly* 799-814

Omotoso SA 'Hairiness and hairlessness: An African feminist view of poverty' in Beck V, Hahn H & Lepenies R (eds) *Dimensions of poverty* 115-130

Oxfam 'The tale of two continents: Fighting inequality in Africa' 19 September https://www-cdn.oxfam.org/s3fs-public/file_attachments/bp-tale-of-two-continents-fighting-inequality-africa-030919-en.pdf

Pillay S (ed) *On the subject of citizenship: Late colonialism in the world today* (Bloomsbury 2023)

Praeg L & Madadla S (eds) *Ubuntu: Curating the archive (thinking Africa)* (UKZN Press 2014)

Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (adopted on 24 October 2011) http://archives.au.int/handle/123456789/2063

Raikes PL 'Ujamaa and rural socialism' (1975) 3 *Review of African Political Economy* 33-52

Raufu MA 'The public sphere in 21st century Africa: Broadening the horizons of democratisation' (2012) 37 *Africa Development* 27-41

Reddy V & Moletsane T 'Gender and poverty reduction in its African feminist practice' (2009) 81 *Agenda: Empowering women for gender equity* 3-13

Robinson C *Black Marxism: The making of the black radical tradition* (University of North Carolina Press 1983)

Rodney W *How Europe underdeveloped Africa* (Verso Books 2018)

Rodríguez-Garavito C'Human rights responses against vaccine apartheid' 12 June https://www.openglobalrights.org/up-close/vaccine-apartheid/#up-close

Roman D 'Guaranteeing human rights in situations of poverty' in *Redefining and combating poverty* (Council of Europe 2012)

Rudman A 'The Commission as a party before the court: Reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 1-29

Snyman T & Rudman A 'Protecting transgender women within the African human rights system through an inclusive reading of the Maputo Protocol and the proposed Southern African Development Community Gender-Based Violence Model Law' (2022) 33 *Stellenbosch Law Review* 57-77

Ssenyonjo M 'Responding to human rights violations in Africa: Assessing the role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7 *International Human Rights Law Review* 1-42

Thompson JA, Gaskin SJ & Agbor M 'Embodied intersections: Gender, water and sanitation in Cameroon' (2017) 31 *Agenda* 140-155

Thornton M 'Social status: The last bastion of discrimination' (2019) 5 *Anti-Discrimination Law Review* 1-19

United Nations General Assembly *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng* 'Sexual and reproductive health rights: Challenges and opportunities during the COVID-19 pandemic' (2021) UN Doc A/76/172

Uwizeyimana DE 'Democracy and pretend democracy in Africa: Myths of African democracies' (2012) 16 *Law, Democracy and Development* 139-161

Valiani S *The Africa care economy index* (UNDP 2022)

Viljoen F 'The African Charter on Human and Peoples' Rights: The *travaux préparatoires* in the light of subsequent practice' (2004) 25 *Human Rights Law Journal* 312-325

Viljoen F *International human rights law in Africa* (OUP 2012)

Villiger ME *Commentary on the 1969 Vienna Conventions on the Law of Treaties* (Brill 2009)

Whiteman J 'Tackling socio-economic disadvantage: Making rights work' (2014) 12 *Equal Rights Review* 95-108

Williams L 'Beyond the state: Holding international institutions and private entities accountable for poverty alleviation' in Davis M, Kjaerum M & Lyons A (eds) *Research handbook on human rights and poverty* (Edward Elgar 2021)

World Inequality Lab 'World Inequality Report 2022' https://wir2022.wid.world/

Yeshanew SA *The Justiciability of economic, social and cultural rights in the African regional human rights system: Theories, laws, practices and prospects* (OUP 2011)

Young KG 'Proportionality, reasonableness, and economic and social rights' in VC Jackson & M Tushnet (eds) *Proportionality: New frontiers, new challenges* (CUP 2017)

Zajontz T 'Debt, distress, dispossession: Towards a critical political economy of Africa's financial dependency' (2021) 48 *Review of African Political Economy* 1-12

International, Regional and Other Rights Instruments, Resolutions and Reports

African Charter on Democracy, Elections and Governance (adopted 30 January 2007 entered into force 5 February 2012)

African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

African Charter on the Rights and Welfare of the Child (adopted on 1 July 1990, entered into force 29 November 1999) OAU Doc. CAB/LEG/153/Rev.2 (1990)

African Commission General Comment 6 On the Protocol to the African Charter on Human and Peoples' Right on the Rights of Women in Africa (Maputo Protocol): The Right to Property During Separation, Divorce or Annulment of Marriage (Article 7(D))

African Commission on Human and Peoples' Right 'General Comment 2 on Article 14.1(a), (b), (c) and (f) and Article 14.2 (a) and (c)'(General Comment 2), adopted at the 55th Ordinary Session of the African Commission, 28 April-12 May 2014

African Commission *Principles on the decriminalisation of petty offences in Africa* (2021)

African Commission Resolution on Indigenous Populations/Communities in Africa (2016) ACHPR/Res. 334 (EXT.OS/XIX)

African Commission Resolution on States' obligation to regulate private actors involved in the provision of health and education services (2019) ACHPR/Res.421 (LXIV)

African Commission Resolution on the adoption of the Declaration of principles on freedom of expression in Africa (2002) ACHPR/Res.62 (XXXII)

African Commission Resolution on the Appointment of the Chairperson and Members of the Committee on the Protection of the Rights of People Living with HIV (PLHIV) and those at Risk, Vulnerable to and Affected by HIV (2011) ACHPR/Res 195

African Commission Resolution on the General Human Rights Situation in Africa (2011) ACHPR/Res.207

African Commission Resolution on the Human Rights issues affecting the African Youth (2016) ACHPR/Res. 347(LVIII); African Commission Resolution on the Need to Develop Principles on the Declassification and Decriminalization of Petty Offences in Africa (2017) ACHPR/ Res. 366 (EXT.OS/XX1)

African Commission Resolution on the human rights issues affecting the African youth (2015) ACHPR/Res. 347 (LVIII)

African Commission Resolution on the impact of the ongoing global financial crisis on the enjoyment of social and economic rights in Africa (2009) ACHPR/Res.159(XLV1)

African Commission Resolution on the Right to Dignity and Freedom from Torture or Ill-Treatment of Persons with Psychosocial Disabilities in Africa (2004) ACHPR/Res 343(LVIII)

African Commission Resolution on the Right to Water Obligations (2015) ACHPR/Res 300 (EXT.OS/ XVII)

African Commission Resolution on the Rights of Older Persons in Africa, (2007) ACHPR/Res. 106

African Commission Resolution on the Situation of Women and Children in Africa (2021) ACHPR /Res.66 (XXXV)

African Commission Resolution on Women's Right to Land and Productive Resources (2013) ACHPR/Res.262 (LIV)

African Youth Charter adopted by the 7th Ordinary Session of AU Assembly of Heads of States and Government held in Banjul, The Gambia, on 2 July 2006

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143

CESCR *Statement on the substantive issues arising in the implementation of ICESCR: Poverty and ICESCR* (2001) UN Doc E/C.12/2001/10 7

Harvard Draft Convention on the Law of Treaties (1935) 29 *American Journal of International Law* Supp 971

Human Rights Council *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Tlaleng Mofokeng* 'Violence and its impact on the right to health' (2022) UN Doc A/HRC/50/28

International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3

M'Baye Draft African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/1

UNCESCR General Comment 20 Non-discrimination in economic, social and cultural rights (art 2, para 2) (2009) UN Doc E/C.12/GC/20

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, adopted 29 January 201, not yet entered into force

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted 10 June 1998, entered into force 25 January 2004) OAU/LEG/EXP/AFC/HPR (I)

Protocol to the Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 1 July 2003, entered into force 25 November 2005) CAB/LEG/66.6

Resolution on access to health and needed medicines in Africa (2021) ACHPR/Res.141(XXXXIV)

United Nations Human Rights Council *Report of the Special Rapporteur on Extreme Poverty and Human Rights: Climate Change and Poverty* (17 July 2019) UN Doc A/HRC/41/39

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

Cases

African Commission on Human and Peoples' Rights v Republic of Kenya (merits) (2017) 2 AfCLR

Antonie Bissangou v Congo (2006) AHRLR 80 (ACHPR 2006)

Centre for the Minority Rights Development v Kenya (2009) AHRLR 75 (ACHPR 2009)

Constitutional Rights Project v Nigeria (2000) AHRLR 248 (ACHPR 1999)

Dabalorivhuwa Patriotic Front v Republic of South Africa [2013] ACHPR 115 (23 April 2013)

Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt (2013) 85 (ACHPR 2013)

Gareth Anvar Prince v South Africa (2004) AHRLR 105 (ACHPR 2004)

Good v Botswana (2010) AHRLR 43 (ACHPR 2010)

Ingabire Victoire Umuhoza v Rwanda (jurisdiction) (2016) 1 AfCLR 562

Jebra Kambole v Tanzania (2020) 4 AfCLR 460

John Kabui Mwai v Kenya National Examination Council Petition 15 of 2011

Khosa v Minister of Defence 2020 (3) SA 190 (GP)

Legal Resources Foundation v Zambia (2001) AHRLR 84 (ACHPR 2001)

Media Rights Agenda v Nigeria (2000) AHRLR 200 (ACHPR 1998)

Open Society Justice Initiative v Côte d'Ivoire (2006) AHRLR 62 (ACHPR 2006)

Purohit and Moore v The Gambia (2003) AHRLR 96 (ACHPR 2003)

Request for Advisory Opinion by the African Committee of Experts on the Rights and Welfare of the Child (5 December 2014) 1 AfCLR 725

Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (2017) 2 AfCLR 572

Shumba v Zimbabwe Communication No 288/04, African Commission on Human and Peoples' Rights (2017)

Social and Economic Rights Action Centre (SERAC) v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Social Justice Coalition v Minister of Police 2019 (4) SA 82 (WCC)

South African Human Rights Commission v City of Cape Town 2021 (2) SA 565 (WCC)

Sudan Human Rights Organisation v Sudan (2009) AHRLR 153 (ACHPR 2009)

Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania (merits) (2013) 1 AfCLR 34

Thomas Kwoyelo v Uganda (2018) ACHPR 129 (ACHPR 2018)

Urban Mkandawire v Malawi (review and interpretation) (2014) 1 AfCLR 299

Zimbabwe Human Rights NGO Forum v Zimbabwe (2006) AHRLR 128 (ACHPR 2006)

Zimbabwe Lawyers for Human Rights and Institute for Human Rights and Development in Africa v Zimbabwe (2009) AHRLR 268 (ACHPR 2009)

8 Comparative jurisprudential developments and adjudication of indigenous peoples' rights. Integration of international human rights law in the Americas and Africa

Alejandro Fuentes

Abstract:

This chapter proposes a critical comparative analysis of the jurisprudence of the Inter-American Court of Human Rights (Inter-American Court), the African Commission on Human and Peoples' Rights (African Commission), and the African Court on Human and Peoples' Rights (African Court) regarding the recognition of indigenous peoples' rights. In particular, it focuses on how these regional adjudication bodies have recognised indigenous peoples' right to communal property over their traditional lands and natural resources and deliver protection to their culture and cultural identity. In analysing these legal advancements, this chapter focuses specifically on the interpretative strategies used by these regional bodies. Specifically, it looks at how they have adapted their own mission to align with the modern progression of international

human rights law concerning the rights of indigenous peoples. An analysis of the jurisprudence of these three regional bodies regarding indigenous peoples indicates that both the African Commission and Court of Human Rights have largely based their findings on the previously consolidated jurisprudence of the Inter-American Court, adopting similar innovative interpretative approaches when protecting indigenous peoples' rights. In addition, this chapter also indicates that both regional African bodies have missed the opportunity to strengthen the protection of the right to life under article 4 of the African Charter on Human and Peoples' Rights (African Charter) by recognising its *lato sensu* dimension, that is, the right to not be prevented from having access to the conditions that could guarantee a decent existence. These are conditions that could guarantee indigenous peoples the possibility to have access to a dignified life, that is, a life in accordance with their own cultural traditions, understandings, and world views. Besides this restrictive approach, the African Commission and Court should be praised for their great contribution to integrating and harmonising the *corpus juris* of international human rights law.

1 Introduction

In recent decades, the protection of indigenous peoples' rights has increased dramatically within two regional human rights systems: the Inter-American and the African human rights systems. This development started with *Awas Tingni*,[1] where the Inter-American Court of Human Rights (Inter-American Court) first recognised the right of indigenous peoples to communal property over their traditional lands and territories. Since then, the protection of indigenous peoples' rights has expanded to the point of guaranteeing their right to cultural identity and to a *dignified* life, that is, to live in accordance with their own cultural traditions and understanding of dignity. Moreover, the Inter-American Court has identified specific safeguards against unjustified restrictions on the right to communal property, in particular, to prevent potential interferences that would amount to a denial of the cultural survival of indigenous peoples.[2]

The first time the African system dealt with the recognition of the right of indigenous peoples over their traditional lands and territories was in *Ogoni*,[3] which was heard just three months after *Awas Tingni*. Even

1 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACHR (31 August 2001) Series C No 79 (*Awas Tingni*).

2 A Fuentes 'Protection of indigenous peoples' traditional lands and exploitation of natural resources: The Inter-American Court of Human Rights' safeguards' (2017) 24 *International Journal on Minority and Group Rights* at 229-253.

3 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*Ogoni*).

though the African Commission on Human and Peoples' Rights (African Commission) recognised the collective rights of the Ogoni people over Ogoniland in this case, it did not elaborate on the scope and extension of that protection.

The full recognition of the right of indigenous peoples over their lands arrived in 2009 in *Endorois,*[4] where the African Commission protected the right of ownership of the Endorois people to their ancestral lands largely based on the comparative jurisprudence developed by the Inter-American Court. After this leading regional case, it was the turn of the African Court of Human and Peoples' Rights (African Court) to decide upon the rights of indigenous peoples in Africa. In the *Ogiek,*[5] the African Court found the responding state responsible for denying access to their land as a distinct tribe. In this latter case, references were made to the case law of the Inter-American Court regarding the link between forced evictions and the generation of conditions unfavourable to a decent life.

Based on these developments, this chapter first introduces the jurisprudential development within the jurisprudence of the Inter-American Court in connection with the protection of indigenous peoples' rights. Second, it critically analyses the influence that this jurisprudence has had on the jurisprudential evolution that has taken place within the African human rights system. In particular, it focuses on how the African Commission and Court have determined the content and scope of protection of indigenous peoples' rights under the African Charter on Human and Peoples' Rights (African Charter) and whether the systemic integration of indigenous peoples' human rights made by the Inter-American Court has influenced or played an interpretative role in expanding indigenous peoples' rights in Africa.

2 Recognition of the right to communal property over indigenous peoples' traditional lands in the Americas

The Inter-American Court was the first regional tribunal to recognise the right to communal property over indigenous peoples' traditional lands, as protected under article 21 of the American Convention on Human Rights (ACHR). Since the adoption of the landmark judgment in *Awas Tingni,*

4 *Centre for Minority Rights Development v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).

5 *African Commission on Human and Peoples' Rights v Kenya* (merits) (2017) 2 AfCLR 9 (*Ogiek*).

the Inter-American Court has shown 'a sensitive inclination towards the protection of indigenous peoples' rights and cultural understandings'.[6]

This innovative interpretation of the ACHR, based on the current evolution of the *corpus juris* of international human rights law,[7] has enlarged the scope of protection of article 21 of the ACHR by means of extending its protection to the 'close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements stemming from these'.[8] In other words, the content of article 21 has been integrated (or re-interpreted) under the guiding light of the normative system of which the ACHR forms part, namely, the international human rights law system.

As mentioned in previous work, the systemic integration of international norms by regional human rights courts implies interpreting their own mandate under the light of other international and regional instruments that are part of the contemporary corpus juris of international human rights law.[9] In fact, it is crucial to emphasise that the systemic integration of international human rights law does not imply that the Inter-American Court would apply a different instrument than the ACHR to address a particular case directly.[10] Rather, this interpretative mechanism means that the Court would consider other relevant instruments that

6 A Fuentes 'Judicial interpretation and indigenous peoples' rights to lands, participation and consultation. The Inter-American Court of Human Rights' approach' (2015) *International Journal on Minority and Group Rights* 23 at 41.

7 According to the IACtHR, '[t]he corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law', *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003) (*Undocumented Migrants)* para 120. See also *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999) (*Consular Assistance*) para 115.

8 *Kichwa Indigenous People of Sarayaku v Ecuador* (merits, reparations, costs) IACtHR Series C No 245 (27 June 2012) (*Sarayaku*) para 145.

9 A Fuentes *Expanding the boundaries of international human rights law: The systemic approach of the Inter-American Court of Human Rights* (ESIL Conference Paper No. 13/2017) European Society of International Law https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3163088 (2017) 10.

10 In connection with the direct inapplicability of international instruments outside of the Inter-American System, see, amongst other, *Street Children (Villagrán Morales et al) v Guatemala* (merits) IACHR (26 May 2001) Series C No 77 (*Street Children*) paras 192-195; *Bámaca-Velásquez v Guatemala* (merits) IACHR (25 November 2000) Series C No 70 paras 208-210; *Plan de Sánchez Massacre v Guatemala* (reparations and costs) IACHR (29 April 2004) Series C No 105 (*Plan de Sánchez Massacre),* Separate Concurring Opinion of Judge Sergio Garcia-Ramírez, para 19.

form part of the *corpus juris* of international human rights law to better understand the current evolution of the scope of protection and extension of the rights enshrined in the ACHR.[11]

One of the main reasons for this *praetorian* jurisprudential development has been identified in the pressing need for the effective realisation, without discrimination of any kind, of the rights recognised in the ACHR, such as the right to property. This is nothing but the concrete (and contextual) application of the above-mentioned principle of effectiveness (*effet utile*) that considers the factual reality in which conventional rights are applied.[12] In the case of indigenous communities, this reality includes the communitarian tradition related to a form of collective land tenure, which 'does not necessarily conform to the classic concept of property'.[13] In the words of the Inter-American Court:

> Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of people.[14]

These interpretative steps by the Inter-American Court paved the way for the expansion of the conventional standard enshrined in article 21 of the ACHR, which could be summarised in the following hermeneutical steps. First, it discharged the possibility of being potentially trapped in a literal reading – as indicated by article 31(1) of the Vienna Convention on the Law of Treaties (VCLT) – of article 21 of the ACHR. Since the wording of the latter provision does not explicitly include or exclude any potential

11 Fuentes (n 6) 53.

12 When interpreting human rights instruments, the interpreter 'must take into consideration society as a whole, paying due account to the complex plurality of cultural understandings that are present (contextual interpretation) and in accordance with the current present conditions existing at a given time (evolutive interpretation)'. Fuentes (n 6) 54.

13 *Sarayaku* (n 8) para 145.

14 As above. See also *Sawhoyamaxa Indigenous Community v Paraguay* (merits, reparations and costs) IACHR (29 March 2006) Series C No 146 (*Sawhoyamaxa)* para 120; *Xákmok Kásek Indigenous Community v Paraguay* (merits, reparations and costs) IACHR (24 August 2010) Series C No 214 (*Xákmok Kásek*) para 87; *Community Garifuna Triunfo de la Cruz and its members v Honduras* (merits, reparations and costs) IACHR (8 October 2015)Series C No 305 (*Garifuna Triunfo de la Cruz*) para 100, and *Garífuna Punta Piedra Community and its members v Honduras* (preliminary objections, merits, reparations and costs) IACHR (8 October 2015) Series C No 304 (*Garífuna Punta Piedra*) para 165.

reference to communal property,[15] the Court – bearing in mind the object and purpose of the ACHR – has also recurred to the preparatory work of the ACHR as a supplementary means of interpretation (article 32 of the VCLT).[16]

The Inter- American Court found that at the time of the drafting of the ACHR, it was decided only to use the term 'enjoyment of his *property*' instead of *private property*.[17] The phrase 'everyone has the right to the use and enjoyment of private property, but the law may subordinate its use and enjoyment to public interest' was replaced by 'everyone has the right to the use and enjoyment of his property'.[18]

Therefore, in light of the *travaux préparatoires* and taking into consideration the preclusion of any potential restrictive interpretation of rights recognised in other international instruments or domestic legislation, as referred to in article 29(b) of the ACHR,[19] the Inter-American Court concluded that the wording of article 21 does not exclude the protection of the right to property in a sense which includes the rights of members of the indigenous communities within the framework of communal property.[20]

In addition, the principle of non-restrictive interpretation of the rights recognised in the Convention leads toward the second interpretative step made by the Court, namely, the integration of the substantive content of article 21 in light of other conventions that are part of the same human rights international law system applicable to a specific case.[21] In other words, to avoid a potentially restrictive interpretation of article 21 of the ACHR in the framework of indigenous lands claims by indigenous peoples, the interpreter needs to analyse other international and regional instruments that are part of the same human rights system applicable to the case.[22]

15 ACHR, art 21(1) states that '[e]veryone has the right to the use and enjoyment of this property. The law may subordinate such use and enjoyment to the interest of society'.

16 *Awas Tingni* (n 1) para 145. In addition, see *Restrictions to the Death Penalty* (arts 4.2 and 4.4 ACHR) Advisory Opinion OC-3/83, Inter-American Court of Human Rights Series A No 3 (8 September 1983) para 49.

17 My emphasis.

18 *Awas Tingni* (n 1) para 145.

19 *Awas Tingni* (n 1) para 148.

20 As above.

21 *Yakye Axa Indigenous Community v Paraguay* IACHR (17 June 2005) Series C No 125 (*Yakye Axa*) paras 124-126.

22 As above. See also *Street Children* (n 10) para 192; *Gómez-Paquiyauri Brothers v Peru* (merits, reparations and costs) IACHR (8 July 2004) Series C No 110 para 164; and *Consular Assistance* (n 7) para 113.

In this sense, it is important to clarify that the Inter-American Court has jurisdiction only over violations of the ACHR and other related instruments that are part of the Inter-American Human Rights System.[23] However, the constant jurisprudence of the Court has clearly indicated that the regional tribunal 'has found it useful and appropriate to use other international treaties [...] to analyse the content and scope of the provisions and rights of the Convention'.[24] Again, by referring to other international instruments, the Court aims at 'keeping with the evolution of the inter-American system and taking into consideration developments in this matter in international human rights law'.[25]

Among international human rights instruments, the regional tribunal found that in most cases in which indigenous peoples' property rights were at stake, the International Labour Organization (ILO) Convention No 169 concerning Indigenous and Tribal Peoples in Independent Countries was – among others – the most suitable international instrument for the interpretation of article 21 of the ACHR.[26] In light of ILO Convention 169, the Inter-American Court has drawn a line between identity, culture, traditional land and natural resources as part of the elements that integrate the scope of protection of article 21 of the ACHR.[27] Specifically, the Court took into account articles 13(1), 14(1), 15(1) and 15(2) of the ILO Convention to interpret article 21 of the ACHR.

Based on article 13(1) of ILO Convention 169,[28] the Court stated that article 21 of the ACHR must safeguard the close ties of indigenous peoples with their traditional territories and the natural resources therein associated with their culture, as well as the components derived from them.[29] Moreover, taking into account article 14(1) of ILO Convention No 169, the rights of ownership and possession of indigenous peoples shall include the use of lands not only exclusively occupied by them but also lands to which they have traditionally had access for their subsistence and

23 *Plan de Sánchez Massacre* (n 10) para 51.

24 *Xucuru Indigenous People and its members v Brazil* (preliminary objections, merits, reparations and costs) IACHR (5 February 2017) Series C No 346 (*Xucuru*) para 35.

25 As above. See also *Yakye Axa* (n 21) para 127; *Ituango Massacres v Colombia* IACHR (1 July 2006) Series C No 148 para 157.

26 *Yakye Axa* (n 21) para 127.

27 *Saramaka People v Suriname* (preliminary objections, merits, reparations and costs) IACHR (28 November 2007) Series C No 172 (*Saramaka*) para 121.

28 Article 13(1) of the ILO Convention expressly states that 'governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship'.

29 *Yakye Axa* (n 21) para 137.

traditional activities. This includes protecting the natural resources, which these peoples have traditionally used, and introducing specific safeguards to protect the right to property over traditional lands and natural resources (article 15 of ILO Convention 169).[30]

Consequently, through a systemic interpretation of article 21 of the ACHR, in light of the provisions enshrined in the ILO Convention No 169, the Inter-American Court has established not only the special relationship that indigenous communities have with their land but also the essential importance of natural resources for the physical and cultural survival of these communities.[31] Moreover, it is important to highlight that this interpretation of article 21 of the ACHR has not been developed exclusively through references to ILO Convention No 169. In fact, in different cases brought against Suriname,[32] a state that does not recognise the right to communal property of tribal peoples and has not ratified ILO Convention No 169, the Court made references to the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[33]

In the cases related to Suriname, the Inter-American Court avoided referring to the ILO Convention. Instead, it decided to make references to the above-mentioned conventions, which have been ratified by Suriname, and to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).[34] In particular, the Inter-American Court referred to the common article 1 of the ICCPR and ICESCR, that is, the right of self-determination, which recognises that 'all peoples' have the right to 'freely pursue their economic, social and cultural development' and 'may … freely dispose of their natural wealth and resources' without being 'deprived of its own means of subsistence'.[35]

Thus, by considering the indigenous peoples as 'peoples' in the sense of enjoying the right to self-determination recognised under common article 1, and therefore being able to 'freely dispose of their natural wealth and resources', it is possible to conclude that they should not be deprived

30 Fuentes (n 2) 238.

31 *Saramaka* (n 27) paras 121-122.

32 See, among others, *Moiwana Community v Suriname* (preliminary objections, merits, reparations and costs) IACHR (15 June 2005) Series C No 124 (*Moiwana*) paras 127-135; and *Saramaka* (n 27) paras 92-95.

33 *Saramaka* (n 27) para 93.

34 See, among others, *Kaliña and Lokono Peoples v Suriname* (merits, reparations and costs) IACHR (25 November 2015) Series C No 309 (*Kaliña and Lokono Peoples)* para 122.

35 *Saramaka* (n 27) para 93.

of their 'own means of subsistence'.[36] This interpretation was reinforced by considering indigenous peoples as minorities in relation to article 27 of the ICCPR, which entails the protection of their right to enjoy their own culture, including 'in a way of life which is closely associated with territory and use of its resources'.[37]

This means that the right to property, as guaranteed by article 21 of the ACHR and interpreted in light of the rights recognised under common article 1 of the ICCPR and ICESCR and article 27 of the ICCPR, extends its scope of protection to the right to communal property of indigenous peoples.[38]

Furthermore, the Inter-American Court has also referred to UNDRIP to reinforce its interpretation of article 21. In fact, in several cases, the Court considered that the states had voted in favour of the Declaration before the UN General Assembly to reinforce its interpretation of the scope of protection of article 21 of the ACHR.[39] Thus, even though the UNDRIP is non-binding, the Inter-American Court has made reference to it, together with ILO Convention No 169, in order to provide content and define the extension of the obligations of the states in relation to the right to property of indigenous peoples.[40]

2.1 Indigenous peoples' right to communal property

As a consequence of the systemic interpretation of article 21 of the ACHR, it is recognised that the protection of the right to communal property of indigenous peoples under the ACHR includes the ownership of their land and some of the natural resources that belong to those territories. Specifically, the Inter-American Court has highlighted the special relationship that indigenous peoples have with their land in the sense that ownership of traditional land is not centred on an individual but rather on the group and its community.[41] For the Court, the right to communal ownership over their traditional lands relates to the 'need to

36 As above.

37 *Saramaka* (n 27) para 94.

38 *Saramaka* (n 27) para para 95. See also *Kaliña and Lokono Peoples* (n 34) para 124.

39 See *Sarayaku* (n 8) para 215 & 217. See also *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama* (preliminary objections, merits, reparations and costs) IACHR (14 October 2014) Series C No 284 (*Kuna Indigenous People)* para 118; *Garifuna Triunfo de la Cruz* (n 14) para 168; *Kaliña and Lokono Peoples* (n 34) para 122; and *Saramaka* (n 27) para 131.

40 See, among others, *Saramaka* (n 27) para 131.

41 See, among others, *Sarayaku* (n 8) para 148.

ensure the security and permanence of the control and use of the natural resources …, which, in turn, preserves the way of life' of indigenous communities.[42] Hence, the Court has stated the need to recognise the close ties of indigenous peoples with their land as a fundamental basis for their cultures, spiritual life, integrity and economic survival.[43]

The Inter-American Court has established that even if this collective understanding of concepts of property and possession does not conform to the classic notion of property, it must be protected under the ACHR.[44] In the case of indigenous peoples, 'land is not owned by the individual but by the group and its community', which means that they have a 'community-based tradition relating to a communal form of collective land ownership'.[45] In fact, according to the Inter-American Court, the protection of indigenous traditional lands under the ACHR is not linked to the existence of a formal legal title; it is the traditional possession that 'grants the indigenous peoples the right to require official recognition of ownership and its registration'.[46] In other words, its recognition is given on the basis of the existence of an ancestral and spiritual relationship with their traditional territories, and it is not necessarily extinguished by the loss of possession unless the lands have been lawfully transferred to third parties in good faith.[47]

Moreover, the Court has also understood that the right to use and enjoy their territory includes the right to own the natural resources they have traditionally used within their territory for the same reasons that they have a right to own the land: without them, the very physical and cultural survival of such peoples is at stake.[48] In other words, protecting the lands and resources that indigenous peoples have traditionally used is

42 See *Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina* (merits, reparations and costs) IACHR (6 February 2020) Series C No 400 (*Lhaka Honhat Association*) para 94; see also *Saramaka* (n 27) paras 121 & 122; and *Kuna Indigenous People* (n 39) para 112.

43 *Awas Tingni* (n 1) para 149.

44 *Sawhoyamaxa* (n 14) para 120.

45 *Kuna Indigenous People* (n 39) para 111.

46 *Xucuru* (n 24), para 117. See also *Awas Tingni* (n 1) para 164; and *Garifuna Triunfo de la Cruz* (n 14) para 105.

47 *Sawhoyamaxa* (n 14) para 128.

48 See *Saramaka* (n 27) para 121. See also *Yakye Axa* (n 21) para 137; *Sawhoyamaxa* (n 14) para 118; and *Sarayaku* (n 8) para 146.

a safeguard against their potential extinction as a group and as distinctive peoples.[49]

2.2 Protection of indigenous peoples' rights over traditionally used natural resources

After recognising the right of indigenous peoples to communal property, the Inter-American Court addressed the question of the extension of the right of the indigenous peoples to use and enjoy the natural resources that lie on and within their traditionally owned lands. In this sense, the regional tribunal has recognised that the same reasons that justify the protection of communal property rights over those lands that indigenous communities have traditionally used and occupied for centuries[50] ground the right to ownership over those natural resources that these communities 'have traditionally used'.[51]

Natural resources that lie on and within their traditional lands are essential – in the case of indigenous and tribal peoples – for the maintenance and enjoyment of their traditional way of life, social structure, economic system, etc. Access to these resources is essential for the conservation and development of their cultural identity and to have the possibility to enjoy a dignified life. Based on the intrinsic connection between the traditional lands and territories, the resources that lie on and within them, and the cultural identity and way of life of the indigenous communities, the Court has extended the protection provided by article 21 of the ACHR to 'those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life'.[52]

Accordingly, those natural resources that can be considered protected by the right to communal property recognised in article 21 of the ACHR are those that fulfil the two above-mentioned conditions. First, these resources have been traditionally used since time immemorial; second,

49 See *Saramaka* (n 27) para 121. See also *Kaliña and Lokono Peoples* (n 34) para 130; and *Garífuna Punta Piedra* (n 14) para 166.

50 It is important to bear in mind that the Inter-American jurisprudence 'has characterized indigenous territorial property as a form of property whose foundation lies not in official state recognition, but in the traditional use and possession of land and resources; indigenous and tribal peoples' territories 'are theirs by right of their ancestral use or occupancy'. Inter-American Commission Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser. L/V/II, Doc. 56/09, 30 December 2009, 26, para 68.

51 *Saramaka* (n 27) para 121.

52 S*aramaka* (n 27) para 122.

they are necessary for the very survival, development and continuation of the indigenous peoples' cultural identity and way of life.[53] Conversely, the allocation of the ownership rights over all other natural resources that 'do not satisfy' these two requirements will, of course, depend on the domestic national legislation and, hence, will fall into 'the inalienable right of each State to the full exercise of national sovereignty over its natural resources'.[54]

Therefore, in line with the acknowledgement of the states' property over those natural resources not traditionally used by these communities, the Court has expressly recognised that 'Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources' within those traditional lands and territories.[55] The legal principle remains that states have the right to explore and exploit the natural resources that lay in and within their territories.

However, the exploitation and extraction of natural resources within indigenous peoples' lands 'is most likely to affect the use and enjoyment of other natural resources that are necessary for the survival' of these peoples.[56] Consequently, the Inter-American Court has called on member states to assess each situation under a proper 'necessity test' before granting concessions over state-owned natural resources.[57] The test aims to determine whether the restriction of the right to communal property of indigenous people upon natural resources (traditionally used) is needed to achieve a legitimate aim in a pluralist and democratic society,[58] and

53 As it has been stressed, indigenous lands and territories traditionally used 'include[s] not only physically occupied spaces but also those used for their cultural or subsistence activities, such as routes of access, [which is] compatible with the cultural reality of indigenous peoples and their special relationship with the land and territory'. Fuentes (n 2) 239.

54 The UN General Assembly, in its 2203rd plenary meeting, has '[s]trongly reaffirm[ed] the inalienable rights of States to permanent sovereignty over all their natural resources, on land within their international boundaries as well as those in the sea-bed and the subsoil thereof within their national jurisdiction and in the superjacent waters.' *Cf* UNGA Res 3171 (XXVIII), 'Permanent sovereignty over natural resources', 2203rd plenary meeting (1973).

55 *Saramaka* (n 27) para 126.

56 As above.

57 *Saramaka* (n 27) para 127.

58 The Inter-American Commission has stressed in this sense that 'recognition and protection as culturally different peoples requires wide political and institutional structures that allow them to participate in public life, and protect their cultural, social, economic and political institutions in the decision-making process. This requires, among other aspects, the promotion of an intercultural citizenship based on dialogue,

whether or not a 'reasonable relation of proportionality' exists between the exploitation and the restriction of the indigenous rights.[59]

At this point, it is important to bear in mind that the right to property of these peoples over their traditional lands and used natural resources is not an absolute right. In this sense, the Court has emphasised that property rights, like many other rights recognised in the ACHR, are subject to certain limitations and restrictions.[60] Article 21 of the ACHR expressly states that the 'law may subordinate [the] use and enjoyment [of property] to the interest of society'.[61] Thus, states could potentially justify a restriction to the use and enjoyment of the right to communal property in those cases where the restrictions are: 'a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society'.[62] In short, '[t]he necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest'.[63]

Finally, when that exploitation generates a direct or indirect limitation on the enjoyment of the indigenous peoples' land rights, it will nevertheless be justified if it pursues the fulfilment of imperative or 'pressing social needs'; as long as it does not 'amount to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members'.[64] This is because an interference on the enjoyment of the right to communal property could eventually generate a possible restriction on their ability to have access to a 'life in dignity' and, therefore, an infringement of their right to life *lato sensu* (article 4 reading together with article 1(1) of the ACHR).[65]

the generation of culturally appropriate services, and differentiated attention for indigenous and tribal peoples.' Inter-American Commission 'Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation, and development activities,' OEA/Ser. L/V/II., Doc. 47/15, 31 December 2015, 75, para 150.

59 See *Saramaka* (n 27) para 127.

60 As above. See also *Yakye Axa* (n 21) paras 144-145 (cited *mutatis mutandis*); *Ricardo Canese v Paraguay* (merits, reparations and costs) IACHR (31 August 2004) Series C No 111 para 96; *Herrera Ulloa v Costa Rica* (preliminary objections, merits, reparations and costs) IACHR (2 July 2004) Series C No 107 para 127; *Ivcher Bronstein v Peru* (merits, reparations and costs) IACHR (6 February 2001) Series C No 74 para 155. See also *Sawhoyamaxa* (n 14) para 137.

61 *Cf* ACHR, art 21(1).

62 See *Saramaka* (n 27) para 127 *et seq.*

63 See *Yakye Axa* (n 21) para 145.

64 *Saramaka* (n 27) para 128.

65 *Saramaka* (n 27) paras 121-123. See also Inter-American Commission (n 50) para 230.

In short, what is protected under article 21 of the ACHR in relation to the right to property of indigenous peoples is the close link that these communities have with their lands and the resources found on and within their territories that are necessary for their survival. As mentioned by the Court,

> To disregard the ancestral right of members of indigenous communities over their territories could adversely impact other basic rights such as the right to cultural identity and the very survival of the indigenous communities and their members.[66]

Due to the centrality of the relationship between indigenous peoples' culture, worldviews, and their traditional territories, the Court has developed concrete safeguards that limit the possibility for member states to introduce restrictions or interference in the enjoyment of the right to communal property in cases where the survival of the group, or its right to exist, is not at stake.[67] As further developed below, the protection provided by the ACHR is not absolute. In the wording of the regional tribunal,

> [W]hen States impose limitations or restrictions on the exercise of the rights of indigenous peoples to the ownership of their lands, territories, and natural resources, certain guidelines must be respected, which must be established by law, necessary, proportionate, and aimed at achieving a legitimate objective in a democratic society.[68]

2.3 Safeguards against unjustified interferences in the enjoyment of indigenous peoples' rights

In order to preserve, protect and guarantee the unique relationship that indigenous communities have with their lands and territories, which in turn ensures their material and cultural survival as distinguished peoples, the Inter-American Court has identified three specific safeguards.[69]

For instance, it has ordered the issuance of logging and mining concessions within indigenous peoples' lands by the states to (a) effective participation of the involved communities, according to their own traditions, in any investment or development project within their lands; (b) the sharing of reasonable benefits with these communities in each project;

66 *Xucuru* (n 24) para 115.

67 *Xucuru* (n 24) para 125. See also *Saramaka* (n 27) para 128; and *Sarayaku* (n 8) para 156.

68 *Garifuna Triunfo de la Cruz* (n 14) para 154.

69 *Lhaka Honhat Association* (n 42) para 175.

and (c) the elaboration of prior and independent environmental and social impact assessment.[70]

The first safeguard required by the Court, 'participation', implies that in any development plan, the state must conduct prior and informed consultations with the communities involved in good faith and in accordance with their own customs and traditions.[71] It should take into account the representative institutions and methods of decision-making of the indigenous people in question.[72] Consultations not only guaranteed the right to property but also supported the effective realisation of the 'right of the indigenous peoples to take part in decisions that affect their rights'.[73] This consultation process must consist of effectively sharing all relevant information regarding the nature of the development project 'at all stages of the planning and implementation of a project or measure that may affect the territory [of indigenous communities] or other rights essential to their survival as people'.[74] In fact, the information shared must be sufficient, accessible, and timely.[75] Moreover, it must be shared 'from the first stages of the planning or preparation of the proposed measure or project, so that the indigenous peoples can truly participate in and influence the decision-making process'.[76]

The obligation to consult is an overarching duty that must be implemented in any situation in which a project could potentially interfere with the rights of indigenous communities over their traditional lands and territories.[77] The aim of the consultation is to seek an agreement with the affected communities. Consultation is an obligation of *means*.[78] It requires a proactive role of the states to accept and disseminate information in good faith in an understandable and publicly accessible format.[79] It must

70 Fuentes (n 2) 242.

71 *Lhaka Honhat Association* (n 42) para 174. See also *Saramaka* (n 27) para 133; *Sarayaku* (n 8) para 186; and *Kaliña and Lokono Peoples* (n 34) para 201.

72 Fuentes (n 2) 242.

73 *Lhaka Honhat Association* (n 42) para 173.

74 *Garifuna Triunfo de la Cruz* (n 14) para 160.

75 Inter-American Commission (n 50) para 198.

76 *Garifuna Triunfo de la Cruz* (n 14) para 160. See also *Garífuna Punta Piedra* (n 14) para 216.

77 Fuentes (n 2) 243.

78 Fuentes (n 2) 245.

79 See *Saramaka People v Suriname* (interpretation of the judgement on preliminary objections, merits, reparations and costs) IACHR (15 June 2005) Series C No 124 (*Saramaka interpretation*) para 17.

be in conformity with their customs and traditions, including paying due respect to their traditional decision-making institutions.[80]

Finally, in case of 'large-scale development or investment projects' that could have major impacts within the territory of the indigenous communities, the Inter-American Court has imposed on the states not only the duty to consult but also 'to obtain their free, prior and informed consent, according to their customs and traditions'.[81] The rationale of this additional requirement is clear: 'the impact of such activities must never negate the ability of members of indigenous and tribal peoples to ensure their own survival'.[82] As concluded elsewhere, this additional requirement does not provide indigenous peoples with a 'veto power' but rather establishes the need to frame consultation procedures to make every effort to build consensus on the part of all concerned.[83]

The second safeguard, benefit sharing, is based upon 'the restriction or deprivation of [indigenous peoples] right to the use and enjoyment of their traditional lands and of those natural resources necessary for their survival'.[84] This right to obtain just compensation (article 21(2) of the ACHR) applies not only to the total deprivation of the communal property title by way of expropriation by the state but also to the restriction or deprivation of the regular use and enjoyment of such property.[85]

Hence, the reasonableness in the sharing of the project's benefits has to be interpreted as the existence of a 'relation of proportionality' between the restriction suffered by the affected communities in the enjoyment of their rights and the possible benefits from the investment or development projects. Consequently, large and invasive interferences will require more participation in the benefit sharing.[86]

Finally, the third safeguard identified by the Inter-American Court is the obligation to conduct a prior environmental and social impact assessment (ESIA). The justification is based on the prevention of

80 *Saramaka interpretation* (n 79) para 18.

81 *Saramaka* (n 27) para 134.

82 *Lhaka Honhat Association* (n 42) para 175.

83 Fuentes (n 2) 229-253. See also Human Rights Council *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, A/HRC/12/34 (2009), para 48, http://unsr.jamesanaya.org/docs/annual/2009_hrc_annual_report_en.pdf 13 December 2022. See also Fuentes (n 2) 74.

84 *Saramaka* (n 27) para 139.

85 As above.

86 Fuentes (n 2) 246.

potential negative impacts that development projects could have on traditional lands, territories, and natural resources.[87] The purpose of the ESIA is to ensure that members of the community 'are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily'.[88] Moreover, the ESIA 'must conform to the relevant international standards and best practices,'[89] 'must be undertaken by independent and technically capable entities, with the State's supervision'.[90] It must also respect the communities' traditions and culture.[91]

As explicitly emphasised by the Inter-American Court, 'the guided principle with which to analyse the result of ESIAs should be that the level of impact does not deny the ability of the members of the affected communities to survive' as a distinct group.[92] In addition, the ESIA must be implemented before granting any concession for the exploration and exploitation of natural resources or the establishment of any development or investment projects within the traditional indigenous peoples' territories and lands in order to produce the least possible impact on the enjoyment and exercise of these rights.[93]

To conclude, these safeguards developed by the Inter-American Court are essential for the survival of indigenous peoples' traditional way of living.[94] They are instrumental in creating a legal framework that considers indigenous peoples' cultural distinctiveness and ensuring that any concession or development project will not take place if its socio-environmental impacts amount to a denial of their material and cultural survival.[95]

2.4 Indigenous peoples' right to cultural identity and dignified life

As argued in this chapter, the innovative interpretation of article 21 of the ACHR has expanded the scope of conventional protection beyond

87 As above.

88 *Saramaka Interpretation* (n 79) para 40.

89 *Saramaka Interpretation* (n 79) para 41.

90 As above.

91 Fuentes (n 2) 247.

92 *Saramaka Interpretation* (n 79) para 42.

93 Fuentes (n 2) 247.

94 As above.

95 *Saramaka* (n 27) para 129.

the material relation that indigenous peoples have with their land. In the wording of the Inter-American Court,

> the close relationship of indigenous peoples with the land must be acknowledged and understood as the fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations.[96]

This means that the protection afforded by the ACHR to the right to property of indigenous peoples includes a spiritual element, which is based on the fact that it is through the special relation with their land that indigenous peoples find their own cultural identity.[97] In the same vein, the UNDRIP has also recognised the axiological centrality that land plays in indigenous peoples' culture, recognising the importance of the right of these people to 'maintain and strengthen their distinctive spiritual relationship with their traditional[ly] owned or otherwise occupied and used lands'.[98]

In fact, what is truly at stake when indigenous peoples are deprived of the enjoyment of their traditional lands and territories is the possibility to maintain and further develop their own way of living and their own right to life in accordance with their own traditions and worldviews.[99] In short, what is under threat is not only their physical survival but also the persistence of their cultural identity and their *indigenousness* as distinguishable peoples.[100]

96 *Yakye Axa* (n 21) para 131.

97 As highlighted by the Court, cultural identity is a 'basic human right, and one of the collective nature in indigenous communities, which must be respected in a multicultural, pluralist and democratic society' and, as a right, 'protects the freedom of individuals [as individuals and as a members of a community] to follow a way of life connected to the culture to which they belong and to take part in its development'. See *Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala* (Merits, Reparations and Costs) IACHR (6 October 2021) Series C No 440 para 125.

98 UNDRIP, art 25.

99 *Yakye Axa* (n 21), Separate Dissenting Opinion of Judges AA Cançado Trindade and ME Ventura Robles, para 4. Moreover, according to the Commission, 'the term 'survival' should be understood in a coherent manner with the indigenous and tribal peoples set of rights, with the aim of not giving rise to a static conception of their ways of life'. In addition, the Commission has emphasised that 'since the requirement to ensure their "survival" has the purpose of guaranteeing the especial relationship between these peoples with their ancestral territories, reasonable deference should be given to the understanding that the indigenous and tribal peoples themselves have in regards to the scope of this relationship, as authorized interpreters of their cultures'. Inter-American Commission (n 50) para 166.

100 Fuentes (n 6) 69.

According to the consolidated jurisprudence of the Inter-American Court, cultural identity must be considered part or an integrative component of the right to life *lato sensu*.[101] Under article 4 of the ACHR, the protection of life includes 'not only the right of every human being not to be deprived of his life arbitrarily' (right to life *stricto sensu*) 'but also the right that he will not be prevented from having access to the conditions that guarantee a decent existence,' that is, the right to life *lato sensu*.[102]

This dual understanding of the right to life must be read in connection with the general 'obligation to respect and ensure' the enjoyment of fundamental rights incorporated in article 1(1) of the ACHR. Thus, it generates upon the states not only the *negative* obligation to prevent and restrain arbitrary deprivations of this right but also the *positive* obligation to guarantee the necessary conditions that would permit indigenous peoples to have a decent life.[103] Consequently, states have the positive obligation to adopt all appropriate measures to secure the full and free enjoyment of human rights, in order to 'protect and preserve' the right to life.[104]

Therefore, in order to guarantee the full enjoyment and access to a decent condition of life for all members of society, and in particular for those in a vulnerable position,[105] the Court has stressed states' positive obligation to recognise within the national legal systems the right of indigenous peoples to the communal property over their traditional lands and resources.[106] This positive obligation is grounded in the intrinsic

101 *Sawhoyamaxa* (n 14) para 151.

102 *Street Children* (n 10) para 144. See also *Sawhoyamaxa* (n 14), Separate Opinion of Judge Ventura-Robles para 10.

103 According to the Human Rights Committee, '[t]he duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.' See UN Human Rights Committee, General Comment 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019 (HRC General Comment 36) para 26.

104 See *Pueblo Bello Massacre v Colombia* (merits, reparations and costs) IACHR (31 January 2006) Series C No 140 (*Pueblo Bello Massacre*) para 120. See also *Mapiripán Massacre v Colombia* (merits, reparations and costs) IACHR (15 September 2005) Series C No 134 (*Mapiripán Massacre*) para 232.

105 Under the 'jurisprudence constant' of the IACtHR, the obligation to take positive measures *vis-à-vis* the protection of the right to life increases its imperativeness according to 'the particular needs of protection of the legal persons, whether due to their personal conditions or because of the specific situation they have to face, such as extreme poverty, exclusion or childhood.' *Pueblo Bello Massacre* (n 104) paras 111-112.

106 In connection with extractive industries, '[t]his obligation includes the adoption of the appropriate domestic legislation to protect the most relevant human rights in the field of extractive and development activities, the repeal of legislation which is incompatible with the rights enshrined in the Inter-American instruments, and to refrain from

and constitutive nature that traditional lands have vis-à-vis indigenous peoples' identity and, therefore, in the enjoyment of decent conditions of life (dignify life).[107] These are necessarily connected with their own way of living, their own culture, understandings, traditions and world views.[108]

The interrelation between the enjoyment of the right to communal property and the protection of indigenous peoples' right to cultural identity and dignified life is based on the inherent interconnection between these rights. The interpretative path of the Inter-American Court starts with expanding the scope of protection of the right to life. Protection of life includes not only the prohibition of its arbitrary deprivation (negative obligation) but as well the generation of all of those conditions that will permit and facilitate its full enjoyment, that is, the creation of conditions that will facilitate or create opportunities for a decent life (positive obligations).[109]

In addition, these positive obligations include the generation of conditions able to facilitate equal enjoyment of decent life conditions for each member of the society in accordance with their own understandings and cultural identity.[110] In this sense, Cançado Trindade highlighted that indigenous peoples' cultural identity 'is closely linked to their ancestral lands', and if members of indigenous communities 'are deprived of them, it seriously affects their cultural identity, and finally their very right to life *lato sensu*'. [111]

Furthermore, because in the case of indigenous peoples, their cultural identity is intimately connected with their traditional lands, positive measures must include adequate legal and material protection for this

adopting legislation contrary to these rights'. Inter-American Commission (n 50) para 67.

107 In the same line of views, the UN Human Rights Committee has expressed that the obligation to take appropriate measures to facilitate the enjoyment of the right to life with dignity, may include addressing the 'deprivation of indigenous peoples land, territories and resources'. See HRC General Comment 36 (n 103) para 26.

108 In this sense, in *Yakye Axa* Cançado Trindade and Ventura Robles have emphasised the fact that even if the right to life 'is a non-derogable right under the American Convention, while the right to property is not [...] the latter is especially significant because it is directly related to full enjoyment of the right to life including conditions for a decent life.' *Yakye Axa* (n 21), Separate Dissenting Opinion of AA Cançado Trindade and ME Ventura Robles, para 20.

109 See *Juan Humberto Sánchez v Honduras* (preliminary objection, merits, reparations and costs) IACHR (7 June 2003) Series C No 99 para 110.

110 As mentioned elsewhere, 'cultural identity has to be considered as part or as an integrative component of the right to life lato sensu'. See Fuentes (n 2) 235.

111 *Sawhoyamaxa* (n 14), Separate Opinion by Judge AA Cançado Trindade, para 28.

special relationship.[112] Without the recognition of communal property over their traditional lands, in accordance with its regulation in their customary laws, the life of indigenous peoples will be under threat.[113] Indeed, the intimate and inseparable connection between indigenous peoples and their traditional lands is crucial for the development of their lives in accordance with their own worldviews and traditions. Without this bond, their life projects become devoid of meaning, as they are unable to pursue a dignified existence that aligns with their own understanding of dignity.[114]

In conclusion, the jurisprudence of the Inter-American Court indicates that the nonrecognition of the right to communal property of indigenous communities to their traditional lands will amount – according to the specific circumstances of each case – not only to a violation of article 21 of the ACHR but also to an infringement of the right to life as protected by article 4(1), which is read in accordance with the dispositions contained within article 1(1) of the same instrument (the obligation to respect and protect).[115]

112 As stated by the Inter-American Commission (n 50) '[t]he obligation to adopt special and specific protective measures is inherent in ILO Convention No 169; the IACHR has highlighted the need for its States parties to "take special measures to guarantee indigenous peoples the effective enjoyment of human rights and fundamental freedoms, without restrictions, and to include measures that promote the full effectiveness of their social, economic, and cultural rights, respecting their social and cultural identity, and their customs, traditions, and institutions."' Inter-American Commission (n 50) para 51. See also A Fuentes *Cultural Diversity and indigenous peoples land claims: argumentative dynamics and jurisprudential approach in the Americas*, Doctoral thesis, Università Degli Studi di Trento (2012) 305 http://eprints-phd.biblio.unitn.it/767/ (accessed 18 June 2023).

113 Inter-American Commission (n 50) para 231.

114 In connection with the understanding of the Court toward the concept of 'project of life,' see *Street Children* (n 10) para 144; and *Loayza-Tamayo v Peru* (reparations and costs) IACHR (27 November 1998) Series C No 42 paras 147-148. Regarding the interconnection between indigenous peoples' project of life, cultural identity and traditional lands, see *Kuna Indigenous People* (n 39) para 143; *Yakye Axa* (n 21) para 146; *Sarayaku* (n 8) para 146; and *Kaliña and Lokono Peoples* (n 34) paras 138 & 272.

115 In *Yakye Axa* (n 21) para 168, the Court established that the lack of recognition of the right to communal property 'has had a negative effect on the right of the members of the community to a decent life, because it has deprived them of the possibility of access to their traditional means of subsistence, as well as to use and enjoyment of the natural resources necessary to obtain clear water and to practise traditional medicine to prevent and cure illnesses'.

3 Recognition of the indigenous peoples' right to property over traditional lands in the African human rights system

Within the African human rights system, the protection of the right of indigenous peoples to their traditional lands and territories started, although in a preliminary manner, in 2001 with the decision adopted by the African Commission in *Ogoni*.[116] This decision was adopted at the 30th Ordinary session of the African Commission held in Banjul, The Gambia, on 13-27 October 2001. That is less than two months after the adoption of the judgment by the Inter-American Court in *Awas Tingni*.[117] Based on the ground-breaking character of the latter decision, it would have been expected that the African Commission would have made some references to it, but it did not. As is argued below, this missed opportunity resulted, to a certain extent, in a restrictive recognition of the indigenous people's collective property rights over their traditional lands and territories in *Ogoni*.

However, years later, the African Commission expanded its jurisprudence on indigenous peoples' rights in *Endorois*. Here the African Commission fully recognised the indigenous people's identity of the Endorois and the centrality that their ancestral lands play in relation to their way of life, culture, cultural identity and religious rights.[118] Based on these premises, the African Commission recognised the right of the Endorois to communal property over the lands traditionally possessed, together with the interconnected obligations of the state to grant them with a full property title over them.[119]

The recognition of the rights of indigenous peoples within the African human rights system was further developed by the African Court in *Ogiek*.[120] This was the first case in which the African Court delivered a

116 *Ogoni* (n 3).

117 *Awas Tingni* (n 1).

118 For a critical analysis of the African Commission's legal reasoning on 'the applicability of the peoples' rights provision of the African Charter to particular collectives' see, among others, FM Ndahinda 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) *African Human Rights Law Journal* 16 at 30.

119 *Endorois* (n 4) para 209.

120 For an in-depth analysis of this case, see, among others, R Rösch 'Indigenousness and peoples' rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples' Rights' (2017) 50 *Verfassung und Recht in* Übersee / *Law and Politics in Africa, Asia and Latin America* at 242-258.

judgment on indigenous peoples' rights.[121] The African Court not only upheld the right of the Ogiek community to their traditional lands and their relevance in connection with their culture and cultural identity but also the lands' importance in generating favourable conditions to a decent life.[122]

The recognition of indigenous peoples' rights by the African Commission and Court is further explored in the following sections, together with the influence that the jurisprudence of the Inter-American Court has had on these developments. In fact, as argued below, the African Court and, in particular, the African Commission have benefited to a very large extent from the jurisprudence of the Inter-American Court, from which they have drawn inspiration in developing their interpretation of indigenous peoples' rights.

3.1 Early development in the jurisprudence of the African Commission: The *Ogoni* case

Ogoni has been celebrated as being the first case in which the African human rights system delivered protection to the special relationship that indigenous peoples have with their traditional lands. However, the communication received by the African Commission focused on the environmental damages generated by the oil exploitation in Ogoniland and the support provided by the Nigerian Government 'by placing the legal and military powers of the state at the disposal of the oil companies'.[123]

After analysing the extension of the general obligations to respect,[124] protect,[125] promote,[126] and fulfil[127] human rights that all state parties to the African Charter have, the African Commission analysed the alleged violation of articles 16 and 24 of the African Charter. In particular, the African Commission focused on the alleged failure of the Nigerian

121 Regarding the relevance of the *Ogiek* case within the African human rights system and its interconnection with the *Endorois* case (both cases against Kenya). See, among others, S Nasirumbi 'Revisiting the *Endorois* and *Ogiek* cases: is the African human rights mechanism a toothless bulldog?' (2020) 4 *African Human Rights Yearbook* at 497-518.

122 *Ogiek* (n 5) para 153. More broadly, regarding the indigenous peoples' land claims in Kenya, see A Kwokwo Barume *Land rights of indigenous peoples in Africa. With special focus on Central, Eastern and Southern Africa* (2010) IWGIA Copenhagen, Denmark 86.

123 *Ogoni* (n 3) paras 2 & 3.

124 *Ogoni* (n 3) para 45.

125 *Ogoni* (n 3) para 46.

126 As above.

127 *Ogoni* (n 3) para 47.

Government in fulfilling the minimum duties required by the right to health and the right to a clean environment.[128] For instance, states should take measures to 'prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources'.[129]

In order to fulfil these overarching environmental obligations in connection with Ogoniland, state authorities should conduct or at least permit 'independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development'.[130] Moreover, they should 'undertake appropriate monitoring and providing information to those communities exposed to hazardous materials and activities'.[131] Finally, state authorities should generate 'meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.[132]

The African Commission has been a pioneer in introducing targeted judicial guarantees for the protection of the environmental rights of the Ogoni people.[133] Guarantees that are quite similar to the safeguards developed by the Inter-American Court in later years, for example, in *Saramaka*.[134] The similarities between the jurisprudence of these two regional bodies could suggest an influence of the findings in *Ogoni* in the development of the Inter-American Court's jurisprudence.[135]

128 *Ogoni* (n 3) para 49.

129 *Ogoni* (n 3) para 52.

130 *Ogoni* (n 3) para 53.

131 As above.

132 As above.

133 However, it is important to bear in mind that the 'Ogoni crisis transcends mere environmental rights or even human rights concerns ... the Ogoni crisis involves political issues including inequalities in Nigerian fiscal structures, domination of the Ogoni by politically dominant peoples in Nigeria, exclusion of the Ogoni from the benefits of oil extraction in the region, dispossession from land, and the general perception among the Ogoni that they are colonized by the Nigerian state'. See P Tamuno 'New human rights concept for old African problems: An analysis of the challenges of introducing and implementing indigenous rights in Africa' (2017) 61 *Journal of African Law* at 318.

134 *Saramaka* (n 27) para 129. See also Fuentes (n 2) 242.

135 According to Inman, 'the African Commission in the *Ogoni* case was progressive in relation to its previous decision in the Katangese Secession case, it was still cautious, particularly with regards to using external sources in determining the rights of Indigenous Peoples'. See DM Inman 'The cross-fertilization of human rights norms and indigenous peoples in Africa: From *Endorois* and beyond' (2014) 5 *The International Indigenous Policy Journal* 4 at 7.

However, when the Inter-American Court formulated its own judicial guarantees for the protection of indigenous peoples' rights in *Saramaka*, it only referred to *Ogoni* in relation to the inclusion of natural resources as part of indigenous communities' land rights.[136] No explicit mention was made of the safeguards identified by the African Commission's case law. This omission was a missed opportunity to strengthen the universality of indigenous peoples' rights worldwide and underscore the importance of cross-fertilisation of jurisprudence.

Returning to *Ogoni*, it is important to mention that the right of the Ogoni people to their traditional lands was not an object of direct protection in this case. According to the African Commission, the Ogoni people have the right to housing or shelter as a 'corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health …, the right to property, and the protection accorded to the family'.[137] As a derivation of these rights, the African Commission identified the obligation of states to 'prevent the violation of any individual's right to housing by any other individual or non-state actors like landlords, property developers, and land owners'.[138] Based on this general obligation, Nigeria was found responsible for the violation of the right to shelter due to the actions of its security forces, which have 'obstructed, harassed, beaten and, in some cases, shot and killed innocent citizens who have attempted to return to rebuild their ruined homes'.[139]

To conclude, *Ogoni* should be considered a leading case regarding the early identification of environmental safeguards for the protection of the enjoyment of traditional lands by indigenous peoples in Africa and beyond. However, it also left the sensation of a missed opportunity because the African Commission disengaged from the very recent and innovative (at the time) development in international human rights law generated by *Awas Tingni*.[140] In other words, by employing an evolutionary and systemic interpretation of international human rights law pertaining to indigenous peoples, the African Commission would have had the opportunity to incorporate the latest jurisprudential developments from

136 *Saramaka* (n 27) para 120, fn 122.

137 *Ogoni* (n 3) para 60.

138 *Ogoni* (n 3) para 61.

139 *Ogoni* (n 33) para 62.

140 The only reference made to the jurisprudence of the IACtHR was in relation to *Velásquez Rodríguez v Honduras* (preliminary objections) IACHR (26 June 1987) Series C No 1, a landmark case on enforced disappearances.

the *corpus juris* of international human rights law in its interpretation of the African Charter.[141]

In conclusion, by using an evolutive and systemic interpretation of indigenous peoples' international human rights law, African Commission would have had the possibility to benefit in its interpretation of the African Charter of the latest jurisprudential developments produced within the corpus juris of international human rights law. In addition, and perhaps even more importantly, it missed the opportunity to provide more robust and effective protection to indigenous peoples by recognising their right to communal property over their traditional lands and territories.

3.2 Consolidation of indigenous peoples' right to property through jurisprudential cross-fertilisation: The *Endorois* case

As introduced above, *Endorois* should be considered a milestone in the jurisprudence of the African Commission related to the protection of indigenous peoples' rights, not only because it was a 'landmark victory' for the Endorois community after 40 years of struggle but also due to the fact that it was the first time that the Commission recognised indigenous peoples' rights in Africa.[142] In this case, the African Commission made a substantive step forward in the manner that interpreted international human rights law and expanded the content and scope of protection of the rights recognised under the African Charter.[143]

In fact, it is possible to conclude that the African Commission approached the interpretation of the African Charter in a systemic manner as part of the *corpus juris* of international human rights law.[144] The African Commission clarified, therefore, that it 'is also enjoined

141 Fuentes (n 9) 11.

142 For an in-depth analysis of the *Endorois* case, including the outline of the key arguments presented by the parties, see C Morel 'Indigenous as equals under the African Charter: The Endorois Community versus Kenya' in R Laher & K Sing'Oei (eds) *Indigenous peoples in Africa. Contestations, empowerment and group rights* (Africa Institute of South Africa: Pretoria 2014). See also Ndahinda (n 118) 38.

143 Although the African Charter does not explicitly mention indigenous peoples' right to land, this right 'has been derived from or read into three different rights: the rights to religion, property and culture, rights which are inextricably linked to land.' See Nasirumbi (n 121) 504.

144 According to the Inter-American Court, who has developed this notion, '[t]he corpus juris of international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, resolutions and declarations). Its dynamic evolution has had a positive impact on international law'. See *Juridical Condition and Rights of the Undocumented Migrants* (n 7) para 120; and *Information on Consular Assistance* (n 7) para 115.

under Article 61 of the African Charter to be inspired by other subsidiary sources of international law or general principles in determining rights under the African Charter'.[145] Notably, in the case of indigenous peoples, the African Commission identified the UNDRIP, officially sanctioned by the African Commission through its 2007 Advisory Opinion,[146] as the instrument that 'deals extensively with land rights'.[147] In addition, it highlights that '[t]he jurisprudence under international law bestows the right of ownership rather than mere access' and, therefore, it concluded that 'if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties'.[148]

By referring to international law and, in particular, to the UNDRIP, the Commission stressed the importance of the right to collective property in protecting indigenous peoples' rights. Moreover, based on the position developed by its own Working Group on Indigenous Populations/Communities,[149] the African Commission expressly noted that 'some African minorities do face dispossession of their lands and that special measures are necessary in order to ensure their survival in accordance with their traditions and customs'.[150]

The need for the adoption of measures capable of providing additional protection for the cultural survival of African minorities and indigenous peoples paved the way for the adoption of a historical *obiter dictum*:

> The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.[151]

145 *Endorois* (n 4) para 152.

146 See *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nation Declaration on the Rights of Indigenous Peoples*, adopted by the African Commission at its 41st Ordinary Session held in May 2007, in Accra, Ghana.

147 *Endorois* (n 4) para 204.

148 As above.

149 Report of the African Commission's Working Group of Experts, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005).

150 *Endorois* (n 4) para 187.

151 As above.

Based on these preliminary considerations, and because the 'Endorois culture, religion, and traditional way of life are intimately intertwined with their ancestral lands,'[152] the African Commission concluded that Kenyan authorities have the 'duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system'.[153] In addition, they also have an obligation to 'establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law'.[154]

The development in the jurisprudence of the African Commission was grounded not only in its own systemic interpretation of international human rights law but also in drawing from the comparative jurisprudence of the Inter-American Court. In this sense, the African Commission extensively cited – as a source of inspiration – the findings in *Saramaka*,[155] *Moiwana*,[156] *Yakye Axa*[157] *Sawhoyamaxa*[158] and *Awas Tingni.*[159]

By relying on the jurisprudence of the Inter-American Court, the African Commission was able to expand the scope of protection of the right of the Endorois people to their traditional lands under the African Charter. It interpreted traditional possession of land as the equivalent of a state-granted full property title and recognised the right to return to their lands in case of dispossession or to be compensated by other lands of equal extension and quality.[160] In addition, the African Commission adopted similar guarantees to the Inter-American Court for the protection of the special relationship that the Endorois people have with their lands. It recognised the obligation of state authorities to guarantee the effective participation of the Endorois people in the establishment of a game reserve in their traditional lands, to carry out a prior ESIA, and to guarantee that the community will enjoy a reasonable share of the profits of the Game Reserve.[161] The non-fulfilment of these obligations led to the violation of article 14 (the right to property),[162] but also article 17(2) (the

152 *Endorois* (n 4) para 156.
153 *Endorois* (n 4) para 196.
154 As above.
155 *Saramaka* (n 27).
156 *Moiwana* (n 32).
157 *Yakye Axa* (n 21).
158 *Sawhoyamaxa* (n 14).
159 *Awas Tingni* (n 1).
160 *Endorois* (n 4) para 209.
161 *Endorois* (n 4) para 228.
162 *Endorois* (n 4) para 238.

right to take part in the cultural life of his community), and article 17(3) (the promotion and protection of morals and traditional values),[163] of the African Charter.

Moreover, based on the comparative analysis of *Saramaka* and the findings of the Inter-American Court in *Yakye Axa* and *Sawhoyamaxa*,[164] the African Commission identified the need to guarantee the protection of the Endorois peoples' way of life and their distinct cultural identity when concessions are granted over their traditional territories. In this sense, the African Commission indicated that Kenya has a 'duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community'.[165] And because state authorities did not engage in any meaningful balancing exercise of the potentially conflicting interests at stake, the Commission found that article 21 African Charter (right to right to free disposal of wealth and natural resources) was violated.[166]

Finally, due to the precariousness of the Endorois' post-dispossession settlement, which was very similar to the extremely destitute conditions faced by the members of the Yakye Axa community in Paraguay,[167] the African Commission considered that their 'traditional means of subsistence – through grazing their animals – has been curtailed by lack of access to the green pastures of their traditional land'.[168] According to the Commission, these precarious living conditions have affected the Endorois' right to development.[169] Thus, and following the footprint of *Saramaka*,[170] the African Commission stated that,

> any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.[171]

163 *Endorois* (n 4) para 251.

164 *Endorois* (n 4) para 260.

165 *Endorois* (n 4) para 267.

166 *Endorois* (n 4) para 268.

167 *Endorois* (n 4) paras 284-286. See also *Yakye Axa* (n 21) paras 164-168.

168 *Endorois* (n 4) para 288.

169 It is important to highlight that this decision by the Commission was one of the first, if not the first, decisions in which the implementation of the right to development by states was analysed. See Nasirumbi (n 121) 506.

170 *Saramaka* (n 27) para 134.

171 *Endorois* (n 4) para 291.

In other words, because the right to development will be violated when development projects within indigenous peoples' traditional lands and territories 'decreases the well-being of the community,' the prior and informed consent of the affected communities needs to be obtained.[172] As in the case of the Inter-American Court, African Commission paid crucial attention to the right of the Endorois communities to be consulted in all matters that might affect them. This is why the African Commission analysed the right to development implies a 'two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end … [a] violation of either the procedural or substantive element constitutes a violation of the right to development'.[173] Therefore, in order to fulfil its realisation, 'consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement'.[174]

In addition, the interference with their right to use and enjoy their traditional lands and those resources necessary for their survival, 'in the spirit of the African Charter translates into a right of the members of the Endorois community to reasonably share in the benefits' generated by the development project (i.e. game reserve).[175] The lack of observance of these guarantees, including the inadequacy of the consultation process carried out by state authorities,[176] 'left the Endorois feeling disenfranchised from a process of utmost importance to their life as a people'.[177] Consequently, their right to economic, social and cultural development, as recognised by Article 22 of the African Charter was violated.[178]

To conclude, *Endorois* not only developed the jurisprudence of the African Commission on indigenous people's rights in line with contemporary international human rights law but also it initiated a fertile

172 *Endorois* (n 4) para 290.

173 *Endorois* (n 4) para 277. For a critical assessment of the manner in which the African Commission has interpreted the right to development, see, among others Gilbert J 'Litigating indigenous peoples' rights in Africa: Potentials, challenges and limitations' (2017) 66 *International and Comparative Law Quarterly* 3 at 674.

174 *Endorois* (n 4) para 289.

175 *Endorois* (n 4) para 295. It is important to bear in mind that development projects, such as the Game Reserve, may not necessarily be perceived as a positive outcome by indigenous peoples. In fact, as highlighted by Gilbert, '[f]or many indigenous communities across the continent, wildlife conservation, economic development and tourism have often become synonymous with destitution and loss of lands'. See Gilbert (n 173) 671.

176 Consultations are paramount for preventing state authorities from making arbitrary decisions that 'not only affect indigenous peoples' right to development but also related rights'. Nasirumbi (n 121) 507.

177 *Endorois* (n 4) para 297.

178 *Endorois* (n 4) para 298.

substantive jurisprudential dialogue between two regional human rights systems.[179] In providing content to the rights of indigenous peoples under the African Charter, through an evolutive and systemic interpretation, the Commission benefited from the consolidated indigenous peoples' rights jurisprudence of the Inter-American Court. Moreover, by promoting cross-fertilisation between these two regional jurisdictions, the African Commission has substantially contributed to the systemic harmonisation of international human rights law.[180]

3.3 Protection of indigenous peoples' rights by the African Court: The *Ogiek* case

In *Ogiek*, the African Court has confirmed, in general terms, the jurisprudence on indigenous peoples' rights developed by the African Commission. In particular, it drew inspiration from its Advisory Opinion on the rights of indigenous peoples.[181] In addition, it was also inspired by the work of the UN Special Rapporteur on Minorities, especially in connection with the notion of indigenous peoples.[182]

In a similar manner to the African Commission, the African Court also applied the systemic and evolutive interpretation of international human rights law when defining indigenous peoples' 'current normative standards'.[183] According to the African Court, this interpretative criterion 'allows it to draw inspiration from other human rights instruments' by virtue of articles 60 and 61 of the Charter.[184] Based on these interpretative principles, the African Court recognises the Ogiek as 'an indigenous population that is part of the Kenyan people having a particular status and deserving special protection deriving from their vulnerability'.[185]

Although the African Court did not make specific references to *Endorois* or to the prolific jurisprudence of the Inter-American Court

179 According to Inman, 'the Endorois decision is integral to developing an understanding of the integration, cross-fertilization, and dynamic relationship of human rights law'. Inman (n 135) 9.

180 See, among others, JM Pasqualucci *The practice and procedure of the Inter-American Court of Human Rights* (Cambridge 2013) 13. See also, M Koskenniem *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission, A/cn.4/L.682 (*International* Law Commission, Geneva, 1 May-9 June and 3 July-11 August 2006).

181 *Endorois* (n 4) para 105.

182 *Endorois* (n 4) para 106.

183 *Endorois* (n 4) para 108.

184 As above.

185 *Endorois* (n 4) para 112.

when analysing the Ogieks' right to property over their ancestral lands, it nevertheless arrived at a similar conclusion.[186] In the words of the African Court,

> by expelling the Ogieks from their ancestral lands against their will, without prior consultation and without respecting the conditions of expulsion in the interest of public need, the Respondent violated their rights to land […] as guaranteed by Article 14 of the Charter read in light of the United Nations Declaration on the Rights of Indigenous Peoples 2007.[187]

As in the case of the African Commission, the UNDRIP is at the centre of the African Court's systemic and evolutive interpretation of the provisions of the African Charter in connection with indigenous peoples' rights. However, the African Court departs from this point by further exploring the potential expansion of the protection afforded by indigenous peoples in the Charter by referring to the jurisprudence of the Inter-American Court related to the protection of the right to a dignified or decent life.[188]

Based on this later precedent and on the assertion that 'the violation of economic, social and cultural rights may generally endanger conditions unfavourable to a decent life,' it considered whether the eviction from traditional lands could amount to a violation of the right to life under Article 4 of the Charter.[189] Despite the fact that the African Court highlighted that 'there is no doubt that their eviction has adversely affected their decent existence in the forest,' the right to life was not considered affected because it was not established 'the causal connection between the evictions of the Ogieks by the Respondent and the deaths alleged to have occurred as a result'.[190]

Even though the African Court has acknowledged that 'a distinction between the classical meaning of the right to life and the right to decent existence of a group' could be made, it missed the opportunity to further expand the scope of protection of the right to life by means of incorporating its *lato sensu* dimension.[191] A dimension would have opened

186 As highlighted by Rösch, '[i]n the African human rights system, [the right to collective property] has been derived in three different ways: from the right to property (art 14), the right to practice religion (art 8) and the right to culture (art 17). The African Court discussed it mainly as a derivate of the right to property (art 14)' Rösch (n 120) 251.

187 *Ogiek* (n 5) para 131.

188 *Ogiek* (n 5) para 153. Reference is made to *Yakye Axa* (n 21) para 161.

189 *Ogiek* (n 5) para 153.

190 *Ogiek* (n 5) para 155.

191 *Ogiek* (n 5) para 154.

the possibility of identifying positive obligations on states to develop conditions in society for the enjoyment of a dignified or decent life.[192] In this sense, what emerges clearly from the *Ogiek* case is that African Court adopted a restrictive view of the right to life, recognising that 'Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life'.[193] In other words, what is protected is the right to life *stricto sensu*, that is, against arbitrary deprivations.[194]

Besides this interpretative drawback in the development of its jurisprudence, the African Court nevertheless took the opportunity to strengthen the protection of the cultural and religious rights of the Ogiek people.[195] In this sense, it expressly recognised that their eviction from the Mau Forest has 'rendered it impossible for the community to continue its religious practices and is an unjustifiable interference with the freedom of religion of the Ogiek,' amounting to a violation of Article 8 of the African Charter (the right to freedom of conscience).[196]

In addition, the African Court took the opportunity to note that 'in the context of indigenous peoples, the preservation of culture is of particular importance'.[197] By interpreting the African Charter under the light of the Cultural Charter for Africa,[198] the UN Declaration on Indigenous Peoples,[199] and the General Comment 21 of the UN Committee on Economic, Social and Cultural Rights,[200] the African Court highlighted the interconnection between culture, cultural identity and indigenous peoples' traditional lands. In the words of the Court, 'the Ogiek population has a distinct way of life centred and dependent on the Mau Forest Complex'.[201]

192 *Pueblo Bello Massacre* (n 104) para 120. See also *Mapiripán Massacre* (n 104) para 232.

193 *Ogiek* (n 5) para 154.

194 *Street Children* (n 10) para 144.

195 Nasirumbi (n 121) 500.

196 *Ogiek* (n 5) para 169. As highlighted by Judge Ferrer Mac-Gregor Poisot in his Separate Opinion in *Lhaka Honhat Association* the African Court analysed the right to religion of indigenous peoples as an autonomous right, separate and distinguishable from the right to culture but dependent on access to land and the natural environment, *Lhaka Honhat Association* (n 42) para 37.

197 *Ogiek* (n 5) para 180.

198 *Ogiek* (n 5) paras 178-179. See also arts 3 and 6 of the Cultural Charter for Africa adopted by the Organisation of African Unity in Accra, Ghana on 5 July 1976.

199 *Ogiek* (n 5) para 181.

200 As above. See also UNCESR, General Comment 21, Right of everyone 10 take part in cultural life (art 15, para 1(a) of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc E/C.12/GC/21, paras 36-37.

201 *Ogiek* (n 5) para 182.

Therefore, 'the restrictions on access to and eviction from the Mau Forest have greatly affected their ability to preserve these traditions'.[202]

The need to preserve the natural ecosystem of the Mau Forest Complex 'may in principle be justified to safeguard the 'common interest' in terms of Article 27(2) of the Charter'.[203] However, the pursuit of this legitimate aim has generated interference in the enjoyment of the cultural rights of the Ogiek population.[204] As a hunter-gatherer community, they get their means of survival from the forest, but not only; their own language, their own spiritual and traditional values are intrinsically connected with those traditional lands.[205]

State authorities were unable to specify in which particular manner the traditional practices and cultural activities of the Ogiek have contributed to the degradation of the Mau Forest.[206] Hence, because 'the purported reason of preserving the natural environment cannot constitute a legitimate justification for the Respondent's interference with the Ogieks' exercise of their cultural rights,'[207] it amounted to a violation of articles 17(2), (3), and 21 of the Charter.[208]

To conclude, it would be possible to say that in the first case in which the African Court dealt with indigenous peoples' rights, it embraced the already developed jurisprudence of the African Commission, in particular in *Endorois*.[209] Moreover, it has also benefited from the existing comparative jurisprudence of the Inter-American Court, notably in *Yakye Axa*. However, the African Court missed the opportunity to incorporate an important evolutionary aspect of the Inter-American Court's jurisprudence. That is, expanding the scope of protection of the right to life under the African Charter by means of including the positive obligation of state authorities to create conditions that could enable the enjoyment of a life in dignity, or a dignified life, according to their own cultural understandings, traditions and world views.[210] Finally, it is also important to highlight that when the

202 *Ogiek* (n 5) para 183.

203 *Ogiek* (n 5) para 188.

204 *Ogiek* (n 5) para 183.

205 *Ogiek* (n 5) para 182.

206 *Ogiek* (n 5) para 189.

207 As above.

208 *Ogiek* (n 5) paras 190 & 201.

209 *Ogiek* (n 5) para 153, footnote 39.

210 A Fuentes & M Vannelli 'Expanding the protection of children's rights towards a dignified life: The emerging jurisprudential developments in the Americas' (2021) 10 *Laws* 4 at 12; and Fuentes (n 6) 77.

African Court refers to the jurisprudence of the Inter-American Court, it does not mean that 'it is bound by decisions and statutes from other regional human rights systems'.[211] As explained above, when introducing the interpretative method of systemic integration, references to relevant international human rights instruments or jurisprudence are made exclusively with the purpose of providing additional understanding of the current evolution of the corpus juris of international human rights law.[212] In other words, the omitted reference to the jurisprudence of the Inter-American Court regarding the interconnection between the right to life, cultural identity and the recognition of the right to communal property has allegedly prevented indigenous peoples in Africa from claiming not only the protection of their possessed traditional lands and territories but also to claim the recognition of substantive living conditions that could enable or facilitate the development of their life in dignity.

4 Concluding remarks

The jurisprudence of the Inter-American Court has paved the way for enhanced protection of the right of indigenous peoples to their traditional lands and territories in Africa. It has not only recognised their right to communal property over their lands and natural resources that they traditionally used but also generated concrete safeguards for the protection of those rights when they need to be balanced vis-à-vis competing rights or legitimate aims (e.g., public interest, right to development, private property, etc.).

Most importantly, the Inter-American Court's jurisprudence stressed the importance of culture and the centrality of cultural identity as a component of the right to life *lato sensu* (Article 4 reading together with article 1(1) of the ACHR). When indigenous peoples are deprived of getting access to their traditional lands and territories, they are directly affected in the practice of their culture and religion and from enjoying their own cultural identity. According to the Inter-American Court, indigenous peoples' culture and traditions are intrinsically connected with their traditional lands; the latter is essential in the construction of indigenous peoples' cultural identity.

Thus, any restriction or interference with the enjoyment of the special relationship that indigenous peoples have with their traditional lands and territories would not only endanger their identity as distinguishable

211 *Ogiek* (n 5) para 71.

212 As stated by African Court, the Court 'can draw inspiration from pronouncements emerging from other supranational human rights bodies', *Ogiek* (n 5) para 71.

peoples but also – and most importantly – their possibility to enjoy a life in dignity or a dignified life, according to their own cultural understandings, traditions, and world views. According to the consolidated jurisprudence of the Inter-American Court, state authorities have an obligation to introduce 'positive measures to protect the right to life, even when it includes providing for vulnerable populations affected by extreme poverty',[213] or when they are dependent on their lands for the preservation of their physical and cultural survival.[214]

This far-reaching jurisprudence has inspired the development of equally inclusive and innovative case law within the African Commission and Court of Human and Peoples' Rights. The Commission was the first to benefit from this inter-continental cross-fertilisation. Especially in *Endorois*, it took the opportunity to expand the scope of protection of the rights enshrined within the African Charter by means of reading its provisions under the light of the relevant instruments part of the *corpus juris* of international human rights law. In particular, it draws inspiration from the UNDRIP, ILO Convention 169, and the jurisprudence of the Inter-American Court. Five different judgments of the latter Regional Court were extensively cited in *Endorois*.

The meticulous reviewing of the Inter-American Court's case law paved the way for the African Commission to incorporate, almost entirely, this jurisprudence into its own case law. The only missing link was the inherent interconnection between protecting the right to communal property over traditional lands and protecting their cultural identity by creating conditions for a decent life. In other words, the Commission did not fully explore the three-prong link between the right to communal property over traditional lands, the right to culture and cultural identity, and the right to life in lato sensu.

In *Ogiek*, it was the turn of the African Court of Human and Peoples' Rights to remediate this missed opportunity. The Regional Court embraced the findings of the African Commission, consolidating the recognition of indigenous peoples as different peoples, entitled to enjoy their own culture, including their own religious practices and their own distinctive cultural identity. Even though the notion of indigenous peoples could be potentially considered contested in the African context, it is clear that

213 *Xákmok Kásek* (n 14), concurring and dissenting opinion of Judge A Fogel Pedrozo, para 23.

214 *Saramaka* (n 27) para 90.

indigenous peoples' rights are indeed protected under the African Charter after this landmark judgment.[215]

Unfortunately, there were still some shortcomings. The African Court missed the opportunity to further develop the findings of the African Commission by recognising the missing link between the protection of communal property life, the right to culture and cultural identity, and the right to life *lato sensu.* On the contrary, it embraced a restrictive interpretation of the right to life under Article 4 of the Charter, which excluded the 'right to decent existence of a group'.[216] As clearly stated by the Court, 'Article 4 of the Charter relates to the physical rather than the existential understanding of the right to life'.[217] In other words, the restrictive interpretation of the right to life made by the Regional Court could, unfortunately, prevent millions of Africans from pleading for better life-related conditions that could facilitate the enjoyment of their fundamental rights.

Finally, despite the above-mentioned restrictive interpretation, we should praise both the African Commission and Court for their courageous opening for cross-fertilisation between regional human rights systems. Their evolving interpretation of the rights of indigenous peoples has promoted an open dialogue between different legal cultures that will certainly contribute to the strengthening and harmonisation of the *corpus juris* of international human rights law.

215 *Endorois* (n 4) para 147.

216 *Ogiek* (n 5) para 154.

217 As above.

Table of abbreviations

SERAC	Social and Economic Rights Action Centre
ACHR	American Convention on Human Rights
ESIA	Environmental and social impact assessment
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organization
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
VCLT	Vienna Convention on the Law of Treaties

Literature

Fuentes A & Vannelli M 'Expanding the protection of children's rights towards a dignified life: The emerging jurisprudential developments in the Americas' (2021) 10 *Laws* 1-19

Fuentes A 'Judicial interpretation and indigenous peoples' rights to lands, participation and consultation. The Inter-American Court of Human Rights' approach' (2015) *International Journal on Minority and Group Rights* 39-79

Fuentes A 'Protection of indigenous peoples' traditional lands and exploitation of natural resources: The Inter-American Court of Human Rights' safeguards' (2017) 24 *International Journal on Minority and Group Rights* 229-253

Fuentes A *Cultural Diversity and indigenous peoples land claims: argumentative dynamics and jurisprudential approach in the Americas*, Doctoral thesis, Università Degli Studi di Trento (2012) http://eprints-phd.biblio.unitn.it/767/

Fuentes A *Expanding the boundaries of international human rights law: The systemic approach of the Inter-American Court of Human Rights* (ESIL Conference Paper No. 13/2017) European Society of International Law https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3163088 (2017)

Gilbert J 'Litigating indigenous peoples' rights in Africa: Potentials, challenges and limitations' (2017) 66 *International and Comparative Law Quarterly* 657-686

Human Rights Council *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, A/HRC/12/34 (2009) http://unsr.jamesanaya.org/docs/annual/2009_hrc_annual_report_en.pdf 13 December 2022

Inman DM 'The cross-fertilization of human rights norms and indigenous peoples in Africa: From *Endorois* and beyond' (2014) 5 *The International Indigenous Policy Journal* 1-26

Inter-American Commission 'Indigenous peoples, Afro-descendent communities, and natural resources: Human rights protection in the context of extraction, exploitation, and development activities,' OEA/Ser. L/V/II., Doc. 47/15, 31 December 2015

Inter-American Commission Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System, OEA/Ser. L/V/II, Doc. 56/09, 30 December 2009

Koskenniem M *Fragmentation of international law: Difficulties arising from the diversification and expansion of international law*, Report of the Study Group of the International Law Commission, A/cn.4/L.682 (International Law Commission, Geneva, 1 May-9 June and 3 July-11 August 2006)

Morel C 'Indigenous as equals under the African Charter: The Endorois Community versus Kenya' in R Laher & K Sing'Oei (eds), *Indigenous peoples in Africa. Contestations, empowerment and group rights* (Africa Institute of South Africa: Pretoria 2014)

Nasirumbi S 'Revisiting the Endorois and Ogiek cases: is the African human rights mechanism a toothless bulldog?' (2020) 4 *African Human Rights Yearbook* 497-518

Ndahinda FM 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) *African Human Rights Law Journal* 16-30

Pasqualucci JM *The practice and procedure of the Inter-American Court of Human Rights*, (Cambridge 2013)

Rösch R 'Indigenousness and peoples' rights in the African human rights system: situating the Ogiek judgement of the African Court on Human and Peoples' Rights' (2017) 50 *Verfassung und Recht in* Übersee / *Law and Politics in Africa, Asia and Latin America* 242-258

Tamuno P 'New human rights concept for old African problems: An analysis of the challenges of introducing and implementing indigenous rights in Africa' (2017) 61 *Journal of African Law* 305-332

Report of the African Commission's Working Group of Experts, submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2005)

International, Regional and Other Rights Instruments

African Charter on Human and Peoples' Rights (adopted 27 June 1981 entered into force 21 October 1986) 1520 UNTS 217

Cultural Charter for Africa adopted by the Organisation of African Unity in Accra, Ghana on 5 July 1976

United Nations Human Rights Committee, General Comment 36, Article 6: right to life, CCPR/C/GC/36, 3 September 2019

United Nations Committee on Economic, Social and Cultural Rights General Comment 21, Right of everyone 10 take part in cultural life (art 15, para 1a of the Covenant on Economic, Social and Cultural Rights), 21 December 2009, UN Doc E/C.12/GC/21

United Nations General Assembly Resolution 3171 (XXVIII), '*Permanent sovereignty over natural resources*', 2203rd plenary meeting (1973)

American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 143

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331

International Labour Organization (ILO) Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries, 1989

Cases

Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nation Declaration on the Rights of Indigenous Peoples, adopted by the African Commission at its 41st Ordinary Session held in May 2007, in Accra, Ghana

African Charter on Human and Peoples' Rights

African Commission on Human and Peoples' Rights v Kenya (merits) (2017) 2 AfCLR 9

Bámaca Velásquez v Guatemala (merits) IACHR (25 November 2000) Series C No 70

Centre for Minority Rights Development v Kenya (2009) AHRLR 75 (ACHPR 2009)

Community Garifuna Triunfo de la Cruz and its members v Honduras (merits, reparations and costs) IACHR (8 October 2015) Series C No 305

Garífuna Punta Piedra Community and its members v Honduras (preliminary objections, merits, reparations and costs) IACHR (8 October 2015) Series C No 304

Gómez-Paquiyauri Brothers v Peru (merits, reparations and costs) IACHR (8 July 2004) Series C No 110

Herrera Ulloa v Costa Rica (preliminary objections, merits, reparations and costs) IACHR (2 July 2004) Series C No 107

Indigenous Communities of the Lhaka Honhat Association (Our Land) v Argentina (merits, reparations and costs) IACHR (6 February 2020) Series C No 400

Ituango Massacres v Colombia IACHR (1 July 2006) Series C No 148

Ivcher Bronstein v Peru (merits, reparations and costs) IACHR (6 February 2001) Series C No 74

Juan Humberto Sánchez v Honduras (preliminary objection, merits, reparations and costs) IACHR (7 June 2003) Series C No 99

Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18, Inter-American Court of Human Rights Series A No 18 (17 September 2003)

Kaliña and Lokono Peoples v Suriname (merits, reparations and costs) IACHR (25 November 2015) Series C No 309

Kichwa Indigenous People of Sarayaku v Ecuador (merits, reparations, costs) IACtHR Series C No 245 (27 June 2012)

Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v Panama (preliminary objections, merits, reparations and costs) IACHR (14 October 2014) Series C No 284

Kwokwo Barume, A *Land rights of Indigenous peoples in Africa. With special Focus on Central, Eastern and Southern Africa* (2010) IWGIA Copenhagen, Denmark 86

Loayza Tamayo v Peru (reparations and costs) IACHR (27 November 1998) Series C No 42

Mapiripán Massacre v Colombia (merits, reparations and costs) IACHR (15 September 2005) Series C No 134

Maya Kaqchikel Indigenous Peoples of Sumpango et al v Guatemala (merits, reparations and costs) IACHR (6 October 2021) Series C No 440

Mayagna (Sumo) Awas Tingni Community v Nicaragua IACHR (31 August 2001) Series C No 79

Moiwana Community v Suriname (interpretation of the judgement of merits, reparations and costs) IACHR (8 February 2006) Series C No 145

Plan de Sánchez Massacre v Guatemala (reparations) IACHR (29 April 2004) Series C No 105. Separate Concurring Opinion of Judge Sergio Garcia-Ramírez

Pueblo Bello Massacre v Colombia (merits, reparations and costs) IACHR (31 January 2006) Series C No 140

Restrictions to the Death Penalty (Arts 4.2 and 4.4 ACHR) Advisory Opinion OC-3/83, Inter-American Court of Human Rights Series A No 3 (8 September 1983)

Ricardo Canese v Paraguay (merits, reparations and costs) IACHR (31 August 2004) Series C No 111

Saramaka People v Suriname (preliminary objections, merits, reparations and costs) IACHR (28 November 2007) Series C No 172

Saramaka People v Suriname (interpretation of the judgement on preliminary objections, merits, reparations and costs) IACHR (12 August 2008) Series C No 185

Sawhoyamaxa Indigenous Community v Paraguay (merits, reparations and costs) IACHR (15 June 2005) Series C No 124

Social and Economic Rights Action Centre (SERAC) v Nigeria (2001) AHRLR 60 (ACHPR 2001)

Street Children (Villagrán Morales et al) v Guatemala (merits) IACHR (26 May 2001) Series C No 77

The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-American Court of Human Rights Series A No 16 (1 October 1999)

Velásquez Rodríguez v Honduras (preliminary objections) IACHR (26 June 1987) Series C No 1

Xákmok Kásek Indigenous Community v Paraguay (merits, reparations and costs) IACHR (24 August 2010) Series C No 214

Xucuru Indigenous People and its members v Brazil (preliminary objections, merits, reparations and costs) IACHR (5 February 2017) Series C No 346

Yakye Axa Indigenous Community v Paraguay IACHR (17 June 2005) Series C No 125