

## The African human rights system as 'norm leader': Three case studies

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**Summary:** *Africa (including its human rights system) is rarely imagined or considered an originator, agent and purveyor of ideas, including in the human rights sphere. On this occasion of the fortieth anniversary of the adoption of the 1981 African Charter on Human and Peoples' Rights which founded the African human rights system, it is only fitting that its contributions or otherwise to global human rights praxis, over these four decades, be examined from this perspective. Utilising the theory of the norm life cycle, developed by scholars of international relations who work within 'strategic social constructivism', this article examines how the African human rights system has, or has not, functioned as a 'norm leader' with regard to certain important and increasingly widely-accepted human rights standards. To that extent, the article examines (as examples) certain human rights norms first elaborated and made into legally-binding forms in the African Charter, widely circulated and having achieved a considerable level of global dispersal and adoption, in*

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*part, as a result of the work of the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights. Focusing on three important norms (the right to self-determination, the right to development and the right to the environment) and based on a study of academic and other literature, treaties or instruments, case law and records of international negotiations, the article attempts to respond systematically to this overarching question. The article argues that although the African human rights system clearly is not a state, the critical but globally under-appreciated roles it has played regarding the globalised socialisation of certain human rights ideas fits within, and helps in extending, social constructivist human rights theory and praxis. The article concludes with a reflection on some key limitations that are observable as to how far the system has been able to travel in the direction of norm leadership in human rights law.*

**Key words:** *African human rights system; norm cycle theory; self-determination; right to development; right to the environment*

## 1 Introduction: Human rights systems and norm creation

The African human rights system is an ensemble of institutions as well as instruments that make provision for individual and peoples' rights and obligations, agents and institutions. In many senses it also is a trailblazer in human rights jurisprudence and the evolution of international human rights law. Yet, despite its influence on regional and global rights theory and praxis,<sup>1</sup> the African human rights system continues to attract relatively marginal and less-than-generous attention.<sup>2</sup> The significantly underexplored character of the system's law/action thus invites a re-dedication to (some of) its norm-building impacts, especially on this occasion of the fortieth anniversary of the adoption of the African Charter on Human and Peoples' Rights (African Charter).<sup>3</sup>

The authors argue that the African human rights system has functioned as a 'norm leader' that has made a critical (and even radical) contribution – at least in certain areas – to the global rights

1 OC Okafor 'The future of the UN Human Rights Council: Insights at the inter-luminated juncture of thought and experience' (2020) 23 *Max Planck Yearbook of United Nations Law* 39.

2 JT Gathii 'The promise of international law: A Third World view' (2021) 36 *American University International Law Review* 377; OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 67.

3 520 UNTS 217 (1982) (African Charter).

project. Its praxis has been quite remarkable in some respects and in connection with certain subcategories of rights theory and practice.<sup>4</sup> It has helped shape developments in other (national, regional and global) human rights systems.<sup>5</sup> Its praxis informs the diffusion of human rights frames that challenge – at times quite radically – the conceptual and institutional orthodoxy.<sup>6</sup> It has also served, in these contexts, as a critically important resource for political agents and social activists at both local and international levels.<sup>7</sup>

The African human rights system's significant counter-orthodox accomplishments underscore its normative significance dating back to the decolonisation project in the twentieth century. As Third World Approaches to International Law (TWAIL) scholars such as Gathii argue, 'the critical tradition of international law in Africa predates the rise of dependency theories of the early 1960s, and ... Africa played a central part in anticolonial resistance within international law in the middle of the twentieth century'.<sup>8</sup> Working broadly within this idiom, the article returns to investigate one strand of these critical traditions of international law on Africa, one defined by contributing through resistance. The article does so by demonstrating the African human rights system's counter-hegemonic leadership in aspects of rights discourse and praxis. In doing this, we rely, albeit only to an extent, on the theoretical guidance of 'strategic social constructivism' to direct our substantive arguments, re-purposing, somewhat, one of its central notions as an analytical aid to our work.

Hence, the article analyses the ways in which the African human rights system has, or has not, functioned as a 'norm leader' in regard to the innovation, application and dispersal of important (and increasingly widely-accepted) human rights standards.<sup>9</sup> We examine the extent to which certain human rights norms, originally enunciated or first elaborated as legally binding under the African Charter, have circulated and achieved a certain level of global attention, adoption or socialisation, in part as a result of the work and jurisprudence of the African Commission on Human and Peoples' Rights (African Commission) and the African Court on Human and Peoples' Rights (African Court).

4 Okafor (n 1) 43-44.

5 As above.

6 As above.

7 Okafor (n 2) 91-272.

8 JT Gathii 'Africa and the radical origins of the right to development' (2020) 1 *TWAIL Review* 28, 37.

9 AK Perrin 'African jurisprudence for Africa's problems: Human rights norm diffusion and norm generation through Africa's regional international courts' (2015) 109 *ASIL: Proceedings of the Annual Meeting* 32.

We argue that the African human rights system has equipped diverse actors and rights systems with an enhanced toolbox, well beyond what usually is available in mainstream human rights praxis, for evolving norms and strategies for, and intervening in, contentious politico-legal affairs. The transformative force of the African human rights system thus is visible across key aspects of human rights law, especially in the way in which norms emerging from Africa socialise actors and their legal and policy choices and actions. Comprising treaty texts, protocols, declarations and resolutions as well as judicial and non-judicial processes, the African human rights system has enunciated, promoted and practised a significantly (even if only partly) organic African vision of rights, while still being responsive to the necessity for broader approaches to human rights.<sup>10</sup>

While Africa's norm-making context certainly is worth investigating, its extraordinary normative content must command similar curiosity.<sup>11</sup> Therefore, the article examines the enunciation of, and praxis in regard to, three distinct yet interconnected rights in the African human rights system (the rights to development, environment and self-determination) as examples of its role as a norm leader in the global rights project. In re-examining the impact of the African human rights system over its young career in norm dispersal, the article is sensitive to Africa's political history and how it is tentacled with the normative innovations embedded in the African human rights system, such as the concept of peoples' rights (a novelty at the time of the adoption of the African Charter).<sup>12</sup>

Following this introduction, part 2 outlines this article's theoretical framework. The article adopts and utilises the idea of norm leadership (from strategic social constructivism) which we find useful in discussing the African human rights system's role (through its network of actors, rules and praxis) in explicating and dispersing norms. Part 3 is an uptake of this theoretical framework as it pushes beyond the African human rights system's innovativeness to concrete action by showcasing Africa's pioneering role in rights praxis through its regional efforts. Part 4 focuses on exemplifying these points through an analysis of the explication and dispersal of three different 'peoples' rights' (self-determination, development, and environment). Part 5

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10 A Rachovista 'On new "judicial animals": The curious case of an African Court with material jurisdiction' (2019) 19 *Human Rights Review* 255.

11 MA Plagis & L Riemer 'From context to content of human rights: The drafting history of the African Charter on Human and Peoples' Rights and the enigma of article 7' (2020) *Journal of the History of International Law* 1.

12 A Huneeus & MR Madsen 'Between universalism and regional law and politics: A comparative history of the American, European and African human rights systems' (2018) 16 *International Journal of Constitutional Law* 136.

discusses the limits of Africa's norm leadership within the contested discourse on sexual orientation and business and human rights. The article concludes by envisioning Africa's future norm leadership and how the African human rights system anticipates and responds to challenges as it seeks to maintain and bolster its (qualified) leadership role in the human rights sphere.

To be clear, the overarching point the article makes not necessarily is that the African human rights system has itself pushed other international human rights bodies, national institutions, scholars and activists to adopt the human rights ideas that have been innovated to a significant extent in its treaties and jurisprudential action. It is rather that, by innovating and disseminating those human rights ideas, the system extended 'an invitation to mimicry' to these other actors, which was taken up – often enough – in various ways and significant measure. This, the article suggests, is a type of norm leadership. Thus, the task here is not so much to describe in detail the intervening process through which those norms were taken up in other human rights systems and 'places', but mostly to demonstrate and theorise the fact that the innovation and mimicry we point to has in fact occurred under the aegis of the African human rights system.

## **2 Strategic social constructivism, the norm cycle theory and human rights: A quasi-evolutive process**

In crafting the African Charter, the founders of the African human rights system drew on Africa's broadly-shared cosmologies, metaphysical ideas and socio-cultural values on the important balance(s) to be struck as between states and societies, communities and individuals, rights and obligations.<sup>13</sup> African-rooted ideas animated their praxis, and these founders expressly stated so, notably in the Preamble to the Charter.<sup>14</sup> These ideas have shaped the work and jurisprudence of the African Commission and the African Court, irradiating the African human rights system. Therefore, as many constructivist scholars have correctly noted, ideas do matter, even if they 'do not float freely'.<sup>15</sup>

13 T Metz 'African values, human rights and group rights: A philosophical foundation for the Banjul Charter' in O Onazi (ed) *African legal theory and contemporary problems* (2014) 131.

14 African Charter Preamble.

15 See T Risse-Kappen 'Ideas do not float freely: Transnational coalitions, domestic structures, and the end of the Cold War' (1994) 48 *International Organisation* 185-186.

The theoretical focus of the article aligns with this founding principle of the African Charter. It further aligns with the constructivist school of international relations upon which the analysis in the article to an extent relies.<sup>16</sup> The focus on 'strategic social constructivism' advances our thesis, where it exemplifies 'a sociological perspective on world politics, emphasising the importance of normative as well as material structures'.<sup>17</sup> In so doing, constructivism aids our reflection on the innovation and dispersal of certain African ideas as a way of understanding the important role the African human rights system has played, and continues to play, in the global human rights field.<sup>18</sup> In working, in part, within this approach, the analysis in the article is conscious of the power of norms and of the institutions that create, uphold and disseminate new norms.<sup>19</sup>

Strategic social constructivism is used by international relations scholars to critically analyse norm production, acceptance and further dissemination. As Finnemore and Sikkink have argued:<sup>20</sup>

The characteristic mechanism of the first stage [of the norm cycle], norm emergence, is persuasion by norm entrepreneurs. Norm entrepreneurs attempt to convince a critical mass of states (norm leaders) to embrace new norms. The second stage is characterised more by a dynamic of imitation as the *norm leaders attempt to socialise other states to become norm followers*.

Strategic social constructivism provides an analysis of the processual lifecycle of norms. This process explains the progression of norms, occasioned by some necessity from which the norm in question derives its constitutive power, and often advanced by a coalition of states (and non-state actors) that are interested in changing an aspect of social life, either at the local or international level.<sup>21</sup> This explanation enriches our understanding of the processes that 'give birth to – and continually shape and reshape – these norms', and guide their diffusion.<sup>22</sup>

16 A Wendt 'Constructing international politics' (1995) 20 *International Security* 71.

17 R Price & C Reus-Smit 'Dangerous liaisons? Critical international theory and constructivism' (1998) 4 *European Journal of International Relations* 259.

18 MN Barnett & M Finnemore 'The politics, power, and pathologies of international organisations' (1999) 53 *International Organisation* 699, 703.

19 F Kratochwil & JG Ruggie 'International organisations: A state of the art on an art of the state' (1986) 40 *International Organisation* 753.

20 M Finnemore & K Sikkink 'International norm dynamics and political change' (1998) 52 *International Organisation* 887, 895 (our emphasis).

21 J Gest et al 'Tracking the process of international norm emergence: A comparative analysis of six agendas and migrants' rights' (2013) 19 *Global Governance* 153.

22 ML Krook & J True 'Rethinking the life cycles of international norms: The United Nations and the global promotion of gender equality' (2010) 18 *European Journal of International Relations* 108.

Three stages are apparent in the life cycle of norms. These are 'norm emergence, norm cascade, and norm internalisation'.<sup>23</sup> Norm emergence is attributable to the identification of a problem requiring a solution; that solution being traceable to the belief that a certain course of action is desirable or must be pursued. Regarding norm cascade, a state (or non-state actor) may adopt a norm, as a direct consequence of external pressure, and this might be the case even in the absence of corresponding domestic pressure. Lastly, norm internalisation involves a crystallisation of norms becoming part of social regulation even to the point that the norm becomes integral to everyday life.

The article re-purposes this norm cycle theory, particularly the notion of 'norm leaders,' to characterise international human rights institutional arrangements such as the African human rights system and to analyse the creation, and attempts at diffusion, of certain of its ideational innovations, even though the African human rights system is not a state.<sup>24</sup> Although this theoretical move is not dissonant with this constructivist theory, it contributes to expounding one of its under-theorised elements and practical applications, namely, the ways in which international human rights institutions (rather than states) function as norm leaders in the primary sense.<sup>25</sup> This re-purposed meaning of norm leadership is then projected onto the field of human rights where Africa sometimes, but not usually, has been acknowledged as a norm maker and shaper.<sup>26</sup>

### 3 The African human rights system as norm leader: From vision to action

The African human rights system is founded on a network of treaties and protocols comprising the African Charter, its protocols and allied institutions (including the African Union (AU) and its constituent organs comprising the African Commission (a quasi-judicial body) and the African Court (a judicialised forum)).<sup>27</sup> The African human rights

23 B Jose 'Not completely the new normal: How human rights tried to suppress the targeted killing norm' (2017) 38 *Contemporary Security Policy* 237, 240.

24 A Witt 'Where regional norms matter: Contestation and the domestic impact of the African Charter on Democracy, Elections and Governance' (2019) 54 *Africa Spectrum* 106.

25 A Acharya 'Who are the norm makers? The Asian-African Conference in Bandung and the evolution of norms' (2014) 20 *Global Governance* 405.

26 CT Hunt 'African regionalism and human rights protection norms: An overview' (2016) 8 *Global Responsibility to Protect* 201.

27 Arts 30-31 African Charter; Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights 10 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III) (African Court Protocol).

system thus is a complex regional framework dedicated to a rights-based order.<sup>28</sup> This web of norms and institutions is complemented by a number of sub-regional bodies and courts that have extended their jurisdictions to include human rights adjudication.<sup>29</sup>

Notwithstanding mainstream/Western influence on its character, African conceptions of human dignity and of the balance between the individual and community inspired the African human rights system. Despite claims to the contrary, African peoples lacked neither their own conceptualisations of human rights nor their functional equivalents or similes.<sup>30</sup> For example, in African cosmology an individual's existence matters only in an intricate, dense and inexorable connection to their society, in a way that departs, *to an extent*, from the mainstream (liberal) cosmologies and allied human rights imaginaries.<sup>31</sup> These African cosmologies have shaped the human rights imaginaries that are prevalent among ordinary Africans. As Viljoen noted, orthodox human rights norms have been 'adjusted to better reflect African conceptual understandings of human rights, and to address issues of particular concern to the continent'.<sup>32</sup> This is meet indeed. For, as Gathii puts it, 'the contemporary human rights regime can only be truly universal from the multicultural elaboration of norms'.<sup>33</sup> Hence, the inclusion of certain African ideas in an African human rights treaty, while a comparatively radical step for some, was more of a reaffirmation of already-existing and valid African human rights imaginaries.<sup>34</sup> Nonetheless, the adoption of the African Charter in 1981 underscored a pivotal revolution from a Eurocentric conceptualisation to a more Afrocentric approach to human rights.<sup>35</sup>

Beside this normative agenda, both the African Commission and the African Court have assumed key adjudicative and implementation roles as the African human rights system became firmly established through their jurisprudence. It is not surprising, then, that the

28 GJ Naldi & KD Magliveras 'The African Court of Justice and Human Rights: A judicial curate's egg' (2012) 9 *International Organisations Law Review* 383.

29 JT Gathii 'Variation in the use of sub-regional integration courts between business and human rights actors: The case of the East African Court of Justice' (2016) 79 *Law and Contemporary Problems* 37.

30 RM D'Sa 'Human and peoples' rights: Distinctive features of the African Charter' (1985) 29 *Journal of African Law* 72.

31 NO Imani 'Critical impairments to globalising the Western human rights discourse' (2008) 3 *Societies Without Borders* 280-281.

32 F Viljoen 'Human rights in Africa: Normative, institutional and functional complementarity and distinctiveness' (2011) 18 *South African Journal of International Affairs* 191, 192.

33 J Gathii 'International law and Eurocentricity' (1998) 9 *European Journal International Law* 184, 190.

34 M Chemhuru 'African communitarianism and human rights: Towards a compatibilist view' (2018) 65 *Theoria: A Journal of Social and Political Theory* 37.

35 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.



African human rights system has 'unmistakably influenced normative developments in international law beyond Africa'.<sup>36</sup> As Hellsten notes:<sup>37</sup>

What is relevant here, however, is that African criticism of the Western concept of human rights first turned into an attempt to give alternative philosophical foundations to human rights, and second, this alternative approach to human rights did not remain merely academic or theoretical, but was applied also to African politics.

Thus, the analysis here is informed by the normative structure and allied institutional influences of the African human rights system.

#### 4 Three tales in one: Norm interrelationships, innovation and attempts at dispersal in the African human rights system

The African Charter, which is widely known as 'the [main] foundation of the African regional human rights system',<sup>38</sup> articulates the three 'peoples' rights' discussed in the article.<sup>39</sup> The remarkable stress placed in the African Charter on peoples' rights flows from a historical awareness of the cosmologies and entailed rights imaginaries of African societies, much of which was incorporated into the Charter. Against this backdrop, we utilise the example of the concept of 'peoples' in the Charter, and its deployment in the work of the pan-continental bodies charged with the Charter's implementation, to develop our arguments regarding the radically important contributions of the rights we focus on to the global human rights imaginary.

To understand the 'concept of peoples' rights' first requires an appreciation of the meaning of the term 'peoples' which was largely left undefined in the African Charter, thereby lending itself to multiple interpretations.<sup>40</sup> This omission, however, was intended to provoke an organic development of the term through adaptive interpretation.<sup>41</sup> As one scholar suggested, its eventual definition(s)

36 T Maluwa 'Reassessing aspects of the contribution of African states to the development of international law through African regional multilateral treaties (2020) 41 *Michigan Journal of International Law* 327, 334.

37 SK Hellsten 'Human rights in Africa: From communitarian values to utilitarian practice' (2004) 5 *Human Rights Review* 61, 63.

38 SA Dersso 'The jurisprudence of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 358, 359.

39 RN Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal International Law* 80, 101.

40 As above.

41 C Baldwin & C Morel 'Group rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice, 1986-2006* (2008) 244.

'should empower the people to do something about their future; to take charge of their destiny and control their affairs'.<sup>42</sup> Similarly, the African Commission has since taken positive steps to outline the contours of peoples as it noted that

[i]n the context of the African Charter, the notion of "people" is closely related to collective rights. Collective rights enumerated under articles 19-24 of the Charter can be exercised by a people bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds.<sup>43</sup>

Emerging from this declaration by the African Commission, the supposed indeterminate character of 'peoples' provides Africa's regional and sub-regional adjudicatory bodies with both canvas and brush to paint the broad strokes of 'peoples' and restrict its scope, where appropriate.<sup>44</sup> The Commission's pronouncement on what peoples could mean, along a continuum of expectations, expands the range of possibilities. Thus, the reasonably flexible character of peoples in the Charter puts it ahead of its co-equivalent regional human rights treaties in the Americas and Europe.

Our material focus in this article is on three case studies that underline the African human rights system's norm leadership in certain aspects of global rights praxis. Our focus on these specific rights is informed by three considerations. First, these are original African contributions to the existing fabric of global human rights; second, their jurisprudence is still evolving and assuming new dimensions; and, third, they are strongly interconnected. Accordingly, some suggest – quite correctly – that the right to development is linked to the right to the environment, and both, in turn, are connected to the right to self-determination.<sup>45</sup>

Therefore, while the African Charter's normative content is positive proof of the African human rights system's norm leadership (that is, in epistemic and conceptual terms), it is through the interpretative jurisdiction (that is, praxis) of the African Commission and the African Court that many aspects of the system's critically significant impacts

42 Kiwanuka (n 39) 101.

43 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Southern Cameroons case*).

44 AA Yusuf 'The progressive development of peoples' rights in the African Charter and in the case law of the African Commission on Human and Peoples' Rights' in F Lezerini & AF Vrdoljak (eds) *International law for common goods: Normative perspectives on human rights, culture and nature* (2014) 41.

45 M Montini 'Interplay between the right to development and the protection of the environment: Patterns and instruments to achieve sustainable development in practice' (2004) 10 *African Yearbook of International Law* 181.

on global human rights are visible. Through their jurisprudence, these adjudicative bodies have provided signal leadership in the development of these norms. Although the Commission's decisions are formally non-binding, its recommendations, are not mere suggestions. They signal a particular appreciation of the rights at issue by impelling a juridical effect within a member state, socio-technical change, or resourcing activist forces. Its praxis therefore is no less valuable than the formally-binding decision or orders of the African Court.<sup>46</sup> Thus, in discussing this trinity of rights – self-determination as remedial secession right; the right to development and the right to the environment – we focus on the African Charter, the African Commission and the African Court, as all three dimensions contribute to the African human rights system's signal norm leadership.

#### 4.1 Right to remedial secession

The right to self-determination is in constant tension with the principle of territorial integrity. While the United Nations Charter endorses the right to self-determination,<sup>47</sup> it is in common article 1 of the two Covenants (the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)) that a formulation of a definition somewhat emerges.<sup>48</sup> Both Covenants state that '[a]ll peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.'<sup>49</sup> Conversely, in respect of territorial integrity, the UN Charter provides that '[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of a state, or in any other manner inconsistent with the purposes of the United Nations'.<sup>50</sup> Owing to the varied manifestations of the self-determination norm, the article limits its intervention to the prohibition on dismembering established states.<sup>51</sup>

Whereas international law neither expressly supports nor rejects secession, secession is considered 'the last resort for ending the

46 M Ssenyonjo 'The African Commission and Court on Human and Peoples' Rights' in G Oberleitner (ed) *International human rights institutions, tribunals, and courts* (2018) 480.

47 United Nations Charter 1 UNTS XVI, art 1 (UN Charter).

48 UN General Assembly Resolution 2200A (XXI) 999 UNTS 3; UN General Assembly Resolution 2200A (XXI) 999 UNTS 171.

49 UN General Assembly Resolution 2200A (n 48) common art 1.

50 Art 2(4) UN Charter (n 47).

51 AE Ouali *Territorial integrity in a globalising world: International law and states' quest for survival* (2012) 2.

oppression of a certain people'.<sup>52</sup> Of course, we do acknowledge that statehood is an existential fact where secession is successful, and a new state, in fact, has been established out of a parent state.<sup>53</sup> Even so, international law accommodates the 'right to secession' in certain situations, including freedom from colonialism.<sup>54</sup> Somewhat understandably, African states seem 'wedded' to the colonial borders inherited at independence, partly as a way of avoiding *inter-state* conflicts.<sup>55</sup> Still, the acceptance of colonially-imposed borders by African states is paradoxical considering that much of Africa's frontiers were drawn based on 'maps rather than chaps'.<sup>56</sup> This concern is reinforced by the fact that though adherence to the *uti possidetis* doctrine has been reasonably successful in fending off violent *inter-state* conflicts in Africa, the continent, still, has been affected by *intra-state* and internecine conflicts.<sup>57</sup>

In this light, the high-politics that attend secession negatively affect the 'righting' of secession.<sup>58</sup> Yet, 'if human rights ought to be meaningful, they ought to prevail over territory. This argument links self-determination, more precisely, the denial of the right to self-determination, to the right to secede from the oppressive state.'<sup>59</sup> Trindade J's opinion in the *Chagos Islands* case at the International Court of Justice (ICJ) underscores this unassailable point;<sup>60</sup> one that has a deep pedigree in the dissenting opinions in the *South West Africa* cases.<sup>61</sup> Still, this link between the African human rights system and self-determination, in the aftermath of colonialism, invites further elucidation.<sup>62</sup>

52 OC Okafor *Redefining legitimate statehood: International law and state fragmentation in Africa* (2000).

53 MG Cohen 'Introduction' in MG Cohen (ed) *Secession: International law perspectives* (2006) 1.

54 OC Okafor 'The international law of secession and the protection of human rights of oppressed sub-state groups: Yesterday, today and tomorrow' (2017) 1 *Nigerian Yearbook of International Law* 143.

55 DM Ahmed *Boundaries and secession in international law* (2015) 11.

56 J Hargreaves 'The making of the boundaries: Focus on West Africa' in IA Asiwaju (ed) *Partitioned Africans: Ethnic relations across Africa's international boundaries, 1884-1984* (1985) 23 (with little regard for ethnic/geographic considerations).

57 Ahmed (n 55) 11-46.

58 Okafor (n 54) 148.

59 S Salomon 'Self-determination in the case law of the African Commission: Lessons for Europe' (2017) 50 *Verfassung und Recht in Übersee* 217, 234.

60 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Request for Advisory Opinion) ICJ GL 169 (see the separate opinion of Trindade J).

61 *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase* 1966 ICJ Reports 6 (see the dissenting opinions of Tanaka J (276) and Jessup J (418-419)).

62 Salomon (n 59) 217.

At least in respect of this right to secede, 'Africa stands out as a key battleground of ideas and practice'.<sup>63</sup> How Africa handles this contentious politico-legal right is crucial in light of the African Commission's embrace of the relationship between human rights and the explosive topic of self-determination relative to the African human rights system.<sup>64</sup> As evident from the African Charter,

[a]ll peoples shall have the right of existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.<sup>65</sup>

It is patent from the reading that article 20 of the African Charter focuses on the subject of 'political self-determination'.<sup>66</sup> Our focus, however, is not to distinguish between internal and external self-determination. Given that Africa's interest in self-determination was driven by decolonisation and the freedom of the post-colonial state to chart its own path without undue external influence, Africa seldom entertained a possible, continuous fracturing of the post-colony.<sup>67</sup> Thus, as is observed in the jurisprudence of the Organisation of African Unity (OAU) (now the African Union (AU)) and the many international resolutions, including at the UN, which Africa tended to endorse, it (Africa) hardly sanctioned the idea of distinct groups within the post-colonial African state being entitled to secede.<sup>68</sup>

Moving forward, the African Commission's jurisprudence has now clarified (in pioneering ways) the position of African regional law on the subject.<sup>69</sup> Its jurisprudence on this subject was inaugurated in the case of *Katangese Peoples' Congress v Zaire*.<sup>70</sup> In this communication the applicant alleged that Zaire (now the Democratic Republic of the Congo (DRC)) had violated article 20 of the African Charter by failing to recognise the right to self-determination of the people of its Katanga province.<sup>71</sup> The African Commission held that the applicants

63 MN Shaw 'Self-determination, *uti possidetis* and boundary disputes in Africa' in Chia-Jui Cheng (ed) *A new international order* (2016) 99.

64 M Mhango 'Governance, peace and human rights violations in Africa: Addressing the application of the right to self-determination in post-independence Africa' (2012) 5 *African Journal of Legal Studies* 199.

65 Art 20 African Charter.

66 R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667, 678.

67 OS Kamanu 'Secession and the right of self-determination: An OAU dilemma' (1974) 12 *Journal of Modern African Studies* 335.

68 AC Ekeke & N Nubisi 'Secession in Africa: An African Union dilemma' (2019) 28 *African Security Review* 245.

69 S Dersso 'International law and the self-determination of Sudan' (2012) Institute of Security Studies Paper 231 1.

70 (2000) AHRLR 72 (ACHPR 1995) (*Katanga* case).

71 R Lemarchand 'The limits of self-determination: The case of the Katanga secession' (1962) 56 *American Political Science Review* 404.

failed to demonstrate that Zaire had denied the Katangese people equal participation in government (article 13 of the Charter); at best, Katanga's attempts at self-determination must be in a form that is 'compatible with the sovereignty and territorial integrity of Zaire'.<sup>72</sup> Here, the Commission endorsed the right to remedial secession, albeit on a conditional basis, affirming its vesting only where it is observed that the rights of an identifiable 'people' in that state are under very grave threat, to the extent that this distinct group of peoples are unable to enjoy their rights or the political guarantee of self-determination as provided under article 13(1) of the African Charter.<sup>73</sup> Therefore, as Okafor (and others) have noted, the Commission 'unanimously held in favour of a limited form of the secessionist entitlement, one that is available only in exceptional circumstances'.<sup>74</sup>

In *Sudan Human Rights Organisation & Another v Sudan* the African Commission was confronted with a similar question of whether the black ethnic groups of Darfur, who had suffered atrocities at the hands of the Janjaweed militia, were 'peoples' within the meaning of the African Charter.<sup>75</sup> In confirming that these 'groups' were peoples under the Charter, the African Commission, by extension, affirmed the right to remedial secession by noting:<sup>76</sup>

There is a school of thought, however, which believes that the 'right of the people' in Africa can be asserted only vis-à-vis external aggression, oppression or colonisation. The Commission holds a different view, that the African Charter was enacted by African states to protect human and peoples' rights of the African peoples against both external and internal abuse.

In the *Southern Cameroons* case the applicants submitted a communication, on their own and on behalf of the peoples of the Southern Cameroons (previously the British-administered territory of Southern Cameroons), to the African Commission on grounds that Cameroon had violated their individual and collective rights, including their right to self-determination.<sup>77</sup> In 1961 the territory in question was incorporated into the Republic of Cameroon after a UN-led plebiscite, a process, the applicants argued, failed to consider

<sup>72</sup> *Katanga* case (n 70) para 6.

<sup>73</sup> Yusuf (n 44) 46-48.

<sup>74</sup> OC Okafor 'Entitlement, process and legitimacy in the emergent international law of secession' (2002) 9 *International Journal on Minority and Group Rights* 41; R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 213.

<sup>75</sup> (2009) AHRLR 153 (ACHPR 2009) para 219.

<sup>76</sup> *Sudan Human Rights Organisation* (n 75) para 222.

<sup>77</sup> C Anyangwe *Betrayal of too trusting a people: The UN, the UK, and the trust territory of the Southern Cameroons* (2009).

their ethnicity and British colonial legacy, thus amounting to 'forceful annexation'.<sup>78</sup> Just as in the *Katanga* case, the Commission found that although the people of the South Cameroons had a right to self-determination, in the instant case it was unjustifiable.<sup>79</sup> The Commission acknowledged the Southern Cameroons as a people in the context of the African Charter as they fulfilled 'numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook'.<sup>80</sup> Yet, the Commission concluded that, in reality, they had not satisfied the test to entitle them to remedial secession as they could not prove the alleged violations were egregious so as to warrant an activation of this right.<sup>81</sup>

The pioneering persistence of the African Commission both in upholding and refining this aspect of rights jurisprudence highlights its leadership in this context. The Commission's jurisprudence, aided by the wording of the African Charter, has made a signal contribution in this regard;<sup>82</sup> one that, for instance, presaged a similar outcome in the famous opinion of the Supreme Court of Canada in the *Quebec Reference* case.<sup>83</sup> The *Southern Cameroons* case was the very first decision of an international or domestic dispute settlement body, whether quasi-judicial or judicial, to affirm the existence of a legally-binding right of sub-state groups in established states to enjoy remedial secession, if even only in exceptional cases. Second, in a radical way it contributed to the ongoing shift toward what has been identified as the 'righting of secession'.<sup>84</sup> Lastly, it placed a strong African imprimatur on the international law of secession, which is deeply rooted in the quotidian human rights struggles of African peoples (not necessarily the states that englobe them), producing a progressive line of legal reasoning that is far ahead of the Asian, European or even inter-American human rights jurisprudence.

From the perspective of norm cycle theory, the important point here is that the African human rights system has innovated and dispersed (or at least attempted to disperse) a remedial secession norm that is on the conceptual and practical leading edge. At the very least, this African normative innovation has appeared subsequently (with or without sufficient attribution) in Canadian jurisprudence and the UN

78 *Southern Cameroons* case (n 43) paras 6-7.

79 FM Ndahinda 'Peoples' rights, indigenous rights and interpretative ambiguities in decisions of the African Commission on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 29.

80 *Southern Cameroons* case (n 43) para 179.

81 *Southern Cameroons* case para 203.

82 Yusuf (n 44) 53.

83 Okafor (n 54); [1998] 2 SCR 217.

84 Okafor (n 74).

human rights system.<sup>85</sup> The system's behaviour in this regard *broadly* aligns with strategic social constructivism's conception of what norm leaders do within the life cycle of human rights norms. It should be noted that the key contribution of norm leaders in such contexts is how they motivate 'a dynamic of imitation' that is produced by their 'attempt to socialise other states to become norm followers'.<sup>86</sup> In this light, the African human rights system's interaction with the right to remedial secession exemplifies and invites an application of the Finnemore and Sikkink thesis. Following this, the African human rights system's radical work has attempted to drive a dynamic of imitation in global human rights and has succeeded in this attempt.<sup>87</sup>

## 4.2 Development as a (human and peoples') right

The right to development originated in Africa. It was birthed in Africa's struggle for global socio-economic justice, becoming especially prominent in the post-independence period.<sup>88</sup> After the formal end of colonialism in the 1960s, African states and other countries of the Global South took a more critical stance on the inequitable global economic infrastructure that underpinned (in part) the Global South's underdevelopment. This was also the moment in which the Global South had begun pushing for radical changes in the international system, including a demand for a new international economic order (NIEO).<sup>89</sup> Similarly, the Global South espoused, among others, the principle of 'self-determination of peoples', the 'right to development', the prohibition of racial discrimination', and 'sovereign control over natural resources'.<sup>90</sup> Neocolonialism, attended by a tendency towards ineffective leadership in parts of the Global South, soon ushered many such countries into a period of neo-imperial exploitation in the 1980s to the 2000s, in significant measure through asymmetrical global trade rules and unfair economic exchange.<sup>91</sup>

The Global South understood the interaction between human rights and development 'first and foremost as central emancipatory

85 Okafor (n 54).

86 Finnemore & Sikkink (n 20) 895.

87 Okafor (n 54) (as explained in the *Quebec Reference* example).

88 B Ibhawoh 'The right to development: The politics and polemics of power and resistance' (2011) 33 *Human Rights Quarterly* 76.

89 YT Chekera & VO Nmehielle 'The international law principle of permanent sovereignty over natural resources as an instrument for development: The case of Zimbabwean diamonds' (2013) 6 *African Journal of Legal Studies* 69.

90 I de la Rasilla *International law and history: Modern interfaces* (2021) 122.

91 BS Chimni 'Capitalism, imperialism, and international law in the twenty-first century' (2012) 14 *Oregon Review of International Law* 17.



discourses'.<sup>92</sup> In this respect, Africa was no different from its Global South peers in the Asia-Pacific and Latin America, as it (Africa) considered development as an indispensable condition for political self-determination.<sup>93</sup> In revisiting this contentious history in the emergent Pan-Africanism, 'the right to development was intrinsically linked to the right to self-determination'.<sup>94</sup> Thus, well beyond its inspiration from and activist influence on this political struggle, Africa soon urged international recognition of the right to development.<sup>95</sup>

While accounts vary over whether it was first articulated by the Senegalese jurist, Keba M'Baye, or another Senegalese jurist, Doudou Thiam, a former Minister of Finance and Foreign Affairs and member of the International Law Commission, the 'right to development' undeniably emerged internationally through Africa's activism, more prominently in 1967 at a Group of 77 conference in Algeria,<sup>96</sup> and then later at the UN.<sup>97</sup> As a Third World construct, the Global North was quite suspicious of this Africa-led and Global South-backed push to recognise development as a right as it (the North) considered this 'new' right antithetical to its interests. Among the reasons publicly offered for the North's opposition were concerns that it was a peoples' (collective) right and not an individual right, and also that the right was a veiled conduit for reviving the NIEO and enacting 'legally binding treaties that would oblige developed countries to transfer resources to the Global South'.<sup>98</sup> These concerns from the Global North persisted even after the right was recognised and adopted in a UN Declaration.<sup>99</sup> Thus, the success of the Global South in institutionalising the right to development on the official UN human rights register has caused much consternation in the north.<sup>100</sup>

92 M Bedjaoui 'The right to development' in M Bedjaoui (ed) *International law: Achievements and prospects* (1991) 1182; D Maul *Human rights, development, and decolonisation: The International Labour Organisation, 1940-70* (2012) 6.

93 ME Salomon 'From NIEO to now and the unfinishable story of economic justice' (2013) 62 *International and Comparative Law Quarterly* 31.

94 F Cheru 'Developing countries and the right to development: A retrospective and prospective African view' (2016) 37 *Third World Quarterly* 1268, 1269.

95 NT Saito 'Decolonisation, development and denial' (2010) 6 *Florida A&M University Law Review* 1; NG Villaroman 'The right to development: Exploring the basis of a supernorm' (2010) 22 *Florida Journal of International Law* 299.

96 DJ Whelan "'Under the Aegis of man": The right to development and the origins of the new international economic order' (2015) 6 *Humanity* 93.

97 Gathii (n 8) 37; see generally CC Ngang 'Towards a right-to-development governance in Africa' (2018) 17 *Journal of Human Rights* 107.

98 Cheru (n 94) 1271.

99 J Oduwole 'Global poverty and the right to development: An African perspective on Macklem's *The sovereignty of human rights*' (2017) 15 *Jerusalem Review of Legal Studies* 98.

100 P Uvin *Human rights and development* (2004) 43.

In sharp contrast to the contention that has characterised its installation at the UN and in the African human rights system, the right to development has been embraced in the jurisprudence of both the African Commission and the African Court as these bodies have demonstrated that the right has normative and socio-legal value. For instance, its praxis shows that the right can engender and resource political activism, equip state and non-state actors alike, and inform the content of law and related policies.<sup>101</sup> Thus, while this right has now received significant attention in the UN system, it was the extraordinary efforts of Africans to conceptualise it both as a human right and a peoples' right, that led to its subsequent incorporation in article 22 of the African Charter, driving to a robust extent, its endurance in global human rights praxis.<sup>102</sup>

Substantively, article 22 of the African Charter states that '[a]ll peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind'.<sup>103</sup> Article 22 couched this right as a peoples' right, a marked distinction from its later restatement under the UN Declaration on the Right to Development as both an individual and collective human right.<sup>104</sup> For our own part, we agree with other scholars, including Ouguergouz, who have noted:<sup>105</sup>

The right to development inevitably has an individual dimension, yet this stems rather from the purpose of the right rather than from the way it is exercised. Failing any proof of the contrary, the view enshrined in the Charter is firmly directed towards the ultimate goal of the full development of the human person. To deny this would be to fail to recognise that each type of rights, individual rights and rights of peoples, in its way strive towards the same goal: respect for human dignity in its two expressions – that of human beings and of human communities.

Yet, given its character as a solidarity right, this right is less intelligible as an individual right, as it attaches more to 'peoples', a society or a

101 SAD Kamga & CM Fombad 'A critical review of the jurisprudence of the African Commission on the right to development' (2013) 57 *Journal of African Law* 196.

102 OC Okafor 'A regional perspective: Article 22 of the African Charter on Human and Peoples' Rights' in United Nations Office of the High Commissioner for Human Rights (ed) *Realising the right to development: Essays in commemoration of 25 Years of the United Nations Declaration of the Right to Development* (2013) 373.

103 Art 22(1) African Charter.

104 Declaration on the Right to Development GA Resolution 41/128, Annex, UN GAOR, 41st session, Supp 53 186, UN Doc A/41/53 (1986).

105 F Ouguergouz *African Charter on Human and Peoples' Rights – A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 306.

community.<sup>106</sup> In this light, it may best be described as 'a human right enshrining obligations for which states can be held accountable'.<sup>107</sup>

Notwithstanding advances in its normative value, the right to development remains controversial as scholars and practitioners alike have inquired into its enforceability.<sup>108</sup> The queries regarding its implementation echo the historical (Eurocentric) attempts at discrediting its material significance.<sup>109</sup> In this regard, the African human rights system provides insights into the justiciability (and peoples-driven accountability structures) of development as a right as the African human rights system's interaction with this right provides both evidence and guidance for those in search of 'similar accountability or enforcement structures at the global level'.<sup>110</sup> Accordingly, in the paragraphs that follow we examine a purposive sample of African jurisprudence relative to this right.<sup>111</sup>

Beginning with *Bakweri Land Claims Committee v Cameroon*, the African Commission has since highlighted the varied dimensions of the right to development by issuing or building on new decisions that redefine its normativity.<sup>112</sup> The *Bakweri* case was based on indigenous claims to sovereignty over lands that had been annexed through colonialism and subsequently transferred to the newly-independent state of Cameroon.<sup>113</sup> While the *Bakweri* case did not pass the admissibility muster, it pioneered a train of cases on the article 22 jurisprudence. To this end, Okafor rightly noted that it was the first time the Commission decided 'a communication that was explicitly grounded in article 22 [of the African Charter]'.<sup>114</sup>

Beyond the *Bakweri* case, the pioneering role of the article 22 jurisprudence was revealed via other cases. The precedent-setting

106 W Scholtz 'Human rights and the environment in the African Union context' in W Scholtz & J Verschuuren (eds) *Regional environmental law: Transregional comparative lessons in pursuit of sustainable development* (2015) 102.

107 O de Schutter 'The international dimensions of the right to development: Enabling poverty-reduction in domestic legal orders by a reformed international legal order' in M Andenas et al (eds) *The fight against poverty and the right to development* (2021) 317, 319.

108 Scholtz (n 106) 102.

109 M Miyawa 'The right to development and non-state actors: Rethinking the meaning, praxis and potential of accountability of non-state actors in international law' (2016) 3 *Transnational Human Rights Review* 39.

110 K Arts & A Tamo 'The right to development in international law: New momentum thirty years down the line?' (2016) 63 *Netherlands International Law Review* 221, 246.

111 Kamga & Fombad (n 101) 196.

112 (2004) AHRLR 43 (ACHPR 2004) (*Bakweri* case).

113 N Kofele-Kale 'Asserting permanent sovereignty over ancestral lands: The Bakweri land litigation in Cameroon' (2007) 13 *Annual Survey of International and Comparative Law* 103.

114 Okafor (n 102) 376.

case of *Centre for Minority Rights Development & Others v Kenya* offers a strong reference for analysis.<sup>115</sup> In this application the Endorois community claimed that Kenya had violated African Charter provisions, including article 8 (the right to practise one's religion) and article 22 (the right to development) by failing to engage with them prior to embarking upon development-related activities including establishing a game park that dislodged the community from their ancestral homes with serious impacts on their religion and culture.<sup>116</sup> In its review, the African Commission held that the Endorois community in fact were a people under the African Charter and, thus, they had capacity to institute the action.<sup>117</sup> The Commission further noted that Kenya's forced removal of the Endorois people from their ancestral Bogoria home violated their religious rights.<sup>118</sup>

As regards the right to development, the Commission held that Kenya had violated article 22 of the Charter by excluding the Endorois community in consultations on developmental processes related to their land.<sup>119</sup> The Commission noted that Kenya's failure to provide suitable, alternative pastoral land for the Endorois people to live and graze their livestock equally violated article 22.<sup>120</sup> In the Commission's opinion, the substantive and procedural aspects of article 22 were 'constitutive and instrumental, or useful as both a means and an end'.<sup>121</sup> Therefore, it is 'notable that so far, at least one quasi-judicial body has applied the right to development as enshrined in article 22 of the African Charter on Human and Peoples' Rights and subjected it to judicial consideration'.<sup>122</sup>

Despite its normative importance, the *Endorois* case has been criticised for failing to sketch more precisely the framework of development as envisaged under the African Charter.<sup>123</sup> A recurrent critique is that the *Endorois* case did not disclose how the right to development practically combines the post-colonial state's aspirations with the needs of indigenous peoples.<sup>124</sup> Still, we argue

115 (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

116 *Endorois* case (n 115) paras 147-162.

117 J Gilbert 'Indigenous peoples' human rights in Africa: The pragmatic revolution of the African Commission on Human and Peoples' Rights' (2011) 60 *International and Comparative Law Quarterly* 245.

118 *Endorois* case (n 115) paras 168-173.

119 *Endorois* case para 298.

120 *Endorois* case paras 290-292.

121 *Endorois* case para 277.

122 N Schrijver 'Self-determination of peoples and sovereignty over natural wealth and resources' in United Nations Office of the High Commissioner for Human Rights (n 102) 95, 100.

123 Okafor (n 102) 376-377.

124 KS Abraham & J Shepherd "'In land we trust': The Endorois Communication and the quest for indigenous peoples' rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 57.

that this communication advances an exceptional relationship across land, indigeneity, sovereignty and rights as it equally invites a complex interaction across and within state and non-state actors and varied interests that are indiscernible without sustained scrutiny.<sup>125</sup> Hence, the *Endorois* case occupies an important place, not only in the African human rights system and related socio-political activism, but also in its global counterpart jurisprudence because, in a very robust way, it is the 'first case [in the African human rights system] to recognise indigenous peoples' rights over their ancestral lands and also the first case adjudicating upon the right to development'.<sup>126</sup>

The case of *African Commission on Human and Peoples' Rights v Republic of Kenya (Ogiek case)* builds on the jurisprudence in the *Endorois* case.<sup>127</sup> It represents a significant normative advance as it pushes the frontiers of the African human rights system, by moving from the recommendatory sphere of the Commission to the legally-binding basis of the African Court. In this case the Ogiek people challenged their displacement from their ancestral home at the Commission, alleging violations including a breach of article 22 of the African Charter.<sup>128</sup> Pending the outcome of the communication, the Commission issued provisional measures.<sup>129</sup> However, Kenya's non-compliance with these provisional measures resulted in the African Commission, albeit reluctantly, referring the matter to the African Court.<sup>130</sup>

The Court held that the Ogiek were a people in the context of article 21 of the African Charter as they had satisfied the condition of being a 'constituent element of a state' and, therefore, entitled to enjoy the right to development.<sup>131</sup> The Court further held that their eviction from the Mau forest violated article 22.<sup>132</sup> Here, the African Court noted the interaction between article 22 of the African Charter and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) as mutually constitutive in empowering indigenous peoples with a right to assume a significant role in their own 'development'.<sup>133</sup> The Court bolstered the norm leadership of the African human rights system (alongside the Inter-American system) in the explication in detail of the relationships among indigenous human rights norms (according

125 Gilbert (n 117) 249-268.

126 L Claridge 'The approach to UNDRIP within the African regional human rights system' (2019) 23 *International Journal of Human Rights* 268.

127 Application 6 (2017) (*Ogiek case*).

128 *Ogiek case* (n 127) para 10.

129 *Ogiek case* para 16.

130 Art 5(1)(a) African Court Protocol (n 27).

131 *Ogiek case* (n 127) para 208.

132 *Ogiek case* (n 127) paras 202-207.

133 *Ogiek case* (n 127) paras 209-211.

to UNDRIP, for example) and this right to ground indigeneity and land claims.<sup>134</sup> Thus, this unique African experience is a reference point for (worldwide) indigenous sovereignty movements seeking to assert similar rights using the UNDRIP. Additionally, while recognising the Inter-American system's significant work on this subject, the *Ogiek* case still inspires an Africa-led trans-judicial dialogue by providing normative guidance to adjudicative tribunals confronted with similar questions.<sup>135</sup>

Overall, the African human rights system has produced innovative normative texts and jurisprudence that are on the leading edge in this area.<sup>136</sup> Quite obvious is the fact that its cutting-edge intellectual dynamism resources scholars across the world who work on the right to development. The African human rights system has also equipped human rights systems, activists and peoples all over the world with valuable normative resources to campaign even more effectively for the implementation of the right to development. Largely innovated in the African human rights system, this right has appeared subsequently in the UN, Inter-American, ASEAN and Arab Charter-based human rights systems. Accordingly, it has motivated a dynamic of imitation that has had and is likely to have strong force within and outside Africa well into the future.

### 4.3 Right to the environment

There was no justiciable right to the environment before the African human rights system innovated and contributed it to the world, thus inviting a dynamic of imitation and dispersal. For Africa, environmental protection was considered a corollary to the struggles of its peoples and leaders for resource sovereignty and the enthronement of an NIEO.<sup>137</sup> The incorporation of this right in legally-binding form in the African Charter marked a turning point in international environmental and human rights law/activism and a pioneering move in linking both bodies of norms and their praxis.<sup>138</sup>

134 *Saramaka People v Suriname* IACtHR Series C 172, 13 IHRR 933 (2007).

135 L Claridge 'Litigation as a tool for community empowerment: The case of Kenya's Ogiek' (2017) 11 *Erasmus Law Review* 57 (especially in Latin America; the African human rights system also borrows from the Inter-American human rights system in a mutually-beneficial juridical interaction).

136 OC Okafor & U Ngwaba 'International accountability in the implementation of the right to development and the "wonderful artificiality" of law: An African perspective' (2020) 7 *Transnational Human Rights Review* 1.

137 Salomon (n 93) 41.

138 A Boyle 'Human rights and the environment: Where next?' (2012) 23 *European Journal of International Law* 613.

Thus, the human rights-environment nexus in the African human rights system pooled what had hitherto been silos of law into a mutually-reinforcing composite and its extension into current human rights discourse accurately transcended the prevailing normative categories of rights at the time.<sup>139</sup> This in fact was appropriate, for 'the right to a healthy environment can hardly be approached in isolation. It cannot be considered without reference to another right of the kind, namely, the right to development.'<sup>140</sup> Accordingly, this right must be read together with other rights, including the right to development under article 22, and the corollary right to freely dispose of natural resources in the absolute interest of Africa's peoples under article 21 of the African Charter.<sup>141</sup>

The foundation of this juridical integration in article 24 proceeds on grounds that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'.<sup>142</sup> Yet, this idea is not particularly novel as environmental consciousness has been both a time-honoured customary value and communal obligation across Africa.<sup>143</sup> Therefore, it is not surprising that this normative synthesis manifests in both the African Charter and the African Commission's jurisprudence which has rightly rejected siloed human rights imagination by denouncing the artificial division between civil and political rights and social, cultural and economic rights.<sup>144</sup>

Thus far, the African Court has yet to decide a case on article 24.<sup>145</sup> Nonetheless, the African Commission's foundational work provides valuable insights into the article 24 jurisprudence. As the Commission stated in the oft-celebrated communication on *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria*, 'environmental rights ... are essential elements of human rights in Africa'.<sup>146</sup> In this case the applicants alleged that the joint petroleum

139 L Chenwi 'The right to a satisfactory, healthy, and sustainable environment in the African regional human rights system' in JH Knox & R Pejan (eds) *The human right to a healthy environment* (2018) 59.

140 AAC Trindade 'Environment and development: Formulation and implementation of the right to development as a human right' in AAC Trindade (ed) *Human rights, sustainable development and the environment* (1992) 43.

141 Chenwi (n 139) 62.

142 Art 24 African Charter.

143 MJ Tosam 'African environmental ethics and sustainable development' (2019) 9 *Open Journal of Philosophy* 172.

144 M van der Linde & L Louw 'Considering the interpretation and implementation of article 24 of the African Charter on Human and Peoples' Rights in light of the SERAC Communication' (2003) 3 *African Human Rights Law Journal* 167.

145 LJ Kotzé & A du Plessis 'African Charter on Human and Peoples' Rights and environmental standards' in SJ Turner et al (eds) *Environmental rights: The development of standards* (2019) 93.

146 (2001) AHRLR 60 (ACHPR 2001) (SERAC) para 68.

operations between Nigeria and Shell had caused extensive environmental damage, including soil and water pollution leading to a loss of agricultural lands, health issues and land dispossession and displacement.<sup>147</sup> The African Commission held that Nigeria had breached article 24 of the African Charter as it did not take active steps to prevent these violations and was complicit in other breaches including using violent suppression of dissent.<sup>148</sup>

The *SERAC* case highlighted ‘the role that the arms of justice and quasi-judiciary bodies in Africa could [and do] play to enhance the environmental rule of law’.<sup>149</sup> In related normative advances, the *Endorois* case and the *Ogiek* case reinforce the jurisprudence in the *SERAC* case by integrating development into the environment discourse as cognate components of article 24 jurisprudence.<sup>150</sup> The *SERAC* case highlights the African Commission’s leading character in influencing political action, resourcing environmental activism, and popularising binding norms on the right to the environment in Africa.<sup>151</sup> It also demonstrates its attempt to spur, more globally, ‘a dynamic of imitation’ of its praxis and effort to socialise other agents beyond Africa to become norm followers relative to environmental rights.<sup>152</sup> Likewise, domestic rights-based civil society groups have relied on the language of the African Charter in strategically crafting and sustaining similarly-situated public interest environmental litigation before Africa’s sub-regional courts, especially in situations where domestic law lacks corresponding justiciable rights and the likelihood that these suits would fail without a reliance on article 24 of the African Charter.<sup>153</sup> Beyond these important inroads, similar advances are observed in intra-state settings with domestic litigants in African states drawing on the article 24 jurisprudence to foreground domestic guarantees of the right to the environment.<sup>154</sup>

147 *SERAC* (n 146) para 10.

148 *SERAC* paras 53-69.

149 F Abioye ‘Advancing human rights through environmental rule of law in Africa’ in M Addaney & A Jegede (eds) *Human rights and the environment under African Union law* (2020) 81, 92-93.

150 Kotzé & Du Plessis (n 145) 108.

151 J Nwobike ‘The African human and people’s rights and the demystification of second and third generation rights under the African Charter: Social and Economic Rights Action (SERAC) and Centre for Economic and Social Rights Centre (CESR) v Nigeria’ (2005) 1 *African Journal of Legal Studies* 129.

152 Van der Linde & Louw (n 144) 169-170.

153 *Registered Trustees of Socio-Economic Rights and Accountability Project (SERAP) v The Federal Republic of Nigeria* Suit ECW/ CCJ/A PP/ 08/ 09, Rul ECW/ CCJ/ JUD/ 18/ 12 14 December 2012 paras 63-67; and JT Gathii ‘Saving the Serengeti: Africa’s new international judicial environmentalism’ (2016) 16 *Chicago Journal of International Law* 386.

154 C Odote ‘Human rights-based approach to environmental protection: Kenyan, South African and Nigerian constitutional architecture and experience’ in Addaney & Jegede (n 149) 381; LJ Kotzé & A du Plessis ‘Putting Africa on the stand: A bird’s eye view of climate change litigation on the continent’ (2020) 50 *Environmental Law* 615.



Beyond Africa, the article 24 jurisprudence's early intervention in setting an inaugural example of a binding right to the environment pointedly invited mimicry and helped shape developments in some other human rights systems. Notably, the San Salvador Protocol adopted in 1988 plugged the normative gap on the right to the environment – a right that was left out of the American Convention on Human Rights of 1969.<sup>155</sup> Similarly, the 2004 Arab Charter on Human Rights incorporates such a right.<sup>156</sup> The Paris Agreement also adopted a rights language in the context of climate change and sustainable development.<sup>157</sup>

Thus, these strategic advances in international environmental law signal to actors and to activism alike Africa's norm leadership in and beyond Africa.<sup>158</sup> It is rather refreshing that the UN system now recognises 'the right to a safe, clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights'.<sup>159</sup> Yet, it is regrettable that the final text of this resolution failed to acknowledge the origins in the African Charter of the formulation of this right as a binding entitlement in international human rights law; a situation that suggests that the marginalisation of Africa's pioneering role in international law continues to pose challenges to a more comprehensive outlook of the global human rights system.

## 5 Expanding on norm leadership: Venturing into 'new' territories and transcending limitations

Despite these attainments, the African human rights system's norm leadership has yet to extend sufficiently to other human rights spheres. Two such areas are lesbian, gay, bisexual and transgender (LGBT+) issues and norms constraining rights violations committed by businesses. These politico-legal developments continue to attract considerable attention from scholars, human rights activists and non-governmental organisations (NGOs) that advocate the African human rights system to do much more in these directions. Thus, the limitations discussed here raise a measure of doubt as to the extent to which the African human rights system can augment its significant

155 28 ILM 156, art 11.

156 12 IHRP (2005) art 38.

157 UN Doc FCCC/CP/2015/L.9/Rev/1 (12 December 2015) Preamble; S Atapattu 'The Paris Agreement and human rights: Is sustainable development the "new human right"?' (2018) 9 *Journal of Human Rights and Environment* 68.

158 GEK Dzah 'Theorising the right to environment: An Africological typology' (2019) 27 *African Journal of International and Comparative Law* 25.

159 Human Rights Council 'The human right to a safe, clean, healthy and sustainable environment' 48/L.23/Rev.1 (2021).

record of norm leadership by venturing into certain controversial 'new' territories and transcending the entailed limitations in the business and human rights domain.

### 5.1 In a flux: Sexual orientation

LGBT+ issues have occasioned complicated discussions in the African human rights system in terms of how non-state actors and individuals relate to the system's constituent agencies, and even as between the different agencies within the AU and its allied institutions. The recognition and protection of LGBT+ rights and sexual orientation under the African Charter continues to be a controversial and contentious politico-legal subject. While the Charter seems (at first glance) to be silent on it, some African countries such as South Africa, Lesotho, Gabon, Mozambique, Seychelles and Botswana have either de-criminalised same-sex relations or provided for legal guarantees on sexual orientation.<sup>160</sup> Yet, the majority of African states continue to impose harsh custodial sentences, the death penalty included, for same-sex relationships.<sup>161</sup>

The African human rights system's position on the issue remained largely untested until the Coalition of African Lesbians (CAL), a South Africa-based NGO, applied for observer status and was rejected by the Commission.<sup>162</sup> CAL reapplied five years later, in 2015, and this time the African Commission accepted and granted CAL observer status on grounds that such accreditation helps protect LGBT+ persons from violence and discrimination.<sup>163</sup> However, the Commission's decision to grant the application drew the ire of the AU Executive Council which quickly requested the Commission to withdraw the observer accreditation.<sup>164</sup> The ruckus between the AU and the Commission intensified when another NGO, the Centre for Human Rights at the University of Pretoria, joined CAL to request an advisory opinion from the African Court.<sup>165</sup> The Court declined the

<sup>160</sup> D Ewing et al 'Sexual and gender identities: Violating norms' (2020) 34 *Agenda* 1.

<sup>161</sup> C Izubgara et al 'Regional legal and policy instruments for addressing LGBT exclusion in Africa' (2020) 28 *Sexual and Reproductive Health Matters* 99.

<sup>162</sup> P Johnson 'Homosexuality and the African Charter on Human and Peoples' Rights: What can be learned from the history of the European Convention on Human Rights' (2013) 40 *Journal of Law and Society* 249.

<sup>163</sup> M Killander & MG Nyarko 'Human rights developments in the African Union (January 2017-September 2018)' (2018) 18 *African Human Rights Law Journal* 732.

<sup>164</sup> M Killander 'Human rights developments in the African Union during 2015' (2016) 16 *African Human Rights Law Journal* 532.

<sup>165</sup> Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians 002/2015 (Advisory Opinion) (2017-2018) 2 *African Court Law Report* 606 (CAL Opinion).

request on grounds that the applicant NGOs were not recognised by the AU although both NGOs enjoyed observer status at the Commission.<sup>166</sup> In the CAL Opinion the Court simply affirmed its earlier decision in a previous case on similar grounds of admissibility where an NGO had requested the Court to provide an advisory opinion on whether NGOs have legal standing before the Court.<sup>167</sup> A year later the Commission revoked its grant of observer status to CAL, bringing to an unhappy end – at least for the moment – what some have described as an unfortunate saga.<sup>168</sup>

This development has far-reaching implications for Africa's rights jurisprudence, especially the strategic social constructivist role of non-state actors before adjudicative bodies. For example, the African Court's interpretation in the CAL Opinion immediately disadvantages non-state litigators before the Court – the reason being that an accredited NGO with observer status at the Commission, that may bring a communication and appear before that body, cannot simultaneously initiate an action before the Court simply because the AU's political organs have not 'recognised' that NGO.<sup>169</sup> Considering that the AU has demonstrated an unwillingness to expand access to NGOs at the Court through the recognition mechanism under article 4(1) of the African Court Protocol, this situation may not altogether be surprising. Yet, given the disadvantage caused to vulnerable groups such as LGBT+ groups in Africa, and the obvious, possible future limits placed on NGOs making other politico-legal claims, Ben Achour J's appeal to the AU in his separate opinion in the CAL Opinion is both relevant and supportable, and may well become the future position of the law. As Ben Achour J stated:<sup>170</sup>

We wish to reiterate our hope that the African Union will amend article 4(1) of the Protocol with a view to opening up possibilities for referrals to [the] African Court and relaxing the conditions required of NGOs to bring their request for Advisory Opinion within the ambit of the Court's jurisdiction; or, the way of amendment being uncertain, to broaden its criteria for granting observer status to include NGOs with similar status before the Banjul Commission.

At this time, Heyns's now two-decade old caution also comes to mind and invites further consideration. As Heyns rightly noted, 'care should be taken to ensure that the African Human Rights Court

166 CAL Opinion (n 165) 614.

167 Request for Advisory Opinion by the Socio-Economic Rights and Accountability Project (SERAP) 1/2013, Advisory Opinion of 26 May 2017.

168 JE Bond 'Intersectionality, women's rights in Africa, and the Maputo Protocol' in VF Bruey (ed) *Patriarchy and gender in Africa* (2021) 47.

169 A Jones 'Form over substance: The African Court's restrictive approach to NGO standing in the SERAP Opinion' (2017) 17 *African Human Rights Law Journal* 320.

170 CAL Opinion (n 165) 616.

does not undermine the African Commission, either by weakening its budget or by making the Commission irrelevant. Africa needs a fully functioning Commission as well as a Human Rights Court.<sup>171</sup> This might well be the time to pause and rethink the relationship between these two adjudicative bodies.

## 5.2 Business meets human rights

International corporate liability is a matter of great interest for scholars of international law and international relations. The interaction between business and human rights violations presents an evolving challenge in Africa's rights discourse.<sup>172</sup> Accordingly, the AU negotiated and adopted a treaty to criminalise and punish serious corporate violations of human rights in Africa.<sup>173</sup> The adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights (Malabo Protocol) made certain that this subject took concrete form in international discourse.<sup>174</sup> Hence, some contend that the Malabo Protocol will help Africa 'to respond more effectively to challenges posed by corporations'.<sup>175</sup>

The Malabo Protocol provides for a regional framework for the criminal prosecution of business entities that commit egregious human rights violations.<sup>176</sup> This framework is critically important for punishing corporations that are deliberately involved in human rights violations or complicit in illegal trade in natural resources, and whose actions or inactions often promote, encourage or result in human rights violations.<sup>177</sup> Hence, as Omorogbe argues, the Protocol 'would enable the prosecution of multinational corporations for crimes against humanity. And if this interpretation is correct, the Protocol would be the first international treaty to do so as a judicial response is currently limited to the national level.'<sup>178</sup>

171 C Heyns African regional human rights system: In need of reform? (2001) 1 *African Human Rights Law Journal* 166.

172 OC Okafor et al 'Assessing the African Union's 2016-2019 human rights action planning process: Embracing, and decoupling from, the conventional "ideal"' (2020) 64 *Journal of African Law* 143.

173 VO Nmehielle "'Saddling" the new African regional human rights court with international criminal jurisdiction: Innovative, obstructive, expedient?' (2014) 7 *African Journal of Legal Studies* 7.

174 N Bernaz 'Conceptualising corporate accountability in international law: Models for a business and human rights treaty' (2021) 22 *Human Rights Review* 45.

175 M Sirleaf 'The African justice cascade and the Malabo Protocol' (2017) 11 *International Journal of Transitional Justice* 71, 77.

176 Art 46C Malabo Protocol (n 174).

177 O Abe & A Ordor 'Addressing human rights concerns in the extractive resource industry in sub-Saharan Africa using the lens of article 46(C) of the Malabo Protocol' (2018) 11 *Law and Development Review* 843.

178 EY Omorogbe 'The crisis of international criminal law in Africa: A regional regime in response?' (2019) 66 *Netherlands International Law Review* 287, 303.

While this is a welcome addition to the repertoire of normative resources available for redressing human rights violations in Africa, certain challenges remain in the area of the struggle to instate a robust anti-corporate violations regime, particularly regarding the forcefulness with which African states – hostages rather than hosts (in most cases) to powerful Global North-domiciled transnational corporations – in reality, even with the best intentions, can mobilise or encourage the mobilisation of this aspect of the Malabo Protocol to moderate the worst excesses of these enterprises. Another question concerns the speed with which the Malabo Protocol will enter into force, even relative to the usual slow pace of treaty ratification in Africa. Given the magnitude of the human rights violations at issue, it would have been expected that the Protocol (imperfect as it is) would receive a more rapid than usual ratification across Africa. To date, this certainly has not been the case.

## 6 Conclusion: Toward a stable future as a norm leader

The African human rights system is a leader in the innovative, and even radical, production and clarification of aspects of the normative life of human and peoples' rights, not only in Africa, but across the world.<sup>179</sup> The African human rights system embodies different chapters in Africa's resistance to the orthodoxies of international law and anticipates a future where Africa's experiences and ideas can play a more prominent role in the re-conceptualisation of rights praxis. In developing our argument on the important leadership role the African human rights system has played, the argument was limited to three rights within the normative framework of the African human rights system (remedial secession, development and environment) the global travels and dispersals of which exemplify this norm leadership.

Influenced by strategic social constructivism's norm cycle theory, the article argued that although the African human rights system is not a state (the typical norm leader within this theoretical construct) the critical but globally under-appreciated roles the system has played

<sup>179</sup> M Talbot 'Collective rights in the Inter-American and African human rights systems' (2018) 49 *Georgetown Journal of International Law* 163 (in comparing the African and Inter-American human rights jurisprudence, the author argues that the African human rights system's direct incorporation of collective rights sets the pace for others to follow. In this regard, the author further noted that the African Charter's provisions on reference to other human rights systems also engender a unique approach by the African human rights system to incorporate other non-African perspectives, which helps the African jurisprudence to continue leading the way in human rights jurisprudence.)

in regard to the socialisation of certain human rights ideas fits within, and can also help extend, social constructivist human rights theory. These alternative, African, forms of rights praxis have been mimicked and utilised by a diverse array of human rights systems, activists, jurists, states and even sub-regional organisations that deploy them at different adjudicative levels and fora. Yet, despite its notable and even radical additions to the global human rights corpus and praxis, the African human rights system has been dogged by its relatively little success in charting new paths in certain specific controversial and important areas. In these instances, the African human rights system has not been a norm leader, has not led enough in norm development and application, or has functioned as an agent of 'de-leadership'. If the African human rights system is not to delegitimise its otherwise rightful position as a norm leader in global rights praxis, then these challenges invite deeper introspection and a more hopeful, robust pro-human rights action, of the kind the late Professor Christof Heyns would have been proud to expect of the African human rights system.<sup>180</sup>

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180 K Mickelson 'Hope in a TWAIL register' (2020) 1 *TWAIL Review* 14 (aligning with TWAIL's call to scholars to assume an activist role through scholarship).