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Contents

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For further information, see 'Guidelines for Contributors' after the last contribution in this *Journal*. Also see http://www.ahrlj.up.ac.za/submissions for detailed style guidelines.

AFRICAN HUMAN RIGHTS LAW JOURNAL

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Editorial

This issue consists of 14 contributions on human rights that are of concern to Africa, generally, and nine articles that together form a 'Special focus' on implementation of decisions by the African Commission on Human and Peoples' Rights (African Commission), specifically. The 'Special focus' is edited by editor-in-chief, Frans Viljoen, together with guest editors, Foluso Adegalu and Zainab Olaitan.

Enigmatic entry into force of two African Union human rights treaties

The second edition of the *Journal* is published at the end of a year in which two substantive protocols to the African Charter on Human and Peoples' Rights (African Charter) entered into force. The first is the 2018 Protocol to the African Charter on the Rights of Persons with Disabilities in Africa (African Disability Protocol). The Protocol entered into force on 3 May 2024, 30 days after the fifteenth state party to the African Charter had ratified it. By the end of 2024, *at least* 15 state parties to the African Charter have either ratified or acceded to this Protocol. The second is the 2016 Protocol to the African Charter on the Rights of Older Persons in Africa (Older Persons Protocol), which entered into force on 6 November 2024. By the end of 2024, *at least* 15 state parties to the Charter have either ratified or acceded to the Older Persons Protocol.

It might strike an observant reader as rather inexact to indicate that, as 2024 draws to a close, 'at least' 15 states have become party to these Protocols. Why do we not reflect the current status of ratifications with more accuracy? This information surely should be available in the public domain, on the website of the African Union (AU)? As the AU is the official depositary for ratifications, it should have the latest updated information instantly at its disposal when an instrument of ratification is deposited. However, as anyone very well knows who over the last years has sought to inform themselves

of the ratification status of any AU treaty, the official AU website is not consistently updated. As we write this editorial, the website indicates that the information pertaining to these two Protocols was last updated on 19 September 2023 which, calculated from the time of writing, is more than 14 months ago. Based on this update, ten states had become party to the African Disability Protocol, and 12 to the Older Persons Protocol. From gleaning the information available to them on the website, Africans – and other observers – would have no idea that these treaties have in fact entered into force.

To be sure, the snail's pace with which the official source of this important information is updated is the same for most of the treaties on the website. See, for example, the ratification status of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, which was last updated on 20 May 2019. While media reports indicate that Angola became the first state to become party to this Protocol, the website still shows '0' state parties. In the human rights domain, the lack of continuously-updated information makes it impossible for African citizens to have an accurate picture of what obligations their states have undertaken and, as a consequence, what rights they are entitled to claim. Not knowing the accurate and up-to-date status of ratifications makes a mockery of campaigns for ratification to ensure the entry into force of these treaties. Why should those at the forefront of these campaigns have to learn about the milestone of 15 ratifications being reached only when a photo is posted on someone's Facebook page, or by way of a public announcement at a session of the African Commission?

Even if there are challenges within the AU bureaucracy, these challenges cannot explain the extent to which the AU's practice reflects disdain for its citizens' rights to have access to the most basic information about the obligations their states have undertaken. This state of affairs also undermines any claim that the AU is or aspires to be people-centred.

While normative stagnation has set in as far as the United Nations (UN) human rights system is concerned, this has not been the case in Africa. The AU has in the last decade maintained its reputation as an active norm entrepreneur by adopting four substantive Protocols to the African Charter. In addition to the two treaties mentioned above, the Protocol on the Rights of Citizens to Social Protection and Social Security was adopted in 2022; and the most recent, the Protocol to the African Charter Relating to the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa, was adopted earlier this year. Available information shows that these two further Protocols to the African Charter are not yet in force.

AHRLJ@25 in 2025

In 2025 the *African Human Rights Law Journal* will turn 25. To mark this landmark moment, we will aim to bring together scholars to reflect on contemporary human rights issues of relevance to Africa. In this regard, the *Journal* plans a conference in June 2025, to dissect and discuss the four most recent Protocols to the African Charter, including the recently entered-into-force Disability and Older Persons Protocols.

This issue

The regular part of this issue of the *Journal* contains 12 articles and a case discussion (under 'Recent developments'). The issue also contains a 'Special Focus' section, devoted to the implementation of the decisions of the African Commission. It has its own editorial, which follows below, at the start of the 'Special Focus' section.

In the first contribution, Mavedzenge explores the features of a reparations framework to address the enslavement and colonisation of the African people. This exploration appears as we move into the year 2025, which the AU has declared the 'Year of Reparations' under the theme 'Reparations, Restoration, and Renaissance', with a focus on historical injustices (slavery, colonialism, apartheid); economic exploitation (resource extraction, unequal trade practices); cultural heritage and knowledge appropriation; health disparities and medical experimentation; and education and cultural exchange programmes. In another contribution, Abebe tackles the contentious topic of rendition, in the process drawing attention to the extraterritorial reach of the African human rights system.

Reiss and Tabengwa use the image of a tug-of-war to describe the contestations around the rights of sexual and gender minorities in Africa, as it played out over the last decade or so within the African human rights architecture, particularly the African Commission. This article discusses Resolution 275 which calls on states to refrain from, prevent and effectively investigate and ensure accountability for acts of violence based on anyone's actual or perceived sexual orientation or gender identity. This landmark soft law instrument was adopted by the Commission in 2014. The year 2024, therefore, marked ten years since it became an instrument of protection, sensitisation and advocacy.

Having entered into force in 1990, the African Charter on the Rights and Welfare of the Child (African Children's Charter) in 2024

marks 25 years of being in force. In her contribution, Quan shares her understanding of the right to education under the African Children's Charter. Lasseko-Phooko's contribution draws attention to a feature of collaboration between the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the African Commission, namely, the adoption of joint General Comments. In particular, she shines a light on the Joint General Comment on Female Genital Mutilation by the two treaty bodies, and provides a feminist perspective on adult women's consent to female genital mutilation.

A number of country-specific articles examine aspects of contemporary human rights concerns in five African countries (Nigeria, South Africa, South Sudan, Kenya and Uganda). In respect of Nigeria, Adejumo explores changing narratives on legal restrictions on abortion, and Oyeyemi looks closely into the right of children to be heard, while drawing lessons from South Africa. Focusing on South Africa, Osman examines the recognition of communities and partnership agreements under the South African Traditional and Khoi-San Leadership Act, and Muwanga and Korsten take a consumer protection perspective on the right to food. Deng's discussion of the deportation of James Dak by the Kenyatta government in 2016 implicates two countries, namely, South Sudan and Kenya, and considers the extent to which these countries have violated international refugee law. The final two articles concern Uganda: Agaba analyses refugee laws and policies as applied to women and girls in Kampala, and Mubangizi considers the implications for human rights of Uganda's 'unrelenting' criminalisation of consensual same-sex relations.

In the 'Recent developments' section, Moyo discusses the case of *Kawenda v Minister of Justice, Legal and Parliamentary Affairs*, decided by the Zimbabwean Constitutional Court in 20 May 2022. The case deals with sexual consent laws and the child's right to freedom from sexual exploitation. In this case discussion Moyo also discusses more broadly the issue of child sexual abuse.

New co-editors

As from this issue, the editorial team is enriched by two new co-editors, Dr Evelyne Asaala, a senior lecturer at the University of Nairobi, and Elsabe Boshoff, a doctoral candidate at the Norwegian Centre for Human Rights, University of Oslo, Norway.

Editors
December 2024

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Towards a framework of reparatory measures for the enslavement and colonisation of the African people

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Summary: *In February 2023 the African Union adopted a resolution by which it resolved to pursue reparatory justice to redress the harm that was caused against Africans through Trans-Atlantic slavery and colonialism. The adoption of the resolution has been followed by a debate on how it can best be implemented, especially considering that the quest for reparations for slavery and colonialism has been ongoing for almost a century. If the AU is to succeed in this quest, it needs to develop a strategy that addresses two critical questions, namely, (i) what would constitute reparatory justice in contemporary terms, for these historical crimes; and (ii) how the AU should pursue its claim for reparatory justice. This article discusses these two questions and suggests that the AU uses 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 as both a legal and conceptual basis for identifying measures that would constitute reparatory justice for Africans, in order to redress the harm caused through slavery and colonialism. This article identifies and discusses these measures, which include compensation for damages suffered by the African people and the African natural environment;*

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the reform of international financing institutions; and the reform of the United Nations. In view of the constrains and biases that exist within the international legal system, the article suggests that the AU should pursue the reparatory justice agenda primarily through political engagements and the forging of global alliances, while using opportunities presented by the international justice system.

Key words: *reparations; justice; slavery; colonialism; Africa*

1 Introduction

The discussion on reparative justice for colonialism and Trans-Atlantic enslavement of African people has been ongoing for a while among academics and policy makers. Among contributions by policy makers at the Africa regional level, of note is the June 1991 Resolution by the Council of Ministers of the Organisation of African Unity (OAU), which expressed the desire 'to ensure that those powers responsible for the centuries of damage to Africa, take measures to make reparation[s] for the exploitation and slavery of Africa'.[1] As part of implementing this Resolution, in June 1992 the OAU appointed a panel of experts to assist with the development and enforcement of a claim for reparations to address the harm caused by slavery and colonialism of the African people.[2] In April 1993 the first Pan-African Conference on Reparations was held in Abuja, Nigeria, and it urged the international community to recognise the 'unique and unprecedented moral debt owed to the African peoples as a result of slavery and colonialism'.[3] In October 2022 the African Monetary and Economic Sovereignty Initiative organised the second edition of the Conference on Economic and Monetary Sovereignty of Africa, in Dakar, Senegal, which resulted in the adoption of what is now popularly known as the Dakar Declaration.[4] This Declaration has been lauded as 'an internationalist manifesto and a global action

1 Organisation of African Unity 'Resolution on reparation for exploitation and slavery in Africa' CM/Res.1339 (LIV), adopted by the Council of Ministers of the Organisation of African Unity, 1 June 1991 (OAU 1991 Resolution), https://www.peaceau.org/uploads/cm-res-1339-liv-e.pdf (accessed 16 January 2024).

2 OAU 1991 Resolution (n 1) para 1. This panel was officially referred to as the Group of Eminent Persons.

3 Organisation of African Unity 'A declaration of the first Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-Colonisation' (1993) 1, https://ncobra.org/resources/pdf/TheAbuja Proclamation.pdf (accessed 16 January 2024).

4 See the Dakar Declaration on Pan-African Cooperation and Global Solidarity, https://www.cadtm.org/The-Dakar-Declaration-Pan-African-cooperation-global-solidarity#:~:text=The%20declaration%20condemns%20the%20constraints,South%20cooperation%20and%20global%20solidarity (accessed 15 September 2024).

plan' through which the delegates to the conference resolved to, among others, pursue reparative justice for slavery and colonialism.[5]

After decades of inaction on the issue, in February 2023 the African Union (AU), which succeeded the OAU in 2002, adopted a resolution calling for, among other steps, the establishment of 'an African Committee of Experts on Reparations for the purpose of developing a common African position on reparations and incorporate therein, an African reparatory programme of action'.[6] In November 2023 the AU held the Accra Reparations Conference, which culminated in the adoption of a declaration which affirmed as follows: [7]

> The fulfilment of reparations is a moral as well as a legal imperative rooted in principles of justice, human rights and human dignity, and that reparations represent a concrete step towards remedying historical wrongs and fostering healing amongst people of different nations and continents.

At the global stage, policy makers have also been having conversations on this issue at least since the early 2000s. Notably, in 2001 the United Nations (UN) organised the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, which culminated in the adoption of the UN Durban Declaration and Programme of Action (Durban Declaration).[8] To date, this remains the UN's blueprint on combating racism, racial discrimination, xenophobia and related intolerance. The Durban Declaration acknowledged that slavery and colonialism are crimes against humanity, committed against the people of Africa, and are among the major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance.[9] It also acknowledges that people of African descent are owed reparations for slavery and colonialism.[10]

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5 S Ndongo and others 'Introduction: Symposium on the 2022 Dakar Declaration' (2023) 4 *Journal of Law and Political Economy* 606-609.

6 African Union 'Decision on building a united front to advance the cause of justice and the payment of reparations to Africans' Assembly/AU/Dec.847(XXXVI), adopted February 2023, https://africanlii.org/akn/aa-au/doc/decision/2023-02-19/decision-on-building-a-united-front-to-advance-the-cause-of-justice-and-the-payment-of-reparations-to-africans-item-proposed-by-the-republic-of-ghana/eng@2023-02-19 (accessed 16 January 2024).

7 African Union Commission 'Accra proclamation on reparations' 14 November 2023, https://au.int/en/decisions/accra-proclamation-reparations (accessed 17 January 2024).

8 United Nations Department of Public Information 'Report on world conference against racism, racial discrimination, xenophobia and related intolerance' (2002), https://www.ohchr.org/sites/default/files/Documents/Publications/Durban_text_en.pdf (accessed 16 January 2024).

9 United Nations Durban Declaration (n 8) para 13.

10 United Nations Durban Declaration (n 8) para 160 which, after having recognised slavery and colonialism as racist practices, 'urges states to take all necessary measures to address, as a matter of urgency, the pressing requirement for justice for the victims of racism, racial discrimination, xenophobia and related

In December 2013 the UN General Assembly proclaimed the International Decade for People of African Descent, starting on 1 January 2015 under the theme 'People of African descent: recognition, justice and development'.[11] During this decade the UN member states committed themselves to combating all the scourges of racism and other forms of injustices suffered by people of African descent. Among these injustices is Trans-Atlantic enslavement and colonialism, of which the enduring legacy of poverty, racism, environmental degradation and general underdevelopment of African people is self-evident.

Among public intellectuals and the academia, the call for reparatory justice in order to redress violations caused by the enslavement and colonialisation of Africans can be traced back to the work of Marcus Garvey, who in the 1920s argued that '[s]lavery ... was more than theft and the loss of freedom in forced labour, it deprived a people [Africans] of their dreams and stripped them of their civilisation',[12] and that this damage must be repaired through reparations. Rodney in 1972 argued that the lower levels of development of Africa and other Third World regions of the world (compared to the Global North) are not a natural state, but a consequence of the process of underdevelopment caused by exploitative relations between these countries and the Western colonisers.[13] Rodney further argued that 'what was a slight difference [in levels of development] when the Portuguese sailed to West Africa in 1444 was a huge gap by the time that European robber statesmen sat down in Berlin, 440 years later to decide who should steal which parts of Africa'.[14]

This article seeks to build on these views that have already been expressed in support of the cause for reparatory justice for Africans. A review of literature on this subject reveals that a strong case for reparations to redress the violations caused by the enslavement and colonialisation of the African people has been made, especially through the work of scholars who include Obeng-Odoom,[15] Táíwò,[16]

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intolerance and to ensure that victims have full access to information, support, effective protection and national, administrative and judicial remedies, including the right to seek just and adequate reparation or satisfaction for damage'. Also see United Nations Durban Declaration (n 8) paras 100-102.

11 Resolution 68/237, adopted by the 68th session of the United Nations General Assembly, 23 December 2013. This Resolution was adopted as a follow-up to the United Nations Durban Declaration (n 8).

12 R Eyerman *Cultural trauma: Slavery and the formation of African American identity* (2001) 91.

13 W Rodney *How Europe underdeveloped Africa* (1972) 149.

14 Rodney (n 13) 149.

15 F Obeng-Odoom 'Reparations' (2024) 51 *Review of Black Political Economy* 458-478.

16 O Táíwò *Reconsidering reparations* (2022).

Beckles[17] and Curto.[18] Therefore, in this article I do not intend to (substantially) address the question of whether there is a justified case for Africans to demand reparations for the enslavement of their ancestors and colonialism. The questions I seek to address are what reparations entail for the African people, and what strategic actions the AU can undertake to pursue the claim for reparations.

However, even as I proceed from the assumption that the case for reparations has been made in literature, it is necessary (as a way of setting context for this article) to summarise the arguments that have been advanced to demonstrate that the reparations claim is a justifiable one. The claim for reparations for slavery and colonialism is grounded on three key legal and political arguments, namely, that slavery and colonialism underdeveloped Africa; slavery and colonialism were gross violations of international human rights that must be remedied; and slavery and colonialism created racial and global inequalities that must be rectified. In the next part I explain these arguments.

2 The case for reparations

Three key arguments have been advanced in support of the claim for reparations. First is the 'underdevelopment school of thought'. According to Rodney:[19]

> Underdevelopment is not absence of development, because every people have developed in one way or another and to a greater or lesser extent. Underdevelopment [is] comparing levels of development. It is very much tied to the fact that human social development has been uneven and from a strictly economic viewpoint some human groups have advanced further by producing more and becoming wealthier. The moment that one group appears to be wealthier than others, some enquiry is bound to take place as to the reason for the difference.

Rodney argues that the underdevelopment of Africa, compared to Europe, is a direct result of the exploitation of Africa by Europe. He argues that slavery and colonialism resulted in the underdevelopment of Africa while enriching the Global North, through the abduction of manpower and grand looting of natural resources from Africa by the slave traders and colonisers.[20] The 'underdevelopment school of thought' expounded on the earlier work of Williams, whose seminal

17 H Beckles 'The case for reparations' in D Dabydeen and others (eds) *The Oxford companion to black British history* (2007) 408-410.
18 J Curto 'A quantitative reassessment of the legal Portuguese slave trade from Luanda, Angola 1710-1830' (1992) 20 *African Economic History* 1-25.
19 Rodney (n 13) 25.
20 Rodney (n 13) 149.

research in 1944[21] demonstrated that the enslavement of Africans was central to the rise and sustenance of capitalist economies and societies of the Global North. Ample evidence[22] has been advanced to demonstrate that natural resources, including minerals, were stolen from Africa to sponsor the development of colonial powers, including Britain, Belgium and France.

A good example is the invention of the Victorian bicycles in Britain in the early 1800s. This invention had a massive impact on the development of infrastructure, technology and social relations in Britain. It is reported that the number of bicycles in use spiked as production rose from an estimated 200 000 bicycles in 1889 to one million in 1899.[23] This led to the widening and smoothening of roadways, paving the way for the introduction of the automobile later on. Inner parts of the cities were decongested as workers moved further out because they could now commute using the Victorian bicycles.[24] The introduction of this bicycle is also regarded as a catalyst for the emancipation of British women. British women, who were not permitted to move around without a male companion in the past for 'safety reasons', were now allowed to do so on the bicycle. The Victorian bicycle revolution was enabled by Congolese rubber collected by slave labourers under the coercive supervision of Belgian security forces.[25] In ways that demonstrate Rodney's underdevelopment theory, the invention and mass production of the Victorian bicycle propelled the development of Britain while promoting the underdevelopment of the Congo, through the exploitation of human and natural resources of the Congo. While the mass production of the Victorian bicycle catalysed the emancipation of British women, such emancipation came at the cost of the liberty of African women who were enslaved by the Belgians as rubber collectors in the fields of the Congo.

A recent study published by the John Hopkins University[26] also vindicates the underdevelopment school of thought, as originally argued by Williams and perfected by Rodney. The John Hopkins study demonstrates that slave trade contributed to the booming of the

21 E Williams *Capitalism and slavery* (1944).
22 Rodney (n 13) 1-15; Williams (n 21) 13-21.
23 https://www.lovetoknow.com/home/antiques-collectibles/victorian-bicycles (accessed 16 January 2024).
24 https://www.lovetoknow.com/home/antiques-collectibles/victorian-bicycles (accessed 16 January 2024).
25 BBC News 'DR Congo: Cursed by its natural wealth' *BBC News* (London) 9 October 2013, https://www.bbc.com/news/magazine-24396390 (accessed 16 January 2024); A Hochschild *King Leopold's ghost: A story of greed, terror, and heroism in colonial Africa* (1998) 161.
26 John Hopkins University 'Underwriting souls' 2020, https://underwritingsouls.org/ (accessed 16 January 2024).

insurance sector in Britain. It shows that several insurance companies, including Lloyd's of London, made huge profits from extending insurance cover to voyages transporting slaves and insuring slaves as cargo.[27] The booming of the insurance services brought about the accumulation of capital in the British financial services sector, which was used to finance other development initiatives, including the building of infrastructure. Such infrastructure and a rich capital base in the financial services sector remain the mainstay of the economy of contemporary British society. This came at the cost of the exploitation of the African people, who (today) remain poor as a result of their exploitation.[28]

Indigenous African communities were disposed of their agricultural land by the colonisers and were turned into poor peasants.[29] The natural environment in Africa was destroyed as a result of the reckless extractive industry operated by the colonial forces,[30] while some Africans were forcibly removed and resettled in regions of the world (including the Caribbean islands) that are more prone to the devastating effects of the ongoing climate change crisis.[31] These actions against Africans and the African natural environment have impoverished Africa while enriching Europe, and there lies the justification for the claim for reparations.

The second argument in support of the claim for reparations has been advanced from a political economy perspective.[32] By virtue of underdeveloping Africa while enriching the Global North, slavery and colonialism created what Obeng-Odoom has described as 'rising and resistant inequalities, and social stratification'.[33] These inequalities manifest in several ways, including the unjustifiable wealth gap between Africa and the Global North. As has been demonstrated above,[34] colonialism created a particular type of economic stratification in which Africa relates to the Global North as a supplier of cheap labour, cheap raw materials, and is a consumer of finished products from the Global North. This has led to the

27 As above.
28 Rodney (n 13) 149.
29 J Laband *The land wars: The dispossession of the Khoisan and AmaXhosa in the Cape colony* (2020). Also see Rodney (n 13) 149.
30 Táíwò (n 16) 63.
31 By virtue of their proximity to the oceans that are experiencing a rapid rising of sea levels. See KK Perry 'Realising climate reparations: Towards a global climate stabilisation fund and resilience fund programme for loss and damage in marginalised and former colonised societies' (2020) *Social Science Research Network* 5-13.
32 Eg, see A Darity & K Mullen *From here to equality: Reparations for black Americans in the twenty-first century* (2020).
33 Obeng-Odoom (n 15) 459.
34 Also see Williams (n 21).

exploitation of Africa's resources and has created poverty among Africans, while enriching the Global North. These inequalities and socio-economic stratification, created through the exploitation of Africa by the Global North as a result of slavery and colonialism, can only be redressed through reparations.

The third argument in support of the reparations claim has been advanced from a human rights and criminal justice perspective. It has been argued that slavery and colonialism were crimes against humanity and, in some cases,[35] Africans suffered genocide as punishment for resisting colonial occupation. Although some[36] have counter-argued that slavery and colonialism were not unlawful at the time of their commission, it has sufficiently been demonstrated, including by Wittmann,[37] that the abduction of human beings and the sale of them to perform forced and unpaid labour (slavery) were contrary to customary international law, which already was in existence at the time. Equally, colonialism, which involved (among other violations) the invasion of other people's homes, the forced removal of families from their land, the extra-judicial killing, torture and rape of those who resisted colonial occupation, was a serious violation of customary international law existing at the time.[38] Although some of the slave-trading states observed domestic legal rules that recognised slaves as a form of property,[39] these rules applied only within those states and could not apply internationally. Customary international law, which was binding in the conduct of states internationally at the time of slavery and colonialism, prohibited subjecting human beings to degrading and inhuman treatment. Slavery and colonialism involved subjecting human beings (Africans) to inhuman and degrading treatment and, thus, were in violation of customary international law.[40] Therefore, although slavery may have been legalised within the slave-trading states, it remained illegal in so far as those states were engaging in it in international territories where they were abducting human beings and selling them as slaves.

35 Including the Nama and Herero people of Namibia. See M Häussler *The Herero genocide: War, emotion and extreme violence in colonial Namibia* (2021) 115-199; R Paulose & R Rogo 'Addressing colonial crimes through reparations: The Mau Mau, Herero and Nama (2018) 7 *State Crime Journal* 369-388.

36 For a detailed discussion, see I McDougle 'The legal status of slavery' (1918) 3 *Journal of Negro History* 240-280.

37 N Wittmann *Slavery reparations time is now: Exposing lies, claiming justice for global survival: An international legal assessment* (2013). Also see Häussler (n 35) 115-199 and Paulose & Rogo (n 35) 369-388.

38 J Allain 'The international legal regime of slavery and human exploitation and its obfuscation by the term of art: Slavery-like practice' (2012) 10 *Esclavage et travail force* 35-40.

39 L Brophy 'Some conceptual and legal problems in reparations for slavery' (2001) 58 *New York University Annual Survey of American Law* 497.

40 Wittmann (n 37).

Scholars, who include Wittmann[41] and Obeng-Odoom,[42] have argued that the doctrine of state responsibility can be relied upon to found a legal claim for reparations for slavery and colonialism. I take a different view on this. As I will explain in detail later, the doctrine of state responsibility is applicable only in situations where it can be proven that the wrongful act was committed against a state. While I agree with Wittmann's argument that slavery and colonialism were violations of customary international law,[43] these violations were committed against a people who were not necessarily recognised as being part of a state under international law that existed at the time, which presents a challenge for existing international fora such as the International Court of Justice (ICJ) to determine these disputes.

However, the fact that the contemporary international legal system does not offer a judicial forum for Africans to pursue a legal claim for reparations does not detract from the fact that slavery and colonialism were wrongful and illegal acts even at the time that these atrocities were committed. As I will demonstrate later in this article, the absence of a judicial forum within the international legal system, with jurisdiction to determine reparations claims by African to redress slavery and colonialism, is a result of the engineering of international law by former colonisers in an effort to evade accountability for these crimes and human rights violations.

Some have argued that it cannot be proven that current generations of Africans have been disadvantaged by slavery and colonialism. For instance, Howard-Hassmann argues as follows:[44]

> While in retrospect, the direct harms of slavery endured by those enslaved are easy to identify, the direct harm visited upon their descendants is far less clear. It is, therefore, difficult to persuade those Western states (and their citizens) who might be expected to pay compensation that the often-tragic situation of Africans and members of the African Diaspora alive today is a consequence in part of the actions of the West's own forebears.

There is ample evidence to demonstrate that current generations of Africans have been disadvantaged by slavery and colonialism and that they continue to suffer the harm caused by these heinous criminal acts. For example, several post-independence African governments inherited huge financial debts accrued by colonial governments and

41 Wittmann (n 37) 15-21.
42 F Obeng-Odoom 'Capitalism and the legal foundations of global reparations' (2023) 4 *Journal of Law and Political Economy* 610-614.
43 See Wittmann (n 37) 15-21.
44 R Howard-Hassmann 'Reparations to Africa and the Group of Eminent Persons' (2004) *Cahiers d'études africaines* 92-93.

they continue to struggle with a debt crisis that is partly as a result of inheriting these debts;[45] colonialism resulted in the damage of the natural environment in Africa and this has made Africans more prone to the contemporary devasting effects of climate change crisis; slave trade removed African families from their homelands and resettled them in regions that are more vulnerable to climate change (including the Caribbean island region) where their descendants are currently suffering the loss and damage caused by the ongoing climate change crisis; descendants of families who were sold off during slave trade continue to suffer from trauma that is caused by being disconnected from their cultural life; and there are several descendants of indigenous African communities who currently are landless and live in poverty because their ancestors were disposed of their land during colonialism. I will engage with these claims substantially in the parts below as part of suggesting a framework of reparatory measures that Africans must demand.

Howard-Hassmann has observed that the challenge facing proponents of the reparations claim 'is the problem of how to frame the question'.[46] She argues that historical efforts to pursue the reparations claim have become stuck because of the failure to define what would constitute the package of reparations in this case.[47] This is what I seek to address through this article by suggesting an approach that can be considered by the AU to identify a package of reparatory measures which the AU must claim and strategic actions that can be taken to pursue these reparations. This discussion is particularly important because the AU has called on the academia to assist with ideation in order to empower the continental body to implement its 2023 Resolution on reparatory justice.[48]

Indeed, it must be acknowledged that the Caribbean Community (CARICOM) has developed its own set of demands of reparatory measures,[49] and I make reference to those in my proposals in this article. Although both the Africans in the diaspora and those in Africa suffered harm as a result of slavery and colonialism, the nature of the damage not necessarily is the same. Each continental block of

45 L Umubyeyi 'Reparations for Europe's colonial crimes in Africa and slavery: A critical step in tackling Africa's contemporary challenges' (2023) *African Futures Lab*, https://africanfutures.mit.edu/research/publications/reparations-for-europes-colonial-crimes-in-africa-and-slavery-a-critical-step-in-tackling-africas-contemporary-challenges-1/ (accessed 17 January 2024).
46 Howard-Hassmann (n 44) 91.
47 As above.
48 African Union (n 6).
49 CARICOM Reparations Commission 'Ten point plan for reparatory justice' 2014, https://caricom.org/caricom-ten-point-plan-for-reparatory-justice/ (accessed 17 January 2024).

African people must develop its own set of measures that constitute its reparations claim. However, as proposed later in this article, they must consider developing and adopting a joint programme of action to pursue their claims.

3 Conceptual framework for reparations against slavery and colonialism

Early discussions on reparations were confined to financial compensation for the wrongs suffered by Africans as a result of slavery and colonialism.[50] Contemporary conversations on this subject have also emphasised financial compensation. For example, esteemed scholars Beckles[51] and Obeng-Odoom[52] have proposed methods of quantifying the damages suffered by Africans that should be claimed as part of the reparations claim against specific states. While I agree with these proposals, it needs to be noted that reparations, as a concept of remedying human rights violations, is broader than financial compensation. Scholar Táíwò[53] has made some innovative proposals on why reparative justice should be factored into the climate justice agenda by suggesting specific measures that must be implemented by the Global North as part of discharging their reparations debt to Africa. While I associate with these suggestions, and I believe that they should be seriously considered by the AU, I contend that discussions on the scope of reparations should be based on a much more comprehensive theoretical or legal framework that allows the AU to identify reparatory measures that adequately address the harm caused by slavery and colonialism.

In this sense, I propose that 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 (UN Basic Principles)[54] offer a more comprehensive framework for developing and determining the scope of reparatory measures that the AU should demand from perpetrator states and non-state actors. These were adopted by the UN in December 2005, as part of the international

50 Howard-Hassmann (n 44) 90.
51 H Beckles *Britain's black debt: Reparations for Caribbean slavery and native genocide* (2013) 170-171.
52 Obeng-Odoom (n 15) 459.
53 Táíwò (n 16).
54 United Nations General Assembly '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', December 2005, https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-and-guidelines-right-remedy-and-reparation (accessed 17 January 2024).

body's affirmation of the principle of international human rights law that victims of human rights violations have a right to remedies that adequately and timeously repair the harm suffered as a result of the violations of their human rights.[55]

Although these principles were adopted in order to give effect to the right to remedies under the International Covenant on Civil and Political Rights (ICCPR), which was adopted way after the formal abolition of slavery, it is appropriate to use these principles in developing a framework of reparatory measures for slavery and colonialism. This is because, although ICCPR came into effect in 1976, some of the rights recognised therein are codifications of rights that existed prior to ICCPR, under customary international law, and which is binding upon states liable for colonialism and slavery. The right to remedies, which the UN Basic Principles seek to implement, is one of those rights that existed under customary international human rights law.[56]

In the process of conducting this research, it has been argued by some[57] that the UN Basic Principles were not originally drafted to address historic crimes, but were rather introduced to ensure reparations to victims of contemporary crimes such as enforced disappearances in Argentina and Chile in the 1970s and 1980s. On this basis, some scholars, including Howard-Hassmann,[58] have argued that these principles are inapplicable when seeking to address historical human rights violations arising from the enslavement and colonialism of the African people. This view represents a gross misinterpretation of the background of the UN Basic Principles and their legal application. While the drafting of these principles may have been inspired by enforced disappearances in Latin America in the 1970s, their origins and purpose are not confined to these events. As indicated under the Preamble[59] to the UN Basic Principles, they were drafted and adopted in order to interpret and provide further legal guidance on the implementation of the right to remedies, which is a customary international human rights principle that was codified under ICCPR in 1976. Therefore, these principles can be applied when interpreting the UN member states' legal obligations

55 UN Basic Principles (n 54) Preamble.
56 UN Basic Principles (n 54) para 1(b).
57 I am grateful to the comments made by one of the reviewers of this article.
58 R Howard-Hassmann *Reparations to Africa* (2008) 4-5.
59 Which states that the purpose of the Basic Principles is 'affirming the importance of addressing the question of remedies and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law'.

on reparatory justice to address historical injustices, including the enslavement and colonisation of the African people.

According to the UN Basic Principles,[60] the term 'reparation' encapsulates measures aimed at redressing violations of human rights by undertaking a range of material and symbolic measures in favour of the victims or their families as well as affected communities. The measures must be adequate.[61] In order to be considered adequate, the scope of reparatory measures must include measures for restitution; compensation; rehabilitation; repatriation; satisfaction and cessation of continuing violations; truth seeking; search for the disappeared persons or their remains; reburial of remains; and public apologies.[62] Using this framework, I suggest the measures below to be part of the package of reparations due to the African people, in order to repair the harm that was caused to them and their environment through slavery and colonialism. The measures suggested below are not exhaustive but are an illustration of the approach that could be applied to identify reparatory measures for Africans, using the UN Basic Principles as a conceptual and legal framework for such an exercise.

3.1 Measures of satisfaction

At the core of the harm inflicted by systematic human rights violations and crimes such as slavery and colonialism is the degradation of the human dignity of the victims and their descendants. In addition to creating enduring economic inequalities and poverty among Africans, slavery and colonialism have created a sense as well as a perception that Africans are an inferior race, and these perceptions are among the major causes of contemporary racism and discrimination against Africans.[63] As part of repairing the dignity of victims and their families, the UN Basic Principles make provision for measures of satisfaction as part of the reparations.[64] Such measures must include

> public apology, including acknowledgment of the facts and acceptance of responsibility; judicial and administrative sanctions against persons liable for the violations; commemorations and tributes to the victims; inclusion of an accurate account of the violations that occurred in international human rights law and international humanitarian law training and in educational material at all levels.[65]

60 UN Basic Principles (n 54) para 15.
61 As above.
62 UN Basic Principles (n 54) paras 15-23.
63 United Nations Durban Declaration (n 8) 3.
64 UN Basic Principles (n 54) para 22.
65 UN Basic Principles (n 54) paras 22(e) to (h).

Perhaps the first set of reparatory measures that must be undertaken by states and non-state actors[66] who perpetrated and were complicit in slavery and colonialism must include the tendering of official apologies in which they unequivocally acknowledge and take responsibility for their role in committing and perpetuating these injustices.[67] There is ample evidence[68] demonstrating that the United States of America (USA), certain European states and their citizens, monarchs and private corporates were beneficiaries, perpetrators and/or accomplices in the process of committing the injustices of slavery and colonialism against Africans. For example, the British royal family and the British state presided over at least 14[69] colonies in Africa. Portugal had six[70] African colonies, while Germany had seven colonial territories,[71] and France boasted of eight colonies.[72] Belgium annexed the Congo (now the Democratic Republic of the Congo (DRC)) in 1908, although it must be noted that King Leopold II had long colonised the Congo and conducted slavery with support from Belgian security forces.[73] The USA alone received an estimated 470 000 African men, women and children who were abducted from Africa and sold as slaves to North American owners.[74]

As highlighted earlier in this article and discussed (more comprehensively) elsewhere in literature,[75] Europe's and the USA's industrialisation benefited from slave labour and the looting of African resources during colonialism. These states, their royal figures and some of their private corporates must tender apologies to the people they enslaved and colonised, and those apologies must be sufficiently unequivocal and comprehensive to reflect full acceptance of responsibility for their roles. This would be an important symbolic sign of remorsefulness and an acknowledgment of the injustices that Africans suffered and continue to suffer today, and will go a long way towards laying a firm foundation for world peace and normalisation

66 Including private companies that are still in existence today.
67 Also see CARICOM (n 49).
68 Beckles (n 51) 170; Rodney (n 13).
69 Namely Egypt, Sudan, Kenya, Uganda, South Africa, The Gambia, Sierra Leone, Northwestern Somalia, Zimbabwe, Zambia, Botswana, Nigeria, Ghana and Malawi.
70 Namely Angola, Cape Verde, Guinea-Bissau, Mozambique, São Tomé and Príncipe and Equatorial Guinea.
71 In Tanzania, Burundi, Rwanda, Namibia, Cameroon, Togo and Ghana.
72 Namely Mauritania, Senegal, French Sudan (now Mali), French Guinea (now Guinea), Côte d'Ivoire, Upper Volta (now Burkina Faso), Dahomey (now Benin) and Niger.
73 Hochschild (n 25) 161.
74 M Battle 'African passages' (1990) *Lowcountry Digital History Initiative*, https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/sectionii_introduction/north_american_context#:~:text=Of%20the%20over%20twelve%20million,were%20sent%20to%20North%20America. (accessed 17 January 2024).
75 Beckles (n 17) 408-410; Rodney (n 13).

of race relations. Some of the members of the European royal families and members of government have made statements in which they expressed regret for their role in slavery and colonialism.[76] However, these statements do not meet the standards of the UN Basic Principles as they do not include an acknowledgment of the facts and acceptance of responsibility. For example, in 2013 the British government expressed its 'sincere regrets' for abuses that took place during the detention of some of the Kenyans during the period of the state of emergency during the Mau Mau rebellion against colonial occupation.[77] However, the British government made it very clear that it did not accept that it is legally liable for the actions of the colonial administration in Kenya.[78] In a rare development in 2020, Lloyd's of London issued an apology for its role in supporting slave trade, through extending insurance cover to voyages transporting slaves and insuring slaves as cargo.[79]

In addition to tendering apologies, the perpetrators and accomplices of slavery and colonialism must undertake and participate in activities to commemorate and pay tributes to the victims.[80] This should include designating a UN International Day of Remembrance of the enslavement and colonial subjugation of African people. Accounts of slavery and colonialism against Africans must be included in the education curriculum of states that were victims, beneficiaries, perpetrators, or accomplices of these injustices. In developing these curricula, it is important that the victims and their families be consulted to ensure accuracy of the accounts. In this sense, Europe and the USA ought to consult the AU and governments of their former colonies when developing these curricula. Undertaking these measures will help create public consciousness on these injustices and may lead to genuine reconciliation and foster international peace, as citizens across the globe take individual and collective action to remedy the harm that was caused.

76 L Umubyeyi 'Europe's hollow apologies for colonial crimes stand in the way of true reparation' *Guardian* (London) 27 November, 2023https://www.theguardian.com/commentisfree/2023/nov/27/europe-apologies-colonial-crimes-reparation-belgium-germany-britain (accessed 17 January 2024); H Williams 'Why Britain's royals won't apologise for profiting off slavery, and why Prince Harry's admission matters' *CBS News* (Toronto) 16 January 2023, https://www.cbsnews.com/news/prince-harry-spare-book-uk-royals-slavery-colonialism-slave-trade-reparations/ (accessed 17 January 2024).

77 BBC News 'Mau Mau torture victims to receive compensation – Hague' *BBC News* (London), https://www.bbc.com/news/uk-22790037 (accessed 17 January 2024).

78 As above.

79 BBC News 'Lloyd's of London deeply sorry over slavery links' *BBC News* (London) 8November2023,https://www.bbc.com/news/business-67354167?utm_source=ground.news&utm_medium=referral (accessed 17 January 2024).

80 UN Basic Principles (n 54) para 22(g).

3.2 Guarantees of non-repetition

It may be argued that measures to guarantee non-repetition of the enslavement and colonisation of Africans are irrelevant because former slave trading and colonial countries are most unlikely to reinstate slave trading and colonialism in the twenty-first century.[81] As has been demonstrated above, and as has been adequately addressed by other scholars,[82] African people are still enduring (and remain vulnerable to) various forms of exploitation akin to or even worse than the Trans-Atlantic enslavement and colonialism. This includes the continued unlawful interferences in the domestic affairs of African states;[83] the ongoing plundering of Africa's natural resources by multinational corporations with the backing of former slave trading and colonial powers in the Global North; the continued enslavement of Africans[84] in mines that are owned by these Global North-based multinational corporations; and the continued exploitation of Africans by international financial lending institutions.[85] In order to address Africa's vulnerability to further exploitation through these neo-colonial practices, a discussion on reparatory measures that guarantee a non-repetition of similar forms of enslavement and colonialism is not only justified but is urgently imperative.

In terms of the UN Basic Principles, such measures must include establishing

> mechanisms for preventing and monitoring social conflicts and their resolution; [and] reviewing and reforming laws contributing to or allowing gross violations of international human rights law and serious violations of international humanitarian law.[86]

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81 I am grateful for the comments made by one of the reviewers of this article. For similar views, also see G Kane 'Why the reparations movement should fail' (2003) 3 *University of Maryland Law Journal of Race, Religion, Gender and Class* 194.

82 Including Rodney (n 13), Obeng-Odoom (n 15) and Táíwò (n 16).

83 See S Ndlovu-Gatsheni *Epistemic freedom in Africa: Deprovincialisation and decolonisation* (2018) 34-40; N Hodges 'Neo-colonialism: The new rape of Africa' (1972) 3 *The Black Scholar* 12-23.

84 J McQuilken, Z Shirgholami & D McFarlane 'Understanding and addressing modern slavery in DRC-UK cobalt supply chains' in N Yakovleva & E Nickless (eds) *Routledge handbook of the extractive industries and sustainable development* (2022) 514.

85 See discussion below on marginalisation of Africa in the governance of these institutions.

86 UN Basic Principles (n 54) paras 23(g) & (h). Also see United Nations Durban Declaration (n 8) para 13 where the United Nations also emphaises the need to prevent a re-occurrence of slavery and colonialism by noting that '[w]e recognise that apartheid and genocide in terms of international law constitute crimes against humanity and are major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and acknowledge the untold evil and suffering caused by these acts and affirm that wherever and whenever they occurred, they must be condemned and their recurrence prevented'.

The establishment of the UN in 1945 is one of the mechanisms (at a global level) that is aimed at monitoring conflicts and ensuring their amicable resolution. The development of international law under the UN framework must also be seen as part of the global efforts to prevent the re-occurrence of injustices such as slavery and colonialism. However, as indicated above, states that perpetrated and were complicit in the enslavement and colonisation of Africans have all but rendered the UN ineffective as a mechanism that could be utilised to redress the harm caused by these heinous injustices. Similarly, the same states have used their unjustifiable dominance in the UN to ensure that the development of international law is skewed against promoting accountability for the crimes of enslavement and colonisation of Africans.

Therefore, as is acknowledged under the UN Basic Principles,[87] part of the reparatory measures must be aimed at strengthening the UN in order for it to be an effective mechanism for protecting and promoting human rights, peace and justice. This requires the UN to be reformed in several ways, as has been suggested by other scholars.[88] However, in so far as guaranteeing Africans with the non-reoccurrence of injustices similar to slavery and colonialism, Africans must be given a permanent seat in the UN Security Council. This will put Africa on the same pedestal with other regions, and ensure that the perspective of Africans is taken on board in decision making, especially on global fundamental issues that concern human rights, peace and justice.

Africa's representation and decision-making powers within the international finance institutions must also be reviewed and strengthened as part of the reparatory measures aimed at preventing the re-occurrence of similar injustices. As indicated above, the enslavement and colonisation of Africans was sorely meant to facilitate the stealing and exploitation of Africa's resources in order to promote industrialisation and subsequent development of Europe and the USA. Decision making and access to finances from the international financial institutions, including the Bretton Woods institutions,[89] are biased against Africans and other developing countries. For example, since their establishment in 1944, the distribution of voting quotas and process of electing the leadership of the Bretton Woods Institutions have remained biased in favour of

87 UN Basic Principles (n 54) Preamble.

88 Who include O Afoaku & O Ukaga 'United Nations Security Council reform: A critical analysis of enlargement options' (2001) 18 *Journal of Third World Studies* 149-169.

89 Including the International Monetary Fund and World Bank. For a full list, see https://www.un.org/esa/africa/brettonwoods.htm (accessed 17 January 2024).

the USA and Europe, and discriminatory against Africans and other regions. A recent analysis by Mohseni-Cheraghlou reveals that

> [t]he United States continues to have the largest voting power in the WBG and IMF, holding greater than 15% of the voting power. Keeping a minimum of 15.01% voting power is critical for U.S influence in these institutions. The majority of the WBG and IMF decisions require a 50% majority vote, while some critical matters require a 70% or 85% rate of affirmative votes. Holding a larger than 15% voting power grants the United States veto power in most cases. Hence, no funding and quota increase, amendments, or other major actions can go into effect without US consent. Moreover, the United States, Japan, Germany, France, United Kingdom, as well as other European countries and US allies in various constituencies, hold more than 70% of all voting power in both institutions.[90]

Thus, these institutions are controlled and unfairly dominated by the same states that perpetrated and were complicit in the economic exploitation of Africans through their enslavement and colonisation. The justification for dominance by Europe and the USA, and the marginalisation of Africa in these institutions, was based on the size of the economies.[91] Yet, Europe and the USA grew their economies on the back of the exploitation of Africa through slavery and colonialism. Therefore, the dominance of Europe and the USA in the Bretton Woods Institutions was never justifiable even at the time these institutions were established. The UN Secretary-General, António Guterres, has called for a new 'Bretton Woods moment to radically transform the global financial architecture'.[92] Such a moment must come as part of reparatory measures to protect Africans against the re-occurrence of economic exploitation similar to what they suffered as a result of slavery and colonialism. Debates on neo-colonialism[93] suggest that the enslavement and colonisation of Africans by Europeans and the USA never ceased, partly due to the current power imbalances and marginalisation of Africans in the international governance system, particularly Africa's underrepresentation in the UN Security Council and international financial institutions.

90 A Mohseni-Cheraghlou 'Democratic challenges at Bretton Woods institutions' Atlantic Council (Web blog) 11 April 2022, https://www.atlanticcouncil.org/blogs/econographics/inequality-at-the-top-democratic-challenges-at-bretton-woods-institutions/ (accessed 17 January 2024).

91 As above.

92 Full address is available at https://press.un.org/en/2023/sgsm21691.doc.htm (accessed 17 January 2024).

93 Ndlovu-Gatsheni (n 83); Hodges (n 83).

3.3 Restitutionary measures

Restitutionary measures entail measures that, to the extent possible, seek to restore the victims of human rights violations to the original situation in which they were before the violations took place.[94] Such measures include returning the victims and their families to their place of residence and returning their property. Slave trade resulted in the forced removal of Africans from their homelands and their relocation to other world regions, including the USA, Europe, the Caribbean islands and Latin America, where they were sold off and subjected to unpaid forced labour.[95] Families were forcibly separated as a result of the slave trade. This resulted in a traumatic disconnection from their culture and loss of family identity. The descendants of those who were enslaved in this way continue to suffer the trauma of being disconnected from their culture, home and family identity.[96] Therefore, as part of restitutionary measures, the descendants of Africans who were removed from their homeland as part of slave trade must be assisted to return to their homelands if they so wish. The perpetrators of slavery and those who were enriched by slavery must bear the costs associated with the repatriation and relocation of Africans who wish to return to their homelands from where their ancestors were removed through slave trade. Some of the descendants may not wish to return to their ancestral homelands, but they have a right to retrace and reconnect with their ancestral family roots. The perpetrators of slavery and those who were enriched by slavery must bear the costs associated with such efforts to retrace the original family roots and identity of Africans whose ancestors were forcibly removed from their homeland by slave trade.

During colonialism, several forms of property (including cultural artefacts) were looted and removed from Africa. Some of these are currently stored in museums located in Europe and owned by Europeans.[97] As part of restitutionary measures, these artefacts and other properties must be returned to Africans, particularly to communities where they were stolen and removed from. The revenue that has been generated through the display of these artefacts in the museums must also be quantified and paid to Africa as part of restitution.

94 UN Basic Principles (n 54) para 19.
95 R Lewis 'How Britain underdeveloped the Caribbean: A reparation response to Europe's legacy of plunder and poverty' (2020) 68 *Caribbean Quarterly* 295-300; Beckles (n 17) 408-410; Rodney (n 13).
96 Rodney (n 13).
97 F Moradi 'Catastrophic art' (2022) 24 *Public Culture* 243-264.

Several post-independence governments inherited huge sums of debts incurred by the colonial authorities. For example, King Leopold II and, later, the Belgian state, ran up vast debts in the course of their exploitation of the Congo.[98] These debts included a $120 million loan from the World Bank, which was primarily used to buy products exported from Belgium.[99] The Congo gained independence in 1960 as Zaire and was forced to take on the debt accrued by Belgium, thereby paying for the costs of its own past exploitation. Currently it is one of the African countries struggling with a debt crisis. Although the situation of debt crisis is also attributable to government corruption in the post-independence era, the contribution of King Leopold II and Belgium to the DRC's debt crisis must be quantified and all the monies which the DRC has spent in repaying the debt accrued by the colonial powers must be returned to the DRC as part of restitutionary measures. Essentially, the DRC must be returned back to the state in which it was in as far as debt is concerned, prior to its colonisation by King Leopold II and Belgium. Similar restitutionary measures are due to several other African states that inherited colonial debts.[100]

3.4 Compensation

Slave trade and colonialism involved the exploitation of Africans and their resources for the benefit of the colonial powers and colonial elites.[101] For example, during colonialism huge quantities of minerals were siphoned from Africa to Europe. This includes gold, copper, diamonds, cobalt, uranium, coltan, rubber and iron, which were used to propel and sustain Europe's industrialisation. For example, historical studies[102] have shown that the manufacturing of bicycles, automobile tyres and electrical insulation in Europe was enabled by rubber from the Congo which was under the colonial occupation of King Leopold II with backing from the Belgian state. The development of Europe's military industrial complex was also enabled by the siphoning of uranium and other minerals from African colonies. For example, it has been reported that the brass casings of allied shells fired during the battle of Passchendaele (in Belgium) and the battle of Somme (in France) during World War I by Allied forces against the Germany Empire were 75 per cent Congolese copper, while the

98 Hochschild (n 25) 161-170.
99 BBC News (n 25).
100 Umubyeyi (n 45).
101 C Mavhunga 'Africa's move from raw material exports toward mineral value addition: Historical background and implications' (2023) 48 *MRS Bulletin* 395-406.
102 BBC News (n 25); Hochschild (n 25) 161-170.

uranium used to make the nuclear bombs dropped on Hiroshima and Nagasaki was taken from a mine in South-East Congo.[103]

In addition, Africans were disposed of their land by colonial governments. Their land was allocated to colonial European farmers who – using cheap labour provided by Africans – produced cash crops such as wheat, cotton and tobacco that were exported to Europe for use as raw materials for the development of finished goods in Europe, supporting the industrial revolution in the Global North.[104] Inevitably, Africa suffered severe economic losses as a result of the siphoning of its natural resources by colonial European powers. Europe's unjustified enrichment on the basis of slave labour and exploitation of African natural resources needs to be quantified, and so is the economic loss that was suffered by Africa as a result of slave trade and colonialism. Based on these quantifications, an agreed sum of funds must be paid to African former colonies by the colonisers. In this regard, the AU should consider the quantification formulas proposed by scholars who include Beckles[105] and Obeng-Odoom.[106]

Due to slave trade, some Africans were forcibly relocated to areas such as the Caribbean islands, which are more vulnerable to the effects of the climate change crisis, including drought and floods as a result of rising sea levels. These descendants of African slaves must be compensated for the loss and damage they have suffered thus far as a result of climate change crisis. In this regard, the AU should seriously consider incorporating the proposals made by scholar Táíwò[107] on specific measures that must be implemented by the Global North as part of discharging their reparations debt to Africa in the context of climate justice.

4 How the African Union can pursue the reparative justice agenda

Having proposed the nature of reparatory measures that the AU should consider pursuing, the next important question for discussion is how the AU should pursue its campaign for reparative justice. In its February 2023 Resolution[108] the AU invited the academia to suggest ideas that can feed into the development of a programme of action by

103 BBC News (n 25).
104 Mavhunga (n 101) 395-406; Rodney (n 13) 150.
105 Beckles (n 51) 170-171.
106 Obeng-Odoom (n 15) 459.
107 Táíwò (n 16).
108 African Union (n 6).

the continental body. Several suggestions have been proffered thus far.[109] Some have suggested that the AU should pursue reparative justice as a legal claim.[110] This approach would entail petitioning domestic and or international tribunals for adjudication of Africa's claims for reparations as redress for the injustices of enslavement and colonialism. Some have argued that the cause for reparative justice should be pursued through political action. In the parts below I examine these suggestions and offer my own views on the way forward.

4.1 Litigation

To some extent, this approach (of litigation) has been applied (with very limited success in the United States of America) and in Britain, and there are lessons to be drawn by the AU and the broader Africa reparations movement. In the USA there have been attempts to bring class action civil law suits against corporations that have profited from the enslavement of African-Americans. Notably, in 2004 a suit was filed in the federal court in Manhattan claiming reparations from Lloyd's of London, FleetBoston and RJ Reynolds for aiding and abetting the commission of genocide by (allegedly) financing and insuring the ships that delivered slaves to tobacco plantations in the USA.[111] No judicial remedy was obtained through these petitions. However, some of the companies have now apologised for their role in supporting slave trade. For example, Lloyd's of London apologised and in 2023 pledged $50 million for its role in the slave trade, which included extending insurance to voyages carrying slaves and even insuring slaves as cargo.[112] Though far from being enough, the apology and the pledge could have been a result of the pressure exerted through litigation as well as the emergence of further damning evidence[113] that demonstrated the role of the company in supporting slave trade.

In 2011 Mau Mau victims of British colonialism in Kenya petitioned a British High Court for an order of 'compensation for the harms they had suffered in British detention camps'.[114] The petition was opposed by the British government, arguing that the applicants did not have

109 African Union Commission (n 7).
110 As above.
111 For a list of these cases and their progression, see https://www.business-humanrights.org/en/latest-news/slave-descendants-file-1b-lawsuit/ (accessed 17 January 2024).
112 BBC News (n 79).
113 Lloyd's made its pledge just before the publication of a ground-breaking research by John Hopkins University (n 26).
114 Paulose & Rogo (n 35) '369.

the right to pursue such a claim in British courts. The Court ruled that the Mau Mau victims had the right to sue in British courts for compensation.[115] Partly as a result of the pressure exerted through litigation, the British government negotiated and reached an out-of-court settlement with the applicants, agreeing to pay £19,9 million to the 5 228 victims.[116] The AU and the Africa reparations movement should study these legal cases more closely and identify opportunities for mounting and supporting similar litigation efforts in the domestic courts of the relevant states, targeting governments, royal families and private corporations.

Litigation using the international legal system is heavily constrained. The ICJ, established in 1945 under the auspices of the UN, would have been the most appropriate forum to pursue a legal claim for reparations to redress the enslavement and colonisation of Africans. The ICJ's mandate includes the adjudication of and the making of binding decisions to settle disputes between member states of the UN, in accordance with international law.[117] As a general rule, any state party to the ICJ Statute can bring cases before the ICJ against another state that is also party to the Statute.[118] All the 193 members of the UN are *ipso facto* parties to the Statute of the ICJ.[119] However, member states are permitted to deposit declarations (to the UN Secretary-General) through which they prescribe conditions under which they recognise the jurisdiction of the Court.[120] Several member states, who are beneficiaries, perpetrators and or accomplices in the enslavement and colonisation of Africans, have deposited declarations stipulating that they only recognise the jurisdiction of the ICJ to settle legal disputes arising from facts that took place after a certain period. For example, the United Kingdom (Britain) has stipulated that it accepts the jurisdiction of the ICJ only over disputes of which the facts arose after 1 January 1987.[121] Similarly, the government of Spain has excluded from its recognition of the ICJ's jurisdiction all disputes of which the facts arose prior to 29 October 1990[122] or relating to events or situations that occurred prior to that date, even if such events or situations may continue to occur or to have effects

115 As above.
116 BBC News (n 77).
117 Arts 36 & 38 of the Statute International Court of Justice, 1945.
118 Statute (n 117) arts 34(1) & 35(1).
119 Statute (n 117) art 35(1) read together with art 93(1). See full list on https://www.icj-cij.org/states-entitled-to-appear (accessed 17 January 2024).
120 Statute (n 117) art 36(2).
121 See para 1 of the Declaration, https://www.icj-cij.org/declarations/gb (accessed 17 January 2024).
122 The date on which it deposited its declaration with the Secretary-General of the United Nations, in terms of art 36 of the Statute.

thereafter.[123] Germany has deposited a declaration stipulating that it recognises the jurisdiction of the ICJ in legal disputes of which the facts arose after 30 April 2008 and other than legal disputes that 'relate to, arise from or are connected with the deployment of armed forces abroad, involvement in such deployments or decisions thereon'.[124] Portugal deposited its initial declaration recognising the jurisdiction of the ICJ in December 1955. However, in February 2005 it amended this declaration to, among other requirements, stipulate that it recognises the jurisdiction of the ICJ only in legal disputes of which the facts arose after 26 April 1974.[125]

These sinister exceptions have effectively enabled states that are guilty of the injustices of slavery and colonialism against Africans to circumvent liability under the ICJ Statute. However, the ICJ can still be approached to issue an advisory opinion[126] on certain legal questions regarding the interpretation of international law in the context of the right to reparative justice for Africans. For example, the AU and others should consider seeking an advisory opinion from the ICJ on whether UN member states have an obligation to establish a special tribunal to adjudicate legal claims for reparations to redress slavery and colonialism suffered by Africans, given the absence of a competent judicial forum within the international legal system to adjudicate over these claims. Such a petition for an advisory opinion should be founded on the claim that the right to remedies was a recognised principle of customary international law at the time the ICJ was established and at the time of the enslavement and colonisation of the African people. Further, as demonstrated above, enslavement and colonialism of Africans are a continuing crime given that Africans continue to experience and suffer the harm long after the formal declaration of the end these historical crimes. On this basis, the ICJ can found jurisdiction to adjudicate the petition for an advisory opinion of this nature. An advisory opinion could also be sought on whether the refusal by certain states to pay reparations for their role in slavery and colonialism, yet they paid reparations to redress violations of the rights of other oppressed people (including the Jews),[127] does not constitute unfair discrimination against Africans.

123 See para 1(d) of the Declaration, https://www.icj-cij.org/declarations/es (accessed 17 January 2024).
124 See para 1(ii)(a) of the Declaration, https://www.icj-cij.org/declarations/de (accessed 17 January 2024).
125 See para 1(iii) of the Declaration, https://www.icj-cij.org/declarations/pt (accessed 17 January 2024).
126 Statute (n 117) arts 65-68.
127 Eg, the Jewish survivors of the holocaust have been receiving compensation from Germany for the holocaust. See 'Germany marks 70 years of compensating holocaust survivors with payment for home care' *NBC News* (New York) 15 September 2022.

Though not legally binding by themselves,[128] advisory opinions on these questions would clarify certain legal questions, including on the nature of obligations that are due from states and non-state actors with regard to reparatory justice, and such clarifications may strengthen litigation efforts in domestic tribunals as well as strengthen other advocacy efforts within the international relations arena.

4.2 Political action

Litigation efforts must be supported with strong political action. Such political action could include making the acceptance of liability for reparations by Europe and the USA to be a mandatory condition for diplomatic, trade and other forms of engagements and cooperation with the AU and its members states. In this sense, Africa's trade policy with the European Union (EU) and the USA must be linked to Africa's quest for reparatory justice. Africa is endowed with vast mineral resources that are critical for Europe and the USA's economic survival and growth. According to the latest EU critical mineral list,[129] these resources include lithium, cobalt, platinum, phosphate rock and light rare earth elements. African states account for the largest reserves of some of these minerals. For instance, Zimbabwe is ranked the sixth largest producer of lithium, accounting for 1,4 per cent of the world's reserves.[130] Several recent surveys[131] show that the DRC has the largest cobalt reserves in the world, accounting for nearly half of the world's reserves of the metal. Madagascar has the world's seventh largest reserves of cobalt.[132] South Africa and Zimbabwe are among the top five world producers of platinum.[133] A recent European Commission report[134] indicates that South Africa provides

128 Statute (n 117) arts 65-68.

129 Critical materials are raw materials for which there are no viable substitutes with current technologies, which most consumer countries are dependent on importing, and whose supply is dominated by one or a few producers. For a full list, see https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0474 (accessed 17 January 2024).

130 C Pavlovic 'Zimbabwe: A new focus for lithium mining' *Mining Weekly* (Harare) 18 April 2023, https://www.miningweekly.com/article/zimbabwe-a-new-focus-for-lithium-mining-2023-04-18 (accessed 17 January 2024).

131 See Statistica 'Reserves of cobalt worldwide in 2022, by country' (2022) https://www.statista.com/statistics/264930/global-cobalt-reserves/ (accessed 17 January 2024).

132 As above.

133 WorldAtlas 'The top platinum producing countries in the world' (2023), https://www.worldatlas.com/articles/the-top-platinum-producing-countries-in-the-world.html (accessed 17 January 2024).

134 European Commission 'Critical raw materials resilience: Charting a path towards greater security and sustainability' (2022) 2, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0474 (accessed 17 January 2024).

71 per cent of the EU's needs for platinum and an even higher share of the platinum group metals, iridium, rhodium and ruthenium.[135]

Other minerals that are critical to Europe and the USA include gold, diamonds and oil, and Africa accounts for some of the largest reserves of these minerals. For example, Nigeria, Angola, Algeria, Egypt and Libya are among the top 30 producers of oil in the world.[136] Of the ten world's largest producers of diamonds, eight are African states, and these are Botswana (second largest producer), the DRC, South Africa, Namibia, Angola, Zimbabwe, Lesotho and Sierra Leone.[137] South Africa, the DRC and Botswana are among the world's top five producers of gold,[138] while Zambia and the DRC are among the world largest producers of copper.[139]

Africa must leverage on its resources endowment in order to sustain its campaign for reparatory justice by making its trade with Europe and the USA conditional to their acceptance of liability for reparations, as part of addressing the harm they caused to Africans through enslavement and colonialism. In undertaking this policy, Africa must forge alliances with other regions, crucially Latin America, China and Russia. Latin America holds a significant share of minerals that are critical to Europe. For example, Brazil is among the largest producers of oil[140]and lithium.[141] China provides 98 per cent of the EU's needs of rare earth elements, [142] while Russia is the world's largest producer of diamonds.[143] Therefore, Africa must consider forging alliances with China, Brazil and Russia so that these countries can also impose trade conditions on Europe and the USA, which seek to reinforce Africa's quest for Europe and the USA to accept liability for

135 M Pistilli 'Top 10 phosphate countries by production' *Investing News Network* (Toronto) 6 June 2023, https://investingnews.com/daily/resource-investing/agriculture-investing/phosphate-investing/top-phosphate-countries-by-production/ (accessed 17 January 2024).
136 Worldometers 'Oil production by country' (2023), https://www.worldometers.info/oil/oil-production-by-country/ (accessed 17 January 2024).
137 S Parker & P Rao 'Ranked: The world's top diamond mining countries, by carats and value' (2023) *Visual Capitalist*, https://www.visualcapitalist.com/cp/world-diamond-mining-by-country/ (accessed 17 January 2024).
138 Diamond Registry 'World's top diamond-producing countries' (2023), https://www.diamondregistry.com/education-guides/worlds-top-diamond-producing-countries/ (accessed 17 January 2024); WorldAtlas 'World's top 5 diamond-producing countries' (2023), https://www.worldatlas.com/industries/world-s-top-5-diamond-producing-countries.html (accessed 17 January 2024).
139 World Economic Forum 'Which countries produce the most copper?' (2022) https://www.weforum.org/agenda/2022/12/which-countries-produce-the-most-copper/ (accessed 17 January 2024).
140 Worldometers (n 136).
141 Statistica 'Mine production of lithium in Brazil from 2011 to 2022' (2022), https://www.statista.com/statistics/717596/brazil-lithium-production/ (accessed 17 January 2024).
142 European Commission (n 134).
143 Parker & Rao (n 137).

reparations to redress the enslavement and colonisation of Africans. In addition to other global forums, BRICS[144] and the Non-Aligned Movement could offer an opportunity for the forging of such an alliance on reparations. Brazil is home to millions of descendants of African slaves,[145] has suffered colonialism, while China and Russia have historically supported Africa's anti-colonial struggles and, thus, would consider supporting Africa's quest for reparatory justice against enslavement and colonialism.

Africa's pursuit to promote intra-trade under the Africa's Continental Free Trade Area (ACFTA) agreement should also be utilised to advance the reparative justice agenda. If fully implemented, the ACFTA could see Africa establishing the world's largest single market.[146] Africa can leverage on this to pursue its reparative justice agenda by adopting a policy that makes access to its market by Europe and the USA conditional on their acceptance of liability for reparations to address the harm caused by their enslavement and colonisation of Africa.

However, in order for this policy to be effective, African states would have to be united in their pursuit for reparatory justice. The 2023 Resolution of the AU, in which they adopted a common position on this issue, is a step in the right direction and offers an opportunity for the development of a legal and political programme around which Africa can unite, as well as forge the necessary global alliances.

5 Conclusion

There is ample evidence presented in existing literature that makes a clear case for Africa's claim for reparations to address the harm caused by their enslavement and colonisation by the USA, Europe and private corporates. There is a range of evidence demonstrating that Africans are still reeling from the harm caused by the enslavement of their ancestors and colonisation. Though a clear case for reparations has been made, Africa is yet to develop (in substantive terms) the package of reparatory measures it seeks to pursue, and a programme

144 An intergovernmental organisation comprising Brazil, Russia, India, China and South Africa.

145 M Battle 'African passages' (1990) *Lowcountry Digital History Initiative*, https://ldhi.library.cofc.edu/exhibits/show/africanpassageslowcountryadapt/sectionii_introduction/north_american_context#:~:text=Of%20the%20over%20twelve%20million,were%20sent%20to%20North%20America (accessed 17 January 2024).

146 V Mlambo & M Masuku 'Africa trade with yourself: Challenges in facilitating the African Continental Free Trade Agreement' (2022) 21 *African Studies Quarterly* 59.

of action through which it seeks to secure the acceptance by Europe, the USA and other entities of their liability for reparations. In this article I have proposed that since the enslavement and colonisation of Africans were crimes against humanity and serious human rights violations, the UN Basic Principles should be used as both the conceptual and legal framework for identifying reparatory measures that are due to Africa. According to the UN Basic Principles,[147] reparations are measures aimed at redressing violations of human rights suffered by victims or their families as well as affected communities. The measures must be adequate.[148] In order to meet the standard of adequacy, reparations must include measures for restitution, compensation, rehabilitation, repatriation, satisfaction and cessation of continuing violations.[149]

In pursuit of the reparative agenda, the AU must explore opportunities for litigating its claim using the ICJ as a forum. However, the ICJ lacks jurisdiction to settle, through binding decisions, any disputes relating to Africa' reparations claim. The ICJ can only provide non-binding advisory opinions on certain important legal questions regarding the interpretation of international law in the context of the right to reparative justice for Africans. For example, the AU and others should consider seeking an advisory opinion on whether the international community has an obligation to establish a special tribunal to adjudicate legal claims for reparations for slavery and colonialism suffered by Africans, given the absence of a competent judicial forum within the international legal system to adjudicate over these claims. An advisory opinion could also be sought on whether the refusal by certain states to pay reparations for their role in slavery and colonialism, yet they paid reparations to redress violations of the rights of other oppressed people, does not constitute unfair discrimination against Africans. Though not legally binding, advisory opinions on these questions would strengthen litigation efforts in domestic tribunals as well as strengthen other advocacy efforts within the international relations arena.

Legal action should be supported through diplomatic pressure. Crucially, Africa must consider designing its trade policy towards the EU and the USA in ways that make access to African resources and markets conditional to Europe being acceptable to repair the damage they caused through the enslavement and colonisation of Africans. African states have the leverage to adopt such a policy because Africa is the source of most of the mineral resources that are critical for

147 UN Basic Principles (n 54) para 15.
148 As above.
149 UN Basic Principles (n 54) paras 15-23.

Europe's and the USA's economic survival and growth, which include cobalt, gold, diamonds, lithium and platinum. The establishment of a single market under the ACFTA agreement should be accelerated. If fully implemented, the ACFTA will see Africa establishing the world's largest single market. Africa can leverage on this to pursue its reparative justice agenda by adopting a policy that makes access to its market by Europe and the USA conditional on their acceptance of liability for reparations to address the harm caused by their enslavement and colonisation of Africa. In undertaking these policies, the AU must forge the necessary global alliances, particularly with Latin America, CARICOM, China and Russia.

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Expounding the frontiers of the human rights agenda of the African Union for the extra-Africa diaspora

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Summary: *There are no rights without responsibilities in the African context. The reverse is equally true: Responsibility is supported by rights. The African Union declaration of Africa's diaspora as the sixth (demographic) region of the African continent triggers a critical discussion of the human rights obligations of the regional body to its diaspora. The African diaspora's invited tactical intervention in the progression of the AU of necessity triggers the expansion of the human rights promotion and protection mandate of the AU to people of African heritage worldwide. Specific human rights guarantees to the diaspora facilitate its envisioned full participation in building the continent. The African diaspora can only make a substantial contribution if its rights are respected, protected and fulfilled in Africa and elsewhere. The 2012 African Diaspora Programme of Action rightly represents the evolving mandate and the nature of the commitment of the AU to embrace it. This mandate comprises the need to address the concerns of African immigrant communities, including recognition of the identity of a person of African descent on the African continent; confronting anti-black racism globally and promoting equality of all races; eradicating political and socio-economic marginalisation of*

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diaspora communities; and advancing Africa's agenda for reparations. These strategies have their nucleus in Africa-led and Africa-advanced approaches; the momentum commences from Africa to the world, with an evident reciprocal effect.

Key words: *African Union; human rights mandate; extra-Africa diaspora; people of African descent; Africa Diaspora Programme of Action*

1 Introduction

One of the objectives of the African Union (AU) is to invite and encourage the full participation of the African diaspora as an important part of the African continent, in the building of the AU.[1] The African diaspora has consequently become known as the 'sixth (demographic) region' of the AU,[2] in addition to the five geographical regions: Central, Eastern, Western, Southern and Northern Africa. This endeavour forges a specialised African diaspora by raising the profile of the criterion of 'relationship with homeland', as one of the dimensions of the diaspora raised by Butler.[3]

The African diaspora is loosely described as consisting of peoples of African origin living outside the continent, irrespective of their citizenship and nationality, and who are willing to contribute to the development of the continent and the building of the AU.[4] There is no firm description of the term 'African diaspora',[5] and self-identification is a key convening factor.[6] 'Diaspora' *per se* is fluid and complex. Zeleza describes it as

> a state of being and a process of becoming, a kind of voyage that encompasses the possibility of never arriving or returning, a navigation of multiple belongings. It is a mode of naming, remembering, living

1 See art 3(q) Protocol on Amendments of the Constitutive Act of the African Union, 2003.

2 See para I(k) African Diaspora Programme of Action, 2012 Diaspora/Assembly/AU/Decl(I), adopted by the Assembly of the AU at its 19th ordinary session on 11 July 2013, Maputo, Mozambique, entered into force in August 2016. The participation of representatives from the African Diaspora and the Caribbean Community (CARICOM) enhanced the legitimacy of the Plan of Action.

3 K Butler 'Brazilian abolition in Afro-Atlantic context' (2000) 43 *African Studies Review* 127.

4 Report of the meeting of experts from members of states on the definition of African Diaspora para 18, African Diaspora (dirco.gov.za) (accessed 30 October 2024).

5 MB Salau 'African diasporas: History and historiography' *Oxford research encyclopedia of African history* (2018).

6 H Abbas 'From roots to branches: The African diaspora in a union government of Africa' in T Murithi (ed) *Towards a union government for Africa: Challenges and opportunities. Monograph No 140* (2008) 121.

> and feeling group identity moulded out of experiences, positionings, struggles and imaginings of the past and the present, and at times the unpredictable future, which are shared across the boundaries of time and space that frame 'indigenous' identities in the contested and constructed locations of 'there' and 'here' and the passages and points in between.[7]

There is a noble agenda of building a global African family by ensuring the participation of the African diaspora in the integration and development of the continent.[8] This development validates the heritage of millions of persons of African descent, who were forcibly moved from the African continent during the trans-Atlantic trade and trafficking in enslaved Africans, and fortifies the citizenship, identity and belonging of millions of African migrants currently living in the Americas, Europe and Asia. The significance of Africa's diaspora to the continent is traceable to the origins of pan-Africanism in the 1800s, and the diaspora's centrality as a catalyst of the movement.[9]

The term 'African diaspora' emerged in scholarship in the 1950s.[10] Zelesa classifies the African diaspora into two formations: the historic African diaspora and the contemporary African diaspora both within (intra-Africa diaspora) and outside (extra-Africa diaspora) on the continent. The historic diasporas refer to the diasporas formed before the construction of colonial states that altered the territorial identifications of Africans, and the contemporary diasporas are those formed since the late nineteenth century.[11] Also described in terms of colour as the 'black diaspora', scholars rightly note that unlike other diasporas that are described in national, ethnic or ideological terms, the African diaspora is homogenised and racialised based upon the Atlantic experience of forced migration of the sixteenth to nineteenth centuries[12] and, more recently, on the dramatic movement across the Sahara, through the Atlantic to Europe.

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7 PT Zeleza 'Rewriting the African diaspora: Beyond the Black Atlantic' (2005) 104 *African Affairs* 41.

8 Diaspora & Civil Society Engagement | African Union (au.int) (accessed 30 October 2024).

9 AG Moges & M Muchie 'The political economy of pan-Africanism' in R Rabaka (ed) *Routledge handbook of pan-Africanism* (2020) 60, https://www.routledgehandbooks.com/doi/10.4324/9780429020193-3 (accessed 30 October 2024); RK Edozie 'The sixth zone: The African diaspora and the African Union's global era pan-Africanism' (2012) 16 *Journal of African American Studies* 272.

10 See also Salau (n 5).

11 Zeleza (n 7) 55.

12 E Alpers 'The African diaspora in the Indian Ocean: A comparative perspective' in S Jayasuriya & R Pankhurst (eds) *The African diaspora in the Indian Ocean* (2003) 21.

The racialisation of Africa's diaspora affects self-identification, sustaining clear race-based lines of difference among persons of African origin. The narratives of defeat and desperation are set to obscure all other reasons for and conditions of dispersal, hence perpetrating barriers to the realisation of the human rights of people of African descent, especially racism and racial discrimination, and marginalisation of African diaspora communities. Derogatory labels are accorded to both the intra- and extra-Africa diaspora such as *Kafir* or unbeliever in certain Middle East and Asian countries;[13] and *Makwerekwere* in South Africa.[14] Of note is the inaccurate representation of the size of the African diaspora partly intended to deliberately 'whiten' the histories and images of certain countries by, among others, misleading use of government statistics.[15] Ideological cleansing perpetrates invisibility of people of African descent and a false minority narrative that excuses inadequate policy reforms.

This article explores how the African Diaspora Programme of Action of 2012 extends the human rights mandate of the AU to the extra-Africa diaspora. It contends that the integration of the African diaspora (as humans and peoples) in the AU also activated the continental body's objective in article 3(h) of the Constitutive Act, to promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights (African Charter) and other relevant human rights instruments. The African human rights system comprises instruments that make provision for individual and peoples' rights, and institutions that promote and protect them. The article embodies an analysis of the key thematic interventions envisaged in the African Diaspora Programme of Action, including (i) mainstreaming the concerns of African diaspora communities in foreign policy; (ii) actualising the identity of a person of African descent on the African continent; (iii) confronting anti-black racism and promoting equality of all races; (iv) eradicating political and socio-economic marginalisation of diaspora communities; (v) combating trafficking, exploitation and contemporary enslavement of people of African descent; (vi) promoting favourable regulatory mechanisms governing migration; and (vii) advancing Africa's agenda for reparation. This could be deemed the 'AU Seven-Point Agenda in Africa's Diaspora'.

13 Zeleza (n 7) 35-68.
14 DM Matsinhe 'Africa's fear of itself: The ideology of Makwerekwere in South Africa' (2011) 32 *Third World Quarterly* 295-313.
15 Zeleza (n 7) 51.

2 Thematic interventions of the African Union in Africa's diaspora

2.1 Mainstreaming the concerns of African diaspora communities in foreign policy

African immigrants are persons who have journeyed within Africa, but also to the Americas, Europe and Asia,[16] intending to permanently settle there. Racism against people of African descent (anti-black racism) is a major barrier to the enjoyment, by the African diaspora, of global human rights advancements. They are confronted with invisible but effective borders to their personal economic, social and political mobility and development, translating into vulnerable African diaspora communities. Even in their precarious state, African diaspora immigrant communities play a significant role in negotiating barriers against the realisation of the rights of Africans abroad, and amplifying the voices of their mostly 'invisibilised' constituency. However, these communities lack meaningful engagement with authorities about concerns of African immigrants because of underrepresentation in government and state institutions.[17] The respective concerns are either directly traceable and lie within the ambit of the African countries of origin or the countries in which they settle. The first category of concerns includes lack of infrastructural support to engage and operate remotely in systems of African countries; inadequate facilitation for acquisition of essential documents from home countries such as birth certificates, national identity documents, police clearances, passports, certificates of no impediment or certificates of no record of marriage and alike, resulting in statelessness; financial exclusion; and disproportionate detention of African migrants in the diaspora.[18] Bureaucratic hurdles delay the issuance of documents and are often accompanied by demands such as physical presence of the applicant and predominantly paper-based operations, which make the processes impracticable for persons in the diaspora with limited mobility.[19] The financial sector in many countries in Africa is equally

16 PL Kasanda 'Identification and definition of "people of African descent" and how racial discrimination against them is manifested in various regions' Commission of Human Rights, E/CN.4/2003/WG.20//WP.3 23 January 2003 para 6.

17 S Gumedze 'The influence of the African diaspora on democracy-building processes in countries of residence' (2019) 3 *Global Campus Human Rights Journal* 116.

18 See Country Visit Reports of the Working Group of experts on people of African descent especially Australia that has indefinite migrant detention.

19 As above.

inclined to domestic products with restricted reach to the diaspora. Lack of documentation is a causal factor for financial exclusion.

The African Diaspora Programme of Action expresses the intention of the regional entity to 'engage developed countries with a view to address concerns of African immigrants in diaspora communities'.[20] The Programme of Action was the outcome document of the Global African Diaspora Summit that sought to 'explore concrete ways and means of harnessing the abundant human and material resources in Africa and beyond, to advance the socio-economic development of the continent'.[21] The objective and purpose of the African Diaspora Programme of Action would be to establish the Magna Carta of the diaspora process and put in place effective plans and mechanisms for facilitating its successful implementation as well as benchmarks and indicators for evaluating and monitoring its progress.[22]

The regional and international cooperation agenda of the AU should mainstream concerns of Africa's diaspora that emerge from the context in which they settle. Kabongo and Okpara note that following the African diaspora in developed countries is a factor that increases the speed of internationalisation.[23] Existing entry points include the work of the Citizens and Diaspora Organisations Directorate (CIDO) as the focal point and hub of the AU's engagement with the diaspora, and 'a catalyst for rebuilding the global African family in the service of the development and integration agenda of the continent';[24] the participation of the AU, as an observer, in the work of the General Assembly and the Human Rights Council; the AU-European Union (EU) partnership on education that promotes harmonisation of education systems and mutual recognition of qualifications, among other relevant subjects.[25] This should translate into systems, with elaborate and equitable criteria for recognition and accreditation of qualifications from African institutions among all EU member states and *vice versa*. At the 2022 European Union-African Union Summit, the regional bodies agreed to deepen their cooperation in finding durable solutions for asylum seekers, refugees and vulnerable migrants.[26] The experience of asylum seekers of African descent in Europe as they fled the war in Ukraine highlighted the significance of

20 African Diaspora Programme of Action, 2012 para D(a).
21 See Introduction of the African Diaspora Programme of Action (n 2) 1.
22 As above.
23 JD Kabongo & JO Okpara 'Timing and speed of internationalisation: Evidence from African banks' (2019) 102 *Journal of Business Research* 12.
24 https://au.int/diaspora-division (accessed 11 October 2024).
25 The European Union and the African Union – Human Development | EEAS Website (europa.eu) (accessed 30 October 2024).
26 European Union – African Union summit – Consilium (europa.eu) (accessed 30 October 2024).

a regional response in eliminating racial discrimination in this area.[27] The UN Working Group of Experts on People of African Descent reveals the appalling living conditions and state of precariousness of asylum seekers from Eritrea in Switzerland,[28] which differs from the plight of persons of other races in a similar situation. A commitment was made at the EU-AU Summit to strengthen asylum systems to provide adequate reception and protection for those eligible, as well as to work on their integration.[29] The leaders also agreed to keep working to address the root causes of irregular migration and forced displacement.[30] The overarching concerns of the African diaspora include substantive recognition of the identity of a person of African descent on the African continent; the elimination of racism and the promotion of equality of all races; eradicating political and socio-economic marginalisation of diaspora communities; and advancing Africa's agenda for reparation.

2.2 Actualising the identity of a person of African descent on the African continent

Persons of African descent include Africans that were displaced to the Americas and parts of Europe during the trans-Atlantic trade and trafficking in enslaved Africans.[31] The tragic trade distorted the foundations of citizenship and the identity of its victims. Multitudes were forcibly moved and dispersed in various parts of the world. This led to the emergence of several African diaspora identities globally, including African Americans, Afro-Caribbeans, Afro-Latin Americans, African Europeans, African Australians, and black Canadians, among others. The African identity, however, remained with them and many of them self-identify as people of African descent – a term that emerged as a legacy of the World Conference Against Racism of 2001. Multitudes have sought the aid of scientific means, such as DNA testing, to ascertain their possible countries of origin in Africa. To self-identity as a person of African descent is to present a legitimate claim of belonging to the place where one traces their ancestry. A cautious effort to recognise, document and incentivise

27 See Statement of the African Union on the reported ill-treatment of Africans trying to leave Ukraine, 28 February 2022, Microsoft Word – english.docx (au.int) (accessed 11 October 2024).
28 See statement to the media Working Group of Experts on People of African Descent, on the conclusion of its official visit to Switzerland, 17-26 January 2022 para 33, Statement to the media by the United Nations Working Group of Experts on People of African Descent, on the conclusion of its official visit to Switzerland | OHCHR (accessed 30 October 2024).
29 European Union – African Union summit – Consilium (europa.eu) (accessed 30 October 2024).
30 As above.
31 Kasanda (n 16) para 6.

the identity of a person of African descent is necessary to formalise the interrelation between Africa and the African diaspora.

Of note, a development model with prospects of success should envisage belonging and ownership rights by people of African descent in African institutions, other entities and spaces on the continent. A framework of qualified descendant status is a fundamental basis. In some parts of the world, the term 'compatriots' is used to refer to citizens that temporarily live abroad, and former citizens who become citizens of other states, while 'diaspora' refers to people who have never been recognised as citizens but consider themselves citizens in terms of ethnic, linguistic, cultural or historical ties.[32] 'Steps have been taken to recognise the diaspora as citizens in most Eastern Europe and Central Asian countries (EECA).'[33] The Caribbean Community (CARICOM) Ten-Point Plan for Reparatory Justice makes a defensible proposal for the establishment of a repatriation programme to resettle descendants of persons of African descent who desire to return to Africa, and that[34] such a programme should address matters such as citizenship, and deploy best practices in respect of community integration.[35] This appeal is not unprecedented. The European Union Global Diaspora Facility (EUDiF) confirms that all countries in the Eastern Europe and Central Asia (EECA) region are establishing special return and reintegration programmes.[36] Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova and Ukraine have special repatriation programmes that are intended to attract citizens and non-citizens with ethnic, cultural and/or historical ties to resettle voluntarily in the countries of their citizenship of origin for the purpose of permanent residence.[37] In Africa, Ghanaian law allows for a right of abode to be conferred upon a person of African descent living in the diaspora.[38] A pioneering project dubbed 'Repatriate to Ghana' has developed fruitfully under which several African-Americans have repatriated to the West African nation,[39] but there is lack of clarity in institutional and policy frameworks.[40]

32 Eg Armenia, Azerbaijan, Georgia, Kyrgyzstan, Tajikistan and Uzebekistan; see EUDiF_Regional-Overview_EECA-v.3.pdf (diasporafordevelopment.eu) 8 (accessed 30 October 2024).
33 EUDiF_Regional-Overview_EECA-v.3.pdf (diasporafordevelopment.eu) 5 (accessed 30 October 2024).
34 CARICOM Ten-Point Programme for Reparatory Justice para 2. The framework was endorsed by the UN Working Group of Experts on People of African Descent.
35 As above.
36 See EUDiF (n 32) 5-6.
37 EUDiF (n 32) 9.
38 Ghana Immigration Service 2020 *Right of abode*, | Visit Us for your Extention/ Renewal of all (gis.gov.gh) (accessed 30 October 2024).
39 See Repatriate to Ghana, Moving to Ghana | Bringing the Diaspora to Ghana (repatriatetoghana.com) (accessed 30 October 2024).
40 See Diaspora engagement mapping: Ghana 3, CF_Ghana-v.2.pdf (diasporafor development.eu) (accessed 30 October 2024).

2.3 Confronting anti-black racism and promoting equality of all races

Equality of all races is determined from a transnational perspective. The Human Rights Strategy for Africa underscores the significance of the guiding principle of universality of rights.[41] Africa has an extensive array of human rights and human rights-related frameworks that comprise treaties, declarations and resolutions, which address thematic issues[42] and concerns of specialised groups, including women,[43] children,[44] persons with disabilities,[45] migrants and refugees,[46] internally-displaced persons,[47] and human rights defenders.[48] Nevertheless, 'insufficient implementation and enforcement of human rights norms and decisions' is a challenge of the African human rights system,[49] and 'the capacity and resources for implementation have not matched the progress achieved in adopting human rights instruments and establishing institutions'.[50] There is a significant gap between the comprehensive regional human rights framework and the lived realities of the people in Africa, so that it can be concluded that human rights are a rhetorical rather than a universal reality on the continent. Leaders of AU member states with a poor human rights record assume the leadership of the organisation, tainting the commitment of the Union to its own human rights

41 Human Rights Strategy for Africa para 27(d), https://au.int/sites/default/files/documents/30179-doc-hrsa-final-table_en3.pdf (accessed 11 October 2024) (accessed 30 October 2024). The Human Rights Strategy for Africa is a guiding framework for collective action for the AU, regional economic communities (RECs), and member states intended to strengthen the African human rights system. The vision is a unified well-governed Africa respectful of human dignity and in which a culture of human rights and democracy is institutionalised (para 25).

42 African Charter on Human and Peoples' Rights.

43 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa of 2003 (African Women's Protocol), https://www.un.org/shestandsforpeace/sites/www.un.org.shestandsforpeace/files/protocolontherightsofwomen.pdf; AU Strategy for Gender Equality and Women's Empowerment, https://au.int/en/articles/au-strategy-gender-equality-and-womens-empowerment (accessed 30 October 2024).

44 African Charter on the Rights and Welfare of the Child.

45 Protocol to the African Charter on Human and Peoples' Rights on the Rights of People with Disabilities in Africa 2018, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-persons-disabilities-africa (accessed 30 October 2024).

46 Resolution on missing migrants and refugees in Africa and the impact on their families ACHPR/Res. 486 (EXT.OS/XXXIII) 2021, https://www.achpr.org/sessions/resolutions?id=517; Migration Policy Framework for Africa and Plan of Action (2018-2030), https://au.int/sites/default/files/documents/35956-doc-au-mpfa-executive-summary-eng.pdf (accessed 30 October 2024).

47 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), https://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4ae572d82 (accessed 30 October 2024).

48 Resolution on Human Rights Defenders in Africa ACHPR/Res.196(L) 2011, https://www.achpr.org/sessions/resolutions?id=192 (accessed 30 October 2024).

49 See African Diaspora Programme of Action, 2012 para 1.

50 See African Diaspora Programme of Action, 2012 para 20.

agenda. This state of affairs causes disproportionate inequalities and a stark contrast in the well-being and respect accorded to Africans globally. The distinction, exclusion and marginalisation are the embodiment of racism, racial discrimination, xenophobia and other forms of intolerance, which is systemic and structural in many contexts.

Diaspora human rights activists are often confronted with the state of the human rights of Africans on the continent as a contrast to the ideals they seek to realise elsewhere. The analogy is unsound but it weakens the premise for equality of all races. This trajectory excuses internalisation of oppression and self-stigmatisation among people of African descent.[51] Africans struggle to claim a status of equality elsewhere, which is rendered impossible at home. The first step towards ensuring equality of all races would be the complete realisation of Africa's human and peoples' rights, and the transformation of the lived reality of persons in Africa, as respected and protected persons that are equal in dignity and worth. This includes the regard for its diaspora on the continent.

The AU intends to work for the full implementation of the Durban Declaration and Programme of Action (DDPA), the outcome of the third World Conference against Racism of 2001.[52] Following over 22 years of operation of the DDPA, the standard is set – racism is regressive to humanity as a whole and must be eliminated.[53] Concisely expressed, 'the DDPA has contributed to the proliferation of legislative measures, the development of national action plans and monitoring mechanisms, and has helped to place the issue of racism, racial discrimination, xenophobia and related intolerance as an urgent priority on today's international agenda'.[54] Of note are Durban mechanisms, including the Working Group of Experts on People of African Descent (WGEPAD); the Intergovernmental Working Group for the Effective Implementation of the Durban Declaration and Programme of Action; the Ad Hoc Committee on the Elaboration of Complementary Standards; and the Group of Independent Eminent Experts on the Implementation of the Durban

51 '[I]nternalised oppression includes the negative self-evaluations and dehumanisations believed to be true by peoples suffering unjust and imposed social conditions such as racism, colonialism and conquest … it influences the thoughts, behaviours, and attitudes toward self, members of one's defined group and the dominant group.' M Salzman & P Laenui 'Internalised oppression among Pacific Island peoples' in EJR David (ed) *Internalised oppression: The psychology of marginalised groups* (2014) 84.

52 Para E(b) African Diaspora Programme of Action, 2012.

53 See Durban Declaration and Programme of Action, 2001 paras 19 & 20.

54 See 'Fighting racism and discrimination: The Durban Declaration and Programme of Action at 20' OHCHR 15, OHCHR_DDPA_Booklet_EN.pdf (accessed 30 October 2024).

Declaration and Programme of Action. Expert bodies under the auspices of the anti-racism machinery of the UN Office of the High Commissioner for Human Rights include the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance; the International Independent Expert Mechanism to Advance Racial Justice and Equality in the context of Law Enforcement; and the Permanent Forum for People of African Descent. Notable examples of plans of action against racism include the EU Anti-Racism Action Plan, 2021-2025;[55] Canada's Anti-Racism Strategy, 2019-2022;[56] South Africa's National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia, and Related Intolerance;[57] Portugal's National Plan to Combat Racism and Discrimination (PNCRD) 2021-2025;[58] the Plan for a National Anti-Racism Framework in Australia,[59] among others. These entities and developments have formed a complementary force that is establishing principles and making interventions towards eradicating racial discrimination and supporting state advancements and the victims. The AU desires to 'encourage and support the adoption and implementation, in different diaspora countries, of policies that will facilitate the elimination of racism and the promotion of equality among races'.[60] However, there is a need for a racial justice index, which is comparable in function to the corruption perceptions index,[61] establishing criteria to measure the efficacy of anti-racism strategies and the progression of states in eradicating racial discrimination.

The DDPA, however, is currently being opposed based on unsubstantiated claims such as anti-semitism that does not surface on the four corners of the framework and emerged even before the instrument was formulated. This led to an unprecedented number of states to boycott the commemoration of its twentieth anniversary in New York in September 2021. Undermining of the Durban framework would be a huge setback to the fight against racism, racial discrimination, xenophobia and related intolerances. If it continues unabated, it is destabilising the ideological basis and the most comprehensive, tried and test framework for the elimination of racial discrimination globally. As the Special Rapporteur on Racism

55 EU Anti-racism Action Plan 2020-2025 | European Commission (europa.eu) (accessed 30 October 2024).
56 Building a Foundation for Change: Canada's Anti-Racism Strategy 2019-2022 – Canada.ca (accessed 30 October 2024).
57 National Action Plan to combat racism, racial discrimination, xenophobia and related intolerance (www.gov.za) (accessed 30 October 2024).
58 Portugal: National plan to combat racism and discrimination 2021-2025 | European Website on Integration (europa.eu) (accessed 30 October 2024).
59 National Anti-Racism Framework | Australian Human Rights Commission (accessed 30 October 2024).
60 Para A(p) African Diaspora Programme of Action, 2012.
61 https://www.transparency.org/en/cpi/2023 (accessed 12 October 2024).

noted, 'the group of non-supporters includes some of the greatest beneficiaries of colonialism, slavery and the trans-Atlantic slave trade'.[62] Trafficking and trade in enslaved Africans and colonialism are among the major roots of racism, racial discrimination and the xenophobia that Africans and people of African descent suffer today. The AU needs to demonstrate solidarity and leadership by utilising its good offices to rally states to recommit to the transnational process of eradicating racial discrimination that began and is still anchored in the Durban Declaration and Programme of Action. It is important for AU member states to support Durban mechanisms by providing financial support, attending the activities of these mechanisms, and exercising their voting rights, where necessary, to advance the cause. AU member states could promote the anti-black racism agenda in their foreign policies, by seeking to encourage strategic partner states to adopt and implement effective strategies to eradicate racial discrimination.

2.4 Eradicating political and socio-economic marginalisation of diaspora communities

The most effective way to eradicate marginalisation of diaspora communities is by empowering them. The African diaspora communities need to be facilitated to harness their advantage of belonging to the African continent. There is a need for legal structures to regularise and accord legal personality to qualifying African diaspora organisations in Africa. Legal existence of diaspora organisations in Africa would strengthen their capacity to invest in the continent and repatriate their benefits. The African-American Association of Ghana may be studied for a possible contribution in this regard.[63] It is a best practice for a state to have an institution dedicated to diaspora engagement.[64]

The AU also intends to bolster the image of Africa by coordinating efforts of existing media and promoting new media to re-brand Africa and to counter stereotypes about Africans and people of African descent.[65] Marginalisation of Africans and people of African descent in mainstream media is deeply entrenched and adversely consequential. Images of African children are used by even reputable international organisations to portray dire situations such as extreme

62 'UN expert criticises boycott of Durban process against racism, calls for action' 28 October 2021, UN expert criticises boycott of Durban Process against racism, calls for action | | UN News (accessed 30 October 2024).
63 See https://aaaghana.org/ (accessed 11 October 2024).
64 EUDiF (n 32) 6.
65 Para C(a) African Diaspora Programme of Action, 2012.

poverty and hunger.[66] Model victories of politicians of African origin have been reported with demeaning references such as 'child of refugees',[67] and 'cleaner',[68] which reflect racial hierarchies and vulnerabilities in the political sphere. A counter-narrative needs to be proactive, revolutionary and broadly disseminated.

Racial stereotypes also cause, promote and sustain racial injustice.[69] Similarly, a prevalent, exaggerated and colonial perspective of life as better abroad is also stereotypical and a driver of irregular migration that pushes Africans into precariousness in the diaspora. This narrative is also promoted by education curricular that lacks the African conscience and does not articulate the opportunities on the African continent. A strategy for the media should be complemented by effective decolonisation of education curricular to develop knowledge and skills that are applicable to the African context.

2.5 Combating trafficking, exploitation and contemporary enslavement of people of African descent

The human and peoples' rights agenda of the AU includes strengthening the implementation of legislation and other measures aimed at eradicating trafficking, exploitation and other modern forms of slavery.[70] These violations are rooted in the historical legacies of slavery and colonialism, which 'negated the essence'[71] of Africans and persons of African descent. The current dysfunctionality of several states has also undermined the propensity of the continent to boost the brand of an African. Structural racism and racial discrimination have placed people of African descent in the margins of the social and economic progression of societies, where they are susceptible to trafficking, exploitation and enslavement. An amalgamation of short, medium and long-term preventive, protective and remedial measures is required to reverse the regressive trajectory.

A notable example for immediate intervention is the state of migrant labour from Africa in the Middle East and Gulf states.[72] There

66 See 'Children of African descent', Report of the UN Working Group of experts on people of African descent, A/HRC/51/54, 18 August 2022 para 39.
67 Child of refugees becomes Germany's first black female cabinet minister | Germany | The Guardian (accessed 30 October 2024).
68 French elections: Cleaner defeats former minister in parliamentary vote – BBC News (accessed 30 October 2024).
69 Report on the role of negative racial stereotypes of people of African descent in perpetuating racial injustice, A/74/274, 2 August 2019.
70 Para E(c) African Diaspora Programme of Action.
71 See Introduction to the Durban Declaration and Programme of Action, 2001, Durban_text_en.pdf (ohchr.org) (accessed 30 October 2024).
72 Situation of African Migrants in the Middle East | African Union (au.int) (accessed 11 October 2024).

is a notable increase in the volumes of labour migration from sub-Saharan countries, including Ethiopia, Kenya, Uganda, Tanzania and Ghana, to the Arab world, to undertake semi-skilled work in homes, the construction industry, manufacturing and agricultural sectors in the recent past.[73] These migrant workers are often subjected to an exploitative system:[74]

> The legal status of domestic and other migrant workers in the [Gulf Cooperation Council] (GCC) and some countries in the Middle East such as Jordan and Lebanon is governed by the *kafala* system. *Kafala* is a migration management policy under which a migrant worker's immigration and employment status is legally bound to an individual employer or sponsor (*kafeel*) ... The *kafala* system has also been found to foster the abuse and exploitation of migrant workers, particularly domestic workers who operate in private spaces.

The workers are excluded from the national labour legislation,[75] and threats of cancellation and illegalisation always loom over them, making them susceptible to oppressive conditions of work.[76] A study by the International Office of Migration on returned Ghanaian domestic workers revealed that a significant percentage of them suffered various forms of abuse, including corporal punishment, sexual assault, denial of food, and extra unpaid tasks.[77] The Uganda Human Rights Commission confirmed police reports that 'some workers who signed up with labour recruitment companies to work in the Middle East and Gulf State countries had their organs, especially kidneys and livers harvested'.[78]

In 2021 President Rodrigo Duterte of the Philippines made an unprecedented call to Middle Eastern countries to dismantle the *kafala* system because, in his own words, 'it's a set up for slavery'.[79] The AU needs to strengthen the call for the complete ban of the *kafala* system in all practising countries, advance and concretise a system

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73 N Laiboni 'A job at all costs: Experiences of African women migrant domestic workers in the Middle East' 10, https://gaatw.org/publications/Africa_Domestic_Work_Consolidated_regional_report.pdf (accessed 30 October 2024).

74 Laiboni (n 73) 10; see also RS Parreñas & R Silvey 'The governance of the Kafala system and the punitive control of migrant domestic workers' (2021) 27 *Population, Space and Place* 1-7, https:// doi.org/10.1002/psp.2487 (accessed 30 October 2024).

75 See Domestic Workers (Arab States) (ilo.org)(accessed 30 October 2024).

76 See, eg, F Demissie 'Ethiopian female domestic workers in the Middle East and Gulf states: An introduction' (2018) 11 *African and Black Diaspora: An International Journal* 1.

77 Summary report on Ghanaian domestic workers in the Middle East, September 2019 4, iom_ghana_domestic_workers_report_summary-finr.pdf (accessed 30 October 2024).

78 Uganda 2021 Human Rights Report 335, https://www.state.gov/wp-content/uploads/2022/03/313615_UGANDA-2021-HUMAN-RIGHTS-REPORT.pdf (accessed 30 October 2024).

79 *Philippines Daily Inquirer* (Makati City, Philippines) 26 July 2021.

that enables the realisation of the rights of African migrant workers in the Arab world. Supposed reforms to the *kafala* system have not been satisfactory.[80] In addition, there is a need to establish accessible, proximate and secure monitoring and complaint mechanisms within the African human rights system that allow for effective interventions and redress for violations.

2.6 Promoting favourable regulatory mechanisms governing migration

Migrants of African descent experience racism, racial discrimination, xenophobia and other forms of intolerance on the African continent and the diaspora. The xenophobic attacks of foreign nationals of African descent in South Africa,[81] the violent crack-down of Africans in transit to Europe, through North African countries,[82] the exclusionary approach of transit and destination European countries towards persons of African descent fleeing the war in Ukraine[83] in the recent past demonstrate the magnitude of the problem.

The African Commission on Human and Peoples' Rights (African Commission) has expressed concern about the number of migrants and refugees who disappear in Africa under circumstances of armed conflicts, violence, trafficking, forced labour, rape and other forms of sexual violence that put them at risk of enforced disappearance, or disappearance in other circumstances, detention in transit or destination countries, or even in their own country of origin when they are deported, including detention of such persons in unofficial or secret places.[84]

Undocumented persons of African descent are also incarcerated indefinitely in prisons around the world, long after serving their terms, for lack of determinable destination countries.[85] There are credible reports of torture and death of people of African descent

80 The Kafala System In Saudi Arabia - ECDHR (accessed 11 October 2024).
81 T Odeogun & OT Faluyi 'Xenophobia, racism and the travails of "black" immigrants in South Africa' in AO Akinola (ed) *The political economy of xenophobia in Africa: Advances in African economic, social and political development* (2018) 125.
82 A Abderrahmane 'Migrants at the mercy of Morocco's iron fist' ISS 24 August 2022, https://issafrica.org/iss-today/migrants-at-the-mercy-of-moroccos-iron-fist (accessed 11 October 2024).
83 https://www.eth.mpg.de/molab-inventory/shock-immobilities/shock-immobility-African-migrants-and-the-Russian-invasion-of-Ukraine (accessed 11 October 2024).
84 Resolution on missing migrants and refugees in Africa and the impact on their families ACPHPR/ Res. 486 (EXT.OS/XXXIII) 2021, https://www.achpr.org/sessions/resolutions?id=517 (accessed 30 October 2024).
85 Portugal Preliminary Observations.

in incarceration. For example, Oury Jalloh, an African asylum seeker, died in a fire in a prison cell in Dessau, Germany, in 2005, while his hands and feet were handcuffed.[86] There are endemic concerns over the detention of undocumented migrants in South Africa, including prolonged, indefinite periods of detention, and physical bodily harm occasioned by law enforcement officials.[87] The response of law enforcement agencies to xenophobic violence against black foreign nationals in South Africa has been focused on removing the victims of persecution rather than taking prohibitive action against the perpetrators.[88] Of note, the undocumented status of several migrants is partly attributable to the bureaucratic inefficiencies of the system that lead to backlogs,[89] delays in processing applications spanning for years, and loss of documents, among other setbacks, which always translate into prejudice to the migrants. 'The practice of the Department of Home Affairs in itself displays characteristics of institutional xenophobia in its response to migrants and refugees.'[90]

The migration regimes of many countries are governed based on criteria that exclude the majority of people of African descent, such as proof of adequate financial means; considerable amounts of financial deposits for possible future repatriation; graduation from top global institutions excluding African universities;[91] and assimilation, among others. There are requirements to assimilate or integrate but no corresponding opportunities to do so. The majority of migrants of African descent live together in separate areas and communities, with limited social mobility and limited interaction with other people, often other migrants.[92] In the case of *Ukumu*[93] a Canadian court

86 Report of the Working Group of Experts on People of African Descent on its mission to Germany, A/HRC/36/60/Add.2, 15 August 2017 para 28, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/238/67/PDF/G1723867.pdf?OpenElement (accessed 30 October 2024).

87 J Jackson & M Hoque 'Effective management of deportation of undocumented migrants from South Africa' in M Mohiuddin and others (eds) *Leadership in a changing world – A multidimensional perspective* (2022) para 4.7.

88 A Hiropoulos 'Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals' APCOF Policy Paper 18, 18 November 2017, https://apcof.org/wp-content/uploads/018-migration-and-detention-in-south-africa-alexandra-hiropoulos.pdf (accessed 30 October 2024).

89 See K Moyo 'South Africa reckons with its status as a top immigration destination, apartheid history, and economic challenges' 18 November 2021, Article: South Africa Reckons with Its Status as a.. | migrationpolicy.org (accessed 30 October 2024).

90 SS Ekambaram 'Foreign nationals are the "non-whites" of the democratic dispensation' in V Satgar *Racism after apartheid: Challenges for Marxism and anti-racism* (2019) 217, https://www.jstor.org/stable/10.18772/22019033061.15#metadata_info_tab_contents (accessed 30 October 2024).

91 Eg, the UK High Potential Individual (HPI) Visa, High Potential Individual (HPI) visa: Eligibility - GOV.UK (www.gov.uk) (accessed 30 October 2024).

92 See Country Visit Reports of the UN Working Group of experts on people of African descent. Country visits | OHCHR (accessed 11 October 2024).

93 *R v Ukumu* 2019 ONSC 3731 (CanLII).

established that as a migrant from the Democratic Republic of the Congo (DRC) then living in Canada, Mr Ukumu's ability to practise English and improve his English comprehension skills was somewhat limited, as he had very few friends, engaged in few social activities, and the employment he was able to secure through a series of short-term jobs (for example, as a field labourer paid 'under the table', a seasonal production and packaging worker for a local clothier, and as a part-time dishwasher working alone in the back kitchen of a restaurant, where he would receive instructions and other messages primarily through a French-speaking chef from Morocco). He did not [indulge in] much social interaction, speaking or communication beyond basic English and, while working, he tried not to 'bother' others in any way that might jeopardise his employment. He also had remained single and had no children, such that he had no partner or other familial ties that might have facilitated or required more ongoing interaction with English-speaking people. While Mr Ukumu attempted to speak with strangers in public locations as much as possible (for example, on buses and at libraries), he quickly learned that, in contrast with customary practices in the DRC, approaching and speaking with strangers is not something commonly done in Ontario. He nevertheless continued to encounter and interact with English-speaking Canadians in daily life, for example, while shopping for groceries, while giving people rides in his vehicle, and while dealing with one of the three transmission repair facilities he visited shortly before his arrest. (Mr Ukumu had purchased his two successive vehicles through brief transactions with other immigrants to Canada, during which he was able to speak a mixture of Spanish and English.)[94]

In the German case of *B v R*, a father of African descent was denied custody of his child by the local and regional courts partly because he lacked appreciation of European standards. The Federal Constitutional Court rightly ruled that the father had not been treated with the requisite neutrality because he was denied residence status and consequently could not access state educational opportunities.[95] Countries such as Germany and Switzerland have introduced integration programmes, offering language courses and support to migrants. Linguistic racism is still a reality even after a person meets the proficiency standards. Lines of difference are drawn according to speech genres and accents.

94 *Ukumu* (n 93) para 42.
95 1178/14, Bundesverfassungsgericht – Entscheidungen – Sorgerechtsentziehung setzt eingehende Feststellungen zur Kindeswohlgefährdung voraus (accessed 30 October 2024).

The effects of slavery and colonialism deprived Africans and people of African descent of a capital base for acquiring intergenerational wealth. In contemporary times, racism is negating their abilities, dismissing people of African descent from life, and denying them access to equal opportunities. Migrant regimes of the world are in conflict with people of African descent, often setting criteria that they cannot meet because of the circumstances imposed on them by the historical factors that perpetuate racism and racial discrimination. The Working Group of Experts on People of African Descent documents the lack of economic mobility of Africans and persons of African descent in the diaspora. They are majorly confined to the informal job sector, where they are prone to exploitation.[96] Even the most educated Africans and people of African descent are downgraded and work way below their education levels, mostly providing manual labour with limited security and poor prospects.[97] In many sectors of certain countries in the diaspora, such as Switzerland and Germany, qualifications from African countries are neither recognised nor accredited.[98] Limited pathways to the labour market have left many Africans and people of African descent with no choice other than to prolong their stay in school in order to retain the right to stay. To require persons in such a predicament to demonstrate ownership of resources in order to regularise their migration statuses is pre-emptive. Of note, racial discrimination is propelled by policies that advance equal treatment of all persons but have an exclusionary effect upon application.

An exception is made for citizens of countries that enter into cooperation agreements for moderation of visa requirements, and facilitation of paper work for their citizens' travel or residency abroad, such as Portugal's agreement on mobility within the community of

96 See, eg, Report of the Working Group of Experts on People of African Descent on its mission to Argentina, A/HRC/42/59/Add.2, 14 August 2019 para 42, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/242/57/PDF/G1924257.pdf?OpenElement (accessed 30 October 2024).

97 Examples include Report of the Working Group of Experts on People of African Descent on its Mission to Belgium, A/HRC/42/59/Add.1, 14 August 2019 para 51; Report of the Working Group of Experts on People of African Descent on its mission to Argentina, A/HRC/42/59/Add.2, 14 August 2019 para 42; Report of the Working Group on Experts on People of African Descent on its mission to Canada, A/HRC/36/60/Add.1, 16 August 2017 para 57, https://www.refworld.org/docid/59c3a5ff4.html; Report of the Working Group of Experts on People of African Descent on its mission to Spain, A/HRC/39/69/Add.2, 14 August 2018 para 45, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/249/75/PDF/G1824975.pdf?OpenElement (accessed 30 October 2024).

98 See, eg, Report of the Working Group of Experts on People of African Descent on its mission to Germany, A/HRC/36/60/Add.2, 15 August 2017, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/238/67/PDF/G1723867.pdf?OpenElement; Report of the Working Group of Experts on People of African Descent on its mission to the United States of America, A/HRC/33/61/Add.2, 18 August 2016 para 55, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/183/30/PDF/G1618330.pdf?OpenElement (accessed 30 October 2024).

Portuguese-speaking countries.[99] This practice needs to be emulated, to every extent possible, in view of the objective of the AU to 'engage developed countries with a view to creating favourable regulatory mechanisms governing migration'.[100]

The planned revitalisation of the AU-EU-UN Tripartite Task Force[101] should envisage broadening the scope of the work of the consortium to migrants and refugees in other North African countries, including Morocco and Tunisia. The Task Force was established in 2017 by the AU, EU and UN with the aim of saving and protecting the lives of migrants and refugees along the migratory routes. Its work could have provided an effective intervention in the recent tragedy that led to the deaths of several African migrants at the Moroccan-Spanish border.[102]

2.7 Advancing Africa's agenda for reparation

The African Diaspora Programme of Action envisages the role of the AU to 'coordinate with the African diaspora regarding the question of the illegally-acquired cultural goods that exist outside the African continent, with the aim of speeding their return to their countries of origin in Africa'.[103] This objective embodies the restitution of property, a form of reparation. There is increased momentum for the restitution of cultural property in the recent past, including the proclamation by the Parliament of France in December 2020, to transfer 26 cultural works, which were held in Museums in France for over a century, back to Benin,[104] and Germany's commitment to return cultural artifacts illicitly obtained from Cameroon, Namibia, Nigeria and Tanzania in the colonial era.[105] The proposed AU Model Law on the Protection of Cultural Heritage[106] needs to specifically address returned cultural artifacts and seek to foster knowledge transfer, sustainability and necessary modification of modes of

99 Prime Minister notes the importance of the mobility of citizens in the Portuguese-speaking Community – XXII Government – Portuguese Republic (portugal.gov.pt) (accessed 30 October 2024).
100 Para D(a) African Diaspora Programme of Action, 2012.
101 European Union – African Union summit – Consilium (europa.eu) (accessed 30 October 2024).
102 UN committee urges prompt investigation into deaths of migrants at Moroccan-Spanish border | OHCHR (accessed 30 October 2024).
103 Para F(d) African Diaspora Programme of Action, 2012.
104 LOI no 2020 – 1673 *du 24 décembre 2020 relative à la restitution de biens culturels à la République*, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000042738023 (accessed 29 December 2021).
105 See Germany Returns Artifacts Taken from Africa during Colonial Rule | International Center for Transitional Justice (ictj.org) (accessed 30 October 2024).
106 The African Union Model Law | African Union (au.int) (accessed 30 October 2024).

preservation used by transferring countries. It may become necessary to continue the preservation regimes and activities of the previously holding countries.

Certain former colonial powers such as Germany have rendered apologies for colonial crimes,[107] accepting responsibility for those tragedies, but the framework for these demands from Africa remains *ad hoc*, unstructured and poorly facilitated. Legal claims from Africa against former imperial powers have failed for various reasons and others have dragged in foreign courts for decades.[108] This has left room for agreements such as the Germany-Namibia Accord in which development aid is offered to pre-empt actions for reparation.

In the recent past, the AU has broadened and furthered the reparation agenda of the continent, beyond the focus of the African Diaspora Programme of Action, by committing to building a united front to advance the cause of justice and the payment of reparations to Africans.[109] The proclamation followed Resolution 543 on Africa's Reparations Agenda and the Human Rights of Africans in the Diaspora and People of African Descent Worldwide.[110] The AU has also declared 'Justice for Africans and People of African Descent Through Reparation' as the theme of 2025.[111] It is intended to establish structures and consolidate practical approaches that advance reparatory justice in a broader sense, including climate justice, reforming the global financial systems and structures, and reforming the prevailing architecture of multilateral organisations.[112]

107 Joint Declaration by the Federal Republic of Germany and the Republic of Namibia, paras 11, 13.

108 See *Hereros v Deutsche Afrika-Linien GMBLT & Co* 06-1684, Opinion of the Court of 10 April 2007 (claim by the Hereros against Imperial Germany for slavery and crimes against humanity). The case was dismissed for failure to state a cause of action; *Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyingi, Jane Muthoni Mara and Susan Ngondi v The Foreign and Commonwealth Office,* 21 July 2011 (Mau Mau Litigation); the matter was settled out of court in 2016. South African apartheid litigation by the Khulumani Support Group, against corporations for reparations, has been ongoing before US Courts since January 2010.

109 Proclamation on building a united front to promote the cause of justice and payment of reparations to Africans, Assembly AU Decl 1 (XXXVII) _E.pdf (africa-union.org) (accessed 11 October 2024); 37th ordinary session of the Assembly of the Union, 17-18 February 2024, The AU theme of the year 2025 is 'Justice for Africans and People of African Descent Through Reparation' (accessed 30 October 2024).

110 ACHPR/Res.543 (LXXIII) 2022 73rd ordinary session 21 October 2022-9 November 2022. See also Preamble to Assembly AU Decl 1 (XXXVII) _E.pdf (africa-union.org) (accessed 30 October 2024).

111 Concept Note on the African Union Theme of the Year for 2025 Theme: 'Justice for Africans and People of African Descent Through Reparations' (accessed 13 November 2024).

112 See, eg, paras 12,10,14, Assembly AU Decl 1 (XXXVII) _E.pdf (africa-union.org) (accessed 11 October 2024).

The leadership of the AU in rallying the continent's solidarity in advancing political claims and fortifying the legal actions for reparations is essential. Following the example of Libya's negotiation for a settlement with Italy for reparation of colonial atrocities, which lasted for decades, the political approach may also be protracted. Regional advances for reparations are not unprecedented. In 2014 the Caribbean Community (CARICOM) developed a ten-point plan for reparatory justice, which outlines a possible path to justice for victims and descendants of colonial crimes, including enslavement of Africans, genocide, and racial apartheid by European governments in the Caribbean.[113] In 1951, 23 major Jewish organisations united, and formed the Claims Conference with the objective of seeking negotiations with the West German government for the suffering and losses of the Jews during the Holocaust.[114] A Committee for Jewish Claims on Austria was also established in 1952. Regulated political settlements are seen to yield better results in cases of collective historical crimes.[115]

Certain reparatory justice measures, such as documenting and promoting authentic African history, require the AU as a direct implementing partner. Africa's image is damaged in the way in which the continent and its people are portrayed in African history. While centring the experience of Europeans in Africa, rather than that of Africans and Africa's civilisation, history promotes the narrative of Africans as vanquished and excludes the atrocities of the imperial powers. Of note, there was no understanding of the full extent of the abuses committed by the British colonial administration during the Kenya Emergency (1952-1960), until the publication of two academic studies, by two expert historians, in 2005.[116] The studies were based on extensive archival research and witness evidence from both Kenya and the United Kingdom.[117] The capacity to document African history is here in Africa and should be fully developed to advance Africa's agenda. This requires a sound resource base to facilitate scholarship and broadly disseminate outcomes. Each former colonial power should be lobbied to integrate authentic pre-

113 See CARICOM Ten Point Plan for Reparatory Justice, https://adsdatabase.ohchr.org/IssueLibrary/CARICOM_Ten-Point%20Plan%20for%20Reparatory%20Justice.pdf (accessed 1 June 2022).

114 See Claims Conference: Conference on Jewish Material Claims against Germany. https://www.claimscon.org/about/history/ (accessed 5 January 2022).

115 L van den Herik 'Addressing "colonial crimes" through reparations? Adjudicating Dutch atrocities committed in Indonesia' (2012) 10 *Journal of International Criminal Justice* 704.

116 See 'The role of expert historians in the Mau Mau claims', https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/the-mau-mau-claims/#:~:text=Leigh%20Day%20acted%20on%20behalf,Kenya%20Emergency%20in%20the%201950s (accessed 30 October 2024).

117 As above.

colonial African history and Africa's colonial history in its curricular as a reparative measure.

There are contemporary violations on the continent such as the dumping of toxic waste from foreign countries on African soil,[118] and environmental degradation resulting from exploration by multinational corporations.[119] The continent needs to establish and exercise jurisdiction over gross violations that is comparable to the Aliens Tort Statute in the United States. Litigation abroad is prohibitively expensive and often sustained on contingency agreements with foreign firms.

3 Conclusion

The integration of the African diaspora into the AU triggers reciprocal rights and responsibilities. Full participation of the African diaspora in the development of the continent is not severable from the promotion and protection of their rights. The African Diaspora Programme of Action alludes to vital undertakings of the regional body to address both historical and contemporary challenges of its constituency in the sixth region. The 'sixth demographic region of the AU' could serve as a framework for unifying African diaspora identities into a cognisable identity of 'a person of African descent' and attaching value of qualified citizen rights. The AU is strategically positioned to use its good offices to advance both political and legal interventions towards creating a favourable environment for Africans to thrive here in Africa, strengthening the African brand, eliminating racism, confronting contemporary slavery, and procuring reparatory justice. It is therefore suggested that, prospectively, (i) the human rights record of an AU member state counts especially in assuming leadership positions and responsibilities in the Union's ranks; (ii) AU member states establish and dedicate specialised institutions to diaspora engagement; (iii) the AU develops, maintains and utilises a global racial justice index that would also inform the foreign policies and strategic engagements of member states; (iv) the identity of a person of African descent is institutionalised on the African continent with qualified citizen rights, (v) the financial sector in Africa facilitates the inclusion of persons in the diaspora.

118 Eg, the Trafigura Incident, 2006: *Stichting Union Des Victimes De Dèchets Toxiques D'Abidjan et Banlieues v Trafigura Beheer BV* C/13/581973/HA ZA 15-195, 30 November 2016, Microsoft Word – 2016.11.30_Judgment_ Stcihting_UVDTAB_v_Trafigura_UK (accessed 30 October 2024).

119 See Endless oil spills blacken Ogoniland's prospects – ISS Africa (accessed 30 October 2024).

Furthermore, (vii) the AU pursues and concretises the continent's reparation agenda including (a) targeted support for evidence-based research and documentation of historical crimes, which would further the prospects of success of claims; (b) championing the promotion of authentic African history that accurately demonstrates the state of pre-colonial Africa and promotes its inclusion in curricular worldwide; (c) the AU should negotiate for structures of recognition and accreditation of qualifications from African universities in the diaspora; (d) the application of the AU Model Law on the Protection of Cultural Heritage should incorporate the preservation and sustainability, with necessary modification, of returned cultural artifacts including possibilities of knowledge transfer.

The AU and its member states should confront the thorny question of irregular migration by (a) devising a preventive approach to irregular migration, including sensitising and educating the general public about the its perils; (b) African countries establishing processes to facilitate documentation for persons in the diaspora; (c) AU member states developing avenues of negotiating the voluntary return and reintegration of stateless persons to African countries of origin; and (d) the reparation agenda should envisage an exception of migration criteria that represents the effects of slavery, colonialism, racism and racial discrimination such as intergenerational deprivation of resources.

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Extraordinary rendition and extraterritorial reach of the African human rights system

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Summary: *African states' participation in the United States programme of extraordinary rendition and the creation of a similar approach among African states and other states have raised the question of the extraterritorial scope of the African Charter on Human and Peoples' Rights. The article seeks to address the question of whether the African Charter gives rise to extraterritorial obligations in case of extraordinary rendition. It evaluates the circumstances for extraterritorial application of international human rights law in the context of extraordinary rendition. The African Commission on Human and Peoples' Rights has received and entertained cases on extraterritorial obligations and extraordinary rendition. Thus, the article discusses the scenarios that need to be fulfilled for extraterritorial obligations and responsibilities of states to be called into question in cases of extraordinary rendition. Accordingly, even though the African Charter is devoid of a jurisdictional clause, based on article 60 of the Charter and teleological interpretation, the obligations imposed by African Charter arguably have extraterritorial reach.*

Key words: *Africa; extraordinary rendition; extraterritorial obligation; human rights;* non-refoulement

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1 Introduction

There is no universally-recognised description of or definition for the term 'extraordinary rendition'.[1] As a result, scholars have attempted to define extraordinary rendition based on their objectives, but most give emphasis to the absence of formal definition.[2] The term was first coined by the Central Intelligence Agency (CIA) to justify the secret extrajudicial arrest, detention and transfer of an individual suspected of 'terrorism' to the custody of another state.[3] Originally, it was termed just 'rendition'.[4] It was carried out on an exceptional basis and sought to bring suspects before a court of law, but it was not conducted in line with extradition laws.[5]

Extraordinary rendition is a relatively new introduction in the discourse of human rights and defined by its informality.[6] It is a kind of state-sponsored abduction and extrajudicial transfer of a suspect of a crime from one state to another for the purpose of enhanced interrogation, including torture, and mostly conducted by the United States of America (US), by cooperating with other states.[7] Extraordinary rendition is defined by the European Court of Human Rights (European Court) as 'an extrajudicial transfer of persons from one jurisdiction or state to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture, or cruel, inhuman or degrading treatment'.[8] It is also referred to as the transfer of terrorist subjects to foreign countries for interrogations that rise to torture outside of normal legal processes in order to gain intelligence for the war on terror.[9] Satterthwaite also defines extraordinary rendition as 'the transfer of an individual, without the benefit of a legal proceeding in which the

1 See JM Retief 'Foreign aid toward extraordinary rendition: An African perspective' in HJ van der Merwe & G Kemp (eds) *International criminal justice in Africa: Issues, challenges and prospects* (2016) 65; R Chandrasekaran & P Finn 'US: Behind secret transfer of terror suspects' *Washington Post* (Washington) 11 March 2002.
2 Retief (n 1) 65.
3 Retief (n 1) 65-81.
4 E Nadelmann 'The evolution of United States involvement in the international rendition of fugitive criminals' (1993) 25 *New York University Journal of International Law and Policy* 813-885.
5 J Mayer 'Outsourcing torture: The secret history of America's extraordinary rendition programme' *The New Yorker* (New York) 14 February 2005.
6 W Kaleck 'Justice and accountability in Europe: Discussing strategies' in 'CIA-'extraordinary rendition' flights, torture and accountability – A European approach' (2009) *European Centre for Constitutional and Human Rights* 26.
7 M Fisher 'A staggering map of the 54 countries that reportedly participated in the CIA's rendition programme' *Washington Post* (Washington) 5 February 2013 6.
8 *Babar Ahmad & Others v United Kingdom* ECHRt (6 July 2012) 24027/07, 11949/08, 36742/08, 66911/09 and para 113.
9 House of Commons Library 'Standard note on extraordinary rendition' (2006), cited in M Byers & HP Aust 'Complicity and the law of state responsibility' (2012) 23 *European Journal of International Law* 586-589.

individual can challenge the transfer, to a country where s/he is at risk of torture'.[10] Moreover, Bulto defines extraordinary rendition as a handing over of suspects with no legally-established procedure, but he further mentions the garnishing elements of extraordinary rendition such as 'an arrest without warrant, denial of access to a court, lawyers or family, and detentions in inhuman and degrading conditions usually outside the country of citizenship or residence for indefinite periods of time'.[11]

As outlined above, extraordinary rendition is a term that cannot be defined based on a single unlawful act but, rather, it is a process consisting of multiple and complex series of illegal acts.[12] Therefore, for the purpose of this article, extraordinary rendition is defined as multiple and complex illegal acts made by states, which includes coercive and illegal capturing and transferring of individuals from one state to another state by state agents, or agents acting under the sponsorship of another state. In the process, torture is used as a means of interrogation, but it is performed outside of public scrutiny and oversight of the law. Basically, it is usually conducted without assurances required from the receiving state. Moreover, after the transfer, the detainee is kept in 'black sites', denied access to justice and access to legal assistance, and treated in an inhuman and degrading manner.[13]

Even though the US is an architect of the extraordinary renditions programme, the execution of this programme is eventually dependent upon the active and collaborative involvement of foreign governments.[14] Regarding this, several African states are cooperating with the US to capture, detain, interrogate, abuse and transfer individuals to secret CIA detention centres, and allow the use of their air spaces and airports for purposes of this programme.[15] In addition, some of those states also created their own extraordinary rendition programmes for the same purpose and using the so-called enhanced interrogation techniques to obtain the confessions

10 M Nino 'Extraordinary renditions: The role of European security services in the fight against international terrorism' First World Conference of Penal Law: Penal Law in the 21st Century, Guadalajara, Mexico, 18-23 November 2007 1. See also Open Society for Justice Initiative 'Globalising torture: CIA secret detention and extraordinary rendition' (2013).

11 TS Bulto 'Tortured unity: United States-Africa relations in extraordinary renditions and states' extraterritorial obligations' in L Chenwi and TS Bulto (eds) *Justice beyond borders: Extraterritorial human rights obligations from an African perspective* (2018) 6.

12 See Retief (n 1) 67.

13 As above.

14 ML Satterthwaite 'Rendered meaningless: Extraordinary rendition and the rule of law' (2007) 75 *George Washington Law Review* 1333.

15 Nino (n 10) 6.

of suspects.[16] Accordingly, by a single extraordinary rendition operation, several human rights are subject to violation.[17] As a result, several human rights activists, United Nations (UN) treaty bodies and other organisations have repeatedly condemned extraordinary rendition.[18] Yet, there is support from African states for effective implementation of the extraordinary rendition programme of the US. Several recurring justifications have been given as reasons for African states reverting to extraordinary rendition.[19] However, the US administration cooperates with other states by considering the political and financial imperatives of extraordinary renditions.[20]

African states' participation in the US led extraordinary rendition programme and the creation of a similar approach among African states have raised the question of the extraterritorial scope[21] of the African Charter on Human and Peoples' Rights (African Charter).[22] Under international and other regional human rights systems, there are controversies on the spatial reach of obligations of states.[23] These controversies originated mainly from the *lacunae* in international human rights instruments.[24] Some treaties either failed to include the jurisdictional clause or may not mention the extraterritorial applicability of human rights obligation of states.[25] In this regard, similar to some other international human rights instruments, the African Charter is silent on extraterritorial obligation of states.[26]

16 Muslim Human Rights Forum (MHRF) (2007) Horn of Terror Report of US-Led Mass Extra-Ordinary Renditions from Kenya to Somalia, Ethiopia and Guantanamo Bay presented to the Kenya National Commission on Human Rights.

17 D Weissbrodt & A Bergquist 'Extraordinary rendition: A human rights analysis' (2006) 19 *Harvard Human Rights Journal* 123.

18 UN Committee against Torture and the Human Rights Committee (HRC) (2009).

19 BE Whitaker 'Compliance among weak states: Africa and the counter-terrorism regime' (2010) 36 *Review of International Studies* 639-645.

20 Several justifications forwarded for extraordinary rendition and its secrecy; Whitaker (n 19) 680.

21 Bulto (n 11) 18.

22 The African Charter on Human and Peoples' Rights adopted in Nairobi 27 June 1981 and entered into force 21 October 1986.

23 For academic debate on this issue, see K da Costa *The extraterritorial application of selected human rights treaties* (2012); M Gibney & S Skogly *Universal human rights and extraterritorial obligations* (2010); M Gondek *The reach of human rights in a globalising world: Extraterritorial application of human rights treaties* (2009); M Milanovic *Extraterritorial application of human rights treaties: Law, principles, and policy* (2011).

24 R Wilde 'Legal "black hole"? Extraterritorial state action and international treaty on civil and political rights' (2005) 26 *Michigan Journal of International Law* 739-806.

25 Art 2(1) International Covenant on Economic, Social and Cultural Rights (ICESCR); art 1 European Convention on Human Rights 1950 (ECHR); art 2(1) Convention on the Rights of the Child (CRC); art 1(1) American Convention on Human Rights (ACHR).

26 The African Charter does not contain a general provision limiting the scope of obligations either *ratione personae* or *ratione loci*.

Accordingly, this article examines the extraterritorial obligations of states and extraordinary rendition under the African human rights system. In particular, the article addresses the question of whether the African Charter applies extraterritorially and, if so, on what basis and in which circumstances it can be applicable to extraordinary rendition under the African human rights system. The first part of the article is an introduction. The second part highlights the practice and patterns of extraordinary rendition in Africa. The third part of the article mainly concerns the content of extraordinary rendition and extraterritorial obligation in general. The fourth part scrutinises extraterritorial obligations of states under the African human rights system in cases of extraordinary rendition. The final part of the article is dedicated to concluding remarks.

2 The practice and patterns of extraordinary rendition in Africa

It is true that European states were working together with the US extraordinary rendition programme.[27] However, due to the active and collaborative investigation and decisions of the Council of Europe and the European Court, European countries are becoming legally accountable for their involvement in the US extraordinary renditions programme.[28] Yet, without the European states willing to aid and abet the policy of extraordinary rendition, the US administration would be forced to turn to African states willing and looking for their political and financial advantages to become hosts for secret prisons and be partners in the abduction, transport and abuse of suspected terrorists.

Credible reports indicate that more than a dozen African states are highly engaged in extraordinary rendition.[29] For instance, over the last 20 years, more than 100 terror suspects are thought to have been arrested in Somalia and Kenya and transferred to Ethiopia to face enhanced interrogation[30] at the central prison or *Maekelawi*.[31] *Maekelawi* is one of the most notorious police detention centres for mostly high political and terrorism detainees in Ethiopia. One writer named it 'Mini Guantanamo Bay'. However, reports indicated that the practice of extraordinary rendition does not exist in a distant past

27 M Hakim 'The Council of Europe addresses CIA Rendition and Detention Program' (2007) 101 *American Journal of International Law* 442-452.
28 As above.
29 Open Society for Justice Initiative (n 10).
30 Spiegel International 'Extraordinary renditions in Africa: US interrogates terror suspects in Ethiopian jails' 11 June 2007.
31 See Bulto (n 11).

since violations continue to be experienced to the present.[32] One of the 'black sites' for the extraordinary rendition programme of the US in Africa is found in Lemonier, Djibouti, which is operational to this day.[33] Egypt[34] and Morocco[35] appear to be the most frequently-used receiving countries.[36] Algeria also allowed its air space and airports for US extraordinary rendition flights.[37] Not only these countries, but also countries such as Libya,[38] Malawi,[39] South Africa,[40] Mauritania,[41] The Gambia,[42] and Zimbabwe[43] are involved in US extraordinary renditions. As stated above, extraordinary rendition in Africa is not only contingent on the US, but there are African states that have created their own rendition programmes. For instance, the East African governments have been transferring terrorist suspects without any extradition laws.[44]

As Bulto identified, extraordinary renditions in Africa have existed with multiple states and in a variety of patterns.[45] As noted above, extraordinary rendition as a programme is highly supported by the US. As a result, most of the extraordinary rendition cases are linked with the CIA. For instance, Ahmed Agiza and Mohammed Alzery (El Zari) are Egyptian citizens transferred from Sweden to CIA operatives, then to Egypt where they were tortured. This pattern of extraordinary rendition illustrates the rendition of citizens of African states by the US agent from a European state to their country of citizenship, Egypt. The extraordinary rendition process of Mohammed Abdullah Saleh AlAsad contains another version of extraordinary rendition pattern in Africa. He is a non-African, Yemeni citizen, but rendered by an African state, Tanzania, to the US agent. In other words, there is a rendition of non-Africans by an African state to the CIA.[46] Furthermore, reports

32 UN Experts 'Ugly chapter of unrelenting human rights violations' (10 January 2022).
33 M Fisher 'A staggering map of the 54 countries that reportedly participated in the CIA's rendition programme' *Washington Post* (Washington) 5 February 2013 1; see also F Hajdarmataj 'Review of America's covert war in East Africa: Surveillance, rendition, assassination' (2020) 22 *Insight Turkey* 271-273.
34 Open Society for Justice Initiative (n 10) 19.
35 E Ben Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Geneva 2013.
36 Association of the Bar of the City of New York and Centre for Human Rights and Global Justice *Torture by proxy: International and domestic law applicable to 'extraordinary renditions'* (2004) 1-123.
37 Fisher (n 7).
38 HRW Report (2013).
39 See Open Society for Justice Initiative (n 10) 95.
40 Open Society for Justice Initiative (n 10) 107.
41 Open Society for Justice Initiative (n 10) 96.
42 Open Society for Justice Initiative (n 10) 77.
43 Open Society for Justice Initiative (n 10) 118.
44 MHRF (n 16) 7.
45 Bulto (n 11) 8.
46 *Mohammed Abdullah Saleh Al-Asad v Djibouti* Communication 383/10, African Commission on Human and Peoples' Rights 28 (2014) paras 176-177.

indicate instances of rendition of Africans by a third African state to the CIA. For instance, Kenya, an African state, rendered the citizens of Somalia and of Eritrean into the hands of the US agency. [47]

African states have taken lessons from US extraordinary rendition programme. As a result, like the US programme, but without the involvement of the US, African states, in collaboration with African and non-African states, also create distinct patterns of extraordinary rendition programmes. For instance, an Ethiopian shepherd, Ishmael Noor, without having any justified ground of suspicion for his involvement in the Ethiopian rebel group Ogaden National Liberation Front (ONLF) and Islamic Courts Union, was rendered from Kenya to a detention facility in Somalia and then rendered to Ethiopia. In his incommunicado detention at Ethiopian 'local mini-Guantanamo Bay', he endured several human rights violations, including torture. However, no human rights group, no journalist, no family member or government ever came – or, rather, was allowed – to visit him.[48] According to the Human Rights Watch (HRW) report, there also is another pattern of extraordinary rendition, which is a rendition of Kenyans by Kenya to Ethiopia and Somalia.[49] This shows the possibilities of the rendition of Africans by an African state of citizenship into the hands of a third African state. The same report also indicates the rendition of Africans, Ethiopian citizens, by another African state, Somalia, to an African state of citizenship, Ethiopia.[50]In addition, the African states are also participating in the rendition process in collaboration with non-African states. For instance, Andargachew Tsige is a British national who was captured in Yemen by the joint operation of Ethiopian and Yemeni authorities and was transferred to Ethiopia without any involvement of the US.[51] Similarly, Abdella Ocalan, a Turkish national, who was abducted or detained in Kenya by the joint operation of Kenyan and Turkish agents, was transferred to Turkey.

As discussed above, extraordinary rendition has evolved in the past two decades to encompass more complex and multifaceted *modi operandi*. It is a legacy that does not exist in a distant past, but is also currently practised in Africa as well as in other parts of the world. However, international human rights instruments are

47 MHRF (n 16) 7.
48 HRW '"Why am I still here?" The 2007 Horn of Africa renditions and the fate of those still missing' (HRW 2008) 4, https://www.hrw.org/reports/2008/eastafrica1008/eastafrica1008web.pdf (accessed 6 April 2021).
49 HRW (n 48) 2-4.
50 As above.
51 A Tsige 'Ethiopian brutality, British apathy' 30 March 2015, https://www.opendemocracy.net/opensecurity/graham-peebles/andargachew-tsige-ethiopian-brutality-british-apathy (accessed 8 July 2021).

not specifically dealing with the issue. Yet, the garnishing elements of extraordinary renditions are included in the major international human rights instruments. Therefore, the following part evaluates the elements of extraordinary rendition in light of international human rights instruments.

3 The extraordinary rendition and extraterritorial human rights obligation of states in general

There are at least three obligations of states, namely, the obligations to respect, protect and fulfil.[52] However, the question is: Can these human rights obligations of states be applied in extraterritorial contexts, and specifically for extraordinary rendition? Conventionally, the obligation of a state is restricted to the territory of the state and the extraterritorial obligation of a state remains controversial.[53] Recently, there has been increased recognition by treaty bodies that these obligations apply extraterritorially, but the controversy remains with the obligation to fulfil. The term 'extraterritorial obligation' in international human rights law is used to describe obligations related to the 'acts and omissions of a state, within or beyond its territory, that have effects on the enjoyment of human rights outside of state's territory'.[54] Although some international human rights instruments do not contain jurisdictional clauses, there are instruments that contain the clause specifying the jurisdictional application of the human rights treaty.[55]

The meaning of the term 'jurisdiction' in the case of human rights is not limited to national territory, and this can be understood from the subsequent discussion. In distinguishing territory from jurisdiction, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights has brought clarification.[56] Similarly, the Inter-American Commission on Human Rights (Inter-American Commission) has clearly stated that the term 'jurisdiction' in the sense of article 1(1) of the American Convention is

52 H Shue *Basic rights* (1996). See also UN High Commissioner for Human Rights Guiding Principles for Implementation of the 'Respect, Protect, Remedy' Framework, 2011 (accessed 4 March 2021).
53 See C Anyangwe 'Obligations of state parties to the ACHPR' (1998) 10 *African Journal of International and Comparative Law* 625.
54 UN Human Rights Council 'Elaboration of an international legally-binding instrument on transnational corporations and other business enterprises with respect to human rights' UN Doc A/HRC/26/L.22/Rev.1, 25 June 2014.
55 Eg, see art 1(1) IACHR; art 1 European Convention on Human Rights.
56 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights ETO Consortium. See also Gibney & Skogly (n 23).

not limited to or merely dependent on the national territory.[57] Rather, a state party to the American Convention can be held responsible under certain circumstances for the acts and omissions of its agents that produce effects or are undertaken extraterritorially.[58] The same understanding can be inferred from the decisions of the European Court[59] and the Human Rights Committee (HRC).[60] There are ways to determine whether the elements of a violation of human rights carried outside the territory of the state or by agents of the state are tantamount to an exercise of 'jurisdiction'. Emerging jurisprudence indicates that states are under an obligation to secure the human rights and freedoms of all individuals under their actual authority and responsibility.[61] Therefore, based on case law of international human rights monitoring and quasijudicial bodies, the state or the state agent that exercises jurisdiction abroad has an obligation to protect and promote the human rights of individuals,[62] and those three levels of human rights obligations apply *mutatis mutandis* in certain extraterritorial contexts.

Extraordinary rendition is an extraterritorial transfer of suspects and has several garnishing elements, because it is a process by which a state or its agent seizes a person assumed to be involved in terrorist activity and then transports them for interrogation to a state where due process of law is unlikely to be respected.[63] Therefore, it was designed to put detainees beyond any kind of legal oversight, premised on the view that the relevant government was not bound by applicable international human rights law when acting outside its own territory.[64] This would contravene the basic features of human rights since international human rights law is principally informed by the features of universality, integrity and equality. These characteristics generate the principle that wherever an agent can guarantee equal treatment in an area of human existence covered by a recognised international human right is justifiably allocated the burdens of the corresponding obligations. This is because this

57 *Saldan v Argentina* IACmHR 11 March 1999 Report 38/99 para 17; C*oard & Others v United States* IACmHR 29 September 1999 Report 109/99 para 37.
58 *Saldan* (n 57) para 37.
59 *Drozd and Janousek v France and Spain* EHRC 26 June 1992 App 12747/8 91.
60 General Comment 31 Nature of the general legal obligation imposed on state parties to the Covenant, UNHR Committee (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.
61 General Comment 31 (n 60) para 3.
62 *Cyprus v Turkey* 4 586 para 8.
63 Extraordinary Rendition *Dictionary*, http://dictionary.reference.com/browse/extraordinary+rendition (accessed 12 July 2022).
64 See United Nations Human Rights Council 13th session, Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism, UN Doc A/HRC/13/42 (20 May 2010) para 40.

position best describes the power that human rights are meant to channel and constrain.[65]

Though conventionally the principle for a state's human rights obligation is territorial,[66] the jurisprudence of both international and regional human rights monitoring bodies clearly shows the existence of 'exceptional scenarios' called spatial and personal controls.[67] It is true that the jurisprudence, standard setting and findings of the UN and regional systems provide useful insights into the development of the African human rights system. Article 60 of the African Charter mandates the African Commission on Human and Peoples' Rights (African Commission) to take inspiration from international and regional human rights systems. Therefore, the jurisprudence of international and regional systems concerning extraterritorial human rights obligations of states can be an important inspirational source for the African human rights system. As many of the human rights contained in the African Charter reflect rights contained in the UN and other regional human rights instruments, there is a degree of cross-pollination in interpreting the African Charter so that, for example, International Court of Justice (ICJ), Inter-American Court and European Court judgments that expand the principles in the spatial reach of human rights may be used as tools for interpreting the parallel extraterritorial human rights obligation of states in the African Charter. The international and regional human rights systems possibly justify the human rights obligation of states beyond territories. Pursuant to the inspirational clause and the exceptional standard set by international and regional systems, an African state has been held responsible primarily for human rights violations beyond its territory. Therefore, the following part analyses the exceptional scenarios in the context of extraordinary rendition.

3.1 Extraordinary rendition and spatial control

One of the scenarios for extraterritorial human rights obligation of states is when a state's conduct is performed outside its national territory and occurs in an area over which it exercises its authority and control.[68] Under this scenario, there are several cases and circumstances

65 L Raible 'Justifying extraterritorial human rights obligations and climate change as a counterexample' (2023) *Blog of the European Journal of International Law.*

66 W Vandenhole 'Obligations and responsibility in a plural and diverse duty-bearer human rights regime' in W Vandenhole (ed) *Challenging territoriality in human rights law: Building Blocks for a plural and diverse duty-bearer (*2015) 115.

67 M Salomon *Global responsibility for human rights: World poverty and the development of international law* (2007)190.

68 For detail, see R Wilde 'Triggering state obligations extraterritorially: The spatial test in certain human rights treaties' (2007) 40 *Israel Law Review* 503.

that demonstrate extraterritorial obligations of states.[69] For instance, the ICJ in its Advisory Opinion on the Palestinian Wall observed that 'Israel as the occupying power had exercised its territorial jurisdiction over the occupied Palestinian territories'.[70] As to the ICJ explanation, international human rights instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.[71] The Court affirmed this decision in *Congo v Uganda* where it held that international human rights instruments are applicable 'in respect of acts done by a state in the exercise of its jurisdiction outside its own territory', particularly in occupied territories.[72]

Similarly, the European Court has also established the application of human rights treaties where states act outside their respective territories. For example, the Court asserted that areas of Northern Cyprus occupied by Turkey incurred Turkey's responsibility in upholding the human rights of local citizens.[73] Such occupation, or effective control, is established when the occupying power 'exercises all or some of the public powers normally to be exercised by the occupied government'.[74] Thus, these cases only apply to the situation where a government has established control of territory such that it has the responsibility to uphold the customary norm of *non-refoulement* when acting outside its territory. Furthermore, in *Abdella Ocalan v Turkey*[75] and *Issa v Turkey*[76] the Court stated that temporary effective overall control of only a particular area in question was sufficient to bring individuals present in that area within the jurisdiction of the controlling state.[77] Under the African human rights system, there are cases that show the spatial control as a model for expanding state obligation beyond it is territory. The *DRC* case is the first instance in which the African Commission recognised extraterritorial obligations, thereby affirming the spatial model. As discussed in part 4.2, the *Al-Asad* case was also the important instance that further affirmed the African Commission's recognition of extraterritorial obligations when states are in effective control over parts of a territory.

69 *Loizidou v Turkey* ECtHR 18 December 1996 (1996) sec A para 62. See also *Democratic Republic of the Congo v Uganda* ICJ 116 Armed Activities on the Territory of the Congo ICJ (19 December 2015) (2015) Judgment para 173.
70 See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* ICJ (9 July 2004) (2004) Advisory Opinion para 136.
71 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (n 70) 180.
72 *DRC v Uganda* (n 69).
73 *Loizidou* (n 69).
74 *Hussein v 21 States* ECtHR 14 March 2006 (Court Decision on Admissibility).
75 *O'calan v Turkey* ECtHR 12 May 2005 Court Decision 44.
76 *Issa & Others v Turkey* ECtHR 16 November 2004 Judgment 48.
77 *Issa* (n 76) 74. See also *Bankovic & Others v Belgium & Others* ECtHR 19 December 2001 (2001) 35-35.

3.2 Extraordinary rendition and personal control

In case of personal control, without exercising sufficient control over a space, a state or state agents may perform temporary operations in the territory of another state and exercise control over an individual. The European Commission on Human Rights (European Commission) and the HRC established personal control on different bases. As to the European Commission, the personal control derived from the authority and control exercised by states over individuals. [78] The HRC, by reiterating General Comment 31, established extraterritorial obligation of states based on the universality of human rights. Particularly, in interpreting article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) the HRC stated that, like the state obligation for the act of its agent within its own territory, the state has an obligation for the acts of its agent in the territory of another state.[79]

The international human rights bodies on several occasions accepted and reaffirmed the theory on effective control. For instance, in *Cyprus v Turkey* the European Court clearly accepted the extraterritorial application of human rights in cases where state agents exercised authority and control over individuals.[80] Similarly, *Lopez v Uraguay* stated that states are responsible for infringements committed by their foreign diplomatic representatives.[81] Moreover, in General Comment 31 the HRC has also stated that a state must provide for the Covenant's rights to anyone within its power or effective control, even if that person is not 'within its respective national borders and regardless of the circumstance in which such power or effective control was obtained'.[82] Similarly, the European Court stated that 'the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, whether that authority is exercised within their own territory or abroad'.[83] Moreover, under the Inter-American human rights system, the Inter-American Court has stated that, if there is an exercise of control over individuals, it may be sufficient to find that a matter is within a state's jurisdiction, whether

78 S Besson 'The extraterritoriality of the European Convention on Human Rights: Why human rights depend on jurisdiction and what jurisdiction amounts to' (2012) 25 *Leiden Journal of International Law* 857-884.
79 See *Lopez Burgos v Uruguay* (HRC) paras 12.1-12.3; *Lopez Burgos v Uruguay* Communication 52/1979, UNHR Committee 29 July 1981 UN Doc CCPR/C/13/D/52/1979 See General Comment 31 (n 60) See also *Loizidou* (n 69).
80 M Scheinin 'Extraterritorial effect of the International Covenant on Civil and Political Rights' in F Coomans & M Kamminga (eds) *Extraterritorial application of human rights treaties* (2004) 73.
81 *Lopez Burgos* (n 79) para 156.
82 General Comment 31 (n 60).
83 *Cyprus v Turkey* (n 62) para 8.

or not there is effective control of the territory in question.[84] In the African human rights system, the African Commission in *Al-Asad* endorsed the personal model and assumes obligations beyond territorial jurisdiction such as where the state exercises control or authority over an individual. The personal model is very relevant for invoking the applicability of human rights norms to situations where state agents detain and extraordinarily render individuals from one state to another state and interrogate them in the custody of another state, whatever the degree of that state's operations in the foreign territory.[85]

3.3 Extraordinary rendition and *non-refoulement*

One distinct class of scenario for obligation beyond state territory is *non-refoulement*, which involves acts committed within the territory of the state that has extraterritorial human rights implications on another state. Basically, the principle of *non-refoulement* originates from article 33 of the Convention Relating to the Status of Refugees.[86] However, it is clearly included in other international human rights instruments, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and in the subsequent part particular emphasis is placed on the African human rights system.[87] While the violation of the *non-refoulement* principle is a territorial violation of a person's rights, the violation of the rights in the receiving state, to the extent it was foreseeable before their extradition, entails the extraterritorial responsibility of the extraditing state for facilitating such violations in spaces beyond its own.[88]

In case of extraordinary rendition, participant states are violating their international obligations by handing a person over to another state where there are reasonable grounds to believe that there is a 'well-founded fear' that they will suffer a violation of their human rights in the receiving state.[89] There is no doubt that the actual breach of

84 D Cassel 'Extraterritorial application of Inter-American human rights instruments' in Coomans & Kamminga (n 80) 23.
85 D van Natta & S Mekhennet 'German's claim of kidnapping brings investigation of US link' *New York Times* (New York) 9 January 2005.
86 The Convention Relating to the Status of Refugees, Geneva, 28 July 1951, UNTS Vol 189.
87 Art 3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).
88 Bulto (n 11) 21.
89 See S*oering v United Kingdom* Series ECtHR 7 July 1989 88-91. See in general G Gilbert *Aspects of extradition law* (1991); C van den Wyngaert 'Applying the European Convention of Human Rights to extradition: Opening Pandora's box?' (1990) 39 *International and Comparative Law Quarterly* 39; CJR Dugard & C van den Wyngaert 'Reconciling extradition with human rights' (1998) 92 *American*

human rights occurred outside the territory of the state and under the jurisdiction of another state. However, without showing a sufficient degree of control either over an area as a whole or over particular individuals, based on the principle of *non-refoulement*, a state may be considered responsible for a breach of its human rights obligations.[90] As the European Court clearly stated, '[a] state's responsibility may also be engaged on account of acts which have sufficiently proximate repercussions on rights guaranteed by the Convention, even if those repercussions occur outside its jurisdiction'.[91] Similarly, by creating a relation between the principle of *non-refoulement* and article 2(1) of ICCPR, the HRC has argued in favour of the above assertion.[92] The Committee also in its General Comment stated that article 2 of ICCPR provides an obligation on state parties to respect and to ensure that human rights are recognised for all persons in their territory and all persons under their control.[93] Therefore, such obligation contains an obligation not to extradite, deport, expel or otherwise remove a person from their territory, if there are substantial grounds for believing that there is a real risk of irreparable harm, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

In the rendering of individuals from one state to another state, states have resorted to the practice of diplomatic assurances for the purpose of excluding extraterritorial responsibilities.[94] However, there are cases that clearly show the ineffectiveness and unreliable nature of such assurances.[95] The other argument concerning extraordinary rendition and *non-refoulement* is related to its extraterritorial nature. For instance, in a report to the CAT Committee the US argued that the *non-refoulement* obligation did not extend to a person detained outside its territory, such as in Guantánamo Bay.[96] However, the Committee responded that the protection provided under article 3 of CAT extends to all territories under the effective control of the state party's authority and the 'rendition' of individuals from Guantánamo Bay to Egypt, Jordan, or any other state is a violation

Journal of International Law 187; S Borelli 'The rendition of terrorist suspects to the United States: Human rights and the limits of international co-operation' in A Bianchi (ed) *Enforcing international law norms against international terrorism* (2004) 334.

90 Gibney & Skogly (n 23).

91 *Ilascu & Others v Moldova and Russia* ECtHR 8 July 2004 (2004) 317 (citing *Soering v United Kingdom* Series A, No 161; *Ilascu & Others v Moldova and Russia* paras 88-91.

92 *Kindler v Canada* Communication 470/1991 para 6.2.

93 General Comment 31 (n 60) para 67.

94 Satterthwaite (n 14) 219.

95 Satterthwaite (n 14) 19.

96 Second periodic report of US to CAT Committee.

to article 3 of CAT or the prohibition on *refoulement*.[97] Therefore, by taking into consideration the ultimate objective of article 3 of CAT, the phrase 'another state' in fact needs to be interpreted as 'another jurisdiction'.

There are substantial grounds for believing that there is a real risk of irreparable harm in the case of extraordinary rendition or extraterritorial transfer of suspects. Even if the actual breach of human rights occurred in case of the extraordinary rendition being under the jurisdiction of another state, a transferee state shall be considered responsible for a breach of its human rights obligations. Therefore, by taking the logic of *non-refoulement*, one can argue that states are prohibited from transferring individuals from their territory to any other part of the world for the purpose of extraordinary detention.

4 Extraordinary rendition and extraterritorial reach of the African human rights system

This part examines extraordinary rendition and extraterritorial obligations of states under the African human rights system. Accordingly, it examines the substantive provision of the African Charter and the practice of the enforcement bodies, including the African Commission and the African Court on Human and Peoples' Rights (African Court) if they are seized with an issue related to extraterritorial obligations. It also examines extraordinary rendition and the territorial scope of the African Charter.

4.1 Extraordinary rendition and the substantive provisions of the African Charter

The African Charter is the main African human rights instrument setting out the rights and duties relating to human and peoples' rights in the African Union (AU) member states. Extraordinary rendition is a clandestine, multiple and complex illegal act committed by states. It includes coercive and illegal capturing and transferring of 'suspected terrorists' from one state to another state, by state agents, or agents acting under the sponsorship of another state. Largely extraordinary rendition violates several provisions of the African Charter.

Extraordinary rendition arises from coordinated actions involving two or more states, often aimed at interrogating detainees.

97 CAT Committee General Comment 4 (2017) on the implementation of art 3 of the Convention in the context of art 22, 4 September 2018.

Unfortunately, in many cases the detainee becomes a victim of torture. While the African Charter does not explicitly mention 'extraordinary rendition', it does recognise the right to physical and mental integrity under article 5. This prohibition extends to cruel, inhuman or degrading treatment or punishment. Furthermore, articles 4 and 6 of the Charter safeguard an individual's right to life, liberty and security. The African Charter emphasises the humane and dignified treatment of all detained persons. Any torture or cruel treatment following transfer violates the African Charter, and the process of abduction and transfer undermines a detainee's inherent human dignity.

Extraordinary rendition also runs afoul of states' obligations related to non-expulsion, *non-refoulement* and extradition. For instance, according to articles 12(2) and (3) of the African Charter, the expulsion of a non-citizen lawfully present within the territory of a state party is strictly prohibited. In exceptional cases where expulsion occurs, it must be carried out in accordance with established laws. Procedural protections become particularly relevant and appropriate when human rights violations are at stake.[98] However, in defiance of this stipulation, extraordinary rendition is carried out without due regard for laws that provide effective diplomatic assurances and thorough review. The principle of *non-refoulement* serves as an extension of the norm prohibiting torture, and some argue that it holds a status akin to that of *jus cogens* – a peremptory norm of international law.[99]

Access to justice is one of the fundamental human rights recognised under article 7 of the African Charter, but extraordinary rendition denies individuals the right to access recognised judicial procedures for extradition.[100] This is because extraordinary rendition is an illegal transfer of a suspect, including arrest without warrant, the denial of judicial guarantee, lawyers, and detentions for indefinite periods of time. Therefore, such acts of states are a clear violation of the African Charter, which unambiguously provides individuals access to judicial and legal guarantees. Therefore, it implicitly violates individual rights to equality as recognised under article 3 of the Charter, particularly 'equality before the courts and tribunals'. It also violates the right to be recognised as a person as recognised under the African Charter. In cases of extraordinary rendition, the detainees are also denied access

98 HRC General Comment 20.
99 See Office of the United Nations High Commissioner for Human Rights (OHCHR) (2011) Interpretation of Torture in the Light of the Practice of Jurisprudence of International Bodies.
100 Eg, see, arts 8(1) & 8(2) of the American Convention on Human Rights; arts 9, 10, 14 & 15 ICCPR and art 6(1) ECHR.

to counsel. In addition, the interrogation is conducted in a coercive manner, and violates the protection against coercive testimony or confession of guilt. Even though there were persons wrongly detained and tortured by several states related to extraordinary rendition, it was difficult to get an effective remedy for those victims.

One of the human rights violations related to extraordinary rendition is enforced disappearance. Enforced disappearances have terrible and long-lasting impacts, both physical and psychological, for those who disappeared, as well as their relatives, friends and communities. In this regard, the Guidelines on the Protection of All Persons from Enforced Disappearances in Africa were adopted by the African Commission during its seventy-first ordinary session held virtually from 21 April to 13 May 2022. The Guidelines are developed pursuant to article 45(1)(b) of the African Charter, which mandates the African Commission to formulate standards, principles and rules upon which African governments can base their legislation. It also adds to the standards developed by the African Commission through its jurisprudence and commentary, including the Guidelines on Human and Peoples' Rights while Countering Terrorism; the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (Luanda Guidelines); General Comment 3 on the Right to Life; and the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Fair Trial Principles). Therefore, acts of extraordinary rendition will fall within the ambit of these guidelines.

Extraordinary rendition is also indirectly associated with other civil and political rights, such as the rights to freedom of religion, thought, opinion, expression and movement. Even though extraordinary rendition by its nature is highly implicated with civil and political rights of individuals, it also has its own impact on individuals' socio-economic and cultural rights recognised under the African Charter. When government agents abduct and transport a person to another country to face torture and other forms of cruel, inhuman or degrading treatment, that government violates the person's economic, social and cultural rights. For instance, extraordinary rendition violates individual rights, including the right to found or maintain a family, as well as rights to health, food, water, and so forth, as they recognised under the African Charter.

4.2 Territorial scope of the African human rights system in cases of extraordinary rendition

As pointed out in the preceding parts, international and regional human rights monitoring bodies exceptionally extend the states' human rights obligations beyond borders. However, under the African human rights system, not much has been discussed about extraterritorial human rights obligations.[101] The African Charter contains a general obligation clause,[102] but it does not contain an explicit jurisdictional clause that limits or extends state parties' spatial obligations.[103] In relation to this, there are controversies about whether the lack of an explicit provision renders the African Charter always applicable to African states anywhere on the globe, or whether some sort of spatial test for applicability should be read into these and, if so, what constitutes the limits of that test. Based on article 60 of the African Charter, the African Commission is mandated to draw inspiration from international and regional human rights systems to extend the applicability of the African Charter in case of extraterritorial transfer of individuals, and to provide remedies for victims of extraordinary rendition.[104] In relation to this, the African Commission initially viewed that, due to the sovereignty of states, the African Charter applies principally within the territorial jurisdiction of states.[105] However, based on spatial and personal models of jurisdiction, a state assumes obligations beyond its territorial jurisdiction. Similarly, CAT has developed an interpretation of 'territory under its jurisdiction' which includes effective control over an individual as well as over territory.[106] Therefore, in the following part the African Charter and its jurisprudence, with respect to the need for extraterritorial obligation of states in case of extraordinary rendition, will be analysed.

As noted above, even though it is not a unique feature, the African Charter does not expressly limit its territorial and/or jurisdictional application *(ratione loci)*. Scholars have different views on the exclusion and inclusion of extraterritorial human rights obligation

101 TS Bulto 'Patching the "legal black hole": The extraterritorial reach of states' human rights duties in the African human rights system' (2011) 27 *South African Journal on Human Rights* 249.
102 Art 1 African Charter.
103 As above.
104 A Buyse *Lost and regained? Restitution as a remedy for human rights violations in the context of international law* (2008) 68.
105 *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2004).
106 CAT Committee Conclusions and Recommendations UN Doc.CAT/C/USA/CO/2 25 July 2006 para 15.

under the African Charter.[107] The article strongly argues that the African Charter's silence on extraterritorial obligations of states is not an exclusion of extraterritorial obligations of the Charter. Even if there is no concept referring territory or jurisdiction under article 1 of the African Charter, from the wording of article 1 there is no intent that precludes the extraterritorial applicability of the African Charter. Similarly, the International Law Commission (ILC) has avowed that 'the acts or omissions of organs of the state are attributable to the state as a possible source of responsibility regardless of whether they have been perpetrated in national or in foreign territory'.[108] Consequently, in relation to extraordinary rendition, there is no explicit rejection for creating an extraterritorial obligation for the attendant African states. The African Commission also follows the same logic and, on several occasions, HAS stated that article 1 of the African Charter does not expressly limit the application of the Charter within the territory and jurisdiction of state parties.[109]

In addition, the African Charter under its substantive provisions, specifically under chapter II, provides for substantive extraterritorial human rights guarantees that have the effect of extending a state's obligation beyond its territory.[110] For instance, article 12(2) of the Charter provides that individuals have the right to return to their country of origin. In such a case, logical interpretation can be used to include extraordinary rendition under the ambit of this provision. Even if African Charter is silent regarding violations related to the extraterritorial transfer of individuals, it can be completed by logical reasoning using analogy. Since the person's right to return to his country of origin is provided to the individuals who are in the custody of another state, it is the duty of the state to allow the same to return home, and this also applies extraterritorially. In addition, there are other substantive provisions that have extraterritorial implications, including 'the right to national and international peace and security' and 'equality and the prohibition of discrimination'. Even though it is argumentative, the presence of these provisions illustrates the intention of the drafter to extend the obligation of states beyond territory.[111]

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107 F Ouguergouz *The ACHPR: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 554; F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986-2000* 61. See the detail in Bulto (n 101).

108 International Law Commission (ILC) Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001 (Draft Articles on Responsibility of States) art 1.

109 *Mohammed Abdullah Saleh Al-Asad vs Djibouti* (n 46) para134.

110 Bulto (n 101) 258.

111 Bulto (n 101) 260.

Unfortunately, neither the African Court nor the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has addressed extraterritorial obligations and extraordinary renditions. The planned merger with the Court of Justice could provide more opportunities for the African Court to develop its jurisprudence on these matters, as it will have jurisdiction over transboundary crimes such as trafficking, terrorism and money laundering.[112] The African Children's Committee, through its General Comment, has provided authoritative interpretations that emphasise states' extraterritorial positive obligations under international humanitarian law. These obligations encompass a broad range of rights, including civil, political, economic and social rights.[113] This means that states must ensure that these rights are respected and protected, even beyond their own borders.

Likewise, the African Commission adopted authoritative interpretations: General Comment on the right to life (General Comment 3) and General Commenton the prohibition of torture (General Comment 4) under the African Charter.[114] These General Comments expressly outline the extraterritorial scope of application of the right to life and the prohibition on torture respectively.[115] Even though the African Charter does not explicitly guarantee the prohibition of *refoulement,* based on the aforementioned General Comments, violating human rights within a state's territory or by a state's agents in a third state or rendition to torture brings the victim under a state's jurisdiction and engages the state's responsibility.[116] The Commissipn also clearly stated that states 'should not violate the principle of *non-refoulement*, through extradition or other mechanisms, by transferring or returning individuals to circumstances where their lives might be endangered'. Similarly, article 2(3) of the Convention Governing the Specific Aspects of Refugee Problems in Africa also specifies that states may not subject individuals to measures, including return or expulsion, which would compel them to return to or remain in a territory where their life, physical integrity

112 A Oloo & W Vandenhole 'Enforcement of extraterritorial human rights obligations in the African human rights system' in M Gibney and others (eds) *The Routledge handbook on extraterritorial human rights obligations* (2022) 11-30.

113 General Comment on Article 22 African Children's Committee Children in Situations of Conflict (19 July 2021).

114 General Comment 3 on the African Charter: The Right to Life (art 4), adopted during its 57th ordinary session, held in Banjul, The Gambia, in November 2015 para 40; General Comment 4 on the African Charter: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (art 5).

115 General Comment 3 (n 114) para 18.

116 General Comment 3 (n 114) para 14.

or liberty would be threatened.[117] Moreover, the Organisation of African Unity (OAU) Convention on the Prevention and Combating of Terrorism and its subsequent subordinate instruments also accepted the same understanding and reaffirm the extraterritorial obligation of states under the African Charter.[118] *Non-refoulement* not only prohibits African states from surrendering individuals under their jurisdiction to states where there is a substantial risk that they will be subjected to violations of their fundamental rights, but also prohibits their surrender to countries that are likely, in turn, to surrender them to states where their fundamental rights may be violated.[119]

However, some African states may reject the application of the rule of *non-refoulement* in relation to extraterritorial transfers. They may emphasise the fact that they have obtained assurances from receiving states before transferring individuals to places where they face a risk of torture. By pointing to 'diplomatic assurances', African states may seek to exploit an area of African Charter that has been less than fully developed under the African human rights system. The relationship between substantive norms, such as the *non-refoulement* rule, and the procedural mechanisms required to implement and safeguard those rules, is not specified in the African Charter. However, international and other regional human rights systems have developed norms about procedural guarantees in case of diplomatic assurance.[120] For instance, the CAT Committee and the HRC in the case of Egyptian nationals Ahmed Agiza and Mohammed Alzery underlined the importance of both the rule against *non-refoulement* and the procedural guarantees needed to safeguard that prohibition. The Swedish government had received assurances that the men would not be tortured, and that the Swedish authorities would have access to the men once they were in Egyptian custody.[121] Regardless of these safeguards, both men have alleged that they were tortured upon return to Egypt.[122] Ahmed Agiza was also subjected to electric shocks during interrogation.[123]

117 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (entered into force 20 June 1974).
118 OAU Convention on the Prevention and Combating of Terrorism adopted in the OAU Summit, Algiers 14 June 1999.
119 CAT Committee General Comment 1, Implementation of art 3 of the Convention in the Context of art 22 (1996) para 2. See also General Comment 31 (n 60) para 12.
120 Conclusions and Recommendations of the Committee Against Torture, Canada (7 July 2005) (2005) UN Doc CAT/C/CR/34/CAN.
121 HRW *Still at risk: Diplomatic assurances no safeguard against torture* (2005) 67-72.
122 HRW (n 121) 68.
123 *Agiza v Sweden*, UN Committee Against Torture (20 May 2005) 233/2003, UN Doc CAT/C/34/D/233/13.

In addition, although the African Court has not pronounced on extraterritorial obligations, the investigation of the practice of the African Commission can be an opening point to address the problem. The interpretative work so far of the Commission provides some basic lines of approach towards a systematic view on extraterritorial obligations under the African Charter. For instance, the African Commission concerning the case of the *DRC v Burundi & Others*[124] has importance in clarifying the scope of the extraterritorial applicability of the African Charter. As to the final report of this case, the attempts to interpret the notion of 'effective control over the space' do not preclude the theory of an extraterritorial applicability of the African Charter.[125] This means that when a state is effectively linked to an extraordinary rendition-related activity, it shall have a legal obligation to be proactive and protective, that is, to demonstrate state responsibility.

In the context of extraordinary rendition, attendant African states violate human rights, including the prohibition on torture and other forms of cruel, inhuman or degrading treatment or punishment by detaining individuals by their agents outside their territories. In such a scenario, the state party does not exercise detailed control over the policies and actions of the authorities in the area situated outside its national territory. However, to lower the possibilities of state impunity, international and regional human rights adjudicative and quasi-adjudicative bodies have recently extended the more localised spatial control theory.[126] As to this theory, spatial control includes the space controlled by the peace keepers,[127] prisons[128] or vessels,[129] including vessels flying the flag[130] of other nations. Therefore, attendant African states must be held responsible for acts of extraordinary rendition that occur outside of their territory even though effective control of that territory might not be established. For instance, in the case between *DRC v Burundi & Others* the African Commission recognised the spatial control theory at the admissibility stage, and it understood that the alleged violations were allegedly being perpetrated by the respondent states in the territory of the Democratic Republic of the Congo (DRC). Similarly, at the merits stage, the African Commission stated that military action and occupation of the territory of another state led to the assignment of human rights obligations with regard

124 *DRC v Burundi, Rwanda and Uganda* (n 105).
125 As above.
126 See Concluding Observations of the HRC 8 December 1998 UN Doc CCPR/CO/81/BEL.
127 *Al-Jedda v the United Kingdom* ECtHR 7 July 2011.
128 *Al-Jedda* (n 127) Judgment.
129 See also *Jamaa v Italy* ECtHR 23 February 2012 27765/09. See also *Medvedyev v France* ECtHR 10 July 2008 3394/03.
130 See also *Ocalan v Turkey* (n 75); see Wilde (n 24) 503.

to that extraterritorial conduct, given the effective control exercised over parts of the DRC territory.[131] Similarly, the African Commission in *Alasad* indicated that 'circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction such as when a state assumes effective control of part of a territory of another state'. The Commission endorsed the position of the ICJ's decision in the *Armed Activities in the Congo* case to hold that occupation by a state of the territory of another state amounts to effective control and triggers the obligations of the occupying state under the African Charter.[132] The African Commission in *Alasad* also stated that 'circumstances may obtain in which a state assumes obligations beyond its territorial jurisdiction where the state exercises control or authority over an individual',[133] which is a personal model of jurisdiction.

Sometimes it may be doubtful whether the attendant African states had effective control of the territory where an individual was extraordinarily rendered. However, it does appear that the attendant African states' officials had a significant degree of control over capturing and transferring an individual to detention in third countries where he was subject to improper treatment. Where it appears that a state has such a degree of control over a person in custody outside that state's territory, the state should still be obligated to uphold human rights obligations and refrain from *refoulement* of persons who will be subjected to torture. Therefore, the personal control model is exclusively fit in cases of extraterritorial transfer and detention, which comprise physical custody of individuals by state agents. This interpretation safeguards that the African Charter fulfils its object and purpose to shield those individuals who are at the risk of extraordinary rendition. On the other hand, the African Commission's report on the case of the *Embargo Measures against Burundi*[134] can demonstrate the extraterritorial applicability of the African Charter.[135] Based on the Commission's view, the exercise of the 'effective control' on individuals would not be necessary to define the personal model, because the source of the extraterritorial applicability of the African Charter could sometimes not be represented by the control on the territory, but rather it may be from the 'indirect control' on individuals suffering the consequences of

131 *DRC v Burundi, Rwanda and Uganda* (n 105) paras 63, 68, 69, 88 & 91.
132 *Mohammed Abdullah Saleh Al-Asad v Djibouti* (n 46) paras 134, 135, 136 & 139.
133 *Mohammed Abdullah Saleh Al-Asad v Djibouti* (n 46) para 134.
134 *Association pour la Sauvegarde de la Paix au Burundi v Kenya, Rwanda, Tanzania, Uganda, Zaire and Zambia* (2003) AHRLR 111 (ACHPR 2003).
135 TS Bulto 'Towards rights-duties congruence: Extraterritorial application of the human right to water in the African human rights system' (2011) 29 *Netherlands Quarterly of Human Rights* 491f, 509-514.

measures adopted by states that are external to the territory where the injured subjects are physically set.[136]

The lack of explicit jurisdiction clause in the African Charter is an opportunity for its treaty bodies to expand and introduce approaches to extraterritorial obligations of states, as no territorial limit or definition of territoriality is provided in the Charter. However, the acceptance of African states regarding extraterritorial obligations is very important for the development of the doctrine of extraterritorial obligations in the African human rights system. Besides, it is the right time for the African Commission and the African Court to use these opportunities in their case law to fill the jurisdictional gap of the African Charter.

Generally, although the African Charter failed to provide the jurisdictional clause, there are avenues to expand the obligation of states beyond territories under the African human rights system. Based on the substantive provisions of the Charter, there is an implication for extraterritorial obligations of states. Through the mandates of the African Commission, which are provided under articles 30 and 45 of the African Charter, it is possible to extend the spatial reach of the Charter in order to have the potential to govern extraordinary rendition in Africa. This can be inferred from the aforementioned General Comments on the provisions of the African Charter. In addition, based on article 60 of the Charter, the article argues that the African human rights system may not exist without the help of international and other regional human rights systems in governing extraterritorial obligation of states relating to extraordinary rendition rather through the African Commission being mandated to draw inspiration from these systems to deal with extraordinary rendition. Therefore, based on the above analysis, the African Commission may receive and adjudicate cases of extraterritorial violations, including extraordinary rendition, and states shall not have defences on the territorial limits of the African Charter.

5 Conclusion

Most African states are signatories to the African Charter and other international human rights instruments that explicitly prohibit elements associated with extraordinary rendition. However, paradoxically, some African states engage in extraordinary rendition, thereby violating human rights enshrined in the African Charter.

136 As above.

These violations span a range of rights, including the prohibition on torture, and the rights to life, liberty, privacy, fair trial, equality, presumption of innocence, health and freedom of movement.

Extraordinary rendition encompasses both territorial and extraterritorial dimensions. However, the African Charter lacks explicit provisions defining the territorial or jurisdictional scope of the rights it upholds. The absence of a specific jurisdiction clause in the Charter invites novel approaches to extraterritoriality. Consequently, this article explores three extraterritorial perspectives: the spatial and personal control approaches and the principle of *non-refoulement*. However, due to the scarcity of relevant cases, a uniquely African perspective remains inconclusive. The African Commission and African Court should shape jurisprudence based on international and regional human rights case law. Notably, proving instances of extraordinary rendition is inherently complex due to its clandestine nature, making acquisition of evidence challenging. Consequently, participating African states face a broad basis of responsibility. This situation underscores the inherently extraterritorial nature of extraordinary rendition.

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Tug-of-war: LGBTIQ+ rights in the African human rights architecture

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Summary: *Regional organisations can constitute an arena for the negotiation of the human rights of sexual and gender minorities. They facilitate this through institutionalised bodies within their human rights architecture and fora for the involvement of non-state actors. However, the narrative of lesbian, gay, bisexual, transgender, intersex and queer Africans' so-called 'un-Africanness' is often invoked to (mis)appropriate these spaces, using 'anti-imperialist/anti-colonial' rhetoric to exclude LGBTIQ+ persons from human rights protection. In this article we argue that the design choices for regional organisations are both a means of establishing institutionalised human rights frameworks and offer*

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mechanisms for selectively appropriating narratives that justify the exclusion of certain groups from rights protections. This makes regional organisations highly contested spaces where norms, policies and power structures are in continuous negotiation. We conceptualise these contestations as a tug-of-war over which rights and whose identities are recognised within these frameworks. To unpack this struggle over whose human rights are acknowledged and whose are questioned and denied, we examine two key cases in the regional human rights arena of the African Union. These cases are the (de)registration of the Coalition of African Lesbians and the adoption and implementation of Resolution 275 by the African Commission on Human and Peoples' Rights. Within these interrelated regional arenas of the AU, critical questions emerge, namely, how these tug-of-war dynamics are carried out among state actors, and how these conflicts unfold between state and non-state actors within the AU's regional spaces.

Key words: *LGBTIQ+; African Commission on Human and Peoples' Rights; African Union human rights architecture; Coalition of African Lesbians; Resolution 275; 'un-Africanness'*

1 Introduction

Highlighting (only) homo-, inter- and transphobic notions perpetuated by African heads of state and government – and other influential individuals – carries the risk of telling the single story of African homophobia, which renders invisible the multifaceted and complex stories of approval and disapproval for the rights of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+)[1] persons across the different local, national and regional spheres on the continent.[2] Being mindful of this, our aim in this article is to

1 This acronym is largely a Western conceptualisation to denominate sexual orientations and gender identities. See S Tamale 'Researching and theorising sexualities in Africa' in S Tamale (ed) *African sexualities: A reader* (2011) 11. The terms and acronym render invisible non-Western descriptions and designations, such as women loving women, *Kuchu* (a Kiswahili term used in Uganda) and *Matanyola* (a Tswana term used in Botswana). Some of these are a distinctive re-claiming of derogatory names; see M Mbaru, M Tabengwa & K Vance 'Cultural discourse in Africa and the promise of human rights-based on non-normative sexuality and/or gender expression: Exploring the intersections, challenges and opportunities' in N Nicol and others (eds) *Envisioning global LGBT human rights: (Neo)colonialism, neoliberalism, resistance and hope* (2018) 177. Colonial continuities need to be reflected here too, as the reproduction of the 'common' abbreviation and the continuation of making other terms invisible is in itself highly problematic and a continuation of power dynamics. Furthermore, the acronym is an oversimplification of the different identities, lived realities and the intersections of identities of the people it tries to describe.

2 S Ndashe 'The single story of "African homophobia" is dangerous for LGBTI activism' in S Ekine & H Abbas (eds) *Queer African reader* (2013) 155-164.

explore the dangers of the single-story framing LGBTIQ+[3] identities as 'un-African' in the name of anti-colonialism and anti-imperialism, and to examine its implications for governance at multiple levels. We argue that this narrative is utilised to paint a picture of ahistorical and apolitical LGBTIQ+ identities, the manifestation of which can be traced in national but also regional governance arenas. At its core, this struggle revolves around the interpretation of who is considered African and whose human rights are recognised as legitimate. These questions have extensive and interrelated implications. Primarily, they impact the lives and lived realities of LGBTIQ+ individuals at the national level, but they also affect regional governance arenas within the African human rights framework. At both levels, a central question arises: For whom is the African human rights system designed, and who is excluded from accessing basic human rights?

On the regional level, governance arenas are highly contentious, especially regarding the rights of sexual and gender minorities. We propose that these contestations can be understood as a tug-of-war over definitions of who belongs and whose human rights matter. Our focus is on how the human rights framework of the African Union (AU) has been leveraged in this tug-of-war concerning LGBTIQ+ rights, and on whether the 'un-Africanness' narrative has been employed to appropriate this regional governance space to tell a certain (single) story shaping a selective view of whose rights are prioritised. Two cases are instructive for understanding how the contestations unfold: the (de)registration of the Coalition of African Lesbians (CAL) and the adoption of Resolution 275 by the African Commission on Human and Peoples' Rights (African Commission) in 2014.[4]

Celebrating its tenth anniversary this year, Resolution 275 has become a cornerstone of the African human rights architecture regarding the rights of LGBTIQ+ persons. It condemns the increasing violence and other human rights violations – including murder, rape, assault, arbitrary imprisonment and other forms of persecution –

3 In the article we speak of LGBTIQ+ because we understand activism for the rights of sexual and gender minorities as an intersectional undertaking. Even though not all examples and the two cases we discuss predominantly address the rights of all or even most of the people grouped under the label of LGBTIQ+, for the sake of being coherent and concise and speaking to the intersectional approach we aim for, we use the umbrella term of LGBTIQ+ even when we speak only of LB(T)Q women or LGB(Q) persons. As n 1 points out, this terminology also is an oversimplification and overgeneralisation and needs further reflection.

4 Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity ACHPR/Res.275(LV) 2014, https://achpr.au.int/en/adopted-resolutions/275-resolution-protection-against-violence-and-other-human-rights-violations (accessed 30 October 2024).

targeted at individuals on the basis of their imputed or real sexual orientation or gender identity. It further condemns systematic attacks by both state and non-state actors against persons on these grounds, calling on African states to prevent, investigate and remedy acts of violence.[5] Resolution 275 is the outcome of relentless activism and strategically-coordinated efforts between state and non-state actors across various AU human rights platforms.

In what follows, we outline the conceptualisation of regional organisations and aspects of their institutional design, framing them as arenas of a tug-of-war over human rights of LGBTIQ+ individuals. Our analysis explores how the narrative of the 'un-Africanness' of African LGBTIQ+ identities is employed to appropriate the AU's established human rights architecture, counteracting protections for LGBTIQ+ persons and positioning these regional arenas as spaces of intense contestation. This argument is illustrated along two interconnected cases within the African human rights system: the (de)registration of the CAL, and the adoption and implementation of Resolution 275. Additionally, we briefly discuss debates around the inclusion of sexual and gender minority rights in other soft law instruments of the African Commission, further contextualising these issues within the African human rights framework.

2 Regional organisations as arenas for a tug-of-war over the rights of LGBTIQ+ persons

The tug-of-war at the regional level is a manifestation of diverging interests at the national level, revealing a divide between countries getting rid of anti-LGBTIQ+ colonial legacy laws and those where leaders invoke the 'un-Africanness' of LGBTIQ+ identities, disregarding the reality that African sexualities are diverse. However, not all states externalise their internal political stances in this way. Additionally, the role of non-state actors at both national and regional levels is critical in shaping these contested spaces. This raises key questions, namely, what roles these state and non-state actors play within the regional arenas in the ongoing struggle over defining the 'Africanness' of LGBTIQ+ identities; and how these roles correspond to broader dynamics in regional governance. In the following parts we first unpack and challenge the conceptualisations of LGBTIQ+ identities as 'un-African', examining these with regard to their colonial legacies. We then offer a conceptualisation of regional arenas, focusing on the

5 Network of African National Human Rights Institutions *A guide for African national human rights institutions for implementing Resolution 275* (2020).

appropriation of human rights narratives in the struggle for LGBTIQ+ recognition.

2.1 Debunking the 'un-Africanness' of LGBTIQ+ Africans and colonial legacies

Today, LGBTIQ+ persons across the African continent are framed as imports from 'the West', their identities and bodies deemed incompatible with African values, and their very existence labelled 'un-African'. This narrative, which frames non-cisgender and non-heterosexual persons as a recent Western import, is reinforced by an alliance of politicians and religious leaders.[6]

In contrast to this narrative, the lived realities and experiences of LGBTIQ+ individuals in diverse African settings are documented in three seminal anthologies, which together challenge and debunk this ahistorical and apolitical view. Morgan and Wieringa[7] focus on female same-sex relationships and practices in Eastern and Southern African countries, arguing that labelling same-sex relations a Western import is a 'perverse distortion of African history', especially since 'homophobic post-colonial governments perpetuated colonial policies in denouncing same-sex relations'.[8] In two more recent anthologies – *African sexualities: A reader*, edited by Tamale,[9] and *Queer African reader,* edited by Ekine and Abbas[10] – bring together scholarly, activist and artistic perspectives from across the continent, offering nuanced insights into the lives of LGBTIQ+ Africans, and further dismantling the 'un-African' label. Another edited volume sheds light on protecting the human rights of sexual minorities in contemporary Africa[11] from a legal perspective, and provides insights into nine country contexts with a view to dispelling the myth of 'un-Africanness'. Based on the accounts from Eastern and Southern Africa, Morgan and Wieringa[12] see the point of departure for this narrative in the influence of missionaries and Christianity, noting how these values were internalised over time.[13] They argue that 'homophobia in many post-colonial African states also results

6 K Mwikya 'Unnatural and un-African: Contesting queer-phobia by Africa's political leadership' (2014) 19 *Feminist Africa* 98; C Ngwena *What Is Africanness? Contesting nativism in race, culture and sexualities* (2018).
7 R Morgan & S Wieringa *Tommy boys, lesbian men and ancestral wives. Female same-sex practices in Africa* (2005).
8 R Morgan & S Wieringa 'Introduction' in Morgan & Wieringa (n 7) 11-22.
9 Tamale (n 1).
10 Abbas & Ekine (n 2).
11 S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017).
12 Morgan & Wieringa (n 7).
13 See also Mbaru and others (n 1).

in same-sex identified women feeling alienated from the project of nation building in their countries'.[14] Abbas illustrates a similar logic in debates on aid conditionality:[15]

> In the last decade LGBTI issues have been put squarely in the geopolitical arena. In Africa, the homophobes are using the very notions of citizenship and African identity as rhetoric to exclude and oppress LGBTI persons and communities. This does not come in a vacuum of oppression. Indeed, a democratic regression and looming economic recession has created systematic entrenchment of various forms of oppression. Notably, oppressions that seek to exert power over bodies and sexuality are gaining ground in an increasingly fundamentalist state and religious rhetoric armed with populist power.

In his seminal work *What is Africanness?* Ngwena[16] theorises the underlying logic behind the narrative of LGBTIQ+ identities as 'un-African'. Ngwena links colonial framings that cast racialised *others* as deviant to similar framings of people based on sexual orientation and gender identity. For instance, '[f]or whites who were inclined to become "deviant" or "disoriented" as to become racially "queer" by going astray and crossing the sexual colour bar, the laws were "straightening devices" to assist with aligning white bodies with white spaces in a racial oligarchy'.[17] Ngwena further develops this idea through the concept of *moral panic*, which

> is the construction of a 'political moment of sex' galvanising political action to serve sectional political, cultural and religious ends in the maintenance of heterosexual patriarchal dominance. Characteristically, as Gayle Rubin underscores, the moral panic is aimed at vulnerable constituencies who lack political power.[18]

These analyses dismantle the notion that non-cisgender and non-heterosexual African identities are merely *Western* influences, exposing the ahistorical foundation of this narrative.[19] They make it clear that colonial legacies are largely responsible for the homophobic and transphobic practices that persist today, among others, through legal frameworks.[20] Laws criminalising same-sex (sexual) relations, so-called 'anti-homosexuality laws' or 'anti-sodomy laws', were passed under British colonial rule and remain in

14 Morgan & Wieringa (n 7) 17.
15 H Abbas 'Aid, resistance and queer power' 5 April 2012, https://sxpolitics.org/we-recommend-136/7385 (accessed 30 October 2024).
16 C Ngwena *What is Africanness? Contesting nativism in race, culture and sexualities* (2018).
17 Ngwena (n 16) 181.
18 Ngwena (n 16) 203.
19 See also CHM Klapeer 'LGBTIQ rights, development aid and queer resistance' in OU Rutazibwa & R Shilliam (eds) *Routledge handbook of postcolonial politics* (2018) 179-194; Mwikya (n 6).
20 A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022).

force in 35 of the Commonwealth's 54 member nations, including 14 African states. These laws commonly use terms such as 'carnal knowledge', 'unnatural offences' and 'indecent practices', which have been interpreted to prohibit sexual acts between persons of the same sex, typically targeting men who have sex with men. These colonial-era laws remain embedded in Penal Codes based on British Commonwealth law.[21] Tamale and Bennett reflect: 'Ironically, while Africa is holding onto these archaic colonial laws, countries from which they were imported have largely scrapped them from their statute books.'[22] The historical entanglements around European interference in the legislation and treatment of LGBTIQ+ individuals in African nations are intricate and to this day remain complex. One manifestation of this complexity is the ongoing debate about the 'un-Africanness' of LGBTIQ+ Africans. The persistence of this narrative over the past decades is evident across national contexts on the continent, although systematic insights into how it plays out in regional governance spaces, such as the AU, are still largely missing from scholarly debates. Increasingly, civil society and scholars are documenting its presence and the implications it carries in regional governance arenas.

Over the past two decades, colonial legacy laws have been challenged through strategic litigation, or what Jjuuko and others have recently termed 'queer lawfare' at the national level.[23] Several of these decriminalisation efforts have been successful in recent years – among them Botswana.[24] Activists involved in the Botswana decriminalisation campaign hope that these national victories will open up spaces for discussion and discourse on different regional governance levels in the future. The assumption is that changes in laws and norms at the national level may diffuse not only to other countries but also through regional arenas. This underlines the AU and, specifically, the African Commission, as critical spaces for both activism and the transnational diffusion of norms.[25] The African

21 CIVICUS 'LGBTQI+ rights in the Commonwealth: Time for change. Commonwealth Heads of Government meeting an opportunity to address colonial legacy of discrimination' 21 June 2022, https://lens.civicus.org/lgbtqi-rights-in-the-commonwealth-time-for-change/ (accessed 1 March 2024); E Han & J O'Mahoney *British colonialism and the criminalisation of homosexuality: Queens, crime and empire* (2018).

22 S Tamale & J Bennett 'Editorial: Legal voice: Challenges and prospects in the documentation of African legal feminism' (2011) 15 *Feminist Africa* 5.

23 Jjuuko and others (n 20).

24 Southern African Litigation Centre 'Botswana Court of Appeals decriminalisation judgment' 2021, https://www.southernafricalitigationcentre.org/2021/12/06/the-botswana-court-of-appeals-decriminalisation-judgment-explained/ (accessed 3 March 2024).

25 M Reiss 'Advocating for human rights of LGBTIQ+ persons in multilevel governance systems' (2024) 20 *Journal of Civil Society* 269-284.

Commission is regarded as essential not only for activism but also for setting human rights standards within and beyond the AU's human rights framework, positioning it as a *norm leader.*[26] Sibongile Ndashe, founder and executive director of the Initiative for Strategic Litigation in Africa (ISLA), underscores this point, stating:[27]

> The ACmHPR [African Commission on Human and Peoples' Rights] is the bearer of standards on for the continent on human rights. The African Charter entrusted the promotion and the protection of human rights to the ACmHPR. If there is any space worth investing in, on the regional sphere, it has to be the ACmHPR. Any advocacy with the political bodies on LGBTI rights that ignores or fails to recognise the importance of engaging with the ACmHPR is doomed to fail.

In the following part we take a closer look at the AU's human rights architecture, its different aspects and parts. We introduce the conceptualisation of its arenas as spaces where a tug-of-war is carried out.

2.2 Conceptualising regional organisations as arenas for tugs-of-war and the appropriation of human rights

We are interested in exploring how the human rights architecture of the AU has been used for tugs-of-war over the rights of LGBTIQ+ persons, and whether the narrative of the 'un-Africanness' of LGBTIQ+ individuals is used to appropriate this regional governance space. The homo and transphobic notions underlying the 'un-Africanness' narrative are understood here as a frame used to claim control over the human rights architecture of regional organisations and to promote a certain (single) story of whose human rights are considered valid and whose are not. To unpack this, it is crucial to examine the different governance levels – both national and regional – as they are central to understanding how these contestations unfolds.

The human rights architecture of the AU is an extensive framework comprising various organs, institutions, policies and polities.[28] This constitutes the umbrella framework for the continent, including the sub-regional governance levels. African regional organisations at

26 See OC Okafor & GEK Dzah 'The African human rights system as "norm leader": Three case studies' (2021) 21 *African Human Rights Law Journal* 669-698.

27 S Ndashe 'Seeking the protection of LGBTI rights at the African Commission on Human and Peoples' Rights' (2011) 15 *Feminist Africa* 32.

28 Centre for Human Rights *Guide to the African human rights system. Celebrating 40 years since the adoption of the African Charter on Human and Peoples' Rights 1981-2021* (2021), https://www.pulp.up.ac.za/component/edocman/a-guide-to-the-african-human-rights-system-celebrating-40-years-since-the-adoption-of-the-african-charter-on-human-and-peoples-rights-1981-2021.

the sub-regional level operate within this framework. However, they often have a less robustly-institutionalised human rights structure – if they have any at all. Among the institutional frameworks in place are regional legislative and judiciary bodies, forums for the involvement of non-state actors, and expert committees.[29]

In the African regional context, regional organisations are largely organised around the principle of intergovernmentalism, where decisions are made by heads of state or government. This process involves a relatively small, homogenous group with consensus-based decision-making procedures. This principle draws from historical experiences and legacies rooted in the struggle for independence and sovereignty, making it a crucial and enduring feature of (Eastern and Southern) African regional organisations.[30] The structure of these institutional designs impacts how power is distributed among the various organs. These design choices are the result of extensive negotiation processes between state – but also non-state – actors.[31]

After the institutional design is implemented, it remains subject to changes and developments from both within and outside. Regarding the role of organised non-state actors in the context of women's rights, Tamale[32] asserts that 'without the push and pull from national, regional and international women's movements, it is unlikely that the progress in the gender normative framework of the AU would have been realised'. In the broader discussions on anti-feminism, Ahikire emphasises the need to

> utilise regional and pan-African spaces and policy instruments to respond to the more deadly manifestations of anti-feminism. The likely spaces may include specific regional blocs such as the East African Community (EAC), Southern African Development Community (SADC), Economic Community of West African States (ECOWAS), possibly the Arab Maghreb Union and the pan-African AU.[33]

29 A van Eerdewijk & C Roggeband 'Gender equality norm diffusion and actor constellations: A first exploration' in A van der Vleuten, A van Eerdewijk & C Roggeband (eds) *Gender equality norms in regional governance. Transnational dynamics in Europe, South America and Southern Africa* (2014) 42-64.

30 S Kingah & C Akong 'Is interregional AU-ASEAN diffusion in the south barren?' in U Engel and others (eds) *The new politics of regionalism. Perspectives from Africa, Latin America and Asia Pacific* (2018) 85-100; M Reiss *Constructing the East African Community: Diffusion from African and European regional organisations* (2022).

31 A Acharya & AI Johnston (eds) *Crafting cooperation. Regional international institutions in comparative perspective* (2007); Reiss (n 30); BA Simmons & L Martin 'International organisations and institutions' in W Carlsnaes, T Risse & BA Simmons (eds) *Handbook of international relations* (2002) 192-211.

32 Tamale (n 1).

33 J Ahikire 'African feminism in context: Reflections on the legitimation battles, victories and reversals' (2014) 19 *Feminist Africa* 20-21.

Ahikire points to the multilevel governance architecture on the continent, including the regional organisations that are part of the AU's overall integration efforts. While we believe that there is much to gain from the insights in these governance spaces, we focus here on the AU and its human rights architecture. Within these arenas, the role of non-state actors is increasingly accredited more relevance – however, rarely with regard to LGBTIQ+ activism.

In reference to these arenas on the regional level, it is instructive for the conceptualisation of this article to understand these as spaces of a back-and-forth between state and non-state actors over the question whose rights are prioritised. Cavanagh explains in the documentary 'The Commission – From silence to resistance' how the African Commission as a regional space is perceived by civil society activists:[34]

> The intention in terms of being involved in those spaces is advancing social justice and human rights. So, for us this was an important space, not necessarily because what happens there is going to be implemented, but it is a space for ideas and, where ideas are being debated, we have to be there.

We propose conceptualising the dynamics of appropriation using the image of a tug-of-war. This approach is guided by two key indicators that inform our analyses: actors and pull dynamics. In a tug-of-war, both teams pull on the rope to gain ground, aiming to draw the opposing team closer or bring them to the ground. The composition of these teams is crucial, as is the specific pull dynamic employed. Therefore, we propose closely examining the 'teams', which consist of various state and non-state actors on either side. This enables us to identify the opposing sides in each regional arena. In the cases discussed, we explicitly account for the power dynamics between the two sides, recognising that the playing field is inherently uneven.

A tug-of-war is typically characterised by a back-and-forth struggle, where one team's gain corresponds to the other team's loss. Aligning with this metaphor, we argue that the dynamics within the regional arenas of the AU reflect a zero-sum game. Human rights cannot be partially implemented: This principle is embedded in the very nature of the international human rights system and international law. Furthermore, article 4 of the African Charter on Human and Peoples' Rights (African Charter) affirms: 'Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity

34 'The Commission – From silence to resistance' Documentary (2017), https://www.youtube.com/watch?v=pq0Pu7Nq6MQ:'12:43-'13:03 (accessed 24 January 2024).

of his person.'[35] Consequently, we apply the framing of a zero-sum game to debates surrounding the rights of LGBTIQ+ persons, conceptualising these discussions within the AU's arenas as a back-and-forth struggle, ultimately resulting in a 'winner'.

We acknowledge that the tug-of-war metaphor may seem overly simplistic for capturing the layered and complex processes at play. However, we are of the view that it effectively illustrates three key points: first, that human rights are indivisible and should be fully safeguarded in their entirety; second, that the struggles in the regional governance arenas are dynamic, engaging a wide range of state and non-state actors on both sides; and, third, that regional organisations are increasingly becoming important governance arenas for the negotiations of the rights of LGBTIQ+ individuals. Following a brief discussion of our own positionality and the database used for this piece, we outline two major contestations over LGBTIQ+ rights within the AU's regional arenas and analyse the dynamics as a tug-of-war.

3 Database and own positionality

The database for the following analysis predominantly consists of primary documents from the AU, non-governmental organisations (NGOs), as well as other non-governmental and governmental actors. Academic literature on the topic and on activism for the rights of LGBTIQ+ persons within multilevel governance systems is relatively scarce. Thus, we also draw on the documentary 'The Commission. From silence to resistance' [36] by Ditsie. This film contextualises and documents the process leading up to the adoption of Resolution 275 and the contestations surrounding CAL's observer status. Ditsie accompanies multiple NGOs, such as CAL, ISLA and African Men for Sexual Health and Rights (AMSHeR), along with activists on their journey, providing a detailed account of the cases discussed in this piece. Additionally, we rely on background information drawn from expert interviews[37] conducted between November 2021 and March 2022 in Pretoria, Johannesburg and Gaborone, during a research stay by one of the authors, Mariel Reiss. Activists, including from CAL and ISLA, and scholars were interviewed based on their in-depth knowledge and experiences advocating LGBTIQ+ rights on the national, regional and international levels. Mariel Reiss is a *white*,

35 Organisation of African Unity African Charter on Human and Peoples' Rights (1981).
36 Documentary (n 34).
37 J Gläser & G Laudel *Experteninterviews und Qualitative Inhaltsanalyse* (2009).

cisgender lesbian in her mid-thirties, trained as a political scientist at universities in Germany and Sweden. She neither can nor claims to fully understand the lived realities of LBQ+ African women, though her allyship and solidarity extends to them as well as to transgender and intersex persons. During this research trip, the authors of this article met and later on decided to write this piece together. Monica Tabengwa is a human rights advocate/activist from Botswana. She is employed as a policy specialist by the United Nations Development Programme (UNDP) based in South Africa. She held various positions within international NGOs working on LGBTI inclusion, and also is co-founder of the leading LGBTI organisation in Botswana, LeGaBiBo. During this time, she was part of the core group of activists attending African Commission sessions since 2009 to lobby for the integration and inclusion of LGBTI issues in the African human rights mechanisms, in particular to be able to fully participate at all the African Commission sessions without discrimination on the basis of sexual orientation or gender identity and expression, and sex characteristics (SOGIESC).[38] Many of the examples and accounts discussed in this article draw on her personal experience and participation in the relevant spaces. We thus complement the data on which we rely our analysis with her experiences and accounts.

4 African Union regional arenas: Tug-of-war over LGBTIQ+ rights

The African regional integration landscape is structured through the AU and the implementation of the treaty establishing the African Economic Community (AEC)[39] and the eight recognised regional economic communities.[40] The AU functions as an umbrella body outlining a six-stage process that extends far beyond mere economic integration. The Organisation of African Unity (OAU), the AU's predecessor, had implemented the African Charter in 1986. This Charter 'is a human rights instrument designed to champion the promotion and protection of human rights and basic freedoms in Africa'. In 1987 the African Commission was inaugurated to oversee and interpret the African Charter.[41] The OAU further established the

38 The terms 'LGBTIQ+' and 'SOGIESC' are both used in this article interchangeably.
39 Also called the Abuja Protocol, which entered into force in 1994 under the predecessor of the AU, the OAU.
40 S Karangizi 'The regional economic communities' in A Abdulqawi Yusuf & F Ouguergouz (eds) *The African Union. Legal and institutional framework. A manual on the Pan-African Organisation* (2012) 231-249.
41 The African Commission consists of 11 commissioners who serve in their personal capacity as independent experts from a variety of professional backgrounds. Commissioners can serve for six years and are eligible for re-election, but not consecutively, and are nominated by their own governments. The appointed

African Court on Human and Peoples' Rights (African Court) in 1998. Thus, the African human rights system is layered and has evolved over time, along with the distribution of tasks among the various entities within the system. 'While the African Commission has a wide mandate covering the monitoring, investigation and promotion of human rights, the African Court's mandate is exclusively limited to receiving and adjudicating complaints on violations of human rights.'[42] Within this African human rights architecture, the rights related to SOGIESC have been the subject of intense contestation. Over the past two decades, however, these rights have come to play a more relevant role.[43]

In the following sub-parts, the contestations and the tug-of-war over the human rights of LGBTIQ+ persons is illustrated along two significant cases within the regional human rights arenas of the AU. The cases are the (de)registration case of the CAL and the adoption of Resolution 275. The analysis proceeds as follows: First, the context of each case is introduced and, subsequently, for each case, the relevant actors on both sides and their respective pull tactics in the struggle over whose human rights matter and whose do not are outlined.

4.1 The African Commission and the (de)registration of the Coalition of African Lesbians

Before the adoption of the landmark Resolution 275 in 2014, the tug-of-war between the African Commission and NGOs advocating LGBTIQ+ rights centred around the issue of accreditation or observer status. This aspect of civil society involvement has been – and continues to be – highly contested.

Under article 45 of the African Charter, the African Commission recognises the vital role played by human rights NGOs in its protective and promotional mandate. NGOs provide critical resources and information, and act as a direct link to grassroots efforts in each country, thereby supporting the Commission in

commissioner should meet the highest standard of independence, impartiality and be competent in their fields of work (Criteria for the nomination and election of members of the African Commission on Human and Peoples' Rights, AI Index: IOR 63/002/2007).

42 S Dersso 'Forty years of the African Charter and the reform issues facing the discourse and practice of human rights' (2021) 21 *African Human Rights Law Journal* 654.

43 F Viljoen & A Sogunro 'The promotion and protection of sexual and gender minorities under the African regional human rights system' in AR Ziegler, ML Fremuth & B Hernández-Truyol (eds) *The Oxford handbook of LGBTI law* (2024).

holding member states accountable for human rights violations. Consequently, NGO participation is regulated through the process of accreditation or granting observer status, a decision made by the African Commission.[44] Any NGO working on human rights can apply for observer status with the African Commission, provided they meet specific criteria. These include demonstrating how their objectives and activities reflect the fundamental principles of the African Charter, outlining their work in the field of human rights, and providing documentation such as financial resources, organisational documents, for instance, their statutes, proof of legal existence, a list of members, and the most recent financial audit statement.[45]

However, the registration process for gaining access to this crucial regional arena is far more difficult and contested than the rules might suggest. This is particularly true for NGOs working on LGBTIQ+ issues. In the following discussion, we outline one of the most significant contestations: the process of the application for – and subsequent deregistration of – CAL as an observer, and the broader implications of the interference by the Executive Council of the AU.[46]

4.1.1 Granting observer status to the Coalition of African Lesbians

CAL submitted its first application for observer status in 2008, but the African Commission rejected it in 2010, stating that the organisation did not promote or protect any of the rights in the African Charter. In a special issue of *Feminist Africa*, Ndashe offers a comprehensive discussion and recap of the process leading up to this first application and its subsequent rejection.[47] Here, we focus on the developments surrounding the second rejection in 2014. That same year, when the African Commission adopted Resolution 275, CAL resubmitted its application. After years of advocacy, CAL was ultimately granted observer status by the Commission at its fifty-sixth ordinary session in April 2015, following a five-to-four vote, with one abstention.

44 African Commission on Human and Peoples' Rights Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights ACHPR/Res.33(XXV)99 (1999) ch II paras 5-6.

45 African Commission on Human and Peoples' Rights Resolution on the Granting of Affiliate Status to National Human Rights Institutions and Specialised Human Rights Institutions in Africa ACHPR/Res.370(LX)2017 (2016), https://achpr.au.int/en/adopted-resolutions/370-granting-affiliate-status-national-human-rights-institutions-achprres370lx (accessed 30 October 2024).

46 The African Union Executive Council is made up of the ministers designated by the member states' governments and thus is one of the intergovernmental bodies of the AU.

47 Ndashe (n 27).

This success is partly attributed to an Africa-wide campaign led by human rights NGOs, which called on the African Commission to reconsider its 2010 decision. The pro-LGBTIQ+ side relied on strategic coalitions between NGOs and commissioners supporting their cause. They managed to rally support for CAL's registration from both state and non-state actors. During the heated debates, the five commissioners who voted in favour of granting CAL observer status stood up to defend the organisation's right to exist, alongside a group of pro-LGBTIQ+ NGOs in the regional arena. On the other end of the rope, openly hostile and homophobic and transphobic sentiments were voiced by those commissioners who voted against granting CAL observer status, as well as by other human rights organisations and state delegates attending the session. These arguments were largely framed around the notion of 'African values, identity, and tradition' which according to the opposition, CAL would undermine or deviate from. Specifically, they argued that an NGO called the Coalition of *African Lesbians* could neither be truly 'African' nor aligned with 'African values'.[48] In this context, the narrative of the 'un-Africanness' of LBQ+ women was invoked.

By granting CAL observer status in 2014, the push for the inclusion and recognition of LGBTIQ+ persons sent a strong signal to other NGOs as well as the diverse LGBTIQ+ communities across the continent. From 2015 until 2018, CAL was able to participate in regional discourses taking place at the African Commission. However, even during this period, CAL's belonging in this space was continuously contested. This is evident from the ways in which members of NGOs in the regional arenas of the African Commission both implicitly and explicitly suggested that CAL's presence tainted the space. Such reactions highlighted CAL's precarious situation and constantly called their status into question.[49] One of the main reasons for this opposition was the perception that a focus on SOGIESC issues would divert attention from what those NGOs have been working on, such as HIV/AIDS, conflict prevention and poverty – issues considered to be more important and urgent. This hierarchisation of human rights issues is not uncommon, especially when resources, such as access and attention, are limited.

4.1.2 Deregistration of the Coalition of African Lesbians

Following these debates within the African Commission, and an unsuccessful request for an advisory opinion submitted to the African

48 Documentary (n 34).
49 As above.

Court,[50] in August 2018 the African Commission withdrew CAL's observer status (Decision 1015). The process stretched from 2015 to 2018. In what follows, we outline the tug-of-war that led to a painful loss for CAL and other human rights organisations and actors advocating LGBTIQ+ persons and their human rights.

The first contestation questioning CAL's belonging can be traced back to June 2015, when the Executive Council of the AU requested that the African Commission withdraw CAL's status and align its decisions on granting observer status more generally with 'fundamental African values, identity and good traditions'.[51] However, the African Commission did not act on this request, instead justifying its decision in its 2017 Activity Report to the AU Executive Council by affirming that the decision fell within its mandate and that it had followed the proper procedure and criteria.[52] The African Commission sought to assert its independence, in line with its mandate to protect and promote fundamental human rights for all. Despite strong contestation of CAL's position, the African Commission stood firm. This indicates an important aspect of alliance building in the tug-of-war. While the African Commission did not explicitly defend CAL and its stance, it aligned itself with the actors on the side of the rope advocating the protection of LGBTIQ+ rights. On the other side of this tug-of-war, we position the Executive Council and the Secretariat of the AU, both part of the political organs of the AU. There are two levels to their practice: first, to further marginalise LGBTIQ+ organisations and keep them out of the relevant regional human rights arenas; and, second, to infringe upon the independence of the African Commission.

The second contestation occurred in 2018, when CAL's observer status was withdrawn directly following a request by the Executive Council of the AU.[53] In this request, the Executive Council urged

50 See *Request for Advisory Opinion by the Centre for Human Rights, University of Pretoria and the Coalition of African Lesbians* (Advisory Opinion) (2017) 2 AfCLR 606, asking the Court's view as to whether the Executive Council was acting within its competence under art 59(3) of the African Charter when it directed the Commission to withdraw CAL's observer status. The request was denied on 28 September 2017, on the basis that the Court does not have jurisdiction to consider a request for an Advisory Opinion by the two NGOs because they were not 'recognised by the African Union', as required by art 4(1) of the Protocol Establishing an African Court on Human and Peoples' Rights. See also 43rd Activity Report of the African Commission on Human and Peoples' Rights (2017) para 50, https://achpr.au.int/en/documents/2017-06-01/43rd-activity-report (accessed 15 November 2024) (African Commission's 43rd Activity Report).

51 African Union Executive Council 'Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights' Doc.EX.CL/921(XXVII) (2015).

52 African Commission's 43rd Activity Report (n 50) para 51.

53 African Union Executive Council, Decision on the 38th Activity Report of the African Commission on Human and Peoples' Rights EX.CL/Dec.887(XXVII) para

the African Commission to consider 'African values' when reviewing applications for the observer status.[54] Viljoen and Sogunro frame this decision within the increasing pressure exerted on the Commission by various (intergovernmental) organs of the AU,[55] such as the Executive Council and the Permanent Representatives' Committee (PRC).[56] Some members of the PRC and the Commission attended a retreat in 2018, after which Decision 1015 was adopted. The authors argue that the language adopted by the Commission around the notion of 'African values' was a direct influence from the above-mentioned intergovernmental bodies. Ultimately, on 8 August 2018, the African Commission withdrew CAL's observer status following decisions by the Executive Council of the AU that called on the African Commission to consider 'African values' when reviewing applications for observer status.[57] In both instances, the intergovernmental organs and their representatives formed the 'anti-LGBTIQ+ team' on one side of the rope, wielding much more power and leverage. On the other side were CAL, individual commissioners and non-governmental allies, who had significantly fewer resources, power and leverage. The former side won this tug-of-war, further marginalising LGBTIQ+ organisations and keeping them out of the relevant regional human rights arenas. Moreover, they infringed upon the independence of the African Commission. This tug-of-war dynamic took on its own momentum as the Executive Council of the AU persisted. A further directive was issued, informing the African Commission that the AU's political organs hold a more powerful position in relation to the African Commission, which only possesses functional powers. Following from this, the relationship between the Executive Council of the AU and the African Commission became increasingly hostile. With mounting pressure on the African Commission's members, a meeting was called in January 2018 to address the non-compliance with the directive to withdraw CAL's observer status and 'to resolve various concerns expressed about the relationship between the African Commission and the policy organs and member states'.[58] In June 2018 the Executive Council of the AU once again firmly requested that the African Commission 'withdraw

7 in Executive Council Decisions, EX.CL/Dec.873-897(XXVII).

54 Centre for Human Rights (n 28).

55 Viljoen & Sogunro (n 43).

56 The PRC is made up of the AU member states' ambassadors to the AU headquarters in Addis Ababa, Ethiopia.

57 African Union Executive Council EX.CL/Dec.995(XXXII) Decision on the African Commission on Human and Peoples' Rights Doc EX.CL/1058(XXXII).

58 African Union Executive Council 'Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR)' DOC.EX.CL/1089(XXXIII) I (2018); EX.CL/Dec.1015(XXXIII) paras 1 & 2 in Executive Council Decisions, EX.CL/Dec. 1008-1030(XXXIII).

the accreditation of the Coalition for African Lesbians (CAL) latest by 31st December 2018, in accordance with previous decisions of AU Policy Organs'.[59] Finally, the African Commission relented and withdrew CAL's observer status in 2018.[60]

4.1.3 The deregistration of Coalition of African Lesbians and its implications for the human rights architecture of the African Union

NGOs, activists and their allies advocating the rights of LGBTIQ+ persons widely condemned the decision to revoke CAL's observer status, interpreting it as a threat to the independence of the African Commission. This concern was amplified by the broader implications of the Executive Council's actions, which extended beyond targeting CAL. The Council also urged state parties to reassess the African Commission's jurisdiction to receive and adjudicate complaints of human rights violations. Such measures underscore a troubling development, as the African Commission supposedly is an independent entity within the AU's (human rights) framework.[61] The fall-out from this decision strained relationships within the African Commission itself, as well as between its members and the Executive Council of the AU. Furthermore, it eroded the trust of NGOs working on LGBTIQ+ issues, casting doubt on the Commission's impartiality and ability to safeguard human rights for all.[62] These developments sparked broader debates on the extent of political interference in the Commission's work and its independence.[63] The dispute further escalated when the Executive Council of the AU pointed to a potential conflict concerning the mandate of the African Court and called on states to 'conduct an analytical review of the interpretative mandate of the ACHPR'.[64] Additionally, the Council requested the African Commission to submit its criteria for granting observer status to state parties for review and approval.[65] This can be seen as a way to systematically undermine the independence of the African Commission, effectively closing the door to dissent and criticism from civil society. The unyielding stance of the Executive Council of the AU

59 African Union Executive Council para 8(vii).
60 LM Mute 'Sexual minorities and African human rights mechanisms: Reflections on contexts and considerations for addressing discrimination' (2023) 7 *African Human Rights Yearbook* 204.
61 Network of African National Human Rights Institutions (n 5).
62 Viljoen & Sogunro (n 43).
63 Reiss (n 25).
64 African Union Executive Council 'Decision on the Report on the Joint Retreat of the Permanent Representatives' Committee (PRC) and the African Commission on Human and Peoples' Rights (ACHPR) para 7(iii).
65 African Union Executive Council para 8(iv).

may also have been influenced by the composition and positions of individual commissioners within the African Commission.

As this discussion highlights, the implications of the decision for NGOs attempting to access and operate within the regional space of the African Commission are profound and contentious, particularly regarding LGBTIQ+ rights. The narrative of the 'un-Africanness' of LGBTIQ+ persons prevails, further marginalising groups such as LBTIQ+ women. It took an extensive transnational alliance of state and non-state actors to initially secure observer status for CAL. However, the interference by the Executive Council of the AU in what is the designated regional human rights arena undermined not only CAL but also other NGOs working on LGBTIQ+ rights. This interference further eroded trust in the African Commission and its impartiality. This tug-of-war was fought on two levels and ultimately failed to protect the human rights of LGBTIQ+ persons and, instead, exposed vulnerabilities both within the Commission as a regional arena and the broader human rights architecture of the AU. The narrative of the 'un-Africanness' of L(G)BTIQ+ individuals was weaponised to appropriate the human rights arena for a homophobic and transphobic agenda. This tug-of-war resulted not only in a loss for CAL, but has a long-lasting impact on NGOs and state actors working towards the advancement of human rights for LGBTIQ+ individuals on the national, regional and international levels.

4.2 The African Commission and the adoption and implementation of Resolution 275

Article 2 of the African Charter provides that '[e]very individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status'. The Charter further states that every individual shall be entitled to equal protection under the law, thus paving the way for the equal treatment (also) of LGBTIQ+ persons within the human rights mandate. However, the continued high levels of violence, discrimination and other human rights violations perpetrated due to a person's sexual orientation, gender identity or expression and sex characteristics persist.[66] In the following, we outline the roles of the

66 Coalition of African Lesbians and African Men for Sexual Health and Rights 'Violence based on perceived or real sexual orientation and gender identity in Africa' (2013), https://www.pulp.up.ac.za/catalogue/other-publications/violence-based-on-perceived-or-real-sexual-orientation-and-gender-identity-in-africa (accessed 15 November 2024); Arcus Foundation 'Data collection and

relevant state and non-state actors as well as pull dynamics within the African Commission that were instrumental to the adoption of Resolution 275.

4.2.1 Building strategic coalitions

The following part predominantly relies on Ditsie's documentary, 'The Commission: From silence to resistance',[67] and the accounts of Monica Tabengwa, who has been actively involved in activist spaces (and the documentary) and has been at the forefront of the struggle for LGBTIQ+ rights over the past two decades. In the documentary, Ditsie accompanies activists working in transnational NGOs such as CAL, ISLA and AMSHeR on their journey toward the adoption of Resolution 275.

Strategic alliances among NGOs advocating the rights of LGBTIQ+ persons and those focused more broadly on human rights played a pivotal role in the lead-up to the adoption of the Resolution. At the forefront, on one side of the tug-of-war, were two NGOs: CAL and AMSHeR. They led advocacy efforts at the African Commission in coalition with a broader movement of LGBTIQ+ activists, NGOs and other human rights allies. Initially, their strategy prioritised visibility and active participation in the African Commission as a regional arena for human rights advocacy. This approach involved collaboration across diverse human rights movements, transcending LGBTIQ+ rights to engage with other human rights issues.[68] To strengthen their position, coalitions were built on the premise of human rights' interdependence – arguing that the denial of one right inevitably undermines others. Consequently, coalitions were built to strengthen the group of actors on the one side of the rope pulling in the direction of advancing LGBTIQ+ rights. As a result of the extended solidarity and the intersectional approach to advancing human rights in general, mainstream and other human rights organisations stood alongside CAL calling out the African Commission for failing to fulfil its mandate.[69] Many of these organisations used their observer status to issue statements

reporting on violence perpetrated against LGBTQI persons in Botswana, Kenya, Malawi, South Africa and Uganda' (2019), https://www.arcusfoundation.org/wp-content/uploads/2020/04/Iranti-Violence-Against-LGBTQI-Persons-in-Botswana-Kenya-Malawi-South-Africa-Uganda.pdf (accessed 30 October 2024).

67 Documentary (n 34).

68 BD Nibogora 'Advancing the rights of sexual and gender minorities under the African Charter on Human and Peoples' Rights. The journey to Resolution 275' in E Durojaye, G Mirugi-Mukundi & C Ngwena (eds) *Advancing sexual and reproductive health and rights in Africa. Constraints and opportunities* (2021) 171-187.

69 Documentary (n 34).

in support of CAL's application for observer status and criticised the African Commission when they denied CAL registration in 2010.[70] Rather than discouraging advocacy, the rejection of CAL's application galvanised efforts to bring more LGBTIQ+ activists and allies into the African Commission's sessions. These alliances, built on the shared belief in the indivisibility of human rights and an intersectional approach, supported their cause through strategic capacity-building initiatives. Trainings organised by the core group of leading NGOs – CAL, AMSHeR, ISLA, SYNERGIA-Initiatives for Human Rights, Human Rights Watch, Amnesty International and East African Sexual Health and Rights Initiative (UHAI) – helped equip activists with the tools to advance their work effectively. The coalition on this side of the rope made an effort to support their allies from the non-state sector by being intersectional in their work, emphasising the interdependence of human rights, highlighting that the denial of one impacts the realisation of the others and recognising the interconnectedness of socio-economic, civil and political rights. This approach intentionally linked LGBTIQ+ issues with broader human rights concerns, ensuring that these topics were not siloed but integrated into broader human rights discussions. LGBTIQ+ groups championed other human rights issues, and non-LGBTIQ+ organisations reciprocated by backing SOGIESC rights. Ultimately, this approach sought to dismantle the single story narrative around LGBTIQ+ issues by fostering a nuanced understanding of SOGIESC as part of a multifaceted spectrum of human rights concerns.

4.2.2 Advocating LGBTIQ+ rights through visibility, reporting and lobbying

For those commissioners open to the inclusion of LGBTIQ+ human rights, targeted measures were implemented to bolster their knowledge and confidence. Information packages were distributed, and panel discussions and workshops were organised.[71] The configuration of the Commission is crucial; as well as the alliances between commissioners, who are open to including the rights of LGBTIQ+ in the human rights architecture of the AU, NGOs and activists.[72] Together, commissioners and NGOs formed a cohesive team on one side of the tug-of-war. Opposing them were commissioners and NGOs advocating the exclusion of LGBTIQ+ persons from the African human rights framework.

70 Ndashe (n 27).
71 Ndashe (n 27); Documentary (n 34).
72 Mute (n 60).

The increasing presence and visibility of African LGBTIQ+ NGOs in these human rights spaces, coupled with the submission of alternative reports by various NGOs detailing human rights violations based on real or perceived SOGIESC status, invoked the need for urgent action.[73] To enable the African Commission to fulfil its mandate to monitor state parties' compliance with human rights standards, article 62 of the African Charter obliges state parties to submit biennial reports. The documentation contains legal and other measures the states have taken to respect, implement and comply with human rights standards. These reports, once submitted, are made public, and NGOs can respond with shadow reports (also called alternative reports) focusing on specific human rights or covering more than one of the human rights under the African Charter. These reports often provide missing or contradictory information and may include recommendations for improving compliance with human rights standards. The African Commission in 2022 adopted guidelines for developing shadow reports,[74] which have been instrumental in providing the Commission with information to hold its member states accountable for human rights violations. The increased publication and review of shadow reports also amplified awareness of (issues related to) LGBTIQ+ struggles for human rights in the AU's member states within the African Commission.

In 2013 a coalition of activists under the auspices of CAL and AMSHeR published a comprehensive report documenting violence and discrimination against LGBTIQ+ persons across Africa.[75] This report provided accounts of the lived experiences of LGBTIQ+ individuals describing experiences of violations of their human rights at the hands of both state actors and non-state actors. It became a powerful lobbying tool for engaging regional governance structures, and to counter the sentiment that the rights of LGBTIQ+ persons should not be among the African Commission's concerns. The idea to develop a resolution addressing violence against LGBTIQ+ persons materialised during the sessions of the African Commission – here, NGOs meet according to thematic groups. During the thematic group discussions at the NGO forum held at the African Commission's sessions, the groundwork for Resolution 275 was

73 Viljoen & Sogunro (n 43).

74 Guidelines on Shadow Reports of the African Commission on Human and Peoples' Rights adopted by the African Commission at its 72nd ordinary session held from 19 July to 2 August 2022, https://achpr.au.int/en/documents/2022-10-28/guidelines-shadow-reports-african-commission-human-and-peoples (accessed 15 November 2024).

75 Coalition of African Lesbians and African Men for Sexual Health and Rights (n 63); recommending that the Commission adopt 'a resolution that condemns the on-going violence against persons based on their sexual orientation and gender identity' (para 4.1(A)).

laid. These discussions focused on human rights violations and discrimination, aligning with the core mandate of the Commission. Particular attention was given to violations and discrimination targeting LGBTIQ+ persons. The publication of the report and adoption of Resolution 275 are closely linked, highlighting the key actors driving the effort on one side of the tug-of-war. Leading this charge were CAL, AMSHeR, ISLA, SYNERGIA-Initiatives for Human Rights, Human Rights Watch, Amnesty International and UHAI, along with commissioners committed to safeguarding LGBTIQ+ rights.

Increasing and further refining their lobbying efforts, these non-state actors developed a traffic light system to map the stance of each commissioner. Commissioners firmly aligned with the 'team' of the LGBTIQ+ activists were marked in green, representing those who had stood on the side of the rope together with the activists for some time. Commissioners marked in yellow were seen as needing more persuasion. For both these groups, activists provided information packages, organised panel discussions and held workshops to enhance their knowledge and confidence. Commissioners categorised in red were firmly on the opposing side of the rope, with little expectation of being convinced – a position that ultimately proved accurate. This system enabled activists to allocate their resources and efforts more effectively and appears to have yielded favourable results.[76]

During its fifty-fifth ordinary session in Luanda, Angola, in May 2014, the African Commission adopted Resolution 275 on the 'Protection against Violence and Other Human Rights Violations against Persons on the Basis of Their Real or Imputed Sexual Orientation or Gender Identity'.[77] Resolution 275 condemns the increasing incidence of violence and other human rights violations, including murder, rape, assault, arbitrary imprisonment, and other forms of persecution of persons on the basis of their imputed or real sexual orientation or gender identity. It denounces systematic attacks by state and non-state actors against persons on the basis of their imputed or real sexual orientation or gender identity. It calls on African states to prevent, investigate and address such acts of violence by both state and non-state actors.[78] Resolution 275 marked a pivotal shift, breaking the long-standing refusal to acknowledge and include LGBTIQ+ persons in African human rights discourses.

As demonstrated above, Resolution 275 is the outcome of relentless and long-term activism by pivotal LGBTIQ+ NGOs in collaboration

76 Nibogora (n 68).
77 ACHPR/Res.275(LV)2014.
78 Mute (n 60); Network of African National Human Rights Institutions (n 5).

with other NGOs on the continental level within the African Commission. These strategic collaborations were instrumental in the adoption of this landmark decision. In the context of the tug-of-war dynamic, Resolution 275 represents a ground-breaking victory for the rights of LGBTIQ+ individuals on the continent, achieved through the concerted efforts of a specific constellation of actors and many years of advocacy. This tug-of-war culminated in a milestone achievement for those championing the rights of LGBTIQ+ persons at the national, regional and continental levels.

4.2.3 Ten years on: Resolution 275 and the African Union human rights architecture

The described dynamics and the tug-of-war have implications beyond the illustrated cases. A decade after its adoption, the realisation of the Resolution's objectives remains largely unmet, and the multi-layered tug-of-war continues.[79] Recent events underscore this ongoing struggle. In November 2022 the African Commission denied observer status to several NGOs that include advocacy for LGBTIQ+ rights in their mandate, namely, Alternative Côte d'Ivoire, Human Rights First Rwanda Association, ISLA, and Synergía-Initiatives for Human Rights. The Commission justified its rejection on the grounds that 'sexual orientation is not an expressly recognised right or freedom under the African Charter' and is 'contrary to the virtues of African values'.[80] This decision reflects the continued use of the narrative that LGBTIQ+ persons do not belong in the national, regional and continental human rights spaces.[81]

Furthermore, we wish to point to a development observable within the AU human rights architecture: mentions and inclusion of SOGIESC issues in resolutions of the African Commission, in General Comments, Concluding Observations, guidelines and principles.[82] We characterise these as aspects of a much broader tug-of-war within the AU human rights architecture. Yet, since these sites of

79 For a comprehensive overview of the application of Resolution 275 between 2014 and 2020, see African Men for Sexual Health and Rights & Synergía – Initiatives for Human Rights 'Application of Resolution 275 by the African Commission on Human and Peoples' Rights: A six-year assessment' (2020).

80 African Commission on Human and Peoples' Rights 'Final Communiqué of Its 73rd ordinary session held in Banjul, The Gambia, from 20 October to 9 November 2022' (2022); F Viljoen 'LGBTQ+ rights: African Union watchdog goes back on its own word' *The Conversation* (2023).

81 The criteria for gaining observer status with the Commission were also amended and now include two more aspects: First, the applicant has to be registered in a state part to the African Charter; and, second, has to have a regional office or presence in an African country.

82 See Mute (n 60) 202-203; Viljoen & Sogunro (n 43) para 3.3.4.

contestation are not at the core of this article's analysis, we cannot provide a comprehensive analysis of these broader dynamics (or tugs-of-war). We do, however, want to outline them briefly, as the tug-of-war within the AU, of course, has continued since the adoption of Resolution 275.[83]

In 2017 the African Commission adopted Resolution 376 on the Situation of Human Rights Defenders in Africa, which calls for the protection of human rights defenders in Africa and specifically mentions protecting those working on sexual orientation and gender identity.[84] By specifically including these categories, the Resolution complements and reinforces paragraph 3 of Resolution 275 which requires African states to 'ensure that human rights defenders work in an enabling environment that is free of stigma, reprisals or criminal prosecution as a result of their human rights protection activities, including the rights of sexual minorities'.[85]

In March 2023 the African Commission adopted Resolution 552 on the Protection and Promotion of the Rights of Intersex Persons in Africa. This Resolution calls on states to develop and implement measures on suggested recommendations and normative reforms that are essential for the integration and inclusion of intersex human rights in the human rights development agenda, especially accelerating the achievement of the Sustainable Development Goals Agenda 2030. Resolution 552 notes that states are obligated to recognise the rights and freedoms guaranteed by the African Charter through the enactment of laws and adoption of other policy and administrative measures to guarantee the rights and freedoms of intersex persons in Africa.[86]

83 Mute (n 60); Viljoen (n 80).

84 Resolution on the Situation of Human Rights Defenders in Africa ACHPR/Res.376(LX) 2017, https://achpr.au.int/en/adopted-resolutions/376-resolution-situation-human-rights-defenders-africa-achprres376 (accessed 30 October 2024).

85 Resolution on Protection against Violence and Other Human Rights Violations against Persons on the Basis of their Teal or IMPUTEd Sexual Orientation or Gender Identity (n 3).
General Comment 2 on arts 14(1)(a), (b), (c) and (f) and arts 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights 2014, https://achpr.au.int/index.php/en/node/854 (accessed 30 October 2024).
General Comment 2 (n 85) 14.
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 (art) 2017 1, https://policehumanrightsresources.org/content/uploads/2021/07/achpr_general_comment_no._4_english.pdf?x49094 (accessed 30 October 2024).
Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015) 23, https://achpr.au.int/en/node/853 (accessed 30 October 2024).

86 Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa ACHPR/Res.552 (LXXIV) 2023, https://achpr.au.int/en/adopted-

SOGIESC issues have also been included in General Comments and Concluding Observations. While General Comment 2 on article 14 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) does not explicitly refer to SOGIESC,[87] it states that '[s]tate parties must ensure provision of comprehensive information and education on human sexuality'.[88] Similarly, General Comment 4 ('The right to redress for victims of torture and other cruel, inhuman or degrading punishment or treatment') focuses on torture and notes that anyone, regardless of their gender, may be a victim of sexual and gender-based violence that amounts to torture or ill-treatment.[89] It notes that LGBTI persons are of equal concern, and states are required to ensure, both in law and practice, that victims of torture and other ill-treatment are able to access and obtain redress irrespective of their SOGIESC.

Several guidelines adopted by the African Commission also address the protection of LGBTIQ+ persons' human rights, for instance, the Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015) clause 30(a); [90] the Guidelines on Freedom of Association and Assembly in Africa (2017) clause 80;[91] and the Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), Preamble.[92] Furthermore, the Guidelines on Combating Sexual Violence and its Consequences in Africa (2017)[93] were adopted by the African Commission with the intent of guiding and supporting states in the effective implementation of their obligations to combat sexual violence and its consequences. The Guidelines include 'sexual orientation, identity or gender expression' in the list of factors that can increase the vulnerability of individuals

resolutions/resolution-promotion-and-protection-rights-intersex-persons (accessed 30 October 2024).

87 General Comment 2 on Article 14(1)(a), (b), (c) and (f) and Article 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights 2014, https://achpr.au.int/index.php/en/node/854.

88 General Comment 2 (n 85) 14.

89 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 (art) 2017 1, https://policehumanrightsresources.org/content/uploads/2021/07/achpr_general_comment_no._4_english.pdf?x49094 (accessed 30 October 2024).

90 Guidelines on the Conditions of Arrest, Police Custody and Pre-Trial Detention in Africa (2015) 23, https://achpr.au.int/en/node/853 (accessed 30 October 2024).

91 Guidelines on Freedom of Association and Assembly in Africa (2017) 26, https://achpr.au.int/index.php/en/soft-law/guidelines-freedom-association-and-assembly-africa (accessed 30 October 2024).

92 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017) 6-7, https://achpr.au.int/en/soft-law/guidelines-policing-assemblies-law-enforcement-officials-africa (accessed 30 October 2024).

93 Guidelines on Combating Sexual Violence and its Consequences in Africa (2017), https://achpr.au.int/en/node/848 (accessed 30 October 2024).

or groups of individuals to sexual violence.[94] Furthermore, it spells out that states should

> 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, 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.[95]

The Guidelines also define sexual violence to include 'corrective' rape, which is a crime that is targeted against women on the basis of their real or perceived homosexuality.[96]

Through these various mechanisms, the African Commission has acknowledged the ongoing violence, stigma, prejudice and discrimination faced by LGBTIQ+ persons in society, with particular attention to LBTI women and intersex persons. These recognitions can be interpreted as victories in the broader context of the tug-of-war metaphor.

5 Conclusion

The tugs-of-war carried out in the regional human rights arenas of the AU are multifaceted, involving not only different governance levels but the complex alliances formed both for and against LGBTIQ+ rights. The two cases illustrate the contested nature of these human rights issues, demonstrating how state and non-state actors negotiate their positions through pull dynamics and the alliances on both ends of the rope. They are directly linked to the broader struggle over interpretations of identity, namely, who is considered African and who is not; whose human rights are recognised, and whose are dismissed. The case of CAL's (de)registration underscores how the human rights framework is appropriated through the narrative of the 'un-Africanness' of LGBTIQ+ persons.

In the case of CAL, the tug-of-war turned into wars carried out by shifting alliances of pro-LGBTIQ+ NGOs and supportive commissioners, who ultimately also stood up to the AU policy organs. This sparked another tug-of-war over the African Commission's responsibilities and powers. Under the header of 'African values' and 'family values', the narrative of LGBTIQ+ Africans' 'un-Africanness'

94 Guidelines on Combating Sexual Violence (n 93) 16-17.
95 Guidelines on Combating Sexual Violence (n 93) 18.
96 Guidelines on Combating Sexual Violence (n 93) 14-15.

was strategically employed. The African Commission's adoption of Resolution 275 marked a pivotal moment and a widely-celebrated milestone in advancing the rights of LGBTIQ+ persons in Africa. It marks the first instance in which the highest regional human rights body acknowledged the need for the protection and promotion of LGBTIQ+ rights. The journey to this milestone was characterised by a tug-of-war, with a coalition of NGOs and supportive commissioners on one side of the rope and commissioners with anti-LGBTIQ+ positions – and AU member states – on the other. Since then, significant developments encompass recognising SOGIESC in resolutions, General Comments, Concluding Observations, guidelines and principles. These, we contend, are also aspects of a much broader tug-of-war within the AU human rights architecture.

The tugs-of-war are not only fought at the regional governance level, but primarily at the national level. Among AU member states a mixed picture has evolved over the past decade. Wins for the LGBTIQ+ communities can be counted in at least six countries – Angola,[97] Botswana,[98] Gabon,[99] Mauritius,[100] Mozambique,[101] Namibia[102] and Seychelles[103] – where laws criminalising consensual same-sex sexual relations between adults were repealed. Chad and Cabo Verde enacted laws providing for aggravated punishment if the victim's sexual orientation was a factor in the crime.[104] Angola enacted a

97 G Reid 'Angola decriminalises same-sex conduct. Discrimination based on sexual orientation banned' 23 January 2019, https://www.hrw.org/news/2019/01/24/angola-decriminalizes-same-sex-conduct (accessed 23 June 2024).

98 Human Rights Watch 'Botswana: High Court strikes down sodomy laws. New momentum for African LGBT movements' 11 June 2019, https://www.hrw.org/news/2019/06/11/botswana-high-court-strikes-down-sodomy-laws (accessed 23 June 2024).

99 United Nations Human Rights Office of the High Commissioner 'Gabon: Decriminalisation of same-sex relations a welcome step for equality, says UN expert' 2 July 2020, https://www.ohchr.org/en/news/2020/07/gabon-decriminalisation-same-sex-relations-welcome-step-equality-says-un-expert/ (accessed 23 June 2024).

100 Centre for Human Rights. University of Pretoria 'Op-ED: Mauritius is the latest nation to decriminalise same-sex ralations in a divided continent' 13 March 2024, https://www.chr.up.ac.za/sogiesc-news/3693-op-ed-mauritius-is-the-latest-nation-to-decriminalise-same-sex-relations-in-a-divided-continent (accessed 23 June 2024).

101 Human Dignity Trust 'Reform of discriminatory sexual offences laws in the Commonwealth and other jurisdictions. Case study of Mozambique' 21 December 2023, https://www.humandignitytrust.org/wp-content/uploads/resources/HDT-Mozambique-Report_web.pdf (accessed 23 June 2024).

102 Amnesty International 'Namibia: Decision to overturn "sodomy" laws is a victory for human rights' 21 June 2024, https://www.amnesty.org/en/latest/news/2024/06/namibia-decision-to-overturn-sodomy-laws-is-a-victory-for-human-rights/ (accessed 23 June 2024).

103 Human Dignity Trust 'Reform of discriminatory sexual offences laws in the Commonwealth and other jurisdictions. Case study of Seychelles' June 2019, https://www.humandignitytrust.org/wp-content/uploads/2019/06/HDT-Seychelles-Report_web_FINAL.pdf (accessed 23 June 2024).

104 ILGA World: LR Mendos and others 'State-sponsored homophobia 2020: Global legislation overview update' 2020 240, https://ilga.org/wp-content/

law prohibiting discrimination on the basis of sexual orientation and gender identity.[105] Mauritius has included sexual orientation as a prohibited ground of discrimination in employment.[106] Yet, vulnerability to discrimination and violence amongst LGBTIQ+ persons remains high even in countries with protective laws and policies. Other AU member states have pushed to enact more punitive laws, policies and practices against LGBTIQ+ people, including currently debated, introduced or adopted 'anti-homosexuality bills' in Ghana, Kenya, Namibia, Tanzania and Uganda.[107]

Furthermore, these tugs-of-war are taking place in other regional and international governance arenas.[108] Other prominent sites of such contestations are the human rights mechanisms at the UN, where African LGBTIQ+ state and non-state actors are actively involved. Here similar debates and contestations of the rights of LGBTIQ+ persons can be observed. The UN Human Rights Council (UNHRC), which had made some important gains in advancing the focus on the rights of LGBTIQ+ persons, faced opposition from narratives centred around 'traditional values' and the so-called 'protection of the family'. This is evident in two UNHRC resolutions. While states continued to affirm their commitment to the universality of human rights, some concerns were raised when two UNHRC resolutions were adopted on the 'protection of the family'.[109] These contestations at the UNHRC coincided with the adoption of Resolution 275 and the debate over the registration of CAL. We thus see the regional arenas on the African continent as sites of contestation situated within the global assault on the human rights of LGBTIQ+ persons. Through this analysis, we seek to contribute to the ongoing discussions about the wider implications of discrimination against LGBTIQ+ persons across various regional and international governance arenas.

uploads/2023/11/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf (accessed 14 June 2024).

105 UNDP 'Inclusive governance initiative: Angola baseline report' 2020 3-6, https://www.undp.org/sites/g/files/zskgke326/files/migration/africa/UNDP-igi-angola-baseline-report-en.pdf (accessed 14 June 2024).

106 https://eoc.govmu.org/eoc/?page_id=1355 (accessed 23 June 2024).

107 OA Maunganidze 'Anti-gay laws: Africa's human rights regression' 27 September 2023, https://issafrica.org/iss-today/anti-gay-laws-africas-human-rights-regression (accessed 23 June 2024).

108 African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights and United Nations 'Ending violence and other human rights violations based on sexual orientation and gender identity' (2016).

109 United Nations Human Rights Council 26th session 'Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development' adopted in June 2014, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.20/Rev.1 (accessed 10 November 2024); United Nations Human Rights Council 29th session 'Promotion and protection of all human rights civil, political, economic, social and cultural rights, including the right to development' adopted in July 2015, https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/29/L.25 (accessed 10 November 2024).

Going forward, we hope to see national and transnational African NGOs, LGBTIQ+ activists, human rights defenders and allies locking arms and together pulling on the rope in order to further entrench Resolution 275 within the AU human rights architecture. To achieve this, continued collaborative advocacy for the adoption of review and monitoring mechanisms, such as reporting guidelines, as well as efforts to ensure the visibility and awareness of all existing mechanisms that protect and promote LGBTIQ+ equality and inclusion are needed. Soft law instruments might play an increasingly important role in the advocacy for the rights of LGBTIQ+ persons by integrating them into the AU human rights architecture. We aim for our work to meaningfully contribute to ongoing discussions about the multifaceted implications of discrimination against LGBTIQ+ individuals within national, regional and international governance arenas. At the same time, we seek to demonstrate that, despite setbacks over the last decade, some of the tugs-of-war can indeed be won.

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Understanding the right to education under the African Charter on the Rights and Welfare of the Child, within the four pillars of interpretation

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Summary: *The African Committee of Experts on the Rights and Welfare of the Child has received several communications alleging violations of the right to education under the African Charter on the Rights and Welfare of the Child. This has led to significant development on the jurisprudence on education and on education-related rights. Like every right under the African Children's Charter, the right to education is subject to the four pillars of interpretation: non-discrimination; best interests; child participation; and survival and development. The aim of this article is to explore how the African Children's Committee has interpreted the right to education within the four pillars of interpretation and how that has shaped the growing jurisprudence on education under the African Children's Charter. The article also draws on examples on educational rights and interpretive provisions from the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.*

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Key words: *education; children's rights; African Children's Charter; African Children's Committee; best interests; non-discrimination; survival and development; child participation; jurisprudence; interpretation*

1 Introduction

The importance of education both as a human right and as a tool to promote economic and social well-being has long been accepted.[1] Globally, it is known that education is necessary for the advancement of an individual and as an instrument to foster the importance of human rights and fundamental freedoms.[2] Education is a key to unlocking other rights and a means of acquiring skills for individuals to rise above circumstances such as poverty.[3] According to a report by the United Nations Children's Fund (UNICEF) in 2021, many African children were out of school.[4] This highlights an underlying problem of access to basic education in general in Africa. Moreover, the report also revealed that some of the children who were in school were not acquiring basic literacy and numeracy skills, demonstrating that the education being received by some African children is inadequate.[5] The fact that education is inaccessible and inadequate to some African children only exacerbates the potential for poverty for some children. For the African child, education is important, not only for its intrinsic value, but also for its instrumental value, in that education can break the cycle of poverty.[6]

The African Union (AU)'s theme for the year 2024 is education, with the aim of 'building resilient education systems for increased access to inclusive, lifelong, quality and relevant learning in Africa'.[7] This is intended to accelerate the achievement of Sustainable Development Goal (SDG) 4. Recognising the need for transformation in education on the African continent, the Continental Strategy for Education in

1 C Chürr 'Realisation of a child's right to basic education in the South African school system: Some lessons from Germany' (2015) 18 *Potchefstroom Electronic Law Journal* 2405.
2 Chürr (n 1) 2406. See also art 11(2)(b) of the African Children's Charter, where the aims of education in the African Children's Charter are discussed.
3 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 People's Rights', https://achpr.au.int/index.php/en/node/871 (accessed 15 May 2024).
4 UNICEF and African Union Commission 'Transforming education in Africa: An evidence-based overview and recommendations for long-term improvements', https://www.unicef.org/media/106686/file/Transforming%20Education%20in%20Africa.pdf (accessed 4 May 2024).
5 As above.
6 African Commission Principles and Guidelines (n 3).
7 African Union 'Theme of the year 2024: Educate and skill Africa for the 21st century', https://au.int/en/theme/2024/educate-african-fit-21st-century (accessed 6 May 2024).

Africa (CESA) and SDG 4 prioritise the education of marginalised groups such as girl children, children in rural areas, children with disabilities, children on the move, and those in 'fragile' countries and situations in Africa.[8]

The four pillars of interpretation in the African Charter on the Rights and Welfare of the Child (African Children's Charter)[9] are found at articles 3, 4 and 5 of the Children's Charter.[10] The four principles, non-discrimination (article 3), best interests of the child, child participation (article 4) and survival and development (article 5) lay the foundation for how the rights in the African Children's Charter should be interpreted. It is important to state here that the four pillars of interpretation are the four general and fundamental principles that guide the interpretation of the rights in the African Children's Charter. Like the Convention on the Rights of the Child (CRC), the four principles or pillars of interpretation is also found in the African Children's Charter. Therefore, all the rights in the Children's Charter must be interpreted by considering the four pillars, including the right to education. Gose submits that the four pillars 'can be seen as the soul of children's rights'.[11] There is no doubt about the fact that the human rights of children are underpinned by the four pillars of interpretation and, therefore, every right must be interpreted in conjunction with the four pillars.[12] Therefore, it may be argued that rights in the Children's Charter are activated by the four pillars during interpretation.

The African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) has received five communications in which the Children's Committee has found direct violations of the right to education.[13] The total number of communications received by the African Children's Committee in which the views of the Committee have been given on the merits are seven. Therefore, the five cases represent a relatively high percentage of the total number of cases when looked at against the total number

8 African Union 'Concept note on education as the theme of the year for 2024', https://au.int/sites/default/files/documents/43425-doc-EX_CL_1476_XLIV_Rev._1_-_CONCEPT_NOTE_with_Roadmap_AU_Theme_E.pdf (accessed 3 May 2024).

9 African Charter on the Rights and Welfare of the Child OAU Doc CAB/LEG/24.9/49 (1990) entered into force 29 November 1999.

10 It should be noted that the four pillars of interpretation are also substantive rights found in the Charter. Therefore, arts 3-5 are substantive rights in and of themselves, and they are also the four pillars and interpretative guidelines.

11 M Gose *The African Charter on the Rights and Welfare of the Child* (2002) 17.

12 Gose (n 11) 25.

13 African Committee of Experts on the Rights of the Child 'Communications', https://www.acerwc.africa/en/communications/table (accessed 20 January 2024).

of cases.[14] The theme of education presents cases in various settings, including in the school environment, in extraordinary circumstances such as armed conflict and unrest, trafficking and slavery, and in situations where a lack of documentation has impeded access to socio-economic rights, including education.[15]

On exceptional occasions the African Children's Committee has developed various tests to determine whether under certain circumstances a state party's failure to realise a child's right to education can be justified. For example, in *Northern Ugandan Children* the Children's Committee has found that a state party acted reasonably to realise the right to education during unrest.[16]

This article examines cases on the right to education under the jurisprudence of the African Children's Committee. The article first introduces the right in part 2 whereafter moving to an analysis of the interpretive framework of the right in part 3. This requires the right to be interpreted in terms of the four pillars, namely, non-discrimination, best interests, survival and development, and child participation.[17] Thereafter the article analyses the cases against the four pillars.

To the extent that the right to education has developed under the African Children's Charter, the article argues that the time is now ripe for a General Comment on the right to education. It concludes with observations on how the right to education has been interpreted in the African Children's Charter.

2 Right to education under the African Children's Charter

The right to education is covered in article 11 of the African Children's Charter. Article 11 opens by recognising the right of each child to education. This approach is important because it sets a clear tone that the provisions that follow are applicable to every child on the African continent, without discrimination.[18] Therefore, in theory,

14 As above.
15 African Children's Committee 'Communications' (n 13).
16 See *Hansungule & Others (on behalf of Children in Northern Uganda) v Uganda*, No 1/Com/001/2005, decided April 2013 (*Northern Ugandan Children*).
17 *Legal and Human Rights Centre and Centre for Reproductive Rights (on behalf of Tanzanian girls) v Tanzania*, No 12/Com/001/2019, decided March/April 2022 (*Tanzanian Girls*) paras 54, 55 & 70.
18 Art 11(1) African Children's Charter.

every child on the continent should receive education regardless of their personal or family circumstances.[19]

Article 11(2) defines the aims of education, which include to promote and develop the child, foster human rights and fundamental freedoms, preserve and strengthen positive African morals and tradition, and prepare the child for a responsible life.[20] While CRC places similar emphasis on the aims of education, the African Children's Charter is unique in stating that education shall preserve and strengthen positive African morals and traditions in the child.

Olowu notes that the African Children's Charter is stronger on the right to education compared to other international law instruments.[21] The Children's Charter is devoid of traditional confinements that limit the realisation of socio-economic rights to 'progressive realisation'.[22] Although the language used in article 11 does not explicitly refer to the fact that the right to education should be realised progressively, in the African Children's Committee's General Comment 5 on state party obligations the Children's Committee has stated that 'the nature of the obligation involves progressively realising children's rights to secondary education'.[23] Elsewhere in the same General Comment, the ACERWC mentions:[24]

> The Committee underlines that there is no reference in article 1 to 'progressive realisation of rights', or to the degree of realisation within the 'maximum extent' of available resources. These phrases have often been adduced with respect to the fulfilment of social and economic rights which appear, at first glance, to entail more intensive dedication of resources, and which also require investment in the systems needed for their administration or delivery (eg health systems, educational systems, and systems for the disbursement of poverty alleviation measures such as social cash transfers).

The above confirms the lack of reference to progressive realisation in the jurisprudence of the African Children's Committee when it

19 Art 3 of the African Children's Charter on non-discrimination emphasises that every child shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the African Children's Charter irrespective of the following: the child or their parents' or legal guardians' race, ethnic group, colour, sex, language, religion, political or other opinion, national or social origin, fortune, birth or other status.

20 Art 11(2)(a)-(d) African Children's Charter.

21 D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) *International Journal of Children's Rights* 130.

22 As above.

23 African Children's Committee General Comment 5 on state party obligations under the African Charter on the Right and Welfare of the Child (art 1) and system strengthening for child protection 2018 para 27.

24 General Comment 5 (n 23) paras 6-7.

comes to the right to primary education, and highlights the fact that the right to primary education is not to be realised within available resources. On secondary education, the concept of progressive realisation is not completely eliminated, as General Comment 5 of the African Children's Committee confirms.[25] This point is elaborated upon below.

It is clear that socio-economic rights, such as the right to education, in the African Children's Charter are in principle not limited to progressive realisation, but the concept of progressive realisation is neither completely excluded from the Charter, nor is it irrelevant in all instances. In contrast, the CRC provision on education explicitly states that 'states parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity'.[26]

Article 11(6) is specifically directed at girl children who fall pregnant while in school. It recognises the pregnant schoolgirl's right to complete their education based on their individual ability. Chirwa highlights the fact that the African Children's Charter is the first to pay attention to the rights of schoolgirls who fall pregnant and, as such, the Children's Charter must be commended 'for taking the lead in focusing states parties' resources on gender discrimination in education'.[27]

Indeed, while CRC envisages protection for pregnant schoolgirls, it does not explicitly do so in the Convention, nor does the International Covenant on Economic, Social and Cultural Rights (ICESCR). The African Children's Charter's explicit protection of the girl child is strengthened in article 11(3)(e) which mentions female children in the categorisation of children who may find themselves in extraordinary situations, which may pose threats to their education. By such inclusion, the drafters recognise the vulnerability of the African girl child, as compared to boy children, in accessing education.

Article 11(3)(e) includes protection for all children in extraordinary situations by providing that

> state parties to the Charter shall take all appropriate measures with a view to achieving the full realisation of this right and shall in particular … take special measures in respect of female, gifted and disadvantaged

25 General Comment 5 (n 23) para 27.
26 Art 28 CRC.
27 D Chirwa 'The merits and demerits of the African Charter' (2002) 10 *International Journal of Children's Rights* 162.

children, to ensure equal access to education for all sections of the community.

The African Children's Committee has interpreted 'disadvantaged children' to include children who are affected by armed conflict, by stating that special measures must be provided for disadvantaged children to ensure the realisation of their right to education.[28] However, this is an open-ended list that is not limited to children in situations of armed conflict but can be extended to all children, in all situations. Put simply, extraordinary situations should not disrupt the African child's right to education, except where the state party can show that it has provided all reasonable measures and has acted with due diligence,[29] to ensure that a child's education is not disrupted.[30]

The right to education in the African Children's Charter, however, is not devoid of criticism. Here Chirwa has identified two gaps: First, he points out that the Children's Charter fails to make provision for pre-school children; and, second, he notes that its provisions on secondary education are weak.[31] He elaborates that the Charter does not place an obligation on state parties to progressively provide for free secondary education.[32] Subsequent to this critique, the African Children's Committee's General Comment 5 shows that the concept of progressive realisation for secondary education is not completely eliminated from the African Children's Charter.[33] It is further submitted that the Children's Charter's provision on basic education impliedly incorporates pre-school and, therefore, a provision on pre-school is not necessary. For example, ICESCR does not make explicit provision for the right to pre-school education,[34] but recognises pre-school as part of basic education. Likewise, CRC simply provides for the right to a basic education, thus implying that pre-school is part of basic education.[35]

The following part discusses the four pillars within which the right to education and, indeed, all other rights in the African Children's Charter must be interpreted.

28 *Northern Ugandan Children* (n 16) para 53.
29 *Northern Ugandan Children* (n 16) para 38.
30 *Northern Ugandan Children* (n 16) paras 61-70.
31 Chirwa (n 27) 162.
32 As above.
33 General Comment 5 (n 23) para 27.
34 See art 13 of ICESCR.
35 See art 29 of CRC.

3 Interpretation of the right to education through the four pillars

Underpinning the rights contained in the African Children's Charter are four cross-cutting general principles that guide the interpretation of the rights contained in the Charter: protection against discrimination (non-discrimination);[36] the best interests principle;[37] protection of the child's right to survival and development;[38] and child participation (or respect for the views of the child).[39] The African Children's Committee requires that the rights in the African Children's Charter be interpreted through the lenses of the four pillars.[40] Due to the general nature and broad scope of the four core principles, it can be argued that they are applicable to, and serve as the starting point for, every right in the African Children's Charter.[41]

Thus, the right to education under the African Children's Charter must be interpreted against the four principles. In general, this means that there should be no discrimination in accessing or enjoying the right to education; it remains in the best interests of the child to receive basic education and to have the best quality education; the right to education should, among other things, contribute to the survival and, more particularly, the development of the child; and decisions on the right to education in terms of access, content and school governing rules should consider the views of the child.

The following sub-sections consider how the right to education has been interpreted by the African Children's Committee. Using the four pillars as a yardstick, the discussion analyses selected cases before the Children's Committee to evaluate whether and how the Committee has adhered to its own standards of rights interpretation.

36 Art 3 African Children's Charter.
37 Art 4 African Children's Charter.
38 Art 5 African Children's Charter.
39 Art 4(2) African Children's Charter.
40 *Tanzanian Girls* (n 17) paras 52 & 70. Sec IV of General Comment 5 (n 23), where the Committee recognises that four key principles as general principles based on which the entire Charter should be interpreted. See also A Getachew Assefa & K Ngankam 'Celebrating 25 years of the African Charter on the Rights and Welfare of the Child: Looking back to look ahead', https://au.int/sites/default/files/documents/31520-doc-celebrating_25_years_of_the_african_charter_on_the_rights_and_welfare_of_the_child_by_ayalew_getachew_assefa_and_kameni_ngankam.pdf (accessed 13 May 2024).
41 T Kaime 'The struggle for context in the protection of children's rights: Understanding the core concepts of the African Children's Charter' (2008) 40 *Journal of Legal Pluralism and Unofficial Law* 34.

3.1 Non-discrimination as a substantive right and the first pillar of interpretation

As the African Children's Committee has rightly noted, the right to non-discrimination is a substantive right by itself that is recognised for every child not only under the African Children's Charter, but also by CRC.[42] It is also one of the pillars of interpretation of the rights in the African Children's Charter.[43] I will address the right and the principle separately.

First, on its substantive meaning, the African Children's Committee has stated that the reading of the right to non-discrimination as a substantive right comprises three complementary elements. The first component is differential treatment; the second is interference; and the third is rights and freedoms in the Charter.[44] The Children's Committee also notes that the three stated elements are essential elements of the right to non-discrimination, not only under the African Children's Charter, but also under CRC and other international instruments.[45]

General Comment 5 of the African Children's Committee on State Party Obligations under the African Charter on the Rights and Welfare of the Child and Systems Strengthening on Child Protection sets out the general content of the right to non-discrimination. According to the General Comment, the right to non-discrimination obliges state parties to intentionally identify children for whom special measures may be required in the recognition and realisation of their rights. The Children's Committee has further explained that

> [t]he application of the non-discrimination principle of equal access to all does not mean identical treatment. It may require taking special measures in order to diminish or eliminate conditions that cause discrimination, whether it is discrimination in the context of civil or political rights, in relation to the fulfilment of social, economic and cultural rights, or in relation to specific measures of protection.[46]

The African Children's Charter by its language purports to extend the rights in the Charter to all children, without discrimination.[47] Article 3 on non-discrimination therefore applies to all children, everywhere on the African continent, and is also applicable to all the rights and

42 See art 2 of CRC.
43 *Tanzanian Girls* (n 17) para 52.
44 *Tanzanian Girls* (n 17) para 53.
45 As above.
46 GeneralComment 5 (n 23) paras 9-10.
47 Art 3 African Children's Charter.

freedoms contained in the African Children's Charter.[48] The African Children's Committee has noted that the right to non-discrimination is an absolute right 'as the wordings of the provision do not include a "balancing test" which gives room for states to justify an act which amounts to differential treatment on the prohibited grounds and which impair the enjoyment of the rights under human rights laws'.[49]

General Comment 18 of the Human Rights Committee (HRC) on non-discrimination[50] notes that notwithstanding its absolute nature, states may use defence as justification for differential treatment. However, according to the African Children's Committee, differential treatment can only be used where it is reasonable and objective with the aim of achieving a purpose, which is legitimate under the African Children's Charter.[51] Therefore, a complainant who alleges discrimination must prove differential treatment on prohibited grounds, and the respondent state must justify how the differential treatment is necessary for the advancement of a right in the African Children's Charter.[52]

In contrast to the substantive right, but with a similar meaning, the principle of non-discrimination means that state parties prioritise the implementation of the rights of poor and marginalised children such as rural children. The African Children's Committee has also emphasised that the non-discrimination principle requires that the right of the girl child be prioritised to achieve gender equality.[53] The Children's Committee has noted its disapproval of free primary education policy in Eswatini which excludes foreign children. According to the Committee, an education policy intended only for Swazi children discriminates on the basis of nationality and hinders the enjoyment of the right to education. The Committee reaffirmed its view that 'primary education should be universal, compulsory and free, it should be granted to all children in the state party irrespective of their nationality and status as an irregular/undocumented migrant'.[54] It is submitted that the African Children's Committee's

48 Kaime (n 41) 36.
49 *Tanzanian Girls* (n 17) para 53.
50 Human Rights Committee General Comment 18 on non-discrimination, para 13.
51 *Tanzanian Girls* (n 17) para 53.
52 *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (OSJI) (on behalf of children of Nubian descent in Kenya) v Kenya*, No 2/Com/002/2009, (2011) AHRLR 181 (ACERWC 2011), decided 22 March 2011 (*Children of Nubian Descent*) para 56.
53 As above.
54 Concluding Observations and Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Initial Report of the Republic Kingdom of Eswatini on the Status of Implementation of the African Charter on the Rights and Welfare of the Child paras 42-43. See also Concluding Observations and Recommendations of the African Committee of Experts on

Concluding Observations to Eswatini are in line with its jurisprudence that primary education is free and compulsory to all.

General Comment 20 of the Human Rights Committee on non-discrimination in economic, social and cultural rights has remarked on the right to education for all children living in a state, including undocumented children.[55] It also notes the need for special measures to be taken for children without discrimination, [56] and emphasise the provision in article 13 of ICESCR that 'primary education shall be compulsory and available free to all'.[57] In its introductory remarks General Comment 20 also highlights the fact that non-discrimination and equality are important aspects of international human rights law, and essential to the enjoyment of socio-economic rights, including the right to education.[58]

Tanzanian Girls concerned the mandatory pregnancy testing, expulsion and denial of re-entry into school of school girls who fell pregnant. Considering the right to non-discrimination as a substantive right, the African Children's Committee had to decide, among others, whether the treatment of the girls amounted to discrimination. The Children's Committee noted that there was no contestation on differential treatment based on pregnancy and marital status and, further, that the differential treatment had resulted in the infringement of other rights, including the right to education. The Children's Committee considered the respondent state's submission that there was a legitimate purpose for the differential treatment of pregnant and married girls.[59] According to the state party, the purpose was to deter sexual relations among school children. The Children's Committee reasoned that for any defence to be justified, the differential treatment should be necessary to achieve the objective. However, it noted that a differential treatment amounted to discrimination if it does not have an objective or reasonable justification and there is no proportionality between the aim sought and the means used to achieve the objective.[60]

Therefore, the African Children's Committee found that the expulsion and denial of re-entry of pregnant and married girls in school were not a necessary measure to deter sexual relations among

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the Rights and Welfare of the Child to the Government of the Republic of South Africa on its Second Periodic Report on the Implementation of the African Charter on the Rights and Welfare of the Child para 13.

55 General Comment 20 of the HRC para 30.
56 As above.
57 As above.
58 General Comment 20 para 2.
59 *Tanzanian Girls* (n 17) para 53.
60 As above.

adolescents.[61] In view of this, the Children's Committee found a violation of the right to protection against non-discrimination. The Committee reasoned that the expulsion of pregnant and married girls from school without an opportunity of re-entry

> creates a vicious cycle of gender-based discrimination as these girls will be excluded from the benefits of education. This is because education is not only a substantive right, but the enjoyment of the right to education also facilitates the realisation of other rights of children and the elimination of discrimination against girls.[62]

Another reason on which the African Children's Committee based its finding of a violation on the right to protection against non-discrimination was that the school had adopted a policy that excludes pregnant and or married girls from school.[63]

It is noted that the Children's Committee did not make a clear distinction between the right to non-discrimination as a substantive right and as a principle of interpretation in its views in *Tanzanian Girls*, but discussed the two separate issues together. However, as mentioned earlier, the two are discussed as separately here.

On non-discrimination as an interpretive principle, the African Children's Committee recalled state parties' obligations to ensure special measures of protection when it comes to the education of girl children and gifted children. In particular, the Children's Committee recalled article 11(6) of the African Children's Charter which obliges state parties to ensure that girls who become pregnant before completing their education are given the opportunity, based on their individual ability, to complete their education.[64] The Children's Committee also noted articles 11(5) and (6) which provide that the right to education should be for all with no conditions attached. The provision in the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (African Women's Protocol)[65] that state parties should prevent discriminatory practices such as the exclusion of learners from school was also referred to by the Children's Committee.[66] The Committee cited international instruments such as the Convention on the Elimination of All Forms

61 *Tanzanian Girls* (n 17) para 55.
62 As above.
63 *Tanzanian Girls* (n 17) para 49.
64 *Tanzanian Girls* (n 17) para 40.
65 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003 (African Women's Protocol).
66 As above.

of Discrimination against Women (CEDAW) and CRC on aspects that deal with discrimination against pregnant girls.[67]

The following case deals with non-discrimination in education during times of unrest. The language of article 3 of the African Children's Charter highlights the drafters' intention, which is that state parties should ensure non-discrimination in education, be it in access or otherwise. Therefore, even in times of unrest, state parties are expected to protect the right to education, where such protection can be reasonably expected of a state party. In *Northern Ugandan Children* the children in Northern Uganda's rights were violated during a period of unrest between the Ugandan People's Defence Forces (UPDF) and the Lord's Resistance Army (LRA). The unrest was between 2001 and 2005 and Ugandan children were abducted and recruited as child soldiers in the unrest, thus violating several rights guaranteed to children by the African Children's Charter, including the right to education (article 11, in that children's education was disrupted during the unrest).[68] The African Children's Committee held that the Ugandan government had made efforts during the unrest to realise the rights of the children to education and, therefore, the Committee applied the 'reasonableness test' which required it to consider whether the government of Uganda had taken all reasonable steps to fulfil its obligations under the African Children's Charter. The Committee concluded that it found no evidence to believe that the Ugandan government did not take reasonable steps to fulfil its obligations.[69]

In addition to the reasonableness test, the African Children's Committee also referred to the principle of due diligence, where it asserted that the effective implementation of laws with due diligence was part of state parties' obligations.[70] The Committee interpreted due diligence on the part of the state party in the present case to mean that protection of rights should lead to the well-being and welfare of children, in that in protecting children's rights, the actions of state parties should 'promote and improve the lived reality of children on the ground'.[71] This the Children's Committee saw as a

67 African Women's Protocol (n 65) para 41. See also CEDAW General Recommendation 36 on the rights of girls and women to education, UN Doc CEDAW/C/GC/36, 27 November 2017 para 24; CRC General Comment 15 on the right of the child to the enjoyment of the highest attainable standard of health, UN Doc CRC/C/GC/15, 17 April 2013 para. 56; CRC General Comment 4 on adolescent health and development in the context of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/4, 21 July 2003.
68 *Northern Ugandan Children* (n 16).
69 *Northern Ugandan Children* (n 16) paras 61-70.
70 *Northern Ugandan Children* (n 16) para 38.
71 As above.

fundamental duty of the state party under article 1(1) of the African Children's Charter.[72] It must be noted that the principle of due diligence was discussed as a general and cross-cutting issue in the case and not exclusively linked to education. Although the Children's Committee did not explicitly state that the state party had acted with due diligence in protecting and realising the rights of the Ugandan children during the unrest, the duty to act with due diligence, as mentioned, must impact the lived realities of children. Therefore, the Committee's finding that the state party had acted reasonably to protect and realise the rights of the children during the unrest implies due diligence through the setting up of schools and learning centres in the camps for children to continue with their education.[73]

It is submitted that the reasonableness test is important to the discussion of the right to and principle of non-discrimination in education because the test aims to prove whether conduct on the part of the state party during the unrest was sufficient to justify non-discrimination by the state party.

Another communication in which discrimination in education has been assessed by the African Children's Committee is *Children of Nubian Descent*,[74] which concerned children of Nubians who had been in Kenya for over 100 years. Since the Nubian children were not ethnic Kenyans, they encountered difficulties in attempting to obtain Kenyan citizenship. They struggled for years without success, leading to several limitations in their daily lives, including access to land, education and healthcare services. The central issue in this case was that Nubian children were stateless because they were not accorded Kenyan citizenship, as they should have been. Many Nubian descent parents could not obtain identity cards, which prevented them from registering the births of their children.[75]

It is noted that *Children of Nubian Descent* presented several violations of the African Children's Charter. However, the scope of this article requires that only the right to education be explored. It is also noted that non-discrimination is discussed in the *Children of Nubian Descent* only as a substantive right and not as an interpretive principle. The lack of birth registration resulted in consequential violations of the rights of the Nubian children, including their rights to education.[76] The Nubian children did not have birth certificates that

72 *Northern Ugandan Children* (n 16) para 37.
73 *Northern Ugandan Children* (n 16) para 66.
74 *Children of Nubian Descent* (n 52).
75 *Northern Ugandan Children* (n 16) paras 1-6.
76 *Northern Ugandan Children* (n 16) paras 58 & 63.

were required for school registration and this lack of documentation caused the consequential infringement of their right to education in that, unlike children that were not of Nubian descent, the Nubian children did not have equal access to education.[77]

The African Children's Committee found a violation of article 11(3) in that children of Nubian descent have less access to educational facilities as compared with communities where children are not of Nubian descent.[78] The state party had failed to take special measures to ensure that the Nubian children, a disadvantaged group, had equal access to education.[79] Most importantly, the state party had discriminated against the Nubian children due to their ethnic origins, without legitimate justification.

The Children's Committee also found a violation of article 3, due to the discriminatory treatment faced by Nubian children, in the so-called vetting process where they were required to prove the nationality of their grandparents and seek the approval of Nubian elders and government officials. In particular, the Committee mentioned that the discrimination violated the dignity and best interests of children.[80]

Fokala and Chenwi submit that the Children's Committee's decision highlights the importance of protecting the rights of all persons, in particular children, without discrimination as to race or ethnicity.[81] They also submit that an aspect of the Committee's decision that is revolutionary is the finding that the state party can only show that discriminating against Nubian children is fair and justifiable if there is 'sincere, convincing and indisputable evidence indicating with certainty that granting them Kenyan nationality will be incompatible with the best interests of the child principle enshrined in the African Children's Charter and founded on legitimate state interest'.[82] According to them, by this requirement the Committee has introduced a burden of proof that will be difficult to meet for state parties that refuse to grant nationality to any child who faces statelessness if denied a nationality. [83]

77 *Northern Ugandan Children* (n 16) paras 63-68.
78 *Northern Ugandan Children* (n 16) para 65.
79 Art 11(e) African Children's Charter.
80 *Northern Ugandan Children* (n 16) para 57.
81 E Fokala & L Chenwi 'Statelessness and rights: Protecting the rights of Nubian children in Kenya through the African Children's Committee' (2014) 6 *African Journal of Legal Studies* 372.
82 As above.
83 As above.

It is submitted that the African Children's Committee found a violation of article 3, in general, due to the failure of the state party to register the Nubian children. Had the complainants not alleged a violation of the right to education, the Children's Committee would still have found a violation of article 3 because the failure to register the births of children of Nubian descent was inherently discriminatory. Therefore, the violation of article 11(3)(e) should have constituted a separate issue against which article 3 should have been interpreted. Put simply, discrimination in education is a separate violation from discrimination by reason of refusal to register births. Such an approach would have found that by not providing equal access to education for the Nubian children, the state party had discriminated against them. Perhaps the Children's Committee did not inquire into discrimination in access to education as a separate violation because it was a consequential violation and not the main violation.

On the implementation of remedies, Sloth-Nielsen submits that Nubian children have been integrated into the community and have no issues with birth certificates and registrations. Most importantly, Nubian children are attending schools similarly to all other children in Kenya.[84]

According to Mezmur and Khabila, 'follow-up has been found to be important, because it has a huge potential to influence implementation and also nurture the much needed political will. It has been argued that follow-up and implementation require a 'multi-tiered approach and a coalition of actors' at both national and international levels.'[85] It is submitted that follow-up is the only means through which the African Children's Committee (and, indeed, all human rights treaty bodies) can ensure that remedies are implemented. Most importantly, when the victims are children, follow-up ensures that governments are held accountable and that infringements are remedied.

The African Children's Committee has given its views on discrimination on education based on child slavery. In *Mauritanian Enslaved Brothers*[86] the Children's Committee considered that the state's duty to protect the right to education includes the obligation

84 J Sloth-Nielsen 'Remedies for child rights violations in African human rights systems' (2023) *De Jure* 632.

85 BD Mezmur & MU Kahbila 'Follow-up as a "choice-less choice": Towards improving the implementation of decisions on communications of the African Children's Committee' (2018) 2 *African Human Rights Yearbook* 212.

86 *Minority Group International and SOS-Esclaves on behalf of Said Ould Salem and Yarg Ould Salem v Mauritania* No 7/Com/003/2015, decided December 2017 AHRLR (ACERWC 2017) (*Mauritanian Enslaved Brothers*).

to prevent and redress the exclusion of children from education by private actors.[87] The Committee noted that the state party had failed to take special measures to assist the boys in attending school, both during their stay in the slave master's house and after they were freed, since it took four years to enrol the boys in school after they were freed. The African Children's Committee noted that the obligation on state parties to ensure that the right to education is realised without discrimination is immediate and requires concrete and deliberate action. More importantly, it also held that deprivation of access to education through exclusion is discriminatory.[88] Therefore, the Committee concluded that the state party had failed to take special measures to assist the vulnerability of the children, to protect their rights to education from being violated by private people and, therefore, violated article 11 on the right to education.[89] At the implementation hearing, the Mauritanian government reported that by 2019 the two boys were in their final year of high school and that they had been compensated for 3 million Mauritanian Ouqiya, that identity cards had been provided for the boys and that the perpetrators were held accountable.[90]

The status of the non-discrimination provision as a general principle in the African Children's Charter is derived from the fact that it is autonomous, in that '[i]t has no independent existence, yet it qualifies all of the other substantive provisions of the Charter as if it were a part of each one. Thus, it governs all the rights and freedoms recognised and guaranteed in the Charter.'[91] Non-discrimination as a general principle means that all children should enjoy all the rights in the African Children's Charter, without being subjected to discrimination. The African Children's Committee has kept to the requirement of interpreting the rights in the Charter using the non-discriminatory principle as a guideline in all cases discussed in this part. In the cases discussed above, the African Children's Committee often interpreted the substantive aspect of the right to non-discrimination together with non-discrimination as an interpretive principle without making a clear distinction between the two. The analysis above has attempted to separate non-discrimination as a right and as an interpretive principle. The following part discusses the best interests principle in light of the right to education.

87 *Mauritanian Enslaved Brothers* (n 86) para 74.
88 As above.
89 As above.
90 Sloth-Nielsen (n 84) 637.
91 Kaime (n 41) 36.

3.2 The best interests principle: A substantive right, an interpretive principle and a rule of procedure

The best interests principle is threefold: First it is a substantive right; second an interpretive right; and third a rule of procedure.[92] It is a substantive right in that a child has a right to protection against infringements on their best interests; an infringement of the substantive rights in the African Children's Charter is an infringement of the child's best interests. As a rule of interpretation, the best interests principle means that the rights contained in the African Children's Charter should be interpreted through application of the best interests principle; in other words, children's rights should be interpreted in line with and within the lenses of the best interests principle. To this end, the African Children's Committee urges all state parties to include the best interests principle in their constitutions as an interpretive guide for all laws, actions and decisions concerning children.[93] Seen as a rule of procedure, the best interests principle requires that a child be given the opportunity to express themselves where they can and that decisions concerning children should be made after assessing the possible implications on the rights and welfare of the child.[94] Hence, all actions or inactions concerning children must be taken only if they are in the best interests of the child.[95]

While CRC proposes that the best interests principle must be '*a* primary consideration' in all matters and decisions affecting children, the African Children's Charter considers that the best interests principle 'shall be *the* primary consideration'. By this assertion, the African Children's Charter places the best interests principle as the overriding consideration in matters concerning children. Thus, it can be argued that the best interests principle is used in a manner that offers better protection to children under the African Children's Charter as compared to CRC.[96]

92 CRC Committee General Comment 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3 para 1), CRC /C/GC/14, 29 May 2013 para 6. See also *Tanzanian Girls* (n 17) para 70, where the African Children's Committee refers to the three-fold nature of the best interests principle.

93 The African Children's Committee's Concluding Observations and recommendations to Eswatini (n 54) para 6.

94 CRC Committee General comment 14 (n 92) para 6(c).

95 *Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense des Droits de l'Homme v Senegal*, No 3/Com/001/2012, decided 15 April 2014 (*Senegalese Talibés*) para 35.

96 G van Beuren *The international law on the rights of the child* (1995) 46. See also F Viljoen 'The African Charter on the Rights and Welfare of the Child' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 219.

The scope and significance of the best interests principle is further magnified by the provision that it must be the primary consideration in *all* matters affecting children. Put simply, the best interests principle must be applied in all cases affecting children and must be the basis upon which a decision should be reached by a judicial or administrative authority. Furthermore, the African Children's Committee's General Comment 5 states that the best interests principle has no any conditions attached that would 'dilute its scope, reach or standard of application'.[97] The same General Comment also notes that the best interests principle is applicable across all settings, including cultural, political and geographic, as well as to all ethnic groups.[98] General Comment 5 also lists matters in which the best interests principle should be considered, which includes the child's right to education.[99]

In *Tanzanian Girls* the African Children's Committee had to decide whether the mandatory pregnancy testing, expulsion and denial of re-entry were in the best interests of the girls concerned. The Committee rightly acknowledged that the best interests principle as a rule of procedure required that the decision to expel a pregnant girl involves administrative proceedings that should involve the views of the child.[100] The Committee noted that this required a consideration of the impact on the child concerned before making a decision.[101]

As a rule of procedure, article 4(2) of the African Children's Charter in this instance pertains to the expulsion of a pupil from school as an administrative proceeding and requires that a child implicated in such proceedings must be allowed to have their views heard. This is a core component of the best interests of the child as a procedural rule, which – at a minimum – requires the consideration of the impact on the child concerned before making decisions affecting them.[102]

The African Children's Committee noted that a child who is forced to have a pregnancy test and then expelled due to the results of the test is put in an extremely vulnerable position which can lead to violations of their civil, economic, social and cultural rights.[103] Therefore, it was in the best interests of such a child to be allowed, at the very least, to be heard.

97 General Comment 5 (n 23) para 4.2.
98 As above.
99 As above.
100 *Tanzanian Girls* (n 17) para 70.
101 As above.
102 As above.
103 As above.

The African Children's Committee further considered that since it always is in the best interests of the child to have access to quality education free of charge, expelling pregnant and married girls from school is not in their best interests as it prevents access to quality education.[104] It is submitted that a finding of a violation of the right to protection against discrimination will always imply a finding of a violation of the child's best interests since discrimination will never be in the best interests of the child. Thus, the finding of violations of the right to protection against discrimination in *Northern Ugandan Children*, *Mauritanian Enslaved Brothers* and *Senegalese Talibés* follows violations of the best interests principle.

In *Children of Nubian Descent*, for example, the African Children's Committee also held that discrimination violated the dignity and best interests of children.[105] The fact that the government of Kenya did not appear before the Children's Committee on several occasions was seen to be contrary to the best interests principle and was used as grounds to proceed with the matter in the absence of the state party.[106] By so doing, the Children's Committee confirmed the best interests principle as a rule of procedure.[107] According to Fokala and Chenwi, the decision by the African Children's Committee in *Children of Nubian Descent* also 'reiterates the Committee's elevation of the best interests of the child principle to a general/cross-cutting principle'.[108]

3.3 Child participation as a third pillar of interpretation and as an element of the best interests principle

Closely linked to one of the elements of the best interests principle is child participation or respect for the views of the child. The right of the child to present their views in matters affecting them is explicitly seen in article 4(2) of the African Children's Charter:

> In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.

104 *Tanzanian Girls* (n 17) para 73.
105 *Children of Nubian Descent* (n 52) para 57.
106 *Children of Nubian Descent* (n 52) paras 14 & 56.
107 BD Mezmur 'Happy 18th birthday to the African Children's Rights Charter: Not counting its days but making its days count' (2017) 1 *African Human Rights Yearbook* 144.
108 Fokala & Chenwi (n 81).

Also, article 7 of the African Children's Charter on freedom of expression is relevant to child participation.[109] According to article 7, '[e]very child who is capable of communicating his or her own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws'.

Article 7 complements article 4(2) by confirming that a child who can express their own views shall be assured the right to express their opinion. While article 4(2) provides the child with 'an opportunity' for their views to be heard, article 7 guarantees that the child will be heard by the term 'assured', which is a stronger word than 'opportunity'. Therefore, the right of the child to express their own opinion in matters affecting them is guaranteed by the African Children's Charter.

The two participatory rights found in articles 4(2) and 7 are applicable to all matters concerning children. While article 4(2) refers to matters of administrative and judicial nature, article 7 broadens the scope of protection without limitation by employing the term 'all' to suggest an infinite number of situations. It is noted that the fact that articles 4(2) and 7 apply to all situations qualifies the participatory principle as a general principle, cutting across all rights in the African Children's Charter. Kaime has described the participatory principle as a 'lynchpin in the scheme set up by the Charter'.[110]

General Comment 5 of the African Children's Committee on state party obligations highlights the role of the child as an active participant in matters that affect them. It notes that government processes to secure the views of the child should be transparent and accessible to children to allow for their participation and should be consistent with their evolving capacities.[111] The African Children's Committee further notes that, for effective child participation, there is a need to integrate the principle of child participation into formal government processes so that office bearers such as teachers can be held accountable.[112] According to the Children's Committee, child participation should comprise nine basic principles, namely, being transparent; informative; voluntary; respectful; relevant; child friendly; inclusive; supported; safe; sensitive to risk; and accountable.[113]

109 General Comment 5 (n 23) para 4.4.
110 Kaime (n 41) 57.
111 General Comment 5 (n 23) para 4.4.
112 As above.
113 As above.

Other participatory provisions include article 13 where the rights of children with disabilities to participation are documented. Article 13(1) is inclusive in that it recognises the rights of children with disabilities to participate in their communities. Articles 8, 9 and 12 arguably are participatory rights in that they allow the African child the right to freedom of association, freedom of thought, conscience and religion and the right to freely participate in cultural life, respectively.

While the African Charter on Human and Peoples' Rights (African Charter)[114] recognises the right to seek, receive and disseminate information,[115] the African Children's Charter has not included children's participatory rights in terms of the right to information. Whether this was intentional or an oversight on the part of the drafters is unknown. Whereas child participation is often highlighted in the CRC Committee's jurisprudence,[116] the principle is not often seen in the jurisprudence of the African Children's Committee, at least not in interpretation of education rights cases currently before the Committee. It has been argued that accounts of children's rights in Africa often show a restriction of participatory rights.[117]

By its own jurisprudence, and perhaps intentionally and strategically placed under the best interests principle, article 4(2) of the African Children's Charter provides that the views of the child must be considered in all judicial and administrative decisions concerning the child. *Tanzanian Girls* highlights the correlation between the best interests principle and the right to child participation. Indeed, it would be repetitive to discuss the African Children's Committee's views on child participation here because it is analogous to the best interests principle. The Children's Committee emphasised in *Tanzanian Girls* that the state party made no effort to obtain the views of the girls before the mandatory pregnancy tests were conducted. This, the Committee found it to be in contradiction with the view that children should be given the opportunity to give their consent in an informed manner, in situations where their health and well-

114 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev 5, 21 ILM 58 (1982) 27 June 1981.
115 See art 9(1) of the African Charter.
116 See CRC Committee Concluding Observations: Liberia, 1 July 2004, CRC/C/15/Add.236, para 28; CRC Committee Consideration of reports submitted by state parties under article 44 of the Convention: Mauritania UN Doc CRC/C/8/Add.42 paras 18-29 & 47-48.
117 See Chirwa (n 27) 157. See also C Hamonga 'The right of the child to participate in decision making: A perspective from Zambia' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 95.

being are implicated, thereby giving effect to the child's right to participation.[118]

In *Children of Nubian Descent* the requirement of child participation as a general principle of interpretation was not explicitly applied by the African Children's Committee in its interpretation. However, the Committee recommended that the state party should, in consultation with the affected beneficiary communities, adopt legislative, administrative and other measures to ensure the fulfilment of the right to education and health.[119] It is hoped that the Committee's recommendation to consult with affected communities envisaged an inclusion of Nubian children who were principally the victims of the violations. Such an inclusion will not only ensure that child participation as a general principle of interpretation is maintained in the case, but also ensure that the voices of the Nubian children are heard in consultation to adopt legislative and administrative measures on their rights to a nationality that will affect their lives as provided for under articles 4(2) and 7 of the African Children's Charter. Although the African Children's Committee has not explicitly mentioned child participation in the cases discussed in this article, Mezmur has observed that where appropriate and possible, child participation has informed the processes of communications, in that in *Children of Nubian Descent*, *Northern Ugandan Children* and *Senegalese Talibés* the Committee conducted on-site investigations, and follow-up on implementations has also been carried out.[120] These processes allow the child victims the opportunity to express their views.

3.4 Survival and development as the fourth pillar and an aspect of the right to education

For purposes of this article, the development aspect of article 5 is the central focus as the article considers the right to education an essential element of the right to development. Article 5 of the African Children's Charter contains the right to survival and development, two separate but closely-related rights. It is important to note the difference between the right to survival and the right to development. The right to survival denotes, first, the inherent right to life, to which every child shall be entitled, and which state parties must protect.[121]

118 CRC Committee General Comment 14 (n 92) para 77.
119 E Durojaiye & E Amarkwei Foley 'Making a first impression: An assessment of the decision of the Committee of Experts of the African Children's Charter in the Nubian Children communication' (2012) 12 *African Human Rights Law Journal* 569.
120 Mezmur (n 107) 144.
121 Art 5(1) African Children's Charter.

The child's right to life is important because to enjoy the rights in the Charter, a child must be alive. Therefore, the right to survival and development is an important pillar as all other rights can be enjoyed only by virtue of being alive.

Second, it also includes the prohibition on the death sentence for children.[122] The African Children's Charter gives a generalised provision on the right to development by stating in article 5(2) that 'state parties should ensure to the maximum extent possible, the survival, protection and development of the child'.

However, some meaning can be derived from the Preamble to the Children's Charter and from the Charter in general. For example, the Preamble states that due to the needs of a child's physical and mental development, care with regard to health, mental, moral, physical and social development are required to be protected.[123] The same Preamble recognises the child's position as a 'unique and privileged member of African society' whose full and harmonious development requires that they grow up in a family environment.

Moreover, article 11 on the right to education recognises that education shall be directed to, among others, the 'promotion and development of the child's personality, talents, mental and physical abilities to their fullest potential'.[124] Elsewhere in the African Children's Charter we gain a similar understanding of the African child's right to development with regard to children with disabilities, in article 13(2) of the Children's Charter, in the provision that state parties must ensure the provision of resources that will prepare the disabled child in a manner that will help them achieve their fullest individual, cultural and moral development.

General Comment 5 of the African Children's Committee on state party obligations highlights that the implementation of rights in the African Children's Charter should aim to achieve optimal development for children in all aspects.[125] The African Children's Committee has explained the role of Sustainable Development Goals (SDGs) as complimentary to the right to development for the African child, in particular in the realisation of socio-economic rights. General Comment 5 also emphasises the importance of all rights

122 Art 5(2) African Children's Charter.
123 See the Preamble to the African Children's Charter.
124 Art 11(2) African Children's Charter.
125 General Comment 5 (n 23) para 4.3.

in the African Children's Charter to facilitate the development of children from childhood to adulthood.[126]

The African child's right to development encompasses a realisation of the rights contained in the African Children's Charter. As Kaime notes, the broad nature of the right to survival and development necessitates the realisation of a range of civil, socio-economic and cultural rights.[127] Thus, as a socio-economic right, the right to education places an obligation on state parties to provide access to adequate education that will develop the intellectual capacities of the African child and allow them to participate in society.

In *Children of Nubian Descent* the African Children's Committee reasoned that education was an important aspect of a child's development. Therefore, by promulgating laws that prevented Nubian children from having access to education, the state party had infringed on their right to education.[128] Durojaye and Amarkwei Foley submit that the obligation to respect the right to education burdens the government to refrain from interfering with the right. Therefore, the failure to register the Nubian children is an indirect interference of their right to education.[129] It must be noted that the nature of education as a socio-economic right places both negative and positive obligations on a government: a positive obligation in the sense that the government must intentionally create laws and policies that will bring about the realisation of the right, including access without discrimination, and a negative obligation by refraining from interfering with the enjoyment of the right.[130] They further submit that by taking an interdependence, interrelated and indivisibility approach to interpreting the right to birth registration and citizenship, the African Children's Committee viewed the rights in the Children's Charter as related, and came to the conclusion that the delay on the part of Kenya in granting the Nubian children citizenship had violated the children's rights, including their rights to education.[131]

Senegalese Talibés[132] concerned 100 000 children from Senegal and its neighbouring countries. The children were boys between the ages of 4 and 12, called the Talibés, who were taken from

126 As above.
127 Kaime (n 41) 53.
128 *Children of Nubian Descent* para 65.
129 Durojaye & Amarkwei Foley (n 119) 575.
130 F Coomans 'In search of the core content of the right to education' in D Brand & S Russell (eds) *Exploring the core content of socio-economic rights: South Africa and international perspectives* (2002) 159.
131 Durojaiye & Amarkwei Foley (n 119) 574.
132 *Senegalese Talibés* (n 95).

their families by the *marabouts* (instructors) so that they would be given Qur'anic religious education in cities in Senegal. The Talibés children were forced to beg on the streets for long hours to benefit the *marabouts*. The children were often beaten when they failed to meet their daily quotas (in the form of rice, money or sugar) which they were supposed to make from begging, and were often injured by speeding vehicles. They lived in deplorable conditions in unsafe and overcrowded houses. They were exposed to illnesses, assault; they were malnourished and exposed to sexual abuse, and were not allowed contact with their families.[133] The case resulted in violations of several rights of the children. However, only the right to education will be discussed here.

The African Children's Committee found a violation of the right to education under article 11 of the African Children's Charter. The Committee held that children had a responsibility towards their family, nation and society and that such responsibility can only be fulfilled if they have the necessary education.[134] The African Children's Committee further recognised that 'education is a tool to enhance the protection of children from dangerous and hazardous labour'.[135] It is submitted that by this reasoning and finding, the Children's Committee recognises the right to education as necessary to the development of children. Therefore, by failing to ensure the realisation of the rights of the Talibés boys to education, the state party had impeded on their right to development.

The above view is substantiated when the African Children's Committee referred to General Comment 1 of the CRC Committee on the aims of education, which states that education should be aimed at empowering the child to develop skills, learning and other capacities. The Committee held that the failure on the part of the state party to provide free and compulsory education for the Talibés had forced them to attend the *daaras* where they were not asked to pay school fees except for the daily quotas. The Committee concluded that the government had failed to ensure that education was available, accessible and acceptable to the Talibés, thus violating article 11 of the African Children's Charter.[136] Mezmur and Kahbila note that it was surprising that the African Children's Committee failed to make a finding on the gender dimension of the case, since the forced begging by children on the streets, as well as education,

133 *Senegalese Talibés* (n 95) paras 1-10.
134 *Senegalese Talibés* (n 95) para 46.
135 As above.
136 *Senegalese Talibés* (n 95) paras 47-50.

health and abduction, differently affect girl and boy children.[137] I agree that it would have been interesting to see the views of the Children's Committee on the gender dimension of this case, as the children involved were all boys. Therefore, the Committee in my view missed an opportunity to pronounce on the gender dimensions of the right to education of boy children.

The African Children's Committee also noted in *Senegalese Talibés* that the 'survival and development encapsulate the right to life and imposes an obligation on states to ensure an adequate standard of living for children, including the right to life and their physical, mental, spiritual, moral, psychological and social development'.[138]

The African Children's Committee also emphasised the responsibility on state parties to protect children by setting minimum standards for educational institutions including for the *daaras,* in accordance with article 11(5) of the African Children's Charter, which provides that children who are subject to school or parental discipline, are treated with humanity and dignity.[139] According to Sloth-Nielsen, the government of Senegal has undertaken measures to implement the African Children's Committee's recommendation to remove the Talibés children from the streets and to ensure the realisation of their right to education.[140] These measures include budgetary allocations, the signing of bilateral agreements to return the children to their homes and accelerating the adoption of a child rights code. On education specifically, new curricula have been drafted for the schools that formerly denied the children their rights to education, and time frames as well as norms and standards for the schools have been set up.[141] Furthermore, a total of 1 147 children were withdrawn from the streets, there has also been an increase in the number of children enrolled in schools, and a better quality of education has been seen.[142]

The cases discussed in this article have illustrated the extent of the development of educational rights within the jurisprudence of the African Children's Committee, in particular as it relates to girl children. Notwithstanding this fact, the Children's Committee is

137 Mezmur and Khabila (n 85) 210.
138 *Senegalese Talibés* (n 95) para 42.
139 *Senegalese Talibés* (n 95) para 47.
140 Sloth-Nielsen (n 84) 634. See also the 29th session of the African Children's Committee para 62. refer also to the Committee report where this was reported as primary source
141 Sloth-Nielsen (n 84) 633. See also the 29th session of the African Children's Committee para 62. refer also to the Committee report where this was reported as primary source
142 As above.

yet to develop a General Comment on the right to education. The following part argues that the extensive development of the right to education under the Children's Committee's jurisprudence calls for a General Comment on education.

4 The need for a General Comment on the right to education by the African Children's Committee

The African Children's Committee currently does not have a General Comment on the right to education, although it regularly refers to the CRC Committee's General Comment on education. The purpose of a General Comment is to provide meaning for rights in a treaty or a charter, by providing interpretations of the provisions in the treaty.[143] General Comments are also authoritative guides on interpretations of treaties and may deal with substantive rights or provide guidance on the information that state parties must submit to treaty bodies in their reports. General Comments also deal with wider issues that may be cross-cutting such as the protection of girl child education.[144]

Based on the extensive level of interpretation on the right to education, particularly in *Tanzanian Girls*, *Children of Nubian Descent* and *Northern Ugandan Children*, the African Children's Committee should consider developing a General Comment on education to give meaning to article 11. The fact that the right of the girl child to education is high on the agenda of the African Children's Charter is commendable and adds to the need for a General Comment since, arguably, no other international treaty has devoted as much attention to girl child education.[145] The recognition that the girl child is part of a vulnerable group, whose right to education deserves special protection, has been elaborated on in detail in *Tanzanian Girls*. This has added meaning to the existing provisions in the Children's Charter on the right to education in so far as the girl child is concerned. The African Children's Committee can go a step further by extracting the 'developed meanings' into a General Comment.

Moreover, there is a case pending against Ghana on behalf of school girls living in villages along a river.[146] Although the case is

143 United Nations Office of the High Commissioner on Human Rights 'General Comments', https://www.ohchr.org/en/treaty-bodies/general-comments (accessed 12 February 2024).
144 As above.
145 Chirwa (n 27) 157-178.
146 *Institute for Human Rights and Development in Africa and Mr Solomon Joojo Cobbinah (on behalf of school girls living in villages along the River Offin in the Ashanti Region of Ghana) v Ghana*, No 19/Com/001/2022, admissibility decision May 2023 (*Ghanaian Girls Crossing River Offin*).

still pending, it invokes violations of the right to education for yet another group of girls. Undoubtedly, the African Children's Charter's special provisions on girl children will bring communications before the African Children's Committee on girl children and will demand further interpretations on the rights provided in the Charter.

The development of the reasonableness test to determine a state party's compliance with the right to education under unusual circumstances or in situations of unrest, which was mentioned in the *Northern Ugandan Children*,[147] cannot be found elsewhere in the African Children's Charter. A General Comment on the right to education to expand on the test will help state parties to measure and self-assess their compliance against the right to education in situations of unrest. It will also add meaning to the African Children's Charter's provision that 'every child' has the right to education, in that 'every child' is inclusive of children who find themselves under unusual circumstances, where the right to education ordinarily would not be prioritised.

While the African Children's Charter makes extensive provisions on the right to education, the interpretations of these provisions are not always clear through initial readings of them. In fact, some provisions are ambiguous, leaving room for different interpretations.[148] Therefore, the meanings of provisions that cannot be explicitly ascertained by reading the African Children's Charter will become clearer in a General Comment.

The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights of the African Commission on Human and Peoples' Rights (African Commission) (Principles and Guidelines)[149] give meaning to free education by providing for measures to eliminate or reduce the costs of attending primary school, such as the introduction of stipends, uniforms, textbooks, transportation and meals in order to encourage attendance.[150] However, the Principles and Guidelines do not expand on the 'compulsory' aspect of basic education. A General Comment by the African Children's Committee can expand on the meaning of compulsory education by providing clarity on for example, who bears the onus for ensuring that education is compulsory. Is the onus on the state, the parent or the child? At what

147 *Northern Ugandan Children* (n 16) paras 69-70.
148 See, eg, Chirwa (n 27) 165, where the author argues that the provision in the African Children's Charter on special measures of education for girl children is ambiguous and can be interpreted in various ways.
149 African Commission Principles and Guidelines (n 3) para 69.
150 African Commission Principles and Guidelines (n 3) paras 71(a)-(b).

age should such compulsory education be enforced? When does it begin and when does it end? What are the consequences for those who do not comply with the requirement?

Also, the Principles and Guidelines encourage prohibition on corporal punishment,[151] which is welcomed as the African Children's Charter does not explicitly prohibit corporal punishment. Neither the African Children's Charter nor the Principles and Guidelines introduce positive discipline as a means of replacing corporal punishment in schools. This the Children's Committee can include in a General Comment. Moreover, an explicit prohibition on corporal punishment by the African Children's Charter can also be included in a General Comment.

A General Comment on the girl child's right to education would limit the scope of the General Comment to only girl children. The jurisprudence of the African Children's Committee on education has not only expanded in view of the girl child, but also in relation to children generally. Therefore, it is recommended that the General Comment should cover the right to education of children in general.

5 Conclusion

This article sought to outline the development of education rights in the African Children's Charter, through the interpretation of the right to education and its development in the jurisprudence of the African Children's Committee. The article discussed five communications on the right to education on which the African Children's Committee has given its views, and analysed how the Committee has interpreted the right to education by applying the four pillars, namely, non-discrimination, the best interests principle, the right to survival and development, and child participation.

Apart from making a case that the right to education in the African Children's Charter is ripe for a General Comment, the following observations are also made. First, the girl child's right to education has been extensively dealt with by the African Children's Committee. Unless the pending case on behalf of school girls against Ghana introduces new jurisprudence in this area, *Tanzanian Girls* remains the leading case on education and girl children on the African continent. Second, non-discrimination as a substantive right and as a pillar of interpretation is more developed in the jurisprudence of

151 African Commission Principles and Guidelines (n 3) para 71(q).

the African Children's Committee in terms of the right to education, as compared to best interests, survival and development and child participation. This is because the five cases all make findings of discrimination, and this had led to extensive development in that area. Moreover, although violations of the best interests principle are also found in all five cases, the complex nature of the facts did not always allow for a clear interpretation of the best interests principle against the right to education as other non-educational violations were found. Finally, there is a need to prioritise child participation on the agenda of children's rights in Africa and thereby build on that jurisprudence. As previously argued, child participation is less prevalent in the African Children's Committee's jurisprudence. For example, the Committee prescribed what has been described as 'far-reaching' remedies in *Tanzanians Girls*. The need for participation and respect for the views of the child could have been emphasised through a recommendation that the school's policies be written by engaging learners who will be affected by these. As Mezmur has observed, the views of the African Children's Committee in the cases discussed are proof that 'the individual complaints mechanism under the African Children's Rights Charter holds a very strong potential to protect children in Africa'.[152]

152 Mezmur (n 107) 144.

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Legislating against adult women's consent to female genital mutilation: A feminist analysis of state practice in light of the Joint General Comment on Female Genital Mutilation by the African Commission and the African Children's Committee

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Summary: *This contribution is concerned with women who opt to undergo female genital mutilation in adulthood. While contentious, the idea that a woman can consent to FGM is condoned in certain African countries in law and in practice. There is an uneven treatment of consent in relevant FGM laws on the continent. States have an obligation to eradicate the practice of FGM, including ensuring that consenting to FGM is impermissible in law. This contribution scrutinises an equality*

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argument in support of consent to FGM for adult women, investigates states' legislative approaches to consent as adopted by select member states that are party to the African Women's Protocol and whether their laws adopt a wholistic approach to eradicating FGM. These approaches are considered from a feminist perspective taking account of the historical place of feminist analysis in the formulation of FGM as a human rights issue under international law. It includes a consideration of state obligations in the African Women's Protocol and the recent Joint General Comment on FGM adopted by the African Commission and the African Children's Committee. It aims to recommend legislative standards that can be applied on the continent to increase the effectiveness of laws criminalising FGM in order to eradicate the practice.

Key words: *female genital mutilation; legislating FGM; anti-rights discourse; bodily autonomy; violence against women*

1 Introduction

On 10 November 2023 the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) launched a Joint General Comment on the Eradication of Female Genital Mutilation (FGM) (Joint General Comment on FGM).[1] The Joint General Comment on FGM aims to clarify the obligation to eliminate FGM as set out for state parties to the African Charter on Human and Peoples' Rights (African Charter), the African Charter on the Rights and Welfare of the Child (African Children's Charter) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[2]

FGM results in the violation of several human rights. It is a violation of the right to freedom from violence, the right to the highest attainable standard of physical and mental health, and where it results in death, the right to life is violated.[3] It also violates the right to security and physical integrity and the right to be free from torture and cruel,

1 African Children's Committee 'Launch of the General Comment in Female Genital Mutilation' 10 November 2023, https://www.acerwc.africa/en/article/activity/launch-joint-general-comment-female-genital-mutilation (accessed 20 November 2023).
2 As above.
3 C Yusuf & Y Fessha 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania' (2013) 13 *African Human Rights Law Journal* 362.

inhuman or degrading treatment.[4] At its core, FGM is a violation of gender equality.[5] The primary treaty relating to the eradication of gender discrimination for women in all its forms and manifestations, in Africa, is the African Women's Protocol. The General Comment on FGM seeks to clarify the scope and nature of state obligations to eliminate FGM in line with the African Women's Protocol.[6] Noting it as an issue relevant to girls' rights, the Joint General Comment seeks to delineate state obligations set out in article 5(b) of the African Women's Protocol, article 21(1) of the African Children's Charter, and other relevant provisions under both Instruments.[7] Hailed as the most inventive and exciting development in women's rights protection since the formation of the African Union (AU), the African Women's Protocol lays down essential human rights standards for African women.[8] The Women's Protocol outlines an obligation on member states to eliminate all forms of gender discrimination, including violence against women, generally, and harmful cultural practices such as FGM, in particular.[9] The African Women's Protocol suggests to member states measures that they can put in place to prevent and respond to instances of FGM, including legislation criminalising FGM. Several AU member states that have ratified the Women's Protocol have put in place a variety of direct and indirect laws aimed at the eradication of FGM.[10] Twenty-eight countries have laws that prohibit or criminalise FGM on the continent.[11]

4 World Health Organisation 'Female genital mutilation' 5 February 2024, https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation#:~:text=The%20practice%20also%20violates%20a,the%20procedure%20results%20in%20death (accessed 10 July 2024).

5 Word Health Organisation 'Eliminating female genital mutilation: An interagency statement UNAIDS, UNDP, UNECA, UNESCO, UNHCR, UNICEF, UNIFEM, WHO' 16 June 2008, https://www.who.int/publications/i/item/9789241596442 (accessed 2 June 2022).

6 Joint General Comment on Female Genital Mutilation, adopted by the African Commission and the African Children's Committee June 2023 (Joint General Comment on FGM) paras 4-5, https://www.acerwc.africa/sites/default/files/2023-11/Joint%20General%20Comment_ACHPR-ACERWC_on%20FGM%20%282%29.pdf (accessed 10 July 2024).

7 As above.

8 L Sithole & C Dziva 'Eliminating harmful practices against women in Zimbabwe: Implementing article 5 of the African Women's Protocol' (2019) 19 *African Human Rights Law Journal* 570.

9 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol entered into force on 25 November 2005.

10 Saleema Initiative Africa Union Initiative on Eliminating Female Genital Mutilation Programme and Plan of Action 2019-2023 (Saleema Initiative) 6, https://au.int/sites/default/files/newsevents/workingdocuments/41106-wd-Saleema_Initiative_Programme_and_Plan_of_Action-ENGLISH.pdf (accessed 9 January 2024).

11 As above. African states that criminalise or prohibit FGM in their laws, including as part of their constitutions, are Benin, Bukina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Djibouti, DRC, Egypt, Eritrea, Ethiopia, Ghana, Guinea Bissau, Kenya, Liberia, Mauritania, Niger, Senegal, Somalia, South Africa, South Sudan, Sudan, Tanzania, Togo, Uganda, Zambia, Zimbabwe and The Gambia. The Gambian Parliament is set to vote on a proposal to decriminalise FGM in the

From a feminist perspective, the persistence of FGM is about maintaining gender norms on sexual relations and controlling women's sexuality before, during and after their marriage.[12] Marriage – belonging – is prioritised as a source of benefit for women and their families.[13] This perspective puts into question the ability to consent to the practice in a social and economic context where the choice so exercised by women may not be free and informed. The negative consequences of FGM for women are documented. However, from the perspective of some women's life experiences, FGM may enable access to livelihoods and social and economic security.[14]

The question of permitting adult women to consent to FGM in the African context has been mooted in some African countries.[15] This article surveys legislative measures enacted by state parties to the African Women's Protocol, with a higher prevalence of FGM, to consider the extent to which legislative measures adopted by these states address the question of consent to FGM. The laws are to be applied in a specific societal setting and not in a vacuum. A law targeted at the practice of FGM as its mischief must also consider the context within which the mischief arises and aim to eradicate the factors that make consent to FGM relevant. As such, this article further interrogates the extent to which the legislative measures recognise the realities of women's lives that demand compliance with the cultural or traditional practice of FGM, and thereby legislate measures to address the discrimination that, in their context, informs women's acceptance of FGM as a means to survive in an otherwise

country through the Women's (Amendment) Bill 2024 that is currently before Parliament for voting on 24 July 2024. See Equality Now 'What's happening with the FGM law In The Gambia?' 8 July 2024, https://equalitynow.org/news_and_insights/whats-happening-with-fgm-law-in-the-gambia/ (accessed 10 July 2024).

12 P Akweongo and others 'It's a woman's thing: Gender roles sustaining the practice of female genital mutilation among the Kassena-Nankana of Northern Ghana' (2021) 18 *Reproductive Health* 2, https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-021-01085-z (accessed 10 July 2024).

13 C Packer 'Understanding the socio-cultural and traditional context of female circumcision and the impact of human rights discourse' in O Nnaemeka & J Ezeilo (eds) *Engendering human rights: Cultural and socio-economic realities in Africa* (2011) 224.

14 As above.

15 See *Kamau v Attorney General & 2 Others; Equality Now & 9 Others (Interested Parties); Katiba Institute & Another (Amicus Curiae)* Constitutional Petition 244 of 2019 [2021] KEHC 450 (KLR) (Constitutional and Human Rights) (17 March 2021) in Kenya through a case challenging the constitutionality of the law criminalising adult women who consent to FGM. See also AR Thomas 'Sierra Leone respects the right of consenting adults to choose – says Minister Blyden' 11 July 2016, https://www.thesierraleonetelegraph.com/sierra-leone-respects-the-right-of-consenting-adults-to-choose-says-minister-blyden/ (accessed 20 December 2023); AR Thomas 'Female circumcision – Women must have the right to choose – says Dr Fuambai Sia Ahmadu' 8 February 2016, https://www.thesierraleonetelegraph.com/female-circumcision-women-must-have-the-right-to-choose-says-dr-fuambai-sia-ahmadu/ (accessed 20 December 2023).

hostile community. It questions how free such consent can be under the circumstances in which many women in these FGM-practising communities are.

First, the article will elaborate on the formulation of FGM as a human rights issue and how this informed its criminalisation at the national level. In this part, the influence of historical essentialist feminist activism on FGM in the adoption and elaboration of the international human rights norms on FGM will be considered. This is due to the documented influence of this movement on the legislative mechanisms criminalising FGM that were adopted by states in response to their international law obligations.[16] Thereafter, it considers the context within which the human rights standards and the laws criminalising FGM are to operate. This part sets out the contextual reality within which African women are purported to be able to exercise consent to FGM.

Second, the article considers the equality rights-based arguments for adult women to consent to FGM. It interrogates the vilification of feminist essentialist approaches to the questions of bodily autonomy and equality as it applies to adult women consenting to FGM. Thereafter, the article investigates the existence of definitive legal text indicating that consent is irrelevant to FGM. It considers the African Women's Protocol and the Joint General Comment on FGM and whether these clarify an obligation on member states to nullify consent to FGM through legislation. The article then considers the existing laws in select member states party to the Women's Protocol that have laws prohibiting FGM and whether the laws in place, first, nullify consent to FGM and, second, adopt other measures to address the root causes of FGM discussed as influencing the ability of women to freely exercise consent in FGM-practising communities.

Finally, the article concludes on minimum aspects that can inform the reformulation or formulation of legislation on FGM in order to ensure that the law criminalising FGM can more adequately address the question of consent to FGM and the factors that are the root causes of FGM.

16 H van Bavel 'Is anti-FGM legislation cultural imperialism? Interrogating Kenya's Prohibition of Female Genital Mutilation Act' (2023) 32 *Social and Legal Studies* 1.

2 Human rights norms on female genital mutilation under international law and domestication into national law: Law versus reality in the African context

The World Health Organisation (WHO) notes that there are four types of FGM. Type 1 FGM, termed as sunna circumcision, involves the excision of the clitoris prepuce and of the clitoris or parts thereof. Type 2 involves the excision of the clitoris prepuce, the clitoris and the inner lips or parts thereof. Type 3 FGM, termed as infibulation, is the most severe form of FGM. It involves the excision of part of or all of the external genitals. Thereafter, the remaining parts of the outer lips are sewn together leaving an opening for urine and menstrual flow.[17] The scar needs to be opened before intercourse or giving birth, which causes additional pain.[18] Type 4 FGM involves pricking, piercing, cutting or stretching of the clitoris or the labia, also burning or scarring the genitals as well as ripping of the vaginal opening or the introduction of corrosive substances or herbs into the vagina in order to tighten it, and any other procedure, which injures or circumcises the female genitalia.[19] Type 4 FGM is considered the mildest form of FGM.[20] FGM has negative physical and psychological effects on the women who undergo this procedure.[21] However, various forms of Type 1, Type 2 and Type 3 FGM are the focus of the anti-FGM activism.[22]

This part sets out the role of anti-FGM feminist activists in formulating FGM as a human rights issue through the years, and the various strategies used to advance this cause through regional and international treaties and eventually into national laws. It then considers the ways in which African women experience human rights violations in the context of the practice. This serves to identify the mischief targeted by the human rights norms relating to FGM and the national laws criminalising the practice.

17 M Kevane *Women and development in Africa: How gender works* (2014) 213.
18 As above.
19 VC Madu 'Socio-cultural practices harmful on female reproductive health: A case against female genital mutilation' (2020) 100 *Journal of Law, Policy and Globalisation* 74.
20 N Ehrenreich & M Barr 'Intersex surgery, female genital cutting, and the selective condemnation of "cultural practices"' (2005) 40 *Harvard Civil Rights Civil Liberties Law Review* 80, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2926589 (accessed 20 December 2023).
21 K Nadessen 'A profile of female genital mutilation and human rights: Towards outlawing the practice' (2000) 7 *Alternation* 170, 174.
22 Ehrenreich & Barr (n 20) 80.

2.1 Influence of feminist discourse in formulating female genital mutilation as an international human rights issue

There are several varieties of feminist legal theory, some of which overlap.[23] All feminist theories, however, share an observation that the world is shaped by men who, for this reason, possess larger shares of power and privileges, and a belief that men and women should have political, social and economic equality.[24] While feminists share the goal of achieving gender equality, they disagree on the meaning of and the manner in which to attain this.[25] Elaborating that FGM is grounded on misogynistic views on women and maintaining socially-constructed gender roles, the feminist movement has significantly informed the formulation of FGM as a violation of the right to equality at the African regional and international level.[26] Feminist advocates argued that the practice is used to enforce patriarchal power by enforcing virginity and fidelity and instituting its status as a prerequisite to marriageability, stigmatising female sexual organs as 'dangerous and dirty', and reducing women's capacity for sexual pleasure.[27]

The term 'FGM' is said to have been first coined in 1979 by Fran Hosken, an American writer, feminist and author of *The Hosken report: Genital and sexual mutilation of females*.[28] In terming it as mutilation, Hosken made a distinction between this description and 'female circumcision'. Referring to the practice as female circumcision draws a comparison between female circumcision and male circumcision. Terming it as mutilation emphasises the gravity of the act and the negative physical and mental health consequences of the cut for women as opposed to the procedure men undergo as circumcision.[29] However, of note is that in 1980 African women boycotted a session featuring Hosken at an international women's conference, calling her perspective of FGM as racist, 'ethnocentric' and 'insensitive to African women'.[30] Some researchers and the United Nations (UN) agencies, the United Nations Children's Fund (UNICEF) and the United Nations Population Fund (UNFPA) have

23 N Levit & RRM Verchick *A primer: Feminist legal theory* (2006) 12.
24 As above.
25 M Lasseko-Phooko 'Challenges to gender equality in the legal profession in South Africa: A case for putting gender on the transformation agenda' Master's dissertation, University of South Africa, 2019 52, https://uir.unisa.ac.za/handle/10500/25608 (accessed 20 December 2023).
26 Ehrenreich & Barr (n 20) 85.
27 As above.
28 L Muzima 'Towards a sensitive approach to ending female genital mutilation/cutting in Africa' (2016) 3 *SOAS Law Journal* 79.
29 WHO (n 5) 22.
30 EH Boyle and others 'Local conformity to international norms: The case of female genital cutting' (2002) 17 *International Sociology* 8.

adopted the use of the term 'female genital mutilation/cutting'.[31] The term 'cutting' is to indicate non-judgmental terminology when engaging with communities that practise FGM.[32] In 2005 the Inter-African Committee on Traditional Practices (IAC) issued a Declaration on the Terminology FGM at its General Assembly (Declaration on Terminology). The IAC reiterated the need to retain the term FGM. The Declaration on Terminology rejects the developments towards replacing the term FGM with less threatening descriptions of the practice, such as 'female circumcision', 'female genital alteration', 'female genital excision', 'female genital surgery' or 'female genital cutting'. The IAC stated that this would not only undermine the years of activism by African women against FGM and the role they played in defining the term and campaigning against the practice regionally and internationally, but also trivialises the recognition of the term as a medical one that accounts for the extensive physical and mental harm to women resulting from the practice.[33] The term FGM remains the internationally-accepted terminology for the practice and the term adopted in the African regional treaties and soft laws and national legislation relating to the practice.[34] It is the term used in the Joint General Comment on FGM.

Activism against FGM was not initially couched as a human rights issue.[35] Campaigns for the eradication of FGM were based on arguments against the negative health implications of the practice for women.[36] At that point in time, international health organisations such as the World Health Organisation (WHO) refused to adopt a position on the practice at the international level.[37] WHO determined that FGM was a cultural issue to be dealt with in country-specific ways by the member states.[38] The campaigns based on the health implications of FGM were for some time preferred. This approach offered what was perceived as more neutral, less normative, and did not require an assessment of or reflection on the values underlying the practice, including an assessment of gender relations.[39] It did not require that any African people's culture is questioned or pre-

31 WHO (n 5) 22.
32 As above.
33 Inter-African Committee on Traditional Practices 'Declaration: On the terminology FGM' 6th IAC General Assembly, 4-7 April 2005, Bamako/Mali 6 April 2005, https://www.fgmcri.org/thematic/terminology-and-fgm/ (accessed 11 July 2024).
34 As above.
35 Yusuf & Fessha (n 3) 362.
36 As above.
37 Yusuf & Fessha (n 3) 363.
38 As above.
39 M van den Brink & J Tigchelaar 'Shaping genitals, shaping perceptions: Frame analysis of male and female circumcision' (2012) 30 *Netherlands Quarterly of Human Rights* 430.

judged as being good or bad and did not outrightly condemn FGM.[40] Rather, it informed people of the medical consequences of FGM in the hope that once aware of the facts, they would stop the practice.[41] This approach to campaigning for the eradication of FGM was not entirely successful. By focusing on the negative medical consequences as the basis of the campaign for eradication, the campaign strengthened proposals to medicalise the practice rather than eradicate it. In other words, to address the problem identified by the campaign, a solution would be to ensure that the practice is undertaken by qualified medical practitioners rather than traditional practitioners.[42] While there is evidence that the approach resulted in a reduction in the number of girls undergoing the cut in some FGM-practising communities, there was also an increase in the number of medicalised procedures being undertaken as a consequence of the campaign.[43] Anti-FGM activists needed a way to make abuses that arise in the context of FGM a violation of internationally-binding and enforceable legal obligations on states, rather than requiring country-specific solutions.[44]

By the 1980s, global non-governmental organisations (NGOs) were increasingly pushing for the inclusion of violence against women as a human rights issue.[45] By the 1993 UN Conference on Human Rights in Vienna, global activism by women's NGOs had succeeded in highlighting the issue of violence against women.[46] The Vienna Declaration specifically called for the drafting of a new declaration on the elimination of violence against women and the appointment of a Special Rapporteur on Violence against Women.[47] The Commission on the Status of Women developed the Declaration on the Elimination of Violence Against Women in 1993. It was unanimously adopted by the UN General Assembly. At this early stage the issue of violence against women was framed in terms of gender inequality.[48]

> For example, the Declaration on the Elimination of Violence Against Women (and later the Beijing Platform) begins with: Recognizing

40 Boyle and others (n 30) 8.
41 As above.
42 A Raafat 'Medicalization of female genital cutting in Egypt' (2009) 15 *Eastern Mediterranean Health Journal* 1380, https://www.emro.who.int/emhj-volume-15-2009/volume-15-issue-6/medicalization-of-female-genital-cutting-in-egypt.html (accessed 11 July 2024).
43 As above.
44 Boyle and others (n 30) 8.
45 AM Tripp & B Bardi 'African influences on global women's rights: An overview' in AM Tripp & B Bardi (eds) *Women's activism in Africa* (2017) 2.
46 As above.
47 T Urs 'Coercive feminism' (2014) 46 *Columbia Human Rights Law Review* (2014) 101.
48 As above.

> that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men. By rooting the cause of domestic violence in gender inequality and male power, the international treatment of the issue largely echoed the Western feminist conceptualization.[49]

By 1995 FGM had been reframed as a form of violence against women. Beginning in earnest in the 1990s, a post-colonial critique of the early academic discourse about FGM critiqued Western feminist 'anti-FGM discourse' for ignoring hierarchies among women and, therefore, reproducing racist and imperialist narratives.[50] This notwithstanding, on the African continent, the women's human rights movement led the adoption of the African Women's Protocol in 2005 by the AU incorporating the international approach to the normative standard on FGM.[51]

The persistence of FGM in many African countries is about maintaining gender norms on sexual relations and controlling women's sexuality.[52] With the aim of uprooting the patriarchal root cause of FGM, the feminist movement has historically had a dominant role in the development of the existing international law framing of FGM as a human rights violation.[53] FGM currently undoubtedly is established within the confines of human rights violations, creating legally-binding obligations on states to prevent, protect from and respond to violations when they occur. FGM is recognised as a violation of a plethora of human rights. This includes the right to equality and non-discrimination; the right to the highest attainable standard of health; the right to freedom from torture, cruel and inhuman treatment; the right to physical and mental integrity; and, in case of death, the right to life.[54] To meet their obligations, states targeted eradication through, among others, legislative measures.[55] Member states' approaches to achieving this through legislation, including their treatment of consent, will be assessed in detail later in the article.

49 As above.
50 Boyle and others (n 30) 10.
51 As above.
52 WHO (n 5).
53 Ehrenreich & Barr (n 20) 85.
54 LR Avalos 'Female genital mutilation and designer vaginas in Britain: Crafting an effective legal and policy framework' (2021) 48 *Vanderbilt Law Review* 628, https://scholarship.law.vanderbilt.edu/vjtl/vol48/iss3/2 (accessed 11 July 2024).
55 Saleema Initiative (n 10) 6.

2.2 Gendering the concept of 'consent to female genital mutilation': Recognition of social conformity and the role of female genital mutilation in controlling women in their reproductive life stages

FGM has been shown to be a manifestation of gender discrimination.[56] This is because the primary aim of the practice is to maintain and reinforce the differential treatment that women experience on the basis of their perceived gender roles in society.[57] Research in different African countries supports this thesis. On the whole, the practice of FGM looks to regulate women's sexuality and sexual activities whether before, within or outside of marriage.[58] Various socially-constructed narratives relating to women's sexuality and their reproductive role are used to justify the practice. Instances of this are found in the examples detailed hereunder.

In Nigeria, the Yoruba believe that if an infant's head touches the tip of the mother's clitoris during birth, the child will die. The Bambara and Dogon in Mali hold a similar belief on the clitoris and child birth.[59] The Akamba in Kenya hold the belief that a woman who is not cut will have difficulties in childbirth.[60] Therefore, clitoridectomy must be performed in order for a daughter to be marriageable. If parents were to neglect circumcising their daughters, the daughters would be regarded as 'abnormal or even monstrous', and the parents and their daughters would be social outcasts.[61]

To justify the need to control women's sexuality, some cultures in Northern and Eastern Africa believe that women are 'naturally promiscuous, and if left to their own devices will, like Eve, seduce men'.[62] For instance, in Egypt, it is believed that the practice is key to maintaining female chastity.[63] In Eritrea, the attitude is that one who

56 Avalos (n 54) 651.
57 G Kail 'Access to justice: Accelerating the abandonment of FGM/C' (2018) 19 *Cardozo Journal of Conflict Resolution* 764.
58 Muzima (n 28) 87.
59 US Department of State 'Mali: Report on female genital mutilation (FGM) or female genital cutting (FGC)' 2009, https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10105.htm (accessed 11 July 2024).
60 US Department of State: Kenya: Report on female genital mutilation (FGM) or female genital cutting (FGC)' 2009, https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10103.htm (accessed 11 July 2024).
61 Kail (n 57) 764.
62 KY McChesney 'Successful approaches to ending female genital cutting' (2015) 42 *Journal of Sociology and Social Welfare* 6.
63 US Department of State 'Egypt: Report on female genital mutilation (FGM) or Female genital cutting (FGC)' 2009, https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10096.htm (accessed 11 July 2024).

is not cut will be promiscuous.[64] Female circumcision is often part of the rites of passage, marking the coming of age of children, but it also serves to control female sexuality, by reducing sexual desire, and to help girls to remain virgin or chaste. In Britain, Canada and the United States of America, it was practised in the eighteenth to nineteenth centuries to prevent masturbation and cure hysteria and some psychiatric conditions.[65]

In Mali, the belief is that failing to control women's sexuality will result in an oversexed woman who, if un-married, will lose her virginity, thereby disgracing her family and losing her chance for marriage.[66] Although not required of any religion, some religious leaders and individuals, particularly within Islam, believe that FGM improves the spirituality of women and in this way is used as a threshold for identifying 'good' women, in other words, marriageable women.[67]

From the instances recorded in the research sampled in this part, the concern seems to be primarily for women of a childbearing age acting in a manner that will affect how they are viewed or valued as being good women, respectable women, marriageable women capable of bearing healthy children. If this is the case, the main issue is marriage for young women and access to the social, economic and cultural benefits that accrue from matrimonial ties for her and her family.[68] In answering the question of whether in these social contexts, a woman can consent to FGM, the Kenyan Court in *Kamau* held:[69]

> The assumption was that anyone above the age of 18 years underwent FGM voluntarily. However, that hypothesis was far from reality, especially for women who belonged to communities where the practice was strongly supported. The context within which FGM/C was practiced was relevant as there was social pressure and punitive sanctions. Those who underwent the cut were involved in a cycle of social pressure from the family, clan and community. They also suffered serious health complications while those who refused to undergo it suffered the consequences of stigma. Women were thus as vulnerable as children due to social pressure and could be subjected to the practice without their valid consent.

64 US Department of State 'Eritrea: Report on female genital mutilation (FGM) or female genital cutting (FGC)', https://2001-2009.state.gov/g/wi/rls/rep/crfgm/10097.htm (accessed 11 July 2024).
65 Van den Brink & Tigchelaar (n 39) 425.
66 M Fotheringham 'Culture clashes: Balancing local and international interests in ending female genital cutting practices' (2004) 16 *Appunti of Scienza Politica* 74.
67 As above.
68 Packer (n 13) 224.
69 *Kamau* (n 15) para 20.

The traditional gender roles that are primarily determined with reference to women's sexual and reproductive capacity result in women remaining in inferior power positions and dependent upon men for status and resources.[70] Women themselves may uphold the same norms that harm them because the social costs of doing otherwise would be too high to bear.[71] Even though a social norm may be harmful, it may give women status in their communities, and some women may tolerate a loss of control and agency in return for the benefit that will be gained in terms of social acceptance and economic support.[72]

The principle of autonomy recognises social, economic and political barriers to the exercise of genuine autonomy and attempts to maximise women's power within those realities.[73] It aims to ensure that women are able to make genuine choices in their everyday lives.[74] Applying this premise to the case of FGM, genuine pursuit of the principle of autonomy in consenting to FGM would imply removing aspects in society that prevent women from being able to genuinely make decisions about their lives. Several social, economic and political barriers undermine the autonomy of women in FGM-practising communities. These include a lack of education and skills, a general increase in the number of poor women and an increase in the level of poverty of women in these communities over time. Women with access to and who enjoy the benefits of education, employment and economic opportunity are better able to take control of their lives generally and their sexual and reproductive health rights in particular.[75] However, for many women in FGM-practising communities, several barriers hinder their access to social, economic and political opportunities. Some of these barriers are considered here.

For many of the women in rural communities that practise FGM, land tenure for women is a system that determines women's access to

70 C Albertyn 'The stubborn persistence of patriarchy: Gender equality and cultural diversity in South Africa' (2009) 5 *Constitutional Court Review* 171.
71 Kevane (n 17) 215.
72 UNFPA 'Against my will: Defying the practices that harm women and girls and undermine equality' (2020) 84, https://www.unfpa.org/sites/default/files/pub-pdf/UNFPA_PUB_2020_EN_State_of_World_Population.pdf (accessed 9 January 2024).
73 R Coomaraswamy 'Identity within: Cultural relativism, minority rights and the empowerment of women' (2002-2003) 34 *George Washington International Law Review* 509.
74 Coomaraswamy (n 73) 510.
75 O Nneameka & J Ezeiolo 'Introductions: Context(ure)s of human rights – Local realities, global contexts' in O Nneameka & J Ezeiolo *Engendering human rights: Cultural and socio-economic realities in Africa: Cultural and socio-economic realities in Africa* (2011) 6.

land through social ties to kin and husbands.[76] For many in rural Africa, women remain at the margins of both formal tenure programmes and local change.[77] Strong norms in many African societies proscribe women from working outside the home.[78] This contributes to the prevalence of a gendered labour market and the feminisation of poverty experienced in many rural areas in Africa. Boys are more likely than girls to receive an education up to secondary school in many African countries. Although it is accepted that literacy enables the realisation of one's capabilities, gender trade-offs associated with schooling are reinforced by social norms that encourage the preference for educating boys over girls.[79]

Addressing the factors that influence women's capacity to consent to FGM calls on the state to adopt an intersectional approach to the enactment of and implementation of laws and policies targeted at enhancing the social and economic prospects of women in these communities. An intersectionality approach calls on one to consider how to enhance the ability of laws and policies to respond to inequalities that are the product of more than one ground of discrimination.[80] Poverty, unemployment and a lack of economic opportunity, low education and skills levels, class, religion and sexual orientation are identities that create a meaningful difference in the manner in which African women may elect to exercise their bodily autonomy in FGM-practising communities.

3 Scrutinising an equality-based argument in favour of adult women consenting to female genital mutilation

The role of the feminist movement in the recognition of FGM as a harmful cultural practice has been discussed above. However, with the development of feminist theories over the years, the essentialist approach adopted in the time of bringing FGM into the international law framework continues to face criticism.[81] The essentialist feminist approaches that informed the earlier era, in the times of Fran Hosken,

76 Kevane (n 17) 90.
77 Kevane (n 17) 114.
78 Kevane (n 17) 22.
79 Kevane (n 17) 208.
80 J Conaghan 'Intersectionality and UK equality initiatives' (2007) 23 *South African Journal on Human Rights* 322.
81 FS Ahmadu & T Kamau '*Dr Tatu Kamau v The Attorney General and Others*: Problems and prospects in Kenya's 2021 High Court ruling to uphold the Prohibition of Female Genital Mutilation Act 2011 – A reply to "The prosecution of Dawoodi Bohra women" by Richard Shweder' (2022) 12 *Global Discourse* 44, https://bristoluniversitypressdigital.com/view/journals/gd/12/1/article-p29.xml (accessed 3 January 2024).

have since been challenged, and new theories of understanding women's experiences of subordination that are more reflective of women's diverse identities have developed both within the feminist movement in the Global North and regionally.[82]

Relevant, as a theoretical frame of analysis, to the claims of those seeking to justify adult women's choice to undergo FGM is the transnational feminist approach. Transnational feminist perspectives focus on the diverse experiences of women who live within, between and at the margins or boundaries of nation states around the globe; they transcend nation state boundaries and speak to a wide range of interacting forces that have an impact on gendered relationships and experiences in a geopolitical context that may occur in global, regional and local contexts.[83] Transnational feminist approaches determine that requests for nuance, anti-essentialism, and even cultural or religious sensitivity, are not merely a defence of culture or religion, but a call to attend to the express desires of women and their articulations of freedom and thriving, even if one may disagree with their interpretation and application of their agency.[84] It calls on feminists to refrain from imposing a version of gender equality that does not resonate with or belittling or demonising women who wish to live differently from the dominant view.[85]

Transnational feminism is carried out by talking to one another, listening to one another, learning from, supporting, and working with one another around topics that affect women in different areas of the globe, but with deep sensitivity to the importance of differing contexts.[86] If applied to the context of adult women consenting to FGM, it would be argued that women in the FGM-practising communities in consenting to the practice are exercising their agency and autonomy.[87] Nnamuchi has argued that treaties and laws that purport to punish adult women consenting to FGM violate

82 CA Choudhury 'Beyond culture: Human rights universalisms versus religious and cultural relativism in the activism for gender justice' (2015) 30 *Berkeley Journal of Gender, Law and Justice* 226-267. See also Ehrenreich & Barr (n 20) 80; Van Bavel (n 16) 1; S Kalantry 'The French veil ban: A transnational legal feminist approach' (2017) 46 *University of Baltimore Law Review* 208.

83 CZ Enns, LC Díaz & T Bryant-Davis 'Transnational feminist theory and practice: An introduction, women and therapy' (2021), DOI: 10.1080/02703149.2020.1774997 (accessed 17 July 2022).

84 Choudhury (n 82) 232.

85 Choudhury (n 82) 233.

86 CG Bowman 'Transnational feminism in the context of intimate partner violence in Ghana' (2019) 1 *Cornell International Law Journal* 3.

87 Arguments in this line have gained traction and were submitted by the petitioner in the case challenging the constitutionality of the anti-FGM law in Kenya. Also see O Nnamuchi 'Circumcision or mutilation – Voluntary or forced excision – Extricating the ethical and legal issues in female genital ritual' (2012) 25 *Journal of Law and Health* 85-122, https://www.researchgate.net/publication/228195308_'Circumcision'_or_'Mutilation'_Voluntary_or_Forced_

the 'human right of rational adults to effectuate autonomous choices regarding their most prized possession: their bodies'.[88]

In these circumstances, calls for contextual analysis made by or on behalf of minority women embedded in an anti-FGM majority-dominant culture can be said to be articulating that there may be different ways of being a modern African woman; that there is a group of women who may want different things that make no sense to feminists situated differently in the anti-FGM discourse. If this view is presented within the parameters of transnational feminist lens, the continued endorsement of FGM by adult women who opt to undergo the practice requires a critical consideration of how principles central to feminist politics, such as respect for autonomy, serve this group of women. Respect for autonomy, no matter how problematic the concept, requires feminists to consider these demands seriously on their own terms and not as forms of false consciousness. Even so, the recognition of the structural inequalities that sustain in the context of African societies where FGM is practised, requires that one question whether valid and informed consent is at all relevant.

On the question of consent and the exercise of autonomy, the transnational method postulates that the essentialist feminist approach has to date offered a representation of the helpless African woman victim subjected to FGM in male power-dominant societies. This is because the essentialist feminist perception of agency was attached to individual agentive action and rationale.[89] Decisions taken to endorse a group or community benefit by an adult woman to her individual detriment, in one way or another, were not recognised as the exercise of agency or autonomy, rather as expressions of false consciousness.[90] Requests for nuance, anti-essentialism, and even cultural or religious sensitivity, then, are not merely a defence of culture, but also a call to attend to the express desires of women and their articulations of freedom and thriving even if one disagrees with the interpretation.[91]

Feminist strategies that informed the formulation of FGM as a human right internationally and regionally remains relevant to the development of new strategies to eradicate FGM. These essentialist historical approaches recognise the need to dismantle the power relations that determine the systematic, social and cultural realities

Excision_Extricating_the_Ethical_and_Legal_Issues_in_Female_Genital_Ritual (accessed 3 October 2023).

88 Nnamuchi (n 87) 116.

89 Choudhury (n 82) 114.

90 As above.

91 As above.

that underpin FGM as a practice and the choices that the women can make.[92] Were the agenda of attaining equality and social and economic freedom for women in FGM-practising communities to be successful, there would be no need for women to contemplate undergoing FGM in adulthood for whatever reason.[93] FGM and its consequences are harmful, dangerous and life-threatening any which way one looks at it. Understanding and addressing the structural violence that sustains adult women's choices on FGM is the key to dismantling the power domination of women in these communities.

Although there are a variety of purported justifications for FGM, it comes down to it being a determinative factor in how a woman will be treated as well as what will be expected of her during the reproductive stage in her life cycle.[94] The cost of not conforming to what society had determined as the threshold for access to communal social and cultural benefits becomes too high for one to endure.[95] Under these circumstances, it is an obligation on member states required to eradicate FGM to seek to attain gender equality for women in this context. Muzima has noted that the continuation of FGM is fuelled by the reality that many women who undergo the cut have to balance the negative consequences of FGM against the socio-cultural benefits they mistakenly perceive themselves to be gaining.[96]

This view is partly endorsed in this article; however, not wholly embraced in that the benefits for the women in these communities are not merely a perception or seen as beneficial in error. Looking at the dynamics that are at play with regard to the question of adult women consenting to FGM requires an appreciation that from the consenting woman's perspective, the benefits are not perceived but rather factual and real; as real, in fact, as the negative consequences that they will endure in their lifetime for undergoing the cut. It is from this perspective that the notion of consent should be considered by member states looking to eradicate FGM.

92 Coomaraswamy (n 73) 513.
93 C Byaruhanga 'Uganda FGM ban: "Why I broke the law to be circumcised aged 26"' 6 February 2019, https://www.bbc.com/news/world-africa-47133941 (accessed 20 December 2023).
94 JR Hess 'United States and Africa on FGM: Cultural comparatives, resolutions, and rights' (2004) 3 *ILSA Journal of International and Comparative Law* (2004) 584.
95 Byaruhanga (n 93). See reports of a cultural curse imposed on those who are not circumcised as a factor in driving FGM within the Samburu community of Kenya in K Mauchuhia 'The bold fight against FGM: Practice no longer "fashionable"' 30 June 2023, https://nation.africa/kenya/news/gender/the-bold-fight-against-fgm-practice-no-longer-fashionable--4288046 (accessed 3 January 2024).
96 S Tamale 'The right to culture and the culture of rights: A critical perspective on women's sexual rights in Africa' (2007) *Urgent Action Fund Sex Matters* 163; Muzima (n 28) 90.

4 Joint General Comment on Female Genital Mutilation: State obligation to address female genital mutilation using legislation and the question of consent

Legislative measures adopted by member states to meet their obligation to eradicate FGM should recognise that consent to a harmful cultural practice cannot be informed consent and is irrelevant in the enforcement of the law. This is so despite the contrary cultural norms that may be applicable and raised as justification for the practice. Further, legislative measures should also have clear provisions targeting the social and cultural factors that inform a woman's decision to consent to FGM. Failing to have such wholistic legislation in place amounts to a violation of women's rights to equality and gender discrimination. The African Court on Human and Peoples' Rights (African Court) has held that where a member state maintains legislation that does not protect women from harmful cultural practices, they violate the right to gender discrimination.[97]

There has been no definitive international law text indicating that consent is irrelevant to FGM. This part considers the extent to which the Joint General Comment on FGM definitively clarifies an obligation on member states to nullify consent to FGM through legislation and what other measures it requires of member states to include in legislation to address the gendered notion of consent to FGM. Thereafter, it considers the existing laws in state parties to the African Women's Protocol that have enacted laws prohibiting FGM and whether they nullify consent to FGM and adopt a wholistic approach to eradicating FGM.

4.1 Obligation to enact wholistic laws on female genital mutilation and treatment of consent in the African Women's Protocol

The African Women's Protocol is the first international treaty to categorically prohibit FGM.[98] Article 5(b) of the Women's Protocol requires that member states

97 *APDF & IHRDA v Republic of Mali* Application 46/2016 para 128, https://www.african-court.org/cpmt/details-case/0462016 (accessed 20 December 2023).

98 S Nabaneh 'Article 5: Elimination of harmful practices' in A Rudman, CN Musembi & TM Makunya (eds) *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa: A commentary* (2023) 117.

> take all necessary legislative and other measures to eliminate such practices, including:
> …
> (b) prohibition, through legislative measures *backed by sanctions*, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.[99]

Article 5 of the African Women's Protocol is to be read with other relevant provisions in the Women's Protocol, including article 2 which imposes an obligation on member states to eliminate all forms of discriminatory practices against women.[100] Article 2(2) of the Women's Protocol requires that member states eliminate FGM by modifying the social and cultural patterns of conduct of women and men through public education, information, education and communication strategies. It also requires that member state use the same methods to end any other practices that are based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. The African Women's Protocol clearly notes the importance of addressing the underlying causes of FGM in order to eradicate the practice.

Further, all provisions in the African Women's Protocol that require measures that are targeted at enhancing the social and economic prospects of women in FGM-practising communities are also relevant to state obligations to address FGM. The discussion under part 2.2 above underscored the link between marriageability in a community and access to social and economic resources. Therefore, it is necessary to consider state obligations that require measures that enable women to have genuine social, economic and political choices in life. Articles 4, 8 and 17 have been specifically outlined in the Joint General Comment on FGM as being relevant.[101] These include, for instance, article 6 of the African Women's Protocol that seeks to modify gender stereotypes in the context of marriage.[102]

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99 Art 5(b) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa adopted by the 2nd ordinary session of the Assembly of the Union, https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf (accessed 21 November 2023) (my emphasis).

100 Nabaneh (n 98) 125.

101 Joint General Comment (n 6) paras 29-31.

102 M Lasseko-Phooko & S Mohamed 'The challenges to gender equality in the legal profession in South Africa: A case for substantive equality as a means for achieving gender transformation' (2021) 21 *African Human Rights Law Journal* 506.

4.2 Clarity in the Joint General Comment for member states of the African Women's Protocol on a wholistic approach to eradicating female genital mutilation and addressing consent

General Comments are prepared by international treaty bodies, such as the African Commission and the African Children's Committee, to address important issues and provide detailed guidance to state parties on how to meet their obligations under the treaties more effectively.[103] The African Women's Protocol mandates member states to enact legislation criminalising FGM and to put in place measures aimed at addressing the social and economic factors that underly FGM. They are required by law to do so by enacting FGM laws that not only criminalise FGM but also encompass wholistic provisions to address the social and cultural patterns of conduct of women and men and gender stereotypes through public education, information, education and communication strategies. As a document aimed at providing further guidance on how member states bound by this obligation by the Maputo Protocol can do this, the part that follows considers what additional guidance is contained in the Joint General Comment on FGM specific to these two aspects. Additionally, it will consider whether the point on consent has at all been raised in the Joint General Comment, given the absence of this detail in the provisions of the African Women's Protocol.

4.2.1 Legislation that prohibits all forms of female genital mutilation

The Joint General Comment on FGM clarifies that the requirement for states to enact legislative measures set out in article 5 of the African Women's Protocol is prescriptive in nature.[104] Further, the state obligation to enact legislative measures also requires the enactment of a specific law prohibiting FGM, rather than a general law that categorises FGM as any other crime such as assault or grievous bodily harm.[105] States are also guided that, in accordance with the African Children's Committee's General Comment 5, laws enacted on FGM must specify that any religious, cultural or social justifications for FGM are impermissible.[106]

103 RD Nanima 'The ACHPR and ACERWC on ending child marriage: Revisiting the prohibition as a legislative measure' (2019) 20 *ESR Review* 9.
104 Joint General Comment (n 6) para 37.
105 As above.
106 Joint General Comment (n 6) para 38.

4.2.2 Wholistic law that requires education and other socio-economic measures to address gender inequality and stereotypes

The Joint General Comment on FGM emphasises the overall state duty to ensure that gender equality is protected in state constitutions, as an ideal, is reflected in other legislation and ensure that the laws on advancing gender equality are effectively implemented.[107]

Beyond this, the Joint General Comment categorises the other educational and socio-economic measures to be adopted by member states as 'other measures for the elimination of FGM'.[108] Under this heading, the factors that were discussed in this article as informing the decision of adult women to consent to FGM are dealt with. Member states are guided to target these factors by way of political empowerment, education, sensitisation, outreach, public awareness and resource allocation.[109]

The details on these other measures as set out in the Joint General Comment on FGM suggest that these measures are to be outlined by member states as additional to or besides any legislative or administrative measures put in place to eliminate FGM. In a sense, the way that legislative measures are covered in the Joint General Comment on FGM in relation to the other measures for the elimination of FGM suggests that criminalisation and prosecution of FGM is the only function of legislative measures on the subject. While this approach may work for some member states, particularly where there is no prohibition on FGM at all in place, a better approach would have been to encourage that these additional measures be enacted as part of legislation to eliminate FGM. Grounding the measures in legislative prescripts would make their enforcement and actualisation more probable.

4.2.3 Consent by adults to female genital mutilation is addressed

The Joint General Comment on FGM indicates that consent to FGM is not relevant with respect to girls.[110] The reason for this is elaborated therein as being the contextual vulnerability of children that heightens their risk of violation, thereby vitiating consent. The Joint General Comment takes note of the contextual factors that make women particularly vulnerable to FGM and the extent

107 As above.
108 Joint General Comment para 22.
109 Joint General Comment para 55.
110 Joint General Comment para 19.

to which patriarchal norms take away their autonomy and agency in the context of FGM-practising communities.[111] However, the Joint General Comment stops short of indicating that consent by adult women to FGM should similarly be vitiated by the contextual vulnerabilities of which it so clearly took note in that section of the document. This is a gap in the guidance provided to member states, particularly given the ongoing discourse in certain member states on the issue.[112]

5 Survey of laws adopted by selected states that have ratified the African Women's Protocol on consent to female genital mutilation and a wholistic legislative approach to eradicating female genital mutilation

Consensus on the efficacy of laws to eradicate FGM is that laws alone are not enough.[113] Engagement with the law can bear some fruits to achieve transformation of a gender-biased community, but these cannot guarantee the achievement of actual social and economic equality that is at the root of the practice.[114] In this part the article set out to determine what the overall approach is on the continent to the question of consent to FGM as a starting point that is indicative of efforts at ending FGM. Thereafter, it aims to consider whether the legislation addressing consent to FGM addresses the state obligations to address the factors that influence the ability or women to give free and informed consent.

The table below illustrates the legislative approach taken by select AU member states that have ratified the African Women's Protocol to declare FGM a crime.

111 Joint General Comment para 20.

112 The current discourse on FGM and the role of culture, religion and the family are to be considered in the context of a global growing anti-rights movement. On this, see A Khan 'Lessons on backlash from Women Deliver: Tackling the enemy in the room' 14 August 2023, https://odi.org/en/insights/lessons-on-backlash-from-women-deliver-tackling-the-enemy-in-the-room/ (accessed 18 October 2024).

113 P Wheeler 'Eliminating FGM: The role of the law' (2004) 3 *International Journal of Children's Rights* 264.

114 F Kaganas & C Murray 'Law and women's rights in South Africa: An overview' (1994) 1 *Acta Juridica* 36.

Country party to the African Women's Protocol with FGM prevalence %[115]	**Wholistic law: Criminalise FGM, require education and other measures by relevant government authority**	**Criminal sanctions for FGM against girls and adult women in other general penal laws**	**Consent by adult to FGM is addressed specifically**	**Criminalise cross-border FGM**
Benin 9%		X[116]		
Burkina Faso 76%		X[117]		X
Cameroon 1%		X[118]		
Côte d'Ivoire 37%		X[119]		
Djibouti 94%		X[120]		
Ethiopia 65%		X[121]		X
The Gambia 76%		X[122]		
Ghana 6%		X[123]		X
Guinea-Bissau 45%	X[124]		X – not relevant	X

115 UNFPA '2020 State of the World Population' (2020), https://www.unfpa.org/publications/state-world-population-2020 pg 73 (accessed 9 January 2024).
116 Law 2003-03 on the Suppression of Female Genital Mutilation in the Republic of Benin, issued on 3 March 2003; Law 2015-08 of the Children's Code in the Republic of Benin sec IX arts 185-188.
117 Law 043/96/ADP to amend the Penal Code (Penal Code) to prohibit and punish the practice of FGM.
118 Law 2016/007 of 12 July 2016 Penal Code and Section 350 ('Assault on Children') of the Penal Code.
119 Law 98-757 of 23 December 1998 (Law 98-757) on the punishment of certain forms of violence against women.
120 The Penal Code of Djibouti (Penal Code) 2 came into effect in 1995 and was the first principal legislation criminalising and punishing FGM in Djibouti. It was further complemented by Law 55 of 2009 (Law 55) 3 relating to violence against women, including FGM. The Criminal Procedure Code of Djibouti 1995 (Criminal Procedure Code).
121 Proclamation 414/2004, also known as the Criminal Code of the Federal Democratic Republic of Ethiopia 2004 (Criminal Code).
122 Women's (Amendment) Act 2015, which introduced secs 32A and 32B into the Women's Act of 2010, the Children's Act 2005 and Criminal Code 1933.
123 Criminal and Other Offences Act 1960 (Act 29) sec 69A (Female Gender Mutilation) (COA 1960).
124 Federal Law to Prevent, Fight and Suppress Female Genital Mutilation passed in 2011 (Law 14/2011).

Guinea 95%		X[125]		
Kenya 21%	x[126]		X – not relevant	X
Liberia 44%		X[127]	X – relevant	
Mali 89%				
Mauritania 67%		X[128] – only girls		
Nigeria 19%		X[129]		
Senegal 24%		X[130]		
Sierra Leone 86%				
Tanzania 10%		X[131]		
Togo 3%	X[132]	X[133]		

5.1 Analysis

Laws that criminalise FGM in many African states are ill-suited for the purpose of addressing any underlying social and economic factors that hinder women's true participation in exercising their agency in consenting to FGM. These laws are weak in many respects in terms of the elaboration of the gendered approach captured in the African Women's Protocol and the Joint General Comment that requires states to consider a contextual understanding in order to address the social and economic push and pull factors that drive FGM in practising communities.

Some states only criminalise FGM committed against a child. This means that in those jurisdictions, an adult woman's consent to FGM is valid consent given that it is not a crime. Of a sample of 19 states, only Kenya, Togo and Guinea-Bissau have laws that not

125 Law 2016/059/AN (the Criminal Code 2016) 2, in which arts 258-261 prohibit FGM whether performed by traditional or modern methods. In addition, Law L/2008/011/AN (Children's Code 2008) 3 criminalised violence against children and explicitly addressed FGM under arts 405-410.
126 Prohibition of Female Genital Mutilation Act 32 of 201.
127 Executive Order 92 on Domestic Violence.
128 Law 2005-015 on the Criminal Protection of the Child (2005) (Law 2005–015) is the main law.
129 Violence Against Persons Prohibition Act 2015.
130 Art 299*bis* introduced in January 1999 into the 1965 Penal Code 2 (art 299bis).
131 Sexual Offences Special Provisions Act provides for amendment to sec 169 of the Penal Code to add sec 169A to prohibit FGM against children (under 18 years).
132 Law 98-016, dated 17 November 1998, on the prohibition of female genital mutilation (Law 98-016).
133 In addition to Law 98-016, FGM is also prohibited in Togo under Law 2015-010 Penal Code of Togo (Penal Code) dated 24 November 2015.

only criminalise FGM but also prescribe more targeted measures that aim to address some of the push and pull factors that inform adult women's pressure to conform to social expectations. While these laws are specific, they are neither comprehensive nor wholistic.

The majority of the 19 states criminalise FGM as part of a general criminal law prohibition making it a crime against women and children. This is not in line with the Joint General Comment on FGM. Mauritania only defines it as a crime in relation to children. In this case, it is not prohibited against women as an offence and, therefore, consent of an adult would not arise as a defence. This is also contrary to the Joint General Comment on FGM and the African Women's Protocol that call for the eradication of FGM against women and girls. Of the 19 states sampled, three categorically mention the question of consent. In Guinea-Bissau and Kenya, a woman cannot consent to FGM.[134] In Liberia, the law allows for the defense of consent.

Domestic legislation may be an expression of states' accountability and commitment to the realisation and advancement of women's rights norms established at regional and international levels. However, an assessment of the legislation and the impact they may have on the question of how women experience violations is critical to determine whether a state has indeed met its commitment to protect them from discrimination, exclusion, deprivation and violence, including harmful practices.[135] The laws should have provisions that aim to dismantle the social and economic conditions that sustain FGM as a practice and force adult consenting women to undergo the cut as a result of the need to meet their economic and social survival needs. From this assessment, this is yet to be adequately implemented through binding legislation in all the countries sampled. In this assessment these laws are inadequate interventions and will in all probability fail in their attempt to serve as tools to eradicate FGM in the member states.

6 Conclusion

AU member states need to be critical in assessing the legislative interventions that exist in their territories to determine whether they genuinely target the root causes of the continuation of FGM as a traditional or cultural practice. This requires that there is a sensitive

134 See *Kamau* (n 15) para 29 where the Court held that '[n]o person could licence another to perform a crime. The consent or lack thereof of the person on whom the act was performed had no bearing on a charge under the Act.'

135 Sithole & Dziva (n 8) 578.

and critical consultation with the women who consent to FGM in adulthood with the aim of understanding what the drivers are for them wishing to exercise this choice. Any social and economic vulnerabilities that they possess will need to be the targets of any state intervention that is to definitively dismantle the practice. The Joint General Comment on FGM has emphasised the importance of sound and credible research and data in decision making on interventions for a particular context.[136] In light of this, it is important to consult with women who articulate their right to make a choice in adulthood on what the motivations are for them and structure interventions to eliminate FGM in the community accordingly.

Criminalising FGM is not enough as a proposed legislative intervention to meet state obligations under international law. A comprehensive, FGM-specific law that both provides criminal sanctions for the offence but also requires other measures that go towards behavioural and social changes and economic empowerment of women is needed. These other measures will necessarily be geared towards empowering women in their own communities. These laws can only be enacted after engaging African women in their own discourse to reflect upon their personal realities and what types of measures would empower them based on their diverse identities and experiences of gender inequality.[137] The Joint General Comment on FGM specifically has called on member states to ensure the participation of women and girls in the process of determining, adopting and implementing legislative and other measures aimed at eradicating FGM.[138]

Measures that will go to the social and economic disadvantages that are barriers to women's economic emancipation in many rural areas where FGM is practised require a commitment to allocate financial and other resources to stimulate their empowerment.[139] This requires those advocating these reforms to call for the necessary measures to address the political will from the government to source and allocate adequate resources to eradicate the traditional practice.[140] Failing to do so sustains the inequality that is a root cause of the practice and is a reason for the failure of the laws criminalising FGM to eradicate the practice.

136 Joint General Comment (n 6) para 63.
137 Hess (n 94) 600.
138 Joint General Comment (n 6) para 69.
139 Joint General Comment para 68.
140 Joint General Comment paras 66-77. See also Sithole & Dziva (n 8) 589.

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Demystifying the legal restrictions on abortion in Nigeria: Time to change the narrative

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Summary: *Approximately one in seven pregnancies in Nigeria end in an induced abortion, with about 4,6 per cent of women of reproductive age in Nigeria undergoing an abortion each year. Abortion itself is not a death sentence. However, death occurs in most cases, as a result of complications arising from unsafe abortion practices. Abortion remains a leading cause of maternal mortality in Nigeria. Approximately 63 per cent of abortions are unsafe and have been reported to contribute to 10 per cent of maternal deaths, with approximately 6 000 women dying each year in Nigeria. Owing to sociological and religious considerations and the provisions of the laws on abortion in Nigeria, abortion is mostly carried out by unqualified health service providers under clandestine circumstances. The likelihood of either a repeal or liberalisation of the laws in the near future is rather slim. Pending the repeal or modification of the laws, however, and in order to reduce the high incidence of unsafe abortion, this article adopts a purposeful outlook in discussing the laws and guidelines. It highlights the legal defences and positive indications for abortion within the current legal framework. It also considers the vulnerability theory and rights-based approach to improve access to abortion services in Nigeria notwithstanding the existing legal restrictions.*

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Key words: *access; health laws and policies; reproductive health rights; safe abortion; universal health coverage*

1 Introduction

Abortion is often understood as the intentional termination of pregnancy before 22 weeks or, in low-resource settings, before 28 weeks.[1] Abortion is classified as induced or spontaneous depending on the circumstances leading to the termination of the pregnancy.[2] Although the legal terminology employed in the criminal laws of Nigeria is miscarriage,[3] the use of the word 'abortion' has been employed mostly in discussing the legality or illegality of termination of pregnancies in Nigeria. Nigerian society is a largely conservative and religious one in which abortion is largely frowned upon. Discussing abortion is not a comfortable experience as it is often perceived to be an end result or driver of promiscuity in women and young girls.[4] Despite these dispositions, the incidence of abortion in Nigeria has remained high.[5]

Religious and cultural beliefs, as well as the low socio-economic status of the majority of the people, contribute to the increased practice of unsafe abortion in Nigeria. The partial perception of the existing laws has also resulted in increased patronage of unsafe abortion service providers.[6] Unsafe abortion exposes women and girls to numerous risks, and sometimes death.[7] The World Health Organisation (WHO) defines unsafe abortion as the termination of

1 Federal Ministry of Health 'National guidelines on safe termination of pregnancy for legal indications' (2018), https://abortion-policies.srhr.org/documents/countries/04-Nigeria-National-Guidelines-on-Safe-Termination-of-Pregnancy-for-Legal-Indications-2018.pdf#page=15 (accessed 12 December 2023).

2 World Health Organisation *Reproductive health indicators: Guidelines for their generation, interpretation and analysis for global monitoring* (2006), https://apps.who.int/iris/bitstream/handle/10665/43185/924156315X_eng.pdf (accessed 12 December 2023).

3 Criminal Code Act Cap C38 Laws of the Federation of Nigeria 2004, https://www.refworld.org/docid/49997ade1a.html. (accessed 12 September 2023); Penal Code (Northern States) Federal Provisions Act Cap P3, Laws of the Federation of Nigeria 2004, https://www.africanchildforum.org/clr/Legislation%20%20Country/Nigeria/nigeria_penal-north_1960_en.pdf (accessed 12 September 2023).

4 EO Orji, AB Adeyemi & OA Esimai 'Liberalisation of abortion laws in Nigeria: The undergraduates' perspective' (2003) 23 *Journal of Obstetrics and Gynaecology* 63.

5 A Bankole and others 'The incidence of abortion in Nigeria' (2015) 41 *International Perspectives on Sexual and Reproductive Health* 81; SK Henshaw and others 'The incidence of induced abortion in Nigeria' (1998) 1 *International Family Planning Perspectives* 156.

6 SO Bell and others 'Inequities in the incidence and safety of abortion in Nigeria' (2020) 5 *British Medical Journal Global Health* e001814.

7 E Adinma 'Unsafe abortion and its ethical, sexual and reproductive rights implications' (2011) 30 *West African Journal of Medicine* 245-249.

an unwanted pregnancy 'either by persons lacking the necessary skills or in an environment lacking the minimal medical standards, or both'.[8]

In Nigeria, the estimated number of abortions carried out every year is approximately 760 000 abortions with about 60 per cent of these abortions being carried out by non-physicians.[9] Abortion itself is not a death sentence for the seeker. Causing death in most cases are the complications that arise from unsafe abortion practices by unqualified health service providers. Victims of unsafe abortion often present to hospitals too late. Unsafe abortion led to hospitalisation and mortality in about a quarter of the cases reported by Akande and others.[10]

A detailed understanding of the extant abortion laws and policies by all stakeholders is crucial in changing the narrative in Nigeria. This is even more so since calls for more liberal abortion laws have been met with strong opposition from religious and anti-abortion organisations. Okonofua and others reported that majority (approximately 80 per cent) of politicians and policy makers agree that unsafe abortion is a major cause of maternal mortality, but only about one-fifth were disposed to an amendment of the restrictive abortion laws in Nigeria.[11] Repeated calls for review of the laws by critical stakeholders have not yielded much to guarantee unhindered access to abortion services for women in Nigeria.[12] The move by these stakeholders has nevertheless resulted in the adoption of the National Guidelines on Safe Termination of Pregnancies for Legal Indication (NGSTPLI) in 2018.[13]

This article seeks to analyse the existing laws and guidelines, while encouraging a purposeful perception towards the reduction of unsafe abortion practices in Nigeria. Existing literature has not given much consideration to the available legal defences and positive indications for legal abortion in Nigeria, especially in view of the NGSTPLI. The aim of this article, therefore, is to adopt a purposive approach to

8 World Health Organisation 'The prevention and management of unsafe abortion: Report of a WHO Technical Working Group' meeting held in Geneva, Switerland, from 12 to 15 April 1992 WHO/MSM/92.5, https://apps.who.int/iris/bitstream/handle/10665/59705/WHO_MSM_92.5.pdf?sequence=1 (accessed 11 October 2023).
9 Adinma (n 7).
10 OW Akande and others 'Unsafe abortion practices and the law in Nigeria: Time for change' (2020) 28 *Sexual and Reproductive Health Matters* 1758445.
11 FE Okonofua and others 'Perceptions of policymakers in Nigeria toward unsafe abortion and maternal mortality' (2009) 1 *International Perspectives on Sexual and Reproductive Health* 194-202.
12 Akande and others (n 10).
13 Federal Ministry of Health (n 1).

discuss the laws and guidelines relating to abortion in Nigeria. The article adopts a focused outlook in discussing the laws and guidelines by highlighting the legal defences, limitations of the laws and the positive indications for abortion within the current legal framework. The article also adopts the vulnerability theory and rights-based approaches to advocate improved access to safe abortion services in Nigeria notwithstanding the existing legal restrictions.

This study was conducted using both peer-reviewed and grey literature focusing on research evidence derived from the fields of law and medicine, especially in Nigeria. An electronic literature search was conducted in the following databases: Google, Google Scholar, PubMed and Jstor stable. Key words that correspond to the thematic objectives of the review were used in the search, including incidence of abortion; access to abortion services; safe abortion; maternal morbidity and mortality; reproductive health rights; and health laws and policy. Eligible articles were included for review only when abstracts contained explicit information about the issues of interest. The full text of the relevant articles and literature was then accessed and read. Also, relevant laws within the Nigerian legal system were reviewed and provisions relevant to the review were highlighted. The review included an analysis of existing case law relating to the issues of interest.

2 Abortion as a major contributor to maternal morbidity and mortality

According to the WHO, 'the high number of maternal deaths in some areas of the world reflects inequities in access to health services' with approximately 99 per cent of all maternal deaths occurring in developing countries.[14] Statistics reveal that a woman's chance of dying from pregnancy and child birth complications in Nigeria is one in 13.[15] Data from the WHO in 2019 revealed that the situation in Nigeria had further worsened, making the country the largest contributor to global maternal deaths in 2017.[16] The maternal mortality ratio in Nigeria was 917 per 100 000 live births in 2017. This was one of the worst in the world, leaving Nigeria ahead of South Sudan, Chad and Sierra Leone out of 185 countries included

14 WHO 'Maternal Mortality Fact Sheet' (2018), https://www.who.int/en/news-room/fact-sheets/detail/maternal-mortality (accessed 31 March 2023).

15 UNICEF *Maternal and child health*, http://www.unicef.org/nigeria/children_1926.html (accessed 13 October 2023).

16 WHO *Trends in maternal mortality 2000 to 2017: Estimates by WHO, UNICEF, UNFPA, World Bank Group and the United Nations Population Division* (2019), https://www.who.int/publications/i/item/9789241516488 (accessed 14 June 2023).

in the report.[17] By 2020 there was no improvement whatsoever with Nigeria retaining its status as the largest contributor to global maternal deaths. The country recorded 82 000 maternal deaths and a maternal mortality ratio of 1 047 per 100 000 live births in 2020.[18]

According to a study conducted between 2015 and 2019 in Nigeria, approximately 48 per cent of unintended pregnancies recorded ended in abortion.[19] Abortion significantly contributes to the very high maternal mortality ratio in Nigeria. According to a recent study by Performance Monitoring for Action (PMA), 4,6 per cent of reproductive-aged women in Nigeria undergo an abortion every year. This translates to approximately two million abortions annually.[20] About 63 per cent of these abortions are unsafe[21] and have been reported to contribute to 10 per cent of maternal deaths with approximately 6 000 women dying each year in Nigeria.[22] A study conducted by Abiodun also reported unsafe abortion as being responsible for up to 30 per cent of the overall maternal mortality in their study.[23] Similarly, Bankole and others revealed that approximately 212 000 women presented for treatment arising from complications of unsafe abortion. An additional 285 000 women were reported to have experienced serious health consequences but did not present for the necessary treatment.[24]

Poor access to accurate, reliable medical information on recommended abortion methods and to safe abortion care was identified as a key factor that aids in resorting to unsafe abortion practices.[25] Mitsunaga and others identified risk factors for induced abortion in Nigeria to include level of education, marital status, age at pregnancy, age at sexual debut, evidence of circumcision, ethnic group, religion, occupation, and abortion provider or facility.[26]

17 As above.
18 WHO *Trends in maternal mortality 2000 to 2020: Estimates by WHO, UNICEF, UNFPA, World Bank Group and the UNDESA/Population Division* (2023).
19 Guttmacher Institute 'Nigeria country profile: Unintended pregnancy and abortion', https://www.guttmacher.org/regions/africa/nigeria (accessed 15 August 2024).
20 Performance Monitoring for Action (PMA) 'Results from 2018-2020 PMA abortion surveys in Nigeria', https://www.pmadata.org/sites/default/files/data_product_results/Nigeria%20Unsafe%20Abortion%20Disparities.pdf. (accessed 20 April 2023).
21 As above.
22 National Population Commission (NPC) (Nigeria) and ICF 'Nigeria demographic and health survey 2018' Abuja, Nigeria and Rockville, Maryland, USA, NPC and ICP.
23 OM Abiodun 'Complications of unsafe abortion in South West Nigeria: A review of 96 cases' (2013) 42 *African Journal of Medicine and Medical Sciences* 111-115.
24 Bankole and others (n 5).
25 Performance Monitoring for Action (n 19).
26 TM Mitsunaga, UM Larsen & FE Okonofua 'Risk factors for complications of induced abortions in Nigeria' (2005) 14 *Journal of Women's Health* 515.

Complications reported in their study include infection and bleeding, which may lead to death. Abbas also identified bleeding, sepsis or perforation of the uterus, chronic pelvic pains and secondary infertility as health consequences of unsafe abortion.[27] Risk factors for complications arising from unsafe abortion were identified to include facilities and skill of the abortion provider; method of abortion and antibiotics used; general health of the woman; presence of sexually-transmitted diseases; female circumcision; age; parity; and gestational age.[28]

2.1 Vulnerability of women and reduction of maternal mortality

The principle of universal health coverage (UHC) was advanced in 2015 by the international community as one of the Sustainable Development Goals (SDGs).[29] The SDGs were a follow-up to the 2015 Millennium Development Goals (MDGs) formulated in 2000 by the United Nations (UN).[30] SDG 3.7 aims to achieve UHC. SDG 3.1, however, specifically targets the reduction of the global maternal mortality ratio to less than 70 per 100 000 live births by 2030.[31] As noted in the preceding part, abortion significantly contributes to the high maternal mortality ratio in Nigeria and, thus, access to safe abortion is highly likely to reduce the number of maternal deaths in Nigeria.

Consistent with the SDGs, the vulnerability theory justifies the need for interventions to address the risk of unsafe abortion resulting in morbidity and mortality of women in Nigeria.

The theory posits that vulnerability is an inherent quality of all humans.[32] Vulnerability, therefore, is associated with the potential to be affected by something and is a condition that limits one. Vulnerability may be limiting, but Gilson believes that it is a condition that can enable one if handled appropriately and with commensurate attention.[33] The fact that all human beings are prone to dependency

27 YG Abbas 'Causes and impacts of unsafe abortion in Nigeria' Master's dissertation, Vrije Universiteit, https://bibalex.org/baifa/Attachment/Documents/AnnX9ogxFq_2016102609545587.pdf (accessed 15 April 2023).
28 As above.
29 United Nations 'Sustainable Development Goals Knowledge Platform', https://sustainabledevelopment.un.org/ (accessed 21 May 2023).
30 United Nations 'Millennium Development Goals and beyond 2015', http://www.un.org/millenniumgoals (accessed 29 May 2023).
31 United Nations 'Sustainable Development Goals Targets and Indicators', https://sdgs.un.org/goals/goal3#targets_and_indicators (accessed 15 August 2024).
32 MA Fineman 'The vulnerable subject: Anchoring equality in the human condition' (2008) 20 *Yale Journal of Law and Feminism* 9-15.
33 E Gilson 'Vulnerability, oppression and ignorance' (2011) 26 *Hypatia* 308-332.

emphasises the responsibility of government to compensate persons for their vulnerability by addressing issues of vulnerability in its varying aspects. In the current context, while vulnerability may be considered a general fact of life, Okin holds the view that vulnerability is not a general fact of life but an injustice to women as a group, which is a creation of social institutions and arrangements.[34]

The vulnerability theory has been used as the basis for studies relating to exposure of women and adolescents to HIV and early pregnancies in separate studies by Fathalla and Rashad[35] and Roberto de Vogli and Birbeck.[36] Okin holds the view that vulnerability is an injustice to women as a group and is a creation of social institutions and arrangements.[37] In the context of abortion, the restrictive laws on abortion are only applicable to women. Only women require abortion and are therefore vulnerable to unsafe abortion practices. The vulnerability theory makes the need to change the legal and institutional arrangements to enhance access to institutions, resources and services for disadvantaged social groups (in this case, women) more apparent. Kohn is of the view that the vulnerability theory is effective and more appropriate to prompt special intervention for vulnerable groups in relation to the specific threat being faced by such groups.[38] Bluhm, in agreement with Kohn, also believes that the vulnerability theory can help solve some problems inherent in health, disease and illness in the philosophy of medicine.[39] The restrictive laws of Nigeria only apply to women and make them vulnerable to death when compelled to seek abortion under unsafe circumstances. The vulnerability theory, therefore, justifies the need for laws that allow women to access safe abortion services and which enables them to exercise their reproductive autonomy without the risk of losing their lives in the process.

34 SM Okin 'Gender inequality and cultural differences' (1994) 22 *Political Theory* 1.
35 M Fathalla & H Rashad 'Sexual and reproductive health of women' (2006) 333 *British Medical Journal* 816-817.
36 R de Vogli & GL Birbeck 'Potential impact of adjustment policies on vulnerability of women and children to HIV/AIDS in sub-Saharan Africa' (2005) 23 *Journal of Health, Population and Nutrition* 105.
37 Okin (n 34) 22.
38 NA Kohn 'Vulnerability theory and role of government' (2004) 26 *Yale Journal of Law and Feminism* 1.
39 R Bluhm 'Vulnerability, health, and illness' (2012) 5 *International Journal of Feminist Approaches to Bio-ethics* 156.

3 A rights-based approach to addressing the issue of access to abortion

The neglect of women's reproductive health has been identified as part of a larger and methodical discrimination against women.[40] The principle of non-discrimination and equal enjoyment of fundamental human rights without any form of distinction is at the core of human rights provisions right from the Preamble to the 1945 United Nations Charter.[41] The issue of reproductive health of women and their reproductive rights was addressed in the provisions of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[42] According to the provision of article 24, CEDAW specifically recognises the need to protect the reproductive rights and health of women by imposing obligations on states to adopt all necessary measures to repeal or modify existing laws, penal provisions, social and cultural patterns, customs and prejudicial practices that constitute discrimination against women. Other provisions include the rights of women to the protection of their health and function of reproduction under articles 11 and 12. These provisions impose clear obligations on states to eliminate discrimination in health care by providing access to women-centred services. Article 16 further requires states to ensure that women have freedom to determine freely and responsibly the number and spacing of their children.

Again, at the UN Conference in 1994, reproductive rights were declared an integral part of fundamental human rights. This is in recognition of the fact that the protection of women is fundamental in the attainment of development in any society.[43] Principle 8 of the Programme of Action (POA) adopted at the end of the Conference[44] emphasises women's ability to control their fertility and the right to access sexual and reproductive health (SRH) services. Paragraph 8.25 specifically recognises the health impact of unsafe abortion as a major public health concern and urges states to address this issue which negatively affects women's health.

40 RJ Cook 'International human rights and women's reproductive health' (1993) 24 *Studies in Family Planning* 80.

41 United Nations Charter of the United Nations 24 October 1945 1 UNTS XVI, https://www.refworld.org/docid/3ae6b3930.html (accessed 5 October 2023).

42 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm (accessed 5 October 2023).

43 NI Aniekwu *Reproductive health law: A jurisprudential analysis of gender specific human rights for the African region* (2011) 54.

44 United Nations 'International Conference on Population and Development (ICPD) Programme of Action (POA)' (1994), http://www.unfpa.org/webdav/site/global/shared/documents/publications/2004/icpd_eng.pdf. (accessed 5 October 2023).

The 1994 Conference was closely followed by the Fourth World Conference on Women that took place in September 1995. The Conference reiterated many of the rights in the POA and also ended with significant progress in the development of women's reproductive rights. Declarations made at the Conference (Beijing Declaration)[45] addresses specific reproductive health and rights issues pertaining to women, including the recognition and reaffirmation of the right of all women to control all aspects of their health, including their fertility under article 17, and the state's obligations to ensure access to services for women to enhance their SRH under article 30.

At the regional level, the right to health is guaranteed in the African Charter on Human and Peoples' Rights (African Charter).[46] The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol)[47] contains more detailed provisions relating to reproductive health and rights of women and is a direct response to African women's needs.[48] In the current context, the provision of article 14 of the Women's Protocol protects the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and in circumstances where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the fetus.

The provision of article 14(2)(c) has been interpreted by the African Commission in 2014[49] to mean that women are not to be subjected to criminal proceedings or be punished for having benefited from health services that provide them abortion and post-abortion care. The provision also entails that health personnel should not fear prosecution or disciplinary action for providing abortion and post-abortion care services, in the cases provided for in the Protocol.[50] The provision was also interpreted to impose an obligation on state parties to provide a legal and social environment

45 United Nations 'Beijing Declaration Platform for Action', https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WG/BeijingDeclarationPlatformAction1995.pdf (accessed 5 October 2023).

46 African Union African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev 5, 21 ILM 58 1982 art 16, https://www.refworld.org/docid/3ae6b3630.html (accessed 5 October 2023).

47 African Union Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 11 July 2003, https://www.refworld.org/docid/3f4b139d4.html (accessed 5 October 2023).

48 NI Aniekwu 'The Additional Protocol to the African Charter on Human and Peoples' Rights: Indications of capacity for African municipal systems', http://www.saflii.org/za/journals/LDD/2009/12.pdf (accessed 5 July 2023).

49 African Union Commission General Comment 2 on arts 14(1)(a), (b), (c) and (f) and art 14(2)(a) and (c) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' 55th ordinary session held from 28 April-2 May 2014 in Luanda, Angola, https://achpr.au.int/en/node/854/ (accessed 15 August 2024).

50 As above.

that is conducive to the exercise by women of their sexual and reproductive rights by revisiting, where necessary, restrictive laws, policies and administrative procedures relating to safe abortion in the cases provided for in the Protocol.

To further enhance the realisation of women's reproductive rights in the African region, the African Union (AU) adopted the revised Maputo Plan of Action (MPoA) 2016-2030[51] as a Continental Policy Framework on Sexual and Reproductive Health and Rights (SRHR) to ensure universal access to comprehensive sexual and reproductive health services in Africa.

The revised MPoA is not a treaty and, thus, it lacks the binding force of law. However, it is a long-term plan that focuses on nine specific areas where actions are needed to fully enhance access to reproductive health rights and consistent with the POA adopted at the 1994 UN Conference. The identified areas under paragraph 6 of the MPOA include political commitment, leadership and governance; health legislations, financing and investments; and health information and education. Paragraph 7 of the MPoA expressly identifies the elements of SRH to include maternal health and new-born care and safe abortion care. Also, paragraph 18 requires the removal of legal, regulatory and policy barriers limiting access to sexual and reproductive health commodities, programmes and services.

However, there currently is no evidence that this comprehensive policy document has been holistically adopted for implementation within the extant policy framework in Nigeria. Also, while the African Charter has been domesticated as part of the laws of Nigeria in compliance with section 12 of the Constitution, the African Women's Protocol has not been so domesticated and therefore is not part of Nigerian laws.

A rights-based approach to access to abortion services in Nigeria holds significant promise and will address the limitations inherent in the criminal laws. The domestication of the African Women's Protocol by the Nigerian government is a much-needed positive step in this direction.

51 African Union Commission 'Maputo Plan of Action 2016-2030 for the Operationalisation of the Continental Policy Framework for Sexual and Reproductive Health Rights', https://au.int/sites/default/files/documents/24099-poa_5-_revised_clean.pdf (accessed 5 October 2023).

4 Legal restrictions on abortion in Nigeria

The applicable criminal law provisions in Nigeria in the context of abortion is the Criminal Code Act (CCA) and the Penal Code Act (PCA). The CCA is applicable in the southern part of Nigeria while the PCA applies in Northern Nigeria. The provisions of both Acts are quite similar with slight variations influenced particularly by the dictates of Shari'a law which is largely practised in some parts of the north.

In the current context, the provisions relating to abortion are not so different with both Acts containing similar provisions that seek to restrict instances when abortion can be lawfully carried out. Based on the similarities, this article will focus on the CCA for the sake of brevity, whilst highlighting the slight differences as may be necessary in the course of discussions.

Section 228 of the CCA punishes anyone who intentionally procures a miscarriage of a woman by any means irrespective of whether the woman is or is not with child. Under section 229 of the same Act, any woman who intentionally procures her own miscarriage is guilty of an offence punishable with seven years' imprisonment. It thus is immaterial that the woman was not in fact pregnant, and the intent to abort suffices for conviction. Also, by the provision of section 309 of the CCA, any act done or omitted to be done that kills a child whether before or during the birth of a child is criminal and the person who does or omits to do the act is deemed to have killed the child. Such a person will be guilty of murder or manslaughter under the CCA, and the punishment is death or life imprisonment under sections 319 and 320 of the CCA. Acts or omissions preventing a child from being born alive is also an offence punishable with life imprisonment under section 328 of the CCA. Still within the context of abortion, the law punishes anyone who unlawfully supplies anything intended to be used to procure the miscarriage of a woman. Such a person is liable to three years' imprisonment under section 230 of the CCA.

The provisions of the Nigerian Criminal Code negate the international rights standards relating to reproductive health care. One of ways of promoting the realisation of reproductive rights is ensuring access to reproductive healthcare services by addressing issues constituting barriers to access. Eliminating barriers to access is consistent with the SDGs under Goal 3 with targets of achieving universal health coverage. The criminal law provisions that impose punishments on those who procure, seek to procure or supply

anything needed to procure a miscarriage constitute a legal barrier to accessing reproductive health services and, therefore, is a violation of the reproductive rights of women. The provisions are discriminatory against women as only women need to seek abortion and related services. The provisions are at variance with states' obligations under CEDAW to eliminate discrimination in health care by providing access to women-centred services and to protect the reproductive rights and health of women by adopting all necessary measures to repeal or modify existing laws, penal provisions, social and cultural patterns, customs and prejudicial practices that constitute discrimination against women. Also, the provisions violate the clear obligations to protect the reproductive rights of women imposed on states under the African Women's Protocol.

5 Demystifying the legal restrictions

5.1 Raising a legal defence to justify abortion

The positive angle, however, is that there is a legal defence available to anyone who commits the above offences under section 297 of the CCA to the extent that the acts were carried out in the course of surgical operations. Section 297 thus is a general defence for acts committed during surgical operations. It provides as follows:

> A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time and to all the circumstances of the case.

The above provision exonerates a person carrying out an abortion in cases where the act was done in good faith, and with reasonable care and skill for the patient's benefit. It also extends to cases where the abortion was carried out for the preservation of the mother's life and if it was reasonable having regard to the patient's state, and to all the circumstances of the case. The PCA does not have an equivalent provision that considers the patient's state or all circumstances of the case. However, the defence of acting in good faith for the purpose of saving the life of the woman is included in the provision of section 232 of the PCA together with the defined offence.

A purposive interpretation of the provision of section 297 appears to undoubtedly justify abortion in situations where the life of the mother is at risk, but it should not end there. The latter part of the

provision envisages a holistic consideration of the circumstances of the case, reasonableness, and having regard to the patient's state. Deflem is of the view – and we agree – that abortion laws 'can never simultaneously satisfy conflicting, pro-life and pro-choice, claims. In a society characterised by an increasing diversity of values and beliefs, law becomes more necessary and more impossible.'[52] Therefore, whatever position the law holds, whether liberal or restrictive, laws must be interpreted positively and in a holistic manner that takes into cognisance the facts of each case. The provision of section 297, therefore, may suffice to hinge an argument to justify abortion in some peculiar circumstances that not only place the woman in a poor physical state, but also in a poor emotional, mental or any state at all that is considered detrimental to her health, progress and development. This may, for instance, be considered in cases of pregnancies resulting from rape or incest or of a young adolescent who may be subjected to stigma, emotional abuse or torture for falling pregnant at a young age.

Although this view remains yet to be tested in the courts, it holds promise as a tenable defence if the laws are not reviewed to conform with modern trends on the right to self-determination in matters of reproduction and protection of the right to reproductive autonomy. In the case of *R v Edgal*[53] the position of the Court reflects a purposive interpretation of the laws. The facts were that persons charged with conspiracy to commit abortion under the Nigerian Criminal Code contended that the attempted abortion was undertaken to preserve the life of the mother. The Court relied on the English court's decision in the earlier case of *R v Bourne*[54] to whittle down the provisions of section 228 of the Criminal Code. The Court held that it was permissible to carry out abortion for the preservation of the life or health of the mother. This decision is a precedent, albeit a persuasive one, to support a purposive and positive interpretation of section 297 to argue for abortion in exceptional cases and based on peculiar facts, for instance, in cases of incest, rape, adolescent or teenage pregnancies that are likely to negatively affect their future as well as their emotional or mental well-being.

Mental health is an area that holds a promise in handling cases of women and girls seeking abortion. In cases where a patient is not psychologically, emotionally or mentally positioned to carry a pregnancy to term, especially considering the circumstances relating

52 M Deflem 'The boundaries of abortion law: Systems theory from Parsons to Luhmann and Habermas' (1998) 76 *Social Forces* 778.
53 (1938) 4 WACA 133.
54 (1938) 3 All ER 615.

to conception (for instance, in cases of rape and incest), a medical practitioner may proceed to abort the patient's pregnancy within the umbrella of section 297, particularly where such finding or diagnosis of mental incapacity can be corroborated by another practitioner. It perhaps is in consideration of this factor that the 2018 NGSTPLI[55] includes mental and psychiatric disorders as the conditions under which a medical practitioner can lawfully terminate pregnancies in Nigeria. The provisions of the NGSTPLI are discussed in detail in part 5.4 below.

Laws that make abortion legally restrictive are long overdue for review. This is to the end that the law, at the very minimum, makes an exception for the termination of a pregnancy arising from unpleasant circumstances such as rape or incest. This will be consistent with modern trends. In the interim, however, and pending the review or repeal of existing laws, the provision of section 297 appears to hold some promise in raising a defence for abortion in the above circumstances.

5.2 Discharging the evidential burden of proof

Apart from the legal defence under section 297, the likelihood of securing a prosecution under the provision of sections 228 and 229 is rather slim. In the case of section 229, which punishes the woman who aborts, proof of the offence will most likely result in self-indictment. The possibility of securing prosecution is made more apparent if one considers the fact that the law imposes no obligation on medical practitioners treating post-abortion cases to report cases of women who may have illegally procured abortion. In any event, and even if we are to assume that such obligation exists, a medical practitioner providing post-abortion care may not be able to conclusively ascertain the legality or illegality of the abortion. This is because the abortion could very well have been carried out under lawful circumstances – that is, to save the life of the mother, or it could have been a spontaneous abortion. Consistent with the above, Chigbu and others note that most women who present for post-abortion care arising from complications often deny the fact that they attempted to or did abort the pregnancy. They rather claim, even against clinical evidence, that the abortion was spontaneous.[56]

55 Federal Ministry of Health (n 1).
56 CC Chigbu and others 'Impact of abortion laws on women's choice of abortion service providers and facilities in South-Eastern Nigeria' (2018) 21 *Nigeria Journal of Clinical Practice* 1119.

On the flip side, assuming the medical practitioner was the one who initially provided the abortion services, it would also have been illogical for the same person to proceed to indict themselves by reporting the woman for conviction under section 229. This is because the medical practitioner would also be indicted and may be found liable under section 228. Schur thus states that 'women who submit to abortions are virtually never prosecuted. And the physician who departs from his legitimate practice to perform an occasional abortion rarely gets in trouble with the law.'[57] He concludes that 'satisfying evidentiary requirements is a major difficulty'.

Also, in cases where a woman may have considered the option of reporting the person who carried out the abortion on her in the case of an unsuccessful abortion attempt or a successful one with negative consequences, the fear of being charged as an accomplice under section 228 and being found guilty under section 229 is enough to deter any thoughts of making such report to seek redress. This situation played out in the case of *State v Njoku,* where the Court made a finding to the effect that the woman was an accomplice in the conspiracy to procure her own abortion.[58] Recent developments, including the acceptability of medical abortion, may make the successful conviction of a woman under section 229 even more challenging as a woman who successfully aborts her fetus is unlikely to incriminate herself.[59]

For the above reasons, most potential abortion cases present as murder or manslaughter cases, arising from abortion[60] and not strictly from a charge hinged on abortion.[61] Perhaps, it is for this reason that the PCA, unlike the CCA, specifically punishes any act intended to cause miscarriage but which results in the death of a woman. The provision of sections 228 and 229 thus are bedevilled with an inherent challenge of proof of the offences therein. The burden of proof in criminal cases is proof beyond reasonable doubt.[62] To successfully convict, it is not enough to merely suspect that the person in question has possibly unlawfully procured a miscarriage. The fact of the illegality of the procurement of the abortion must be proved beyond all reasonable doubt. It is only then that the burden

57 EM Schur 'Abortion and the social system' (1955) 3 *Social Problems* 97.
58 (1973) ECSLR 638.
59 Medical abortion is recognised as the acceptable form of abortion under the African Women's Protocol and the NGSTPLI discussed in part 6 below.
60 *State v Akpaete* (1976) 2 FNR 101.
61 PC Okorie & OA Abayomi 'Abortion laws in Nigeria: A case for reform' (2019) 23 *Annual Survey of International and Comparative Law* 169.
62 Evidence Act 2011 sec 135, https://www.refworld.org/docid/54f86b844.html. (accessed 5 October 2022).

of proof would have been discharged to ground a conviction under sections 228 and 229 of the CCA.

5.3 Socio-legal considerations

Social realities continue to influence people's decisions to resort to abortion under hidden and unsafe circumstances in utter disregard of the laws. Incidences of unwanted pregnancies and unsafe abortion in Nigeria remain high and disturbing. As far back as 1955, Devereux states – and this still holds true – that from all indications, abortion is 'an absolutely universal phenomenon, and that it is impossible even to construct an imaginary social system in which no woman would ever feel at least impelled to abort'.[63]

One of the major reasons why people continue to seek unsafe abortion in Nigeria is because the laws restricting abortion are at variance with sociological realities. Laws that do not reckon with societal needs and realities are likely to become obsolete and ineffective. In most cases, such laws lack the legitimacy that ought to drive its enforcement. Apart from legitimacy needed to influence compliance with laws, the significance of rational calculation; self-interest and sanctions in determining obedience to laws was emphasised by Hyde.[64] In context, the self-interest of the woman and the need to protect same appear to trump the legal restrictions imposed by the criminal laws. Self-interest will, therefore, influence the decision of an adolescent whose pregnancy was occasioned by rape, or a young unmarried lady who is afraid of society's reaction to the news of having a child outside wedlock. The need to self-protect would propel them to make rational decisions that will save them from perceived fears and negative societal reactions.

The punishment for offences relating to abortion also appears to have no deterrent effect sufficient to keep people from seeking abortion. The law is an instrument of social change, and a law that is unable to achieve needed change is a bad law. In this case, a law that is unable to reduce the incidence of unsafe abortion cannot be said to be a good and effective law. Therefore, there is a the need for Nigeria to take positive steps to reform its criminal law provisions consistent with its obligations under ratified international treaties and trends in other jurisdictions in Africa. As far back as 2012, Rwanda amended its penal laws to approve induced abortion where pregnancy was as

63 G Devereux 'A study of abortion in primitive societies' (1955) 122 *Journal of Nervous and Mental Disease* 498.

64 A Hyde 'The concept of legitimation in the sociology of law' (1983) *Wisconsin Law Review* 396.

a result of rape, incest or forced marriage, or where the pregnancy seriously jeopardises the health of the pregnant woman. The amendment also substantially reduced the prescribed penalties for violations of the provisions criminalising abortion.[65] Women who had previously been convicted for abortion-related offences have also been pardoned, with more than 500 women pardoned and released between 2016 and 2023.[66]

In Kenya, the High Court in Malindi in *PAK and Salim Mohammed* recognised the constitutional right to abortion and further held that the arbitrary arrest and prosecution of persons seeking abortion and healthcare workers providing abortion care are illegal and a violation of the reproductive rights of women. The provisions of the Penal Code that criminalise abortion was held to be a violation of the reproductive rights of women.[67] The High Court in Malawi in 2021 equally adopted a broad and purposive interpretation of the law within existing legal restrictions on abortion in the country. In *CM v The Hospital Director of Queen Elizabeth Central Hospital*[68] the Court held that the indication for abortion is legal where the life of a pregnant woman is in danger, but further held that the statutory indication for preservation of life necessarily includes preservation of the physical and mental health of the pregnant woman.

The laws in Ghana are also somewhat liberal, and to an extent recognises the reproductive rights of women to seek abortion under circumstances similar to those stated under the African Women's Protocol. Under the extant law, abortion will not be an offence where it is carried out by a licensed medical professional and in cases where pregnancy was the result of rape or incest, or where the pregnancy constitutes a risk to the physical or mental health of the pregnant woman.[69]

Nigeria should take a cue from the developments in other jurisdictions where the right to safe abortion have been upheld by the courts and abortion laws reformed consistent with international human rights obligations. Some efforts so far made are discussed below. However, there is a need for more deliberate action to repeal or amend the extant criminal law provisions.

65 J Påfs and others 'Implementing the liberalised abortion law in Kigali, Rwanda: Ambiguities of rights and responsibilities among health care providers' (2020) 80 *Midwifery* 102568.
66 https://www.npr.org/sections/goatsandsoda/2023/09/02/1194431567/rwanda-women-abortion-laws-kagame-presidential-pardon-jail (accessed 15 August 2024).
67 *PAK and Salim Mohammed v AG* Malindi High Court Petition E009 of 2020.
68 (2021) MWHC 43.
69 Criminal Offences Act 29 of 1960 sec 58.

5.4 National Guidelines on Safe Termination of Pregnancy for Legal Indications 2018

A major development in the policy framework relating to abortion in Nigeria was the formulation of the NGSTPLI[70] by the Federal Ministry of Health in 2018. The NGSTPLI reiterates the fact that abortion alone accounts for up to 14 per cent of the maternal morbidity and mortality in Nigeria. It seeks to build capacity for medical practitioners by providing information on the laws relating to abortion and also assisting them to clearly identify circumstances that threaten the life and well-being of pregnant women and which suffices to justify abortion, within the boundaries of the law.

As a welcome development, the NGSTPLI emphasises the legality of therapeutic abortion when carried out to save the life of a woman, or to promote her health and well-being.[71] It lists an array of conditions, diseases and disorders that put the mother at risk and which allow a medical practitioner to lawfully terminate a pregnancy. These include obstetric and gynaecological conditions; maternal heart and vascular diseases; kidney diseases; cancer; blood diseases; psychiatric and mental disorders; auto-immune diseases; thyro-cardiac diseases; advanced diabetic mellitus with organ failure; and other maternal pathology situations that put the mother at risk.

In addition, a crucial step in reaching a decision to abort involves obtaining a second opinion for confirmation of the indication for abortion. This step appears to be a prerequisite that cannot be waived under any circumstances. The NGSTPLI thus specifically recommends a referral to obtain the needed second opinion where same cannot be obtained locally. It is worth noting that it also prescribed medical abortion as one of the recommended and acceptable methods for the safe termination of pregnancies.

5.5 Violence Against Persons Prohibition Act 2015

The enactment of the Violence Against Persons Prohibition Act in 2015 indeed was a welcome development, especially as it relates to the protection of the rights of women in Nigeria. In the context of access to safe abortion and reproductive health services, the Act reiterates the recognition of not only constitutionally-guaranteed

70 Federal Ministry of Health (n 1).
71 As above.

rights, but also provisions in international human rights treaties to which Nigeria is a party.[72]

The Act specifically highlights the right of victims of violence to receive and be readily given access to medical, psychological, social and legal assistance. Section 41 of the Act requires protection officers to ensure that victims of violence have easy access and transportation to medical facilities and hospitals for treatment, if required. This Act has been passed by the House of Assembly of some states with significant additions to improve on the provisions of the Act. The Ogun State and Oyo State laws, for instance, mandate free medical treatment and counselling for victims of violence in hospitals in the states.[73] The affirmation of the rights of victims of violence to access necessary medical services is suggestive of the fact that women who have been victims of sexual violence and who may require abortion services are not to be denied same under the Act.

The relevance of this Act to the abortion discourse is also apparent in the provision that gives recognition to the rights of victims of violence within the international human rights framework. As will be seen in the next part, the international human rights framework appears to provide a firm basis for improved access to safe abortion services for women.

6 Conclusion and recommendations

The legal restrictions in the criminal code laws of Nigeria give an illusionary satisfaction that is at variance with current realities on the incidence of abortion in Nigeria. Discussions on abortion are usually limited to these restrictions, which have been shown to be significantly ineffective. There usually is very little or no discussion at all on the limitations of the laws and the available defences to the offences under the criminal laws. Not much publicity has been given to the NGSTPLI, which partly resolves the uncertainties surrounding situations and circumstances in which pregnancies can be lawfully terminated.

Therefore, there is a need for sensitisation of all stakeholders on a holistic appraisal of the laws and guidelines on abortion in Nigeria. The adoption of a rights-based approach to access to abortion

72 Violence Against Persons (Prohibition) Act 2015 sec 38, https://www.refworld.org/docid/556d5eb14.html. (accessed 5 October 2023).
73 Ogun State Violence Against Persons Law 2017 secs 31 & 66; Oyo State Violence Against Women Law 2016 sec 38.

services in Nigeria will also significantly address the limitations in the criminal laws. A good starting point will be the domestication of the African Women's Protocol, which recognises the right to medical abortion under specified circumstances. Enhanced access to safe abortion services for women in Nigeria will ultimately result in a decline in the maternal morbidity and mortality rate in Nigeria.

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Implementation of the right of the child to be heard under article 12(1) of the Convention on the Rights of the Child in Nigeria: Lessons from South Africa

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Summary: *Article 12(1) of the United Nations Convention on the Rights of the Child provides for the child's participatory rights. The reference to 'in all matters' indicates that article 12(1) rights is more comprehensive, in that it covers both the private and public spheres of society and creates duties on the state concerning matters left for actors in the private area such as the family. The regional African Charter on the Rights and Welfare of the Child emphasises the preservation of tradition and culture, promoting African morals and values in children's lives, and imparting duties towards family, community and society. CRC and the African Children's Charter are the bedrock of children's rights implementation in Africa. This article examines the implementation of article 12(1) of CRC in domestic children's rights laws in Nigeria and South Africa. While the South African children's law explicitly contains a replica provision of article 12 of CRC reflecting the principles and provisions of the Convention, the Nigerian children's law omits this provision but contains article 12 of CRC in principle scattered in the implementing statute within the meaning of the best interests of the child, the right to*

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freedom of expression under the Constitution. It concluded that having a replica of article 12 CRC provisions in the Nigerian Children's Act will serve as a tool for a rights-based approach advocacy, harmonise its legislation so that it is in line with CRC and makes for greater legislative clarity in terms of children's participation rights within the family as is shown by the South African example discussed in the article.

Key words: *children's rights; participation; decision making; implementation*

1 Introduction

The 1989 United Nations Convention on the Rights of the Child (CRC) is one of the international instruments that broadened children's rights and placed it on the governmental agenda.[1] CRC was widely ratified by countries and created a universal standard for the rights of the child globally.[2] The fundamental objective of CRC is to establish the status of children as rights bearers and for their rights to be considered equally important to those of adults when it comes to respect and fulfilment.[3]

The Guiding Principles of CRC include non-discrimination (article 2); the best interests of the child (article 3); the right to life (article 6); the right to survival and development (article 6); and the right to participation (article 12). Together, these provisions form the backdrop against which all actions of state parties to CRC are to be measured.[4] Although all the preceding provisions are relevant to the participatory rights of the child, the discussions in this contribution are limited to the right to participate in article 12(1) of CRC.

Aside from this, CRC's recognition of normative diversity is also discernible throughout its provisions. For instance, CRC emphasises

1 G van Bueren *The international law on the rights of the child* (1995) 310; J Todres 'The emerging limitations on the rights of the child' (1998-1999) 30 *Columbia Human Rights Law Review* 161-162.

2 The United States of America and newly-created state of South Sudan are yet to ratify the Convention. Somalia ratified CRC on 20 January 2015, http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdIvnYo (accessed 15 March 2019).

3 United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by GA Resolution 44/25, 1577 UNTS 3 (20 November 1989). The Convention entered into force on 2 September 1990.

4 A Parkes *Children and international human rights law: The rights of the child to be heard* (2013) 260-261. See also UN Committee on the Rights of the Child Rules of Procedure CRC/C/Rev 4 Rule 77 (18 March 2015). See also S Varanda 'The principle of evolving capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 308.

the importance of cultural values for the protection and harmonious development of a child.[5] Article 30(1) provides that the children of indigenous populations should not be denied the right to enjoy their own culture, religion and language. Furthermore, in terms of article 30(2), state parties must respect and promote children's rights to fully participate in cultural activities. An individual's right to participate in cultural practices is a way to express common sense of identity, values and tradition.[6] CRC, therefore, acknowledges the interrelation of cultural values, and the realisation of children's rights under article 12(1) of CRC within the domestic legal system of the various state parties.[7]

The regional children's legislation in Africa – the African Charter on the Rights and Welfare of the Child (African Children's Charter) was developed in response to the need for a document that expressly considered the qualities of African cultural heritage, historical context and African civilisation values, and that 'should inspire and characterise their reflection on the concept of the rights and welfare of the child'.[8] The need for the African Children's Charter was predicated on the perceived failure of CRC to take into cognisance the essential values and the economic realities of the African region.[9] The African Children's Charter as a children's rights instrument majorly influenced the application of children's rights in the implementing laws of African countries.

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5 In furtherance of the above acknowledgment of a diversity of cultures by CRC, art 8(1) obliges state parties to respect the right of the child to preserve their identity. Similarly, art 29(1)(c) provides that education shall be directed towards the development of respect for cultural identity and values.

6 T Boezaart 'Building bridges: African customary family law and children's rights' (2013) 6 *International Journal of Private Law* 396.

7 Suffice to also say that the interplay and realisation above are key aspects to children's rights and legal pluralism in human rights discourse. In fact, there are various legal contributions on how the implementation of children's rights under CRC and local norms interrelate. See C Giselle & D Ellen 'A review of literature on children's rights and legal pluralism' (2015) 47 *Journal of Legal Pluralism and Unofficial Law* 226-245; Boezaart (n 6) 395; S Harris-Short 'International human rights law: Imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130-181; T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 221-238; R Songca 'Evaluation of children's rights in South African law: The dawn of an emerging approach to children's rights' (2011) 44 *Comparative and International Law Journal of Southern Africa* 340-359.

8 See the Preamble to the African Children's Charter. See also Boezaart (n 6) 397.

9 D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights*127; F Viljoen 'Why South Africa should ratify the African Charter on the Rights and Welfare of the Child' (1999) 116 *South African Law Journal* 661; F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 110. The author alluded to the fact that 'the reasons why a regional charter was adopted were the side-lining of Africans from the UN drafting process and the exclusion of "African-specific" issues from the CRC'.

Nigeria and South Africa are multicultural state parties to CRC,[10] which domesticated the provisions of article 12(1) CRC in distinctive ways.[11] The diversity and the complexity of the task of implementing legislation in a multicultural context is a crucial reason for choosing these countries as a point of discussion.[12] Besides these two multicultural states operating a constitutional democracy, they also share a common law tradition as well as a federal characteristic.[13] Therefore, it is imperative to study how their article 12(1) CRC implementation obligation is exercised and described.

The approach adopted to investigate the issue of article 12(1) implementation in these countries focuses on one level of implementation, which is the specific children's rights legislation of the respective jurisdiction, namely, the Nigerian Child's Rights Act[14] and the South African Children's Act respectively.[15] These pieces of legislation are critical to the overall implementation of the CRC provisions in these countries. The extent to which the domestic children's laws reflect the principles as well as the spirit and intent of article 12(1) of CRC in terms of children's rights to participation within the family are discussed.

However, before proceeding to discuss the implementation of article 12(1) in the domestic laws of the aforementioned state parties, one must first consider the main features and perspectives of children's rights to participation under article 12(1) of CRC.

10 Nigeria as a member of the UN ratified CRC on 19 April 1991. South Africa ratified CRC on 16 June 1995. See Office of the High Commissioner of Human Rights Status of Ratification of the Convention on the Rights of the Child, https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child (accessed 15 March 2020).

11 See discussion in the subsequent parts for the adopted implementation approach of art 12 of CRC in Nigeria and South Africa respectively.

12 The people of Nigeria are extremely diverse, with over 250 ethnic groups speaking over 500 indigenous languages. See E Durojaiye and others 'Harmful cultural practices and gender equality in Nigeria' (2014) 12 *Gender and Behaviour* 6169-6181; PAO Oluyede 'Constitutional law in Nigeria' (1992) 21; AA Oba 'Religious and customary laws in Nigeria' (2011) 25 *Emory Law Review* 881-895; Central Intelligence Agency 'Country profile: Nigeria' 2018, https://www.cia.gov/library/publications/theworldfactbook/geos/ni.html (accessed 20 April 2019). South Africa is a union of nine provinces, reflecting not only a geographical but also a rich cultural diversity. M Alexander 'The nine provinces of South Africa', https://southafrica-info.com/land/nine-province-south-africa/amp/ (accessed 18 November 2024).

13 On the Nigerian federal system of government, see secs 4(1), 5(1)(a) & 5(2)(a) of the 1999 Constitution of Nigeria. See also Durojaye and others (n 12) 6169-6181. On the South African system of government, see L Mhlongo 'A critical analysis of South Africa's system of government: From disjunctive system to synergistic system of government' (2020) 41 *Obiter* 257-274.

14 Nigerian Children's Rights Act 2003 Cap C50, Laws of the Federation of Nigeria 2004.

15 South African Children's Act 38 of 2005.

2 Article 12 of CRC – rights to participate in decision making

Article 12 of CRC is the distinct provision that takes cognisance of the participatory rights of the child. Paragraph 1 of Article 12 obliges state parties to 'assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.

Article 12(2) builds on the above by stating that the child shall be afforded the right to be heard in judicial or administrative proceedings that affect the child. However, the focus of this contribution is on participation under sub-section (1), more specifically concerning children expressing their views and having these views be afforded due weight in the context of the family.

What is noticeable from the components of the article 12(1) provision above is that the rights of children to express views does not refer to any age limit.[16] When commenting on article 12(1) of CRC, Stern[17] pointed out that '[c]hildren from a very early age can form views and wishes, even though they might be communicated in ways other than through speech – for example, in play, art or other forms of oral expression'.[18] Similarly, Lansdown[19] points out areas where young children can demonstrate equal or greater competence on issues, for instance, in terms of their 'capacity to acquire IT skills, remember where things are, use their imaginations, mediate between arguing parents, show a willingness to forgive, learn new languages, or express creativity, love and compassion'.[20]

From the preceding, the provision of article 12(1) on participation extends to children who can understand and contribute thoughtful opinions on a range of issues affecting them and to children from the very youngest of ages who can form views, even where they are not able to communicate verbally. In other words, there should be no lower age limit on the right to participate, and it should not be limited to the expression of views in 'adult' language.[21] The

16 See art 12(1) CRC.
17 R Stern 'The child's right to participation – Reality or rhetoric?' PhD thesis, Uppsala University, 2006 160 (on file with author).
18 As above.
19 G Lansdown *Participation and young children'* (2004) 4-5.
20 As above.
21 Stern (n 17) 160; G Lansdown 'The realisation of children's participation rights: Critical reflections' in P Percy-Smith & N Thomas (eds) *A handbook of children and young people's participation* (2010) 12; Lansdown (n 19) 4-5.

implementation of article 12, therefore, requires recognition of and respect for non-verbal forms of communication such as 'play, body language, facial expression, or drawing and painting, through which very young children make choices, express preferences and demonstrate an understanding of their environment'.[22]

Furthermore, what is noticeable from the components of article 12(1) is that children who wish to participate have the right to freely convey their views and opinions without any limitations. Therefore, children should not be 'subject to influence, constraint or pressure from parents, authorities or any other actors that might prevent the expression of the child's views'.[23] Included in this right is the right to be provided with the access to appropriate information for an informed decision, because a decision cannot be considered free if it is not an informed decision;[24] so also, the right not to express a view or position, as freedom of expression also entails the right to choose to remain silent.[25] Therefore, to contribute their views freely, children need access to appropriate information and to safe 'spaces' where they are afforded the time, encouragement and support to enable them to develop and articulate their views.[26]

Furthermore, the reference to 'in all matters' indicates that the participatory rights in article 12(1) are not limited to matters that are explicitly dealt with in CRC.[27] In other words, 'in all matters' entails that participation right extends to all actions and decisions that affect children's lives and it applies both to issues that affect individual children, and children as a group.[28] Tisdall and others,[29] for example, when explaining children's participation stated the following: 'Their very behaviour – going to or absenting themselves from school, their activities in public space, their everyday actions within their families, with peers, with others in their communities – are all forms of participation.'[30]

22 Lansdown (n 21) 12; Lansdown (n 19) 4-5.
23 Stern (n 17) 161.
24 Lansdown (n 21) 12.
25 M Santos-Pais & S Bissell 'Overview and implementation of the UN Convention on the Rights of the Child' (2006) 367 *The Lancet* 426.
26 Lansdown (n 21) 12.
27 See subsequent discussion in this article that describes participation.
28 It applies to individual children, such as parental contact following divorce, and children as a group, such as the quality of child care or play facilities. See Lansdown (n 21) 12; Stern (n 17) 162; MF Lücker-Babel 'The right of the child to express views and be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child' (1995) 3 *International Journal of Children's Rights* 396.
29 KM Tisdall and others 'Reflecting upon children and young people's participation in the UK' (2009) 16 *International Journal of Children's Rights* 419-429.
30 Tisdall and others (n 29) 419.

Similarly, Hart[31] describes participation as '[t]he fact of being involved in the decision-making that concerns oneself and that concerns the life of the community in which one lives', while, Moosa-Mitha[32] describes participation as '[t]he expression of one's agency in the multiple relationships within which citizens are present in society'.[33] From the foregoing, it therefore seems that the scope of the article 12(1) participation rights is more comprehensive, in that it covers both the private and public spheres of society and creates duties on the state concerning matters left for actors in the private area such as the family.

In terms of 'in all matters' within the family, decisions that affect a child taken in the family setting may be considered trivial or casual, and formal or significant decisions.[34] Trivial or everyday decision making may revolve around, but is not limited to, participating in social aspects of family decisions such as the family's daily food consumption, choice of clothing and extra-curricular activities.[35] According to Sutherland,[36] 'what the child wears to school may seem relatively trivial to an adult, but it may matter for the child's sense of self and may be important for the child's interaction with his or her peers'. In terms of formal or significant participation, this may involve the legal aspects of family decisions regarding health matters,[37] the choice of school and other significant matters that may affect the child, such as cultural practices or religious belief(s) or faith.[38]

Another essential component of article 12(1) is that children have the right to express their views and, more importantly, to have those views taken seriously.[39] Therefore, state parties must provide children

31 R Hart *Children's participation: From tokenism to citizenship* (1992).
32 M Moosa-Mitha 'A difference-centred alternative to theoriaation of children's citizenship rights' (2005) 9 *Citizenship Studies* 369-388.
33 Moosa-Mitha (n 32) 375.
34 E Sutherland 'Listening to the child's voice in the family setting: From aspiration to reality' (2014) 26 *Children and Family Law Quarterly* 156. It is not within the focus of this contribution to discuss one after the other all forms of child participation in the family as they are endless. However, references to participation within the family herein are used interchangeably and in the context of both trivial and major participation.
35 J Mason & N Bolzan 'Questioning understandings of children's participation: Applying a cross-cultural lens' in B Percy-Smith & N Thomas (eds) *A handbook of children and young people's participation* (2010) 129. Australia and China were mentioned in their study as places where decision making within the family revolves around interactions on clothes, family food consumption and extra-curricular activities.
36 Sutherland (n 34) 156.
37 Specifically, in the discussion later, the extent of decisional autonomy by the child in health matters under South African legislations is elaborated upon.
38 Article 14(3) of CRC provides for the freedom of a child to manifest their religion or beliefs which may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others.
39 Lansdown (n 21) 12.

capable of self-expression, the platform to air their views through verbal and non-verbal means,[40] with the possibility that these views influence any decisions taken.

Requiring that attention is given to both 'age and maturity' when considering the views of the child shows that article 12(1) makes it clear that age on its own should not be used to limit the significance accorded to children's views.[41] Lansdown[42] argues that age alone is not a sufficient criterion and reliable indicator of an individual's capability and capacity to seek and analyse information and to understand the consequences of decisions made. The child's individual experiences and abilities, available support from adults present in the child's life, the peculiarity and social context of the child all form the components to be considered in a specific assessment.[43] Therefore, to be considered alongside age and maturity is the rights and duties of parents as expressed in article 5, to provide the child with appropriate direction and guidance.[44]

Furthermore, giving due consideration to children's views does not necessarily mean that the child's preference should be accorded systematic pre-eminence. However, such views should be considered in light of the nature of the problem and the child's developing maturity.[45] According to Lansdown,[46] 'consideration has to be given to their level of understanding of the issues involved while also protecting their best interests'. In other words, the extent to which the child's views should be respected needs to 'reflect the risks associated with the decision involved'.[47] For instance, a child of two years old cannot be left to decide to run into a busy road. However, with knowledge about the weather and the day's activities in hand, the child can take part in deciding what clothes to wear. A decision about whether or not to wear a coat to school, for example, will be based on a comparison of the harm that could be caused by compelling a child to wear a garment the child perceives as restrictive versus the risk of the child catching a cold.[48]

40 CRC Committee General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 21.
41 Lansdown (n 21) 12.
42 Lansdown (n 19) 3-5.
43 Lansdown (n 21) 3.
44 Stern (n 15) 164. She is of the view that these factors can somewhat limit the extent to which children's voices are appreciated.
45 A Moyo 'Reconceptualising the "paramountcy principle": Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 176.
46 Lansdown (n 19) 5.
47 As above.
48 Lansdown (n 19) 5-6.

Apart from the principal components of article 12(1) of CRC on a child's participation referred to above, article 12(1) together with the other intertwining provisions has been broadly and variously conceptualised as 'participatory rights', empowerment rights or 'autonomous participation rights'.[49] For example, the General Comment of the Committee on the Rights of Child (CRC Committee) indicates that participation is '[w]idely used to describe ongoing processes'. This process includes information sharing, mutual respect in terms of dialogue between children and adults, 'in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes'.[50]

Another example of a broader view of participation is that of Parkinson and Cashmore.[51] They described children's participation broadly as a process that involves having a 'voice', for instance, control of the process, and having a 'choice', for example, control over the decision. The preceding entails children being informed about a decision that will be or has already been taken, being consulted for purposes of expressing a view, having an opportunity to influence the outcomes, and making independent decisions if the child in question has the intellectual and emotional competence to do so.[52]

In light of the preceding, participation can be summarised to include specific characteristics such as inclusion, transparency, communication, equality and empowerment.[53] Children's participation, thus, can generally and usefully be described as a joint task which is difference-centred, acted out in private and public spaces individually and collectively.[54] It necessarily entails a relational space, where children play, grow, learn and work.[55] Thus, participation encompasses a broad understanding of recognising children's everyday experiences, including being an autonomous individual[56]

49 It is important to note that commentators on CRC use varied terminologies to describe these provisions, eg, 'participatory rights' and 'empowerment rights', and some have referred to these as 'autonomous participation rights'. See Lüker-Babel (n 28) 392. Therefore, in this article these terminologies are used interchangeably.
50 UN Doc General Comment CRC/C/CGC/2009/12 para 2.
51 P Parkinson & J Cashmore *The voice of a child in family law disputes* (2008) 20-21.
52 Moyo (n 45) 173.
53 See the analysis above on degrees of participation and participation generally. See also Stern (n 17) 153.
54 H Deirdre and others 'Children's participation: Moving from the performative to the social' (2016) 15 *Children's Geographies* 3.
55 Deirdre (n 54) 3-4.
56 G Mower *The Convention on the Rights of the Child: International law support for children* (1997) 4.

capable of making and participating in decision making within the family.[57]

As is mentioned earlier in the introductory part, it is also clear that CRC recognised or acknowledged culture, tradition and the family as central in the socialisation of children from childhood to adulthood.[58] It follows logically that the implementation of CRC within the multicultural state parties will bear a specific socio-cultural context.[59] In fact, and as mentioned earlier, the regional children's legislation in Africa – the African Children's Charter – was developed to expressly consider the qualities of African cultural heritage, historical context and African civilisation values, and that 'should inspire and characterise their reflection on the concept of the rights and welfare of the child'.[60] The place of the African Children's Charter on the right to participation and how participation is drawn per the peculiarity of the African society will be discussed later in the article.

However, in the determination of which values must take precedence between article 12(1)'s children's autonomous participation right and the cultural values within the context of the family, recourse must be had to the interpretation principle of CRC in terms of its holistic approach,[61] what article 12(1) provisions entail, and the fact that article 24(3) obliges state parties to take all effective and appropriate measures to abolish traditional practices that are prejudicial to the health of children.[62] Furthermore, the CRC Committee had consistently stated in their response to state parties' reports on the implementation of CRC to prioritise article 12 rights of the child over cultural considerations. It is submitted that under CRC, article 12(1) rights supersede cultural consideration or practices.[63]

57 E Such & R Walker 'Young citizens or policy objects? Children in the "rights and responsibilities" debate' (2004) *Journal of Social Policy* 39-57; M Freeman 'Why it remains important to take children's rights seriously' (2007) 15 *International Journal of Children's Rights* 5-23.

58 See the introductory part of this article.

59 According to Mutua, the implementation of CRC in the African context, eg, must bear what he terms the 'the African cultural fingerprint'. See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 351.

60 See the Preamble to the African Children's Charter. See also Boezaart (n 6) 397.

61 Parkes (n 4) 260-261. According to the author, CRC enjoys a holistic nature of interpretation and implementation approach. It goes, therefore, that even though most of the CRC articles include elements that amount to either civil or political rights, there is no distinction in terms of the human rights as contained in CRC.

62 Although these provisions did not specifically mention children's rights to participation, denying children rights to participate in matters affecting them can be regarded as traditional practices harmful to them. See Kaime (n 7) 227.

63 See General Comment 5 CRC/C/GC/2003/5 para 20 where the Committee recommended that the provisions of CRC should prevail where there is a conflict with domestic legislation or common practice. See also Kaime (n 7) 227.

The above position rationally ought to have settled likely conflict or dispute at the domestic level for all state parties. However, this seems not to be the case in certain state jurisdictions in terms of their implementation in children's domestic legislation. However, before proceeding to examine the Nigerian and South African implementation approach to article 12 of CRC in their domestic children's legislations, it is considered necessary to further reflect on the place of the African Children's Charter on rights to participation within the family and how participation is drawn per peculiarity of the African society, highlighting specific factors that may impede or limit the application of article 12 of CRC in African countries.

3 African Children's Charter and children's participation rights

As stated earlier, a critical value that the African Children's Charter puts on the front burner is the preservation of tradition and culture. In its Preamble the Children's Charter urges state parties to consider the virtues of cultural heritage, 'historical background and the values of African civilisation'.[64] The Children's Charter also alludes to the negative impact of, among other things, culture on the situation of children in Africa.[65] Article 1(3) of the African Children's Charter states that 'any custom, tradition, cultural or religious practice' that is incompatible with the Charter's rights, duties and obligations must be discouraged to the extent that it is incompatible'.[66] Other provisions, such as article 11(2)(c), enjoins state parties to focus children's education on preserving and promoting African morals, traditional values and cultures, as well as respecting and encouraging children to participate in cultural activities. Thus, the preservation of African cultural value is a 'linchpin' of the African Children's Charter.[67]

Article 31 on the duties of the child is a significant African cultural value addition to the African Children's Charter not contained in CRC. It imparts duties and responsibilities on children, emphasising their responsibility towards their family, community and society.[68] This is based on the traditional African view that individuals have rights and duties within the family and society, and they must contribute to their greater good.[69] In other words, in the context of

64 See the preamble to the African Children's Charter.
65 Boezaart (n 6) 397.
66 As above.
67 A Lloyd 'The African regional system for the protection of children's rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 33.
68 See art 31 of the African Children's Charter.
69 Z Motala 'Human rights in Africa: A cultural, ideological, and legal examination' (1988-1989) 12 *Hastings International and Comparative Law Review* 403.

African society, communalism or collective solidarity in relation to child's participation within the family exists. This communal system not only recognises the devolution of authority in the family but also distributes rights, duties and responsibilities accordingly to every member of the family.[70] However, the addition of duties by the African Children's Charter does not mean that children are subject to whims of their families and society. The Preamble to article 31 introduces duties subject to age and ability, and the child's duties are subject to limitations as contained in the Charter.[71] The first qualifiers require an open-ended assessment of the child's evolving capacity and ability,[72] similar to CRC's recognition of children's participation rights.[73] The second qualifiers subject the child's duties to general clauses and specific protection from abuse, neglect and exploitation.[74] Finally, when it comes to limits in article 31, the three general principles of the African Children's Charter, namely, 'the best interests of the child, non-discrimination and the right to life, survival and development' must be considered.[75]

Sloth-Nelson and Mezmur[76] argue that the obligation to respect parents, elders and superiors under the African Children's Charter is similar to positive traditions in African child-rearing practices, 'constituting an asset to the upbringing of African children'.[77] They argue that respect promotes cohesion and mutual support within the family and the community.[78] The socialisation goals and participation within the family and society are on raising responsible children who obey and respect their parents and elders.[79] Therefore, the African Children's Charter aims to celebrate the 'positive aspects of African child-rearing practices in nurturing a respectful society'.[80]

In light of the foregoing, the African Children's Charter seems similar to CRC but also established innovative provisions that are relevant, useful and peculiar to Africa and African children. In terms of similarity, the Children's Charter also adopts the same protection,

70 TW Bennett 'The cultural defence and the practice of *thwala* in South Africa' (2010) 10 *University of Botswana Law Journal* 17.
71 For a further discussion on this matter, see J Sloth-Nielsen and BD Mezmur 'A dutiful child, the implication of article 3 of the African Children's Charter' (2008) 52 *Journal of African Law* 159-189.
72 See the preambular para of art 31 of the African Children's Charter.
73 See earlier discussion on this issue above.
74 Sloth-Nielsen and Mezmur (n 71) 170-173.
75 Sloth-Nielsen and Mezmur (n 71) 173-177.
76 Sloth-Nielsen and Mezmur (n 71) 159-189.
77 Sloth-Nielsen and Mezmur (n 71) 177.
78 Motala (n 69) 381; A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 421.
79 Sloth-Nielsen and Mezmur (n 71) 177.
80 As above.

participation and prevention concepts as in its Guiding Principles for defining child rights akin to CRC. Similar to CRC, the African Children's Charter also protects the right to life;[81] the right to equality;[82] the right to a name and nationality;[83] rights to survival and development;[84] the right to health;[85] and the best interests of the child,[86] among others.[87] The African Children's Charter was developed 'in tandem' with CRC, and not in opposition to it.[88] Therefore, CRC and the Children's Charter can both be said to provide a framework upon which children's rights are considered and fostered on the African continent, with the latter aligning more to Africa's historical and cultural heritage and taking the value systems of the continent into account. However, the extent to which children may exercise their autonomous participatory rights under CRC and the African Children's Charter differs slightly. For example, article 7 of the Children's Charter grants these rights to children capable of expressing their views, subject to 'such restriction as are prescribed by law'.[89] Additionally, the African Children's Charter in article 10 imposes a limitation on the privacy rights of children by obliging parents 'to exercise reasonable supervision over the conduct of their children'.[90] These limitations may affect the exercise or enjoyment of those rights, suggesting that children are less considered autonomous human beings under the African Children's Charter than in CRC.[91]

Questions have justifiably been asked as to the desirability and applicability of the CRC construction of the autonomous child in those socio-cultural contexts where the autonomy of the individual is not emphasised as much as their interdependence and duties within the family and the community,[92] as is especially the case with Africa and Asia, as well as among ethnic migrants and indigenous

81 Art 6 CRC; art 5 African Children's Charter.
82 Art 2 CRC; art 3 African Children's Charter.
83 Art 7 CRC; art 6 African Children's Charter.
84 Art 14 African Children's Charter.
85 Art 16 African Children's Charter.
86 Art 4 African Children's Charter.
87 See J Sloth-Nielsen & BD Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 330-353 for a comprehensive listing of comparative rights.
88 Olowu (n 9) 127.
89 Art 7 African Children's Charter.
90 Art 10 African Children's Charter.
91 E Brems 'Children's rights and universality' in J Willems (ed) *Developmental and autonomy rights of the children, empowering children, caregivers and communities* (2002) 21-45.
92 S Toope 'The Convention on the Rights of the Child: Implications for Canada' in M Freeman (ed) *Children's rights: A comparative perspective* (1996) 44; Twum-Danso (n 78) 415-432; Mason & Bolzan (n 35) 128; ID Cherney, A Greteman & B Travers 'A cross-cultural view of adults' perceptions of children's rights' (2008) 21 *Social Justice Research* 432-456.

groups in Western societies.[93] Therefore, it is unexpected that the African Children's Charter's recognition of the child's duties and responsibilities towards the family based on African cultural and communal practices and which dictate the role and nature of the relationship between children and their parents[94] is a major influence on the application of article 12 of CRC's autonomous child participation in the domestic legislations in Africa. In other words, the implementation of the right of the child to participate in decision making within the family with reference to domestic legislation of state parties in the African region may and cannot escape the confines of cultural values found in the child's socio-cultural environment. The CEC Committee, mandated to oversee the implementation of CRC, has regularly expressed concern that state parties are not giving adequate attention to the promotion of the autonomy rights of the child.[95] Traditional practices and cultural values in some state parties have been noted by the Committee as obstacles to the implementation of these rights.[96]

The foregoing underscores the need for an approach of implementation of children's participation rights within the family in domestic legislations of African countries, that not only serve the best interests of children but also protect their human dignity within the family and society. A suggestion is, adopting a clear, direct and specific approach of implementation in terms of integrations of autonomous children participation and African cultural values of duties in their implementing children's legislation. The subsequent parts examine the implementation approach of article 12 of CRC in the Nigeria and South Africa-specific implementing children's legislations respectively.

93 It does not fall within the focus of this article to analyse the various jurisprudential debates on this issue as it is considered a subject worthy of a separate article. However, for the Asian perspective, see R Vasanthi 'Politics of childhood: Perspectives from the south' (2000) 35 *Economic and Political Weekly* 4055-4064. Vasanthi argues that the CRC provisions on autonomy are based on the assumption that individuation is the norm for all societies. She subsequently presents a view of the Asian context and how it might differ from the CRC model. For the African perspective, see T Mosikatsana 'Children's rights and family autonomy in the South African context: A comment under the final constitutions' (1993) 3 *Michigan Journal of Race and Law* 347-370. Mosikatsana argues that children's rights without duties or obligations undermine family autonomy.

94 Sloth-Nielsen & Mezmur (n 71) 159-189.

95 General Comment by the Committee, CRC-C-GC-12 (2009) 6. See also the CRC Committee comments to Mexico, Iceland, Burkina Faso and Senegal. See R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2002) 90.

96 Hodgkin & Newell (n 95) 163.

4 Nigerian Child's Rights Act

4.1 Scope and status of the Act

Nigeria fulfilled its legal and administrative obligation under CRC[97] by the National Assembly enactment of the Nigerian Child's Rights Act, 2003 (Children's Act or Act).[98]

Despite the above fulfilment, the pledge to promote a uniform children's rights nationally in Nigeria seems not to have been successful.[99] What seems partly accountable is the pluralist nature of Nigeria with many laws, norms and fora that co-exist to function as its legal system.[100] Under the Nigerian Constitution, each of the component states in Nigeria is empowered to make laws; for example, federal government makes laws on all matters in the exclusive lists and share law making with the state on the concurrent list.[101] However, issues around children are not explicitly listed in either the exclusive or the concurrent list in the Nigerian Constitution.[102] This non-listing of children makes it seem as if the nationwide application of the national Children's Rights Act that domesticated CRC is limited to the federal capital territory.

Nevertheless, the practice is that each state of the federation may adopt or refuse any provisions about children that were enacted at the national level.[103] This practice explains why, even where the nationally-enacted Children's Rights Act gives recognition to specific children's rights,[104] by adherence to customary laws and values at the

97 Art 4 CRC.
98 Nigerian Child's Right Act, 2003 Cap C50, LFN 2004.
99 See KK Oyeyemi & LA La-kadri 'Realiing the rights of child under the Nigerian Child's Rights Act, 2003: An exploratory critique' (2017) 2 *Unimaid Journal of Private and Property Law*22-32; Oba (n 10) 881-895; T Ladan 'The Nigerian Child Rights Act, 2003: An overview of the rationale, structure and contents' (2004) 2 *Nigerian Bar Journal* 219-230; F Olaleye 'Cultural diversity, child discipline and the Child's Rights Convention: The quest for a universal child?' (2005) 4 *University of Ibadan Journal of Private and Business Law*162.
100 Durojaiye (n 12) 6169-6181.
101 See secs 4 and 2nd Schedule, Parts I and II of the 1999 Constitution of Nigeria (as amended).
102 As above.
103 The reason perhaps lies in the fact that children's rights in Nigeria involve a matter also within the legislative competence of the states. Therefore, the federal act on children's rights must be ratified or separately enacted by each state's Houses of Assembly before it becomes applicable in the states. See Oba (n 10) 893. This explains why, since the enactment of the Nigerian Children's Rights Act 2003, which is over a decade, not all the 36 states in Nigeria have adopted the Children's Rights Act into their state legislation.
104 Secs 3(1)(2), 6, 7, 8, 13, 19 & 20 are among the sections that provide for specific rights of the child which include the rights and duties of the child in matters that concern them.

state level, cultural practices contrary to established children's rights often deprived the child of these rights.[105] Besides, not all states in Nigeria have adopted or enacted a Children's Rights Law.[106]

4.1.1 Best interests of the child under the Act

Under part 1 of the Nigerian Children's Rights Act, section 1 provides that the best interests of the child shall be the paramount consideration in all actions to be taken by all concerned.[107] Therefore, under the Act, an individual, a public or private body, institutions or service, a court of law, administrative or legislative authority in Nigeria shall adhere in their duties towards ensuring the best interests of the child.

The fact that there is no precise definition of the phrase 'interests of the child' was emphasised in the case of *Odogwu v Odogwu*,[108] where the Supreme Court of Nigeria stated that the phrase is not limited to material provisions but include those things that will assist the psychological, physical and moral development of the child, something that would promote the happiness and security that a child of tender years requires.

The interests of children envisaged under the Children's Rights Act, thus, embody several factors that depend on the peculiar circumstance of each case. In the case of *Williams v Williams*[109] the learned Supreme Court justice summed up that these factors interpreted the phrase 'paramount consideration' to mean 'preeminent and superior consideration'. Prominent among varieties of factors as considered by the Court are the adequacy of arrangement respectively made by the parties,[110] their conduct,[111] the age of the child,[112] the sex and social background of the child,[113] and the wishes of the child.[114]

105 See Oyeyemi & La-kadri (n 99) 31.
106 Since the enactment of the Nigerian Childs Rights Act 2003, which is over a decade, not all the 36 states in Nigeria have adopted the Children's Rights Act into their state legislation. See Oyeyemi & La-kadri (n 99) 27-28.
107 See Part 1, sec 1 of the Children's Rights Act.
108 (1992) 2 NWLR (Pt 225) 339.
109 (1987) 2 NWLR (Pt 54) 74.
110 See the cases *of Damulak v Damulak* (2004) 8 NWLR (Pt 874) 151, *Dawodu v Dawodu* (1976) 7-9 CCHCJ 201 and *Onwuzulike v Onwuzulike* (1981) 1-3 CCHCJ 277, 280-81. In *Damulak*, the Court held that an order of custody for the child of the marriage must necessarily postulate that there is on ground adequate arrangements for the sound education as well as those for the physical and mental welfare of the said child.
111 In the case of *Afonja v Afonja* (1971) 1 ULR 105 the Court held that 'the welfare of the infant', as necessary, is not the sole consideration. The guilty party's conduct is a matter also to be taken into account. See also *Lafin v Lafin* [1967] NMLR 101; *Oduneye v Oduneye* [1976] 2 85.
112 See *Williams v Williams* (1987) 2 NWLR (Pt 54) 66 at 74.
113 See *Oyelowo v Oyelowo* (1987) 2 NWLR 239.
114 See *Odogwu v Odogwu* (1992) 2 NWLR (Pt 225) 339.

Besides the foregoing, inferences from other provisions of the Children's Rights Act also point to what determine the standard of best interests of the child. Section 2(1) of the Children's Rights Act provides that necessary protection and care shall be given to the child for their well-being, while taking into account the rights and duties of the child's parents, legal guardians and other bodies that are legally responsible for the child.[115] The implication of the above section 2(1), read alongside section 1, is that the best interests of the child, which shall be the paramount consideration, are subject to the control of parents, legal guardians and other bodies that are legally responsible for the child.

From the above, it therefore seems as though the Children's Act limits the application of the best interests of the child to parental control. There are other instances where the rights of the child are subject to parental control.[116] For example, on the protection of the privacy and family life of the child, section 8 of the Act provides that 'every child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in sub-section (3) of this section'.[117] Section 8(3) is to the effect that nothing in the provision of sections 8(1) and (2) 'shall affect the rights of the parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards'.[118]

Similarly, it is noticeable that section 9(2) on freedom of movement subjected the application of the child's freedom of movement to the 'right of a parent, and where applicable, a legal guardian or other appropriate authority to exercise control over the movement of the child in the interest of the education, safety and welfare of the child'.[119]

Furthermore, the term 'reasonable supervision and control' as used in section 8(3) of the Act indicates the intention of the drafters of the Act to ensure parental authority over children's exercise of their right in the daily activities of the family life.[120]

115 See part 1, sec 2(1) of the *Nigerian Child's Rights* Act, 2003.
116 Secs 8(1), (2) & (3) and sec 9(1)(2) and sec 20 of the Nigerian Child's Rights Act.
117 Sec 8 of the Nigerian Child's Rights Act.
118 Sec 8(3) of the Nigerian Child's Rights Act.
119 Secs 9(1) & (2) of the Nigerian Child's Rights Act.
120 See part 1, sec 1-2(1) and sec 8(1)(2) and (3) of the Act. So more so, that sec 20 of the Child's Rights Act categorically placed a duty on every parent, guardian and others to ensure the necessary guidance, discipline, education and training to the child, for the assimilation, appreciation and observance of the their responsibilities set out in the Act.

It is observed from the foregoing provisions that parents and guardians are required to provide the needed guidance and training for the child in the daily activities of the family life, which includes traditional values of nurturing children from infancy. Parents and guardian are expected to consider the best interests of the child in all actions concerning the child. Unfortunately, parents, guardians and many care givers have been found wanting in terms of compliance with the best interests principle. The Concluding Observation of CRC[121] notes that most Nigerian children are subject to domestic violence or corporal punishment in school or in detention facilities, adding that several harmful traditional practices remain common in Nigeria.

4.1.2 Duties and responsibilities of the child

Section 19 of the Act makes explicit provision for the responsibilities of children, which include working towards the cohesion of the family, respecting their parents and elders at all times, and assisting them in their time of need.[122]

In addition to establishing the duties of the child, the Children's Rights Act obligates the parents and guardians, institutions and authorities in whose care children are placed to so equip the child in order to secure '[h]is assimilation, appreciation and observance of these responsibilities'.[123] In other words, parents and guardians should ensure that children in their care understand and observe their responsibilities towards the cohesion of the family. Therefore, the obligation on parents and guardians of the child to secure assimilation and observance of their responsibilities shows the importance of the duties and responsibilities of the child in exercising their rights and the children's relationships within the family.[124]

In light of the foregoing, the approach of the Children's Act in terms of prescribing duties and responsibilities on the child appears to dictate the role and nature of the relationship between the child and their parents and family. Further, it can be stated that section 19 of the Act on responsibilities and duties of the child is premised on the African customary law concept of rights and duties that hinges on connectedness, interdependence and loyalty within the society

121 Concluding Observations on the Rights of Child, Nigeria CRC/C/15/Add. 257 (2005). See also Concluding Observations on the Rights of Child, Nigeria CRC/C/NGA/CO 3-4 (2010).
122 See secs 19(1) & (2)(b) of the Nigerian Child's Rights Act.
123 Sec 20 of the Nigerian Child's Rights Act.
124 As above.

and the family.[125] Therefore, it is safe to conclude that the societal expectation in Nigeria in terms of children's rights to participation in decision making seems that the child within the family can only exercise their rights subject to restraints existing within the family.[126]

As the subsequent discussion shows, the Children's Act noticeably omits the article 12(1) of CRC provision on the right of the child to participate in decision making.

4.1.3 Omission of child's right provision of article 12(1) of CRC in the Act

Conspicuously, the Children's Rights Act omits the right of the child to participate in decision making and to have freedom of expression within the family as contemplated under CRC. In other words, article 12(1) of the CRC provision on a child's right to participation in decision making within the family is not included among those rights listed in the Children's Rights Act as applicable to a child.[127] What appears to be the closest interpretation of the article 12 CRC provision in the Child's Rights Act is section 3 which refers to the provisions in chapter IV of the Nigerian Constitution, relating to fundamental rights of citizens.[128] The provisions of chapter IV of the Constitution, among others, includes general provisions on freedom of expression as well as all other civil rights.

In light of the above, it appears that the exercise of children's participation rights in decision making within the family under the Act becomes contingent on the constitutional provisions on freedom of expression for all citizens in the Constitution.[129] Although this approach seems laudable and logical, it is rather too simplistic, blanket and unyielding. The reason for this is that fundamental

125 For a detailed discussion of respect, reciprocal support obligations and restraint, see BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' (1989) 4 *Journal of Social Development in Africa* 5; Twum-Danso (n 92) 415; NA Apt 'Ageing and the changing role of the family and the community: An African perspective' (2002) 55 *International Social Security Review* 44; NA Apt & M Grieco 'Urbanisation, caring for elderly people and the changing African family: The challenge of social policy' (1994) 47 *International Social Security Review* 111-122.

126 B Ibhawoh *Between culture and constitution: The cultural legitimacy of human rights in Nigeria* (1999). See sec 19 of the Nigerian Children's Rights Act, 2003, most particularly secs 19(2), (a) and (b) which emphasise the need for children to work towards the cohesion of family and community, and respect for parents, superiors and elders at all times and assist them in case of need.

127 See, generally, the Nigerian Child's Rights Act, more particularly, part II – Rights and responsibilities of a child.

128 Sec 3 of the Nigerian Child's Rights Act. See also Nigeria Third and Fourth Periodic Report of State Parties due 2008, OHCHR, 2009 UN DOC CRC/C/NGA/3-4.

129 Sec 39 of the 1999 Constitution of the Federal Republic of Nigeria.

rights provisions under the Nigerian Constitution that apply to all citizens are not absolute; they are qualified rights in nature. In other words, the exercise of these rights is curtailed to the extent that the Constitution prescribed.[130] According to Hodgkin and Newell,[131] constitutional provisions are sometimes 'purely aspirational or declaratory and could be limited in scope'. Therefore, it is not enough that the Constitution simply includes civil rights as fundamental rights for everyone, but it is essential and imperative that it indicates how these rights specifically apply to children.[132] The Nigerian Constitution does not contain a Bill of Rights specifically for children.

In light of the absence of specific Bills of Rights for children in terms of article 12(1) of CRC participation rights, it appears that the legislative provisions of the Nigerian Children's Rights Act did not fully reflect the aspiration and intent of CRC.[133] The omission of the important article 12(1) provisions in the Act is an indication that the Nigerian implementation approach of children's participation in decision making within the family is solely within prevailing cultural norms and values, and merely imbibed article 12 of CRC in principle scattered in the implementing statutes within the meaning of the best interests of the child and the rights to freedom of expression under the Constitution. More so, the exercise of some of the rights of children in the Act is explicitly linked to the children's relationship with the family, especially parental control and not the child's evolving capacity.[134] This adopted approach may constitute an impediment to the enforcement and implementations of children's rights to participation within the family in terms of article 12(1) of CRC.

4.1.4 Justifying the need for specific inclusion of children's rights in the domestic children's legislation in Nigeria

It is valid to argue that the reason why specific rights for the children are not explicitly included in the children's legislations could be that children are included in the general rights as provided regardless of whether or not they are explicitly mentioned.[135] Therefore, explicitly

130 See generally sec 45 of the 1999 Constitution.
131 Hodgkin & Newell (n 95) 187.
132 As above.
133 See earlier analysis of art 12 of CRC.
134 See earlier discussion above.
135 As indicated earlier in terms of the rights as contained in ch IV of the Nigerian Constitution all the sections on fundamental human rights, by its wording provide that 'everyone has the right'. Children are regarded as part of everyone. See secs 33(1) and 34(1) of the Constitution. Also, there is no replica of art 12 of CRC's children's participation rights in the Nigerian legislation implementing

making specific rights for children could be considered redundant. As indicated in the earlier discussion, the Nigerian Constitution contains the right to freedom of expression which applies to the child, and the statute that implements CRC contains a provision on the best interests of the child. To ascertain the best interests of the child may involve the participation of the child in decision making within the family.[136] Hence, the inclusion of a replica provision of article 12 of CRC is not necessary. The foregoing resonates with the views that in implementing human rights norms, a flexible approach that takes the particular circumstance of each state into account is the practice and that it may take the form of a comprehensive implementing legislation, principles scattered in different statutes, policy measures or a combination of them all.[137]

While acknowledging the above as a common position in human rights practice, it does not foreclose other remarkable approaches in terms of legislations as essential to advancing specific human rights and well-being.[138] Legislative protection in terms of provisions that guarantee specific children's rights, therefore, cannot be overemphasised. Making provision for children's rights in a legislation or the Constitution is only a starting point; the extent to which it adopts a genuine child's rights approach is determined by the quality of the legal or constitutional provisions in question.[139] O'Mahony provides a typology for assessing the approach to protecting children's rights, based on visibility, agency and enforcement spectrums.[140] Visibility indicates the extent of explicitly protecting children's rights; agency determines whether children are autonomous rights holders or need protection; and enforcement specifies the extent of enforcement through various remedies.[141]

In light of the foregoing, it is clear that the implementing legislations in Nigeria merely imbibed article 12 of CRC children's participation in principle. This approach rates children's participation rights within the family low due to its lack of visibility and agency. Agency is a measure of the extent to which a legislation treats children

CRC. See earlier discussion on the omission of art 12 of CRC in the Nigeria Child's Rights Act, 2003.

136 See generally earlier discussion on the best interests of the child in this article.

137 L Chenwi 'International human rights law in South Africa' in E de Wet, H Hestermeyer & R Wolfrum (eds) *The implementation of international law in Germany and South Africa* (2015) 353-354; SD Kaplan *Human rights in thick and thin societies: Universality without uniformity* (2018) 16-47.

138 Kaplan (n 137) 16-47.

139 C O'Mahony 'Constitutional protection of children's rights: Visibility, agency and enforceability' (2019) 19 *Human Rights Law Review* 401-434.

140 O'Mahony (n 139) 403-432.

141 O'Mahony (n 139) 402-434.

as autonomous rights holders, not objects in need of protection.[142] The provisions relating to children's participation within the family in the implementing statutes do not convey agency,[143] and are lacking in clarity.[144] For instance, to determine the standard of the best interests of the child, recourse is usually had to inferences from other provisions of the Children's Act that limit the application of the best interests to parental control, and other legislations in matrimonial causes relating to guardianship and custody issues as applicable to everyone, not specifically children.[145] The inevitable consequence is that most legal as well as some constitutional provisions on rights applicable to everyone are merely 'aspirational or declaratory and could be limited in scope'.[146] Therefore, it is essential to indicate the extent these rights specifically apply to children, particularly participation rights of children within the family.

It is submitted that failing to provide specific protection for key children's rights, such as participation rights within the family, in the implementing domestic legislations could be seen as lack of recognition of the particular vulnerability of children in relation to their parents and other stakeholders. The Nigerian implementation legislations, therefore, could be seen and characterised as primarily paternalistic.

It is further submitted that enumerating specific rights for children in terms of their participation in decision making within the family in the Nigerian implementing children's legislation will not only serve as a tool for a rights-based approach advocacy, but also as a beacon guiding implementation and for developing policies,[147] and to protect children from abuse within families and society. For instance, article 12(1) of CRC recognises children's vulnerabilities in power hierarchies and children's autonomy rights. The inclusion of this provision in the Nigerian Children's Rights Act, the specific

142 As above.
143 See earlier discussion in terms of the rights as contained in ch IV of the Nigerian Constitution, all the sections on fundamental human rights. See secs 33(1) and 34(1) of the Constitution. Again, there is no replica of art 12 of CRC children's participation rights in the Nigerian legislation implementing CRC. See earlier discussion on the omission of art 12 of CRC in the Nigeria Child's Tights Act, 2003.
144 Eg, the Constitution provides fundamental rights applicable to every citizen, but these are limited and not absolute. See generally sec 45 of the 1999 Constitution. Also, the directive principles of ch II on promoting and protecting children's interests in social, religious, cultural life, and family promotion are also not enforceable in a court of law. See sec 6(6)(c) of the 1999 Constitution.
145 See earlier discussion in parts 3.1 and 3.1.1.
146 Hodgkin & Newell (n 95) 187.
147 The South African Children's Act and the South African Constitution are examples in this regard, since they explicitly bestow on children the right to participation. See sec 10 of the Children's Act and sec 28 of the South African Constitution 1996.

implementing legislations, are likely to be more powerful tools guiding implementation than general provisions on children or principles in scattered statutes. More so, having a replica of the article 12 of CRC provisions will not only harmonise the legislation so that it is in line with CRC, but makes for greater clarity in terms of children's participation rights within the family than drawing inferences from scattered legislations that are limited in scope.

At this juncture, it becomes desirable to discuss the South African implementation approach to article 12(1) of CRC in its domestic Children's Rights Act (Children's Act). The essence is to show how a Southern African country as opposed to Western Africa – Nigeria – goes about its implementation. As shown in the discussion that follows, South Africa adopted a clear and remarkably integrated approach to the implementation of article 12(1) of CRC and local norms and values in its domestic Children's Rights Act.

5 South African Children's Act 2005

5.1 Scope and status of the Children's Act

The Children's Act came into full operation in April 2010. The Preamble to the Children's Act reinforces and endorses rights provided for in section 28 of the South African Constitution.[148] It specifically echoes the provision of section 28(2) of the Constitution to the effect that in all matters concerning the protection, care and well-being of the child, the child's best interests must always be of paramount importance.[149]

The Children's Act embraces a notion of childhood, namely, that for a child to fully assume their responsibility in the community, and for a full and harmonious development of their personality, a child should ideally grow up in a family environment, and in an atmosphere of happiness, love and understanding.[150] In other words, there is recognition of family and community values for the growth of a child in the Children's Act.

148 Sec 28(2) of the Constitution indicates that the principle of the child's best interest is of paramount importance in every matter concerning the child.
149 See sec 9 of the Children's Act.
150 See the last part of the Preamble to the Children's Act. To a certain extent, this recognies the African cultural value of connectedness, interdependence, and loyalty within the family.

Section 16 of the Children's Act specifically articulates the responsibilities of children to their families, community and the state.[151] Also, the Children's Act recognises that some children are capable of 'acting autonomously and in their own best interests'.[152]

5.1.1 The best interests principle under section 7 of the South Africa Children's Act

Besides the judicial guidelines in terms of the children's best interests principle stipulated by section 28(2) of the Constitution, the Children's Act explicitly provides for a set of guidelines on the standard of the best interests of the child. These guidelines are stipulated in section 7(1) of the Children's Act.[153]

Section 7 of the Act provides 'remarkably a realistic legislative scheme revealing the holistic nature of the concept of the best interests of the child'.[154] Section 7 recognises parental role and influence in the overall development of the child as well as the child being part of a larger family and community.[155] Therefore, whenever a provision of the Children's Act requires the best interests of the child standard to be applied, the nature of the personal relationship between the child and the parents or any person is relevant in those circumstances.[156]

Furthermore, according to section 7 of the Children's Act, parents and other decision makers in the public and private may be compelled to protect the child from any physical or psychological harm; specifically, any physical or psychological harm caused by maltreatment, abuse, neglect, exploitation or degradation or exposure of the child to violence or exploitation or other harmful behaviour.[157]

In addition to the factors provided by section 7 of the Children's Act, a strong emphasis is placed on the importance of a child being raised in a stable family setting or in an environment that is as close as possible to a caring family environment.[158] Similarly, there is a

151 Sec 16 of the Children's Act.
152 Ch 2 sec 6(3) of the Children's Act. See R Songca 'Evaluation of children's rights in South African law: The dawn of an emerging approach to children's rights' (2011) 44 *Comparative and International Law Journal of Southern Africa* 340-359.
153 See sec 7(1) of the Children's Act for the list of guidelines on the best interests of the child.
154 Moyo (n 45) 142-267.
155 Secs 7(1)(a), (b),(c) & (f) of the Children's Act.
156 Secs 7(1)(a) & (b)(i) & (ii) & (c) of the Children's Act.
157 See sec 7(1)(l) of the Children's Act.
158 See sec 7(1)(k) of the Children's Act.

need for the child to remain in the care of their parent, family and extended family as well as to keep ties to their family, extended family, culture or tradition.[159] Section 7 provisions, therefore, mirror the variety of family models, value systems and practices in South African society.[160] King[161] explains that the child's right to grow up in the context of a family and culture is based on the fundamental truth that it can be crucial to the 'basic dignity, survival and development' of everyone in society. In other words, the interests of the child to ideally grow up in a family environment for a full and harmonious development of their personality are linked to the interests of society.[162]

5.1.2 Section 10 of the South Africa Children's Act: A replica of article 12(1) of CRC

Section 10 of the Children's Act provides as follows: 'Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.'

The above section 10 provision in the Children's Act – a replica of article 12(1) of CRC – provides that all children that are of such an 'age, maturity and stage of development' are entitled to influence decision making in all matters affecting them.[163] Therefore, the approach of section 10 of the Children's Act on child participation rights symbolises the separate personhood of the child, and the need to take seriously the views expressed by the child same way as article 12(1) of CRC expresses it.[164]

There are several provisions of the Children's Act that fully embrace the autonomous status of children's participatory rights in decision making in matters that affect the child within the family. As

159 Sec 7(1)(f) of the Children's Act.
160 Moyo (n 45) 142-267.
161 S King 'Competing rights and responsibilities in inter-country adoption: Understanding a child's right to grow up in the context of her family and culture' in C Lind and others (eds) *Taking responsibility: Law and the changing family* (2011) 259.
162 See also J Heaton 'An individualised, contextualised and child-centred determination of child's best interest and the implication of such approach in South African context' (2009) 34 *Journal for Juridical Science* 8. However, despite these laudable provisions as regards the best interests standard, sec 7 has been criticised and considered too vague and indeterminate, as it gives the courts a wide discretion to apply different cultural norms. On the other hand, this inherent flexibility to contextualise the best interests standard by the court could be said to be a strength. See Boezaart (n 6) 395-396; Moyo (n 45) 142-267.
163 Sec 10 of the Children's Act.
164 Brems (n 91) 21-45.

the subsequent discussion indicates, the Children's Act creates space for children's autonomy and self-determination in many contexts.

5.1.3 Decisional autonomy under the Children's Act

As established earlier, article 12(1) of CRC views a child as being an autonomous individual capable of making and participating in decision making in all matters that concern them. As will be seen shortly, it seems that in line with the intent and spirit of CRC, the Children's Act creates excellent space for children's autonomy and self-determination in many contexts.

Decisional autonomy is guaranteed for every child under the Children's Act with the capacity for rational action.[165] For example, under sections 129(2)(a)(b) and 129(3)(a)(b) of the Children's Act, a child may consent to medical treatment or a surgical operation if the child is over the age of 12 years and has sufficient maturity to understand the benefits, risks and other implications of the treatment or surgical procedure.[166] However, section 129(3)(c) provides for due assistance by the parent or guardian of the child to validly consent to a surgical operation.[167] It is interesting to note that section 129(3)(c) only covers consent concerning the surgical procedure and not medical treatments, as there is no 'visible requirement of parental assistance in respect of consent to medical treatment by children who have the capacity to make rational decisions'.[168]

Another instance in the Children's Act is the provisions of sections 130(2)(a) and 133(2)(a) of the Children's Act on HIV testing. These provisions enable consent to an HIV test or to the disclosure of HIV status by a child who has reached 12 years of age, or under 12 years with sufficient maturity to understand the benefits, risks and social implications of such a test or disclosure.[169] In other words, a child of 12 years or below but endowed with sufficient maturity will be ascribed by the Act the competence that enables the child to exercise self-determination in respect of these decisions.[170]

However, there are other criteria such as informed consent that may be required when deciding issues of a child's sufficient maturity

165 See the provisions under part 3, protective measures relating to the health of the children, of the Children's Act.
166 Secs 129(2)(a) & (b), 129(3)(a) & (b) of the Children's Act.
167 Sec 129(3)(c) of the Children's Act.
168 Moyo (n 45) 181.
169 Secs 130(2)(a) & 133(2)(a) of the Children's Act.
170 Secs 130(2)(a) & 133(2)(a) of the Children's Act.

to enable the child to exercise self-determination.[171] In the case of *Castell v De Greeff*[172] the Court emphasised that for consent to be regarded as valid, it must be informed, voluntary and comprehensive. According to Van Bueren,[173] for a child to be capable of giving informed consent, 'a child should be able to understand the nature of the medical treatment, the risks and seriousness of the procedure, the potential benefits, the alternatives, the possibility of refusing consent, and the medical consequences which such refusal could entail'.

In light of the above, children above the age of 12 years will be accorded a larger measure for personal decisions than children below the age of 12 as a result of sufficient maturity and mental capacity.

Virginity testing is another instance where decisional autonomy will be guaranteed for any child with the capacity for rational action. For example, sections 12(5)(a) and (b) of the Children's Act permit virginity testing of children older than 16 years if the child gives her consent in the prescribed manner and after proper counselling.[174] Section 12(6) allows the results of the virginity test to be disclosed only with the child's consent.[175] Similarly, sections 12(9)(a) and (b) only makes the circumcision of a child over 16 years possible when the male child gives consent to the circumcision in the prescribed manner and after proper counselling.[176] The provision of section 12(10) gives every male child the right, in light of his age, maturity and stage of development, to refuse circumcision.[177] Finally, section 134 of the Children's Act enables a child who is 12 years or older to be provided with contraceptives on request by the child and without the consent of the parent or care giver of the child.[178]

The implications of the foregoing provisions of the Children's Act are that it creates a presumption of competence for children that have acquired the requisite capacities and maturity to make autonomous decisions.[179] The foregoing position is in line with the spirit and intent of the article 12(1) provisions of CRC.

171 Sec 7 of the National Health Act 61 of 2003.
172 1994 (4) SA 408 (C) 425.
173 Van Bueren (n 1) 310.
174 Secs 12(5)(a) & (b) of the Children's Act.
175 Sec 12(6) of the Children's Act.
176 Secs 12(9)(a) & (b) of the Children's Act.
177 Sec 12(10) of the Children's Act.
178 Sec 134(1) & (2) of the Children's Act.
179 Moyo (n 45) 182.

5.1.4 Application and interpretations of the integration approach in the South African Children's Act in relation to the best interests of the child

The integration of both article 12(1) of the CRC, as well as accepted cultural norms and values in the South African Children's Act, provides for a unique interpretation of children's rights to participation in decision making within the family in South Africa.

As discussed earlier, the Children's Act introduced a new dimension of relationships regarding parent and child. The Children's Act expressly recognises that parents have both rights and responsibilities towards their children.[180] The rights and responsibilities of the parent over their children under section 18(1) of the Children's Act focus on the right of the child to parental care and not on parental powers as would be assumed under the customary model. In fact, under section 18(1), parental responsibilities and rights that a person can exercise in respect of a child include to care for the child; to maintain contact with the child; to act as guardian of the child; and to contribute to the maintenance of the child.[181] The implication of the above is the clear emphasis on parent-child relationships of care and support and not parental authority or control over a child, which is to promote the best interests of the child.

Furthermore, the best interests of the child are paramount under the Children's Act. However, the consideration of what is best for the child depends on the guiding factors laid down by section 7 of the Children's Act, and the Constitutional Court of South Africa.[182] At the same time, the guiding factor depends on the circumstances of each interest of the child as well as the social realities and interpersonal relations of the child within the family.[183] Therefore, section 7 provisions on the best interests of the child and the constitutional value of tolerance and respect for diversity may allow for an approach that takes the cultural, traditional and religious circumstances of an individual child into account when considering the best interests of

180 Sec 18 of the Act. In *J v J* 2008 (6) SA 30 (C) the Court held that the terms 'parental authority' and 'parental power' are replaced by the terms 'parental responsibilities and rights' and the term 'custody' by 'care'. In *LB v YD* 2009 (5) SA 463 (T) Murphy J stated that the Children's Act has introduced changes to existing laws to bring them in line with constitutional rights and values. The judge was of the view that the concept 'rights and responsibilities' corresponded broadly with 'parental authority' and its components of care.

181 Secs 18(1)(a), (b) & (c) of the Children's Act.

182 *McCall v McCall* 1994 (3) SA 201 (C) 205 B-G.

183 Sec 7 of the Children's Act. See also Moyo (n 45) 177.

the child in all matters affecting the child[184] – in this instance the child's rights to participate in decision making within the family.

The fulcrum of the foregoing discussion is that the integrated approach of implementation of article 12(1) of CRC portends an implication for a clear and flexible application of children's rights to participation in South Africa. In other words, with the provisions of section 10 and 7 of the Children's Act, children will exercise their participation rights in decision making within the family in an autonomous manner. Also, with the value of tolerance, respect for diversity and pluralism in South Africa, children may also exercise their participation rights in decision making within the family in a culturally-responsive manner, in accordance with the constitutional requirements.[185] This approach of implementation did not only fully reflect the specific principle and provisions of CRC, but it also allows for a greater legislative clarity in terms of children's rights to participation within the family in South Africa.

6 Conclusion

CRC establishes children's participatory rights. Article 12(1) contains children's rights to participate in family decision making. The regional African Children's Charter emphasises preserving tradition and culture, instilling African morals and values in children's lives, and entrusting them with duties and responsibilities to their family, community and society. CRC and the African Children's Charter as children's rights instruments majorly influenced the application of children's rights in the implementing laws of African countries. The approach to implementing article 12(1) of CRC in Nigerian and South African domestic children's laws is an example in this regard. The South African children's law explicitly contains replica provisions of article 12 of CRC reflecting the principles and provisions of the Convention as well as incorporating cultural norms and values based on family rights and duties. The Nigerian children's law omits the article 12 provision and emphasises the duties and responsibilities of the child within the family. However, it contains article 12 of CRC in principle scattered in the implementing statute within the meaning of the best interests of the child and the right to freedom of expression under the Constitution. This approach seems to suggest

184 Heaton (n 162) 1-18.

185 See secs 15(3)(b) & 39(3) of the Constitution; sec 211 of the Constitution. See also *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) 926. See also C Rautenbach 'South African common and customary law of intestate succession: A question of harmonisation, integration or abolition' (2008) 119 *Electronic Journal of Comparative Law* 1-15.

that the implementing legislation in Nigeria only imbibed article 12 of CRC children's participation in principle, which rates children's participation rights within the family low due to its lack of visibility and agency. Agency is a measure of the extent to which legislation treats children as autonomous rights holders, not objects in need of protection. Although human rights could be articulated differently in dissimilar parts of the world, a remarkable approach in terms of specific legislative provisions essential to advancing human rights and the well-being of children should be encouraged and practised. Thus, having a replica of article 12 of CRC provisions in the Nigerian Children's Act will not only serve as a tool for rights-based approach advocacy, guiding implementation, and for developing policies, but also harmonise its legislation so that it is in line with the spirit and intent of CRC. More so, it makes for greater legislative clarity in terms of children's participation rights within the family, as is shown by the South African example discussed in this article.

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An examination of the recognition of communities and partnership agreements under South Africa's Traditional and Khoi-San Leadership Act

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Summary: *In 2021 the South African legislature enacted into force the contentious Traditional and Khoi-San Leadership Act 3 of 2019 under the guise of recognising leaders of the Khoi San, who generally are regarded as the 'first people' in South Africa. This article provides a critical analysis of key provisions in the Act: the recognition of traditional communities and the power of traditional councils to conclude partnership agreements. It reveals that the Act differentiates between the Khoi-San and other South African indigenous groups in the recognition of traditional communities. Khoi-San councils exercise jurisdiction over individuals who voluntarily affiliate to the Khoi-San community, while in other communities traditional councils are conferred jurisdiction over land and the people that live thereon. Furthermore, the Act does not address existing concerns regarding the concentration of powers in traditional councils, but rather bolsters the powers of traditional councils to conclude agreements on behalf of communities. The article argues that voluntary affiliation should be centred as a requirement for the formation of all communities and that the power to conclude partnership agreements must be reconsidered.*

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Key words: *traditional leadership; Traditional and Khoi-San Leadership Act; Khoi-San; traditional communities*

1 Introduction

In 2021, after years of deliberation and contestation,[1] the Traditional and Khoi-San Leadership Act[2] (TKLA) entered into force. However, only two years later the Constitutional Court, in a unanimous judgment in *Mogale v Speaker of the National Assembly*[3] delivered on 30 May 2023, declared the TKLA unconstitutional because Parliament had failed to facilitate public participation in the legislative process.[4] The declaration of unconstitutionality was suspended for two years to allow Parliament time to re-enact the statute in a manner consistent with the Constitution or to pass another statute in a manner consistent with the Constitution.[5] This article examines key provisions in the TKLA, with a view to contributing to the discourse on what a new and improved iteration of the Act could look like.

The article focuses on what I consider to be the critical provisions of the Act that require reconsideration: the differences in recognition of a traditional and Khoi-San community and the power of traditional councils to conclude partnership agreements on behalf of communities. First, I provide a brief overview of the recognition of customary law and traditional leadership institutions in South Africa to contextualise the critique and analysis of the current TKLA. This overview encompasses the Traditional Leadership and Governance Framework Act (TLGFA),[6] being the legislation that preceded the TKLA. I then contrast the TKLA's different approaches to recognising

1 The Draft Traditional Affairs Bill was published in 2013. It was replaced by the first iteration of the Traditional and Khoi-San Leadership Bill B23-2015 in 2015 and thus had taken six years to pass through the legislative process. For a discussion of the protests preceding the TKLA, see C Himonga & T Nhlapo *African customary law in South Africa: Post-apartheid and living law perspectives* (2023) 348. For a discussion of concerns raised during the legislative process, see X Poswa 'What happens when government fails to listen to rural voices: Constitutional Court declares Traditional and Khoisan Leadership Act unconstitutional' *Local Government Bulletin* September 2023, https://dullahomarinstitute.org.za/multilevel-govt/local-government-bulletin/archives/volume-18-issue-3-september-2023/what-happens-when-government-fails-to-listen-to-rural-voices-constitutional-court-declares-traditional-and-khoisan-leadership-act-unconstitutional (accessed 8 October 2024); Legal Resources Centre 'Constitutional Court declares the Traditional and Khoi-San Leadership Act unconstitutional' 30 May 2023, https://lrc.org.za/30-may-2023-constitutional-court-declares-the-traditional-and-khoi-san-leadership-act-unconstitutional/ (accessed 8 October 2024).

2 Act 3 of 2019 (TKLA).

3 *Mogale v Speaker of the National Assembly* (CCT 73/22) [2023] ZACC 14 (30 May 2023).

4 *Mogale* (n 3) paras 1 & 2 of the order.

5 *Mogale* (n 3) para 3 of the order.

6 Act 41 of 2003 (TLGFA).

a traditional and Khoi-San community and explain the consequences thereof. In conclusion, I analyse the controversial section 24 of the TKLA which empowers traditional councils to conclude partnership agreements on behalf of communities.

2 Historical recognition of customary law and traditional leadership institutions in South Africa

Customary law and its accompanying institutions have a checkered history in South Africa. This part examines the historical recognition of customary law and traditional leadership institutions because several of the issues associated with the TKLA discussed in this article arise from the historical treatment of customary law.

Early colonialists in South Africa ignored customary law and sought to incorporate indigenous people into a single legal order in accordance with the approach of direct rule.[7] The approach proved unfeasible, as the under-resourced state faced a large and dispersed population that continued to live according to their own laws.[8] The colonial state shifted to a policy of indirect rule, with the state recognising and using customary law and its institutions for the purposes of controlling the indigenous population.[9]

The apartheid (which means 'apartness' in Afrikaans) era, which ran from 1948 to 1994, saw a solidification of the approach of indirect rule as the state implemented its policy of segregation and separation of the population by race through a series of legislation that in some cases used traditional leadership institutions to implement its agenda.[10] The state broke up, amalgamated and, in essence, created tribes by grouping people according to language and appointing chiefs who presided over communities.[11] These state-created tribes with state-appointed traditional leaders resulted in – and continue

7 Himonga & Nhlapo (n 1) 4-5; T Bennett *Customary law in South Africa* (2004) 35.
8 Bennett (n 7) 35-36.
9 Himonga & Nhlapo (n 1) 6, 8.
10 Eg, the Immorality Act 5 of 1927 prohibited extra-marital sex between Europeans and non-Europeans and the Prohibition of Mixed Marriages Act 55 of 1949 prohibited marriages between white and non-white people. The Black Administration Act 38 of 1927 purported to regulate the lives of black individuals and regulated, among others, customary marriage, succession and the formation of tribes. The Act was described by Langa DCJ as being 'specifically crafted to fit in with notions of separation and exclusion of Africans from the people of "European" descent. The Act was part of a comprehensive exclusionary system of administration imposed on Africans;' *Bhe v Magistrate, Khayelitsha; Shibi v Sithole* 2005 (1) SA 580 (CC) para 61.
11 Bennett (n 7) 106-111; J Ubink and others 'An exploration of legal pluralism, power and custom in South Africa. A conversation with Aninka Claassens' (2021) 53 *Journal of Legal Pluralism and Unofficial Law* 498, 502.

to give rise to – disputes regarding the legitimacy of chiefs and the state-created boundaries of communities.[12] Furthermore, chiefs were responsible for implementing state policy and were seen as state puppets.[13] In this regard, chiefs administered pass laws, controlled access to urban areas and collected fees and levies.[14] As the state conferred greater power on chiefs, their legitimacy in communities was undermined.[15] However, because chiefs were now accountable to the state, and land was no longer freely available, people could no longer secede when unhappy with a chief.[16] The loss of the possibility of secession meant the loss of the primary means by which people protested bad chiefs and held them accountable.[17] On the other hand, chiefs had very little choice in the matter. Chiefs who resisted the state agenda were stripped of their power and confined to small areas of land, while those who supported the state policy were rewarded with large areas of land[18] and power.[19] In conclusion, customary law was recognised during the pre-constitutional era to control the indigenous population rather than to recognise it as a legitimate source of law.

The state's treatment of the Khoi-San people in the pre-constitutional era is more complex. The Khoi-San, who are regarded as the 'first people' of South Africa,[20] were marginalised and overlooked as an indigenous group in South Africa's pre-constitutional history.

12 A Claassens 'Contested power and apartheid tribal boundaries: The implications of "living customary law" for indigenous accountability mechanisms' (2011) 1 *Acta Juridica* 174, 188; P Delius 'Chiefly succession and democracy in South Africa: Why history matters' (2021) 47 *Journal of Southern African Studies* 209-227. Former President Thabo Mbeki established the Commission on Traditional Leadership Disputes and Claims known as the Nhlapo Commission to investigate disputes surrounding traditional leadership and tribal boundaries; see UCT 'Nhlapo to adjudicate traditional leader disputes' *UCT News* 8 November 2004, https://www.news.uct.ac.za/article/-2004-11-08-nhlapo-to-adjudicate-traditional-leader-disputes (accessed 18 April 2023); J Peires 'History versus customary law: Commission on traditional leadership: Disputes and claims' (2014) 49 *South African Crime Quarterly* 7.
In 2012 the Kgatla Commission was established in Limpopo to investigate 568 disputes relating to traditional leadership; *News24* 'Limpopo to probe 568 traditional leadership disputes' 18 May 2012, https://www.news24.com/news24/limpopo-to-probe-568-traditional-leadership-disputes-20150430 (accessed 3 October 2024).

13 I van Kessel & B Oomen '"One chief, one vote": The revival of traditional authorities in post-apartheid South Africa' (1997) 96 *African Affairs* 561, 563.

14 Van Kessel & Oomen (n 13) 566.

15 Van Kessel & Oomen (n 13) 563.

16 Himonga & Nhlapo (n 1) 342. Before people were confined to homelands, groups regularly seceded; see Delius (n 12) 213.

17 Himonga & Nhlapo (n 1) 342.

18 Claassens (n 12) 187-188.

19 N Kukauka 'Political recognition and cultural identity of minorities: What is their meaning in the case of Khoisan in South Africa?' LLM dissertation, University of Cape Town, 2023 29.

20 D Pieterse 'The implication of the Traditional Khoisan Leadership Bill of 2015' 9, https://ijisrt.com/assets/upload/submitted_files/1570013558.pdf (accessed 18 April 2023).

Khoi-San is the collective term used to refer to the 'lighter-skinned indigenous peoples of Southern Africa',[21] namely, the Khoi Khoi and the San who were similar in language, appearance and way of life.[22] Historically, the colonial and apartheid state did not recognise the indigeneity of Khoi-San institutions.[23] The apartheid state classified the South African population according to race, and the lighter-skinned Khoi-San were classified as 'coloured' (along with others such as Malay slaves and people of a mixed race),[24] and dispersed them throughout the country.[25] Khoisan people describe this as humiliating, which resulted in them 'not being able to maintain their identity as an indigenous community with a distinct ethnic composition'.[26] In contrast, the other indigenous groups who were darker skinned were classified as 'black', relocated and confined to the homelands,[27] and had chiefs and tribal authorities established over them.[28] Thus, the notions of 'customary law', 'traditional community' and 'traditional leadership' were applied to black indigenous groups by the state in the pre-constitutional era. In contrast, the Khoi-San never had a homeland like the black indigenous groups.[29]

The advent of the Constitution marked a significant shift in the state's treatment of customary law and accompanying institutions. As a starting point, it should be noted that customary law[30] is not defined in the South African Constitution,[31] but is defined in legislation as 'the customs and usages traditionally observed among the indigenous African peoples of South Africa and which form part of the culture of those peoples'.[32] This raises the question of who is considered indigenous to South Africa.

21 B van Wyk 'Indigenous rights, indigenous epistemologies, and language: (Re) construction of modern Khoisan identities' (2016) 4 *Knowledge Cultures* 33, 34.
22 Kukauka (n 19); A le Fleur & L Jansen 'The Khoisan in contemporary South Africa: Challenges of recognition as an indigenous people. Country report: South Africa' August 2013 1-2, https://www.kas.de/documents/252038/253252/7_dokument_dok_pdf_35255_2.pdf/ (accessed 8 October 2024).
23 S Burnett and others 'A politics of reminding: Khoisan resurgence and environmental justice in South Africa's Sarah Baartman district' (2023) 20 *Critical Discourse Studies* 524, 527.
24 Burnett and others (n 23) 527; Kukauka (n 19) 13.
25 For a historical discussion of the Khoi-San's engagement with colonialists, which is beyond the scope of this article, see Kukauka (n 19) 8-12.
26 Le Fleur & Jansen (n 22) 2.
27 The homelands, also referred to as Bantustans and established as part of apartheid, were the areas to which the state moved the majority black population to deny them citizenship and rights in 'white' South Africa. The infrastructure of these areas was never developed. See MC Rogerson & JM Rogerson 'The Bantustans of apartheid South Africa: Transitioning from industry to tourism' (2023) 25 *Revista Română de Geografie Politică* 1-3.
28 Himonga & Nhlapo (n 1) 10-11.
29 Kukauka (n 19) 26.
30 The term 'customary law' is used interchangeably with 'indigenous law' in this article.
31 Constitution of the Republic of South Africa, 1996.
32 Recognition of Customary Marriages Act 120 of 1998, definition.

The term 'indigenous people' is contested in international law,[33] but the United Nations (UN) has provided a working definition with three features, namely, '(1) a pre-colonial presence in a particular territory; (2) a continuous cultural, linguistic and/or social distinctiveness from the surrounding population; and (3) a self-identification as "indigenous" and/or a recognition by other indigenous groups as "indigenous"'.[34]

The Working Group of Experts on Indigenous Populations/ Communities of the African Commission on Human and Peoples' Rights (African Commission) has identified criteria or characteristics for identifying an indigenous community.[35] The African Commission articulated the criteria as 'the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; an experience of subjugation, marginalisation, dispossession, exclusion or discrimination'.[36] The African Court on Human and Peoples' Rights (African Court) articulated it slightly differently as follows:[37]

(1) self-identification;
(2) a special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
(3) a state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.

Notably, the above characteristics do not require a pre-colonial presence, unlike the UN working definition set out above, which may be a contentious requirement for some indigenous groups.

33 The United Nations Declaration on the Rights of Indigenous Peoples (2007) does not define indigenous people. For a discussion of this, see D Champagne 'UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, civil, and indigenous rights' (2013) 28 *Wicazo Sa Review* 9 17. The ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries 169 (1989) provides that indigenous peoples are descendants of populations 'which inhabited a country or geographical region during its conquest or colonisation or the establishment of present state boundaries' and 'retain some or all of their own social, economic, cultural and political institutions'; see art 1(1).

34 S Lightfoot & D MacDonald 'The United Nations as both foe and friend to indigenous peoples and self-determination' in JR Avgustin (ed) *The United Nations: Friend or foe of self-determination?* (2020) 33.

35 African Commission on Human and People's Rights Report of the African Commission's Working Group of Experts on Indigenous Populations/ Communities (2005) 92-93.

36 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) para 150.

37 *ACHPR v Kenya, African Court of Human and Peoples' Rights* Application 6/2012, African Court of Human and Peoples' Rights, May 2017 para 105.

Neither the South African Constitution nor any South African legislation defines 'indigenous people', and this has not been an issue in law as yet. People are grouped together on the basis of language[38] and other cultural features and practices,[39] and because of the similarities between the groups, they are often discussed as a collective or in terms of the broader groups, namely, the Nguni, Tsonga/Shangaan, Sotho or Venda.[40] There accordingly is no single system of customary law in South Africa, but there are as many versions of customary law as there are indigenous communities.[41] Unfortunately, the fact that the Khoi-San continue to be labelled 'coloured' and their languages are not officially recognised languages often renders them invisible in the constitutional dispensation.[42] The marginalisation of the Khoi-San may be due to their relatively small number in relation to the total population (they are estimated to be 1 per cent[43] of South Africa's 60,4 million population) and, therefore, they may lack a political voice to ensure their recognition.[44]

Despite some debate regarding whether customary law should be recognised in a constitutional democracy, and in particular whether traditional leadership should be recognised given the hereditary and patriarchal system of succession in traditional leadership,[45] customary law is recognised as a valid system of law in South Africa. Sections 30 and 31 of the Constitution protect individual and group rights to culture, respectively, which entails the right of individuals to enjoy their culture, practise their religion, use their language, and form and maintain cultural, religious and linguistic associations. Cultural rights are usually best exercised in association with other people and, therefore, are described as associational individual rights.[46] The rights are also interpreted as recognising customary law.[47] In

38 The nine official indigenous languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, isiNdebele, isiXhosa and isiZulu; see the Constitution sec 6(1). The languages of the Khoi-San are not recognised as official languages.
39 C Rautenbach & AE Tshivhhase 'Nature and sphere of African customary law' in C Rautenbach (ed) *Introduction to legal pluralism* (2021) 22.
40 Rautenbach & Tshivhhase (n 39) 23.
41 Himonga & Nhlapo (n 1) 23; Van Kessel & Oomen (n 13) 572-578.
42 Le Fleur & Jansen (n 22) 2.
43 IWGIA 'The indigenous world 2022: South Africa' 1 April 2022, https://www.iwgia.org/en/south-africa/4642-iw-2022-south-africa.html (accessed 8 October 2024).
44 For a discussion of how the Khoi-San negotiated for their recognition, see Le Fleur & Jansen (n 22) 2-3.
45 N Mathonsi & S Sithole 'The incompatibility of traditional leadership and democratic experimentation in South Africa' (2017) 9 *African Journal of Public Affairs* 35, 38.
46 Bennett (n 7) 86. For a discussion of culture, see O Ampofo-Anti & M Bishop 'On the limits of cultural accommodation: *KwaZulu-Natal MEC for Education v Pillay*: Part III: Reflections on themes in Justice Langa's judgments' (2015) *Acta Juridica* 463-472.
47 *Gongqose v Minister of Agriculture, Forestry and Fisheries* 2018 (5) SA 104 (SCA) para 24; Bennett (n 7) 88.

addition, the Constitution recognises the existence of any other rights and freedoms in customary law to the extent that they do not conflict with the Bill of Rights, and provides that in the development of customary law courts must promote the spirit, purport and objects of the Bill of Rights.[48] Furthermore, the Constitutional Court, being the apex court in South Africa, described customary law as 'an integral part of our law' and confirmed that the Constitution 'acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system … In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'[49]

More pertinent for this article, the Constitution recognises that 'the institution, status and role of traditional leadership, according to customary law' are subject to the Constitution.[50] This provision centres customary law in the recognition of traditional leadership and recognises the role of traditional leaders without conferring upon them any functions.[51] Furthermore, the Constitution is sparse in the regulation of traditional leadership and provides that '[a] traditional authority that observes a system of customary law may function subject to any applicable legislation'.[52] It is thus envisaged that national legislation will regulate traditional leadership rather than the Constitution directly. Courts are further mandated to apply customary law subject to legislation[53] and the Constitution.[54] In the context of traditional leadership, it means that where the role or conduct of traditional leadership found in customary law conflicts with legislation, the legislation takes precedence – rendering the

48 Secs 39(2) and (3) of the Constitution. For a discussion of constitutional legal pluralism, see C Himonga 'The Constitutional Court of Justice Moseneke and the decolonisation of law in South Africa: Revisiting the relationship between indigenous law and common law' (2017) *Acta Juridica* 104-108.

49 *Alexkor Ltd v the Richtersveld Community* 2004 (5) SA 460 (CC) 480 para 51.

50 Sec 211(1) of the Constitution.

51 A role that may be ceremonial is distinguishable from a function that may carry responsibility and powers; Himonga & Nhlapo (n 1) 336-337.

52 Sec 211(2) of the Constitution.

53 For a discussion of some of the consequences of the statutory regulation of customary law, see F Osman 'The consequences of the statutory regulation of customary law: An examination of the South African customary law of succession and marriage' (2019) 22 *Potchefstroom Electronic Law Journal* 1-24.

54 Sec 211(3) Constitution. This section means that customary law must be brought into line with the Constitution. The courts have applied customary law directly by striking down customary law and indirectly by developing customary law. For a discussion of how the Constitution may apply, see W Lehnert 'The role of the courts in the conflict between African customary law and human rights' (2005) 21 *South African Journal on Human Rights* 241-277. The constitutional oversight has ensured that discriminatory customary practices are not perpetuated. Eg, the court has struck down the principle of male primogeniture (*Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC)), and developed customary law to require the consent of a first wife for a subsequent customary marriage (*Mayelane v Ngwenyama* 2013 (4) SA 415 (CC)).

legislation regulating the institution of traditional leadership critical in South Africa.

The TLGFA,[55] which entered into force in 2004, was the legislation enacted to provide for, among others, the recognition, function and roles of traditional leadership.[56] Section 20 of the TLGFA listed a range of areas in which traditional leaders and councils could be given a role, which included land administration and the administration of justice. Section 28 of the TLGFA recognised pre-existing tribes, traditional leaders and tribal authorities and deemed them to be traditional communities, traditional leaders and traditional councils, respectively, to be regulated in terms of the Act.[57] This provision entrenched the tribal authority boundaries established during apartheid.[58] While this may have ensured continuity in traditional governance matters, empirical research reveals that some individuals were dissatisfied about this as they did not want to form part of a traditional community but were not given an opportunity to say so.[59] It should be noted that the recognition of a 'traditional community' was important for the purposes of the TLGFA and for identifying the traditional leadership that governed the community. Accordingly, I use the term 'traditional community' as it is used in the relevant legislation and not interchangeably with the term 'indigenous people'.

Furthermore, a comprehensive critique of the TLGFA is beyond the scope of this article, but it should be noted that it was vehemently criticised because it was seen as the linchpin for other laws that treat people as subjects of traditional leaders, as was done in the pre-constitutional era.[60] Claassens argued that locking in people was

55 Act 41 of 2003.
56 TLGFA, Preamble.
57 Secs 28(1), (3) and (4) TLGFA. The TLGFA made provision for the transformation of these institutions and provided that a third of the councillors on a traditional council should be women and 40% were to be democratically elected while 60% may be appointed by a senior traditional leader (TLGFA sec 3). In this way, councils would be more representative of communities.
58 A Claassens 'Denying ownership and equal citizenship: Continuities in the state's use of law and "custom", 1913-2013' (2014) 40 *Journal of Southern African Studies* 761, 767.
59 J Ubink & T Duda 'Traditional authority in South Africa: Reconstruction and resistance in the Eastern Cape' (2021) 47 *Journal of Southern African Studies* 191, 205.
60 Claassens (n 58) 767-769. Claassens discusses how the TLGFA along with the Communal Land Rights Act 11 of 2004 (which Act was declared unconstitutional on a technicality in *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC)) and the Traditional Courts Bill of 2011 essentially locked people into areas where traditional leaders were the owners of land and the adjudicator of disputes. For a further discussion of this, see Ubink & Duda (n 59) 192-193. For a critique of the Traditional Courts Bill 2017, see F Osman 'Third time a charm? The Traditional Courts Bill 2017' (2018) 64 *South African Crime Quarterly* 45-53.

indicative of the state's lack of confidence in people choosing their customary identities through consensual affiliation.[61] More cynically, it may reflect the state's lack of confidence that people would voluntarily choose to be represented by a traditional leader. Claassens further criticised the TLGFA's revival of the traditional institutions and their boundaries for conflicting with the constitutional requirement that municipalities would be established throughout the country[62] to replace traditional authorities.[63]

The Act did not explicitly exclude Khoi-San leaders from recognition, but because they were not expressly recognised, it was interpreted to mean that they were not recognised in terms of the Act.[64] This is because the notions of 'customary law' and 'traditional leadership' were historically understood as applying to black indigenous groups in South Africa (and not the Khoi-San) and the Act continued the existing recognition of communities and traditional leadership.

Accordingly, the TLGFA, which was meant to recognise, regulate and transform existing traditional institutions, was not interpreted to apply to Khoi-San communities that were not historically recognised or regulated by the state. For ease of understanding, the article continues to use the notion of 'traditional community' and 'traditional leadership' to refer to the institutions associated with black indigenous groups.

3 Traditional leadership and the Khoi-San Act

The TKLA was advocated as being necessary to give long-awaited recognition to Khoi-San leadership in South Africa. Comprising 54 pages and 66 sections, the length of the TKLA is double that of the TLGFA, which makes up 20 pages and has 30 sections.[65] The substantial increase in length is due in part to the Act's approach of maintaining a distinction in the regulation of traditional and Khoi-San

61 Claassens (n 58) 769.
62 Sec 151(1) of the Constitution provides: 'The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.'
63 Claassens (n 58) 767.
64 High Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change 'Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change' November 2017 424, 428, https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf (accessed 8 October 2024).
65 For a general discussion of the similarities and differences between the TLGFA and TKLA, see MP Sekgala 'The role of traditional leaders in South Africa: Comparison between the Traditional and Khoi-San Leadership Bill, 2015 and the Traditional Leadership and Governance Framework Act 41 of 2003' (2018) 15 *Bangladesh e-Journal of Sociology* 80.

communities and leadership. The Traditional Khoi-San Leadership Bill was vehemently resisted by rural communities and civil society organisations because it was believed to confer disproportionate and illegitimate powers to traditional authorities over communities.[66] Most notably, the 'Stop the Bantustan Campaign' opposes the TKLA, along with other proposed legislation, for entrenching apartheid boundaries and conferring greater powers on traditional leadership.[67] In respect of land reform, the TKLA, when still a Bill, was flagged as being inconsistent with other laws governing communal land tenure and possibly irrational and unconstitutional.[68] I focus on the key differences in the Act's recognition of traditional and Khoi-San communities and the power conferred upon traditional leadership institutions to conclude partnership agreements because these provisions give rise to many of the critiques.[69]

3.1 Recognition of traditional community

Like its predecessor, the TKLA recognises existing traditional communities and leadership structures.[70] Communities and leaders recognised during the pre-constitutional era are automatically recognised based on their historical recognition.[71] This is problematic as it ignores the history of forced removals and state imposition of traditional leaders that have led to a plethora of disputes regarding the boundaries of communities and the legitimacy of traditional leaders.[72] The recognition of traditional leader that a community disputes denies people the right to define their own customary identity or affiliate with a leader of their choice.[73]

The TKLA further defines a traditional community as a traditional community recognised in terms of section 3 of the Act.[74] Section

66 S Mnwana 'Chiefs, land and distributive struggles on the Platinum Belt: A case of Bakgatla-ba-Kgafela in the North West Province, South Africa' 3-4, https://mistra.org.za/wp-content/uploads/2019/10/Sonwabile-Mnwana_Working-Paper_-Final.pdf (accessed 8 October 2024).
67 https://stopthebantustanbills.org/ (accessed 8 October 2024).
68 Presidential Advisory Panel on Land Reform and Agriculture 'Final Report of the Presidential Advisory Panel on Land Reform and Agriculture' 4 May 2019, https://static.pmg.org.za/panelreportlandreform_1.pdf (accessed 8 October 2024). The Constitutional Court in *Mogale* did not pronounce on the substance of the TKLA.
69 Sekgala provides an overview of the similarities and differences between the TLGFA and TKLA with respect to the role of traditional leadership; Sekgala (n 65) 80.
70 Section 63 TKLA. See Himonga & Nhlapo (n 1) 353.
71 High Level Panel on the Assessment of Legislation (n 64) 425.
72 See discussion above.
73 High Level Panel on the Assessment of Legislation (n 64) 423.
74 Definition of 'traditional community' in the TKLA.

3 of the Act, in turn, sets out the criteria for the recognition of a community as a 'traditional community'. Section 3(4) provides:

> (4) A community may be recognised as a traditional community if it –
> (a) has a system of traditional leadership at a senior traditional leadership level recognised by other traditional communities;
> (b) observes a system of customary law;
> (c) recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities;
> (d) occupies a specific geographical area;
> (e) has an existence of distinctive cultural heritage manifestations; and
> (f) where applicable, has a number of headmenship or headwomenship.

The important requirements that warrant further discussion are that the community has a system of traditional leadership at a senior traditional level and occupies a specific geographical area.

First, as to the system of traditional leadership, the Act assumes that every traditional community has senior traditional leadership (formerly known as a 'chief').[75] However, evidence suggests that this is not the case and that many communities have flat structures where there is no chief but rather leadership in the form of an elected headman or a committee of community members.[76] For example, in the AmaHlathi community in the Eastern Cape, various villages were led by their headmen, and when the headmen lost power, the community elected village chairpersons for fixed-term periods.[77] After a resident claimed chieftaincy over the community, some residents petitioned the Eastern Cape Committee on Traditional Leadership Disputes and Claims for the disestablishment of the senior traditional leadership position, claiming that they never had a chief and that it is contrary to their custom for one to be imposed upon them.[78] The claims and disputes surrounding chieftaincy in the AmaHlathi case study reveal how the requirement that a community have a system of senior traditional leadership creates the potential for power grabs, as either community members claim to occupy these positions or a senior traditional leader from another community claims authority over the community.

75 Himonga & Nhlapo (n 1) 332, 354.
76 Himonga & Nhlapo (n 1) 347; Ubink & Duda (n 59) 195-197.
77 Ubink & Duda (n 59) 199.
78 Ubink & Duda (n 59) 199-200.

Second, the Act requires that the community occupy a specific geographical area. The requirement of the occupation of a specified geographical area is important because this geographical area is likely to constitute the jurisdictional area of the traditional leadership council that presides over the traditional community. This is because the Act contemplates that the premier of a particular province will define the area of jurisdiction of a traditional leadership council (which may be a kingship or queenship council, principal traditional council or traditional council)[79] and the geographical area occupied by the community is likely to be the jurisdiction of a traditional leadership council. The traditional council accordingly exercises jurisdiction over an area of land. People thus fall under the jurisdiction of a council because of where they live, regardless of whether they voluntarily affiliate with the traditional leader and their council. This is problematic because, as was discussed earlier, the colonial and apartheid history of forced removals and relocations means that individuals may live in areas where they reject the legitimacy and authority of the presiding traditional leader or council, or the community's boundary. This imposition of traditional leadership on people without their consent may infringe on the right to culture, self-identification, and association with the traditional authorities of their choice, the very rights interpreted to confer a right to live according to customary law.[80]

In essence, the TKLA continues the TLGFA's model, and the problems of recognising existing communities and their boundaries. This is disappointing because, at its heart, customary law is defined as a system of voluntary affiliation,[81] as evinced by the notion of *inkosi yinkosi ngabantu* – a chief is a chief by the people.[82] This principle alludes to the idea that a chief's power, authority and legitimacy derive from the people who recognise him as such.[83] It was the colonial and apartheid state that distorted this understanding of traditional leadership and gave chiefs a state-enforced jurisdiction over land, regardless of whether the inhabitants of the area recognised the authority and legitimacy of the chief,[84] and which is continued under the TKLA.

The consequences of locking people in are exacerbated by the current socio-economic conditions, which do not allow people to move away (as they did before they were locked into the

79 Sec 16(5)(a) TKLA.
80 See discussion above on the historical recognition of customary law.
81 Himonga & Nhlapo (n 1) 229-230.
82 Himonga & Nhlapo (n 1) 341.
83 Himonga & Nhlapo (n 1) 341.
84 See discussion above on the historical recognition of customary law.

homelands)[85] if they are unhappy with traditional leadership. South Africans living in the former homelands under traditional leadership often are the poorest and most vulnerable in South Africa. For example, in the Eastern Cape province,[86] mostly constituted of the areas of the former homelands of Transkei and Ciskei, infrastructure (such as roads, water and telecommunications) was never developed and the province remains one of the most underdeveloped in the country.[87] The state has failed dismally to provide access to basic services such as sanitation and water in the province.[88] The province has one of the highest unemployment rates in the country, at 32,2 per cent and an expanded unemployment rate of 43,6 per cent.[89] It is also considered to be one of the most dangerous in South Africa with the highest murder rate in the country.[90] These socio-economic constraints mean that individuals cannot simply move away if dissatisfied with the traditional leadership.

Furthermore, secession as a means of holding traditional leadership accountable was also rendered difficult under the TLGFA. For example, the North West High Court in *Pilane v Pilane* interdicted a village from meeting to discuss secession plans where they were unhappy with the broader traditional leadership.[91] While the Constitutional Court overturned the judgment, the saga revealed that secession may no longer be a viable means of holding traditional leaders accountable.

The complexity of enforcing accountability mechanisms compounds the above concerns. Schedule 1 to the TKLA contains a code of conduct for members of traditional councils.[92] The code is

85 Delius (n 12) 213.

86 In 2016 the Eastern Cape province was the third most populous province in the country with a population of almost 7 million people, 86% of which were black South Africans; Statistics South Africa 'Provincial profile: Eastern Cape community survey 2016' 2018 7, 15, http://cs2016.statssa.gov.za/wp-content/uploads/2018/07/EasternCape.pdf (accessed 24 October 2018); Statistics South Africa 'Quarterly labour force survey. Quarter 1: 2017' https://www.statssa.gov.za/publications/P0211/P02111stQuarter2017.pdf (accessed 19 April 2023).

87 For a general discussion of the rural area in South Africa, see C Himonga & E Moore *Reform of customary marriage, divorce and succession in South Africa* (2015) 16-18.

88 Pit toilets are still the norm at 1 500 schools in the province where schools often cannot provide students with a useable toilet during the schooling day; see M Sizani 'Stinking, broken, overflowing: These are the pit toilets Eastern Cape learners are expected to use at school' GroundUP 15 October 2021, https://www.groundup.org.za/article/stinking-broken-overflowing-these-are-pit-toilets-eastern-cape-learners-are-supposed-use-school/ (accessed 11 October 2024).

89 Statistics South Africa 'Quarterly labour force survey' (n 86).

90 Staff writer 'These are the most violent areas in South Africa' *BusinessTech* 23 November 2022, https://businesstech.co.za/news/government/645545/these-are-the-most-violent-areas-in-south-africa/ (accessed 19 April 2023).

91 *Pilane v Pilane* (263/2010) [2011] ZANWHC 80 (30 June 2011). See discussion in Claassens (n 58) 775. The judgment was overturned in the Constitutional Court in *Pilane v Pilane* 2013 (4) BCLR 431 (CC).

92 Schedule 1 TKLA.

broad and covers the declaration of personal interests, the prohibition of using the position for personal gain, and the solicitation of gifts and favours.[93] Furthermore, section 9(1)(b) of the TKLA provides for the withdrawal of recognition of a traditional leadership position where an individual has been removed from office in terms of the code of conduct or has transgressed customary law or customs on a ground that warrants withdrawal of recognition. Thus, traditional leadership, in theory, may be held accountable under the Act. However, reality has proved otherwise, as exemplified in *Pilane* mentioned above. Mr Nyalala Molefe Pilane was the senior traditional leader or *kgosi* of the Bakgatla-ba-Kgafela community located in the North-West province.[94] For years before his removal, *Kgosi* Pilane had been embroiled in controversy amidst claims that he exploited his position of chieftancy to benefit from lucrative mining deals while the community remained impoverished.[95] There were numerous attempts to remove *Kgosi* Pilane from office and demands for an audit of the financial accounts, which proved futile.[96] Even after an internal audit detailing reckless and extravagant expenditure for his own benefit with minimal funds flowing to the community, there was no accountability and he retained his position.[97] While *Kgosi* Pilane was subsequently removed from his position, the controversy underscores the difficulty in holding traditional leaders accountable.

Balancing the recognition of traditional communities and respecting customary law in a constitutional democracy is complex. It involves acknowledging traditional communities and customary law practices while respecting people's rights to choose their leaders. In this balancing exercise, the current legal position errs in favour of traditional leadership at the expense of people's rights to elect their leaders. This, I submit, is untenable because it potentially infringes on rights to culture and self-identification by locking people into traditional communities and leadership without their consent. Concerns about this are compounded by the fact that moving away, secession and holding traditional leaders accountable is difficult or near impossible. Accordingly, the TKLA must allow people to express their affiliation to a leader, rather than impose a traditional leader on them. Fortunately, here the Act provides a possible alternative in how it recognises a Khoi-San community, and is discussed below.

93 Secs 5, 6, 7 & 8 of Schedule 1 TKLA.
94 *Pilane v Pilane* 2013 (4) BCLR 431 (CC) para 2.
95 G Capps & S Mnwana 'Claims from below: Platinum and the politics of land in the Bakgatla-ba-Kgafela traditional authority area' (2015) 42 *Review of African Political Economy* 612-613.
96 Capps & Mnwana (n 95) 613; A Claassens & B Matlala 'Platinum, poverty and princes in post-apartheid South Africa: New laws, old repertoires' in GM Khadiagala and others (eds) *New South African Review 4* (2014) 125.
97 Claassens & Matlala (n 96) 125-126.

3.2 Recognition of the Khoi-San community

The recognition of a Khoi-San community conflicts starkly with that described above. A Khoi-San community is defined as a Khoi-San community recognised in terms of section 5 of the Act.[98] Section 5(1)(a) of the TKLA in turn provides that a community may apply to be recognised as Khoi-San community if it –

(i) has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities;
(ii) observes distinctive established Khoi-San customary law and customs;
(iii) is subject to a system of hereditary or elected Khoi-San leadership with structures exercising authority in terms of customary law and customs of that community;
(iv) has an existence of distinctive cultural heritage manifestations;
(v) has a proven history of existence of the community from a particular point in time up to the present; and
(vi) occupies a specific geographical area or various geographical areas together with other non-community members.

The Act further provides that an application for the recognition of a community as a Khoi-San community must be accompanied by, among others, an application for the recognition of the position of a senior Khoi-San leader of that community and a list of all community members, which includes their names, surnames, identification numbers and signatures acknowledging their association with the community.[99]

From the statutory provisions, it is apparent that the recognition of both a traditional community and Khoi-San community requires a history of self-identification as a traditional community distinct from other communities. As stated previously, section 3(4)(c) of the TKLA requires that a traditional community, among others, 'recognises itself as a distinct traditional community with a proven history of existence, from a particular point in time up to the present, distinct and separate from other traditional communities'. This is similar to the requirements for the recognition of a Khoi-San community which in section 5(1)(a)(i) requires that the Khoi-San community 'has a history of self-identification by members of the community concerned, as belonging to a unique community distinct from all other communities'. This difference, however, is that the TKLA's recognition of a Khoi-San community is centred on community members self-identifying as part of the community. In respect of

98 Definition of 'Khoi-San community' in the TKLA.
99 Secs 5(1)(b)-(d) TKLA.

Khoi-San communities, the Act goes beyond requiring a history of self-identification by community members for recognition as a community. An application for the recognition of a community as a Khoi-San community must be accompanied by a list of members, along with their details, acknowledging their association with the community.[100]

Furthermore, the recognition of a Khoi-San community envisages that the community may be porous and, while they may occupy a specific geographical area, they may also occupy various areas with other non-community members.[101] The implication is clear that the community is defined by the individuals who voluntarily identify as part of the community (not by the area of land) and not everyone living within the geographical area may be a community member. Thus, individuals are not classified as belonging to a Khoi-San community simply because they live in a particular area. There must be an explicit voluntary association with the community. As the people define the community – and not an area of land – the Act provides that the Khoi-San council exercises jurisdiction over only such members who have voluntarily affiliated with the community.[102]

In contrast, the recognition of a traditional community does not require a list of community members who, through signature, acknowledge their association with the community. The risk is clear: Some individuals may form part of a community and fall under the jurisdiction of a traditional leader even where they do not voluntarily affiliate with the community or leader. If individuals reside in a community where there is a general history of self-identification as a traditional community, individuals will be subsumed into the community.

From the above it is clear that the state has adopted unmistakably different approaches to the recognition of traditional and Khoi-San communities, which difference itself is not problematic. The problem lies in the rationale and impact of the differentiation. It may be that the distinction in recognition is based on continuity. As discussed previously, black indigenous groups were historically confined to the homelands and had chiefs placed over them who exercised jurisdiction over the area of land and all people on the land. The TLGFA, and now the TKLA, continue this recognition of jurisdiction over the land. Khoi-San communities, however, were never allocated distinct areas of land and Khoi-San leaders never exercised jurisdiction

100 Secs 5(1)(a)(i) and 5(1)(b)(ii) of the Act.
101 Secs 5(1)(a)()(vi) of the Act.
102 Sec 18(4) TLKA.

over land. To confer jurisdiction over land on Khoi-San leaders would first require them to be given areas of land. This would be complex and would open a Pandora's box. The state has shied away from conferring land rights and jurisdiction to the Khoi-San, who as the first people may have large land claims.[103] The TKLA thus continues the existing model of recognition.

However, could the state do better than reproduce the pre-constitutional era's approach to recognising traditional communities? Could the recognition of a traditional community be based on voluntary affiliation, as is done with a Khoi-San community? Importantly, this would accord with the customary law understanding that a community is formed through voluntary affiliation, as was discussed in the historical recognition of customary law. It would furthermore treat traditional leaders and Khoi-San leaders equally. Finally, it addresses a monumental critique currently levelled against the regulation of traditional leadership in South Africa: It is a system imposed on citizens in South Africa's rural areas without them having a choice.[104] Voluntary affiliation requires individuals to choose to participate in the system, and it avoids the imposition of the system based on an individual's geographical location – a remnant of the apartheid era spatial policies. Voluntary affiliation, of course, has difficulties – for example, it may be administratively onerous to keep up-to-date records of individuals who affiliate to a traditional leader – and may need improvement, but it, nonetheless, demonstrates that voluntary affiliation remains a plausible solution, and while there may be room for improvement in how the system is managed, recognising a traditional community should be based on voluntary affiliation.

3.3 Section 24 partnership agreements

Section 24 of the TKLA allows traditional and Khoi-San councils to enter into partnership agreements with municipalities, government departments and any other person, body or institution. This is a new section not found in the TLGFA and a broadening of the original position that envisaged partnerships between councils and municipalities, being state institutions.[105] The powers of traditional councils have seemingly been broadened to conclude partnership

103 In this regard, the initial date for land restitution claims in the Land Restitution Act 22 of 1994 was set at 1913, a date that many Khoi-San claimed was after they had been dispossessed of their land.

104 A Claassens & G Budlender 'Transformative constitutionalism and customary law' (2013) 6 *Constitutional Court Review* 75, 82.

105 Clause 24 Traditional Affairs Bill.

agreements with private entities. These agreements may be popular with mining companies, who are required to engage with the traditional leader and council (and not the entire community or rights holders within the community) before commencing operations within a community.[106] This is advantageous to the company as the community may have varied and differentiated interests that cannot be reconciled with those of the company. The section assumes that traditional leaders speak for and act in the best interests of citizens in rural areas when they may favour their own interests and those of the company.[107] The TKLA requires that a partnership agreement be beneficial to the community, clearly detail the responsibilities of parties and the termination of the agreement and be subject to prior consultation with the relevant community where a majority of the community members present at the consultation support the partnership or agreement.[108]

The provisions appear to directly address previous criticisms that empowered councils to conclude agreements on behalf of communities without their consultation and consent.[109] The TKLA, in a welcomed amendment, now explicitly requires the council to conduct a prior consultation with the community and a majority of the community members present at the consultation to make a decision in support of the partnership or agreement, which presumably means consent to the agreement. Unfortunately, the section remains problematic. Section 24 requires a consultation with the relevant community represented by the council, and a majority of the community members present at the consultation must support the decision. In a glaring omission, the section does not stipulate who from the community must be consulted. Must it be all or a majority of the members of the community? Will consultation with a minority of the community or merely the traditional council members suffice? Is the gender, age and general representativity of the consulted community members relevant? What about representativity on views? If the council consults only with members aligned with their views, does it satisfy the requirement for consultation?

More distressing is the fact that the section does not appreciate the nuanced nature of customary land rights. The council must

106 D Huizenga 'Governing territory in conditions of legal pluralism: Living law and free, prior, and informed consent (FPIC) in Xolobeni, South Africa' (2019) 6 *Extractive Industries and Society* 715.
107 Huizenga (n 106) 715.
108 Sec 24(3) TKLA.
109 Parliament 'Report: Stakeholders inputs and public hearings: Traditional and Khoi-San Leadership Bill, [B23-2015]' 30 August 2017, https://pmg.org.za/committee-meeting/24909/ (accessed 19 April 2023).

consult with the represented community broadly, but there is no acknowledgment that there may be different rights holders in a community. For example, consider a scenario where a company wants to commence mining operations within a community. The proposed mining may have varied consequences. It may require some people to vacate their homes and relocate elsewhere, contaminate the water supply of some residents, bring employment to some men and have no impact on others. The legislation does not cater for these differentiated interests and accord them weight in the consultation process. What happens if the council consults only with those who benefit or are not impacted by the mining? Should their support for the agreement mean that the requirements of the section have been satisfied, despite those who stand to lose their homes not being consulted or refusing to support it? The blunt requirement of consultation and support ignores the different nature of rights and the varied impact an agreement may have on rights holders. Surely, affected rights holders must be involved in the process and their interests weighed more heavily. Rather, the provision allows for the expeditious conclusion of agreements between traditional councils and companies at the risk of individual rights.

Furthermore, section 24 of the TKLA may conflict with other legislation. The power conferred upon traditional councils to conclude agreements such as the sale of land without the consent of rights holders in terms of section 24 of the TKLA conflicts with the Interim Protection of Informal Land Rights Act (IPILRA).[110] The IPILRA was enacted to give effect to the constitutional right to legally secure tenure or comparable redress.[111] It provides that subject to law, 'no person may be deprived of any informal right to land without his or her consent'.[112] An informal land right is defined to include the use, occupation and access to land in terms of customary law. Where land is held on a communal basis, a person may 'be deprived of such land or right in land in accordance with the custom and usage of that community',[113] which is

> deemed to include the principle that a decision to dispose of any such right may only be taken by a majority of the holders of such rights present or represented at a meeting convened for the purpose of considering such disposal and of which they have been given

110 The Interim Protection of Land Rights Act 31 of 1996 (IPILRA).
111 Sec 25(6) of the Constitution provides: 'A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.'
112 Sec 2(1) IPILRA.
113 Sec 2(2) IPILRA.

sufficient notice, and in which they have bad a reasonable opportunity to participate.[114]

The IPILRA thus provides much stronger protection to land right holders than the TKLA. First, it explicitly requires the rights holder's consent before a deprivation of an informal land right may occur. Where land is held on a communal basis it acknowledges the differentiated nature of rights – requiring any decision to dispose of rights to be made by a majority of the holders of such rights present at the meeting. This differs from the TKLA which does not specify that the council must consult with the affected rights holders. It begs the question of whether IPILRA or the TKLA will take precedence in determining who must be consulted before an alienation of rights can occur.

The Constitutional Court in *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* confirmed the strength of IPILRA's rights conferred in the context of granting mining rights.[115] The Constitutional Court held that the Mineral and Petroleum Resources Development Act (MPRDA),[116] which only requires communities to be consulted in the granting of mining rights, does not trump IPILRA, and the full and informed consent of communities is required for a mining right to be granted in terms of the MPRDA.[117] The TKLA threatens the rights conferred by IPILRA once again and the defence of land tenure will fall to the courts. The issue will be whether the TKLA trumps IPILRA and allows the sale of land without the safeguards of IPILRA. This is particularly concerning given that IPILRA was only meant to provide temporary protection for land rights. Its provisions may not be extended once the Communal Land Tenure Policy (meant to be the permanent policy regulating customary land holding) is enacted. The feared consequence is that the Communal Land Tenure Policy and the TKLA may, as in the pre-constitutional era, allow land dispossession without an individual's consent.

114 Sec 2(2) IPILRA.
115 *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 (2) SA 1 (CC).
116 Act 28 of 2002.
117 *Maledu* (n 115); *Baleni v Minister of Mineral Resources* 2019 (2) SA 453 (GP). A full discussion of the case is beyond the scope of the article, but see TM Tlale 'Conflicting levels of engagement under the Interim Protection of Informal Land Rights Act and the Minerals and Petroleum Development Act: A closer look at the Xolobeni Community Dispute' (2020) 23 *Potchefstroom Electronic Law Journal* 1.

4 Conclusion

The apartheid state's artificial categorisation of individuals according to race resulted in the differentiated treatment of South Africa's indigenous population. Black South Africans were systematically dispossessed of their land and confined to the homelands, and were controlled through, among others, traditional leaders and the (oft-distorted) application of customary law. The lighter-skinned Khoi-San were classified as 'coloured' and dispersed throughout the country without recognising their indigeneity. The TKLA was advocated to give long overdue recognition to Khoi-San communities and leaders.

This article examines the TKLA's different approaches to recognising traditional communities and Khoi-San communities and the power to enter into partnership agreements. It reveals that self-identification is centred in recognising Khoi-San communities, with the TKLA requiring community members to confirm by signature their affiliation to a Khoi-San community. This would have been welcomed in the recognition of other communities, given the disputes regarding the legitimacy of traditional leaders and the boundaries of communities. It would ensure that individuals are not subsumed into communities with which they do not affiliate. Furthermore, the requirements for the identification as a community, such as the existence of a senior traditional leader and conferring upon a traditional council jurisdiction over land and those who live on it, are not from customary law. Many communities did not have senior traditional leadership and, thus, the requirements are at odds with customary law. Thus, the TKLA presents a peculiar anomaly of recognising traditional communities contrary to customary understandings of the formation of communities and then confers on traditional leaders the power to enter into partnership agreements on behalf of communities in terms of section 24 of the TKLA.

Section 24 of the TKLA raises alarm bells as its requirements for consultation with a community are ambiguous. It does not specify who in the community must be consulted before the conclusion of an agreement. More specifically, contrary to IPILRA, the TKLA does not specify that rights holders must be consulted before alienating rights. This is alarming and dangerous as vulnerable citizens may have the land sold without their consent.

As Parliament is meant to re-enact the TKLA in a manner consistent with the Constitution or to pass another statute in a manner consistent with the Constitution, it is hoped that the re-enactment or new Act will address these substantive concerns. Centring self-identification

by requiring individuals to expressly affiliate with a community in the recognition of a traditional community will allow citizens to express their constitutional rights of cultural association and accord with customary law notions for the identification of a community. It will ensure that individuals are not locked into a traditional leadership they dispute. Finally, section 24 of the TKLA should be amended to explicitly require consultation with rights holders before the conclusion of partnership agreements and mirror the protections conferred in IPILRA. These changes would hopefully address the most significant substantive concerns regarding the TKLA and signal the state's intent to protect the rights of its most vulnerable citizens.

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The right to food in South Africa: A consumer protection perspective

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Summary: *The right to food is a recognised human right, particularly within socio-economic rights. In South Africa, this right is still evolving but has become increasingly significant as global hunger worsens. Importantly, the right to food means not the right to be given food, but the right to access safe, nutritious and affordable food, which is crucial for health and development. Malnutrition, especially in low and middle-income countries, affects both children and adults. It includes various forms of undernutrition and micronutrient deficiencies that impair the body's ability to grow and function properly. There are also challenges related to obesity and diet-related non-communicable diseases, which have become major public health concerns. NCDs such as heart disease and cancer often stem from poor diets and lifestyle choices. In South Africa, unhealthy eating habits – such as the consumption of foods high in sugar, salt and unhealthy fats – have contributed to the rise in these conditions, especially in lower-income communities where healthier food is less accessible for different vulnerable groups. South Africa's*

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health system is burdened by a combination of communicable and non-communicable diseases, making the need for preventative measures more urgent. Regulatory interventions are crucial to managing this health crisis. This article emphasises the need for stronger legislation, particularly around food labelling and advertising, to protect consumers. The article analyses the right to food and food insecurity from a national and global perspective, as well as conducting a review of case law surrounding food rights. The article will further discuss South Africa's food law and regulatory interventions to combat NCDs, focusing on consumer protection through labelling and advertising regulations, particularly the proposed new regulations, which are yet to be passed, on labelling and advertising of foodstuffs.

Key words: *non-communicable diseases; human rights; consumer protection; food security; food law; right to food; labelling requirements*

1 Introduction

The right to food is considered a human right, falling under socio-economic rights.[1] While still a fairly recent concept in terms of its content, particularly in South Africa, the importance of this right has been progressively increasing over time as world hunger continues to worsen. As will be discussed in greater detail below, the right to food does not imply the right to be given food. Instead, it bestows on everyone a right to have access to food that is safe, accessible, affordable, as well as nutritious. Nutrition is an integral part of an individual's health and development. Malnutrition has resulted in approximately 45 per cent of deaths among children under the age of five, mostly occurring in low and middle-income countries.[2] Malnutrition takes on various forms, including undernutrition, which has four broad sub-forms, namely, 'wasting, stunting, underweight, and deficiencies in vitamins and minerals';[3] and micronutrient-related malnutrition. The latter refers to inadequacies in mineral and vitamin intake which enable the body to produce hormones, enzymes and other substances essential for proper growth and development.[4]

1 This is evident from its inclusion in numerous human rights instruments, including, but not limited to, art 11 of the International Covenant of Economic, Social and Cultural Rights of 1966, as well as ch 2, sec 27(1)(b) of the Constitution of the Republic of South Africa, 1996. Ch 2 contains the human rights or fundamental rights of South Africa.

2 WHO 'Malnutrition – Key facts' (2021), https://www.who.int/news-room/fact-sheets/detail/malnutrition (accessed 24 March 2023).

3 As above.

4 As above.

Micronutrient-related malnutrition has two further sub-categories, namely, overweight and obesity as one sub-category; and diet-related non-communicable diseases (NCDs) as the second. Obesity poses a global public health problem.[5] South Africa is one of the countries in the world with the highest prevalence of obesity, with projections estimated to be 47,7 per cent in females and 23,3 per cent in males by the year 2025.[6] The high prevalence of obesity further leads to an increase in NCDs, to which this article will mostly refer.

According to the World Health Organisation (WHO), NCDs account for 71 per cent of all global deaths.[7] In 2017 the Global Burden of Disease Study estimated that 22 per cent of all deaths were diet-related.[8] This makes NCDs the leading cause of deaths worldwide. NCDs are referred to as chronic illnesses, for instance cancer, resulting from a combination of physiological, genetic, behavioural and environmental factors.[9] These types of illnesses are mainly chronic respiratory diseases, such as asthma, and cardiovascular diseases such as heart attacks or strokes.[10]

South Africa has a poor health prognosis and has been associated with 'a quadruple burden of communicable diseases, NCDs, maternal and child health, as well as injury-related disorders'.[11] There is a further growing trend of multi-morbidity, with the increasing need for resources to be allocated to the management and treatment of 'human immunodeficiency virus (HIV)/NCDs and tuberculosis mycobacterium (TB)/diabetes'.[12] A shift in dietary patterns has also led to an increase in NCDs, with the poorer communities moving away from the more traditional healthier foods, and adopting diets that are high in sugar, salt and trans fats, leading to food-related NCDs.[13] The reason behind this shift in patterns has been determined to be the socio-economic development in the country, as well as globalisation that has resulted in a change in the food environment,

5 As above.
6 M Manafe and others 'The perception of overweight and obesity among South African adults: Implications for intervention strategies' (2022) 19 *International Journal of Environmental Research and Public Health* 1.
7 WHO 'Noncommunicable diseases' (2021), https://www.who.int/news-room/fact-sheets/detail/noncommunicable-diseases (accessed 7 June 2022).
8 D Rozanska and others 'Dietary patterns and the prevalence of non-communicable diseases in the PURE Poland Study participants' (2023) 15 *Nutrients* 2.
9 WHO (n 7).
10 As above.
11 E Samodien and others 'Non-communicable diseases – A catastrophe for South Africa' (2021) 117 *South African Journal of Science* 1.
12 As above.
13 K Reddy 'Food products and non-communicable disease: Implications of the Consumer Protection Act 68 of 2008' (2018) 3 *Journal of South African Law* 569.

with sweet and salty snacks, sugar-sweetened beverages and fast foods being made more affordable and easier to access.[14]

The situation involving food-related NCDs in South Africa thus is in need of regulatory interventions to help curb the increasing number of NCDs in South Africa, for instance, the passing of the Regulations Relating to the Labelling and Advertising of Foodstuffs',[15] which will be discussed below. Consumers can be highly influenced by promotional marketing within the food industry, with suppliers generally being large enterprises whose sole purpose is to make a profit, even at the expense of the health of consumers.[16] In addition to this, vulnerable groups, that is, low-income persons, children and individuals who are illiterate or have trouble reading and understanding food labels and advertisements, are at a greater risk of making detrimental food choices that could affect their health negatively.[17] The government has proposed measures in the past, such as a sugar tax on sweetened drinks and limits on salt in common food. However, Reddy believes that these steps are not enough to protect consumers from NCDs, and broader legislation is needed.[18]

This article investigates the legislation surrounding consumer protection in relation to NCDs, with particular focus being placed on labelling requirements and adherence. The article will first provide a brief discussion on food security and food law internationally and nationally, as well as legislation and case law linked thereto, as a means to unpack the right to food.

2 Global food insecurity

Food insecurity is defined by the Food and Agricultural Organisation (FAO) to exist when a person lacks 'regular access to enough safe and nutritious food for normal growth and development and an active and healthy life'.[19] The reasons for this may vary from the unavailability of food, to a lack of the resources necessary to obtain nutritious food.[20] In 2015 the African Union (AU) Commission adopted the Agenda 2063, a framework aimed at fostering sustainable development across Africa including, but not limited to, improvements in health

14 As above.
15 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Regulations Relating to the Labelling and Advertising of Foodstuffs, R.3337 (Draft Regulations).
16 Reddy (n 13) 570.
17 As above.
18 As above.
19 Food and Agriculture Organisation of the United Nations (FAO) 'Hunger and food insecurity', https://www.fao.org/hunger/en/ (accessed 9 June 2021).
20 As above.

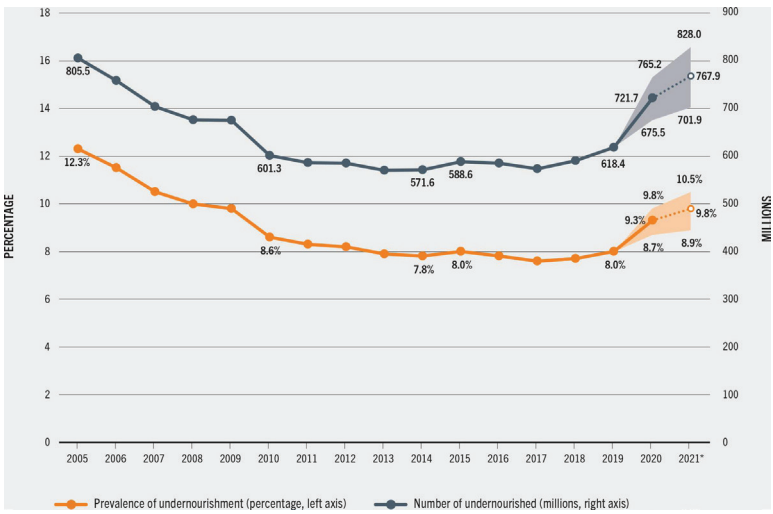
and nutrition.[21] On a more global scale, in the same year the United Nations General Assembly (UNGA) issued the Resolution on the 2030 agenda for sustainable development.[22] This Resolution demonstrates the ambition and scale of the new universal agenda through 17 Sustainable Development Goals (SDGs) and 169 targets.[23] These goals range from achieving gender equality and clean water and sanitation, to ending poverty. For purposes of this article, goal 2 is relevant as it seeks to end hunger, achieve food security and improved nutrition, and promote sustainable agriculture.[24] Accordingly, these goals should be reached by the year 2030.

Achieving goal 2 has had major setbacks, recently more due to the COVID-19 pandemic (pandemic). The pandemic brought with it growing numbers of people facing hunger and food insecurity, as the crisis aggravated pre-existing inequalities that were already hindering progress beforehand.[25] This is due to the inflation of food prices, driven by the economic impacts of the pandemic, as well as measures taken to control it, which made healthy diets more expensive and less affordable, particularly for vulnerable groups.[26] This also highlighted the challenges related to malnutrition in all forms, particularly child malnutrition, which is expected to be higher owing to the pandemic.[27] In 2021 the pandemic was still prevalent and worsened in some parts of the world. The gross domestic product (GDP) of most countries globally in 2021 'did not translate into gains in food security in the same year'.[28] The countries facing the worst of the pandemic effects continue to face enormous challenges. These are the countries with lower and more unstable income, less wealth and poorer access to critical services.[29]

In addition to this, the state of food security worldwide has further been affected by the war in Ukraine – an ongoing crisis as at the time of writing this article. Tension between Russia and Ukraine has been ongoing since Russia's illegal annex of Crimea, a peninsula in Ukraine,

21 African Union 'Agenda 2063: The Africa we want' Addis Ababa, Ethiopia (2014).
22 Transforming our world: The 2030 Agenda for Sustainable Development (25 September 2015) UNGA A/70/L 1.
23 UNGA (n 22).
24 UNGA (n 22) para 2.1.
25 FAO, IFAD, UNICEF, WFP and WHO *The state of food security and nutrition in the world 2022* (2022). FAO 'Repurposing food and agricultural policies to make healthy diets more affordable' 9, https://doi.org/10.4060/cc0639en (accessed 9 June 2021).
26 FAO (n 25) 47.
27 FAO (n 25) 9.
28 As above.
29 As above.

in 2014.[30] The situation escalated to a full-scale war in 2022 when President Vladimir Putin sent up to 200 000 soldiers into Ukraine.[31] This war has had a negative impact on the food insecurity crisis as both Russia and Ukraine are two of the most central producers of agricultural commodities in the world.[32] Prior to this war, Russia and Ukraine together contributed 30 per cent and 20 per cent of all global maize and wheat products.[33] They also supplied 80 per cent of all global exports of sunflower seed products.[34] The war in Ukraine has led to massive disruptions in agricultural exports, exposing global food and fertiliser markets to increased risks of 'tighter availabilities, unmet import demand, and higher international prices'.[35] Numerous low-income food-deficit countries (LIFDCs), as well as those countries falling into the group of least-developed countries (LDCs), rely heavily on imported fertilisers and food stuffs from these two countries and, as such, have struggled to meet their consumption needs.[36] These are some of the recent major events that have contributed to the food insecurity crisis worldwide. The diagram below reveals the prevalence of undernourishment from 2005, with projected rates for 2021:[37]



30 'Has Putin's war failed and what does Russia want from Ukraine?' *BBC News*, https://www.bbc.com/news/world-europe-56720589 (accessed 3 March 2023).
31 As above.
32 FAO (n 25) 20.
33 As above.
34 As above.
35 FAO (n 25) 20.
36 As above.
37 FAO (n 25) 13.

According to the above diagram, it can be seen that the prevalence of undernourishment was relatively unchanged from 2015, but it spiked in 2019 from 8 per cent to 9,3 per cent in 2020.[38] This rise continued in 2021, although at a slower pace, to 9,8 per cent. Approximately between 702 and 828 million people globally faced hunger in 2021.[39] This translates to approximately 8,9 per cent and 10,5 per cent of the world population respectively. From a global perspective, Africa suffered from hunger the most with one in five people facing hunger in 2021, as compared to '9,1 percent in Asia, 8,6 percent in Latin America and the Caribbean, 5,8 per cent in Oceania, and less than 2,5 per cent in Northern America and Europe'.[40] In addition to this, the proportion of the population affected by hunger increased the most on the African continent.[41]

3 Food insecurity in South Africa

There is no single standard definition for food security, as it has been described in various ways over time. There have been numerous attempts at providing a definition through research and policy usage, which has resulted in over 200 definitions having been provided in published work.[42] From these definitions, certain elements of food insecurity have become apparent, namely, (i) availability; (ii) a ccessibility; (iii) affordability; (iv) nutrition; and (v) stability.

Availability refers to the supply of food in a country. Accordingly, there has to be a national supply of food that is sufficient to feed the general population. This is determined by the level of food production, net trade and stock levels.[43] Accessibility refers to the ability of individuals to have access to the food that is available. This would consider the markets, general incomes, food prices and expenditures.[44] This element can also refer to one's ability to grow their own food, or fish for their food, or any other means of attaining food. In order to maintain a healthy diet, the food that is available also has to be nutritious, that is, healthy. However, food affordability is a key determinant of adequate nutrition and food security as it will

38 FAO (n 25) 11.
39 As above.
40 FAO (n 25) 13.
41 As above.
42 W Peng & E Berry 'The concept of food security' (2019) 2 *Encyclopaedia of Food Security and Sustainability* 1.
43 World Bank 'What is food security?', https://www.worldbank.org/en/topic/agriculture/brief/food-security-update/what-is-food-security (accessed 28 March 2023).
44 As above.

determine whether one has access to nutritious foods.[45] It has been defined as 'the capacity to pay a market price for food compared to the proportion of a household's income and other expenses'.[46] These elements all have to reach stability over time, and individuals need to have access to affordable, nutritious food at all times in order for a country to be considered food secure.

South Africa is considered to be the net exporter of processed and agricultural food products, having reached the second highest level of US $10,2 billion in the year 2020 following a good production season.[47] Thus, on a national level, South Africa is considered to be food secure, in that the food supply is available.[48] However, food security has other aspects, as mentioned above. The lack of accessibility to nutritious foods by much of the population makes South Africa food insecure at a household level. Individuals employed in the informal sector suffer the most from food insecurity as they often experience a lack of access to welfare and social services, basic health care, and other resources necessary for their well-being.[49]

In 2022 the World Bank categorised SA as the most unequal country globally, the reasons for this being the missing middle class; the legacy of apartheid; racial inequalities; and highly unequal land ownership.[50] It was further determined that approximately 10 per cent of the population controls 80 per cent of the wealth in South Africa.[51] This further engrains the socio-economic divide in the country. Before the COVID-19 pandemic, South Africa was already considered the most unequal country in the world 'with the rich getting richer and the poorer getting poorer'.[52] The country was already facing service delivery issues, rampant crime, inequality, poverty, institutionalised

45 World Business Council for Sustainable Development (WBCSD) 'Food Affordability – The role of the food industry in providing affordable, nutritious foods to support healthy and sustainable diets' 2022 5, https://www.wbcsd.org/Programs/Food-and-Nature/Food-Land-Use/FReSH/Resources/Food-Affordability-The-role-of-the-food-industry-in-providing-affordable-nutritious-foods-to-support-healthy-and-sustainable-diets (accessed 9 June 2022).

46 As above.

47 W Sihlobo 'South African riots and food security: Why there's an urgent need to restore stability' *The Conversation*, https://theconversation.com/south-african-riots-and-food-security-why-theres-an-urgent-need-to-restore-stability-164493#:~:text=South%20Africa%20is%20generally%20a,following%20a%20favourable%20production%20season (accessed 9 June 2022).

48 As above.

49 V Mlambo & N Khuzwayo 'COVID-19, food insecurity and a government response: Reflections from South Africa' (2021) 19 *Technium Social Sciences Journal* 2.

50 World Bank 'Inequality in Southern Africa: An assessment of the Southern African customs union' (2022), https://documents1.worldbank.org/curated/en/099125303072236903/pdf/P1649270c02a1f06b0a3ae02e57eadd7a82.pdf#page=14 (accessed 1 September 2024).

51 As above.

52 Mlambo & Khuzwayo (n 49) 2.

corruption and high rates of unemployment.[53] While the ongoing pandemic has exacerbated the issue of food insecurity, other factors, including slow economic growth, an increase in food prices and droughts, have been prevalent even prior to the pandemic.[54]

Measures introduced to assist in curbing the spread of COVID-19 have further affected access to food and distribution of food, with mass job losses preventing households from being able to afford the food that is accessible. This was mostly due to the nationwide lockdown. This coupled with the globalisation and socio-economic development, mentioned above, which has created a shift to unhealthy foods, has also had an impact on the consumption of nutritious foods. All these factors affect the accessibility, availability and affordability of nutritious food for households. The government's response through legislative measures thus is important to analyse in this discussion.

4 Food law and the human right to food

4.1 Food law in international law

Food law[55] is a fairly recent field, with the content of the right still being unpacked. The right enjoys both national and international protection, as seen in various international agreements. Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), for instance, obligates state parties to 'recognise the right of everyone to an adequate standard of living … including adequate food, clothing, and housing and to the continuous improvement of living conditions'.[56] Article 11 further requires member states to improve on methods of production, distribution and conservation of food using scientific and technical knowledge, including the dissemination of knowledge on principles of nutrition, by developing agrarian systems to achieve the most efficient utilisation, and the development of natural resources.[57] Similarly, the Universal Declaration of Human Rights, 1948 (Universal Declaration)

53 As above.
54 As above.
55 The Food and Agricultural Organisation has defined food law as applying to 'legislation which regulates the production, trade and handling of food and hence covers the regulation of food control, food safety, quality and relevant aspects of food trade across the entire food chain, from the provision for animal feed to the consumer'. See FAO 'Food laws and regulations', https://www.fao.org/food-safety/food-control-systems/policy-and-legal-frameworks/food-laws-and-regulations/en/ (accessed 1 September 2024).
56 International Covenant on Economic, Social and Cultural Rights, 1996.
57 Art 11(2)(a) ICESCR.

supports this right in article 25 which provides everyone with the right to a standard of living that is adequate for the health and well-being of individuals, including food.[58]

The African Charter on Human and Peoples' Rights (African Charter) does not explicitly provide for the right to food. However, in the landmark decision *SERAC*[59] the African Commission on Human and Peoples' Rights (African Commission) found a violation of the right to food despite this right not being expressly recognised by the African Charter. The facts of the case are as follows: The Nigerian government was involved in oil production through the Nigerian National Petroleum Company (NNPC) – a state-owned oil company that was also the majority shareholder 'in a consortium with Shell Petroleum Development Corporation (SPDC)'.[60] It was alleged that these operations led to various oil spills that contaminated the environment, against international environmental standards, and led to health problems among the Ogoni people.[61] The consortium exploited oil reserves in Ogoniland, disposing toxic waste into the local waterways, and failing to maintain their facilities 'causing numerous avoidable spills in the proximity of villages'.[62] The result was the contamination of water, soil and air which had serious health impacts, 'including skin infections, gastrointestinal and respiratory ailments, and increased risk of cancers, and neurological and reproductive problems'.[63]

The government was accused of condoning and facilitating these violations by placing the military and legal powers of the state at the disposal of the oil companies.[64] These operations not only left thousands of villagers homeless, but food sources were also destroyed as the water bodies and soil were contaminated, where the Ogoni people relied mostly on fishing and farming for food.[65] Farm animals and crops were also destroyed during raids on villages by the national security forces in an attempt to stop non-violent protests by the Ogoni people against these activities, where some

58 Art 25(1) Universal Declaration of Human Rights, 1948.
59 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) *(SERAC)*.
60 *SERAC* (n 59) para 1.
61 As above. The Ogoniland is a kingdom in Nigeria that covers approximately 1 000 square kilometres in Southern Nigeria. According to the 2006 national census, the area has a population of about 832 000 Ogoni people, who predominantly are fishermen and farmers. See UN Environment Programme 'About Ogoniland', https://www.unep.org/explore-topics/disasters-conflicts/where-we-work/nigeria/about-ogoniland (accessed 10 June 2022).
62 *SERAC* (n 59) para 2.
63 As above.
64 *SERAC* (n 59) para 3.
65 *SERAC* (n 59) paras 8-9.

individuals were also killed.[66] In its decision, the African Commission linked the right to food with several other human rights including, dignity, life, health, and social and cultural development as provided for in the African Charter, and the Nigerian government was found to be in violation of these rights and others.[67] In this way, although not explicitly provided for in the African Charter, the right to food finds implicit protection therein.

The right to food is further protected in other international documents where the rights of specific vulnerable groups are highlighted, for instance, the Convention on the Rights of the Child, 1989 (CRC); the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW); and the Convention on the Rights of Persons with Disabilities, 2006 (CRPD). The right has further recognition in various regional documents, including the African Charter on the Rights and Welfare of the Child (African Children's Charter), 1990, and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003 (African Women's Protocol).

4.2 The right to food in South African national law

When analysing national legislation in South Africa on food law, the Constitution of the Republic of South Africa, 1996 (Constitution) is and should be the starting point as it is the supreme law of the land. Any law or conduct that goes against the Constitution is deemed to be null and void, and all obligations imposed by it must be fulfilled.[68] Chapter 2 of the Constitution contains the Bill of Rights which is defined as the 'cornerstone of democracy in South Africa' and enshrines the human rights of the people in the Republic, affirming the rights to freedom, equality and human dignity.[69] The right to food was included in section 27(1)(b) of the Bill of Rights which provides everyone with the right to have access to sufficient food and water. Important to note here is that the right to food does not obligate the government to provide individuals with food, but that individuals need to have 'access' to food.

This section is to be read in conjunction with section 27(2) which provides that '[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights' including the right

66 As above.
67 *SERAC* (n 59) para 64.
68 Sec 2 Constitution.
69 Sec 7(1) Constitution.

to food. In determining what would constitute 'other measures', the Constitutional Court has referred to 'policies, programmes and strategies adequate to meet the state's section 26 obligations'.[70] The aspect of 'progressive realisation' of rights creates a hinderance in that it considers resource constraints that may slow down the implementation of the state's obligations in this regard.[71] During this time, the state is still tasked with laying down a 'roadmap towards the full realisation of the right to food immediately', and illustrating the possible efforts being made, using all available resources, 'to better respect, protect and fulfil the right to food'.[72] The Constitutional Court has attempted to unpack the meaning of the phrase in *Grootboom* where it provided the following:[73]

> Progressive realisation shows that it was contemplated that the right could not be realised immediately. But the goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.

In determining the content of the right to food, the Constitutional Court in *Wary Holdings*[74] unpacked the right from the context of land, agriculture, food production and the environment, in terms of section 27(1)(b) and under international law. In its analysis, the Court recognised two elements to the right: 'the sufficient supply of food' which requires the presence of a national food supply which would meet the nutritional needs of the general population, and the 'the existence of opportunities for individuals to produce food for their own use'.[75] The second element requires the ability of individuals to acquire the food that is available or make use of opportunities to produce their own food.[76]

The Constitution also provides for the right to food in other sections, particularly when looking at specific groups. Section 28(1)(c) provides every child with the right to 'basic nutrition, shelter, basic healthcare services and social services'. This right was addressed in the recent case of *Equal Education v Minister of Basic*

70 *Government of the Republic of South Africa & Others v Grootboom & Others* 2001 (1) SA 46 (CC) para 40.
71 OHCHR & FAO 'The right to adequate food' (2010) 19, https://www.ohchr.org/en/publications/fact-sheets/fact-sheet-no-34-right-adequate-food (accessed 10 June 2022).
72 As above.
73 *Grootboom* (n 70) para 45.
74 *Wary Holdings (Pty) (Ltd) v Stalwo (Pty) Ltd* (2008) ZACC 12.
75 *Wary Holdings* (n 74) para 85.
76 As above.

Education[77] where the suspension of the National Schools Nutrition Programme (NSNP) during the COVID-19 government lockdown was challenged.[78] It was uncontended by the Court that had the NSNP programme not been suspended, 45 million meals would have been delivered per week, with no viable substitute for the NSNP for children.[79]

The programme benefits approximately 9 million children, all learners in quintiles 1 to 3, which represent the poorest 60 per cent of schools, thus targeting the poor and food insecure.[80] The Court linked the right to a basic education, as provided by the Constitution in section 29(1)(a), with the right in section 28(1)(c) – the right of the child to a basic nutrition and the right of everyone to have access to food (section 27(1)(b)).[81] Thus, the Minister and the Member of the Executive Council (MEC) were found to have violated these rights by issuing the suspension.[82] The Court further elaborated on the duties of the Department of Education in relation to the right to food for children as follows:[83]

> If there was no duty on the Department to provide nutrition when the parents cannot provide the children with basic nutrition, the children face starvation. A more undignified scenario than starvation of a child is unimaginable. The morality of a society is gauged by how it treats it children. Interpreting the Bill of Rights promoting human dignity, equality and freedom can never allow for the hunger of a child and a constitutional compliant interpretation is simply that the Department must in a secondary role roll out the NSNP, as it has been doing.

Another specific group provided for in the Constitution deals with the right to food of detainees in section 35(2)(e) which states:

> Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.

77 *Equal Education v Minister of Basic Education* 2021 (1) SA 198 (GP).
78 The NSNP is a government programme that provides one nutritious meal to all learners in poorer primary and secondary schools with the objective to provide nutritious meals to leaners in order to improve their ability to learn. See South African Government 'What is the National School Nutrition Programme (NSNP)?' https://www.gov.za/faq/education/what-national-school-nutrition-programme-nsnp (accessed 14 June 2022).
79 *Equal Education* (n 77) para 24.
80 *Equal Education* (n 77) para 32.
81 *Equal Education* (n 77) para 34.
82 As above.
83 *Equal Education* (n 77) para 53.

The Court in *Lee v Minister of Correctional Services*[84] dealt with the right in section 35. Although not dealing specifically with the aspect of nutrition or food within the right, the Constitutional Court did expound on the duty of the state in the fulfilment of the rights of detainees, which includes the provision of adequate nutrition, as follows:[85]

> A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner.

This implies that the state has the duty to provide detainees with the provision of nutritious food, as the state in this instance has assumed control over their autonomy.

4.3 Right to food legislation in South Africa

Aside from the Constitution, aspects of food law can be found in several pieces of national legislation including, but not limited to, the following:

- Agricultural Product Standards Act 119 of 1990;
- Consumer Protection Act 68 of 2008;
- Fertilisers, Farm Feeds, Agricultural Remedies and Stock Remedies Act 36 of 1984;
- Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972;
- Liquor Products Act 60 of 1989;
- Marine Living Resources Act 18 of 1998;
- Meat Safety Act 40 of 2000;
- Plant Improvement Act 11 of 2018.

Each piece of legislation listed above contains different aspects relating to food law in South Africa. This creates a fragmented system, which is problematic as it could lead to a lack of uniformity regarding policy implementations as well as potential duplications. The lack of specific legislation dealing with food thus creates additional challenges in the realisation of the right to food in South Africa. In addition to this, there are three main departments responsible for the implementation of food legislation: the Department of Agriculture, Forestry and Fisheries (DAFF); the National Department of Health (DoH), and the Department of Trade and Industry (DTI). Having various departments covering issues related to food makes it difficult

84 *Lee v Minister of Correctional Services* Case CCT 20/12.
85 *Lee* (n 84) para 17.

to 'coordinate all the efforts of these departments', resulting in the fragmentation of policies and activities.[86]

All these aspects mentioned above have an impact on the continued issue regarding NCDs in the country. Individuals need to be able to afford and access the nutritious food, which is available in the country, especially with the effects of the ongoing pandemic. A further issue would be regarding access to nutritious foods. As mentioned above, there has been a shift in dietary patterns from healthy foods to foods that, if consumed regularly, can contribute to food-related NCDs. It therefore is pertinent to analyse the protection being afforded to consumers to determine whether there is adequate protection in place.

4.4 Consumer protection in South Africa

The concept of consumer protection arose as a reaction to the unfair nature of business transactions within the law of contract. Traditionally, the notion of 'freedom of contract' allowed the parties to an agreement to determine the terms and conditions of a contract, and on an equal footing.[87] This, however, was not the case as businesses or corporations were normally in a dominant position over the consumer, with the consumer being given 'standard-term contracts' on a 'take-it-or-leave-it' basis.[88] These types of contracts were drafted in favour of the business entity, and the consumer ordinarily was the vulnerable party as the products and services being offered were needed by the consumer who would thus accept terms that were unreasonable or unfair.[89] Additionally, the consumers were often unable to understand the terms of the agreements, and remedies being offered provided inadequate protection for consumers.[90]

Due to this, social justice legislation, that is, the Consumer Protection Act 68 of 2008 (CPA), was promulgated as a means to rectify these inequalities. The purpose of the CPA is to advance and promote the social and economic welfare of consumers in South Africa.[91] The Act aims to promote fair business practices, establish a fair legal framework for the development of a fair consumer market, with

86 E Durojaye & E Chilemba 'The judicialisation of the right to adequate food: A comparative study of India and South Africa' (2017) 43 *Commonwealth Law Bulletin* 272.
87 Reddy (n 13) 576.
88 As above.
89 As above.
90 As above.
91 Sec 3 CPA.

a particular focus being placed on ameliorating the disadvantages experienced by particular vulnerable groups, including low-income persons; minors; seniors; illiterate persons; those living in isolated or remote areas; and those living in low-density population areas.[92]

The Act further provides protection of certain fundamental rights under chapter 2, some of which emulate the fundamental rights in the Bill of Rights in the Constitution. The fundamental rights under the CPA include the following:

- the right of equality in the consumer market;[93]
- the consumer's right to privacy;[94]
- the consumer's right to choose;[95]
- the right to disclosure and information;[96]
- the right to fair and responsible marketing;[97]
- the right to fair and honest dealings;[98]
- the right to fair, just and reasonable terms and conditions;[99] and
- the right to fair value, good quality and safety.[100]

These rights highlight the importance the Act places on consumer safety and protection. Important to this discussion is the aspect of labelling of food products. This is because certain vulnerable groups may be unable to understand the labels on food products and may inadvertently purchase a product that could result in possible harm. It is imperative for the average consumer to understand the information on food items, which also forms part of the right to disclosure and information. Section 22 of the CPA requires the supplier to ensure that any 'notice, document or visual representation' being displayed to a consumer should be in plain language.[101] Such a representation or, in this case, a label, will be considered to be in plain language if one can reasonably conclude that an ordinary consumer of the class of persons for which the label is intended, with minimal consumer experience and average literacy skills, can understand the content and significance of the label.[102]

92 As above.
93 Sec 8 CPA.
94 Secs 11-12 CPA.
95 Secs 13-21 CPA.
96 Secs 22-28 CPA.
97 Secs 29-39 CPA.
98 Secs 40-47 CPA.
99 Secs 48-52 CPA.
100 Secs 53-61 CPA.
101 Sec 22(1) CPA.
102 Sec 22(2) CPA.

In considering the information that needs to be included on labels, in this instance food labels, pertinent basic information is required that is necessary for the consumer to be able to make an informed choice.[103] This would include 'the number, quantity, measure, producer information, place or country of origin, ingredients, allergens, contact information and trademarks', depending on the type of goods.[104] The CPA further prohibits suppliers from applying descriptions on labels that would be misleading to consumers, including the intentional altering, defacing, removal, covering or obscuring of information with the purpose of said misleading.[105] Examples of this would include changing expiration dates on perishable goods and/or leaving out allergens on products which could result in serious health issues.[106] The importance of labelling was prevalent during the ongoing COVID-19 pandemic, where illicit ad counterfeit goods were on the rise in the market, and suppliers removing expiration dates on products including canned foods.[107]

The labelling of food products goes hand-in-hand with marketing and advertisements. As mentioned above, consumers often lack the ability to interpret labels. This lack of knowledge and support is exploited by suppliers and manufacturers in the food industry to promote food products in a manner that is not conducive to nutrition.[108] Historically speaking, challenges involving labelling and advertisements faced by consumers in South Africa include promoting health claims through brand names; food manufacturers making nutrient and health claims on labels and advertising; labels and advertising that were misleading; the lack of nutritional information and specifications on labels; and advertising of 'unhealthy foods', particularly by restaurants and food companies.[109] This, coupled with the low literacy skills and inequality in South Africa, has the result of contributing to inaccurate food choices.[110] This inevitably has an effect on the rise of NCDs in the country.

103 J Barnard 'An overview of the consumer safety and product liability regime in South Africa' (2021) 9 *International Journal on Consumer Law and Practice* 36.
104 As above.
105 Secs 24(2)(a)-(b) CPA.
106 Barnard (n 103) 36.
107 As above.
108 Reddy (n 13) 574.
109 As above.
110 As above.

4.4.1 Proposed new regulations – Regulations Relating to the Labelling and Advertising of Foodstuffs

In response to the problems associated with the labelling and advertisements of food, the Department of Health released the Regulations Relating to the Labelling and Advertising of Foodstuffs (Draft Regulations)[111] in January 2023 for public comment. While not passed as at the time of writing this article, the document aims to make changes to the way in which food products are being labelled and advertised at stores nationwide. One of the propositions being made relates to prohibited statements. Accordingly, certain statements, reflected on both food labels and advertisements, which would create the impression that the product has been supported or endorsed according to recommendations by certain entities, that is, certain practising health professionals, would be prohibited.[112] Endorsement entities related to NCDs would be required to be actively involved in generic health promotion activities promoting the reduction of NCDs, and would have to be 'free from influence by, and not related to the supplier' of a particular foodstuff.[113]

Additionally, the draft regulations also aim to prohibit the use of certain words and phrases that could be seen as 'trendy', for instance, words such as 'wholesome', 'nutritious', 'nutraceutical' or 'super-food', 'smart' or 'intelligent', or any comparable pictorials or logos with similar meanings that would imply that the food is superior in some way.[114] This would include placements of this nature on the name and tradename.[115] Labels or advertisements which purport that the foodstuff provides balanced or complete nutrition would also be prohibited according to the Regulations.[116] Furthermore, in an attempt to curb misleading statements or descriptions on foodstuffs, the use of words or phrases such as, but not limited to, 'grass-fed', 'grain-fed', 'Karoo lamb', 'country reared', 'natural lamb', 'free range' and so forth, are permitted to be reflected on pre-packaged labelling and advertising of these goods only if the 'descriptor is linked to a specific protocol which is approved or registered with the Department of Agriculture, or regulated in terms of the Agricultural Product Standards Act'.[117]

111 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Regulations Relating to the Labelling and Advertising of Foodstuffs, R.3337 (Draft Regulations).
112 Sec 9(1) Draft Regulations (n 112).
113 Sec 9(1)(a)(iii) Draft Regulations.
114 Sec 9(1)(e) Draft Regulations.
115 As above.
116 Sec 9(1)(f) Draft Regulations.
117 Sec 42(1) Draft Regulations; Agricultural Product Standards Act 119 of 1990 (Agricultural Products Standards Act).

Where a food product is not regulated under the Agricultural Product Standards Act, statements indicating that the food product is, among others, 'natural', 'fresh', 'nature's', 'traditional', 'original', 'authentic', 'real', 'genuine', 'home-made', or any other similar words or phrases with a similar meaning would be permitted provided such statement is in accordance with criteria provided for in certain guidelines published on the DoH website.[118]

The Draft Regulations further discuss marketing restrictions for foodstuffs that would not be permitted to be advertised to children. The packaging, labelling or advertising of foodstuffs would be prohibited from depicting any reference made to celebrities, cartoon characters, sport stars, computer animations or any similar type strategy.[119] Reference made to competitions, tokens or collectable items that appeal to children, and would inspire unhealthy eating, would also be prohibited.[120] In this same light, any portrayals of 'positive family values' on labels or packages that would ultimately encourage excess consumption of a foodstuff, undermine healthy, balanced diets, promote an inactive lifestyle, be promoted as a food replacement, or leave out undesirable aspects of the food's nutritional content would also be prohibited.[121]

Important to note further is that the Draft Regulations also introduce mandatory 'front-of-pack labels' (FOPLs) to be visible on food products where the product contains added sugar, added saturated fat, added sodium and also where the product exceeds the 'nutrient cut-off values for total sugar, total sodium or total saturated fatty acids' or contain artificial sweeteners.[122] Nutrient cut-off values, as well as artificial sweeteners, are listed as follows in the Draft Regulations:[123]

118 Sec 42(2) Draft Regulations (n 112).
119 Sec 52(1)(b)(i)(aa) Draft Regulations.
120 Sec 52(1)(b)(i)(bb) Draft Regulations.
121 Sec 52(1)(b)(i)(cc) Draft Regulations.
122 Sec 51(1) Draft Regulations.
123 Sec 51(1)(c) Draft Regulations.

Nutrient cut-off values	
Nutrient	**Value indicated in nutritional information table**
Total sugar(s) in g	Solids: ≥ 10.0g per 100g
	Liquids: ≥ 5.0g per 100ml
Total Saturated fatty acids in g	Solids: ≥ 4.0g per 100g
	Liquids: ≥ 3.0g per 100ml
Total Sodium in mg	Solids: ≥ 400mg per 100g
	Liquids: ≥ 100mg per 100ml
Artificial sweeteners	
Contain any added artificial sweetener	Bear the applicable logo warning as per Annexure 10[124]

Annexure 10 of the Draft Regulations provides elements of the FOPL. Accordingly, should the above nutrient cut-off values be exceeded, the product would be required to carry a warning label as follows:[125]

The Draft Regulations thus appear to address concerns surrounding misleading labels and advertisements, among other issues. It has been reported that nearly 80 per cent of pre-packaged foodstuffs sold in South African supermarkets are 'highly processed or ultra-processed, containing excessive amounts of added sugars, salt, unhealthy fats and chemical additives' which tend to make the products more flavoursome.[126] This has led to an increase in NCDs, as discussed above, and, thus, the Draft Regulations appear to be a move in a more positive direction in battling these issues. However, this also poses an additional cost to companies as these will be forced to relabel most of their products and redo advertisements for various

124 Secs 91-92 Draft Regulations.
125 Annexure 10 Draft Regulations.
126 A Sulcas 'Draft regulations aim to make warning labels on unhealthy foods mandatory by 2025' *The Daily Maverick*, https://www.dailymaverick.co.za/article/2023-02-02-draft-regulations-aim-to-make-food-warning-labels-mandatory-by-2025/ (accessed 30 March 2023).

foodstuffs. The Draft Regulations are likely to come into effect in the year 2025 according to the Global Health Advocacy Incubator, Mr Philip Mokoena.[127]

4.4.2 Cons to the Draft Regulations

The Draft Regulations aim to regulate the marketing, packaging and promotion of food products in South Africa. While they are important for promoting transparency, preventing misleading claims, and assisting in reducing the number of NCDs in the country, they do pose a few challenges. For instance, compliance with the labelling requirements discussed above could pose an additional financial burden, particularly for small businesses, and/or businesses conducted in rural areas. This involves costs for new packaging (where the FOPL would be necessary), as well as testing the products to ensure that they comply with these labelling requirements.

Questions surrounding the enforcement of these regulations may also be raised, particularly in the rural and/or under-resourced areas. This could potentially lead to non-compliance going unnoticed, with some businesses evading the rules without facing consequences. One could further argue that in these instances, certain parts of the population may lack access to nutritional information of certain foods, hindering their ability to make informed food choices. Since the draft regulations aim to, among others, lessen instances of NCDs in South Africa, this would mean that the rural population would still be at a higher risk, and lack access to nutritious food, affecting their food security.

Furthermore, the Draft Regulations fail to fully accommodate illiterate consumers. Despite the enhanced visibility of nutritional information through FOPL, the reliance on text-based labelling may still exclude those who cannot read. While visual cues, such as the warning labels pictured above, would be helpful, the needs of illiterate consumers –who may struggle to interpret even the most clearly-written labels – remain largely unaddressed. Research should be conducted into ways of making the Regulations more inclusive in this manner.

While it is commendable that the government has released these Regulations to the public, and they seem poised to contribute to reducing NCDs in South Africa if implemented, the fact that they have yet to be passed and have undergone four revisions raises

127 As above.

concerns surrounding public trust. It may foster a perception of a lack of transparency in decision making, government instability, and/or incoherent policy processes. This could also potentially suggest that the government may be uncertain about its own policies, which can result in public confusion, making it difficult for individuals to stay informed about evolving proposals, grasp their implications, and offer meaningful feedback.

4.4.3 Current Regulations – Regulations Relating to the Labelling and Advertising of Foodstuffs, 2010

The Current Regulations in place are the Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972: Regulations Relating to the Labelling and Advertising of Foodstuffs, R146 (current Regulations).[128] The main differences between the Regulations in place and the Draft Regulations discussed above refer to the FOPL, nutrient profiling system, marketing to children, and so forth. Perhaps the most pertinent difference between the two would be the FOPL, which is mandatory according to the Draft Regulations,[129] but not mentioned in the Current Regulations. Accordingly, nutritional information is typically placed on the back or side of the food packaging, which makes it less visible and accessible to consumers at a glance according to the Current Regulations.

A further change viewed in the Draft Regulations is the inclusion of a nutrient profiling system which is not included in the Current Regulations. Section 51(1)(c) of the Draft Regulations provides a profiling model for foodstuffs, where a comprehensive system is in place to assess the overall nutritional profile of a food product. Such a system is not included in the Current Regulations.

With regard to information on allergens, the Current Regulations make it mandatory to provide this information on the ingredient list of foodstuffs, as per section 43. However, it is rather generalised, focusing on common allergens with a mention of uncommon allergens. Alternatively, the Draft Regulations call for enhanced labelling requirements and stricter rules relating to allergens, including more detailed descriptions of allergens and potential cross-contamination risks as viewed in sections 37 to 42.

128 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972 – Regulations Relating to the Labelling and Advertising of Foodstuffs, R 146 2010 (Current Regulations).
129 Sec 51 Draft Regulations (n 112).

A distinction is also prevalent where sugars are involved. Under the Current Regulations, 'added sugar' is defined in section 1, and a total sugar content is required to be listed in the nutritional information panel of a food product. However, no clear distinction is given or required for naturally-occurring sugars (such as those in fruits and dairy) and added sugars (such as table sugar or high-fructose corn syrup). This means that consumers are informed of the total sugar content, but cannot identify how much comes from added sugar as opposed to naturally-occurring sugars. The Draft Regulations require this distinction to be made clear and each to be listed separately on food packaging. Section 51(1)(a) requires a FOPL to be added where added sugar occurs in the food product, as discussed above.

Perhaps one of the most important distinctions for purposes of this discussion would be the element of marketing. The Current Regulations are somewhat limited in this regard, focusing primarily on ensuring truthful and non-misleading advertising.[130] The Draft Regulations, on the other hand, propose stricter advertising restrictions, particularly for products marketed to children. This includes restrictions on promoting high-sugar, high-fat, or high-salt foods in media targeted at children, as well as the use of cartoons or characters that appeal to young audiences in product marketing.[131]

5 Other initiatives

There have been several initiatives made on an international level to attempt to address the prevalence of NCDs. The WHO implemented the 'WHO Best Buys' – a document that provides policy makers with a list of recommended interventions to address NCDs.[132] Regarding diet-related NCDs, the document highlights enabling actions, including the implementation of WHO recommendations on the marketing of foods and non-alcoholic beverages to children, and implementing the global strategy on diet, physical activity and health.[133]

The UN General Assembly has over the years further issued numerous declarations in an attempt to tackle the issue of NCDs. While declarations are not binding on member states, they still

130 Sec 47 Current Regulations (n 128).
131 Secs 2(3)(c), 51(5)(c) & 52 Draft Regulations (n 112).
132 World Health Organisation '"Best buys" and other recommended interventions for the prevention and control of non-communicable diseases' Geneva (2017), https://iris.who.int/bitstream/handle/10665/259232/WHO-NMH-NVI-17.9-eng.pdf (accessed 30 March 2023).
133 WHO (n 132) 10.

provide guidelines that can be considered by states, including South Africa, in the implementation of legislation and policies aimed at tackling NCDs.[134]

On a more national level, the National Consumer Commission (NCC) is the body established by section 85 of the CPA tasked with enforcing the rights of the consumer. This body has successfully mediated over a few cases concerning the rights of consumers. An example of this, dealing with the misleading of consumers generally speaking, would be the *Unicity Trading* case.[135] Accordingly, the NCC found that Unicity Trading had misled consumers by failing to disclose significant information regarding their car's history and condition. Consumers should be encouraged to make use of the NCC for food-related issues where the CPA is involved.

6 Conclusions and recommendations

Food security has several aspects to it, including availability, accessibility, affordability, and the nutritional value of food. Although considered to be food secure on a national level, South Africa is 'at home' food insecure, as a large portion of the population are unable to access the food that is available in the country. The socio-economic divide in the country also attributes to several inequalities in this regard, with low-income level individuals and other vulnerable groups experiencing the worst of the food insecurity issues. The ongoing COVID-19 pandemic further exacerbated this divide as numerous people had to endure job losses, which further prevented households from being able to afford and/or access food. Globalisation and the socio-economic development in South Africa have also had the added effect of individuals moving from healthier food options to those that are high in salt, sugar and trans-fats, contributing to food-related NCDs.

Although a fairly recent concept, the right to food is a right that has to a large extent been endorsed on an international, regional and national level. As mentioned above, we find different implementations

134 Examples include United Nations General Assembly Political Declaration of the High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases (2012) A/RES/66/2; United Nations General Assembly Outcome Document of the High-Level Meeting of the General Assembly on the Comprehensive Review and Assessment of the Progress Achieved in the Prevention and Control of Non-Communicable Diseases (2014) A/RES/68/300; and United Nations General Assembly Political Declaration of the Third High-Level Meeting of the General Assembly on the Prevention and Control of Non-Communicable Diseases (2018) A/RES/73/2.

135 *Unicity Trading (Pty) Ltd t-a Cape SUV and The National Consumer Commission & 3 Others* Case A76-2024.

of the right to food in international conventions, such as ICESCR, the Universal Declaration and also regionally in the African Charter, even if not explicitly mentioned, but can be deduced from case law as seen in *SERAC* discussed above. Various other documents provide for the right to food for specific vulnerable groups as seen in CRC, CEDAW and CRPD. This highlights the importance of the right to have access to food, particularly from a human rights perspective. Food law, particularly in South Africa, has a fragmented system regarding the policies and activities surrounding food, which creates a lack of uniformity and duplications.

Moving away from accessibility, consumer protection deals with ensuring that business entities do not exploit vulnerable individuals who may not fully understand the terms of agreements, preventing them from agreeing to terms that are unreasonable or unfair. This article focused on the instance of labelling requirements and advertisements, and their importance particularly regarding food products. The implementation of the CPA attempts to curb these instances by advancing and promoting the social and economic welfare of consumers, with a particular focus on low-income persons, minors, seniors, illiterate persons, those living in isolated or remote areas, and those living in low-density population areas. Food labels, for instance, need to be displayed in plain language, and not be intentionally misleading. Regardless, the COVID-19 pandemic still brought with it an influx of illicit and counterfeit goods, with some having expiration dates tampered with. Instances of this nature can lead to consumers ingesting foods where the nutritional value is compromised, leading to further instances of NCDs.

In their evaluation of NCDs in the Caribbean, Webb and Conrad suggest a way of targeting unhealthy dietary habits, by raising taxes on fast food and implementing legislation that targets foods high in trans fats.[136] They further suggest incentives to be included at a community level by governments aimed at incentivising physical exercise, for instance, by removing taxes on gymnasiums.[137] A more equitable system surrounding health care should further be investigated, with policies being put in place to improve the quality of health care.[138] Considering the fragmented food law system in South Africa, and taking into account the high levels of food insecurity in the country, it would be beneficial for a single piece of

136 M Webb & D Conrad 'Public expenditure on chronic non-communicable diseases in the Caribbean: Does it matter?' (2017) 8 *Journal of Emerging Trends in Economics and Management Sciences* 35.
137 As above.
138 As above.

legislation being implemented that focuses solely on food systems in the country, as well as having only one governmental department dealing with aspects relating to food, as a means to prevent potential instances of duplication, confusion and a lack of uniformity on policy implementations.

The government appears to be making attempts to rectify the problem surrounding NCDs through the Draft Regulations on labelling and advertising of foodstuffs discussed above. By having FOPL warning labels on product packaging and reflected in their advertisements, the average consumer will be more capable of making informed food choices, as they will be more aware of the content of the product and be knowledgeable on the fact that it exceeds the nutrient cut-off values in a way that is understandable to the lay person. The Draft Regulations further aim to counter corporate exploitation in the food industry, and ultimately protecting the public health. Should the Draft Regulations be signed into law, misleading words and phrases would also be prohibited even further than currently is the case, hopefully preventing companies and corporations involved in the food industry from taking advantage of consumers, and ultimately reducing the rate of NCDs in the country.

The Current Regulations differ substantially from the proposed Draft Regulations. The Current Regulations focus on general labelling requirements but lack key elements that are proposed in the Draft Regulations. These include the FOPL, introducing a nutrient profiling system to assess the overall nutritional value of food products, and the addition of stricter allergen requirements for food products labelling. Important to note is also the proposed imposition of stricter restrictions on marketing, particularly to children, limiting the promotion of unhealthy foods and the use of child-appealing characters. Although more inclusivity could be made available for illiterate consumers, as mentioned above, this comparison highlights the positive and potentially transformative impact the Draft Regulations could have should they be passed into law.

However, this is yet to be seen as it is important to note that the current Draft Regulations are the fourth version to be released to the public this year, with the latest released in April 2023. The problem with this is that it creates the perception of a lack of transparency in decision making, instability within the government, a lack of coherent decision making, or evidence that the government is uncertain about its own policies. This can further lead to confusion among the public as it becomes challenging for individuals to keep up with the evolving proposals, understand the implications, and provide meaningful input and feedback. It is crucial for governments

to strike a balance between making necessary revisions and ensuring transparency, stability and effective public participation.

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Implications of James Dak's 2016 deportation to South Sudan by the Kenyatta government in violation of international refugee law

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Summary: *This article discusses James Gatdet Dak's 2016 deportation from Kenya to South Sudan where he was imprisoned for two years for several offences he allegedly had committed in relation to the civil war in that country. It provides an understanding of the circumstances that led to deportation and violation of Dak's right to refugee protection. The article makes three principal arguments. First, the Kenyatta government carried out the deportation in violation of international and regional refugee laws. Particularly, the Kenyatta government violated the principle of* non-refoulement*, which is now considered to have become a peremptory norm of international law from which no derogation is permitted. Second, Dak had suffered persecution at the hands of South Sudan's authorities because of his political opinion. Third, the injustice Dak had suffered entitles him to a remedy from the Kenyan government, which he could potentially pursue through the African Commission on Human and Peoples' Rights' complaint process. Although a considerable period has elapsed, the African Commission's flexible approach to the relevant admissibility criterion should be able to accommodate his complaint.*

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Key words: *refugees; deportation; violation; Kenya; South Sudan; African Commission; delay*

1 Introduction

An event that struck at the heart of international refugee law occurred in Kenya in 2016. The Kenyatta government deported a refugee, James Gatdet Dak, back to South Sudan – his country of nationality – after having granted him refugee protection by issuing him with the applicable visa in 2015. Dak was arrested on arrival in South Sudan and imprisoned for two years for several offences he allegedly had committed in relation to the 2016 violence outbreak between the government of South Sudan and the Sudan People's Liberation Movement-In Opposition (SPLM-IO). As will be discussed more fully below, the offences ranged from 'treason', 'publishing or communicating false statements prejudicial to Southern Sudan' to 'undermining the authority of or insulting the President [of South Sudan]'.[1]

The Kenyatta government was no more than equivocal in explaining what prompted the deportation. In a press statement issued immediately after Dak had left Kenya, the government spokesperson, Eric Kiraithe, simply stated that Dak had become 'an inadmissible person' in Kenya and, as a result, his visa was cancelled, making him liable to deportation.[2]

Whatever wrong Dak may have committed, it is clear that the deportation was carried out in violation of Kenya's protection obligations to asylum seekers and refugees. Kenya is party to the 1951 United Nations (UN) Convention Relating to the Status of Refugees,[3] and its 1967 Protocol Relating to the Status of Refugees.[4] Kenya is also party to the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in

1 Penal Code Act 2008 secs 64, 75 & 76. Reference to 'Southern Sudan' in sec 75 of the Penal Code Act speaks to the fact that this law was enacted during the interim period (2005 to 2011) but has remained in force in the post-separation period. Art 198 of the Transitional Constitution 2011 mandates all laws of the former Southern Soudan to remain in force unless they have been repealed.

2 'Fears after Kenya deports South Sudan rebel spokesman' *Aljazeera* 4 November 2016, https://www.aljazeera.com/news/2016/11/fears-kenya-deports-south-sudan-rebel-spokesman-161104164614835.html (accessed 3 October 2024).

3 Convention Relating to the Status of Refugees (Refugee Convention) opened for signature 28 July 1951, 189 UNTS 150, entered into force 22 April 1954.

4 Protocol Relating to the Status of Refugees (Refugee Convention) opened for signature 31 January 1967, 606 UNTS 267, entered into force 4 October 1967.

Africa.[5] These treaties were given effect through the enactment of Kenya's Refugees Act, 2006, which was repealed by the Refugees Act, 2021.[6] Thus, the treaties were binding on the Kenyatta government.

This article discusses James Gatdet Dak's 2016 deportation from Kenya to South Sudan, providing an intersection of international law and domestic law of both Kenya and South Sudan. It is organised in four parts. The first part discusses the circumstances around the deportation. The second part provides an overview of the refugee protection regime and discusses Kenya's refugee protection obligations under the Refugee Convention and its Refugee Protocol, as well as the OAU Refugee Convention. The point here is to demonstrate that the Kenyan government acted in violation of its refugee protection obligations to Dak in forcefully removing him from its territory. In particular, the Kenyatta government violated the *non-refoulement* principle enshrined in the Refugee Convention, which is now regarded as *jus cogens*, or a peremptory norm of international law from which no derogation is permitted.

The third part discusses the persecution Dak had suffered at the hands of South Sudan's authorities. This is evidenced in large part by the fact that he was imprisoned for two years for offences that were likely politically motivated (not to mention the appalling conditions of the Juba Blue House prison in which he was placed).[7] The offences were likely politically motivated in the sense that Dak was affiliated with the SPLM-IO and had been openly critical of the government of South Sudan since the civil war first broke out in 2013.

The final part looks at the question of what recourse, if any, Dak may have against the Kenyan government for violating his refugee protection right. There are two options to consider. The first regards local remedies that Dak may seek from Kenya's immigration and administrative bodies and courts. The second invokes the possibility of Dak bringing a complaint before the African Commission on Human and Peoples' Rights (African Commission) against the Kenyan government. The article also serves analytical purposes, providing an understanding of the vague circumstances that led to deportation and violation of Dak's refugee protection right.

5 Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 September 1969, UNTS 14691, entered into force 20 June 1974 (OAU Refugee Convention).

6 The Refugees Act 13 of 2006 was repealed in 2021 by the Refugees Act 10 of 2021; see sec 42.

7 'South Sudan: Inaction on dire security agency abuse' *Human Rights Watch* 14 December 2022, https://www.hrw.org/news/2020/12/14/south-sudan-inaction-dire-security-agency-abuse (accessed 2 October 2024).

2 Circumstances around the deportation

James Gatdet Dak is a national of South Sudan and is a journalist by trade. He joined the SPLM-IO in 2013 following the outbreak of the civil war in South Sudan. He served in the SPLM-IO as Dr Riek Machar Teny's press secretary (Dr Teny is the leader of the SPLM-IO).[8]

Dak escaped to Kenya with his family in 2013 after having survived the alleged targeted killing of the members of his Nuer ethnic group by the government of South Sudan.[9] The Kenyatta government granted him protection and he was registered as a refugee in 2015.[10] He returned to Juba with Dr Teny in 2016 for the formation of the first transitional government of national unity mandated by the Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015.[11] A few weeks later he returned to Nairobi to be with his family.[12]

In early November 2016 the Kenyan police officers went to his residence in Nairobi and arrested him. He was deported to South Sudan the following day. The government spokesperson, Eric Kiraithe, held a press conference immediately after Dak's departure, stating that '[Dak] became an inadmissible person, so we cancelled his visa and he was taken to his country of origin'.[13]

The official fell short of clarifying how Dak became 'an inadmissible person' in Kenya, leaving room for speculation. For example, it was alleged that Dak's deportation had to do with an opinion he published on social media in which he commended the sacking of General Johnson Ondieki, the Kenyan military officer who was in

8 Dr Teny is also the first Vice-President in South Sudan's Revitalised Transitional Government of National Unity formed in 2020 after the peace agreement – Agreement on the Resolution of the Conflict in the Republic of South Sudan – was revitalised in 2018.

9 On the alleged targeted killing of the Nuer people during the 2013 war, see HF Johnson *South Sudan: The untold story from independence to civil war* (2018).

10 V Nyamori 'Kenya: Global compact on refugees must be quickly anchored in national policy *Amnesty International* 24 December 2018, https://www.amnesty.org/en/latest/news/2018/12/kenya-global-compacton-refugees-must-be-quickly-anchored-in-national-policy/ (accessed 3 October 2024); T Odula & J Lynch 'Kenya deports South Sudan's rebel official' *Daily Herald* 4 November 2016, https://www.dailyherald.com/article/20161104/news/311049975/ (accessed 4 October 2024).

11 Agreement on the Resolution of the Conflict in the Republic of South Sudan, 2015.

12 LG Gatluak 'Review and analysis of my painful story' *Sudan Tribune* 25 November 2019, https://sudantribune.com/spip.php?article68582 (accessed 4 October 2024).

13 'Fears after Kenya deports South Sudan rebel spokesman' *Aljazeera* (Doha) 5 November 2016, https://www.aljazeera.com/news/2016/11/fears-kenya-deports-south-sudan-rebel-spokesman161104164614835.html (accessed 4 October 2024).

charge of the UN peacekeeping forces during the formation of South Sudan's unity government in 2016.[14] General Ondieki was sacked for failing to protect civilians during the J1 Incident (J1 is the name of South Sudan's state house and it was where the incident occurred). The sacking of General Ondieki reportedly angered the Kenyatta government for multiple reasons. One is that the dismissal was unfair as General Ondieki had been in the job for just three weeks before the J1 Incident.[15]

It is also possible that Dak was deported at the request of the South Sudan authorities. Immediately after the J1 Incident, the authorities in South Sudan named him as one of the people who had disseminated false information that led to the incident (clashes between the government and the SPLM-IO forces). This accusation was based on a text message Dak sent to his colleagues in the SPLM-IO during a meeting of the presidency at the state house.[16] In the text message, which he also posted on Facebook but removed it some time after that, Dak informed his colleagues that the meeting was a set-up to arrest Dr Teny.[17]

The SPLM-IO forces, which were stationed in Juba, also received this news. A large number of soldiers was sent to the state house to rescue Dr Teny.[18] On arrival, they forcefully attempted to enter the state house but the presidential guards denied them access.[19] They felt frustrated and started shooting, and a fierce fight ensued.[20] Literally, the matter turned into a shoot-out. A total of 230 lives were lost, most of whom (190) were from the SPLM-IO.[21]

A few hours after the situation was brought under control, President Kiir and his two Vice-Presidents[22] emerged and jointly gave a press conference. They stated that they had no idea about what had happened and called for calm in the nation, as well as

14 P Lang 'UN chief used Lt-General Ondieki as a sacrificial lamb' *Daily Nation* (Nairobi) 28 November 2016, https://www.nation.co.ke/news/UN-chief-faulted-over-sacking/1056-3466998yswdv7z/index.html (accessed 2 October 2024).
15 'Kenya withdraws troops from UN mission in South Sudan' *Aljazeera* 3 November 2016, https://www.aljazeera.com/news/2016/11/kenya-withdraws-troops-mission-south-sudan161102165506898.html (accessed 2 October 2024).
16 J Koinange Interview with Salva Kiir Mayardit on 3 August 2016, https://www.youtube.com/watch?v=hOQEyFk-4do (accessed 2 October 2024).
17 'Battle in Juba: Eight questions for confused observers' *Radio Tamazuj* 11 July 2016, https://radiotamazuj.org/en/news/article/battle-in-juba-8-questions-for-confused-observers (accessed 4 October 2024).
18 Koinange (n 16).
19 As above.
20 As above.
21 As above.
22 Dr Riek Machar Teny and Dr James Wani Igga are two of the five Vice-Presidents of South Sudan mandated by the peace agreement.

announcing an investigation into the matter.[23] Dr Teny himself spoke at that press conference and condemned the incident, calling it 'an interruption' of the peace process.[24]

Dr Teny and his colleagues in the SPLM-IO strongly denied that the text message was the cause of the J1 incident, stating the government had concocted the situation to derail peace. One thing that is clear, however, is that the Kenyatta government acted in disregard of its obligations in expelling Dak from its territory without a valid reason.

3 Refugee protection regime: An overview

The problem of refugees first came to the attention of the international community in the post-World War II era.[25] In response, the League of Nations (a precursor to the UN) adopted a number of instruments.[26] However, these instruments did not resolve the problem of refugees as they were intended to deal only with refugee problems from specific countries on a temporary basis.[27] A more comprehensive international instrument, defining the 'legal status of refugees', as such, was needed.[28] This saw the adoption of the Refugee Convention in 1951. The Convention defines a refugee broadly as a person who

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or is unwilling to avail himself of the protection of that country.[29]

The Refugee Convention covered only the refugee crises existing at the time of its adoption.[30] This suggests that the state parties did not want to bind themselves with indefinite protection obligations to refugees. As the refugee problem continued to escalate, as endless violent conflicts continued to displace more and more people around the world, it became necessary to extend the application of the Refugee Convention. This saw the adoption of the 1967 Refugee

23 R Nield 'Fighting in South Sudan on eve of fifth anniversary' *Aljazeera* 9 July 2016, http://www.aljazeera.com/news/2016/07/clashes-sudan-eve-independence-anniversary-160708195049321.html (accessed 3 October 2024).
24 As above.
25 United Nations High Commissioner for Refugees *Handbook on guidelines and procedures and criteria for determining refugee status* (2011) 5 (UNHCR Handbook).
26 Arrangements of 12 May 1926, 30 June 1928, and the Conventions of 28 October 1933, 10 February 1938, and the Protocol of 14 September 1939.
27 G Jagger 'On the history of international protection of refugees' (2001) 83 *International Review of the Red Cross* 730.
28 UNCHR Handbook (n 25) 5.
29 Art 1A(2) Refugee Convention.
30 UNHCR Handbook (n 25) 6.

Protocol under which states agreed to extend their protection obligations under the Refugee Convention to new refugees but without the 1951 dateline.[31]

Importantly, article 33(1) of the Refugee Convention enshrines *non-refoulement* – an inviolable principle of international law prohibiting all state parties from returning a refugee to a territory where they may face persecution:

> No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

There are, of course, exceptions to these conventions, that is, grounds on which a state may expel a refugee from its territory.[32] These relate to security risks a refugee poses to the host country, for example, having been convicted of a serious crime and the potential to reoffend.[33] These grounds, however, are subject to *non-refoulement*, meaning that a state would be barred from expelling a refugee if there is a possibility that the expulsion would result in a risk of harm or torture.[34]

3.1 Kenya's obligation to protect refugees

Kenya is party to the Refugee Convention and its Refugee Protocol. Both documents have been incorporated into Kenya's domestic law through the enactment of the Refugees Act, 2021. The Refugees Act was first enacted in 2006 but it was repealed in 2021.[35] The new Act received presidential assent on 17 November 2021 and took effect on 21 February 2022.[36] All the claims or liabilities that arose under the previous Act are enforceable against the relevant authorities under the current Act.[37] In all likelihood, the revision of the Act was needed to give effect to articles 2(5) and (6) of the Constitution of Kenya,

31 As above.
32 See, eg, Refugee Convention art 33(2).
33 Refugee Convention arts 32(1) & 33(2).
34 See, eg, the United Nations High Commissioner for Refugees, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (26 January 2007); Executive Committee of the United Nations High Commissioner for Refugees, Conclusion 6 (XXVIII) Non-Refoulement (1979) para (c); Executive Committee of the United Nations High Commissioner for Refugees, Conclusion 79 (XLVII) General (1996) para (j).
35 See Refugees Act sec 42.
36 See 'Refugees Act, 2021: a summarised and simplified version' (Kitua Cha sharia – Legal Advice Centre, 2021) 5-7, https://kituochasheria.or.ke/wp-content/uploads/2023/11/Refugees-Act-2021-plus-Cover-B_compressed.pdf (accessed 14 October 2024).
37 Sec 43(2) Refugees Act.

dealing with the incorporation of international treaties into Kenya's domestic law. By the operation of these constitutional provisions, Kenya is considered to have moved from a dualist to a monist state.[38]

Section 24 of the Refugees Act, 2021 makes clear Kenya's protection obligations to refugees:

> (1) Any person entering Kenya to seek asylum shall make his or her intention known immediately upon entry or within thirty days by reporting to the nearest reception centre or the nearest government administrative office.
> (2) Where a person is lawfully in Kenya and is subsequently unable to return to his country of origin for any of the reasons … the person shall, prior to the expiration of his lawful stay, present himself before an appointed officer and apply for recognition as a refugee, in accordance with the provisions of this Act.

Kenya has also ratified the 1969 OAU Refugee Convention. Article II of the Convention stipulates the member states' refugee protection obligations:

> (1) No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1and 2.
> (2) Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum.

It is indisputably clear that the Kenyatta government owed protection obligations to Dak. As mentioned at the outset, Dak engaged Kenya's protection obligations in 2015 and went through all the legal procedures provided under the Refugees Act, 2006 to obtain his refugee protection visa. He was living in Nairobi as a peaceful and law-abiding person – at least the Kenyatta government provided no evidence that he posed a risk to Kenya's national security and safety to warrant his forceful removal, namely, to invoke the exceptions to the refugee conventions. He was not even given a written notice before his visa was cancelled as the Refugees Act, 2006 required.[39] He also was not given an opportunity to be heard, to which he was

38 See also M Mwagiru 'From dualism to monism: The structure of revolution in Kenya's constitutional treaty practice' (2011) 3 *Journal of Language, Technology and Entrepreneurship in Africa* 144-155.
39 Secs 11 & 12 Refugees Act, 2006; secs 17(2)(a)-(c) Refugees Act, 2021.

entitled under both the Refugees Act, 2006 and the Constitution of Kenya.[40]

In short, the Kenyatta government violated its protection obligations to Dak, both in terms of cancelling his visa without a valid reason and not affording him an opportunity to make representation. Consequently, it also violated *non-refoulement*, which is now regarded as a norm of customary international law and as having acquired a *jus cogens* status, meaning that states are not at liberty to derogate from it under any circumstances.

3.2 *Non-refoulement* as a norm of customary international law

First, it may be useful to have some understanding of customary international law. Customary international law has been defined as a 'law derived from the consistent conduct of states acting out of the belief that the law required them to act that way'.[41] In other words, it is a law based on states' consent expressed through practice. This view is reflected in the Statute of the International Court of Justice (ICJ) (Statute). For example, article 38 of the Statute stipulates that, in adjudicating disputes between states, the ICJ shall apply

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations.

In the famous *North Sea Continental Shelf* cases,[42] in which the parties requested the ICJ to determine the rules of international law applicable to their delimitation disputes, the ICJ interpreted article 38 of the Statute as containing two principal elements of customary international law, namely, state practice (what states do, sometimes referred to as the objective element); and *opinio juris*, being the recognition and acceptance of practice by the community of nations (the subjective element). The Court found that, although there have been cases where states had delimited their boundaries using the equidistance method, such practice (*opinio juris*) could not be established in the present case. It explained how state practice and *opinio juris* give rise to the customary international rule:[43]

40 See Constitution of Kenya, 2010 sec 50.
41 S Rosenne *Practice and methods of international law* (1984) 55.
42 *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands* (Advisory Opinion and Orders) [1969] ICJ Rep 4.
43 *North Sea Continental Shelf Cases* (n 42) 77.

> Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitati*s.

In short, a norm becomes customary international law if states have accepted it and abide by it.

The principle of *non-refoulement* is considered a norm of customary international law on the basis that it is enshrined in a number of international conventions that states have ratified.[44] These include the Refugee Convention and its Refugee Protocol, the Convention against Torture (CAT),[45] and the International Convention against Enforced Disappearance.[46] In addition, the UN General Assembly has passed numerous resolutions in which it has consistently reemphasised the fundamental importance of *non-refoulement*.[47] The General Assembly's resolutions may not be binding on states, but they certainly are relevant considerations in determining the 'existence or emergence of *opinio juris'*.[48]

Perhaps most important, conventions are now understood as 'norm-creating' rules. In the *North Sea Continental Shelf* case, for example, the ICJ stated that conventions no doubt are 'norm-creating' as they imply state practice and *opinio juris.* The Court noted that Denmark and The Netherlands had argued that

> [e]ven if there was at the date of Geneva Convention no rule of customary international law in favour of equidistance principle … such rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice – and that this rule, being a rule of customary international law binding on

44 UNHCR Handbook (n 25) 66.
45 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted 10 December 1984, entered into force 26 June 1987 1465 UNTS 65 (CAT) art 3(1).
46 International Convention for the Protection of All Persons from Enforced Disappearance adopted 20 December 2006, entered 23 December 2010 2716 UNTS 3 (Convention against Enforced Disappearance) arts 16(1) & (2).
47 UNGA Res 57/187, 18 December 2002; UNGA Res 54/146, 22 February 2000; UNGA Res 55/74, 12 February 2001; UNGA Res 56/137, 19 December 2001; UNGA Res 57/187, 18 December 2002; UNGA Res 58/151, 22 December 2003; UNGA Res 59/170, 20 December 2004; UNGA Res 60/129, 20 January 2006; UNGA Res 61/137, 25 January 2007; UNGA Res 62/124, 24 January 2008; UNGA Res 63/148, 18 December 2008; UNGA Res 63/127, 15 January 2009; UNGA Res 65/194, 28 February 2011; UNGA Res 64/127, 15 January 2010; UNGA Res 66/133, 19 March 2012; UNGA Res 67/149, 6 March 2013; UNGA Res 68/141, 8 January 2014; UNGA Res 69/152, 17 February 2015.
48 General Assembly (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion) [1996] ICJ Rep 226, paras 70-71.

> all [parties], should be declared applicable to the delimitation of the parties' respective continental shelf areas in the North Sea.[49]

The Court further stated that the Convention (the Geneva Convention) 'has passed into the general corpus of international law, and is now accepted as such by the *opinio juris'*.[50] In what perhaps is the most authoritative part of the judgment on this issue, the Court stated: 'There is no doubt that this process [referring to the process by which conventions are adopted] … constitutes one of the recognized methods by which new rules of customary international law may be formed.'[51]

There also is a wealth of scholarly opinion supporting the view that *non-refoulement* has passed into the realm of customary international law, thereby binding all states. For example, Lauterpacht and Bethlehem, in their 2003 report on the 'scope and content of … *non-refoulement* in international law', found that *non-refoulement* has a treaty-based norm-creating character and enjoys 'widespread and representative support'.[52] They concluded on that basis that 'it must be regarded as a principle of customary international law'.[53] Similarly, Costello and Foster, investigating this very same issue, concluded that there is strong evidence, from widespread state practice and *opinio juris,* pointing 'to the establishment of *non-refoulement* as a norm of customary international law'.[54]

The recognition of *non-refoulement* as a norm of customary international law is rendered absolutely necessary by the fundamental importance of the rights and values it protects, especially for the most-at-risk members of the human community. This understanding raises an important question, namely, whether *non-refoulement* has also attained the status of *jus cogens* (norms from which no derogation is permitted), or whether it remains a *jus dispositivum* (a law subject to the discretion of states).[55]

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49 *North Sea Continental Shelf Cases* (n 42) [70].
50 *North Sea Continental Shelf Cases* (n 42) [71].
51 As above.
52 E Lauterpacht & D Bethlehem *The scope and content of the principle of non-refoulement: Opinion* (2003) 147.
53 Lauterpacht & Bethlehem (n 52) 149.
54 K Costello & M Foster '*Non-refoulement* as custom and *jus cogens*? Putting the prohibition to the test' in M Heijer & H Wilt (eds) *Netherlands yearbook of international law* (2015) 286; *Encyclopaedia of public international law* (1985) 456.
55 J Allain 'The *jus cogens* nature of *non-refoulement*' (2001) 13 *International Journal of Refugee Law* 533, 534.

3.3 Is *non-refoulement* a *jus cogens* norm?

The term *jus cogens (*or *ius cogens),* sometimes referred to as a peremptory norm, is Latin and means 'coercive law'.[56] It is derived from the idea central to 'Roman law that certain legal rules cannot be contracted out, given the fundamental values they uphold'.[57] This idea has been accepted by the international community of nations, making *jus cogens* a core principle of the international legal regime. This recognition is most evidenced in article 53 of the Vienna Convention on the Law of Treaties (VCLT):

> A treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole, as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In addition, there are a number of international conventions that are regarded as enshrining *jus cogens* principles. These include those prohibiting genocide, crimes against humanity, war crimes,[58] torture[59] and slavery.[60] These acts are treated as imposing non-derogable obligations on states.[61]

The prevailing view is that *non-refoulement* has attained the status of *jus cogens* norms. In its series of declarations, for example, the Executive Committee of the High Commissioner's Programme (Executive Committee) has stated that *non-refoulement* is progressively gaining a *jus cogens* status.[62] This is most explicit in its General Conclusion on International Protection (GCIP) 79 which states, in part, that '*non-refoulement* is not subject to derogation'.[63]

56 PE Nyah & P Butt *Concise Australian legal dictionary* (2004) 244.
57 A Lagerwall '*Jus cogens*' *Oxford Bibliographies* 2015, http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0124.xml#obo-9780199796953-0124-div1-0005 (accessed 3 October 2024).
58 Rome Statute of the International Criminal Court (2002) arts 6, 7 & 8.
59 Art 2(2) Convention against Torture.
60 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery adopted 7 September 1957, entered into force 30 April 1957 226 UNTS 3 art 9.
61 Human Rights Committee General Comment 29 (XXIX), 'Derogations during a State of Emergency (Article 4)' (2001) 9.
62 UNHCR Executive Committee Conclusion 25 (XXV), 'General Conclusion on International Protection' (1982); UNHCR Executive Committee 55 (XL), 'General Conclusion on International Protection' (1989).
63 UNHCR Executive Committee 79 (XLVII) 'General Conclusion on International Protection General' (1996).

The ICJ's position remains less clear on this matter. However, some of its decisions have been interpreted as recognising *non-refoulement* as a *jus cogens.* One such decision is the Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*) in which it stated:[64]

> The prohibition of torture is part of customary international law and it has become a peremptory norm *(jus cogens) …* That prohibition is grounded in a widespread international practice and on the *opinio juris* of states. It appears in numerous international instruments … and it has been introduced into the domestic law of almost all states; finally, acts of torture are regularly denounced within national and international fora.

It has been argued that since *non-refoulement* shares certain features with the prohibition of torture, it should be accorded the same *jus cogens* status.[65] Strong support for this argument can also be found in the decisions of regional judicial bodies. (Regional jurisdiction can be relevant to international legal obligations in many ways. For example, for an international custom to develop, it must involve all of the major regions of the world.)

The European Court of Human Rights (European Court), in particular, has given a persuasive opinion on why *non-refoulement* has the same status as *jus cogens*. This is most evident in its 2012 decision of *Hirsi v Italy*.[66] This case concerned an application brought by 24 applicants (11 Somali nationals and 13 Eritrean nationals) claiming that their transfer to Libya by Italian authorities violated article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 4 of its Protocol 4.[67] The applicants were basically alleging a violation of *non-refoulement.*

In a lengthy judgment analysing applicable human right instruments, both domestic and international, the European Court upheld the applicants' claim. The decision was hailed as historic and a huge success for refugees and international human rights organisations.[68] On *non-refoulement*, the Court elaborated:[69]

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64 *Belgium* v *Senegal* [2012] ICJ Rep 422, 457, 99.
65 Costello & Foster (n 54) 309; T Molnar 'The principle of *non-refoulement* under international law: Its inception and evolution in a nutshell' (2016) 1 *Cojourn* 51, 54.
66 *Hirsi Jamaa & Others v Italy* [2012] ECR 1.
67 Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols 11 and 14 adopted 4 November 1950, entered into force 3 September 1953 ETS 5.
68 'Italy: "Historic" European Court judgment upholds migrants' rights' *Amnesty International* 23 February 2012, https://www.amnesty.org/en/latest/news/2012/02/italy-historic-european-court-judgment-upholds-migrants-rights/ (accessed 3 October 2024).
69 *Hirsi* (n 66) [64].

> The prohibition of *refoulement* is a principle of customary international law, binding on all states, even those not parties to the United Nations Convention Relating to the Status of Refugees or any other treaty for the protection of refugees. In addition, it is a rule of *jus cogens*, on account of the fact that no derogation is permitted and of its peremptory nature, since no reservations to it are admitted.

In support of the European Court's decision is persuasive scholarly opinion. Allain, for example, has argued strongly that '*non-refoulement* is … a norm which cannot, in any circumstances, be overridden. All states are bound to respect the obligation not to *refoule* individuals … either unilaterally, bilaterally or multilaterally.'[70] Costello and Foster hold very much the same view:[71]

> Much of th[e] evidence … leads to the conclusion that [*non-refoulement*] is ripe for recognition as a norm of *jus cogens*, due to its universal, non-derogatory character. In other words, it is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted.

The main insight from this body of opinion is that *non-refoulement* is now recognised and accepted as a norm of customary international law and as having acquired a *jus cogens* status. *Non-refoulement* is provided for in Kenya's 2021 Refugees Act, as follows:[72]

> (1) No person shall be refused entry into Kenya, expelled, extradited from Kenya or returned to any other country or be subjected to any similar measure if, as a result of such refusal, expulsion, return or other measure, such person is compelled to return to or remain in a country where –
>
> (a) the person may be subject to persecution on account of race, religion, nationality, membership of a particular social group or political opinion; or
>
> (b) the person's life, physical integrity or liberty would be threatened on account of external aggression, occupation, foreign domination or events seriously disturbing public order in part or whole of that country.
>
> (2) The benefit of subsection 1 may not, however, be claimed by a refugee or asylum seeker whom there are reasonable grounds for him or her being regarded as a danger to the national security of Kenya.

The implication for Kenya is that, since *non-refoulement* lies at the heart of its Refugees Act, the Kenyatta government, in deporting Dak on unjustifiable grounds, violated *non-refoulement* as a *jus cogens* principle of international law from which no derogation is allowed.

70 Allain (n 55) 541.
71 Costello & Foster (n 54) 273.
72 Sec 29 Refugees Act, 2021.

The Kenyatta government was determined to deport Dak to the point that it was unwilling to consider other options. For example, it was reported that Dak pleaded to be given some time to seek admission into another country[73] – a right granted by the Refugee Convention[74] and the OAU Refugee Convention.[75] In addition, a number of leading international human rights organisations, including Amnesty International and the United Nations High Commissioner for Refugees (UNHCR), intervened in an attempt to stop the deportation, arguing that Dak could face severe persecution in South Sudan – all to no avail.[76] However, this is not an isolated case. Kenya's country reports show that the Kenyan government has consistently failed to ensure adequate protection for refugees and asylum seekers on its shores.[77]

4 *South Sudan v James Gatdet Dak*: A politically-motivated case?

Immediately after arriving in South Sudan in 2016, Dak was arrested by the National Security Service personnel and was kept in prison for two years without having been convicted by a court of law. (The NSS has power to arrest a person with or without a warrant, depending on the nature of the offence committed or suspected to be committed.)[78] In February 2018 Dak was brought before the High Court of South Sudan charged with treason, 'sedition',[79] and undermining the authority of or insulting the President of South Sudan.[80] The case has not been made public as South Sudan's courts have yet to develop digital means of recording and reporting cases.

73 LG Gatluak 'Review and analysis of my painful story' *Sudan Tribune* (Paris) 25 November 2019, https://sudantribune.com/spip.php?article68582 (accessed 2 October 2024).
74 Art 32(3) Refugee Convention.
75 Arts II(4) & (5) OAU Refugee Convention.
76 'Deportation of South Sudanese opposition spokesperson: A chilling assault on refugee rights' *Amnesty International* 4 November 2016, https://www.amnestyusa.org/press-releases/kenya-deportation-of-south-sudanese-opposition-spokesperson-a-chilling-assault-on-refugee-rights/ (accessed 3 October 2024).
77 Kenya's 2022 Human Rights Report, https://www.state.gov/wp-content/uploads/2023/02/415610_KENYA-2022-HUMAN-RIGHTS-REPORT.pdf (accessed 3 October 2024).
78 Secs 54 & 55 National Security Service Act 2014.
79 The Penal Code refers to this offence as 'publishing or communicating false information prejudicial to South Sudan', but here it is referred to as 'sedition' for ease of exposition.
80 'James Gatdet Dak former Machar's spokesperson is sentenced to death by hanging within 15 days' *South Sudan Liberty News* 12 February 2018, http://www.southsudanliberty.com/news/index.php/latest-news/1703-james-gatdet-dak-former-machar-s-spokesperson-is-sentenced-to-death-by-hanging-within-15-days (accessed 3 October 2024).

4.1 Treason

Treason is a serious offence against the state in South Sudan. This is provided in section 64 of the Penal Code Act, 2008 (Penal Code). Section 64(1) of the Penal Code proscribes treason as an offence against South Sudan, punishable by death or life imprisonment. Section 64(2) specifies the elements of treason, which include overthrowing the President of South Sudan or conspiring with a foreign government to invade South Sudan. Section 64(3) provides for what may be taken as a lawful means by which a citizen can initiate certain actions intended to improve the system of governance.

The Court found Dak guilty of treason under section 64(2) of the Penal Code, that is, that he engaged in acts that were intended to overthrow President Salva Kiir Mayardit.[81] He was sentenced to death by hanging along with other prisoners, but the President intervened and pardoned them as part of his effort to restore peace in the country.[82] However, it is highly unlikely that the case of treason against Dak was proven or provable. This essentially was about the J1 incident which, as previously noted, has remained a subject of contention between the government[83] and the SPLM-IO.[84] In light of the politics involved in the case, it is difficult to see how the Court could have been satisfied beyond reasonable doubt that Dak had committed treason.

4.2 Sedition

It is an offence under section 75 of the Penal Code to publish or communicate false information that can cause public disorder or violence, among other things. This offence attracts a maximum penalty of 20 years' imprisonment.

Dak was charged with sedition based on the comment he published on social media in July 2016 and was sentenced to 20

81 'Quash death sentence for former opposition spokesman' *Amnesty International* 12 February 2018, https://www.amnesty.org/en/latest/news/2018/02/south-sudan-quash-death-sentence-for-former-opposition-spokesman/ (accessed 3 October 2024).
82 'Kiir orders release of James Gatdet and Machar's South African advisor' *Radio Tamazuj* 31 October 2018, https://radiotamazuj.org/en/news/article/kiir-orders-release-of-james-gatdet-and-machar-s-south-african-advisor (accessed 3 October 2024).
83 J Koinange Interview with Salva Kiir Mayardit (Part 1) on 3 August 2016.
84 J Young 'Isolation and endurance: Riek Machar and the SPLM-IO in 2016–17' (2017) *Small Arms Survey* 12.

years' imprisonment.[85] As mentioned at the outset, the comment was taken to be one of the series of events that sparked the J1 Incident:[86]

> BREAKING NEWS: Fighting erupted inside J1 ... The President and his commanders attempted to arrest the First Vice-President, Dr Riek ... This came after the President called for a meeting in his office with [his two Vice-Presidents]. This turned out to be a setup to arrest and possibly to harm Dr [Riek]. Fortunately, Dr [Riek's] bodyguards have managed to fight vigorously and rescued Dr [Riek]. He is now safe!

Nothing in this text has the effect of inciting violence. Dak was simply reporting what was already taking place at J1. What is more, the comment comes within the right to 'freedom of expression and media' provided in the Transitional Constitution of the Republic of South Sudan.[87] It is true, of course, that the government only gives lip service to freedom of expression.

4.3 Undermining the authority of or insulting the President

Finally, the Penal Code makes it an offence to undermine the authority of or insult the President of South Sudan.[88] Basically, it criminalises criticism of the President, which is what is dubbed as making a false statement that may cause 'hostility towards', or 'hatred, contempt or ridicule of … the President'.[89] Dak was sentenced to one year's imprisonment for insulting the President.

This article argues that insulting the President should not be prescribed as a legal offence in South Sudan for two principal reasons. First, the President of South Sudan is a political leader who makes decisions that affect the lives and interests of the South Sudanese people. As such, every South Sudanese is entitled to have a say in every political decision the President makes. Having a say in the President's decisions can lead to insult or criticism. In fact, insults are inevitable in the generally heated political discussion. To shield the President's decisions from being questioned or criticised is to deny freedom of expression and to ultimately hinder accountability.

Second, to regard the President of South Sudan as immune from public criticism is to place him above the law and politics.

85 'Machar's ex-spokesman sentenced to death in Juba' *Radio Tamazuj* 12 February 2018, https://radiotamazuj.org/en/news/article/machar-s-ex-spokesman-sentenced-to-death-in-juba (accessed 2 October 2024).
86 As cited in M Deng 'South Sudan v James Dak: A case of travesty of justice' (2018) *Sudd Institute* 1, 4.
87 Art 24 Transitional Constitution.
88 Sec 76 Penal Code.
89 Secs 76(a)(i) & (ii) Penal Code.

The President as a political leader is not the fountain of justice and his dignity cannot be protected by law. *Lese majeste* laws – laws protecting the dignity of a monarch – with which the Penal Code shares similarities, have no place in protecting the political executive from criticism.

However, even if these offences were sufficiently proven, Dak would still have been covered by the CoH agreement[90] signed between the government and the rebel groups.[91] Article 9(2)(c) of the CoH, for example, requires all the parties to the conflict to release the 'prisoners of war [and] all political prisoners and detainees'. Dak was a political prisoner within the meaning of article 9(2)(c) of the CoH agreement. A political prisoner, as defined by Amnesty International, is 'a member or suspected member of an armed political group who has been charged with treason or subversion'.[92]

The violation of Dak's refugee right, the pain and suffering he endured while in prison in South Sudan, and the embarrassment of having been treated like a criminal raise the question of what remedy he might be entitled to from the Kenyan government.

5 Could Dak be entitled to any remedy from the Kenyan government?

This part examines the possibility of exhausting remedies under Kenyan law, and the potential for Dak to successfully submit a communication to the African Commission. Submitting a complaint to the African Commission is possible because Kenya has ratified the African Charter on Human and Peoples' Rights (African Charter).

The process under the African Charter is that anyone seeking redress at the African Commission must first exhaust local remedies.[93] There are important reasons for this, one of which is to give a respondent state the opportunity to rectify the alleged violation.[94] Another reason is that domestic courts are well placed to undertake a 'fact-finding' task, although in authoritarian states it is difficult for courts to investigate governments' actions and to require governments to rectify their own violations of laws or human rights.[95]

90 Agreement on Cessation of Hostilities, Protection of Civilians and Humanitarian Access (CoH), 2017.
91 Arts 9(2)(b) & (c) CoH.
92 *International handbook* (2002) 21.
93 Art 56(5) African Charter.
94 See F Viljoen *International human rights law in Africa* (2012) 316.
95 As above.

The African Court on Human and Peoples' Rights (African Court) is also a potential legal avenue for Dak in seeking remedies from the Kenyan government. The African Court was established in 2006 pursuant to article 1 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol) as a judicial arm of the African Union (AU). It has jurisdiction over all cases and disputes arising under the African Charter, the African Court Protocol, and other human rights instruments, and referred to it by the parties.[96] Although Kenya has also become a state party to the African Court Protocol, and thus falls under the jurisdiction of the African Court, it has not made the declaration to allow direct individual access to the Court. Therefore, any submission by Dak would have to go through the African Commission.

It should be noted that, while South Sudan has ratified the Refugee Convention and its Protocol, as well as the OAU Refugee Convention,[97] no action against it is likely to succeed. This is because South Sudan ratified these conventions almost two years after Dak was deported, meaning that they would not apply retroactively.[98] Also, given that Dak avoided death in South Sudan only through a presidential pardon, it would probably not be appropriate for him to consider taking legal action against the government of South Sudan, even though his conviction remains questionable. Another factor is that courts in South Sudan are not in a position to entertain an application of this kind. For one thing, they lack judicial independence, especially when it comes to matters involving the government.[99]

5.1 Exhausting remedies under Kenyan law

As Dak's refugee protection visa was cancelled on unspecified grounds, making him immediately liable to deportation, he could, as a first step, seek a review of the decision of Kenya's Commissioner for Refugee Affairs. As noted previously, all the claims that arose under the repealed Refugees Act, 2006 can be made under the Refugees

96 Art 4 African Court Protocol.

97 On South Sudan treaty status, see agreements and treaties ratified by South Sudan, https://mofaic.gov.ss/agreements-treaties-and-protocols/ (accessed 4 October 2024).

98 A Chua & R Hardcastle 'Retroactive application of treaties revisited: *Bosnia-Herzegovina v Yugoslavia*' (1997) *Netherlands International Law Review* 414-420.

99 C Rickard 'Sacking of 14 judges by South Sudan President unconstitutional: East African Court of Justice' *African Legal Information Institute* 30 July 2020, https://africanlii.org/articles/2020-07-30/carmel-rickard/sacking-of-14-judges-by-south-sudan-president-unconstitutional-east-african-court-of-justice (accessed 4 October 2024).

Act, 2021.[100] The Refugees Act grants the right to appeal the decision of the commissioner to the Refugee Status Appeals Committee.[101] If his application is unsuccessful, he could appeal to the High Court of Kenya.[102] The Court has jurisdiction over violations of rights contained in the constitutional Bill of Rights.[103] An example of these rights is 'fair hearing' which was denied to Dak notwithstanding being one of the key principles in the Kenyan Constitution and the International Bill of Human Rights, to which Kenya adheres.[104]

However, this option – appealing to the Refugee Status Appeals Committee or the High Court of Kenya – has no prospects of success because of the lapse of time. Appeals have to be made within 30 days of the cancellation of the refugee protection visa.[105] It is unlikely that the High Court or any other Kenyan court would accept an application from Dak brought under the Refugees Act outside the permitted timeframe.

In terms of the types of local remedies that could be awarded to Dak if the Appeals Committee or the High Court of Kenya were to review his case, the Refugees Act is silent. However, there are two other possible local remedies. The first could be a reinstatement of Dak's refugee status – that is, to be regranted a refugee protection visa – although the possibility of this is uncertain given that South Sudan has gained relative stability. The second could be a common law remedy, such as financial compensation for the violation of his human right and the suffering he endured as a result.[106]

Given that the time for seeking a review under the Refugees Act has long expired, the only option available to Dak might be to take the matter to the African Commission.

5.2 Lodging a complaint with the African Commission

The African Commission was established by the African Charter to protect and promote the human rights of the African people.[107] It serves as a quasi-judicial body along with African Court. As a quasi-

100 Sec 43(2) Refugees Act, 2021.
101 Secs 11 & 14(1) Refugees Act, 2021.
102 Sec 14(2) Refugees Act, 2021.
103 Sec 165 Constitution of Kenya.
104 Sec 50 Constitution of Kenya; the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966 form the International Bill of Rights.
105 As above.
106 On local remedies, see Viljoen (n 94) 316-319.
107 Art 30 African Charter.

judicial body, the Commission's decisions on communications are not legally binding on state parties.[108] As such, it relies on the goodwill of state parties for the implementation of its decisions. However, the Commission does take it upon itself to follow up with a respondent state to ensure that its decision (recommendation) is implemented.[109]

There are admissibility requirements that must be met to file an application with the African Commission. These requirements are contained in article 56 of the African Charter. The two most relevant requirements are that local remedies must be first exhausted, as discussed, and that the application must be filed 'within a reasonable period from the time local remedies are exhausted, or from the date the Commission is seized of the matter'.[110]

Unlike other regional conventions,[111] the African Charter takes a flexible approach to the submission of complaints. As Viljoen explains, there are factors favouring flexibility when assessing delay in submission, such as the complainants not knowing their rights under the African Charter or the existence of the African Commission; their particular circumstances such as being in detention and not able to submit a complaint on time; and a delay on the part of domestic courts in determining cases involving local remedies.[112] These reasons are consistent with the African Charter's overarching objective to ensure justice and fairness as a human rights instrument.

However, in recent times the African Commission has adopted a more rigid six-months period for the submission and receipt of communications. Its reasoning was that the six-months period is the 'usual standard', suggesting that the Commission intended to bring itself in line with other regional bodies.[113] However, any reliance on a fixed term is at odds with the wording of the African Charter, which allows for submissions within a reasonable period of delay.

The African Court's jurisprudence also is a relevant consideration in the scheme of things. Like the African Commission, the African Court

108 Viljoen (n 94) 339-343.
109 As above.
110 Art 56(6) African Charter.
111 Eg, under the American Convention on Human Rights art 46(1)(b), communications must be lodged within six months from the date of the alleged violation. See also European Convention on Human Rights art 35; the timeframe is four months; Protocol 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms art 4, https://rm.coe.int/168008483 (accessed 9 October 2024).
Art 56(6) African Charter.
112 Viljoen (n 94) 320.
113 *Majuru v Zimbabwe* (2008) AHRLR 146 (ACHPR 2008) para 109.

applies the same criteria in relation to admissibility of applications under article 56(6) of the African Charter, including that applications be filed within a reasonable period. While the Court has shown flexibility, there are also some inconsistencies in its approach to 'reasonable period'.[114] Nkhata argues that in some cases, the African Court seemed to have taken applicants' arguments for delay at face value, but in others it seemed to have rejected the same arguments without specifying the types of evidence it needed to justify the delay.[115] He concludes that the Court's approach creates incoherence and uncertainty in its jurisprudence.[116]

However, the African Court's overall approach is sympathetic to applicants as long as they can justify delay.[117] This is consistent with the intention of the drafters of the African Charter to not burden the Court with a fixed time frame within which applications should be filed. The Court's sympathetic or flexible approach may seem unfair to respondent states, but the objectives of the African Charter to ensure justice and fairness for all should always be borne in mind. Besides, domestic courts do not always administer justice impartially. This is particularly the case in states where courts lack independence, for example, South Sudan, although a South Sudanese applicant has yet to file an application in the African Court.

It has been eight years since the Kenyatta government deported Dak back to South Sudan in 2016. That is far beyond the six-months' time frame the African Commission has imposed under article 56 (6) of the African Charter. However, there are many factors that could work in Dak's favour in terms of persuading the Commission to allow him to file an application to seek remedies from the Kenyan government.

First, as he was in detention for two years (from November 2016 to November 2018), he could make a case that the time he should have filed an application with the African Commission began after he was released from detention on 2 November 2018. It has been five years and 10 months since he was released, which is within the period of delay that the Court allowed in many cases, for example, *Dexter*

114 WJ Nkhata 'What counts as a "reasonable period"? An analytical survey of the jurisprudence of the African Court on Human and Peoples' Rights on reasonable time for filing applications' (2022) 6 *African Human Rights Yearbook* 147-149.
115 As above.
116 Nkhata (n 114) 152-153.
117 See, eg, *Beneficiaries of Late Norbert Zongo & Others v Burkina Faso* (2011) (ACHPR 013/2011) para 124; *Christopher Jonas v United Republic of Tanzania* (2015) (ACHPR 011/2015) para 54; *Dexter Eddie Johnson v Republic of Ghana* (2017) (ACHPR 016/2017) paras 3-12.

Eddie Johnson v Republic of Ghana and *Werema Wangoko Werema and Waisiri Wangoko Werema v United Republic of Tanzania*.[118]

Second, he could argue that being far away in South Sudan and the African Commission being seated in Banjul in The Gambia in West Africa, he was not aware of the existence of the Commission and its role. Third, and the perhaps his strongest argument, he could argue that he could not return to Kenya to seek local remedies there to satisfy the requirements of article 56(5) of the African Charter, although the conditions imposed on him by the Kenyan government are not known, for example, how long he was barred from returning to Kenya.

There have been cases where the African Court considered geographical proximity to be a justifiable reason for the delay in filing an application. For example, in *Lucien Rashidi v United Republic of Tanzania*, which involved deportation, the Court held that since 'the applicant was deported within a week of the High Court's judgment and issuance of the Notice of Prohibited immigrant', '[h]e … lacked the proximity that was necessary to follow up on his requests to the domestic authorities'.[119] Finally, he could argue that he lacked legal representation. There is evidence for this. For example, he self-represented when he was being tried in South Sudan in 2018.[120]

In short, Dak could argue that his case comes within a reasonable period of delay, and is compelling by all accounts. A relevant consideration here also is the fact that he needed time to recover after he was released from jail as he may have been traumatised (South Sudan's Blue Prison where Dak was kept arguably is among the worst prisons in the world). On the other hand, he may have moved on in his life and, thus, may not be keen to file an application with the African Commission. This possibility renders highly unlikely the prospects for holding the Kenyan government accountable for serious violations of international and regional refugee laws. For Dak, it may mean that he will have to live with the injustices he had suffered for the rest of his life.

118 (2015) (ACHPR 024/2015) paras 48-50.
119 *Lucien Rashidi v United Republic of Tanzania* (2015) (ACHPR 009/2015) para 55.
120 Deng (n 86) 7-8.

6 Conclusion

It has been said that 'the refugee law remains the unwanted child of states'.[121] This to a degree is true. States have signed up to the 1951 Refugee Convention and its 1967 Refugee Protocol, yet in too many cases they have violated refugee protection rights these conventions provide. In some cases, this is done in the most blatant way. Such was the case with James Gatdet Dak, who was deported from Kenya to South Sudan in 2016 where he was charged and convicted of offences that arguably were politically motivated.

This article has sought to comment on Dak's deportation. It found that the Kenyatta government carried out the deportation in violation of international and regional refugee laws, namely, the Refugee Convention and its Refugee Protocol, the OAU Refugee Convention and the African Charter. Particularly, it found that the deportation violated the principle of *non-refoulement*, which is now believed to have become a peremptory norm of international law from which no derogation is permitted.

The article also argued that Dak had suffered persecution at the hands of South Sudan's authorities in at least two ways: (a) he was imprisoned for two years without having been formally convicted by a court of law; (b) his imprisonment was likely politically motivated because he is affiliated with the SPLM-IO – an armed opposition movement.

Finally, the article looked at the question of what recourse Dak may have against the Kenyan government for violating his refugee protection right. It is argued that Dak could seek a review of his deportation within Kenya's immigration bodies and courts and/or bring a complaint before the African Commission. However, the prospects for this are uncertain for two principal reasons. First, the time (30 days) for seeking a review of a cancellation of visa under Kenya's Refugees Act had long expired.

Second, the African Charter requires complaints to be filed within a reasonable period, which the Commission has determined to be a period of six months. This had also long expired. However, the African Commission allows complainants to invoke exceptional circumstances. Dak's circumstances are exceptional given that he

121 R Byrne & A Shacknove 'The safe country notion in European asylum law' (1996) 9 *Harvard Human Rights Journal* 184, 187.

was jailed for two years and needed some recovery after being released from jail as he may have been traumatised.

However, it may be the case that Dak has moved on in his life and does not wish to revisit the matter. This would mean impunity for the Kenyan government. However, the point in writing this commentary is less about seeking justice for Dak, but more about providing an analytical understanding of the contentious issues that led to deportation, and perhaps to create a wider awareness about violations of refugees' protection rights that go unpunished.

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Analysing the implementation of refugee laws and policies in relation to women and girls: A case of Kampala, Uganda

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Summary: *Significant numbers of refugee women and girls are increasingly migrating from one country to another in the Eastern African region, in this case, to Uganda. A series of factors prompt women and girls to migrate, among which are fleeing political and economic unrest; escaping sexual and gender-based violence in their families and communities; the search for better socio-economic opportunities, including better-paying employment; the hope of improving their quality of life; and access to education. On a positive note, by escaping their communities, women and girls are freed from restrictive and sometimes harmful gender norms, thus gaining the opportunity to enhance their autonomy, self-esteem and, ultimately, their social standing. Furthermore, by gaining access to employment and education, they are able to contribute to their families back home, thereby improving their decision-making power and authority in their families and communities. Conversely, refugee women and girls face a series of obstacles and difficulties, such as difficulties in accessing housing and basic infrastructure; negative changes in gender roles; challenges with accessing timely and quality health care, including sexual and reproductive health; failure to access employment/access to decent work and social protection; exclusion from*

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political participation; violence; security threats; and a lack of access to justice. Using a documentary review approach, the article interrogates the implementation of refugee laws and policies in relation to women and girls. The geographical scope is on refugees from Eastern African countries such as South Sudan, Ethiopia, Eritrea, the Democratic Republic of the Congo, Somalia, Burundi and Rwanda, into Kampala slums in Uganda.

Key words: *refugees; laws/policies; regional migration; rights of women and girls; urban slums*

1 Introduction

Whether voluntary or forced, migration has profoundly shaped our world. It is estimated that 3 per cent of the world's population, or at least 258 million people, live outside of their country of origin.[1] In 2021 it was reported that the East and Horn of Africa region is home to 13,2 million forced migrants, including 3,6 million refugees and asylum seekers;[2] 50,4 per cent of these migrants are women and girls.[3] Several factors foster regional migration, especially in the case of women and girls. Conflict and insecurity remain the biggest drivers of migration in the region as a result of the destruction of infrastructure and socio-economic service delivery systems.[4] Due to the consistent occurrence of insecurity in the region, civilians are forced to abandon their homesteads as a result of traumatic experiences of killings, torture and kidnapping.[5] Others are forced to flee due to sudden or slow-moving disasters such as droughts, floods or sea level rises, often exacerbated by climate change and environmental stress.[6] Some move in search of better education; improved health services; in order to escape stigmatisation – especially people living with HIV; in search of better remuneration, employment, and better standards of living.[7] Others escape for political reasons such as fear of political persecution, limited or no freedom to exercise their political

1 JE Stiglitz 'Making globalisation work' ESRI Thirty-fifth Geary lecture (2006) 3, 1-12.
2 R Musoke 'Women on the move' *The Independent* 13 September 2022, https://www.indepedent.co.ug/women-on-the-move/(accessed 18 January 2024).
3 As above.
4 https://www.ohchr.org/en/press-releases/2015/04/committee-migrant-workers-considers-initial-report-uganda (accessed 13 July 2023).
5 WL Swing 'Migration: Making the move from rural to urban by choice' 16 October 2017, https://www.iom.int/news/migration-making-move-rural-urban-choice (accessed 23 November 2022).
6 As above.
7 As above.

and civil liberties, and the breakdown of law-enforcing institutions, among others.[8]

Uganda is currently facing one of the fastest-growing refugee crises in the world.[9] With over 1,5 million refugees, Uganda hosts the largest refugee population in Africa and the sixth largest in the world. Approximately 60 per cent of these refugees come from South Sudan, and approximately 30 per cent come from the Democratic Republic of Uganda, with the remaining percentage coming from Somalia, Eritrea, Burundi, Sudan, Ethiopia and Rwanda.[10] Most refugees are accommodated in the West Nile region, with the remaining in refugee camp settlements in the western and south-western parts of the country and in the capital, Kampala.[11]

Uganda has been widely acclaimed for having an inclusive and exemplary refugee policy dating as far back as the 1960s.[12] On the other hand, Uganda's refugee policy has been critiqued by some as a political and patronage strategy, used by the various political regimes (since independence) to entrench their political rule in the south-western regions and West Nile regions where the refugee camps have been housed as far back as the 1950s.[13] This policy was concretised in 1999 and termed the Self-Reliance Strategy (SRS) aimed at providing assistance to the refugees with the aim of enabling them to become self-sufficient.[14] The assistance included food rations, non-food items, a small plot of land for subsistence agriculture, with the expectation that once they reached self-sufficiency, they would be phased off the food rations and the humanitarian assistance.[15] In reality, this often does not happen as expected, as the pieces of land they are given often need a series of advanced farming practices in order to keep them fertile and in a position to continually produce food.[16] Due to their impoverished status, the refugees often do not have the resources to turn this land into productive land.

8 As above.
9 World Bank 'Informational note on forced displacement in Uganda', Informational-Note-on-Forced-Displacement-in-Uganda-November-2017.pdf (accessed 18 January 2024).
10 https://civil-protection-humanitarian-aid.ec.europa.eu/where/africa/uganda_en; https://reporting.unhcr.org/operational/operations/uganda (accessed 1 June 2024).
11 World Bank (n 9).
12 A Bretts 'Refugees and patronage: A political history of Uganda's "progressive" refugee policies' (2021) 120 *African Affairs* 243-276.
13 As above. The Nakivale settlement which is known as Africa's oldest refugee camp, was already in existence by 1958, based on the country's rural settlement model, providing plots of land to Rwandan Tutsis who were fleeing political persecution.
14 L Hovil 'Self-settled refugees in Uganda: An alternative approach to displacement?' (2007) 20 *Journal of Refugee Studies* 599-620.
15 As above.
16 As above.

Furthermore, the self-reliance strategy is based on the premise that the refugees have to stay in these settlement structures, ultimately confining them to a situation to which some have referred as not being any different from the refugee encampment situation.[17] Article 44 of Uganda Refugee Act 2006 gives the minister authority to designate transit centres or refugee settlements, where refugees and asylum seekers can be be temporarily or permanently accommodated.[18] The Act further states that any applicant or refugee who seeks to stay in another place rather than the designated areas may apply to the commissioner and, once authorised, may be required to report to an authorised officer in the local or urban council of the area where they choose to reside.[19]

Due to some of the limiting factors in the settlement areas, some refugees end up moving away and settling into other areas, most notably, Kampala district. This category of refugees is often referred to as 'Self-settled refugees' or in this case, 'Urban Refugees'.[20] Self-settled refugees often face a series of challenges as they fall outside of the scope of protection of those considered refugees by virtue of their opting to live outside the settlements, their exact numbers usually are not known and the law is ambiguous on their protection.[21] The United Nations High Commission for Refugees (UNHCR), with the government's collaboration, has made various efforts to document urban refugees through its urban load case file.[22] The UNHCR further adopted the Urban Refugee Policy which stresses that 'urban refugees', like other refugees, are entitled to protection and other durable solutions and, hence, they must be able to enjoy their rights provided for in the 1951 Convention as well as in other refugee and international human rights laws.[23]

However, the UNHCR reports that it faces a series of challenges when it comes to urban refugees, including an ever-increasing number of undocumented refugees moving to the capital city; huge backlogs in refugee status determination, which hinders their access to full civic rights; unaccompanied minors and separated children; an increase in the number of cases of sexual and gender-based

17 As above.
18 Art 44(1) Uganda Refugee Act 2006.
19 Arts 44(2) and (3).
20 SB Murray & SA Skull 'Hurdles to health: Immigrant and refugee healthcare in Australia' (2005) 29 *Australian Health Review* 25-29.
21 Hovil (n 14).
22 https://data.unhcr.org/en/documents/details/74470 (accessed 16 May 2024).
23 UNHCR *UNHCR policy on refugee protection and solutions in urban areas* (2009), http://www.unhcr.org/refworld/docid/4ab8e7f72.html (accessed 7 April 2017).

violence; and chronic refugee unemployment in the urban areas.[24] Those who end up employed often engage in petty businesses or provide casual labour, and there are challenges relating to accessing quality healthcare and education services, among other challenges.[25]

2 Focus and scope of study

Much has been written on refugees and specifically on refugees in Uganda. However, most of this is focused generally on refugees in camps or those in areas designated as settlement areas. Very little has been written on refugees who chose not to stay in the areas where they have been designated to stay but rather opt to move to urban areas. Urban refugees usually are discrete and unregistered and are regarded as 'spontaneous' or 'self-settled' refugees – those who have abandoned the encampment regime.[26] Different from camps, urban refugees are scattered, making it more difficult for service providers to correctly appraise their needs.[27] Furthermore, while several studies have addressed refugee rights, very few have taken a step further to investigate how and whether these rights are actualised, in other words, the translation of human rights law or policy into practice. This article attempts to examine the status of implementation of refugee laws and policies, with a specific focus on women and girls. The rights emanating from the refugee laws and policies that are scrutinised by no means are an exhaustive list of the refugee rights. Another focus of the article is the often vulnerable/marginalised aspect of refugees that often translates into their settlement in low-income spaces, which in the context of this article are cautiously referred to as 'urban slums'.

The area of study for this research is Kampala district. Kampala is the capital of Uganda and is estimated to have a population of 3 600 000 people.[28] Kampala's rapid population and urbanisation growth rate, over the years, has resulted in an exponential increase in slums, to the extent that Kampala has been referred to as 'one

24 https://www.ohchr.org/en/press-releases/2015/04/committee-migrant-workers-considers-initial-report-uganda (accessed 13 July 2023).
25 https://reporting.unhcr.org/uganda-refugees-and-asylum-seekers-urban-18 (accessed 17 May 2024).
26 P Marfleet '"Forgotten", "hidden": Predicaments of the urban refugee' (2007) 24 *Refuge* 36-45.
27 G Hoffstaedter 'Between a rock and a hard place: Urban refugees in a global context' in K Koizumi & G Hoffstaedter (eds) *Urban refugees: Challenges in protection, services and policy* (2016) 1-10.
28 TB Angurini 'Urban population to hit 21 million by 2040-UBOS' 15 May 2022, https://www.monitor.co.ug/uganda/news/national/urban-population-to-hit-21-million-by-20240-ubos-381650 (accessed 3 December 2022).

big slum'.[29] Kampala is estimated to have approximately 57 slums making up at least a quarter of the city, with about 60 per cent of the total city population living in these slums.[30] These slums include Katanga, Bwaise, Kasubi, Wandegeya, Nakulabye, Kisenyi, Kamwokya, Kanyanya, Kasokoso, Namuwongo, Mbuya, Kabalagala, and many others. [31]

Slums are often described as residential areas with sub-standard housing, usually characterised by overcrowding, often deemed unsafe, unhealthy and socially undesirable.[32] UN-Habitat defines a slum household as a group of individuals living under one roof in an urban environment and lacking one or more of the following: durable housing that protects against extreme weather conditions; adequate living space, often characterised by more than three people sharing a room; lack of access to sufficient safe water; lack of access to sanitation facilities such as well-constructed toilets shared by a reasonable number of people; poor solid waste management; lack of security of tenure often characterised by forced or illegal evictions; and so forth. [33] Slums are also increasingly characterised by high poverty levels, high levels of alcohol and drug abuse, limited access to healthcare services, increasing crime rates, and so forth.[34] The term 'slums' is not without controversy, as it is often rejected by those who inhabit places that are deemed to fit into the category. These often oppose the pejorative and essentialising nature of the term and allege that it is often used as an excuse for public or external interventions aimed at clearing or doing away with slums in ways that further marginalise and impoverish the low-resourced communities that reside in these areas.[35]

29 RK Mugambe and others 'Drivers of waste segregation and recycling in Kampala slums, Uganda: A qualitative exploration using the Behaviour Centred Design Model' (2022) 19 *International Journal of Environmental Research and Public Health* 10947 2; 'Kampala is one big slum' *New Vision* July 19 2023, https://www.newvision.co.ug/news/1309482/kampala-slum (accessed 3 December 2022).

30 As above.

31 R Nuwematsiko and others 'Unintended socio economic and health consequences of COVID-19 among slum dwellers in Kampala, Uganda' (2022) 22 *BMC Public Health* 88; 'Top 10 Kampala city slums tour' *Ultimate Wild Safaris,* https://ultimatewildsafaris.com/index.php/blog/top-10-kampala-city-slums-tour (accessed 19 July 2023).

32 https://www.sciencedirect.com/topics/social-sciences/slums (accessed 13 March 2024).

33 'What are slums? 12 Ddfinitions' *Cities Alliance* 4 March 2013, https://www.citiesalliance.org/newsroom/news/urban-news/what-slum-twelve-definitions#:~:text=UN%2DHabitat%20defines%20a%20slum,people%20sharing%20the%20same%20room; UN-HABITAT 'Slum upgrading', https://unhabitat.org/topic/slum-upgrading (accessed 19 July 2023).

34 R Ndejjo and others 'Drivers of cardio-vascular disease risk factors in slums in Kampala, Uganda: A qualitative study' (2023) 16 *Global Health Action* 2159126; Nuwematsiko and others (n 31).

35 https://www.sciencedirect.com/topics/social-sciences/slums (accessed 13 March 2024).

In 2008 Uganda drafted a comprehensive National Slum Upgrading Strategy and Action Plan, which was aimed at slowing the rapid growth of slums, by providing security of tenure; making housing more affordable; and addressing challenges associated with increasing urbanisation typified through brutal urban poverty.[36] Despite this policy framework, slums have increased in and around Kampala, as well as their associated challenges. Furthermore, due to its status as the capital city, Kampala district attracts a multiplicity of refugees from within the Eastern African bloc. These include refugees from different countries, for example, the Democratic Republic of the Congo (DRC), Eritrea, Somalia, Kenya, Burundi, Tanzania and South Sudan.[37] These refugees routinely migrate to Kampala slums in the areas of Kabalagala, Katwe, Bwaise, Kasokoso, Kamwokya and several others.[38]

The research principally used the documentary review method. Due to the topical nature of the research, relevant written material was the main source of information. These included international, regional and domestic human rights documents, Acts, statutes, regulations, policy papers, peer-reviewed journals, opinion pieces, online newspapers, reliable website pieces, organisational websites, organisational reports, and so forth. The author adhered to the authenticity of the documentary research method by ensuring that the information collected was reliable, representative (in the selection of documents), and inferred 'meaning' from the documents.[39] The main limitation of this method was accessing relevant and up-to-date written information on the subject under study. In as much as care was taken to authenticate the sources of information, deductions were drawn using the information that was available.

3 Legal/policy framework for refugee women and girls

When it comes to refugee laws and policies, a series of laws have been enacted right from the international to the domestic level in order to address a series of varied impacts of gendered migration on refugee rights. The 1951 UN Refugee Convention Relating to the Status of

36 Ministry of Lands, Housing and Urban Development 'National Slum Upgrading Strategy and Action Plan' December 2008 Vi.
37 As above.
38 MF Bwambale and others 'Migration, personal physical safety and economic survival: Drivers of risky sexual behaviour among rural-urban migrant street youth in Kampala Uganda' 4 June 2022, https://bmcpublichealth.biomedcentral.com/articles/10.1186/s12889-022-13516-y (accessed 2 December 2022).
39 J Ahmed 'Documentary research method: New dimensions' (2010) 4 *Industrial Journal of Management Sciences* 1-4.

Refugees aims at promoting and protecting refugees' fundamental rights and freedoms without discrimination.[40] In 1976 Uganda ratified the 1951 UN Refugee Convention and its 1967 Protocol.[41] Later, in 1987, the country ratified the 1969 OAU Convention on Refugees.[42] The definition of a refugee in both documents is similar. The 1950 UN Refugee Convention defines a refugee as

> any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or owing to such fear is unwilling to return to it. [43]

In addition to the definition above, the 1969 OAU Convention added another aspect by further defining a refugee as

> every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.[44]

Relatedly, an asylum seeker is a person who is seeking and awaiting a decision in line with their request for international protection, or who has applied for refugee status and is awaiting a final response to their application.[45]

Other non-binding but persuasive documents at the regional level include the Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa (adopted on 23 October 2009), which commits the African Union (AU) to creating an enabling

40 UNHCR – The Refugee Agency 'The 1951 Refugee Convention', https://www.unchr.org/about-unhcr/who-we-are/1951-refugee-convention (accessed 1 February 2024).
41 International Labour Organisation 'Diagnosis on informality in targeted interventions areas of the prospects programme in Uganda' 8 July 2021, https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ddg_p/documents/genericdocument/wcms_815306.pdf (accessed 1 March 2024).
42 As above.
43 Art 1(a) of the 1951 Convention Relating to the Status of Refugees as read together with art 1 of its 1967 Protocol. Also see art 1(1) of the 1969 OAU Convention on Specific Aspects of the Refugee Problem.
44 UNHCR – The Refugee Agency 'OAU Convention Governing the Specific Aspects of Refugee Problems in Africa', https://www.unhcr.org/fr-fr/en/media/oau-covention -governing -specific-aspects-refugee-problems-africa-adopted-assembly-heads (accessed 31 January 2024).
45 https://www.unhcr.org/asylum-seekers#:~:text=An%20asylum%2Dseeker%20is%20someone%20who%20intends%20to%20seek%20or,final%20decision%20on%20their%20claim (accessed 6 June 2024).

environment for refugees and internally-displaced persons.[46] In 2023 the African Commission on Human and Peoples' Rights (African Commission) adopted the African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers.[47] While non-binding, these principles gave normative content to refugee rights which had not been elaborated upon in the 1969 OAU Convention. The African Commission has also overseen the organisation of migrant-related seminars/workshops/conferences, and the appointment of a Special Rapporteur on Refugees, Asylum Seekers, Migrants and Internally-Displaced Persons in Africa. It has also allied itself with various international human rights and humanitarian law organisations to protect the rights of refugees in Africa.[48]

At the domestic level, the Refugee Act, 2006 was enacted, which replaced the Control of Aliens Refugee Act, 1960.[49] It is vital to note that Uganda is a dualist country, meaning that in order for international law to be implementable in the country, there is a need for enabling legislation to essentially domesticate it.[50] In reality, Ugandan courts of law have not often followed this to the letter, as they have been known to refer to international treaties even when they have not been domesticated.[51] Nonetheless, by enacting the Refugee Act, 2006, Uganda ultimately completed its obligations in as far as domesticating refugee law and ultimately making it enforceable by national courts.

The Refugee Act applied the same definition of refugees as that which is spelt out in both the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa [52] One common aspect in all the definitions mentioned above is the coercion element which implies that the migration of refugees is not voluntary but rather forced as a result of the various circumstances

46 https://www.refworld.org/legal/resolution/au/2009/en/70740 (accessed 18 May 2024).
47 https://achpr.au.int/en/soft-law/african-guiding-principles-human-rights-all-migrants-refugees (accessed 15 May 2024).
48 JD Mujuzi 'The African Commission on Human and Peoples' Rights and the promotion and protection of refugees' rights' (2009) 9 *African Human Rights Law Journal* 160.
49 'Control of Alien Refugees Act' *Open Law Africa* 30 June 1960, https://ulii.org/akn/ug/act/ord/1960/19/eng@1960-06-30 (accessed 15 May 2024).
50 DK Agaba 'The impact of the African Charter and Maputo Protocol in Uganda' in VO Ayeni (ed) *The impact of the African Charter and Maputo Protocol in selected African states* (2016) 265-266; JD Mujuzi 'International human rights law and foreign case law in interpreting constitutional rights: The Supreme Court of Uganda and the death penalty question' (2009) 9 *African Human Rights Law Journal* 581.
51 As above.
52 Refugee Act 21 of 2006.

beyond their will or power. Another vital provision in the Refugee Act, similar to that in the international provisions, is section 3(1) which specifies that the granting of the refugee status shall not be taken as an unfriendly act to the country of origin but rather as a humanitarian and peaceful act granted in line with adherence to human rights.[53]

The Refugee Act 2006 provides a comprehensive legislative frame work for the protection of the rights of urban refugees and other related matters.[54] Article 3(2) grants the government the sovereign right to grant or deny the application for refugee status of any person.[55] This discretionary right derogates from international refugee law standards it aims to uphold, specifically the principle of *non-refoulement* laid out in the 1951 Convention and the OAU Convention.[56] By granting the government legal backing to arbitrarily decide on whether or not to grant refugee status, the article essentially weakens the Act.[57] Furthermore, article 11 of the Refugee Act sets out the 'refugee eligibility committee' charged with, among others, dealing with and considering refugee applications. Article 19 sets out that anyone who enters Uganda, wishing to be a refugee, is required to make an application to the eligibility committee within 30 days after their entry. This 30-day stipulation has been noted to be impractical, as many refugees arrive in Uganda fully ignorant of the procedures of refugee status determination, some arrive sick and are still undergoing post-traumatic stress disorder, some are unable to even speak or understand the languages of communication in the country.[58] Furthermore, most border points do not have refugee registration desks and generally there is very little assistance for those applying for asylum. Thus, there is a need for more flexibility by adjusting the deadline for filing the application as well as providing assistance in the preparation of refugee status documents.[59]

In addition, article 20 sets out that the eligibility committee is required to respond, by either granting of rejecting the application within 90 days after the date upon which they have received the application. In reality, this 90-day requirement is not often met as a result of the large influx in the number of asylum seekers in regard to government capacity in relation to limited financial and technical

53 Para 3(1) Refugee Act.
54 Art 8 Ugandan Refugees Act.
55 Art 3(2) Ugandan Refugees Act.
56 MG Buwa 'Critique of the Refugees Act, 2006' (2007) Refugee Law Project Policy Paper 1.
57 As above.
58 As above.
59 As above.

capacity to register the refugees.[60] As a result, the asylum seekers often end up waiting one or two years for the complete adjudication of their cases.[61] An applicant whose application has been rejected may appeal to the Refugee Appeals Board within 30 days after receiving the decision of the eligibility committee.[62] However, while the board can set aside the decisions of the eligibility committee, it does not have the power to grant refugee status to an applicant and thus has to send the matter back to the committee for reconsideration, as per articles 17(2) and (4) of the Act. This essentially renders the Appeals Board an impotent organ, merely offering lip service, as opposed to one with appellate powers to reverse the decisions of the Refugee Eligibility Committee (REC) and grant refugee status as and when deemed appropriate.[63]

Due to such restrictions, limitations, contradictions in the law, as well as other systemic challenges, such as the large numbers of asylum seekers, insufficient infrastructure, the small number of refugee status determination officers entitled to work with refugees, huge backlogs have been reported in refugee status determination.[64] It was reported in 2022 that there were approximately 80 000 to 100 000 undocumented refugees, most of whom come from South Sudan, the Democratic Republic of the Congo (DRC) and Somalia, especially those who choose to stay away from the camps.[65] Their undocumented status poses a series of challenges, including limited access to healthcare and education; a high risk of arrest and harassment; difficulties in securing employment; restricted movement in and out of the county; difficulties in accessing decent housing; and several other challenges, as elaborated upon throughout the article. [66]

In addition, article 28 of the Ugandan Refugees Act entitles urban refugees to all the rights guaranteed under the 1951 Convention and the 1969 OAU Convention and other relevant international

60 UNHCR 'Annual Results Report' (2022) 10.
61 As above.
62 Art 21 Refugees Act, 2006.
63 Buwa (n 56).
64 UNHCR (n 60) 10-11.
65 'Over 100 000 undocumented refugees living in Kampala: Lord Mayor' *The Independent* 8 December 2021, https://www.independent.co.ug/over-100000-undocumented-refugees-living-in-kampala-lord-mayor/#:~:text=Over%20100%2C000%20undocumented%20refugees%20living%20in%20Kampala%3A%20Lord%20Mayor,-The%20Independent%20December&text=Kampala%2C%20Uganda%20%7C%20THE%20INDEPENDENT%20%7C,%2C%20on%20rural%2Durban%20migration (accessed 3 June 2024).
66 Norwegian Refugee Council 'Legal protection needs of refugees self-settled in secondary cities in Uganda' March 2024.

treaties to which Uganda is a party.[67] Therefore, all refugees have the right to be issued with identity cards for purposes of identification and protection,[68] and to stay in Uganda.[69] The Act further provides for urban refugees to own property[70] and to transfer assets,[71] to have access to education, and accords them the same treatment as nationals regarding basic education.[72] To assist urban refugees to become self-reliant, the Act guarantees their right to engage in agriculture, industry, commerce and crafts and to set up other ventures in accordance with applicable laws.[73] The Act also reinforces the rights of urban refugees to be gainfully employed and to contribute to the sustainable socio-economic development of the host country.[74] Related to the Refugee Act, the Refugees Regulations of 2010 were also adopted, which guarantee the rights of refugees to reside in camp settings and make a living, among other rights.[75]

Another vital document in line with the migration aspect at the domestic level is the Uganda Citizenship and Immigration Control Act (UCICA) 2006, of which section VI is dedicated to immigration control, and part VII addresses the registration and control of aliens (a person or people who are not citizens of Uganda).[76] Relatedly, UCICA established the National Citizenship and Immigration Board, established in line with article 16 of the Constitution, charged with issuing identity cards, passports, immigration permits and other related functions.[77] One shortcoming of the Citizenship and Immigration Act is that most of its provisions are prohibitive rather than rights-based. In other words, it serves to control and regulate, rather than lay out the rights to which migrants are entitled. By limiting rights, the UCICA tends to contradict the Refugee Act, which provides an expansive rights mandate to refugees. Also, owing to the fact that the UCICA was adopted in the same year as the Refugee Act, it refers to the Control of Aliens Refugee Act, which essentially was repealed by the coming into force of the Refugee Act.[78] While the UCICA was amended in 2009, the amendments mostly focused around dual citizenship and not refugee clauses.[79] Therefore, there

67 Art 28 Ugandan Refugees Act.
68 Art 29(1)(a) Ugandan Refugees Act.
69 Art 29(1)(b) Ugandan Refugees Act.
70 Art 29(1)(e)(i) Ugandan Refugees Act.
71 Art 29(1)(e)(ii) Uganda Refugees Act.
72 Art 29(1)(e)(iii) Uganda Refugees Act.
73 Art 29(1)(e)(iv) Ugandan Refugees Act.
74 Arts 29(e)(v) & (vi) Ugandan Refugees Act.
75 'The Refugees Regulations 2010 Uganda' *Ref World* 27 October 2010, https://www.refworld.org/docid/544e4f154.html (accessed 31 May 2023).
76 Art 2(a) Uganda Citizenship and Immigration Control Act, Chap 66, 2006.
77 Paras 3-7 UCICA.
78 Para 2(g) UCICA; sec 49 Refugee Act, 2006.
79 UCICA Amendment 2009.

is a need to amend the UCICA in order for it to be line with the expansive rights mandate of the Refugee Act, especially as it related to refugees.

From the above, it is clear to note that the legal and policy landscape on refugees is quite expansive. However, the highlighted limitations within the law, as well as other structural barriers, pose a challenge when it comes to its implementation. These challenges are worth examining.

4 Implementation of refugee laws and policies in relation to women and girls

When analysing the implementation of refugee laws and policies, it is important that the analysis includes a social interpretation rooted in gender norms and culture.[80] It also is vital to take stock of the human rights landscape in line with gendered migration.[81] As highlighted above, the search for enhanced social autonomy, escaping harmful gender and social norms, the need to have more autonomy as regards decision making, better access to employment opportunities, fleeing the heightened gender insecurity as a result of conflict and wars, are among the factors that encourage women and girls to migrate regionally – in this case from within the Eastern African bloc into Uganda and, specifically, Kampala district.[82] While in some instances these reasons are realised when they migrate, they often encounter challenges that end up frustrating these gains.[83]

The following discussion examines the implementation of refugee laws and policies towards the improvement of refugee women's and girls' living conditions, as well as the realisation of their rights, specifically those who opt to stay in Kampala. The major aspects that are discussed are employment/access to decent work and social protection; enhanced autonomy/decision making; housing and basic infrastructure; access to enhanced education; change in gender roles; access to health care, including sexual and reproductive health; employment/access to decent work and social protection; civic participation; violence; security threats; and lack of access to justice. These are by no means exhaustive but aim to provide a contrast between refugee laws/policies and the extent of their realisation.

80 S Pedraza 'Women and migration: The social consequences of gender' (1991) 17 *Annual Review of Ssociology* 303-325.
81 As above.
82 N Coppola 'Gender migration: Women, migration routes and trafficking' (2018) 3 *New England Journal of Public policy* 9.
83 As above.

4.1 Employment/Access to decent work and social protection

Employment rights for refugee women and girls are the binding thread when it comes to the enjoyment of rights, as they are vital for the enjoyment of other rights, such as the rights to health, education, adequate housing and enhanced autonomy in decision making.[84] Article 17(1) of the 1951 Convention Relating to the Status of Refugees states that the contracting states shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.[85] At the domestic level, section 29(1)(e)(iv) of the Uganda Refugees Act 2006 provides for the right of refugees to have access to employment opportunities and engage in paid work.[86] Article 64 of Refugees Regulation 2010 stipulates that a person who has been granted refugee status and is in possession of a valid identity card issued by the commissioner for refugees shall, in order to facilitate their local integration, be allowed to engage in gainful or wage-earning employment and the most favourable treatment accorded to foreign residents in similar circumstances; that recognised refugees shall exceptionally be exempt from any requirement to pay any charges or fees prior to the taking up any offer of or continuing in their employment.[87] However, the Employment Act 2006, which governs employment in the country, does not explicitly mention refugees, except if inferred from the discrimination clauses.[88] In 2023 Parliament passed the Employment Amendment Bill 2022, but even that makes no mention of refugees. Refugees' exclusion from the official laws governing employment hinders them from effectively competing equally with locals for employment opportunities.[89]

Refugees who have moved to Kampala slums are involved in a series of income-generating activities for their livelihood. For example, South Sudanese refugees who reside in Katwe slum tend to be involved in informal jobs or small enterprises such as hawking, tailoring, cooking and laundry work.[90] Congolese refugees who reside in the Katwe areas are often associated with specific economic

84 EM Ndagije 'Implications of youth unemployment on Uganda's national security' unpublished Master's dissertation, Makerere University, 2019 58.
85 Art 17(1) 1951 Refugee Convention.
86 Art 29(1)(e)(iv) Ugandan Refugee Act.
87 Art 64 Refugees Regulations 2010 Uganda.
88 P Lindrio 'Safe but sidelined: Qualified refugees are being turned away from jobs in Uganda' *Global Press Journal* 2 October 2023, https://globalpressjournal.com/africa/uganda/safe-sidelined-qualified-refugees-encounter-barriers-employment-uganda/ (accessed 7 June 2024).
89 As above.
90 K Kruger 'Invisible to policy: Where are female youth among refugees in Kampala?' *WI-HER* 12 October 2017, https://wi-her.org/invsible-to-policy-

activities such as textiles, skills development trainings, tailoring, hair dressing, making and selling jewelry and Congolese Kitenge fabrics. Somali refugees in Kisenyi slum end up owning or working in salons, shops and restaurants.[91] Furthermore, Somali privately-owned companies such as City Oil tend to hire a considerable number of Somali refugees.[92] Burundian refugees in Kibuye slum are also typically engaged in the shoes and clothing business.[93]

However, the predominantly informal nature of the work they do, combined with issues of the language barrier, exposes refugee women and girls to financial and sexual exploitation and other forms of exploitation.[94] In addition, at times they are subjected to unfair policies by the Kampala Capital City Authority (KCCA).[95] For adolescent girls the work they do, such as paid domestic work, allows them to escape early marriage, oppressive social norms, and the lack of control over their lives.[96] However, because paid domestic work is done mainly in private homes, there is an increased risk of abuse and mistreatment. Domestic workers are often not paid or are underpaid, work long hours, may be sleep deprived and may find it difficult to get time off.[97] Additionally, refugee women and girls doing domestic work are more likely to be victims of sexual abuse and rape by their employers because they are socially isolated and dependent on their employers. They are often excluded and have difficulties in claiming wages because of their legal status.[98]

A 2021 study by the International Labour Organisation (ILO) reviewed Ugandan policy with regard to refugees' employment rights.[99] According to the study, refugees' rates of participation in the labour force are lower than those of the general population, with refugee unemployment in Uganda estimated at 72 per cent. Those finding employment often end up in the informal sector, working

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where-are-female-youth-among-refugees-in-kamapala (accessed 29 February 2024).

91 A Betts and others 'Refugee economies in Uganda: What difference does the self-reliance model make?' University of Oxford: Refugee Studies Centre 2019, 15, https://www.rsc.ox.ac.uk/publications/refugee-economies-in-uganda-what-difference-does-the-self-reliance-model-make/@@download/file; D Kigozi 'Congolese "refugees" and freedom of movement in the Kampala urban space' 16 April 2015, https://refugee-rights.org/congolese-refugees-and-freedom-of-movement-in-the-kampala-urban-space-2/ (accessed 12 March 2024).

92 As above.

93 A Bronee & P Haupt 'Interview: Finding solutions together/UNHCR' *Global Impact on Refugees* 30 August 2029 5, https://globalcompactrefugees.org/news-stories/interview-finding-sloutions-together (accessed 20 March 2023).

94 Kruger (n 90).

95 As above.

96 As above.

97 As above.

98 As above.

99 Lindrio (n 88).

longer hours and earning wages that are 35 per cent to 45 per cent lower than those of Ugandans.[100] The jobs that are informal include hawking, tailoring, hospitality and domestic services. In Kampala, the gender gap in employment for refugees was recorded at 70 per cent for males compared to 57 per cent for females.[101] This gender gap was attributed to education gaps for women and girls, gender stereotypes that make employers reluctant to hire women, and a lack of technical and financial skills that are needed to start and run their own businesses.[102] Additionally, due to high unemployment levels, the majority of youths turn to risky or dangerous activities including sex trafficking, the abuse of drugs, and other criminal acts that increase their potential for imprisonment.[103] Unemployment and the lack of a basic income also deprive women, the sick, the elderly and children of food, decent shelter, healthcare services and education.[104]

Furthermore, contrary to the Refugee Act and Regulations provisions stipulated above, as well as the claims by the Office of the Prime Minister, that once a refugee is in the country, they are allowed *de facto* to work,[105] the Citizenship and Immigration Control Act requires foreigners, including refugees, to obtain work permits, the exception being that refugees are exempted from paying fees for obtaining a work permit, as per article 64 of the Regulations, outlined above. As a result of this provision, the Directorate of Citizenship and Immigration Control (DCIC) stamps work permits on Refugee Convention travel documents.[106] In cases where refugees possess only refugee identification documents, the DCIC often declines to stamp work permits for them.[107] This is not only contradictory to the regulations mentioned above, but also limits employment for refugees without conventional travel documents (CTDs), which are not easy to acquire on account of the fees required to process them (around $62) but also the duration it takes to access them.[108] This lack of clarity and uniformity, as well as inconsistent enforcement of the provisions guiding the employment of refugees, often leads to a situation where government officials, potential employers and

100 As above.
101 UNHCR 'Uganda knowledge brief' July 2021 5.
102 UNHCR (n 101) 14.
103 As above.
104 J Birchall 'Gender, age and migration: Extended briefing' 7 April 2016, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/10410/General%20Age%20and%20%Migraton%20Extended%20Briefing.pdf?sequence=1 (accessed 23 August 2022).
105 Women's Refugees Commission *The living isn't easy: Urban refugees in Kampala* (2010) 2.
106 UNHCR (n 101) 13-14.
107 UNHCR 'Country Summary as at 30 June 2023' 8-9.
108 As above.

refugees are not clear on the refugees' 'terms of employment'. This leads to a situation where employers are wary of hiring refugees.[109] It is also reported that refugees who engage in formal work are frequently besieged by government and immigration officials and are consistently exploited and discriminated against in accessing employment.[110]

Therefore, in line with the laws set out above, there is a need to revise the employment laws as they relate to refugees with the aim of doing away with the contradictions therein. Furthermore, there is a need to address the structural barriers when it comes to the implementation of these laws. Other measures include skilling for refugee women and girls; addressing gender stereotypes that hinder refugee women's employment in formal employment; facilitating their access to financial institutions with affordable loans; and SACCO funds to increase their autonomy and enhance their ability to earn through favourable and lawful employment opportunities. Furthermore, there is a need for strengthening laws concerned with minimum wages paid to domestic workers. Relatedly, labour courts should be set up for refugee women and girls in Kampala urban slums aimed at lobbying for their labour rights.

4.2 Enhanced autonomy/decision-making power

At their core, gender relations are power relations. This power keeps shifting between the sexes based on a series of factors. One of the major ways in which gender inequality manifests is the lack of or limited decision-making power in line with economic opportunities and household decisions, as it pertains to women and children. Their ability to autonomously make and own their decisions is often worsened by conflict due to its destabilising effect on countries' socio-economic structures.[111] By moving to Kampala and being able to access employment opportunities, as laid out above, refugee women and girls facilitate in filling the critical gaps in the labour markets with a positive impact on employment production.[112] As refugee women's and girls' access to financial resources increases, so does their autonomy, decision-making power and self-esteem at the household

109 Women's Refugees Commission (n 105).
110 As above.
111 DF Larson & KL Bloodworth 'Mechanisation and the inter-sectoral migration of agricultural labour' 2 December 2022, https://link.springer.com/chapter/10.1007/978-981-19-5542-6_20 (accessed 12 April 2023).
112 R Certto 'Fostering women's empowerment in Uganda' 27 June 2022, https://www.fes.de/en/shaping-just-world/article-in-shaping-a-just-world/fostering-womens-empowermet-in-uganda (accessed 2 December 2022).

and extended family level.[113] As a result of these income-generating opportunities, refugee women and girls often are in position to invest remittances in children's education and health care, both in Kampala and back home, thus positively contributing to Uganda's and their country's revenue and, by extension, development goals.[114]

This acquired autonomy is often instrumental in positively shifting refugee women's power dynamics, thereby putting them in a position where they can influence their families and home communities to adopt more equitable norms around education, marriage, fertility rates, and reproductive and gender roles in the household and community.[115] For example, Ethiopian and Eritrean refugee women that run restaurants and guest houses in Kabalagala are reported to have used their increasing decision-making power to employ Ugandans and other refugee women and girls as well as directed their funds towards health care and education for their families both in Kampala and back home.[116]

On a different note, this increased autonomy on the part of refugee women and girls, in certain instances, has brought about adverse consequences such as the enforcement of stricter traditional values in order to preserve social norms when they appear to be under attack.[117] The change in roles that men may experience or their inability to adapt to the increased decision-making power by the women can increase their desire to assert their position, sometimes resulting in negative consequences. For instance, men's failure to provide for the family can cause frustration leading to violence against their wives and children.[118] Congolese refugee women reported that among married couples, domestic violence occurs more often in Kampala

113 AE Jack 'Gender and armed conflict: Overview report, 1 January 2003, https://www.researchgate.net/publication/237250440_Gender_Armed_Conflict_Overview_report (accessed 3 December 2022); JA Matz & LM Mbaye 'Migration and the autonomy of women left behind' (2017) 64 *European Journal of Development Research* 19.

114 SL Ekra and others 'The impact of remittances on gender roles and opportunities for children in recipient families: Research from the international organisation for migration' (2011) 19 *Gender and Development* 69-80.

115 JB Bravo 'Rural-urban migration: A path for empowering women through entrepreneurial activities in West Africa' (2015) 5 *Journal of Global Entrepreneurship Research* 1; J Birchall 'Gender, age and migration: Extended briefing' 7 April 2016, https://opendocs.ids.ac.uk/opendocs/bitstream/handle/123456789/10410/General%20Age%20and%20%Migraton%20Extended%20Briefing.pdf?sequence=1 (accessed 23 August 2022).

116 Bronee & Haupt (n 93) 5; DT Kadengye and others 'Effects of women's intra-household bargaining power on postnatal and infant health care in rural Uganda: Results from a cross-sectional survey in Kyenjojo district' 12 February 2020, https://pubmed.ncbi.nlm.gov/32087395/ (accessed 23 August 2022).

117 United Nations General Assembly 'The impact of migration on migrant women and girls: A gender perspective' 15 April 2019, https://digitallibrary.un.org/record/3804642/files/A_H_RC_41_38_EN.pdf (accessed 2 December 2022).

118 As above.

than it did in their country of origin because of increased tension in the household, due to economic pressures and other difficulties related to them being foreigners.[119] They further reported an increase in the occurrence of child marriages in Kampala[120] because, whereas in the DRC a girl in their village might get married at 15 years of age, in Kampala, because of economic pressure, the age can be lowered to 12 or 13 years.[121]

In addition, despite a marked improvement in their financial standing, refugee women and girls tend to face resistance or stigma and struggle to reintegrate into their families once they decide to go back to their homes. More so, in instances where they find their money or remittances and property mismanaged, they struggle with the moral and financial debt they owe to their families, who have often invested money in their outward journey.[122] Moreover, prolonged conflict tends to alter family and household structures as well as change the gender roles and responsibility of women and girls.[123] Thus, when they flee their countries, the men and boys are usually separated from their families, leaving the women and girls to take on more responsibilities including the financial provision for those left in their care, including the elderly, children and the sick.[124]

Increased decision-making power for refugee women and girls is a vital avenue for achieving gender equality. This is stipulated in several refugee-related laws and policies. Article 29(c) of the Refugee Act 2006 states that a refugee shall be entitled to fair and just treatment without discrimination on grounds of race, religion, sex, nationality, ethnic, identity, membership of particular social group or political opinion.[125] Article 62 of the Refugees Regulation 2010 states that in the integration of refugees in the host communities, the commissioner shall in cooperation with the UNHCR and other organisations involved in the assistance of refugees ensure that

119 'Gender-based violence prevention and response: Key risks facing urban refugees in Kampala' *Refugee Law Project* 1 March 2016 3, https://relief.int/report/uganda/gender-based-violence-prevention-and-response-key-risks-facing-urban-refugees-kampala (accessed 2 April 2024).
120 As above.
121 As above.
122 D Mulumba 'Gender relations, livelihood security and reproductive health among women refugees in Uganda: The case of Sudanese women in Rhino camp and Kiryandongo refugee settlements' 2005, https://edepot.wur.nl/42396 (accessed 1 March 2024).
123 J Cerrato & E Cifre 'Gender inequality in household chores and work-family conflict' 3 August 2018, https://www.frontiersin.org/articles/10.3389/fpsyg.2018.01330/full (accessed 1 March 2024).
124 As above.
125 Refugee Law Project 'The Refugees Act 2006' 24 May 2006, https://www.refugeelawproject.org/files/legal_resourses/refugeesact.pdf (accessed 30 May 2023).

special attention is given to women, children and persons with disabilities.[126] Furthermore, article 6(2) of the Employment Act 2006 states that without prejudice to subsection (1), in the interpretation and application of this Act, it shall be the duty of all parties, including the minister, a labour officer and industrial court, to promote and guarantee equality of opportunity for persons who, as migrant workers or as members of their families, are lawfully within the territory of Uganda.[127] Therefore, a vital part of increasing women's and girls' decision-making power is through the commitment to the implementation of the legal provisions mentioned above as well as the comprehensive inclusion of refugee women and girls in socio-economic national systems in order to enable them to lead a decent life, to access public services while contributing fully to the local economies of their host countries.[128]

4.3 Civic participation and issues of residency

Women refugees' and girls' rights to political participation tend to be limited by the law, especially at the domestic level. The Refugee Act recognises that refugees have a right to freedom of association, but this does not extend to political and for-profit associations or trade unions.[129] Furthermore, in order to effectively participate in political affairs, their residence status should be more certain, which is confusing when it comes to the law pertaining to their residency, citizenship or naturalisation. Ratified by Uganda in 1976, the 1951 UN Convention Relating to the Status of Refugees states that the contracting states shall as far as possible facilitate the assimilation and naturalisation of refugees.[130] Furthermore, Principle 24(1) of the Human Rights of All Migrants, Refugees and Asylum Seekers states that 'every refugee has the right to participate in civil and political life of the migrant's community and in the conduct of public affairs'.[131] Also according to sections 35(a), (b) and (c) of the Refugees Act 2006, a recognised refugee shall be bound by and conform to all laws and regulations currently in force in Uganda, conform to

126 Refugees Regulations 2010 Uganda (n 75).
127 Art 6(2) Employment Act 2006.
128 Resolution on the Inclusion of Refugees, Asylum Seekers, Internally Displaced Persons and Stateless Persons in Socio-Economic National Systems, Services and Economic Opportunities in Africa ACHPR/Res.565 (LXXVI) 2023 African Commission on Human and Peoples' Rights 4 August 2023, https://achpr.au.int/en/adopted-resolution/565-resolution-inclusion-refugees-asylum-seekers-internally-displaced (accessed 2 February 2024).
129 Refugees Act 2006 (n 125).
130 1951 Refugee Convention (n 40).
131 'African Guiding Principles on the human rights of all migrant, refugees and asylum seekers' African Commission on Human and Peoples' Rights 8 November 2023, https://achpr.au.int/en/soft-law/african-guiding-principles-human-rights-all-migrants- refugees (accessed 2 February 2024).

measures taken for the maintenance of public order and not engage in activities that may endanger state security, harm public interests or disrupt public order.[132]

The Constitution and UCICA contain similar provisions where citizenship is concerned. Article 16 of the UCICA, which is similar to article 12(c) of the Constitution, stipulates that the National Citizenship and Immigration Board (Board) may grant naturalisation where the applicant fulfils a number of criteria, including 20 years' residence (of which 24 months must immediately precede the application), an adequate knowledge of English or a prescribed vernacular language and good character.[133] Articles 12(1) and 14(1) of UCICA, which are similar to article 12(1) of the Constitution, states that someone born on the territory is eligible for citizenship by registration, but only if 'neither of his or her parents and none of his or her grandparents was a refugee in Uganda'.[134] This particular clause limits refugees' ability to apply for citizenship. In addition, section 14(2)(b) of UCICA, which enables citizenship by registration for migrants, provided they migrated 'legally and voluntarily', also seems to exclude refugees, since they do not voluntarily migrate but are often forced to flee their countries.[135] Clauses such as these limit refugees' ability to naturalise or become citizens, which would then facilitate their right to political participation as well as their freedom of movement.

Indeed, entities working with refugees have regularly reported the challenges they face in facilitating refugees to legally become Ugandans, even when they meet the minimum requirements, including having spent more than 20 years in Uganda as stipulated by the Constitution and UCICA.[136] The inability to transition into citizens hinders or limits a series of their rights, including the right to participate in political processes, vote and even obtain formal employment.[137] To this end, in 2010 the Centre for Public Interest Law and Refugee Law Project took a case to the Constitutional Court, requesting the clarification of refugees' rights to acquire citizenship under the law (articles 12(1) and 12(2) of the 1995

132 Arts 35(a), (b) & (c) Refugees Act 2006.
133 The 1999 Uganda Citizenship and Immigration Control Act.
134 As above.
135 As above.
136 SG Walker 'From refugees to citizens? Obstacles to the naturalisation of refugees in Uganda' *Refugee Law Project* 1 November 2019, https://www.refugeelawproject.org/index.php?option=com_content&view=article&id=144:from-refugee-to-citizen-obstacles-to-the-naturalisation-of-refugees-in-uganda-august-2008&catid=19&Itemid=101 (accessed 11 April 2024).
137 As above.

Uganda Constitution).[138] This application was based on verified reports by refugees of being denied access, by the immigration department, to the application process of citizenship on the basis that the Constitution bars Ugandan refugees from ever acquiring citizenship.[139]

Five years later, in 2015, the Court handed down the decision which was termed a 'mixed bag' by the petitioners, on the basis of its lack of clarity.[140] The judges declared that refugees were not eligible for citizenship by registration but could rather take the route of naturalisation. However, they refused to grant the order to compel the government to start on the process of considering the pending refugee applications, stating that the petitioners had not presented sufficient evidence and that government departments had failed to do so.[141] The petitioners were disappointed by the ruling, citing that the production of evidence is an uphill task due to the fact that the rejection processes are usually informal and not documented, for instance, the application forms being verbally denied or told that they do not qualify. [142]

They further reported that there were documented cases where officials made the acquisition of the documents impossible by, for instance, relying on obsolete laws such as the Uganda Citizen Act of I964 which was replaced by the UCICA, and that, even in the instance where they had managed to secure three witnesses, due to the lengthiness of the case, two had relocated to the US and another could no longer be reached.[143] This is a clear illustration of the need to clarify or deal with the contradictions or confusion in the immigration laws such as the Constitution, UCICA, the Refugee Act, the Refugee Regulations, the Employment Act and others. This translates into their inconsistent application, the lack of awareness as well as challenges with interpreting legal procedures among those charged with the execution of laws and policies. Related to this, the various stakeholders should clarify the conditions by which refugees, who meet the obligations, transition to residents either by naturalisation or citizenship and also remove the systemic barriers and delays that often hinder this process.

138 'Centre for Public Interest Law Ltd *Salina Namusobya v The Attorney General* Constitutional Petition No 34 of 2010)' 21 October 2015, https://www.refworld.org/jurisprudence/caselaw/ugacc/2015/en/107469 (accessed 11 March 2024).
139 'The eligibility for refugees to acquire Ugandan citizenship' *IRRI* 22 March 2016, http://refugee-rights.org/the-eligibility-for-refugees-to-acquire-ugandan-citizenship/ (accessed 1 May 2024).
140 As above.
141 *Namusobya* (n 138).
142 'The eligibility for refugees to acquire Ugandan citizenship' (n 139).
143 As above.

From a gendered perspective, challenges around residency limit refugee women and girls from taking part in political decision-making and policy processes.[144] This compounds the gendered discrimination element by adding the residency status to that of already having less decision-making power on the basis of their gender and socio-economic status. Furthermore, women's participation in immigration associations is often constrained by sexism and marginalisation, as these associations often end up reproducing traditionally discriminatory gender relations.[145] The limited participation of refugee women and girls and their inability to advance specific priorities on the collective agenda has forced them to form their own associations, of which the actions and interventions are more gender-sensitive and gender-specific.[146] For example, different women-led cooperatives/SACCOS in the areas of Kabalagala, Katwe have been formed, which have enabled refugee women and girls to access loans and provide for their families.[147] Somali refugees in Kisenyi have engaged in starting and running small and medium-scale enterprises that provide employment and financial resources to secure or meet other needs such as housing, food, health care and education.[148] They also engage in developing and maintaining social networks with Ugandans and fellow Somalis in Kisenyi. The social networks provide them with significant relationships and financial resources to establish business enterprises.[149] As a result, this socio-culturally mediated agency, attained by engaging in actions aimed at improving their living conditions, has greatly enhanced refugee women's socio-economic well-being. Therefore, in order to enhance their participation in civic and political decision making, refugee women and girls should be at the centre of developing, implementing and reviewing immigration laws, polices, programmes and regulations.

4.4 Housing and basic infrastructure

Article 21 of the UN Convention Related to the Status of Refugees states that, in line with housing, the contracting states shall accord refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded

144 UNGA (n 117).
145 G Ferrant & M Tuccio 'How do female migration and gender discrimination in social institutions mutually influence each other' (2015) OECD Development Centre working paper 326.
146 MS Balyejjusa 'Somali refugees' well-being: The role of socio-culturally mediated agency' (2019) 6 *Journal of Science and Sustainable Development* 149-166.
147 As above.
148 As above.
149 As above.

to aliens generally in the same circumstances.[150] In addition, article 29(1)(e)(i) of the Refugees Act 2006 states that a recognised refugee shall receive at least the same treatment accorded to nationals generally in similar circumstances relating to property and to leases in line with movable and immovable property. Article 65 of the 2010 Refugee Regulations stipulates that a refugee who resides outside a designated refugee camp as a tenant may legally acquire or dispose of their occupancy or leasehold interests in land, as the law permits resident nationals generally to do.[151] Principle 28(1) of the Guiding Principles on the human rights of all migrants, refugees and asylum seekers stipulates that states shall recognise the right of every refugee and their family to an adequate standard of living, including adequate food, clothing and housing, and to the continuous improvement of living conditions.[152]

It is estimated that 12 per cent (over 200 000) of Kampala residents are refugees (more than half of whom are women and girls), particularly residing in the slums of Kisenyi, Katwe and Kabalagala.[153] Most of these come from Somalia and the DRC with an increasing number of recent arrivals being South Sudanese.[154] According to the office of the Prime Minister, between 2008 and 2017 the number of registered Somali refugees in the country soared from 8 239 to 41 234, with 43 per cent of the total registered in Kampala and the rest in Nakivale refugee settlement.[155] This figure does not account for Somalis with foreign passports who regularly travel in and out of Uganda.[156] Furthermore, an estimated 18 000 Somalis reside in the Kisenyi slum.[157]

Most urban refugees who do not wish to reside in settlements end up residing in slums or informal settlements on the fringes of urban areas.[158] This is based on the notion that, in the urban environment, refugees can locate places of transitory protection, where they are

150 1951 Refugee Convention (n 40).
151 Art 65 Refugees Regulations 2010 Uganda.
152 Guiding Principles (n 131).
153 Kruger (n 90).
154 As above.
155 G Lazzolino & M Hersi 'Shelter from the storm: Somali migrant networks in Uganda between international business and regional geopolitics' (2019) 13 *Journal of Eastern African Studies* 1753-1063; S Muhindo & E Jjingo 'Lubaga, Kisenyi, Kabalagala, Ggaba now "Little horn of Africa"' *The Observer* 5 September 2023, https://observer.ug/lifestyle/79025-lubaga-kisenyi-kabalagala-ggaba-now-little-horn-of-africa (accessed 28 February 2024).
156 As above.
157 'The voices of three Somali women refugees finding their way in Kampala' *IOM UN Migration* 25 April 2019, https://uganda.iom.int/news/voices-three-somali-women-refugees-finding-their-way-kamapala (accessed 5 April 2024).
158 A Lucia 'Challenges and livelihood strategies of Darturian refuges living in Kampala, Uganda' MA dissertssation, University of San Francisco, 2012 2.

more dependent on their own networks and personal resilience and also have no choice but to be self-reliant.[159] However, when they move to Kampala, they often find it difficult to find housing on their own due to unemployment and low income levels.[160] The UNCHR provides minimal support to the vulnerable group of refugees in the areas of accommodation, including food, limited access to education and health care.[161] However, as highlighted, the support is minimal. At times, they do not have their residential papers in order, limiting their ability to rent or even purchase homes.[162] In addition, landlords and employers often take advantage of urban refugees who do not enjoy legal protection by charging them higher rents or paying them less than locals with equivalent skills.[163]

Moreover, life, especially in the urban slums, by no means is easy for refugee women and girls. These mostly reside in sub-standard settlements that are often overcrowded, and lack basic infrastructure services such as water, sanitation and medical facilities.[164] In addition, pests, diseases and unsanitary housing are a threat to girls and women living in slums. The houses often have leaking roofs, inadequate drainage facilities, and are infested by insects and rodents that are carriers of disease.[165] A study conducted by the women's refugee commission revealed that many urban refugees are vulnerable and live in extreme poverty, are unable to pay for their basic needs such as rent, and some sleep on the streets, eat less frequently and engage in negative economic strategies.[166] The regulations also recognise the general lack of consultation with urban refugees on issues pertinent to the protection of their rights.[167]

Inadequate urban planning also affects refugee women and girls that live on marginal lands due to poor garbage disposal and narrow drainages and unplanned development, which can also lead to localised urban flooding.[168] Research conducted in the slums

159 Hoffstaedter (n 27).
160 'Gender discrimination: Women's rights and lives in slums today' *Habitat for Humanity Great Britain*, http://gender.itcilo.org/toolkit/online/story_content/external_files/TA_migration.pdf (accessed 23 August 2022).
161 UNHCR (n 23).
162 As above.
163 B Dale 'Case identification: Challenges posed by urban refugees' Annual Tripartite Consultations on Resettlement June 2003.
164 A Richmond, I Myers & H Namuli 'Urban informality and vulnerability: A xcse study in Kampala, Uganda' 5 March 2018, https://www.mdpi.com/2413-8851/2/1/22 (accessed 26 July 2023).
165 As above.
166 Women's Refugees Commission (n 105).
167 Art 61 Refugees' Regulation 2010.
168 SB Musoke 'Vulnerabilities and urban flooding in Bwaise parish iii, Kampala Uganda' 1 January 2012, https://www.diua-portal.org/smash/get/diua2:535079/FULLTEXT01.pdf (accessed 23 August 2022).

of Bwaise reveals that refugee women and girls in particular are affected by flooding directly and indirectly, which often leads to loss of property as well as copious amounts of time taken to evacuate water from their homes.[169] For example, Kisenyi slum, which is home to many Somali refugees, is characterised by poor temporary housing and poor water supplies and sanitation.[170] In addition, refugee women and girls are often more affected by flooding due to the fact that most of their time is spent at home and, thus, when the flooding occurs, they are often in their houses.[171] Likewise, due to floods, water-borne diseases such as cholera, typhoid, gastroenteritis and other diseases often spread rapidly in populated communities.[172]

The conditions described above demonstrate the failure by government and other relevant stakeholders to realise the conditions that are necessary to ensure sufficient access to adequate housing for refugee girls and women. This is so despite the elaborate human rights and legal provisions relating to their property and housing conditions that have been set out above. Therefore, there is a need to ensure proper urban planning as well as tracking the status of implementation of the 2008 National Slum Upgrading Strategy and Action Plan. Improving housing conditions would entail addressing cases of congestion, hygiene-related diseases and flooding as a result of poor drainage systems in those areas. It also requires ensuring basic infrastructure services such as clean and safe water, garbage disposal, housing and health facilities that are affordable for the less-resourced populations, especially refugee women and girls.

4.5 Access to education

Uganda has an extensive legal landscape stipulating refugee rights to education, as set out below. Refugee children are expressly granted access to basic education and may not receive less favourable treatment than nationals.[173] Article 29(1)(e)(iii) of the Refugees Act 2006 of Uganda stipulates that refugees shall receive the same treatment as nationals in circumstances relating to education and, in particular, regarding access to particular studies, the recognition of foreign certificates, diplomas and degrees and remission of fees and charges.[174] The introduction and implementation of the Universal Primary Education (UPE) policy of 1997 and the Universal

169 As above.
170 'AFFCAD'S story', https://affcad.org/about/ (accessed 23 August 2022).
171 Musoke (n 168).
172 As above.
173 Sec 2 read with sec 34(1) Refugees Act.
174 Art 29(1)(e) Refugee Act (n 72).

Secondary Education (USE) policy of 2007 increased opportunities for disadvantaged children, including refugees who have migrated to Kampala, to access and benefit from basic primary and secondary education.[175] In addition, in 2018 the Ministry of Education and Sports, came up with the Education Response Plan for Refugees and Host Communities in Uganda (ERP) which facilitated the education of over 500 000 children and youths in refugee hosting areas.[176]

However, section 29(1)(e) subjects refugees seeking secondary education to the same treatment accorded to aliens in similar circumstances (that is, if they can afford it). This is contradictory to the Education (Pre-Primary, Primary and Post-Primary) Act (2008)). Section 4(2) of the Act states that '[b]asic education shall be provided and enjoyed as a right by all persons'. Nevertheless, the government maintains that refugees, in practice, do enjoy free access to the USE programme.[177] Section 9(1) of the Act further states that '[n]o person or agency shall levy or order another person to levy any charge for purposes of education in any primary or post-primary institution'. Furthermore, in practice, despite the provision of section 9, fees are charged for all children, whether refugees or nationals, to write national examinations at the conclusion of both primary and secondary school.[178] Similarly, additional charges for registration, development and feeding have been imposed by some schools. The fees charged by the Ugandan National Examination Board at the end of primary and secondary school, to write the respective examinations, prevent many children from completing these levels of schooling.[179]

Conflicts prompt persons, in this case women and girls, to flee their countries and reside in other countries, thereby disrupting their education. The time taken in transit disrupts their education and even when they arrive at their final destination, they spend some time out of school while others never have the chance to re-enrol for education. For example, Congolese refugees residing in Kampala often come from a school system in which the language of instruction is French, into a system in which the language of instruction is

175 'Education and sports sector strategic plan 2017-20, Uganda' Ministry of Education and Sports 7 May 2020, https://www.globalpartnership.org/content/education-and-sports-sector-strategic-plan-2017-2020-uganda (accessed 18 July 2023).
176 As above.
177 MM Sekawebe 'Increasing access to education for refugees in Uganda' (2021) 25 *Law Democracy and Development* 558.
178 Sekawebe (n 177) 555-556.
179 As above.

English, hence they face language barrier challenges.[180] The lack of comprehensive educational, training and economic opportunities has a significant impact on refugee women and girls as they are not equipped or qualified to earn an income that ensures self-sufficiency and development.

Furthermore, most Somali refugee women and girls residing in Kabalagala slum struggle to pay the high tuition costs of the universities they attend along Ggaba Road, thus hindering their completion of university education. These campuses include Kampala International University, Cavendish University and the International University of East Africa.[181] As a result, most refugee women and girls find it difficult to find work in urban centers due to lower literacy rates.[182] Most also fall victim to child marriages and teenage pregnancies, destining them for a life of continued poverty.[183]

Several other factors contribute to the inability of refugee women and girls to access quality education. One of these is early or forced marriage in order to attain economic security to cater for their immediate needs.[184] Financial costs of education, especially in urban areas, limit the number of refugees who can attend school. English as the language of instruction forces most refugee women and girls to repeat classes, causing them to attain education at a much older age, compared to their class mates, a factor that affects their social integration.[185] The Women Refugees' Commission further contends that barriers, such as discrimination in admission procedures, by which limited seats go to non-nationals, language barriers, adjustment to a new curriculum, and the psychosocial needs of urban refugees to public schools often affect refugee women and girls. As a result, it is reported that more than half of the refugee children of school-going

180 O Giovetti 'Forced migration: Six causes and examples' 28 June 2019, https://www.concernusa.org/story/forced-migration-causes/ (accessed 13 April 2023).
181 Muhindo & Jjingo (n 155).
182 MP Tadaro 'Urbanisation, unemployment and migration in Africa: Theory and policy' Policy Research Division Working Paper 104, New York: Population Council, 1997, https://knowledgecommons.popcouncil.org/cgi/viewcontent.cgi?aricle=1247&context=departments_sbsr-pgy (accessed 23 August 2022).
183 A Taremwa 'Adolescent saving groups move to end child marriages, teenage pregnancies in Kamuli district' 26 May 2021, https://www.unicef.org/uanda/stories/adolescent-sving-groups-move-end-child-marriages-teenage-pregnancies-kamul-district (accessed 23 August 2022).
184 E Camilletti & P Banati 'Gender, social protection and life course research: Moving the fields forward' 15 January 2020, https://www.unicef-irc.org/article/1953-gender-responsive-age-sensitive-social-protection-a-think-piece-series.html (accessed 2 December 2022).
185 SD Peterson 'Education of refugees in Uganda: Relationships between setting and access' Refugee law project working paper 9.

age in Kampala do not attend school, and fewer than 10 per cent of refugee students in Uganda are enrolled in secondary school.[186]

Consequently, the inability to ensure that refugee women and girls residing in Kampala acquire quality education, despite the extensive education-related, legal and policy provisions that Uganda has adopted, demonstrates a lack of legal and political will to protect the education-related rights of refugee women and girls. Beyond the need to implement the extensive laws outlined above, the relevant stakeholders, including the Ministry of Education, the Ministry of Gender, Labour and Social Development and the UNHCR, should set up, equip and support government schools in the areas where refugees predominantly reside. Likewise, strategies should be devised to address the factors that lead to high school drop-out rates, including early marriages, teenage pregnancies, a failure to pay school fees and the challenge of balancing house work with school work, especially in the case of refugee women and girls.

4.6 Access to health care, including sexual and reproductive health

The right to health must be enjoyed without discrimination on the grounds of race, age, ethnicity or any other factor.[187] The realisation of the right to health is essential and dependent on the realisation of other human rights such as food, housing, employment, education, information and participation.[188] According to the 1951 UN Refugee Convention, refugees should have access to the same or similar health care as host populations.[189] Section 28 of the Refugees Act 2006 accords refugees rights to health care in line with international standards. Principle 27(1) of the Guiding Principles on the human rights of all migrants, refugees and asylum seekers sets out that every refugee has the right to enjoy the best attainable state of physical and mental health.[190] Principle 27(2) also stipulates that states shall take all necessary measures to reduce maternal mortality, still birth rate and infant mortality for the healthy development of the refugee child and mother.[191]

186 InterAid *Socio-economic baseline survey for urban refugees in and around Kampala (*2009) 11.
187 N Mulznieks 'Protect women's sexual and reproductive health and rights' 27 August 2016, https://www.coe.int/en/web/commissioner/-/protect-women-s-sexual-and-reproductive-health-and-rights (accessed 12 May 2023).
188 As above.
189 Art 28 Refugees Act 2006.
190 Guiding Principles (n 131).
191 As above.

However, refugee women and girls are not always in a position to adequately enjoy the health-related rights that are stipulated above, due to several reasons. Refugee women and girls often do not have reliable access to health care or reproductive healthcare services in transit and destination areas.[192] This is often attributed to factors such as the lack of health information or education, a lack of social networks, a fear to access health services due to their residence status being in question, which could lead to deportation or other repercussions.[193] The lack of vital sexual and reproductive healthcare services such as contraceptives, treatment for sexually-transmitted infections and diseases, threatens the lives of refugee women and girls.[194]

According to IOM UN migration, only 43 per cent of the refugee population in the slums of Bwaise and Kabalagala, predominantly comprising Ethiopians and Sudanese, have access to government health centres and, by extension, access to healthcare services.[195] Refugee women and girls face a series of challenges while trying to access healthcare services, including long travelling distances to healthcare facilities and underequipped facilities that offer minimal services in terms of human and medical resources.[196] Furthermore, due to their less than ideal living conditions, refugee women and girls are often prone to communicable diseases such as hepatitis, tuberculosis and HIV, which often require timely and adequate medical attention, which often is not readily available.[197]

Refugee women and girls, especially those in lower-skilled employment such as domestic service work, often have limited access to preventive healthcare and sexual health services, gynecological care and maternity care as well as antiretroviral treatment due to their often precarious residence status and lack of access to national health or insurance schemes.[198] Due to economic frustration and difficulties with affording food, proper housing and medication, refugee women and girls sometimes resort to commercial sex work

192 N Davidson and others 'Access to preventive sexual and reproductive health care for women from refugee-like backgrounds: A systematic review' (2022) 403 *BMC Public Health* 22.
193 As above.
194 UNGA (n 117).
195 MMA Kagaba 'Rapid assessment on service available in the slums of Bwaise and Kabalagala' *IOM UN Migration* October 2018, Rapid assessment on services available in Bwaise and Kabalagala slums.pdf (accessed 10 March 2024).
196 As above.
197 As above.
198 As above.

as a mechanism to fill the economic gap.[199] Such risky behaviour makes them vulnerable to contracting sexually-transmitted diseases, including HIV.[200]

In addition, a study by Roe revealed that women and girls who are forced to migrate as a result of conflict or war develop trauma that leads to a psychological disorder called post-traumatic stress disorder.[201] The refugee women and girls who have moved to Kampala suburbs from the DRC, South Sudan, Somalia and Ethiopia have done so as a result of war-related consequences, including sexual and gender-based violence, the destruction of their homes and villages, and the loss of family and loved ones.[202] These physical and psychological conditions usually go untreated due to a lack of adequate psychiatric care and services and may lead to more adverse health consequences. Therefore, the fulfilment of the health rights of refugee women and girls is contingent upon ensuring their access to healthcare services, including sexual and reproductive health, psycho-social support and comprehensive sexual education.

4.7 Violence, security threats and lack of access to justice

Violence or insecurity is another issue that refugee women and girls face at all stages of the migration process, whether at home, in transit or in the Kampala suburbs and slums where they end up settling. Article 17 of the Convention on Migrant Worker Rights stipulates that migrant workers and members of their families, detained or imprisoned in any manner whatsoever, in the state or region to which they migrated, must enjoy the same rights as the nationals of those states.[203] Article 10 of the Convention provides that no migrant workers or members of their families shall be subjected to torture or other cruel, inhumane or degrading treatment or punishment.[204] Article 18(2) provides that migrant workers and members of their families accused of a crime have a right to be presumed innocent until proven guilty under the law.[205] Article 16(1) of the 1951 UN

199 AC Schyler and others 'Mobility among youth in Rakai, Uganda: Trends, characteristics and associations with behavioural risk factors for HIV' (2017) 12 *An International Journal for Research, Policy and Practice* 8.
200 As above.
201 S Bhandari 'Post-traumatic stress disorder (PTSD)' 31 August 2022, https://www.webmd.com/mental-health/post-traumatic-stress-disorder (accessed 2 December 2022).
202 MV Matin, AS Sancha & MJ Canto 'Refugee women with a history of trauma: Vulnerability in relation to post-traumatic stress disorder' 29 April 2021, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC8125581/ (accessed 2 December 2022).
203 Art 17 ICMW.
204 Art 10 ICMW.
205 Art 18(2) ICMW.

Refugee Convention Relating to the Status of Refugees states that a refugee shall have free access to the courts of law on the territory of all contracting states.[206] The Refugee Act of Uganda 2006 stipulates that a refugee shall have free access to courts of law, including legal assistance under applicable laws of Uganda.[207] Article 33 of the Refugees Regulation 2010 states that at the hearing of the appeal, the appellant shall be given a fair hearing with regard to rules of natural justice.[208]

These provisions are often starkly removed from the lived realities of refugee women and girls. Gender-based violence or conflict-related sexual violence can force women and girls to migrate from one country to another within the East-African region.[209] However, during transit or at their destination, they are often subjected to even more violence and exploitation, and young refugee girls and women are often at greater risk compared to boys of being trafficked, or experience sexual exploitation.[210] In most cases, refugee women and girls fall victim to theft from 'con men' even before they reach their destination. Some are sexually assaulted or physically abused, exposing them to sexually-transmitted diseases or other injuries.[211]

Reports often record higher rates of domestic violence in poorly-resourced areas of Katwe, Bwaise and Kasubi, where the majority of the refugee women and girls tend to reside.[212] In Katwe slum, for instance, physical insecurity is a challenge in the Congolese refugee community and sexual and gender-based violence is rife. Refugee women and girls are sometimes obliged to engage in 'survival sex', where they are highly exploited and susceptible to various risks.[213] Likewise. according to the research conducted by IOM UN migration, Ethiopian refugees face challenges relating to incessant requests for money from police before any service is offered, extortion by police officers and crime preventers, which is manifested through giving bond to repeat criminals, and framing innocent people with the aim of extorting money from them.[214]

206 Art 16(1) 1951 Refugee Convention.
207 Refugees Act 2006 (n 125).
208 Art 33 Refugees Regulations 2010 Uganda.
209 M Temin and others 'Girls on the move: Adolescent girls and migration in the developing world' 7 February 2020, https://www.researcggatttttttttt/publications/339103903-Girls_on_the_Move_Adolescent_Girls_Developing_World (accessed 2 December 2022).
210 As above.
211 As above.
212 AJ Abdirashid 'Poverty and domestic violence in Kisenyi, Kampala Uganda' unpublished Master's dissertation, Kampala International University, 2019 80.
213 Kigozi (n 91).
214 Kagaba (n 195).

Relatedly, refugee women and girls face security threats when traveling to and from their work using public transport.[215] The more these women are involved in roles outside their homes, the more they are targeted for various kinds of assaults as they are often perceived to be vulnerable and are often unprotected by the formal system.[216] Furthermore, when their rights are violated, there often is a lack of access to timely justice.[217] When they migrate to poorly-resourced urban areas, they do not have access to lawyers due to a lack of financial resources and information on legal and other services, limited knowledge on legal frameworks, language barriers and a lack of trust in law enforcement officers.[218] Findings further revealed that limitations and a lack of confidence in police and judicial systems are a common concern in situations regarding women migrants' rights.[219]

An important aspect related to human rights protection for refugee women and girls, especially victims of violence, is ensuring their effective access to justice.[220] Upon ratifying the Covenant on the Rights of Migrant Workers on 14 November 1995, Uganda entered a reservation stating that '[t]he Republic of Uganda cannot guarantee at all times to provide free legal assistance in accordance with the provisions of article 18 paragraph 3(d)'.[221] While this reservation is understandable in the face of limited resources, it should not be an encumbrance to ensure access to effective legal remedies for refugee women and girls. Particular attention should be paid to refugee women and girls with disabilities, who may face additional barriers that prevent them from reporting violence to the police and from receiving adequate protection.[222]

According to the Hill research on justice needs in Uganda, refugee women and girls experience difficulties in resolving justice

215 *Habitat for Humanity* (n 160).
216 As above.
217 P Prettitore & S Okoro 'Measuring the gender justice gap' 21 June 2018, https://www.brookings.edu/blog/future-development/2018/06/measuring-the-gender-justice-gap/amp/ (accessed 2 December 2022).
218 'Strengthening police responses to gender-based violence crucial in lead up to generation equality forum in Paris' *UN Women* 25 May 2021, https://www.unwomen.org/en/news/stories/2021/5/news-strengthening-police-response-to-gender-based-violence (accessed 2 December 2022).
219 As above.
220 N Muiznieks 'Human rights of refugee and migrant women and girls need to be better protected' 7 March 2026, https://www.coe.int/sv/web/commissioner/-/human-rights-of-refugee-and-migrant-women-and-girls-need-to-be-better-protected (accessed 10 January 2024).
221 https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-13.en.pdf (accessed 25 July 2023).
222 As above.

problems.[223] The study also found the justice system complex to navigate, expensive and, in many cases, incapable of producing fair outcomes.[224] The poor and vulnerable are the primary victims of marginalisation, discrimination, exclusion and exploitation, which further exacerbates their situation, leading to extreme forms of poverty and vulnerability.[225] The poor and vulnerable persons, already faced with difficulties in several ways, including illiteracy, interacting with the legal procedures and their adversarial nature is a daunting task.[226] Equally, many refugee women and girls are poor and vulnerable, with the result that they often are not in position to afford the services of lawyers.[227]

Therefore, access to justice is a vital component for the full integration of refugee girls and women in the communities where they decide to settle. In order for this access to be realised, there is a need to ensure that the laws and policies that have been outlined above are fully implemented. This also entails ensuring access to affordable, gender-sensitive legal remedies and compliant mechanisms when refugee women and girls rights are violated, as well as providing financial, medical and psychiatric assistance to victims of trafficking, domestic abuse and sexual violence.

5 Conclusion

In its attempt to investigate the implementation of refugee laws and policies, the article focuses on refugee women and girls who end up residing in Kampala district. Uganda has been heralded for having a favourable refugee legal and policy system. Indeed, from a rights perspective, the Refugee Act 2006 provides a wide mandate of rights for refugees, which is a commendable step. However, the article identifies a series of challenges or hindrances as far as the implementation of refugee laws and policies towards the realisation of the rights of refugee women and girls is concerned. One of the prevalent challenges is the contradiction, non-uniformity and the lack of clarity of refugee laws, which presents a challenge with their implementation. This is further compounded by the lack of awareness

223 'Press release: Call on government to fast track the passing of the draft national legal aid policy and legal aid law' *Legal Aid Service Provider's Network* 5 May 2016, Https://www.laspnet.org/index.php?option=com_content&view=article&id=423:p-release-call-on-governmnet-to-fast-track-the-passing-of-the-draft-national-legal-aid-policy-and-legal-aid-law&catid=89&itemid=895 (accessed 2 December 2022).
224 As above.
225 As above.
226 As above.
227 As above.

or confusion regarding the appropriate legal procedures, by those charged with their implementation, which leads to practices that infringe upon the rights of refugee women and girls.

Other identified challenges include a push-back against the increase in women's autonomy and decision making; inadequate or sub-standard housing; challenges in accessing education; difficulties faced when accessing adequate healthcare services, including sexual and reproductive healthcare services; bottlenecks in being employed gainfully characterised by their predominance in the informal sector; low skills, and so forth. Additionally, refugees' civic participation is limited to non-political participation as well as the confusing nature of the conditions that need to be in place for them to transition to residents or citizens. With regard to freedom from violence, it is highlighted that refugee women and girls often are at risk of gender-based violence in transit and in the areas where they work or stay. Among the most pervasive forms of violence is sex trafficking, sexual violence for women and girls who work in domestic spaces, worsened by a lack of access to affordable, timely, gender-sensitive forms of justice.

Therefore, it is suggested that various mechanisms need to be put in place in order to ensure that the highlighted rights are realised, for women and girls who decide to move away from other countries in the region or the camps or settlement areas into Kampala district. Some of the measures include addressing the fragmentation as well as the contradictions in Uganda's laws in line with refugees, such as the UCICA, the Refugee Act, the Employment Act, and others. Related to this, the various stakeholders should clarify the conditions by which refugees who meet the obligations, transition to residents either by naturalisation or citizenship and also remove the systemic barriers and delays that often hinder this process.

Regarding employment, it is recommended that targeted skills trainings are implemented. It is further suggested that laws regarding minimum wages paid to domestic workers and their protection should be effectively implemented. In line with living conditions, the need for proper urban planning, including safe housing, access to clean and safe water and proper garbage disposal is emphasised. In order to realise the right to health, it is forwarded that the Ministry of Health and relevant stakeholders should ensure access to affordable healthcare facilities and services, including sexual and reproductive healthcare services for refugee women and girls.

In line with physical and sexual abuse, it is recommended that the relevant stakeholders take necessary measures to prevent, investigate,

prosecute and sanction human rights violations and abuses against refugee women and girls. It is further recommended that access to affordable education for refugee women and girls be prioritised. Furthermore, strategies should be devised to address the factors that lead to high school drop-out rates, including early marriages, teenage pregnancies, a failure to pay school fees and the challenge of balancing house work with school work, especially in the case of girls. In the same vein, it is recommended that refugee women and girls should have equal access to legal remedies and compliant mechanisms when their rights are violated. Finally, refugee women and girls should be at the centre of the development, implementation and review of immigration laws, policies and regulations to ensure that they meet their specific needs.

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Uganda's unrelenting legislative efforts to criminalise same-sex relations: Implications for human rights

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Summary: *The first direct legal instrument promoting homophobia and aimed at criminalising all sexual acts of intimacy by LGBTI persons in Uganda was the 2009 Anti-Homosexuality Bill. The Bill was widely criticised by human rights groups, foreign governments and international organisations, and was eventually withdrawn in 2011. In 2013 the Ugandan Parliament passed a new version of the Bill, which was signed into law by President Yoweri Museveni but was later, in August 2014, overturned on technical grounds by the Ugandan Constitutional Court. In May 2023 the Ugandan Parliament passed a new Anti-Homosexuality Act, which is the focus of this article. This Act attracted world-wide condemnation as the harshest legislation ever against LGBTI persons. The article begins with a historical context of legislative efforts to criminalise same-sex relations in Uganda before focusing on the latest Anti-Homosexuality Act. In order to understand the human rights implications of the legislation, a discussion of certain aspects and contents of the Act is undertaken. The human rights implications of the legislation are then discussed, before concluding with some recommendations on how the rights of LGBTI persons in Uganda can be protected in the face of such legislative and societal hostility.*

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1 Introduction

There are a number of possible reasons for anti-gay sentiments in Uganda. First, many Ugandans are deeply religious and hold traditional beliefs that view homosexuality as immoral, unnatural, and contrary to the will of God.[1] These beliefs are reinforced by conservative interpretations of religious texts that condemn homosexuality. The second reason is political opportunism. Some politicians in Uganda have used anti-gay sentiments to rally support and distract from other issues.[2] Third, there is a general lack of education and awareness about homosexuality in Uganda. Many people have little understanding of what homosexuality is and view it as a foreign concept that is being imposed on Ugandan culture.[3] Moreover, there is a perception among some Ugandans that homosexuality is a Western import that threatens traditional values and culture.[4] This fear has been fuelled by the involvement of Western countries and organisations in promoting lesbian, gay, bisexual, transgender and intersex (LGBTI) rights in Uganda. Worse still, some Ugandans view homosexuality as a public health threat, linking it to the spread of HIV and other sexually-transmitted infections.[5] This perception is fuelled by a lack of understanding of the causes of HIV and the role that discrimination and stigma plays in the spread of the disease.[6]

It is important to note that these reasons are not unique to Uganda and are often cited in other countries with anti-gay sentiments. Indeed, there is what is referred to as 'an epidemic of intolerance'

1 J Ohayon 'Following the herd: The influence of religion and national identity on antigay sentiment in Uganda' (2018) 6 *International Human Rights Internship Programme: Working Paper Series* 13.

2 N Manglos-Weber 'US talks sanctions against Uganda after a harsh anti-gay law – but criminalising same-sex activities has become a political tactic globally' *The Conversation* 22 June 2023, https://theconversation.com/us-talks-sanctions-against-uganda-after-a-harsh-anti-gay-law-but-criminalizing-same-sex-activities-has-become-a-political-tactic-globally-206352 (accessed 23 August 2024).

3 S Nyanzi 'Homosexuality in Uganda: The paradox of foreign influence' MISR Working Paper 14 March 2013, https://misr.mak.ac.ug/sites/default/files/publications/ 14Homosexuality%20in%20Uganda.pdf (accessed 23 August 2024).

4 K Tschierse & I Eisele 'Why is homophobia so strong in Uganda?', https://www.dw.com/en/why-is-homophobia-so-strong-in-uganda/a-65393277 (accessed 23 August 2024).

5 LJ Nakiganda and others 'Understanding and managing HIV infection risk among men who have sex with men in rural Uganda: A qualitative study' (2021) 21 *BMC Public Health* 1309.

6 As above.

of LGBTI people in many African countries.[7] For example, 'same-sex relations remain illegal in 32 of 54 African countries and are still punishable by death in three countries: Mauritania, Somalia, and Nigeria (only in 12 northern states where Shari'a law is enforced)'.[8] In Kenya, gay sex is a criminal offence, and is punishable by up to 14 years' imprisoment.[9] In Tanzania it is punishable by a minimum of 30 years and a maximum of life imprisonment.[10]

There is no shortage of literature on the violation of the human rights of LGBTI persons in Uganda and legislative efforts to criminalise same-sex relations. In *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation*[11] Jjuuko and Nyanzi explored 'the increasing significance of the LGBT debate in Uganda showing why there is increased contestation and the politics around LGBT rights'.[12] The authors also discussed 'how both sides of the LGBT divide have used the courts of law to further their ends and what influences the choice of court cases and other legal actions taken'.[13]

In *Protecting the human rights of sexual minorities in contemporary Africa*[14] Ambani carefully outlined 'the winding walk toward popular anti-homosexuality legislation'[15] in Uganda, highlighting the country's manifestation of a 'chronic allergy to the rights of sexual minorities'.[16] Ambani also highlighted judicial decisions that have occasionally exhibited the capacity to protect the human rights of LGBTI persons despite a few that have failed to do so – concluding that those progressive cases that protect LGBTI rights serve as 'exhibits of the potential of the judicial forum in Uganda to serve as an effective bastion of the rights of sexual minorities'.[17] Related

7 V Rouget 'Tolerance still in short supply for LGBT rights in sub-Saharan Africa' *Control Risks/Social Risk and Compliance* 5 July 2021, https://www.controlrisks.com/our-thinking/insights/tolerance-still-in-short-supply-for-lgbt-rights-in-sub-saharan-africa (accessed 27 July 2023).
8 As above.
9 T Mhaka 'Homophobia: Africa's moral blind spot: It is high time for African leaders to accept LGBTQ rights are human rights' *Al Jazeera* 6 May 2022, https://www.aljazeera.com/opinions/2022/5/6/homophobia-africas-moral-blind-spot (accessed 27 September 2023).
10 Sec 154 Penal Code of 1945 (as revised by the Sexual Offences Special Provisions Act, 1998).
11 A Jjuuko and others (eds) *Queer lawfare in Africa: Legal strategies in contexts of LGBTIQ+ criminalisation and politicisation* (2022).
12 A Jjuuko & S Nyanzi 'Court focused lawfare over LGBT rights: The case of Uganda' in Jjuuko and others (n 11) 145-146.
13 As above.
14 S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017).
15 JO Ambani 'A triple heritage of sexuality? Regulation of sexual orientation in Africa in historical perspective' in Namwase & Jjuuko (n 14) 43.
16 As above.
17 Ambani (n 15) 49.

to this is the 'homosexuality versus culture' debate in Uganda. This was discussed in detail by Namwase who analysed how the right to culture has been interpreted and applied in specific rulings by Ugandan courts, while also exploring the jurisprudential implications of these decisions on the debate surrounding homosexuality and cultural values in Uganda.[18]

Other commentators that have written about the criminalisation of same-sex relations in Uganda include Ssenyonjo who explored the criminalisation of private, consensual same-sex relationships, focusing specifically on the Anti-Homosexuality Act 2023 and its effects on human rights such as the right to life, privacy, human dignity, personal integrity, freedom, personal security, equality, non-discrimination, health, and the freedoms of association, expression and peaceful assembly.[19] They also include Johnson and Falcetta who examined the Official Report (Hansard) to critically assess the Ugandan Parliament's activities concerning homosexuality since 2014.[20] They explored how parliamentarians perceive the 'problem' of homosexuality and the claims they make about homosexuals. The study found that calls for increased regulation of homosexuality are largely based on problematic assertions about two related issues: the so-called 'promotion' of homosexuality in Uganda and the imagined 'recruitment' of Ugandan children into homosexuality.[21] The authors concluded that reducing parliamentary support for anti-gay legislation and preventing the enactment of new anti-gay laws require Ugandan parliamentarians to speak out against homophobia.[22]

However, the focus of this article is on the human rights implications of Uganda's unrelenting efforts to criminalise same-sex relations, culminating in the opprobrious Anti-Homosexuality Act that was passed in May 2023. The Act, which was signed into law by the President on 26 May 2023, attracted world-wide condemnation.[23] This article begins with a historical context of legislative efforts to criminalise same-sex relations in Uganda before focusing on the

18 See S Namwase 'Culture versus homosexuality: Can a right "from" culture be claimed in Ugandan courts?' in Namwase & Jjuuko (n 14) 52-78.
19 M Ssenyonjo 'Sexual orientation and the criminalisation of private consensual sexual acts between adults of the same gender' (2023) 12 *International Human Rights Law Review* 143-212.
20 PJ Johnson & S Falcetta 'Beyond the Anti-Homosexuality Act: Homosexuality and the Parliament of Uganda' (2021) 74 *Parliamentary Affairs* 52-78.
21 As above.
22 As above.
23 OHCHR 'Uganda: UN experts condemn egregious anti-LGBT legislation' *Press Release* 29 March 2023, https://www.ohchr.org/en/press-releases/2023/03/uganda-un-experts-condemn-egregious-anti-lgbt-legislation (accessed 30 August 2023).

2023 Anti-Homosexuality Act. In order to understand the human rights implications of the legislation, a discussion of certain aspects and contents of the Act is undertaken. The human rights implications of the legislation are then discussed, before concluding with some recommendations on how the rights of LGTBI persons in Uganda can be protected in the face of such legislative and societal hostility.

2 Context and background

As in several other African countries, such as Kenya, Nigeria, Egypt and Botswana, male homosexual relations were quite common in pre-colonial Ugandan society.[24] Homosexuality, therefore, has a long history in Uganda. Although there is some contestation around the claim, it is alleged that Kabaka Mwanga II, who succeeded his father, Kabaka Mwanga I, in 1884, 'murdered tens of Christian Baganda men … because they refused to sleep with him. They refused because of their faith and the encouragement of the missionaries.'[25] It is now well known that 'in 1964, 22 of the men were canonised and are now regarded as saints'.[26] They are commonly and famously referred to as the 'martyrs of Uganda'.

The genesis of Uganda's anti-gay legislative expression can be traced to the 1950 Penal Code Act,[27] which in section 145 provides for 'unnatural offences'. It states the following:

> Any person who –
> (a) has carnal knowledge of any person against the order of nature;
> (b) has carnal knowledge of an animal; or
> (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.

The 1950 Penal Code Act does not explicitly specify any sexual acts related to the LGBTI community. Nevertheless, the Act consists of provisions that have the potential to be interpreted in a discriminatory manner. Moreover, the Act criminalised attempts to carry out what it refers to as 'unnatural offences'.[28] Additionally, law enforcement

24 K Christensen 'A legacy of homophobia: Effects of British colonisation on queer rights in India and Uganda' (2022) *Capstone Projects and Master's Theses* 1413, https://digitalcommons.csumb.edu/caps_thes_all/1413 (accessed 31 August 2024).
25 See 'The gay king of the Buganda' *Medium* 30 October 2015, https://medium.com/@Owaahh/the-gay-king-of-the-buganda-876a392adbe6 (accessed 28 July 2023).
26 As above.
27 The Penal Code Act (Cap 120) 1950.
28 Sec 146.

officials could exploit another provision in the Act to deprive LGBTI individuals of their sexual rights. This provision states:[29]

> Any person who, whether in public or in private, commits any act of gross indecency with another person or procures another person to commit any act of gross indecency with him or her or attempts to procure the commission of such act by any person with himself or herself or with another person, whether in public or in private, commits an offence and is liable to imprisonment for seven years.

In 2000 the Penal Code was amended to introduce stiffer penalties for 'carnal knowledge against the order of nature'.[30] Under section 140 the offence was punishable by life imprisonment and, under section 141, 'attempted homosexuality' was specifically made a criminal offence.

In 2009 an 'Anti-Homosexuality Bill', which sought to criminalise same-sex relationships more explicitly, was introduced in the Ugandan Parliament. The Bill proposed the death penalty for 'aggravated homosexuality' (defined as same-sex activity involving a minor, a person with disabilities, or someone infected with HIV) and life imprisonment for other same-sex relationships. The Bill was widely criticised by human rights groups, foreign governments and international organisations and was eventually withdrawn in 2011 due to international pressure.

In 2013 the Ugandan Parliament passed a new version of the Anti-Homosexuality Bill, which criminalised the 'promotion of homosexuality', as well as same-sex relationships. The Bill imposed harsh penalties on anyone who 'funds, sponsors, or abets homosexuality' or 'counsels or procures another to engage in homosexuality'. The Bill was signed into law by President Yoweri Museveni but was later overturned by the Ugandan Constitutional Court in August 2014 on technical grounds,[31] although it is widely believed that the decision was influenced by international pressure.

On 21 March 2023 the Ugandan Parliament passed a new Anti-Homosexuality Bill. As will be seen further below, this Bill entrenched the criminalisation of same-sex conduct and created new offences that would curtail any activism on LGBTI issues. It created harsher sentences for those identified as LGBTI persons and attempted to eradicate them from any form of social engagement in Uganda. The

29 Sec 148.
30 Penal Code Amendment (Gender References) Act 2000.
31 *Oloka-Onyango & 9 Others v Attorney-General* Constitutional Petition 8 of 2014 [2014] UGSC 14 (1 August 2014).

Bill was signed into law by the President on 26 May 2023. In order to understand the gravity of this legislation and the implications it carries for human rights, it is important to have an understanding of its drafting history, particularly focusing on the debates and discussions that informed its passing. We now turn our attention to that aspect.

3 Drafting history

Understanding the drafting history of the anti-homosexuality legislation in Uganda is important for an appreciation of its human rights implications. As mentioned earlier, anti-homosexuality sentiments have their legislative genesis in the Penal Code Act of 1950. They also found expression in other subsequent statutes such as the Equal Opportunities Act.[32] This Act established the Equal Opportunities Commission with powers to act as a tribunal in all cases of discrimination against marginalised groups. However, the Commission could not investigate any matter involving behaviour, which could be considered '(i) immoral and socially harmful, or (ii) unacceptable by the majority of the cultural and social communities in Uganda'.[33] Clearly, this provision was deliberately targeted at LGBTI persons. It was later successfully challenged in court.[34] Other anti-LGBTI statutes include the Public Order Management Act (POMA),[35] which contains provisions that have been used to restrict LGBTI individuals' rights to peaceful assembly and expression, and the HIV and AIDS Prevention and Control Act,[36] which criminalises the intentional transmission of HIV but has also been used to target LGBTI individuals.

POMA has been used by Ugandan authorities to prevent or shut down gatherings of LGBTI individuals. For instance, in 2016 Ugandan police raided a gathering organised by Sexual Minorities Uganda (SMUG) to celebrate Pride Week.[37] The police cited POMA as justification for the raid, claiming that the gathering was an illegal assembly, even though the organisers had notified the authorities as required by law.[38] This action effectively suppressed

32 Act 2 of 2007.
33 Sec 15(6)(d) Equal Opportunities Act.
34 *Adrian Jjuuko v Attorney-General* Constitutional Petition 1 of 2009.
35 Act 9 of 2013.
36 Act 1 of 2015.
37 See HRAPF 'A legal analysis of the brutal police raid of an LGBTI pageant on 4th August 2016 and subsequent actions and statements by the police and the minister of ethics and integrity' 16 August 2016, https://hrapf.org/?mdocs-file=1792&mdocs-url=false (accessed 23 August 2024).
38 As above.

the LGBTI community's right to peaceful assembly. The HIV and AIDS Prevention and Control Act has been used as a tool to harass and prosecute individuals based on their sexual orientation. For example, there have been cases where LGBTI individuals have been accused of intentionally transmitting HIV, without substantial evidence, leading to their arrest and prosecution.[39]

The first most direct legal instrument promoting homophobia and specifically aimed at criminalising all sexual acts of intimacy of LGBTI persons in Uganda, however, was the 2009 Anti-Homosexuality Bill. As mentioned earlier, the Bill sought to criminalise same-sex relationships more explicitly. It proposed life imprisonment or even the death penalty for homosexuality. Besides its controversial content and intent, the Bill had many shortcomings. For example, it did 'not contain a clear definition of the offence of homosexuality and thus offended the principle of legality, which requires that for a person to be convicted of an offence, it should be clearly defined by law'.[40] Second, the scope of the Bill was not clear. Although its aim was to outlaw the promotion of homosexuality, it extended its application to third parties (such as 'persons in authority') on whom it bestowed a duty and obligation to 'police' homosexual acts or tendencies. The most problematic aspect of the Bill, however, was its human rights implications for which it was widely criticised by human rights organisations and the international community. Nevertheless, after several revisions and amendments, it was eventually passed into law in December 2013, with the death penalty clause removed. That is how the Anti-Homosexuality Act 2014 came into being.

A number of observations are to be made from the parliamentary debates leading to the passing of the Anti-Homosexuality Act 2014. First, it appears that the legislators saw their role as custodians of morality rather than representatives of their people, whose role is to make laws and ensure that the government is functioning properly and effectively. For example, in moving the Bill for its second reading, Mr Benson Obua-Ogwal stated the following:[41]

> This Bill is meant to provide for marriage in Uganda as contracted between only man and woman, and that is the way the Creator really intended it to be. This is one of the reasons why this Bill must be

39 S Devi 'Uganda takes "another step backward" with HIV Bill' 383 (9933) 1945-2018, https://doi.org/10.1016/S0140-6736(14)60941-7 (accessed 23 August 2024).

40 JC Mubangizi & B Twinomugisha 'Protecting the right to freedom of sexual orientation: What can Uganda learn from South Africa' (2011) 22 *Stellenbosch Law Review* 344.

41 Uganda Parliament Parliamentary Debates (Hansard) 20 December 2013 (Mr Benson Obua-Ogwal).

> considered – there is an attempt to redefine marriage. The family is also under attack, and it is our role, as Members of Parliament, to protect what we know as the family. The family is being redefined and we need to protect what we know, as Ugandans, to be a family.

Regarding the purpose of the Bill, the member went on to say:[42]

> The Bill further aims at providing a comprehensive and enhanced legislation to protect the cherished culture of the people of Uganda and legal, religious and traditional family values of the people of Uganda against the attempts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda.

The other observation is that in passing the Bill, the legislators were not unaware of its human rights implications and the potential violation of international human rights norms. They were clearly and unequivocally reminded of these norms by the dissenting minority opinion in the report of the Committee on Legal and Parliamentary Affairs to whom the Bill had been referred after the first reading in accordance with Rules 117 and 118 of the Rules of Procedure of Parliament. The opinion advised as follows:[43]

> The introduction of this law contravenes many international conventions and treaties which are already ratified by Uganda, such as the African Charter on Human and Peoples' Rights (the Banjul Charter) ratified by Uganda on 10 May 1996; the International Covenant on Civil and Political Rights (ICCPR); and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The opinion further advised:[44]

> A citizen loses the right to his or her citizenry the moment the state intervenes in the affairs of his or her bedroom. To that end, that Act offends the provision of Article 27 of the Constitution of the Republic of Uganda, which comprehensively provides for the right to privacy of persons … What two consenting adults do in the privacy of their bedroom should not be the business of this Parliament. It is not right to have the state allowed in the bedrooms of people.

This advice was clearly not taken, as the Bill was passed by Parliament in December 2013, as mentioned earlier, and was signed into law by President Yoweri Museveni in early 2014. However, as mentioned earlier, the statute was later struck down by Uganda's Constitutional Court in August 2014 on a technicality, with the Court ruling that Parliament had passed the law without a quorum.[45]

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42 As above.
43 As above.
44 Uganda Parliament Parliamentary Debates (Hansard) 20 December 2013 (Mr Mwiru).
45 *Oloka-Onyango & 9 Others v Attorney-General* Constitutional Petition 8 of 2014 [2014] UGSC 14 (1 August 2014).

On 3 May 2021 Parliament passed the Sexual Offences Bill of which the objective was to criminalise any sexual activity conducted between individuals of the same gender, as well as anal intercourse among individuals of any gender. The legislation was intended to introduce significant changes to the Ugandan Penal Code with regard to sexual offences. However, in August 2021 President Museveni declined to approve the Bill, arguing that many of the provisions included in the proposed law were superfluous as they were already covered by existing legislation such as the Penal Code Act.

The most recent attempt at enacting legislation aimed at criminalising the sexual behaviour of LGBTI persons is the Anti-Homosexuality Act of 2023. Deemed as the harshest law against LGBTI persons ever, the 2023 Anti-Homosexuality Bill was initially passed by Parliament on 21 March 2023. As mentioned earlier, it was signed into law in May 2023 after having been passed by Parliament again with a few amendments. Worldwide condemnation of the Act was swift and vociferous.

As with the 2014 Anti-Homosexuality Act, the parliamentary debates leading to the passing of the 2023 Bill make for interesting reading. In moving the motion for the second reading of the Bill, it was stated that the objective of the Bill was

> to establish a comprehensive and enhanced legislation to protect traditional family values, our diverse culture, and our faiths, by prohibiting any form of sexual relations between persons of the same sex and the promotion or recognition of sexual relations between persons of the same sex.[46]

The other objective was 'to strengthen the nation's capacity to deal with emerging internal and external threats to the traditional heterosexual family' and 'to protect our cherished culture, the legal, religious and traditional family values of Ugandans and acts that are likely to promote sexual promiscuity in this country'.[47] This is the very same language that was used in debating and passing the 2014 Anti-Homosexuality Act.

The debates also display a lack of understanding of Uganda's place in the international community and the relationship between Ugandan law and international law. This is clear from the contribution of one member who submitted as follows:[48]

46 Uganda Parliament Parliamentary Debates (Hansard) 21 March 2023 7559 (Mr Basalirwa).
47 As above.
48 Uganda Parliament Parliamentary Debates (Hansard) 21 March 2023 7562 (Ms Rwakoojo).

> Whereas Uganda is a signatory to a number of international instruments that might be interpreted to recognise sexual minorities, these do not legally create binding obligations on Uganda since the Constitution, which is the supreme law of Uganda, and other enactments such as the Penal Code Act, specifically bar sexual acts between sexual minorities.

This raises the issue of the relationship between the Ugandan Constitution and international law. The Ugandan Constitution contains provisions that emphasise the importance of international law, including the respect for international treaties, conventions and protocols. Article 2(2) of the Constitution explicitly states that 'the Constitution shall be the supreme law of Uganda and shall have binding force on all authorities and persons throughout Uganda'. However, unlike countries with a monist system – where international law can have direct effect within the domestic legal system without requiring specific legislative action – Uganda is considered a dualist state. Accordingly, international treaties and conventions to which Uganda is a party do not automatically become part of the domestic legal system. Instead, these international obligations must be explicitly incorporated into national law through legislation passed by the national Parliament.

Indeed, in cases where there is a conflict between the Constitution and international law, the Constitution prevails. However, the Ugandan courts have shown a willingness to interpret the Constitution in light of international human rights norms and principles.[49] The courts have also recognised the importance of international law in interpreting and applying Ugandan law, particularly in cases involving human rights and environmental protection.[50] It can therefore be argued that the Ugandan Constitution and international law have a complementary relationship, with international law serving as a source of guidance and inspiration for the development of Ugandan law and the protection of human rights and fundamental freedoms.

It is important to note that, as with the parliamentary debates leading to the passing of the Anti-Homosexuality Act 2014, the minority report presented during the debates on the 2023 Bill

49 See eg *Attorney-General v Susan Kigula & 417 Others* Constitutional Appeal 3 of 2006 [2009] UGSC 6 (21 January 2009) in which the Ugandan Constitutional Court held that the mandatory death penalty for murder was in violation of international human rights law. The Court relied upon international treaties and conventions, such as the International Covenant on Civil and Political Rights, to support its decision.

50 See eg *Uganda v Thomas Kwoyelo* Constitutional Appeal 1 of 2012 [2015] UGSC 5 (8 April 2015) in which the Court relied upon international law, including the Rome Statute of the International Criminal Court, to interpret and apply Ugandan law on war crimes.

advised members of its potential human rights violation. The report made it clear that

> not only does the Bill contravene the provisions of the Constitution of the Republic of Uganda, it also contravenes established international and regional human rights standards, as it unfairly limits the fundamental rights of the LGBTQ+ persons. This criminalisation denies them equal protection under the law, owing to the harsh and differential treatment they receive based on their sexual orientation and criminalisation of the same.[51]

The report warned that, if passed into law, the Bill would 'infringe the rights of Ugandans, specifically the rights and freedoms of expression, association, liberty, privacy, equality and freedom from discrimination, inhuman and degrading treatment, the right to a fair hearing'.[52] The report concluded that if Parliament enacted the Bill into law, it would be unconstitutional. The report also concluded that 'the Bill is ill-conceived. It contains provisions that are unconstitutional, it reverses the gains registered in the fight against gender-based violence. It criminalises individuals instead of conduct and that contravenes all known legal norms.'[53] As in December 2013, the advice of the minority was clearly not taken, and Parliament went ahead and passed the Bill that is now the Anti-Homosexuality Act 2023.

4 Understanding the 2023 Anti-Homosexuality Act

According to the long title, the purpose of the Act is 'to prohibit any form of sexual relations between persons of the same sex; prohibit the promotion or recognition of sexual relations between persons of the same sex; and for related matters'.[54] However, an introductory memorandum prefacing the Bill that served before Parliament stated the following:

> The object of the Bill is to establish a comprehensive and enhanced legislation to protect the traditional family by –
>
> (a) prohibiting any form of sexual relations between persons of the same sex and the promotion or recognition of sexual relations between persons of the same sex;
> (b) strengthening the nation's capacity to deal with emerging internal and external threats to the traditional, heterosexual

51 Uganda Parliament Parliamentary Debates (Hansard) 21 March 2023 7566 (Mr Odoi-Oyelwowo).
52 As above.
53 Uganda Parliament Parliamentary Debates (n 51) 7567.
54 Long title of the Bill.

family. This legislation further recognises the fact that same sex attraction is not an innate and immutable characteristic;

(c) protecting the cherished culture of the people of Uganda, legal, religious, and traditional family values of Ugandans against the acts of sexual rights activists seeking to impose their values of sexual promiscuity on the people of Uganda;

(d) protecting children and youth who are made vulnerable to sexual abuse through homosexuality and related acts.

This seems to indicate that the purpose of the legislation goes beyond the mere prohibition of same-sex relations but extends to the so-called 'protection' of African values, the culture of Ugandans and the traditional heterosexual family. According to one commentator, '[t]his is reflective of a spate of new laws across Africa. Their proponents argue that they protect the heterosexual African family and "African values" in a rejection of "Western norms".'[55] Okech argues that these laws endanger people's lives as they 'cause a crackdown on basic sexual and reproductive health services and education, including lifesaving HIV/AIDS services. While targeting gender and sexually diverse people, they're actually pushing a conservative interpretation of gender relations and roles.'[56] She sees these laws as a reaction by patriarchal societies to increased freedoms for formerly-marginalised groups, such as women and girls. Increased participation of women in political spaces, enhanced access to education, and measures to prevent gender-based violence are indicators of these freedoms.[57]

Besides being opprobrious in its objective, the Act contains certain aspects that make it egregious. One such aspect is the definition of the offence of homosexuality and its sentence. Under section 2(1) of the Act, 'a person commits the offence of homosexuality if the person performs a sexual act or allows a person of the same sex to perform a sexual act on him or her'. Section 2(2) prescribes a sentence of life imprisonment for the offence. Even more egregious is the description of the offence of 'aggravated homosexuality' and its sentence.[58] This so-called aggravated homosexuality refers to same-sex conduct where the victim is either a child or a disabled individual, or where the perpetrator is living with HIV, serves as a parent or guardian to the victim, possesses authority or control over the victim, or is a serial offender. The offence carries the death penalty.

55 A Okech 'Uganda's anti-homosexuality law is a patriarchal backlash against progress' *The Conversation* 31 May 2023, https://theconversation.com/ugandas-anti-homosexuality-law-is-a-patriarchal-backlash-against-progress-206681 (accessed 5 September 2023).

56 As above.

57 As above.

58 Sec 3 of the Act.

Sections 2(3) and 3(3) of the Act deal with attempts. Under section 2(3) a person who attempts to commit the offence of homosexuality is liable, on conviction, to imprisonment of ten years. Under section 3(3) attempting to commit the offence of aggravated homosexuality is punishable with a term of imprisonment of 14 years.

Section 5 of the Act deals with 'protection, assistance and payment of compensation to victims of homosexuality', and section 6 talks of 'consent of a victim of homosexuality'. These provisions are a clear indication of how the Act confuses consensual and non-consensual same-sex relations. Indeed, throughout the Act, and during the parliamentary debates that led to its passing, there seems to be a total lack of understanding of the difference between consensual and non-consensual same-sex relations. According to the UN High Commissioner for Human Rights, 'the former should never be criminalised, whereas the latter requires evidence-based measures to end sexual violence in all its forms – including against children, no matter the gender or sexual orientation of the perpetrator'.[59]

Another aspect of the Act that has attracted much concern is a ban on the promotion of homosexual activities. Section 11 imposes a jail term of up to 20 years for promoting homosexuality through advertising, publishing, printing, distributing, or broadcasting any material that promotes or encourages homosexuality. This means that individuals or institutions that support or fund LGBTI persons' activities or organisations face prosecution and imprisonment. Similarly, media groups, journalists and publishers face prosecution and imprisonment for publishing, broadcasting or distributing any material that advocates LGBTI rights or promotes homosexuality.

Section 11 of the Act has been particularly criticised for targeting 'third parties' who are not necessarily in any same-sex conduct, such as journalists and funders. The same applies to section 9 which targeted property owners whose premises are occupied or used by LGBTI persons. Similarly, section 10 targets people who conduct marriage ceremonies between persons of the same sex.

It should be pointed out that the enactment of the 2023 Anti-Homosexuality Act was challenged in court on procedural and substantive grounds in the case of *Hon Fox Odoi-Oywelowo & 21 Others v Attorney-General & 3 Others*.[60] Apart from the procedural

59 OHCHR 'Uganda: Türk urges President not to sign shocking anti-homosexuality Bill', https://www.ohchr.org/en/press-releases/2023/03/uganda-turk-urges-president-not-sign-shocking-anti-homosexuality-bill (accessed 12 April 2023).
60 Consolidated Constitutional Petitions 14, 15, 16 & 85 of 2023.

aspects, the petition raised the issue of the impact of the contested statute on prior judicial decisions concerning related issues, and questioned the financial repercussions it may have on the nation's budgetary framework. More critically, the petition challenged specific provisions of the Anti-Homosexuality Act on the grounds that they violated constitutional rights and freedoms enshrined in the Ugandan Constitution, as well as international human rights instruments to which Uganda is a party.

Although the statute was not struck down, the Court nonetheless found certain sections of the Act to be unconstitutional. For example, section 3(2)(c) of the Act, which criminalised the transmission of a terminal illness through same-sex sexual activity, was found to violate the right to health enshrined in article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[61] Relatedly, sections 9 and 11(2)(d) of the Act were found to be inconsistent with the right to health, as well as the right to an adequate standard of living enshrined in article 25(1) of the Universal Declaration of Human Rights (Universal Declaration) and article 11(1) of ICESCR.[62] Furthermore, section 14 in its entirety was adjudged to infringe the right to health, privacy and freedom of religion.[63] The right to privacy in this context is recognised under article 12 of the Universal Declaration and article 17(1) of the International Covenant on Civil and Political Rights (ICCPR), while the right to freedom of religion is encapsulated in article 29(1)(c) of the Ugandan Constitution.[64]

5 Human rights implications

In order to understand the human rights implications of the 2023 Anti-Homosexuality Act, it is important to first highlight Uganda's obligations under international law. As mentioned earlier, Uganda is a party to several international human rights treaties. These include, but are not limited to, ICCPR;[65] ICESCR;[66] the Convention on the Rights of the Child (CRC);[67] the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW);[68] and the

61 Para 532.
62 Para 535.
63 As above.
64 As above.
65 Adopted by the UN General Assembly on 16 December 1966.
66 Adopted by the UN General Assembly on 16 December 1966.
67 UN Commission on Human Rights, adopted on 7 March 1990, E/CN.4/RES/1990/74.
68 Adopted by the UN General Assembly on 18 December 1979.

Convention on the Rights of Persons with Disabilities (CRPD).[69] It is also party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[70] and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).[71] At the regional/continental level, Uganda is a party to the African Charter on Human and Peoples' Rights (African Charter);[72] the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol);[73] and the African Charter on the Rights and Welfare of the Child (African Children's Charter).[74] Uganda therefore is obligated to respect, protect and fulfil the human rights of its citizens as contained in these international instruments.

The Ugandan Constitution clearly states that respect for international law and treaty obligations is one of the principles upon which the foreign policy of Uganda is based. Moreover, one of the functions of the Ugandan Human Rights Commission is 'to monitor the government's compliance with international treaty and convention obligations on human rights'.[75] The status and recognition of international law in Uganda is further reinforced by article 286 of the Constitution dealing with the status of international agreements, treaties and conventions.

It should also be noted that most of the human rights norms in the international human rights instruments to which Uganda is a party are contained in the Ugandan Constitution. As mentioned earlier, these rights are for the benefit of all citizens, including LGBTI persons. In other words, the rights of all Ugandan citizens, including LGBTI persons, are contained in the Constitution and should be respected and protected. Unfortunately, the 2023 Anti-Homosexuality Act violates most, if not all, those rights. Although the Act essentially violates almost every conceivable relevant right in international human rights instruments and in the Ugandan Constitution, only a few can be discussed here.

Of all the human rights violated by the Anti-Homosexuality Act, the right to equality and non-discrimination is the most critical. The Act discriminates against individuals on the basis of their sexual

69 Adopted by the UN General Assembly on 24 January 2007, A/RES/61/106.
70 Adopted by the UN General Assembly on 10 December 1984.
71 Adopted by the UN General Assembly on 21 December 1965.
72 Adopted by the Organisation of African Unity (OAU) on 27 June 1981, CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982).
73 Adopted by the African Union on 11 July 2003.
74 Adopted by the Organisation of African Unity (OAU) on 11 July 1990, CAB/LEG/24.9/49 (1990).
75 Art 52(1)(h) of the Constitution.

orientation, which is a violation of human rights norms contained in several international human rights to which Uganda is a party, such as the Universal Declaration[76] and ICCPR.[77] It also violates article 2 of the African Charter which provides that individuals are entitled to the rights under the Charter 'without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national or social origin, fortune, birth or any status'. Article 3 of the African Charter provides for 'every individual's' right to equality before the law and equal protection before the law. The African Commission on Human and Peoples' Rights (African Commission), which monitors the adherence of member states to the African Charter, has stated its view while evaluating state reports submitted to it in accordance with article 62, as follows:[78]

> Together with equality before the law and equal protection of the law, the principle of non-discrimination provided under article 2 of the Charter provides the foundation for the enjoyment of all human rights …The aim of this principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.

Article 21(1) of the Ugandan Constitution guarantees the right to equality and freedom from discrimination. It states that '[a]ll persons are equal before and under the law in all spheres of political, economic, social and cultural life and in every other respect and shall enjoy equal protection of the law'. The anti-homosexuality law clearly violates this constitutional guarantee.

It should be noted that in *Hon Fox Odoi-Oywelowo & 21 Others v Attorney-General & 3 Others* the Court did not find the Anti-Homosexuality Act to violate the right to equality and non-discrimination, holding as follows:[79]

> In the result, it is our finding that sexual orientation was never intended by the framers of our Constitution to be one of the parameters in respect of which differential treatment is constitutionally prohibited. Consequently, we do not find sections 1, 2(1) - (4), 3(1) and 3(2) (c) - (f), (h), (j), 3(3) and (4), and 6 of the Anti-Homosexuality Act to contravene the right to equality and freedom from discrimination guaranteed under articles 21(1), (2), (3), (4), 32(1), 3(2)(c), and 45 of the Ugandan Constitution. On the other hand, the limitation to the right to equality and non-discrimination embedded in sections 12 and 13 of the Act to abide article 17(1)(c) of the Constitution, and are

76 Art 7.
77 Arts 2 & 26.
78 See 21st Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/322 (X), https://achpr.au.int/sites/default/files/files/2022-09/achpr40actrep212006eng.pdf (accessed 13 August 2023).
79 Para 340.

demonstrably justifiable in a free and democratic society as envisaged under article 43(2) of the Cconstitution.

Another critical right for which the Anti-Homosexuality Act has serious implications is the right to privacy. This right is protected under the Universal Declaration[80] and ICCPR,[81] among other international human rights instruments. It is also protected by the Ugandan Constitution, article 27, which states:

(1) No person shall be subjected to –
  (a) unlawful search of the person, home or other property of that person; or
  (b) unlawful entry by others of the premises of that person.
(2) No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property.

By criminalising adult consensual sexual activity (albeit same-sex), which by nature is private, the Anti-Homosexuality Act violates the right to privacy contained in international human rights instruments and the Ugandan Constitution. It is worth noting that in *Odoi-Oywelowo* the Court found no violation of the right to privacy, holding that 'we find no violation whatsoever of article 27 of the Constitution, neither do we find any inconsistency between sections 1, 2, 3, 9 and 11(2)(d) of the Anti-Homosexuality Act and the right to privacy enshrined in article 12 of the UDHR and article 17(1) of the ICCPR'.[82]

There is no doubt that freedom of expression is central to issues of human rights, sexual orientation and gender identity. It is also 'one of the most fundamental rights that individuals can enjoy'.[83] That is why it is protected under the Universal Declaration[84] and ICCPR.[85] It is also protected by the African Charter[86] and the Ugandan Constitution itself.[87] It is clear that the Anti-Homosexuality Act violates this right. As mentioned earlier, the Act criminalises the promotion of homosexuality through advertising, publishing, printing, distributing or broadcasting any material that promotes or encourages homosexuality. Clearly, the Act goes beyond the parties to same-sex conduct and extends criminalisation to third parties that enable communication and expression. It restricts

80 Art 12.
81 Art 17.
82 Para 371.
83 JC Mubangizi *The protection of human rights in South Africa: A legal and practical guide* (2013) 96.
84 Art 19.
85 Art 19(2).
86 Art 9(2).
87 Art 29.

freedom of expression by criminalising the expression of support for homosexuality or LGBTI rights. This is a serious violation of the right to freedom of expression.

The right to health is another important fundamental right for which the Anti-Homosexuality Act has serious implications. Both the African Charter[88] and ICESCR[89] protect the right to health and require Uganda to take steps to safeguard the health of its citizens. By criminalising homosexuality and implementing provisions that criminalise its promotion, as well as the aiding and abetting of homosexuality, the Act has adverse effects for the quality, accessibility, acceptability and availability of health services for individuals who identify as lesbian, gay, bisexual, or transgender. In addition, the Act singles out LGBTI persons living with HIV for harsher penalties. This is likely to adversely affect efforts to prevent the transmission of HIV, as it may force groups that are already marginalised due to their consensual sexual conduct to retreat further into hiding. It also goes against the International Guidelines on HIV/AIDS and Human Rights, which require states to 'review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups'.[90]

As mentioned earlier, the offence of 'aggravated homosexuality' under the Act carries the death penalty. This is in contrast to the global trend towards a moratorium on the use of the death penalty. According to article 6(2) of ICCPR, '[i]n countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes'. The definition of 'crimes', however, should be consistent with the provisions of the Covenant. According to the UN Human Rights Committee, article 6 is abolitionist in outlook and the expression 'most serious crimes', therefore, should be 'read restrictively to mean that the death penalty should be a quite exceptional measure'.[91] In that regard, the former UN Special Rapporteur on Extra-Judicial Executions, Asma Jahanghir, stated that it was

> unacceptable that in some states homosexual relationships are still punishable by death. It must be recalled that under article 6 of the

88 Art 16.
89 Art 12.
90 OHCHR & UNAIDS *International guidelines on HIV/AIDS and human rights* (2006 consolidated version), https://www.ohchr.org/sites/default/files/Documents/Publications/HIVAIDSGuidelinesen.pdf (accessed 14 August 2023).
91 UN Human Rights Committee (HRC) CCPR General Comment 6: Article 6 (right to life) 30 April 1982, https://www.refworld.org/docid/45388400a.html (accessed 14 April 2023).

> International Covenant on Civil and Political Rights death sentences may only be imposed for the most serious crimes, a stipulation which clearly excludes matters of sexual orientation.[92]

Article 22 of the Ugandan Constitution purports to protect the right to life but allows for the intentional deprivation of life 'in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda'. It is submitted that including matters of same-sex relations within the ambit of this provision has serious implications for the rights of LGBTI persons.

The length and depth of this article do not lend themselves to a detailed discussion of the implications of the Anti-Homosexual Act on each and every right. Suffice to say that in addition to the rights discussed above, other rights affected include freedom and security of the person; freedom of conscience, thought and belief; the right to dignity; and freedom of association. The Act also has implications for the rights of specific groups of people such as children, persons with disabilities and persons living with HIV.

Notwithstanding the decision in *Odoi-Oywelowo*, Uganda could learn from other countries where court challenges to anti-LGBTI legislation have been successful. In February 2023 the Supreme Court of Kenya upheld the right to freedom of association for LGBTI persons and reiterated the right to non-discrimination on the grounds of sexual orientation in *Non-Governmental Organisations Co-Ordination Board v Eric Gitari & 5 Others.*[93] In reaching its decision, the Court specifically stated the following: 'The right to form an association is an inherent part of the right to freedom of association guaranteed to every person regardless of race, sex, nationality, ethnicity, language, religion, or any other status.'[94]

On the issue of discrimination, the Court made reference to article 26 of ICCPR and article 2 of the African Charter, both of which prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.[95] The Court further held that

92 Report of the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Ms Asma Jahangir E/CN.4/2001/9, 11 January 2001, https://digitallibrary.un.org/record/433636?ln=en (accessed 14 August 2023.
93 Supreme Court Petition16 of 2019 (2023).
94 Para 54.
95 Paras 74 & 75.

> an interpretation of non-discrimination which excludes people based on their sexual orientation would conflict with the principles of human dignity, inclusiveness, equality, human rights and non-discrimination … to allow discrimination based on sexual orientation would be counter to these constitutional principles.[96]

Uganda could also take a leaf out of South Africa's case law book on the rights of sexual minorities, the *locus classicus* of which is *National Coalition of Gay and Lesbian Equality & Another v Minister of Justice & Others*.[97] The case clearly defined the term 'sexual orientation' and invalidated the common law offence of sodomy and other similar statutory offences. Regarding non-discrimination and the rights of sexual minorities, the Constitutional Court stated:[98]

> Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation, stigma and punishment. At best, it celebrates the vitality that difference brings to any society.

Another strategy that could be adopted is to challenge the Anti-Homosexuality Act through the mechanisms of the African Charter. Indeed, some have argued that the African Charter is an important instrument that could be utilised to tackle anti-gay laws in Africa. For example, Ekhato has argued that

> the African Charter could be used for the promotion of gay rights especially in countries with anti-gay laws … For example, it can be argued (to some extent) that article 2 of the African Charter grants equal protection to everyone.[99]

Ekhato further argues that 'the African Union (AU) has posited that the various anti-gay laws enacted in different countries in Africa go against the tenor of the African Charter'.[100]

6 Conclusion

Uganda is not the only country in Africa or in the world with strong anti-gay sentiments. It is not the only country in which same-sex relations are illegal. The new Ant-Homosexuality Act passed by the Ugandan Parliament in May 2023, however, undoubtedly is the

96 Para 79.
97 1999 (1) SA 6 (CC).
98 Para 132.
99 E Ekhato 'The impact of the African Charter on Human and Peoples' Rights on domestic law: A case study of Nigeria' (2015) 41 *Commonwealth Law Bulletin* 253-270.
100 As above.

harshest piece of legislation targeting LGBTI persons ever. In order to understand the human rights implications of the Act, this article has looked at its drafting history and highlighted certain aspects and contents of the Act. The human rights implications have also been discussed. It was evident that the law discriminates against individuals on the basis of their sexual orientation, violating their rights to equality and non-discrimination. Everyone is entitled to the same rights and freedoms without discrimination of any kind, including on the basis of sexual orientation or gender identity.

It has also been seen that the Anti-Homosexuality Act violates the right to privacy, as it criminalises consensual sexual conduct between adults in private spaces. The right to privacy is a fundamental human right that protects individuals from unwarranted interference in their personal lives. The Act also has implications for freedom of expression, as it criminalises the promotion of homosexuality, which can include expressing support for LGBTI rights. The right to freedom of expression includes the right to express opinions without interference and to seek, receive and impart information and ideas.

The discussion has also highlighted implications of the Act for the right to health, as it may discourage LGBTI individuals from seeking medical care and other healthcare services. The right to health includes the right to access healthcare services without discrimination. Implications of the Act on the right to life in the context of the death penalty have also been discussed. Mention has been made of the implications of the Act on several other rights, such as freedom and security of the person; freedom of conscience, thought and belief; the right to dignity; and freedom of association. The implications of the Act for the rights of specific groups of people, such as children, persons with disabilities and people living with HIV, have also been mentioned.

In conclusion, besides highlighting the significant human rights implications of Uganda's anti-homosexual legislation, particularly the recently-passed Anti-Homosexuality Act, the article also draws attention to the unrelenting opprobrious legislative efforts to criminalise same-sex relations that Uganda continues to make.

It is important for Uganda and other countries that criminalise same-sex relations to realise that the human rights of all individuals, regardless of their sexual orientation or gender identity, are important and should be respected and protected. This requires a concerted effort from various stakeholders, including the government itself, civil society organisations and international partners. In the particular context of Uganda, civil society organisations can play a crucial role

in advocating the rights of LGBTI persons and raising awareness about their issues. The protection of the rights of LGBTI persons can also be done through legal challenges. As argued earlier, lawyers and human rights activists can challenge the opprobrious anti-homosexuality legislation in court, arguing that laws criminalising same-sex relations violate international human rights norms and Uganda's own constitutional provisions. The African Charter and its mechanisms can also be utilised. Finally, international pressure can be brought to bear on the Ugandan government to respect the rights of LGBTI persons. International partners can do this by reducing aid to the country, issuing statements condemning the government's actions, and raising the issue in international forums such as the United Nations (UN).

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Sexual consent laws and the child's right to freedom from sexual exploitation in Zimbabwe: Unpacking the 'polarising' legacy of *Kawenda & Another v Minister of Justice, Legal and Parliamentary Affairs & Others*

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Summary: *This article examines the intersection between sexual consent laws and the child's right to be protected from sexual exploitation and abuse in Zimbabwe. It is shown that, by codifying a minimum age of sexual consent, the law performs an integral function in preventing child sexual exploitation and the prosecution of adult offenders. A MASC – without exceptions or gender-based variations – entrenches a protective and irrefutable presumption that children below that age lack the capacity to consent to sexual activities. It is argued that to better protect children, the stipulation of a MASC should be coupled with the criminalisation of consensual sex between an adult person and any child below the MASC and the enforcement of the relevant rules. The article approaches the analysis through the prism of the decision on*

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20 May 2022 by the Constitutional Court of Zimbabwe in Kawenda & Another v The Minister of Justice, Legal and Parliamentary Affairs & Others*, which held that legislative provisions that stipulate the MASC to be 16 years are invalid and unconstitutional for lack of consistency with the child's right to be protected from sexual exploitation and abuse. The article argues that the Court's decision attracts, divides and polarises public opinion on sexual consent issues due to the conflicting messages it conveys. It is a landmark decision in holding that (a) the child's right to freedom from sexual exploitation means that all children, including those over the age of 16 years, have no legal capacity to consent to sexual intercourse with adults; (b) the limitation of the rights of over-16s to be protected from sexual exploitation is not reasonable, necessary and justifiable in a democratic society; and (c) the Criminal Law Code, in criminalising predominantly extra-marital sex with under-16s, perpetuates the sexual exploitation of children already in marriages. Conversely, the case is also a missed opportunity in failing to (a) declare invalid and unconstitutional legislative provisions that stipulate that children aged 12 to 14 years are capable of consenting to sex with adults in certain circumstances; (b) explicitly hold that the physical appearance of a child should not be a partial defence to any sexual offence committed on a child; (c) fully address the way in which sexual relationships between adolescents should be regulated; and (d) require the state to liberalise access to SRHR information and services to all adolescents who have reached the age of puberty to protect and empower sexually-active adolescents before they reach the age of sexual consent. While these gaps have been partially addressed by the Criminal Laws (Protection of Young Persons) Amendment Act, 2024, some have been re-enacted, thereby retaining the legal position that existed before the Court's decision.*

Key words: *minimum age of sexual consent; child sexual exploitation; close-in-age defence; child marriage; adolescent sexual and reproductive health*

1 Introduction

Child sexual abuse and exploitation (CSEA) is one of the enduring problems affecting the whole world today – including rich and poor countries and neighbourhoods – and occurs in all the settings in which children spend their time, including families, schools, workplaces, playgrounds and the digital environment. A comprehensive review of over 200 studies once found that one in eight of the world's children (12,7 per cent) had been sexually abused before reaching the age of

18 years.[1] Further, CSEA is gendered, with approximately 90 per cent of perpetrators being male, and girls predominantly reporting rates of victimisation that are two to three times higher than those of boys. Nonetheless, boys experience higher levels of victimisation than girls in certain contexts and organisational settings, such as single-sex residential institutions.[2] Globally, approximately 120 million girls have been estimated to have suffered some form of sexual violence during their life courses.[3] The United Nations Children's Fund (UNICEF) estimates that one in every 20 girls aged 15 to 19 years (around 13 million) have experienced forced sex during their lifetime.[4]

In Africa, one-third of girls from across all social classes suffer sexual violence and this is often repeatedly experienced.[5] Evidence-based research also suggests that this phenomenon is replicated at the domestic level as slightly more than one in three (39 per cent) reports of abuse received involve sexual abuse. This is particularly the case with girls – especially in the 13 to 17 age category – who are reported to experience sexual abuse more than other forms of abuse.[6] With the emergence of the fourth industrial revolution, many children have access to digital devices and the internet. Their lives are mediated by the digital environment in ways that impact how they both enjoy their rights and have these rights transgressed, including through violations that constitute online CSEA.[7] The term 'sexual exploitation' encompasses multiple practices that include physical or non-physical sexual contact with another person or acts of inducing or coercing that other person to take part in exploitative sexual activities. Article 27(1) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) provides as follows:

> States parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall take … measures to prevent
>
> (a) the inducement, coercion or encouragement of a child to engage in any sexual activity;
>
> (b) the use of children in prostitution or other sexual practices;

1 M Stoltenborgh and others 'A global perspective on child sexual abuse: Meta-analysis of prevalence around the world' (2011) 16 *Child Maltreatment* 79-101.

2 UNICEF and End Violence Against Children *Action to end child sexual abuse and exploitation* (2020) 5-6.

3 UNICEF *Global status report on preventing violence against children* (2020).

4 UNICEF *A new era for girls: Taking stock of 25 years of progress* (2020).

5 Big Win *Violence against children: A review of evidence relevant to Africa on prevalence, impacts and prevention* (2018).

6 UNICEF Zimbabwe and Childline Zimbabwe 'A secondary analysis of data from Childline Zimbabwe: Understanding violence against children in Zimbabwe data series (2016) 1 3.

7 African Children's Committee General Comment 7 on article 27 of the African Children's Charter: Sexual exploitation (2021) para 16. See also We Protect *Global threat assessment* (2019) 34.

(c) the use of children in pornographic activities, performances and materials.

The Zimbabwean Constitution 'domesticates' this provision by entrenching every child's 'right to be protected from economic and sexual exploitation, child labour, maltreatment, neglect or any form of abuse'.[8] Child sexual exploitation and abuse includes 'any actual or attempted abuse of a position of authority, differential power or trust, for sexual purposes, including profiting monetarily, socially or politically from the sexual exploitation of another. Sexual exploitation of children can be commercial or non-commercial.'[9] Thus, CSEA includes exploitation of children in prostitution, the use of children in pornography, child trafficking for sexual exploitation and child marriage.[10] The exploitation of children in prostitution has been deemed one of the worst forms of child labour under International Labour Organisation (ILO) Convention 182 on worst forms of child labour.[11]

A sub-category of CSEA, sexual abuse is conventionally defined as 'actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions'.[12] Child sexual abuse is 'the involvement of a child in sexual activity that he or she does not fully comprehend, is unable to give informed consent to, or for which the child is not developmentally prepared and cannot give consent to, or that violates the laws or social taboos of society'.[13] Sexual abuse also involves explicit and implicit sexual activities that cause harm, such as penetration, or acts that harm the sexual integrity of the child, such as lascivious exhibition of children's genitals.[14] It is possible to perpetrate against children psychologically intrusive, exploitative and traumatic forms of sexual abuse that are not accompanied by physical force or restraint. Sexual abuse involves contact and non-contact sexual activity and may take place in person or virtually. It is not an essential requirement of the offence that there be an element of exchange, and child sexual abuse can occur for the mere purpose of the sexual gratification of the perpetrator. For CSEA to materialise, there should be an underlying notion of exchange.[15] In this article the terms 'sexual abuse' and 'sexual exploitation' are used

8 Sec 81(1)(e) of the Constitution. See also sec 7 of the Child Protection and Adoption Act 22 of 1971.
9 African Children's Committee General Comment 7 (n 7) para 19.
10 Interagency Working Group on the Protection of Children from Sexual Exploitation and Abuse Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (adopted 28 January 2016).
11 Terminology Guidelines (n 10) 18.
12 See General Comment 7 (n 7) para 20.
13 As above.
14 Terminology Guidelines (n 10) 15.
15 Terminology Guidelines (n 10) 18; General Comment 7 (n 7) para 20.

interchangeably to refer to all sexual activities that are committed by adults on children with the latter's 'consent' – either authentic or legally presumed to exist.

This article unpacks the interaction between sexual consent laws and CSEA, focusing particularly on the role of the minimum age of sexual consent (MASC) in protecting children from sexual exploitation in Zimbabwe. It discusses the Zimbabwean Constitutional Court's decision of 20 May 2022 in *Kawenda & Another v Minister of Justice, Legal and Parliamentary Affairs*.[16] In this case the Court found that certain provisions of the Criminal Law (Codification and Reform) Act (Code),[17] which pegged the MASC at 16 years, were inconsistent with the child's constitutional right to be protected from sexual exploitation. The article argues that the Court's decision is a landmark ruling in finding that (a) the child's right to freedom from sexual exploitation means that all children, including those over the age of 16 years, have no legal capacity to consent to sexual intercourse with adults; (b) the limitation of the rights of over-16s to be protected from sexual exploitation is not fair, reasonable, necessary and justifiable in a democratic society; and (c) the Code, in criminalising mainly extramarital sexual intercourse with under-16s, perpetuates the sexual exploitation of children already in marriages. While it is important in that it invalidates the legislative provisions permitting marital sexual intercourse with a minor, this finding perhaps is moot in that the same Court had already abolished child marriage in an earlier judgment[18] and the 'new' Marriage Act now prohibits this harmful practice.

Further, the article discusses four ways in which *Kawenda* constitutes a missed opportunity. To begin with, the Court did not declare invalid and unconstitutional the provisions of the Code that suggest that children aged between 12 and 14 years are capable of consenting to sexual intercourse with adults in certain circumstances. Entrenched in section 64(2) of the Code, these provisions perpetuate the sexual abuse and exploitation of young children because they provide leeway for perpetrators to plead relatively minor offences that attract lesser sentences than those stipulated for serious offences such as rape and aggravated indecent assault. Further, the Court should have explicitly held that the physical appearance of a child should not be a partial or total defence to any sexual offence committed on a child. This partial defence has found itself in the

16 CCZ 3/22.
17 Ch 9:23 Laws of Zimbabwe.
18 *Mudzuru & Another v Minister of Justice, Legal and Parliamentary Affairs & Others* CCZ 12/2015.

new law which still permits adults to claim that they thought the child was over the age of 18 years. Third, it is argued that the Court should have grabbed the opportunity to fully address the way sexual relationships between adolescents should be regulated by the legislature. Fourth, it would have been ideal for the Court to require the state to liberalise access to sexual reproductive health and rights (SRHR) information and services to all adolescents of a particular age, which should be below the minimum age of sexual consent, in order to protect and empower sexually-active adolescents.

2 Minimum age of sexual consent

The minimum age of sexual consent (MASC) is the legal age at which a person is considered sufficiently mature to give informed consent to sexual activities.[19] The Committee on the Rights of the Child has continuously emphasised that state parties to the Convention on the Rights of the Child (CRC) must ensure that specified legal measures, such as setting a minimum age of sexual consent and marriage, are provided for under domestic laws.[20] Despite considerable evidence of adolescents below the age of 18 years engaging in sexual activities, the notion that the MASC should coincide with the marriageable age is deeply entrenched in many societies, especially given the social, religious and cultural beliefs that sexual intercourse should be the prerogative of married people.[21] Such consistency in the law, it is thought, facilitates the effective adjudication of CSEA cases. This would also ensure the effective eradication of CSEA crimes where any sexual conduct perpetrated against a child below the legislatively-ordained MASC would automatically constitute a crime and be subjected to prosecution without any other considerations.[22] The fulfilment of such obligations at the domestic level helps countries easily combat sexual offences against children.

However, international child rights law does not set a universal age of consent to sexual activities, but leaves it open for states to set their own MASC. Nevertheless, states are mandated to take into account the need to balance children's protection rights and evolving capacities in determining their MASC.[23] The need for and establishment of any sexual age of consent is motivated by

19 ECPAT International *Strengthening laws addressing child sexual exploitation. A practical guide* (2008).
20 CRC Committee General Comment 4 Adolescent health and development in the context of the Convention on the Rights of the Child (2003).
21 UNICEF (n 3).
22 General Comment 7 (n 7).
23 CRC Committee General Comment 20 Implementation of the rights of the child during adolescence (2016).

protective purposes, including the recognition that very young children are incapable of understanding the potentially far-reaching consequences of consenting to sexual acts and that adolescents should be protected from adult sexual predators.[24] The MASC means that it becomes unlawful and prohibited for adults to indulge in sexual conduct with children below the MASC in all situations, regardless of the 'consent' of the child concerned.[25]

Codifying a minimum age for any act or contract shelves the need for an objective empirical enquiry into the psychological maturity of any person (below that age) to perform that act or become party to that contract. A MASC establishes an irrefutable presumption of lack of sufficient maturity for children below that MASC, to decide whether to take part in sexual activities. It is an indispensable prerequisite for the effective prevention of CSEA and the prosecution of adult offenders since it legally denies any person below that age the capacity to consent to sexual activities. The presumption embedded in a MASC is that children below that age lack the level of maturity to fully comprehend the nature, long-term consequences of sex or marriage and the heavy responsibilities associated with it.[26] Legally, children below the MASC are incapable of 'consenting' to marriage and cannot logically be said to have consented to any sexual activities. The child's presumed lack of legal competency to give consent leaves no grey area in the protection of children, especially girls, from CSEA in the name of 'consent'.

More importantly, however, the stipulation of a MASC should be coupled with the criminalisation of consensual sexual intercourse between an adult person and any child below that age (subject to the close-in-age defence discussed below).[27] The criminalisation of intergenerational sex and its enforcement in concrete cases is important if the legal prohibition of CSEA is to bear fruit; would-be perpetrators are to be deterred and the general public is to observe the relevant law. As noted by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), 'the age of sexual consent as defined by law must mean that adults engaging children below that age in sexual activities is prohibited under all circumstances, and that the consent of such a child is legally

24 General Comment 7 (n 7) para 47.
25 Human Dignity Trust *Good practice in human rights compliant sexual offences laws in the Commonwealth* (2019).
26 See, generally, UNFPA 'Harmonising the legal environment for adolescent sexual and reproductive health and rights', https://esaro.unfpa.org/sites/default/files/pub-pdf/2017-08Laws%20and%20Policies-Digital_0.pdf (accessed 14 June 2021).
27 See part 4.3 of this article.

irrelevant. It should be criminalised.'[28] In many African countries the minimum age for consenting to sexual intercourse is spelt out or codified in criminal laws.[29] The intention is to ensure the protection of children, mainly girls, from sexual predators by criminalising and penalising every adult person who engages in sexual intercourse with children, even in the context of 'child marriage'.

3 Kawenda and Another v Minister of Justice

3.1 The salient facts

The applicants approached the High Court in the public interest for an order declaring multiple provisions of the Code invalid and unconstitutional as they allegedly did not protect children between the ages of 16 and 18 years from abusive or exploitative sexual relationships. The impugned provisions were the following:

- section 61, which defines a young person as a boy or girl under the age of 16 years;
- section 70, which criminalises the conduct of any person, whatever their age, who has extramarital sexual intercourse or commits indecent acts with a young person in Zimbabwe;
- section 71, which makes the crime extra-territorial, by declaring it to be a crime for any citizen or resident of Zimbabwe, whatever their age, to have extra-marital sexual intercourse or to commit indecent acts with a young person outside the country;
- section 76, which makes it an offence for persons in control of premises to permit anyone to have extramarital sexual intercourse or to commit indecent acts with a young person in those premises;
- section 83, which prohibits the procurement of anyone for the purpose of unlawful sexual activities and prescribes a higher sentence if the person procured is a young person; and
- section 86, which makes it a crime for the owner of a place to induce or allow young persons to be in the place for the purpose of engaging in unlawful sexual activities.

All these sections protect children under the age of 16 years to the exclusion of those aged between 16 and 18 years. In the court *a quo* the applicants argued that children aged over 16 years were being

28 General Comment 7 (n 7) para 51.
29 See, generally, World Population Review 'The legal age for consent by country', https://worldpopulationreview.com/country-rankings/age-of-consent-by-country (accessed 12 June 2021).

treated as adults even though they have the right to be protected from sexual exploitation under section 81(1) of the Constitution. The High Court dismissed the application on the grounds that teenagers naturally engage in sexual activity; the law cannot stop them from doing so and they should not be criminally punished for it. It also held that many other statutes distinguish between children under the age of 16 years and young persons in the 16 to 18 years category, and a declaration of invalidity would require that all these statutes be amended rather than just the impugned provisions of the Code. Hence, the High Court declined to declare the sections unconstitutional. Aggrieved by the judgment, the applicants appealed to the Constitutional Court for relief.

3.2 Issue before the Constitutional Court

Section 70 and other provisions of the Code penalise persons who engage in sexual acts with children between the ages of 12 and 16 years only, leaving those in the 16 to 18 year bracket exposed to sexual exploitation. The issue that was before the Court was whether section 70 and other related sections of the Code, which create offences prohibiting extramarital sexual intercourse and the performance of indecent acts with young persons, as read with section 61 of the Code, are inconsistent with sections 81(l)-(2), 70, 56 and 53 of the Constitution as alleged or at all. In the words of the Court, the issue was neither novel nor complex as it called for an interpretation of the relevant provisions of the Constitution and an analysis of the effect of the impugned law on children.

3.3 Decision of the Court – *Kawenda* as landmark

3.3.1 The child's right to freedom from sexual abuse and exploitation: Implications for sexual consent laws

Interpreting section 81(1)(e) of the Constitution,[30] the Court observed that it is an amalgam of the age of majority provisions in the country and makes it clear that the rights protected in it are conferred specifically on children. Section 81(1) provides that a child is a boy or girl below the age of 18 years.[31] According to the Court,

30 Sec 81(1)(e) of the Constitution provides that '[e]very child, that is to say every boy and girl under the age of eighteen years, has the right to be protected from economic and sexual exploitation, from child labour and from maltreatment, neglect or any form of abuse'.

31 *Kawenda* (n 16) 20.

this is important as 'it settles the definition of the term "child" for any other law or practice, and any law, practice, custom or conduct that defines a child differently becomes *ipso facto* inconsistent with the Constitution in that regard and to that extent'.[32] Having given this broad background analysis, the Court zeroed in on the meaning of the term 'sexual exploitation' which it held to mean taking advantage of the child's 'consent' to sexual activities. It further held that children lack understanding of sexual behaviour, the context of normal sexual relationships and knowledge of the consequences of sexual intercourse.[33]

Ultimately, the Court held that the criminal offences described in sections 70, 76, 83 and 86 of the Code amount to the sexual exploitation from which all children should be protected.[34] More importantly, the Court observed that section 81(l)(e) of the Constitution protects every child from sexual exploitation. Yet, the impugned provisions protect some and not all children as it leaves out those aged between 16 and 18 years.[35] In this regard, these provisions were held to be inconsistent with the provisions of the Constitution and to infringe on the rights of those children left out of the protective ambit of the law. To quote the Court:[36]

> The effect of the impugned law is not only to fail to protect those children that are between sixteen and eighteen, it particularly fails to protect all children in child marriages. The impugned law denies some children the protection that the Constitution demands. It cannot therefore 'disobey' the Constitution and hope to remain constitutional. The Constitution has already spoken and has supremely demanded that every child be protected. There is therefore no room to leave some children out of the protective tent.

Makarau JCC, for the Court, observed that it is supremely imperative to protect all children from sexual exploitation even though the 'levels of protection may decrease with age to recognise that the development of a child is evolutionary and, as he or she grows older, a child interacts and responds to the world around him or her such that later, during adolescence, he or she should be able to explore and understand his or her body'.[37] While recognising the role the evolving capacities of the child play in limiting the levels of protection accorded to children, the Court hastened to hold that the impugned law offered no protection whatsoever to children between the ages

32 *Kawenda* (n 16) 20-21.
33 *Kawenda* (n 16) 22.
34 *Kawenda* (n 16) 23.
35 *Kawenda* (n 16) 24.
36 *Kawenda* (n 16) 24-25.
37 *Kawenda* (n 16) 25.

of 16 and 18 years, even in a decreased manner or form. The Court held that these children fall outside the protective reach of the law.[38]

All children are entitled to equal protection and benefit of the law without any discrimination based on gender, sex, age or any other prohibited grounds.[39] Under international standards, under-18s remain incapable of fully comprehending sexual activities, are unable to give informed consent and developmentally unprepared to sexually engage with adults. They are often exposed to multiple violations of their rights to life, survival, development and freedom from sexual violence, abuse and exploitation. This highly stems from the fact that the Code defines a young person as a child under the age of 16 years,[40] which again contradicts with the Constitution which sets the age of majority at 18 years. Therefore, the Court emphasised that there is a need to amend the Code and harmonise it with the Constitution to fully protect all children from sexual exploitation.

3.3.2 Is the limitation of the right justifiable?

Having interpreted the provisions of the Code as a violation of the child's right to freedom from sexual exploitation, the Court proceeded to analyse whether the limitation of this right was necessary, justifiable, fair and reasonable in a democratic society based on openness, justice, human dignity, equality and freedom. In the Court's world, the infringement constituted a complete denial of the right to be protected from sexual exploitation, particularly in regard to both children aged between 16 and 18 years and to all children in child marriages.[41] Given that the infringement of the right amounted to a complete negation of the right, the Court held, there hardly existed any reason for contending that the limitation of the right was justifiable both under the common law and section 86(2) of the Constitution.[42] The respondents did not press on the Court any argument that there was a rational basis for justifying the complete denial of the protection – envisaged in section 81(1)(e) of the Constitution – to children above 16 years or in child marriages. In light of the unambiguous provisions of the Constitution that demand that all children be protected from sexual protection, there was no justification for the violation of these rights.[43]

38 As above.
39 Secs 56 & 81 Constitution.
40 Sec 61(1) of the Code.
41 *Kawenda* (n 16) 28.
42 As above.
43 *Kawenda* (n 16) 29.

These are compelling remarks for purposes of ensuring that children are protected from sexual abuse and exploitation as envisaged in the Constitution. While the finding that the limitation of the child's rights was unjustifiable can perhaps not be faulted, the process of reaching this noble conclusion was, with due respect, logically questionable and somewhat unsystematic. First, it was incorrect for the Court to hold that the violation constituted a complete denial of over-16s' rights to protection from sexual exploitation. Establishing a MASC does not force all children over that age to agree to sexual intercourse with adults. They can still withhold or withdraw their consent. For sexually-active adolescents who are developmentally mature to make informed sexual choices, a MASC below the age of majority can actually be both liberating and empowering. Therefore, it is only for over-16s who lack the capacity for informed consent that an earlier MASC can increase possibilities for sexual abuse and exploitation. This is because their 'consent' would be tantamount to manipulation as they would have no capacity to make the decision in question.

Second, the learned judge did not apply the limitations analysis prescribed in section 86(2) of the Constitution. Makarau JCC rushed to the conclusion without explaining or following the prescribed process. For instance, there was no analytical engagement with the factors that should guide courts in determining whether the limitation of the child's right to sexual exploitation is fair, necessary, reasonable and justifiable in a democratic society. These factors include the nature of the right or freedom in question; the purpose of the limitation; the relationship between the limitation and its purpose; the availability of less restrictive means to achieve the purpose; and so forth.[44] It appears that the stipulation of the age of sexual consent at 16 years was not directly intended to limit any of the stipulated rights of children, but to ensure respect for children's evolving capacities and to confer on children with sufficient maturity the freedom to consent to sexual activities between them, peers and adults. Making a finding, as the Court did, that a MASC below the age of majority leads to the sexual exploitation of children, is a different matter that does not necessarily require a finding that such MASC was initially designed to limit the child's right to freedom from such exploitation.

Third, the Court could still have found that the purpose of the limitation of the right – namely, the expansion of children's agency and participation in sexual and reproductive decision making – could

44 See sec 86(2) of the Constitution.

still have been achieved without lifting the protection to which children over 16 are entitled under the right to freedom from sexual abuse or exploitation. In other words, decisions about whether to have intergenerational sex are too big and developmentally damaging for adolescents that none of them should be deemed to have acquired the capacity to make them before they attain the age of 18 years. In this way, the Court could have found that there was no rational connection between the limitation of the right to be protected from harmful sexual activities and its purpose – the need to empower sexually-active adolescents. In any event, the analysis would have proceeded, there are less restrictive means to achieve the purpose of the limitation. Such means include involving adolescents in self-empowerment and SRHR initiatives that enable them to make informed sexual and reproductive choices without necessarily removing the protection to which all children are entitled before they attain majority.

3.3.3 Addressing the relationship between sexual exploitation and child marriage

Section 70 of the Code makes it a crime for any adult male person to have extramarital sexual intercourse or commit indecent acts with a young person, legislatively defined as any person under the age of 16 years.[45] This offence constitutes a violation of the 'sexual offences' section. As a result, it is illegal for a male person to have extramarital affairs with a girl under the age of 16 years, and the infraction exists to preserve society's sense of legality.[46] Section 70(1) of the Code reveals that the crime of indulging in sexual intercourse with a minor will only materialise if the perpetrator has extramarital sexual intercourse with a young person. Thus, if an adult male person is married to the child victim, then no offence is committed.[47] Section 78(1) of the Constitution prohibits child marriages, yet the impugned legislative provisions 'sanitise' sexual encounters between adults and children in the context of marriage. After *Mudzuru & Another v Minister of Justice*, a person who indulges in sexual intercourse with a minor will fortunately no longer claim marriage as a defence to a charge of sexual penetration, violation or assault.

Given that sexual intercourse is a material component of marriage, criminal laws that effectively outlaw child marriage are

45 See sec 61 of the Code.
46 *Mharapara v The State* HC/CA 9/17.
47 See, generally, C Govhati 'Existing laws in Zimbabwe fail to protect the rights of children' 2017, https://www.humanium.org/en/existing-laws-in-zimbabwe-fail-to-protect-the-rights-of-children/ (accessed 8 January 2023).

an important part of efforts to eliminate CSEA, especially against girls. In *Kawenda* the Court observed that the impugned law did not offer any protection to children in marriages as it remained a defence under the impugned section 70 of the Code that the accused adult person was married to the child.[48] Makarau JCC was at pains to emphasise that the impugned law particularly failed to protect 'children who are in child marriages notwithstanding the age of the child concerned'. This made the entire law inconsistent with the Constitution and, therefore, invalid.[49] In the Court's words, the law that affords a defence to persons accused of having sexual intercourse with children on the basis that they are married to such children is unconscionable, unconstitutional and must be struck down immediately. It cannot be saved even if the respondents are given time before the order of constitutional invalidity takes effect.[50] In this respect, the Court drew inspiration from its own ruling in *Mudzuru*, where Malaba DCJ (as he then was) authoritatively held as follows:[51]

> The age of sexual consent which currently stands at sixteen years is now seriously misaligned with the new minimum age of marriage of eighteen years. This means that absent legislative intervention and other measures, the scourge of early sexual activity, child pregnancies and related devastating health complications are likely to continue and even increase. The upside is that the new age of marriage might have the positive effect of delaying sexual activity or childbearing until spouses are nearer the age of eighteen. The downside is that children between sixteen and eighteen years may be preyed upon by the sexually irresponsible without such people being called upon to take responsibility and immediately marry them. *Thus, there is an urgent need, while respecting children's sexual rights especially as between age-mates as opposed to inter-generational sexual relationships, to extend to the under-eighteens the kind of protection currently existing for under-sixteens with the necessary adjustments and exceptions.*

A comprehensive approach to combating CSEA and its root causes requires a legal ban on child marriage. Accordingly, the Court's position that the minimum of age of consent to sex (as between adults and children) and marriage should coincide with the age of majority, helps curb CSEA in intergenerational relationships involving under-18s, in theory at least. The link between child marriage, sexual abuse and teenage pregnancy is underscored by the fact that approximately 80 per cent of teenage mothers in most African

48 *Kawenda* (n 16) 25.
49 *Kawenda* (n 16) 27.
50 *Kawenda* (n 16) 30-31.
51 My emphasis.

countries are married or cohabit with a male partner or have already been married.[52] Once married, girls are expected to engage in sexual intercourse and fall pregnant to consummate the union. Girls who are trapped in early or forced marriages face a very high risk of sexual exploitation, abuse and pregnancy.[53]

There is a close association between child marriage, CSEA and early pregnancy as girls are often pressured to prove fertility early on in the union.[54] There is evidence that married girls are often confronted with pressure from their adult partners and, in some cases, in-laws to conceive within a short period of time after marriage. In many instances, marriages of young girls to older men are done for procreation and to benefit from the long reproductive life of a young girl. Accordingly, many girls are sexually abused and fall pregnant soon after marriage, even when their bodies are still physiologically underdeveloped.[55] This is because the use of contraceptive methods among married teenage girls is extremely low for several reasons, including girls' inability to give or withhold sexual consent. The Court's holding on the need to reconcile the age of marriage and sexual consent will help protect adolescents, particularly girls, from sexual exploitation and abuse by older males. While this is an important finding, it should have been coupled with a recommendation that children should not be criminalised for engaging in consensual, non-exploitative sexual intercourse among themselves.

4 Kawenda as missed opportunity

This part demonstrates how the case under study was a missed opportunity in that the Court did not comprehensively address key issues relating to teenage sexuality and CSEA. The missed opportunity comes in three forms: first, the failure to unpack the textual contradictions entailed in section 64 of the Code that potentially permit the sexual exploitation of children between 12 and 14 years of age; the failure to address the idea that the accused's belief that the child was above the age of sexual consent is a partial

52 See African Children's Committee *Teenage pregnancy in Africa: A review of status, progress and challenges* (2022).

53 AM Ochen and others 'Predictors of teenage pregnancy among girls aged 13-19 years in Uganda: A community-based case-control study' (2019) 19 *BMC Pregnancy Childbirth* 19; NC Kaphagawani and E Kalipeni, 'Sociocultural factors contributing to teenage pregnancy in Zomba district, Malawi' (2017) 12 *Global Public Health* 694-710.

54 SADC PF SADC Model Law on Eradicating Child Marriage and Protecting Children already in Marriage (2016) 11.

55 African Union Campaign to end child marriage in Africa: Call to action (2013) 3.

defence to criminal charges under the Code; and the Court's implicit refusal to prescribe rules regulating child-to-child sexual conduct in a manner that does not lead to the criminalisation of children who engage in consensual, non-exploitative sexual activities.

4.1 Failure to declare that children aged 12 to 14 years categorically lack the capacity to consent to sexual activities with adults

To some extent, the sexual consent rules entrenched in the Code amount to a shocking story of ambiguities and textual contradictions. The provisions are not fully designed to ensure that adults are fully accountable for their actions if they engage in 'consensual' sexual activities with children in the 12 to 14 year age category. Section 64(1) of the Code provides that any person accused of engaging in anal or vaginal sexual intercourse or other sexual conduct with a young person aged 12 years or younger shall be charged with rape, aggravated indecent assault or indecent assault, and not with sexual intercourse or performing an indecent act with a young person, or sodomy. Sexual conduct of any kind with a minor above the age of 12 years, but below 14 years, attracts the same charges unless otherwise proven that the young person was capable of giving consent and in actual fact gave the consent,[56] in which case the competent charge becomes having sexual intercourse with a young person as provided for under the now declared unconstitutional section 70 of the Code. If a male person engages in anal sexual intercourse or other sexual conduct with a young male person of or below the age of 14 years and there is evidence that the young person (a) was capable of giving consent to the sexual intercourse or other sexual conduct, and (b) gave his consent thereto, the first-mentioned adult male person alone shall be charged with sodomy.[57] What is not clearly said? It is the implicit normative claim that adolescents (aged 12 to 14 years) have the mental and legal capacity to consent to sexual activities with adults and, where they do consent, the sexual intercourse should not be deemed to constitute rape or (aggravated) indecent assault.

Through section 64 of the Code, the legislature established the rule that children can consent to sexual activities with adults, despite other provisions of the Code making it clear that children under the age of 16 years are incapable of consenting to sex.[58] Section 64 of the Code establishes an exception to the usual legal position that

56 Secs 64(2)(a) & (b) of the Code.
57 Secs 64(4)(a) & (b) of the Code.
58 Sec 70(2) of the Code.

under-16s cannot consent to sexual intercourse or other related activities with adults. By creating this exception, the Code codifies a contradiction to the presumption that children under the age of 16 years have no legal capacity to consent to sexual activities, thereby exposing even younger children to the risk of sexual abuse and exploitation. Sections 64(1) to (4) are built around the idea that some children aged between 12 and 14 years have sufficient maturity to understand the potential risks associated with sexual activities and to make informed choices relating to such activities. The law stipulates that, where this is the case, the adult person commits less serious offences such as sodomy or having sexual intercourse with a young person, with their attendant less punitive sentences, instead of rape or (aggravated) indecent assault, with its attendant more punitive sentences. Relying as they do on another person's subjective analysis of whether a child (over 12, but under 14 years) is sufficiently mature to give informed consent to sexual activities with adults, these provisions can be abused by perpetrators, defence lawyers and the courts.

What perhaps is more alarming is the fact that in reviewing the constitutionality of the MASC (16 years), the Court neither referred to nor declared unconstitutional the provisions of section 64 of the Code that stipulate that under-14s who are over the age of 12 years can consent to sexual activities in certain circumstances. In its ruling, the Court declared unconstitutional and set aside the definition of 'young person' in section 61 of the Code.[59] It also declared unconstitutional and set aside sections 70, 76, 83 and 86 of the Code. However, the Court did not make any pronouncements on the unconstitutionality of section 64 of the Code. Accordingly, it is not clear whether the provisions of sections 64(1) to (4) of the Code remain in force, especially given that the Court appeared to be inclined towards mentioning all the sections of the impugned law that were not fully aligned with the Constitution.

While it would have been ideal for the Court to expressly affirm the unconstitutionality of section 64 of the Code, it can be argued that all legislative provisions or common or customary law rules that confer on under-18s the capacity to consent to sexual activities are no longer valid by dint of the Court's ruling that all children have no legal capacity to consent to sexual intercourse with adults. As shown above, the Court categorically held that the child's constitutional right to freedom from sexual exploitation requires that the age of consent to sexual activities be increased to 18 years, which is the age

59 *Kawenda* (n 16) 32.

of majority. To comply with this part of the Court's ruling, all legislative provisions that confer on under-18s the capacity to consent to sexual intercourse with adults are rendered unconstitutional by the holding that the MASC be the same as the age of majority.

4.2 Failure to hold that an accused's subjective belief that the child was above the MASC is not a defence to sexual abuse charges

Some of the Court's findings do not address the deep-seated legislative stereotypes and social attitudes about children's capacity to consent to sexual intercourse with adults. For instance, the supposedly now repealed section 70(1) of the Code creates the offence of sexual intercourse or performing indecent acts with a young person.[60] The crime, attracting an imprisonment term of up to 10 years, is committed when any person (a) has extramarital sexual intercourse with a young person; or (b) commits upon a young person any act involving physical contact that would be regarded by a reasonable person to be an indecent act; or (c) solicits or entices a young person to have extramarital sexual intercourse with them or to commit any act with them involving physical contact that would be regarded by a reasonable person as an indecent act.[61]

While section 70(2) of the Code provides that the consent of a young person – legislatively defined as a person under the age of 16 years – is not a defence to the charge, perpetrators have a defence if they are able to satisfy the court that they believed the young person was 16 years or older when they consented as provided for under section 70(3) of the Code. Under such obscure circumstances, courts are overly made to rely on the subjective state of mind of an accused person at the expense of a child victim of sexual abuse. It is difficult for the state or any person to prove that the perpetrator knew or should have known that they were performing indecent acts with the child victim at the time the offence was committed, especially if the child is physically bigger than the perceived 'standard size' for that child's age. Fortunately, the old section 70(3) further provided that the apparent physical maturity of the young person concerned shall not, 'on its own', constitute a reasonable cause to believe that the young person was 16 years or older.[62] This appears to comply

60 Sadly, the use of the word 'with' tends to impose on the child some responsibility for the crime committed, and the text in the section confirms this misplaced thinking.
61 Sec 70(1) of the Code.
62 Sec 70(3) of the Code.

with the normative principle that discourages arguing a child's older physical appearance as a defence to sexual crimes.[63]

After the Court's decision in *Kawenda*, Parliament purported to repeal and replace the provisions of the old section 70 of the Criminal Law Code.[64] However, the gist and, in many cases, the wording of the 'old' section 70 were merely re-enacted. First, the offence of sexual intercourse or performing indecent acts with a young person has been re-enacted, roughly with similar criminal sanctions.[65] Second, it is now a defence to the charge 'for the accused person to satisfy the court that he … had reasonable cause to believe that the putative child concerned was of or over the age of eighteen years at the time of the alleged crime'.[66] This is a regression from the previous legal position in terms of which the Code provided that the 'apparent physical maturity' of the child could not, 'on its own', constitute reasonable cause to believe that the young person was of age. In terms of the new section 70 of the Code, the term 'reasonable cause' is wide enough to imply that the 'apparent physical maturity' of a child partially constitutes a defence to a charge of sexual intercourse or performing indecent acts with a young person.

Whether an accused person had 'reasonable cause' to believe that the child was a person of age is a subjective inquiry into the accused's state of mind. It is highly likely that an accused person would almost always resort to this justification by alleging that their state of mind reasonably concluded that the maturity of the child victim matched that of a person above the age of 18 years, despite having known that the person concerned was below 18 years. These stereotypical messages have spilled over to the amendments of the Code even if the age of consent has been legislatively raised to 18 years. Accordingly, adult sexual predators may still allege that they thought the child had attained majority status. Ultimately, the Court should have given adequate guidance to the legislature to ensure that, in amending the Code, the physical appearance of a child cannot at all be a defence to a charge of rape, (aggravated) indecent assault and other sexual offences. It offers little to no consolation that the defence of having a 'reasonable cause' to believe that the child was a major 'may be refuted by the prosecutor adducing evidence to the effect that the accused person knew or had reasonable cause to believe that the child concerned was under the age of eighteen

63 UNFPA *Harmonising the legal environment for adolescent sexual and reproductive health and rights: A review of 23 countries in East and Southern Africa* (2017) 8.
64 See the Criminal Laws Amendment (Protection of Children and Young Persons) Act, 2024.
65 See the new sec 70(1) of the Code.
66 See the new sec 70(5) of the Code.

years at the time of the alleged crime'.[67] This is partly because, in most cases, it may be hard for the prosecutor to adduce evidence to prove the accused's knowledge that the child had not reached the age of majority.

4.3 Failure to give guidelines on the regulation of sexual activities between adolescents?

It was incorrect for the Court to hold that the case had nothing to do with the age at which adolescents should be granted legal capacity to explore their sexuality with their peers. On numerous occasions, the Court insisted that 'the application before the court did not require the court to make a finding on the appropriate age at which children should be allowed to have their first sexual experiences. The application challenged the constitutional validity of the law that seeks to protect children from sexual exploitation.'[68] A MASC should still regulate the age ranges within which children may engage in sex without assuming criminal responsibility for their conduct. For instance, a 'consensual' sexual encounter between a 17 year-old and a 10 year-old is naturally abusive due to the differences in the ages and levels of maturity of the children involved. A well thought-out MASC helps in giving clarity on how sexual relationships between adolescents are regulated.

More outrageously, the Court found that under Zimbabwean law, 'children under the age of 16 years are not automatically prosecuted for having sexual intercourse with a peer, [therefore] the finding by the court *a quo* that affording protection to all children from sexual exploitation will lead to children being criminalised as sex offenders is somewhat startling'.[69] This finding is questionable for multiple reasons. First, only children below the age of seven years are irrefutably presumed to lack the capacity to commit crimes.[70] Second, children aged seven years or older, but below the age of 14 years, are presumed to lack criminal capacity unless it is shown beyond reasonable doubt that they had such capacity at the material time.[71] Third, regarding children aged 14 years or older, there is no presumption of lack of capacity to commit criminal offences. They are 'automatically' fully criminally responsible for their conduct

67 As above.
68 *Kawenda* (n 16) 7-8.
69 *Kawenda* (n 16) 7. The Court went on to hold, erroneously in my view, that the ruling of the court *a quo* 'is not based on a correct interpretation of the law and, more importantly, it was not directly relevant to the issue that was before the court'.
70 Sec 6 of the Code.
71 Sec 7 of the Code.

and should 'behave in the way that a reasonable person would have behaved in the circumstances of the crime'.[72] In light of these provisions, children over the age of 14 are 'automatically' prosecuted for sexual offences with other children, especially those substantially younger than them. Accordingly, there is nothing 'startling' about the finding that a high MASC leads to the criminalisation of children below that MASC if it is not coupled with an exception to accommodate consensual, non-exploitative sexual intercourse between adolescents within permissible age ranges.

In its decision the Court glossed over the regulation of consensual sex between children and did not explain what the extension of the MASC to 18 years might mean for persons below that age. The Court did acknowledge that raising the MASC 'in such a way that it protects all children will have serious impact on the "Romeo and Juliet" relationships' but maintained that fear of that impact cannot derogate from the need to protect all children from sexual exploitation in obedience to the constitutional imperative in section 81(I)(e) of the Constitution. Child-upon-child sexual exploitation and abuse must be dealt with in accordance with a law that recognises the rights of all children as set out in the Constitution. This may entail the enactment of a comprehensive Children's Act.[73] These sweeping over-generalisations do not provide solid guidance to the legislature on what exactly needs to be done to comply with the Constitution in regulating consensual sex between adolescents.

While making attempts to protect children, especially girls, from intergenerational sexual abuse by adult male predators, the government should take reasonable legislative, administrative and other measures to ensure that children who engage in consensual sex are not criminalised.[74] Depending on their evolving capacities and whether they are close-in-age, adolescents have the right to engage in consensual sexual relationships that are not exploitative or abusive. This is an exception to state parties' duty to criminalise sexual conduct where a child below the MASC is involved. More importantly, the Court should have expressly held that Zimbabwe should decriminalise consensual peer-to-peer sexual conduct provided that the adolescents involved are both sufficiently mature and close in age. As noted by the African Children's Committee:[75]

> State parties should decriminalise consensual, non-abusive and non-exploitative sexual activities among child peers. Some states apply a

72 Sec 8 of the Code.
73 *Kawenda* (n 16) 26.
74 General Comment 7 (n 7) para 50.
75 As above.

> 'close-in-age' exception to age of consent provisions (sometimes known as the 'Romeo and Juliet defence') where one or both participants are under the age of consent. This exception is usually available as a defence to child sexual assault charges to avoid criminalising genuinely consensual sexual activity between young people who are close in age. This applies, for example, where one person is 16 years and the other is only a few years older, eg, 2-5 years, provided there is no relationship of trust, authority or dependency between the two people. Sexual activity between adolescents is not as such harmful, as long as both adolescents give informed consent and have access to sexual and reproductive information and services.

In South Africa, for instance, the age of sexual consent is set at 16 years for boys and girls. In *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development*[76] the Constitutional Court of South Africa declared the criminalisation of consensual sexual activities between adolescents unconstitutional.[77] Before that, the Sexual Offences Act required the reporting of sexual activities between adolescents by any person who had knowledge thereof. If the adolescents were found guilty, their names would be written in the National Register of Sex Offenders. Apart from recognising children's evolving capacities, the Court reiterated the need to avoid treating children as criminals when they begin to explore their sexuality and to offer them appropriate guidance in the exercise of sexuality-related rights.[78]

After the Court's decision in *Teddy Bear Clinic*, children are no longer criminally charged for having consensual sex when they are between 12 and 16 years of age. Further, it is no longer criminal for a child under 16 years to have sex with a partner less than two years older than them. Further, the law confers on adolescents the right of access to SRHR information and services from the age of 12 years and puts the minimum age of marriage at 18 years, sadly with an exception for girls. These provisions entrench a close-in-age exception to the MASC to ensure that sexual acts between two children who both are between 12 and 16 years of age, or where one is under 16 years and the other is less than two years older, are not criminalised.[79] They ensure that adolescents are not unnecessarily brought into the criminal justice system for taking part in what essentially amounts to sexual experimentation. As noted by the African Children's Committee, sexual activities between adolescents are not harmful as

76 2014 (2) SA 168 (CC).
77 Secs 15(1)-(2) of the Sexual Offences and Related Matters Act 32 of 2007 (Sexual Offences Act) criminalised consensual sexual activities between adolescents.
78 See *Teddy Bear Clinic* (n 76) paras 2 & 44-47.
79 See *Child marriage and the law: Technical note for the global programme to end child marriage* (2020) 10.

such, provided both of them are close in age, give informed consent and have access to SRHR information and services.[80]

The criminalisation of consensual sexual intercourse between adolescents may constitute an absolute denial of their evolving capacities and their normative development in the domain of SRHR. In *Mudzuru* the Court acknowledged that there is an urgent need, while respecting children's sexual rights, especially as between age mates as opposed to inter-generational sexual relationships, to extend to all under-18s who engage in consensual sex with peers, relative levels of protection from prosecution.[81] This should be done with the 'necessary adjustments and exceptions', thereby ensuring the accountability of older adolescents who sexually abuse young children. In *Kawenda* the Court should have made similar findings, with a clearly-articulated close-in-age defence, to ensure that peer-to-peer sexual intercourse between children is not criminalised.

Leaving the matter open ensures that the issue remains unregulated and may drive the sexual abuse and exploitation of young children by their peers. In this respect, both the African Children's Committee and the CRC Committee have emphasised that if children are involved in perpetrating sexual abuse and exploitation, the law should differentiate their level of responsibility, with particular emphasis on the reintegrative and rehabilitative potential of children.[82] In the process, legal systems and governments should – where appropriate – avoid bringing children into criminal justice systems, especially given children's rehabilitative potential. This approach places the focus on the use of specialised systems and structures to divert child offenders to therapeutic services in appropriate cases and prevent criminal records or the inclusion of child offenders in registers.[83] All these issues could have been addressed by the Court in its attempt to curb the sexual abuse of children by other children. Fortunately, after the Court's decision in *Kawenda,* Parliament swiftly intervened and adopted legislative provisions to prevent the prosecution of sexually-active adolescents who engage in consensual sex. Adopted in 2024, the new section 70(3) of the Criminal Law Code provides:

> Where sexual intercourse or an indecent act takes place between (a) children between whom the difference in age is not more than three years, or (b) a child and an adult who is not more than three years older than the child, neither of them shall be charged with sexual intercourse or performing an indecent act with a child unless the Prosecutor-

80 General Comment 7 (n 7) para 53.
81 *Mudzuru* (n 18).
82 General Comment 7 (n 7) para 134.
83 As above; CRC Guidelines OPSC paras 71 & 73.

> General, after considering a report by a probation officer appointed in terms of the Children's Act [Chapter 5:06], has authorised the charge.

These transformative legislative provisions introduce the close-in-age defence and decriminalise consensual, non-exploitative sex between adolescents. Sadly, the new legal framework still leaves open some wide room for the Prosecutor-General to authorise that children be charged for consensual, non-exploitative sex after considering a report by a probation officer. This exception to the general rule unjustifiably violates the country's constitutional and international obligations to avoid charging children for what essentially constitutes sexual experimentation.

4.4 Illogical analysis on the MASC and adolescents' sexual and reproductive health

Surprisingly, the Court did not fully address the impact a lift of the MASC to 18 years may potentially have on sexually-active adolescents. As noted by the court *a quo*, raising the MASC to 18 years to afford protection to all children potentially creates barriers for sexually-active adolescents in accessing SRHR information and services.[84] If access to SRHR information and services is criminalised for children below the MASC, it may also prevent care givers and institutions from responding to adolescents' SRHR issues for fear of prosecution. Given that evidence indicates that adolescents start exploring their sexuality and engaging in consensual sexual activity with their peers earlier than is generally thought,[85] it was important for the Court to clearly recommend that the proposed amendment to the Code explicitly allows children of particular ages access to SRHR information and services, including through comprehensive sexuality education, among others.[86]

The criminalisation of consensual sexual activities between adolescents does not necessarily prevent them from engaging in such activities, but merely drives such activities underground. This may serve to prevent sexually-active adolescents from accessing education, and SRHR information and services, thereby driving high unwanted pregnancies, unsafe abortion and sexually-transmitted

84 For a summary of the holding of the court *a quo* in this respect, see *Kawenda* (n 16) 7-8.

85 See, generally, R Tallarico and others 'Age of consent: A case for harmonising laws and policies to advance, promote and protect adolescents' sexual and reproductive health rights' (2021) 25 *African Journal on Reproductive Rights* 94.

86 In South Africa there is no minimum age at which children can have access to sexual and reproductive health information and services. See sec 13(1)(a) of the Children's Act.

diseases (STDs).[87] It was incumbent upon the Court to require the government to establish informal, child-friendly strategies to ensure that sexually-active adolescents have access to SRHR information and services as guaranteed by law. Similarly, the Court should have also held that mandatory reporting systems should not be applied in a manner that drives consensual sexual activities between adolescents underground as this is detrimental to their rights to SRHR information and services. To its credit, the Court acknowledged that there is some confusion around the MASC and the child's right to reproductive health care services. In the words of the Court:[88]

> The paradox is that whilst it is highly desirable that children should stay away from sex until they are adults, the lived reality may be otherwise. Children who have sexual relations still have the right to health care services notwithstanding their youthfulness. Efforts to accommodate their health care services needs must be scaled up [the same way] laws to protect them from sexual exploitation are made to comply with the Constitution. Health care providers need to be empowered by the law to provide sexual and reproductive health services to children in need of such services without regarding them as being too young to need such services. This is an issue of law development generally with which I will not further burden this judgment.

While acknowledging children's rights to healthcare services, Makarau JCC did not make a clear statement on the age at which children should have access to SRHR information and services. Some textual references to the right to reproductive health care under the Constitution[89] would have provided the legal basis for the Court to enunciate child-specific rules on access to SRHR information and services, without necessarily having to harmonise the MASC to the age of access to SRHR information and services. This is the approach codified in South Africa and other countries where the age of access to SRHR information and services is 12 years (roughly meant to coincide with the age of puberty) and the MASC with adults is pegged at 16 years of age.[90] Further, the Children's Act confers on every child the right to have access to information on, among others, sexuality and reproduction; without any age-based restrictions.[91]

It is patently clear that the Court missed the opportunity to categorically hold that children's right to healthcare services is not just an issue of law development, but one of interpretation of the

87 General Comment 7 (n 7) para 51.
88 *Kawenda* (n 16) 26.
89 On the child's right to health care, see secs 76(1)-(3) & 81(1)(f) of the Constitution.
90 See, generally, secs 10, 129(1)-(10), 130(2), 132(1)-(2), 133(2) & 142(2)-(3) of the Children's Act 38 of 2005.
91 See sec 13(1)(a) of the South African Children's Act.

available legal provisions, to which the Court never referred. Section 76(1) of the Constitution provides that every citizen and permanent resident has the right to have access to basic health care, including reproductive healthcare services.[92] These provisions are given effect by the Public Health Act.[93] Under section 37(1)(vi) thereof, healthcare practitioners have the duty to ensure, among others, that 'appropriate, adequate and comprehensive information is disseminated on the health services for which they are responsible'. This is supplemented by other provisions that bind healthcare practitioners to inform a user, including a child, of the range of diagnostic procedures and treatment options generally available to the user; the benefits, risks, costs and consequences generally associated with each option; and the user's right to refuse healthcare services and explain the implications, risks, and obligations of such refusal.[94] These provisions demonstrate that the law is already sufficiently developed to require healthcare practitioners to inform adolescents of a particular age – which the Court should have stipulated – of the range of SRHR services available to them even before they reach the legislative MASC. Accordingly, such practitioners are already legally empowered to provide SRHR information and services to adolescents 'in need of such information and services without regarding them as being too young to need such services'.

5 Conclusion and way forward

In conclusion, it is beyond doubt that the Court's decision is both a landmark and a missed opportunity. Its legacy is 'mixed' and 'polarising', as the Court made findings that were progressive but left other more pressing issues unresolved. First, it is a landmark because it categorically declares that the Constitution protects all, not some, children from sexual exploitation, and that the Code, therefore, is unconstitutional as it leaves outside the protective reach of the law children aged between 16 and 18 years. Equally important was the finding that all children are entitled to equal protection and benefit of the law without discrimination based on age, gender and other prohibited grounds. By declaring that all under-18s lack the legal and mental capacity to consent to sexual intercourse with adults, the judgment breaks new ground in domestic child law and sets normative standards from which many countries in Africa and

92 See also sec 61 of the Constitution, which provides that every person has a right of access to information, which obviously includes SRHRs information. In the case of a child, the information must be age-appropriate and consistent with their level of maturity.
93 Ch 15:17 Act 11 of 2018.
94 See secs 34(1)(b)-(d) of the Public Health Act.

beyond may draw inspiration. Further, the Court deserves credit for holding that the legislative limitation of the right to be protected from sexual exploitation is not constitutionally justifiable in a democratic society, because this eliminates all possibilities for arguing that sexual intercourse with a minor is not necessarily offensive or exploitative in certain contexts.

Perhaps one of the compelling findings of the Court relates to the abolition of the 'marital defence' to a charge of sexual intercourse or committing indecent acts with a young person as provided for in the Code. This defence allows an adult who is 'married' to a child to avoid being charged with these offences. Makarau JCC, for the Court, was on point in holding that the accused's 'married-to-the-child' defence created fertile ground for the sexual exploitation of children regardless of their ages. To 'give life' to the ground-breaking findings of the Court, Parliament has amended the Code in a bid to harmonise it with the constitutional command to protect all children from sexual exploitation and abuse, including by legislatively lifting the MASC to the age of 18 years.

Regardless of the encouraging findings referred to above, *Kawenda* will be recorded as one of the missed opportunities for the Court to address the sexual abuse of children in a comprehensive manner. It was a dereliction of duty for the Court not to identify, declare unconstitutional and set aside all provisions stipulating that children aged between 12 and 14 years have the legal capacity to give consent to sexual encounters with adults. Accordingly, the Court could not possibly have been concerned with children aged between 16 and 18 years without deciding that all under-16s irrefutably lack the capacity to consent to sexual intercourse with adults. Compared to over-16s, this category of children even needs more protection due to their young ages, immaturity and vulnerability. The exception entrenched in the Code perpetuates the sexual exploitation of children as it allows perpetrators to plead minor offences that attract lesser sentences than those prescribed for serious offences such as rape and aggravated indecent assault. However, it is very refreshing to note that the drafters of the Criminal Laws Amendment Act, 2024 noticed this omission and ensured that the new section 70 of the Code applies to all children aged between 12 and 18 years.[95]

In addition, the Court should have held that an accused's subjective belief that the child was above the MASC is not a defence to sexual

95 See sec 4 of the Criminal Laws Amendment Act, 2024 and the new sec 70(1) of the Criminal Law Code.

abuse charges. To address this challenge for future purposes, Parliament should make it clear that the physical appearance of a child should neither be used as an indicator of maturity nor as a partial defence to sexual offence charges. Due to lack of guidance in the judgment, the legislature re-enacted the principle that it is a defence for an accused person to satisfy the court that they had reasonable cause to believe that the child concerned was of or over the age of 18 years at the time of the alleged crime.[96] This provision gives accused persons an unreasonable defence – based on subjective considerations – that is likely to lengthen court processes and delay access to justice for victims of coercive sexual conduct.

In my view, the Court's refusal to set guidelines on how to govern consensual sexual intercourse between adolescents is one of the shocking shortcomings of the judgment. This article has generally argued against the criminalisation of children who engage in consensual, non-exploitative sex with their peers, especially if the children involved are close in age. If one of the children involved is charged due to a big age gap between them and the child victim, the accused child should be dealt with through diversionary and restorative justice mechanisms instead of highly punitive ones. This approach to juvenile offending dominates the provisions and philosophy behind the Criminal Laws Amendment Act, 2024.[97] More importantly, this reasoning foresees instances where a young adult aged 18 or 19 years is not charged for having consensual, non-exploitative sexual intercourse with a 16 or 17 year-old child. This is where the close-in-age defence becomes very important in ensuring that consensual sexual relationships between children are not criminalised 'overnight' when one of them becomes a major at 18 years of age. As noted above, the Criminal Laws Amendment Act now stipulates that where sexual intercourse or an indecent act takes place between a child or any person who is not more than three years older than the child, such conduct is not criminalised.[98] This provision plugs some of the gaps left wide open by the Court's decision in *Kawenda.*

In addition, the Court should have stipulated the ideal age at which children should have access to SRHR information and services as part of giving meaning to the child's constitutional right to reproductive health care. To avoid prejudicing or criminalising sexually-active adolescents, the age of access to SRHR information and services does not have to coincide with the MASC, but with the age of puberty,

96 See the new sec 70(5) of the Criminal Law Code.
97 Child Justice Bill, BB 11, 2021.
98 See the new sec 70(2) of the Criminal Law Code.

which is thought to be around 12 years in many jurisdictions. Finally, legislative regimes designed to reduce and prevent CSEA are largely inadequate in the absence of sufficient social protection support systems; changes in socio-cultural attitudes; adequate capacity and commitment from government; skilled personnel; extensive engagement of the civil society sector and fully-equipped child-friendly, gender sensitive, age-appropriate and disability-inclusive structures and institutions. In the Zimbabwean context, existing laws should criminalise CSEA, especially that which is perpetrated by adult sexual predators. However, the existence of strong legal and policy frameworks is not effective in addressing CSEA unless it is backed by full implementation and enforcement of such frameworks.[99] Without adequate institutional and financial support, sexually-abused children run out of options and often return to abusive relationships and environments, with or without the knowledge of authorities.

99 NB Ngondi 'Child protection in Tanzania: A dream or nightmare?' (2015) 55 *Children and Youth Services Review* 10-17, demonstrating that sexual exploitation had increased after the adoption of relevant policies.

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Special Focus: Implementation of decisions of the African Commission on Human and Peoples' Rights

Editorial

Background to the Special Focus

This Special Focus is devoted to the implementation of decisions of the African Commission on Human and Peoples' Rights (African Commission), the longest-standing African supranational human rights body with continental coverage. The nine articles in this Special Focus were presented as papers at a conference on the theme 'Implementation and domestic impact of the decisions of the African Commission on Human and Peoples' Rights', held from 13 to 15 September 2023, in Pretoria, South Africa. The conference, organised by the Centre for Human Rights, Faculty of Law, University of Pretoria (Centre), in collaboration with the African Commission, provided a scholarly platform for scholars, practitioners and other stakeholders to address the critical gap between the issuance of decisions by the African Commission and their effective implementation at the national level. The editors of the Special Focus at the time were the director of the Centre, the co-manager of the Centre's Litigation and Implementation Unit, and a post-doctoral fellow in that unit.

The conference brought together 55 participants, including presenters of 23 presentations that offered technical, policy and case study analyses of implementation challenges and successes. A unique feature of the conference was the participation of members of the African Commission and its Secretariat, who provided comments on the papers presented. This interaction ensured that the insights and proposals incorporated in this Special Focus are not only theoretically sound but also practically aligned with the African Commission's operational realities and priorities. After the conference, presenters were given an opportunity to incorporate the comments by commissioners, Secretariat staff and other participants. Selected papers were subsequently sent for peer review.

The conference built on two regional seminars held under the auspices of the African Commission in Dakar, Senegal (2017) and Zanzibar, United Republic of Tanzania (2018), also focusing on the implementation of the African Commission's decisions. Recommendations from these earlier seminars emphasised the importance of bolstering national legal frameworks, fostering collaboration with stakeholders, and improving monitoring and follow-up mechanisms. However, persistent challenges necessitated further discussions, making the 2023 Pretoria implementation conference a significant consolidative milestone in the ongoing discussion on implementation.

While 'decisions' most often refer to recommendations adopted by the African Commission in respect of 'communications' (under the individual complaints mechanism), the term, in this special issue understood more broadly, is to encompass all recommendations made by the African Commission, including those adopted as part of Concluding Observations (after the examination of state reports); those contained in country-specific resolutions; and those included in reports of visits by the Commission's special mechanisms.

The effective implementation of decisions by the African Commission remains a persistent challenge across the continent, undermining its ability to deliver justice and uphold human rights. Despite widespread ratification of African human rights treaties, the gap between ratification and implementation reveals systemic and contextual barriers that hinder progress. This Special Focus explores these challenges and presents transformative strategies to enhance compliance, accountability and impact.

Introductory overview

The first contribution, by Kembabazi, provides a bird's eye view of the topic. It examines the challenges and opportunities faced by the African Commission in ensuring compliance with its decisions on individual communications. It highlights the gap between the African Commission's potential effectiveness and its actual implementation record, with systemic barriers such as lack of political will, insufficient state cooperation, and inadequate resources playing significant roles. The article underscores the importance of follow-up mechanisms, and briefly surveys the steps taken by the African Commission to address the low compliance rate by providing greater normative clarity in its 2020 Rules of Procedure; by integrating implementation into its state reporting procedure, missions of special mechanisms, promotional missions and other promotional activities; by conducting implementation hearings; by adopting resolutions drawing attention to and encouraging implementation; through collaboration with civil society organisations; by reporting to the African Union (AU) Executive Council; and – to a limited extent – by way of referral of three communications (cases) to the African Court on Human and Peoples' Rights (African Court).

Low level of implementation and emerging challenges

Obwogi and Kremte evaluate the implementation of decisions by the African Commission in three countries: Botswana, Kenya and Ethiopia. While none of these states has fully complied with any of the Commission's recommendations with respect to them, Kenya has at least partially implemented some decisions. The authors highlight the measures taken in response to the recommendations in the *Endorois* decision, including the registration of the Endorois Welfare Council; the sharing by the Endorois in the annual earnings from the reserve; and community participation in employment opportunities in the reserve. However, they also indicate how these measures still fall short of 'full implementation'. The implementation challenges they identify include the perception of the African Commission's remedial recommendations as non-binding; a lack of state commitment linked to the socio-political context of the implementing states; the lack of clarity and specificity of the Commission's recommendations; the inadequate institutional follow-up capacity of the African Commission; and constraints on the functioning of civil society, constraining their role of mustering domestic pressure towards improved implementation.

Biegon examines the impact of the African Commission's country-specific resolutions through the lens of 'naming and shaming', a method aimed at pressuring states to improve human rights practices. While these resolutions often attract international attention and raise public awareness, Biegon argues that full compliance by targeted states is rare. Most cases demonstrate situational or partial compliance driven by political transitions or other contextual changes rather than deliberate adherence to the African Commission's recommendations. Examples such as Ethiopia's revision of restrictive civil society laws and Zimbabwe's amendments to draconian legislation illustrate indirect impacts influenced by broader pressures. However, many states, including Eritrea and Eswatini, have shown persistent non-compliance, demonstrating the limited enforcement power of the African Commission. Biegon also suggests leveraging collaborations with regional and international actors to amplify pressure on non-compliant states, combining naming and shaming with practical tools such as technical assistance and diplomatic interventions. These strategies aim to transition the African Commission's resolutions from situational impacts to significant, sustained improvements in human rights practices across Africa.

Role of national judiciaries (with a focus on Kenya)

Juma and Orao examine the role of the Kenyan judiciary in implementing decisions and recommendations from African regional human rights mechanisms, particularly the African Commission. It highlights a dual approach: The judiciary has sometimes harmonised these decisions with domestic law, enhancing their value and relevance in interpreting constitutionally-guaranteed rights. However, courts more often adopt an avoidance approach, downplaying or outright rejecting the applicability of these decisions due to perceptions of their non-binding nature or conflicts with domestic laws. This inconsistent engagement diminishes the impact of the African Commission's rulings, weakening their potential to enhance human rights protection in Kenya.

Exploring non-confrontation: Dialogue, negotiation and documentation

Diplomatic tools, such as dialogue and negotiation, can foster constructive engagement and align state practices with human rights norms. Promoting the integration of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) and other frameworks into national policies, particularly for marginalised

groups such as persons with disabilities, is crucial for inclusive policy development. These non-confrontational measures are also more likely to facilitate capacity-building initiatives and the provision of technical assistance.

Mbanje and Okoloise argue that the African Commission's significant challenges in ensuring state compliance with its decisions are exacerbated by governance deficits, political instability and weak institutional capacity within states. Their article critiques the African Commission's one-size-fits-all approach to engagement with states, noting that a lack of tailored strategies undermines its effectiveness. It calls for a contextual approach to strengthen state capacity, emphasising the importance of addressing the unique political, economic and social realities of each state. The need for greater collaboration with national human rights institutions and civil society is highlighted as a critical step in bridging the gap between the African Commission's recommendations and domestic implementation. The authors recommend the adoption of a range of strategies to improve compliance that, in their view, would strengthen the African Commission's effectiveness in advancing human rights across Africa.

Ayeni argues that the African Commission can enhance the implementation of its decisions by prioritising dialogue and documentation. Dialogue involves engaging with national actors, civil society and other stakeholders to address implementation challenges through collaborative communication, while documentation entails establishing a publicly-accessible database to track decisions, remedial measures, and their implementation status. These approaches align with the African Commission's quasi-judicial nature, leveraging its ability to engage constructively rather than impose binding decisions. The current lack of systematic monitoring and comprehensive data has hindered progress, leaving the African Commission reliant on *ad hoc* methods and minimal state cooperation. In this regard, there is a need for institutionalising dialogue mechanisms, such as regular implementation hearings, and incorporating implementation tracking into state reporting processes. By focusing on respectful engagement and systematic tracking, the African Commission could foster greater state compliance and enhance its role in promoting and protecting human rights across the continent.

Purmah focuses on the African Commission's decisions regarding the rights of persons with disabilities. His contribution attributes implementation challenges of these rights to systemic barriers, including attitudinal, environmental and political factors that hinder implementation. The article underscores the critical role of diplomatic

mechanisms, such as dialogue, negotiation and cooperation, in fostering compliance. It advocates leveraging the African Disability Protocol and mechanisms such as the Working Group on the Rights of Older Persons and Persons with Disabilities and the state reporting process. These tools aim to promote constructive engagement, tailored recommendations and sustained dialogue to align state practices with human rights norms and enhance the Commission's credibility and impact. Purmah emphasises the use of diplomatic tools to encourage states to integrate disability rights into their national policies, align with the African Disability Protocol, and prioritise inclusive policies. By fostering a cooperative rather than confrontational approach, these strategies aim to enhance the implementation of the African Commission's decisions and improve the human rights landscape for persons with disabilities across the continent.

Targeted action by the African Commission: A dedicated special follow-up mechanism

Okoloise submits that the African Commission has struggled to effectively monitor the implementation of its decisions and recommendations due to systemic and resource-based constraints. Despite its broad mandate under the African Charter on Human and Peoples' Rights (African Charter), the African Commission lacks a dedicated and institutionalised mechanism for tracking compliance by state parties. This deficit, compounded by vague procedural rules and insufficient funding, has resulted in low implementation rates and a diminishing credibility for the African Commission. *Ad hoc* methods, such as relying on commissioners' promotion activities or sporadic regional seminars, fail to effectively address the growing volume of non-compliance. Drawing on the example of the Working Group on Implementation of Decisions, established by the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee), he urges the African Commission to take urgent action by setting up a dedicated special mechanism responsible for the follow-up of domestic implementation.

African governance architecture, with a focus on the Peace and Security Council

The African Commission operates within the framework of the African Governance Architecture (AGA), the AU's platform to coordinate its initiatives in respect of governance, democracy and human rights. A number of contributions in this Special Focus emphasise the political dimension of implementing the decisions of the African Commission,

exemplified by the lack of political will on the part of member states. This emphasis underscores the potential role of AU organs such as the Pan-African Parliament, the African Peer Review Mechanism, the Economic, Social and Cultural Council and the Peace and Security Council (PSC) in this process.

Olajuwon and Asamoah explore the pivotal role of one of most important of these, the PSC. They argue that while the African Commission primarily focuses on human rights, its recommendations often intersect with broader peace and security issues. Tasked with conflict prevention, management and resolution, the PSC can bridge this gap by enforcing the African Commission's recommendations, especially in contexts of grave human rights violations that threaten peace and stability. The authors emphasise the need for effective collaboration between the PSC and the African Commission to foster compliance with human rights norms, enhance the Commission's credibility, and address challenges such as state non-compliance, limited resources and political constraints. This collaboration can be achieved by strengthening the operational and financial capacity of the PSC, improving the coordination between the PSC and the African Commission, and revising the PSC's legal framework to resolve ambiguities and enhance its enforcement capabilities. They further suggest diversifying funding sources for the Peace Fund, leveraging sanctions and incentives to encourage compliance, and employing technology and skilled personnel to enhance the PSC's early warning systems and follow-up mechanisms. By adopting these strategies, the PSC can more effectively support the African Commission.

Conclusion

Understandably, much of the Special Focus draws attention to the role of national executives, judiciaries and legislatures, as well as national human rights institutions, in the implementation of decisions. Much emphasis, however, is also placed on the crucial complementary role of civil society coalitions comprising victims, families, communities, traditional and religious leaders, to act as local implementation champions.

However, the Focus most pertinently reveals the central and undeniably neglected role of the African Commission in persuading, coaxing, cajoling and pushing all relevant actors towards domestic implementation through effective follow-up. Establishing robust follow-up mechanisms to sustain engagement and monitor state responses will ensure continued pressure and accountability. These integrated strategies can collectively enhance the implementation

of the African Commission's decisions and strengthen its role in promoting and protecting human rights across Africa.

The African Commission should understand the core of its protective mandate as being closely linked to the effective enforcement of its decisions. Focusing on the role of the African Commission in this process, three broad approaches emerge from the Special Focus.

The first approach requires deliberate and transformative action towards institutional reform within the African Commission's institutional ecosystem. A dedicated implementation unit should urgently be set up within the African Commission (whether a secretarial operational 'department' or 'unit', a working group or special mechanism, or a combination of some of these), in order to increase coordination, transparency and accountability. Resources should be prioritised for this purpose. Now is the time to convert into reality the repeated seminar and conference calls for the adoption of such a measure.

The second approach, ironically, is to *implement* the already-existing *implementation and follow-up framework*. There is less need for more procedural clarity than there is for the straightforward, consistent and complete adherence by the African Commission to its existing 2020 Rules of Procedure concerning implementation. Consistently conforming with these Rules does not require a significant increase in allocated resources, although the human resource capacity may have to be strengthened. Improving transparency regarding implementation status is key. The African Commission's systematic compliance-monitoring practice should include a completely updated implementation database, setting out the recommendations and implementation status of all its merits decisions in which violations have been found. This database should be updated in its annual reports and, at all times, be publicly accessible on its website. Other related measures that can be taken include consistently adopting remedial recommendations with greater specificity and clarity to increase their actionable impact; developing a thematic case digest to improve the accessibility and applicability of its decisions; and developing further guidelines on remedies and implementation to potential litigants.

The third approach is to leverage existing implementation-focused efforts within the AU by improving collaboration and coordination. Based on the truism that human rights implementation is a collective responsibility, the African Commission should vigorously formalise and consistently draw on partnerships with AU organs, including policy organs, to leverage political and financial support. Country-

specific engagement, through initiatives such as the first Pre-Session Forum facilitating constructive dialogues with states, is a step in the right direction. Together with the policy organs, the African Commission should increasingly explore sanctions or incentives to encourage state compliance.

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The role of the African Commission in enhancing compliance with its decisions on communications

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Summary: *The African Commission on Human and Peoples' Rights, an organ of the African Union, is tasked with promoting and protecting human rights across the African continent. A central aspect of its protective mandate is handling individual communications that allege human rights violations by states. While the African Commission has decided on the merits well over 100 individual communications, the implementation of its decisions faces significant challenges that hinder the full realisation of human rights. The primary objective of implementing recommendations arising from individual communications is not to ensure respect for human rights, but to guarantee that victims of human rights violations have access to remedies. This article provides a bird's eye view of the effectiveness of measures put in place by the African Commission and evaluates the role of the African Commission in ensuring the implementation by states of its decisions. The article relies on existing scholarship and the regional seminars on the implementation of decisions, held in 2017 in Dakar, Senegal, and in 2018 in Zanzibar, Tanzania, to identify strategies and recommendations aimed at enhancing the effectiveness of the African Commission in implementing its decisions on individual communications by states. The article argues that the measures outlined in the 2020 Rules of Procedures of the*

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African Commission have not been consistently applied, leading to non-implementation of its decisions by states. As a result, the article offers a series of recommendations aimed at enabling the African Commission to more effectively leverage its procedures and enhance compliance with its decisions and recommendations by states. As an introduction to the 'Special Focus' on the implementation of the Commission's decisions, this article draws on other contributions contained in the 'Special Focus'.

Key words: *African Commission on Human and Peoples' Rights; individual communications implementation; follow-up; Rules of Procedure; implementation unit; recommendations*

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) was established on 2 November 1987,[1] with the primary mandate of advancing and safeguarding human rights across Africa. According to article 30 of the African Charter on Human and Peoples' Rights (African Charter), the African Commission serves as the primary continental body for the promotion and protection of human and peoples' rights on the continent. The African Commission is empowered to advocate, defend and provide interpretations of the various provisions of the African Charter. Additionally, the African Commission is tasked with fulfilling any other responsibilities delegated to it by the African Union (AU) Assembly of Heads of State and Government.[2]

This article focuses on individual communications, as the inter-state procedure has been invoked only on rare occasions.[3] In fact, the African Commission has noted in some of its promotional materials that the procedure governing interstate complaints has been explained only in brief terms, because of its limited use.[4] Of the over 400 communications handled by the Commission, the majority are individual complaints, with only a limited number

1 African Commission on Human and Peoples' Rights (African Commission) 'Establishment, composition and functioning of the Commission', https://achpr.au.int/en/about/history (accessed 10 October 2024).

2 Arts 45(1)(a), (b), (c), 45(2), 45(3) & 45(4) African Charter on Human and Peoples' Rights.

3 The African Commission has to date addressed only four inter-state complaints. See F Viljoen 'Inter-state complaints under the African human rights system: A breeze of change?' (2024) 13 *International Human Rights Law Review* 96-129.

4 African Commission 'Communication procedure' 2, https://achpr.au.int/sites/default/files/files/2021-04/achprcommunicationprocedureeng.pdf (accessed 11 November 2024).

involving organisations and groups.[5] It is important to note that the impact of the African Commission's decisions has been significantly limited, largely due to the lack of effective and strategic follow-up to ensure the full implementation of its decisions.[6] This, combined with lack of political will by state parties, lack of awareness about the existence of the recommendations, and lack of clarity as to which government agency has the mandate to ensure compliance with recommendations, has inhibited the full enjoyment of human rights in general and inadvertently impeded access to justice for individuals.[7] Implementation or compliance with its decisions enhances the legitimacy of the African Commission.[8]

This article examines the pressing need for the prompt implementation of decisions made by the African Commission. It notes, in part 2, the efforts of the African Commission to ensure implementation of its decisions, and in part 3 highlights strategies and recommendations that can be employed to enhance the efficiency of the Commission when it comes to executing its decisions regarding individual communications to be translated into justice for human rights violations.

2 Measures taken by the African Commission towards implementation of its decisions

This part of the article examines the state of implementation of the African Commission's decisions, analysing the mechanisms through which the Commission may follow up with state parties.

5 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 151.

6 On the Commission's role on implementation, see Murray and others (n 5); C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law* Journal 31; F Viljoen 'Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: Compliance at a crossroads' in R Grote, MM Antoniazzi & D Paris (eds) *Research handbook on compliance in international human rights law* (2021) 362; R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 845; VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 13.

7 R Murray 'Confidentiality and the implementation of the decisions of the African Commission on Human and Peoples' Rights' (2019) 19 *African Human Rights Law Journal* 10.

8 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by States Parties ACHPR/Res.97(XXXX)06, https://achpr.au.int/en/adopted-resolutions/97-resolution-importance-implementation-recommendations (accessed 10 October 2024).

Clearly, compliance under the African Commission remains a work in progress.

In the discharge of its mandate over the years, the African Commission has steadily evolved as an apparatus for entrenching human rights and democratisation in Africa.[9] It has taken significant steps to ensure compliance with its decisions, and it deserves support and commendation for its efforts in this regard. It has put various mechanisms in place,[10] some of which are designed specifically for follow-up purposes, and these mechanisms can be effectively used to enhance the implementation of its decisions. The adoption of its revised Rules of Procedure in 2020 has brought clarity to the follow-up procedures, as they are now explicitly outlined in Rule 125. Further, in its Strategic Framework (2021-2025),[11] the African Commission includes enhanced compliance and follow-up of recommendations of its decisions among its priorities. Under its strategic goals and outputs, a strategy to ensure compliance are 'enhanced monitoring, follow up and tracking of compliance by state parties'.[12] This strategy includes improved adherence to reporting obligations; systematic engagement of civil society organisations (CSOs) and national human rights institutions (NHRIs) in the state reporting procedures; an operational implementation unit; and institutionalising implementation of its recommendations by member states.[13]

2.1 Greater normative clarity in 2020 Rules of Procedure

The African Commission has taken significant steps to guide the engagement process and ensure the effective implementation of its decisions through the comprehensive provisions outlined in its 2020 Rules of Procedure. These Rules of Procedure provide a robust framework to facilitate effective engagement with state parties and to ensure the implementation of the African Commission's decisions. The designation of a rapporteur for each communication,[14] the 180-day feedback requirement,[15] and the mechanism to address non-compliance,[16] all contribute to a more transparent and accountable process. These provisions create a forum for ongoing dialogue and

9 Okoloise (n 6) 31.
10 State Reporting; Promotion and Protection Missions; Issuance of Press Statements, Letters of Concern; Resolutions; Activity Report of the ACHPR which reports to the Assembly on the compliance with decisions.
11 African Commission 'Strategic Framework 2021-20215' 2020.
12 African Commission (n 11) 8.
13 African Commission (n 11) 28.
14 Rule 125(5) of the 2020 Rules of Procedure of the African Commission on Human and Peoples' Rights.
15 Rules of Procedure (n 14) Rule 125(1).
16 Rules of Procedure (n 14) Rules 125(8) & 9.

cooperation, ultimately enhancing the protection and promotion of human rights in Africa. The Rules serve to facilitate state reporting, enhance state participation, and keep track of the implementation of the decisions of the African Commission.

2.2 Implementation hearings

Although used sparingly, the African Commission has made use of implementation hearings as a tool to enhance state compliance with its decisions.[17] These hearings provide an opportunity for the Commission to assess the progress of states in implementing its rulings and to engage directly with the parties involved.[18] To date, there have been two cases in respect of which the African Commission has held implementation hearings, allowing for a closer examination of the extent to which its decisions have been carried out by the states concerned. The first implementation hearing by the African Commission took place on 26 April 2012, in the case of *Malawi African Association & Others v Mauritania*.[19] The Commission held a hearing to listen to the parties in the case, considered an 'implementation dossier' prepared by CSOs, and followed up on the overall implementation of its decision in the case.[20]

The second hearing was that of the *Endorois* case,[21] where the African Commission held an oral hearing at its fifty-third ordinary session in April 2013. During this hearing, the parties provided updates on the progress of implementing the Commission's decision in the case. Following the hearing, the African Commission on 29 April 2013 sent a *note verbale* to the government of Kenya, reminding it of the commitment made during the oral hearing to submit an interim report within 90 days and a comprehensive report at the fifty-fourth ordinary session of the Commission.[22] Subsequently, on 23 September 2013, the African Commission's Working Group on Indigenous Populations/Communities, in collaboration with the Endorois Welfare Council, organised a workshop to assess the status of implementation of the *Endorois* decision.[23] However, despite these efforts, the Kenyan government failed to participate in the

17 Viljoen (n 6) 370.
18 Ayeni & Von Staden (n 6) 13.
19 (2000) AHRLR 149 (ACHPR 2000).
20 Ayeni & Von Staden (n 6) 14.
21 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).
22 Minority Rights Group 'The *Endorois* decision' – Four years on, the Endorois still await action by the government of Kenya', https://minorityrights.org/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 12 November 2024).
23 Ayeni & Von Staden (n 6) 14.

workshop and did not provide the promised feedback. As a result, on 5 November 2013, the African Commission adopted Resolution 257, urging the government of Kenya to fulfil its obligations under the African Charter and implement the *Endorois* decision.[24]

The practice of holding implementation hearings by the African Commission has not been a consistent or systematic approach but rather an *ad hoc* process, often facilitated by litigants and CSOs.[25] This is because the African Commission lacks formal guidelines for conducting such hearings, which would allow it to initiate these independently. As a result, the Commission largely relies on non-governmental organisations (NGOs) to initiate these hearings, as has been the case with the two aforementioned cases. While the African Commission has used implementation hearings as a mechanism to monitor state compliance with its decisions, the overall effectiveness of this approach has been limited, likely due to inconsistencies in its application. In the *Endorois* case, despite the African Commission's efforts to engage with the government of Kenya through hearings, workshops and reminders, the state failed to fulfil its commitments, underscoring the challenges of ensuring compliance.

2.3 Periodic state reporting

The periodic state reporting process is a fundamental mechanism for monitoring implementation, not only of treaty provisions but also of the decisions of the African Commission. During the examination of periodic state reports, the Commission has asked questions about measures that states have taken to implement the African Charter or its decisions, for instance, during the Concluding Observation of Mauritania.[26] In its thirty-fifth Activity Report, the African Commission amended the structure of its activity reports to refer to the implementation status of decisions,[27] and included follow-up

24 Resolution Calling on the Republic of Kenya to Implement the Endorois Decision ACHPR/Res.257(LIV) 2013.

25 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 20.

26 See Concluding Observations – Mauritania: 10th, 11th, 12th, 13th & 14th Periodic Reports, 2006-2014 para 10, https://achpr.au.int/index.php/en/concluding-observation/concluding-observations-mauritania10th-11th-12th-13th-14th-perio (accessed 18 November 2024); Concluding Observations and Recommendations – Mauritania: 8th and 9th Periodic Reports, 2002-2005, https://achpr.au.int/en/concluding-observation/concluding-observations-and-recommendations-mauritania-8th-and-9th-periodic (accessed 18 November 2024).

27 African Commission 35th Activity Report of the African Commission, adopted October 2013, reference to *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011) para 24, to 'follow up on implementation'.

on decisions in its fact-finding missions by special procedures and its promotional missions, and it has made reference to the status of implementation of decisions in country-specific resolutions.[28] However, the value and effectiveness of this method have been undermined by states that are not up to date with their initial or periodic state reports. In his presentation at the eighty-first ordinary session of the African Commission, Commissioner Hatem Essaiem stated that only 10 African states are fully up to date with their periodic reports.[29] He further noted that five African states were in the process of catching up on their reporting obligations, while 10 states were behind by one report, three were delayed by two reports, and one was delayed by three reports.[30] Additionally, 19 states are more than three reports overdue, and six African countries have never submitted a single report in the history of the African Commission.[31]

Another factor that hinders state parties in effectively reporting is a lack of coordination between the various state departments that have to contribute to the report.[32] An additional problem faced by the state departments responsible for the compilation of the report is the fact that they often also have to file state reports under other international human rights bodies such as the Universal Periodic Review (UPR). The pressure to meet multiple reporting obligations can strain resources and lead to delays or compromises in the quality of the reports submitted to the African Commission. During the seventy-ninth ordinary session, the Deputy Minister of Justice, Constitutional and Religious Affairs of Mozambique identified several factors hindering the ability of states to submit their periodic reports to the African Commission.[33] These factors include inadequate allocation of funds and technical human resources to the national committees responsible for reporting, limiting their ability to effectively carry out their activities. Additionally, challenges in collecting and gathering timely information further delay the submission of reports.[34]

28 Murray and others (n 5) 157.
29 International Service for Human Rights 'ACHPR81: Situation of state reporting at the African Commission', https://ishr.ch/latest-updates/achpr81-situation-of-state-reporting-at-the-african-commission/ (accessed 21 November 2024).
30 As above.
31 As above.
32 Open Society Justice Initiative 'Structures and strategies for implementing international human rights decisions: From rights to remedies', https://www.justiceinitiative.org/uploads/7d34546e-dfe6-450b-82ec-77da3323d4bd/from-rights-to-remedies-20130708.pdf (accessed 10 November 2024).
33 International Service for Human Rights 'Key stakeholders must coordinate their efforts for states to submit periodic reports', https://ishr.ch/latest-updates/achpr79-key-stakeholders-must-coordinate-their-efforts-for-states-to-submit-periodic-reports/ (accessed 21 November 2024).
34 As above.

2.4 Adoption of resolutions

The adoption of resolutions is a key function of the African Commission, as outlined in Rule 7(d) of the 2020 Rules of Procedure, read in conjunction with article 45(1) of the African Charter. The African Commission typically issues three types of resolutions, namely, thematic, country-specific and administrative resolutions. Resolutions are directed at a range of actors, with states being the primary audience, urging them to take specific actions to comply with the standards and recommendations outlined in the resolutions.[35] The resolutions fall under the category of human rights soft law, specifically referred to as 'secondary soft law'. Their existence and jurisdiction are derived from a treaty, and they provide a normative interpretation of that treaty.[36] Thus, resolutions have been one of the principal tools used by the African Commission to advance human rights promotion and protection in Africa. In 2006 the African Commission first appealed to state parties to implement its decisions by adopting Resolution 97 on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties.[37] In this Resolution, the African Commission called upon state parties to respect the recommendations and to provide remedy to victims of human rights violations. Subsequent to this, the Commission has used various country and thematic resolutions issued over the years to call on states to implement its decisions.[38] For instance, it issued country Resolution 91 to call on the government of Eritrea to implement its decision in *Zegveld & Another v Eritrea*,[39] following the continuation of human rights violations, and the detention of former cabinet ministers, government officials, members of parliament, journalists and media practitioners.[40]

Similarly, the African Commission issued Resolution 257 calling on the government of Kenya to implement the *Endorois* decision.[41] This

35 J Biegon 'The incorporation of the thematic resolutions of the African Commission into the domestic laws of African countries' in O Shyllon (ed) *The Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 191.
36 Biegon (n 35) 197.
37 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties ACHPR/Res.97(XXXX)06.
38 Viljoen (n 6) 373.
39 *Zegveld & Another v Eritrea* (2003) AHRLR 85 (ACHPR 2003).
40 Resolution on the Human Rights Situation in Eritrea ACHPR/Res.91(XXXVIII)05 adopted at its 38th ordinary session held in Banjul, The Gambia, from 21 November to 5 December 2005.
41 Resolution Calling on the Republic of Kenya to Implement the *Endorois* Decision ACHPR/Res.257(LIV)2013 adopted its 54th ordinary session, held in Banjul, The Gambia, from 22 October to 5 November 2013.

Resolution was adopted to remind the government of Kenya to fulfil its commitment of submitting an interim report within 90 days of the oral hearing, and a comprehensive report during the fifty-fourth ordinary session of the African Commission.[42] The adoption of this Resolution by the Commission was necessitated by the absence of Kenyan government representatives at the Workshop on the Status of Implementation of the *Endorois* Decision of the African Commission on Human and Peoples' Rights.[43] This workshop, organised by the Working Group on Indigenous Populations/Communities in collaboration with the Endorois Welfare Council, took place in Nairobi, Kenya, on 23 September 2013,[44] but yielded no concrete results in terms of enhancing compliance by the government of Kenya with its decision.

2.5 Promotional missions

Under Rules 7, 76 and 86 of the 2020 Rules of Procedure, the African Commission is mandated to conduct promotional missions to state parties to the African Charter. Commissioner rapporteurs have the authority, as part of these missions, to inquire into and obtain updated information regarding the implementation status of its decisions. As can be gleaned from the promotional mission reports, the commissioners have routinely made inquiries on the implementation of its decisions on communications. In 2007 the then Special Rapporteur on Refugees, for example, visited Mauritania to follow up on the implementation of the remedial orders in *Malawi African Association & Others v Mauritania*.[45] During a visit to Mauritania in 2012, members of the African Commission also asked questions about the status of the implementation of its decisions.[46] In respect of *Modise v Botswana*, the Attorney-General of Botswana, during the thirty-first ordinary session of the African Commission in 2002, agreed to implement its recommendations upon receiving a written request from the Commission in this regard, together with specifications on implementation.[47] During

42 As above.
43 Murray and others (n 5) 160.
44 Resolution – Kenya (n 41).
45 R Murray 'How do the African Commission and Court on Human and Peoples' Rights and African Committee on the Rights and Welfare of the Child monitor implementation of their decisions and judgments?' 6, https://www.bristol.ac.uk/media-library/sites/law/hric/2021documents/Implementation%20of%20the%20decisions%20and%20judgments%20of%20the%20African%20bodies.pptx (accessed 10 October 2024).
46 African Commission 'Report of the promotional mission to the Islamic Republic of Mauritania held between 26 March and 1 April 2012', file:///C:/Users/Mox/Downloads/missionreportmauritaniacptaeng%20(1).pdf (accessed 22 October 2023).
47 Viljoen & Louw (n 25) 10.

a subsequent promotional visit to Botswana, in 2005, members of the African Commission posed questions to the government officials on the status of the implementation of the decisions in *Modise v Botswana*.[48] The government of Botswana has since agreed in principle to award Modise citizenship by birth, which will then also apply to his children.[49]

Despite its critical role in fostering collaborative engagement with states, NHRIs and CSOs, to enhance compliance with the African Commission's decisions, promotional missions are heavily dependent on the availability of sufficient funding. Currently, the African Commission is grappling with financial shortfalls, which threaten its ability to consistently hold physical public sessions and to carry out essential promotional visits. Without immediate financial support, the Commission's ability to effectively fulfil its promotional mandate across the continent remains in jeopardy. Furthermore, promotional missions are undermined by the fact that they have to be authorised by member states before they can take place, and member states usually delay to agree to such promotional visits.[50] Another factor that should be addressed with regard to both promotional and protective missions is a time limit for the publication of a mission report. Most reports are published years after the mission had taken place. This delay in publication defeats the impact and actual goal of the missions.[51] In the case of following up on the implementation of recommendations against a state party, a delay in publication could have devastating effects for the victims as well as compliance with the decisions of the African Commission.

2.6 Reporting to the Executive Council of the African Union

Policy organs of AU play a crucial role in providing political support and acting as a key interface between the African Commission and states. The involvement of the AU Executive Council, in particular, is crucial for effectively monitoring the implementation of the African Commission's decisions. Article 54 of the African Charter mandates the African Commission to submit activity reports to the ordinary

48 African Commission 'Report of the Promotional Mission to the Republic of Botswana, held 14-18 February 2005', https://achpr.au.int/sites/default/files/files/2022-10/misreppromobotswana2005eng.pdf (accessed 12 November 2024).
49 African Commission (n 48) 10.
50 L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' LLD thesis, University of Pretoria, 2005 151.
51 As above.

session of the Assembly.[52] Submitting these reports provides the African Commission with the opportunity to report on instances where member states have failed to implement its decisions. A notable example is the adoption of the sixteenth Annual Activity Report of the African Commission by the Assembly of Heads of State and Government of the African Union, held in July 2003 in Maputo, Mozambique. In its decision, the Executive Council recommended that the Assembly should 'urge all member states to cooperate with the ACHPR, and the various mechanisms it has put in place, and implement its decisions in compliance with the provisions of the African Charter on Human and Peoples' Rights'.[53]

Despite these recommendations, it is important to note that some members of the Executive Council have rejected certain decisions and resolutions issued by the African Commission, particularly those they perceive as offensive.[54] Furthermore, when the Commission submits its annual activity reports to Executive Council, there often is a lack of clarity regarding the subsequent actions or outcomes.[55] Viljoen has argued that, in many instances, the Executive Council has shied away from naming specific states, and the Assembly has failed to impose sanctions on states that do not comply with the AU human rights bodies' decisions and policies.[56] These issues raise critical questions about the effectiveness of reporting to the Executive Council in fostering state compliance with the African Commission's decisions.

2.7 Promotional activities envisaged in article 45(1)

Article 45(1)(a) of the African Charter mandates the African Commission to organise seminars, symposia and conferences. The African Commission's 2020 Rules of Procedure further stipulate in Rule 77(1) that the Commission may organise such meetings on its own initiative or in collaboration with partners. Seeking to strengthen its assessment of the status of implementation of its decisions, the African Commission also took the initiative to organise two regional seminars on implementation of the decisions of the Commission, the first in 2017 in Dakar, Senegal (Dakar Regional

52 African Commission '54th and 55th Activity Reports of the African Commission on Human and Peoples' Rights' 17, file:///C:/Users/Mox/Downloads/eng-54th-55th-activity-reportachpr%20(1).pdf (accessed 12 November 2023).
53 M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 574.
54 Ayeni & Von Staden (n 6) 10.
55 As above.
56 Viljoen (n 6) 366.

Seminar),[57] and the second, in 2018, in Zanzibar.[58] One of the pertinent recommendations made during these two seminars is that the African Commission should create a separate unit to monitor the implementation of its decisions,[59] to significantly enhance the implementation of its decisions. However, by November 2024, the recommendations of these seminars have not been implemented, which further undermines its capacity to effectively monitor state compliance with its decisions.

2.8 Referral by African Commission to African Court

While the African Commission's 2020 Rules of Procedure are silent on the referral of merits decisions containing remedial recommendations by the Commission to the African Court on Human and Peoples' Rights (African Court),[60] this silence does not preclude the African Commission from making such referrals. The authority to refer cases to the African Court stems not from its Rules of Procedure but from article 5(1)(a) of the African Court Protocol.[61] Despite this clear legal foundation, the African Commission has made only three referrals to the African Court. Two of these, *African Commission v Libya*[62] and *African Commission v Kenya*,[63] concern the non-implementation of provisional measures issues by the Commission.[64] This seeming reluctance to refer cases to the Court raises questions about the reasons behind the limited use of what could be a powerful tool

57 African Commission 'Press release on the regional seminar on implementation of the decisions of the Commission' 2017, https://achpr.au.int/en/news/press-releases/2017-08-10/press-release-regional-seminar-implementationdecisions-commis (accessed 8 October 2024).

58 African Commission 'Report of the Second Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights 4-6 September 2018, Zanzibar, Tanzania' 2018, https://achpr.au.int/en/news/communiques/2019-01-09/report-second-regional-seminar (accessed 10 October 2023).

59 R Murray & D Long 'Providing reparation for human rights cases: A practical guide for African states' (2019), https://www.bristol.ac.uk/media-library/sites/law/documents/Guide.pdf (accessed 29 November 2021).

60 Contrast Rule 130(1) of the 2020 Rules with Rule 118(1) of the 2010 Rules of Procedure of the African Commission on Human and Peoples' Rights; see Viljoen (n 6) 374-375.

61 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998 art 5(1)(a) (African Court Protocol).

62 *African Commission on Human and Peoples' Rights v Libya* (Merits) (2016) 1 AfCLR 153; in respect of the same case, see *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2013) 1 AfCLR 145; and *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures 2) (2015) 1 AfCLR 150.

63 *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9.

64 The third case is *African Commission on Human and Peoples' Rights v Libya* (Provisional Measures) (2011) 1 AfCLR 17; see also the African Court's scrapping from the role the merits case (*African Commission on Human and Peoples' Rights v Libya* (Order) (2013) 1 AfCLR 21).

in ensuring compliance. Scholars such as Ayeni and Von Staden have offered a possible explanation for this cautious approach. They argue that referring a case to the African Court may be seen by some as an implicit acknowledgment of the African Commission's own limitations and an indirect admission that the Court may be better equipped to enforce compliance with its decisions.[65] This perception of the African Court as a 'superior' body could contribute to the African Commission's reluctance to make referrals unless necessary.

2.9 Internal special mechanisms: Working Group on Communications

The Working Group on Communications (WGC) was established by the African Commission through Resolution 194.[66] Rule 112 of the African Commission's 2020 Rules of Procedure outlines the procedure for follow-up, which includes a range of functions such as reporting, information gathering, assessment and, arguably, enforcement.[67] The responsibility for coordinating these activities primarily lies with the WGC, which consists of commissioners and members of the Secretariat.[68] Follow-up was initially not included in the mandate of this working group.[69] It was only in October 2012 that the mandate of the WGCs was expanded to include coordination of the follow-up process and the collection of information on the status of implementation of the decisions of the African Commission.[70] However, it should be noted that reports from the WGC, which could serve as a valuable source of such information, have also been irregular and are not consistently available on the African Commission's website.[71] Furthermore, the issue of implementation has only from time to time been included on the agenda, thereby causing the potential role of the WGC in enhancing the implementation of Commission's decisions not to be fully developed.

With respect to information gathering, the African Commission's efforts are often hampered by the lack of responsiveness of states, which makes it difficult to monitor the implementation of its decisions. This

65 Ayeni & Von Staden (n 6) 17.
66 Resolution 194 Establishing a Working Group on Communications and Appointment of Members ACHPR/Res.194(L) 2011, https://achpr.au.int/en/node/772 (accessed 27 November 2024).
67 Rules of Procedure (n 14) Rule 112.
68 Resolution Establishing a Working Group on Communications and Appointment of Members (n 66).
69 As above.
70 Resolution on the Expansion of the Mandate of the Working Group on Communications and Modifying its Composition ACHPR/Res.225(LII) 2012.
71 Viljoen (n 6) 366.

ongoing difficulty in securing timely and meaningful responses from states reveals the gap between the African Commission's procedural efforts and the practical realities of holding states accountable. Given the experience of the Commission with states' general failure to provide information about implementation, it is disappointing that the African Commission has not developed the capacity to effectively gather and record this information.[72] Moreover, effective follow-up has been hampered by the lack of human and material resources at the Secretariat and the fact that commissioners serve on a part-time basis. Viljoen and Louw's 2007 study evaluated 44 cases decided between 1987 and 2003 and found that there had been full implementation in 14 per cent; partial implementation in 32 per cent; situational compliance in 16 per cent; and no implementation in 30 per cent of cases.[73] The African Commission has communicated this problem to stakeholders.[74]

2.10 Other special mechanisms

The 2020 Rules of Procedure empower the African Commission to establish subsidiary mechanisms, including Special Rapporteurs, committees and working groups.[75] The African Commission determines the mandate and terms of reference for each subsidiary mechanism, which is required to present a report on its work at each ordinary session. Currently, the African Commission has established 12 such mechanisms.[76] The commissioner appointed as rapporteur for a particular communication or any other member of the Commission so authorised may 'take such action as may be appropriate' to monitor the implementation of the decision.[77] For instance, the Special Rapporteur on Refugees, Asylum Seekers, Displaced Persons and Migrants in Africa conducted promotion missions in Senegal, Mali and Mauritania to study the situation of refugees in order to find lasting solutions to their problems.[78] As part of these missions, the Special Rapporteur engaged government officials

72 As above.
73 Viljoen & Louw (n 25) 15.
74 See Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties ACHPR/Res.97(XXXX) 06.
75 Rules of Procedure (n 14) Rule 25.
76 African Commission 'Special mechanisms', https://achpr.au.int/en/special-mechanisms (accessed 19 November 2024).
77 Rules of Procedure (n 14) Rules 125(5) & (6).
78 Report of the Mechanism of the Special Rapporteur on the Rights of Refugees, Asylum Seekers and Internally Displaced Persons and Migrants in Africa since its creation at its 52nd ordinary session of the African Commission on Human and Peoples' Rights in Côte d'Ivoire, from 9 to 22 October 2012, https://achpr.au.int/en/intersession-activity-reports/maya-sahli-fadel-refugees-asylum-seekers-migrants-internally (accessed 20 November 2024).

and national human rights institutions and civil society organisations on any measures taken to implement the decisions of the African Commission.[79] It should be noted that the effectiveness of the special mechanisms of the Commission is closely tied to the cooperation of state parties. These mechanisms rely on states to provide timely and accurate information regarding the implementation of the African Commission's decisions. Without the active cooperation and transparent reporting from states, the African Commission's decisions risk remaining without meaningful impact on the ground. Additionally, some special mechanisms, particularly the Special Rapporteur on the Protection of Refugees, Asylum Seekers, Internally Displaced Persons and Migrants in Africa, often face refusals by states to grant permission for promotional and fact-finding missions.[80] This resistance undermines the rapporteur's ability to effectively monitor the implementation of its decisions and assess the human rights situation on the ground.

3 Strengthening the role of the African Commission in enhancing compliance with its decisions

As demonstrated above, the African Commission has utilised several mechanisms, such as promotional missions, implementation hearings, the adoption of resolutions, and many others to enhance compliance by states with its decisions and recommendations. Despite utilising these mechanisms, the African Commission still faces significant challenges in enhancing compliance with its decisions and recommendations by states. While the Commission has made strides in encouraging state compliance through various initiatives, the effectiveness of these mechanisms is often undermined by a range of systemic challenges. Thus, below, the article provides seven strategies to empower and strengthen the African Commission to enhance compliance by states with its decisions. While many strategies could be explored, this article focuses on a select few.

3.1 Creating an implementation unit and a special follow-up mechanism within the African Commission

The creation of an implementation unit within the African Commission has received widespread support, including the recommendations adopted at the two regional seminars, and acknowledgment by

79 Murray & Long (n 6) 845.
80 Report (n 78) para 55.

various actors in human rights protection and promotion.[81] Notably, during the Dakar Seminar, then Commissioner Reine Alapini Gansou stated that the Commission should build its capacity to systematically monitor compliance and keep updated records, in addition to developing collaborative relations with NHRIs, NGOs and other actors who can assist in the collection and publication of information on decisions made by the African Commission.[82] A promising development has been the establishment of the WGC by the African Commission, which is responsible for monitoring the implementation of decisions and collecting information on their progress.[83] With the mandate of collecting information on implementation and reporting on the status of implementation at each ordinary session,[84] the WGC would be best positioned to guide the establishment of an implementation unit within the African Commission. The implementation unit would formalise the follow-up process within the African Commission, ensuring that it remains a priority on its agenda. It would also provide the public with essential information to assess state compliance (or the lack thereof) and support NGOs and NHRIs in strategically planning and structuring their advocacy efforts to enhance compliance with the African Commission's decisions. Therefore, this article recommends the creation of an implementation unit within the African Commission as a crucial strategy to enhance state compliance with its decisions. In addition, as is argued elsewhere in this Special Focus section,[85] a special mechanism dedicated to following up on Commission decisions, in the broadest sense, may also be considered – but in full awareness of potential overlaps between the WGC, an implementation unit and a special mechanism.

3.2 Harnessing the role of national human rights institutions

With the African Commission cooperating with states, NGOs and other relevant stakeholders, harnessing the affiliate status of NHRIs to support the implementation agenda is strategic. The involvement of NHRIs in the state reporting procedures of regional and global human rights bodies, including the submission of alternative

81 Murray & Long (n 59).
82 African Commission 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights in Dakar, Senegal', https://achpr.au.int/en/news/statements/2018-08-29/report-regional-seminar-implementation-decisions-african (accessed 20 October 2024).
83 Resolution (n 70).
84 As above.
85 C Okoloise 'Systematising monitoring: The case for a special mechanism for following up on the implementation of decisions by the African Commission on Human and Peoples' Rights' (2024) 24 *African Human Rights Law Journal* 985.

reports, is a recognised and established practice. Specifically, the African Commission's 2020 Rules of Procedure stipulate that those institutions and organisations, or any interested party, may contribute to the assessment of state reports by submitting written input, including shadow or alternative reports.[86] These institutions are well-positioned to advocate the implementation of the African Commission's decisions in their respective countries. For instance, the Kenya National Commission on Human Rights (KNCHR) has been advising the Kenyan government on measures needed to implement the African Commission's decision in the *Endorois* case. The KNCHR has organised sensitisation meetings with the Endorois community and engaged with different state and non-state actors in a bid to catalyse implementation of the decisions.[87]

To strengthen its implementation role, the African Commission could consider developing guidelines for NHRIs, building on the guidelines already established by the Network of African National Human Rights Institutions (NANHRIs).[88] These are a set of principles that guide NHRIs when following up on and monitoring the recommendations and decisions of the African Commission.[89] They stipulate that NHRIs should provide reliable, accurate and regular information to the Commission on the level of implementation of and compliance by the state with its decisions.[90] They require NHRIs to provide technical assistance to the state in the implementation of decisions of the African Commission as well as to adopt a victim-centred approach to monitoring the implementation of these decisions.[91] Thus, the African Commission should engage with these guidelines, make recommendations for how they may be improved, and consider working out a plan with NANHRIs for their dissemination. Additionally, the African Commission should formally acknowledge and endorse these guidelines, either through a press release or a resolution, as they are fundamental to enhancing the compliance of its decisions by states. By publicly affirming the importance of these guidelines, the Commission would not only reinforce their significance but also signal to member states its commitment to

86 Rules of Procedure (n 14) Rule 79(3).
87 Kenya National Human Rights Commission 'Latest on *Endorois* case', https://www.knchr.org/articles/artmid/2432/articleid/1022/latest-on-endorois-case (accessed 20 October 2023).
88 Network of African National Human Rights Institutions (NANHRIs) 'The role of NHRIs in monitoring implementation of recommendations of the African Commission on Human and Peoples´ Rights and judgments of the African Court on Human and Peoples´ Rights', https://www.bristol.ac.uk/medialibrary/sites/law/hric/Guidelines%20final%20English%20Version.pdf (accessed 11 November 2024).
89 As above.
90 NANHRIs (n 88) 8.
91 As above.

strengthening compliance mechanisms. This endorsement could serve as a critical step towards ensuring that states are more accountable in implementing the African Commission's decisions, ultimately advancing the protection of human rights across the continent.

3.3 Addressing the lack of information about the existence of decisions and the status of their implementation

Addressing the lack of information[92] about the existence of African Commission decisions and the status of their implementation is crucial for upholding human rights in Africa. Transparency, accessibility and active engagement with stakeholders are key to ensuring that these decisions are effective in promoting and protecting the rights of individuals and communities across the continent. By collaborating with a range of stakeholders, both governmental and non-governmental, the African Commission can harness the strength of collective advocacy to promote the widespread awareness and acceptance of its decisions. The African Commission has the capacity to initiate information campaigns regarding its decisions relevant to specific countries, thereby enabling local constituents to exert pressure on their representatives to adhere to these rulings. CSOs and local communities assume pivotal roles in disseminating information about these decisions and actively advocating their execution.[93] Through public pressure and well-organised advocacy initiatives, state parties can be compelled to take the necessary actions.

The African Commission can efficiently gather information on the implementation of its decisions without significant additional resource allocation by seamlessly integrating this data collection process into its existing activities. States could be encouraged to include updates on the status of decision implementation in their periodic state reports, as was expressly done in the case of *Legal Resources Foundation v Zambia*.[94] The African Commission expressly stated in its decision a clear recommendation to the state of Zambia to include information on the progress of implementation in its upcoming periodic report.[95] Additionally, the African Commission's missions

92 See also, in this Special Focus section, VO Ayeni 'The role of the African Commission in enhancing implementation monitoring through dialogue and documentation' (2024) 24 *African Human Rights Law Journal* 937.

93 The Institute on Human Rights and Democratisation in Africa (IHRDA) publicises decisions and conducts advocacy on their implementation, https://www.ihrda.org/category/implementation-of-decisions/ (accessed 15 October 2024).

94 *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) paras 75-76.

95 Murray & Long (n 59).

can serve as opportunities to engage with officials and complainants, conduct on-site assessments, and evaluate the measures taken in response to its decisions.[96] Further, the Commission could also collaborate with other international agencies, such as those within the United Nations (UN) and AU, by sharing information regarding the pertinent decision and inviting them to provide relevant updates on implementation progress.

3.4 Encouraging the adoption of national implementation authorities

Taking inspiration from African sub-regional mechanisms that have guides to states to establish national authorities to oversee the execution of their decisions, the African Commission can consider adopting a similar approach. The Economic Community of West African States (ECOWAS) Community Court of Justice has devised a method of implementing its decisions, which are in the form of a writ of execution. Articles 24(3) and (4) of the Supplementary Protocol provide that upon the verification by the appointed authority of the recipient member state that the writ is from the Court, the writ shall be enforced..[97] It further states that all member states shall determine the competent national authority for the purpose of recipient and processing of execution and notify the Court accordingly.[98] However, there is no information demonstrating how member states apply this article in practice. The African Commission should similarly guide state parties to the African Charter to designate a competent national authority responsible for the implementation of its decisions, a provision that is currently absent in both the African Charter and the Rules of Procedure of the African Commission.

3.5 Developing a standard guideline for conducting implementation hearings

The primary challenge hindering the effectiveness of implementation hearings in ensuring compliance with the African Commission's decisions by states is the absence of standardised guidelines within the African Commission. Neither the African Charter nor the 2020 Rules of Procedure of the African Commission establish a consistent or coherent approach regarding when and where implementation hearings should be held, who should attend, or what the expectations

96 *Modise v Botswana* (2000) AHRLR 25 (ACHPR 1997).
97 Supplementary Protocol (A.SP.1/01/05) of 2005.
98 Supplementary Protocol (n 97) art 4.

are for the parties involved.[99] As a result, the process remains largely *ad hoc*, with litigants and CSOs often taking the lead in facilitating these hearings.[100] The lack of standardised procedures has made it difficult for the African Commission to consistently hold implementation hearings to monitor the compliance of its decisions.[101] To enhance compliance with its decisions, the Commission should adopt clear guidelines for conducting implementation hearings, including provisions for joint hearings and hearings *in situ*. These guidelines should specify the list of delegates to attend, with a particular emphasis on ensuring the presence of key state representatives from institutions central to the implementation of reparation measures, such as judges, prosecutors and relevant ministry officials, as well as the victims of human rights violations. Their presence is crucial, as they can assume responsibility for ensuring implementation and catalyse significant action at the domestic level, driving important dynamics across various institutions and branches of government, beyond just the executive. While there is no direct causal link between an implementation hearing and the eventual implementation of decisions, such hearings play a vital role in maintaining ongoing dialogue, keeping cases on the radar, and helping the African Commission better understand the challenges states face in implementing decisions.[102] Additionally, implementation hearings foster a three-way dialogue between the African Commission, victims of human rights violations and the state party accused of violation. This dialogue is crucial for addressing implementation challenges and expediting the fulfilment of the Commission's decisions.

3.6 Establishing a procedure or guideline for determining compensation or reparations for victims

The African Commission has no separate procedure, written or oral, to determine the compensations or reparations to be made following the finding of a violation.[103] Thus, the Commission should establish a clear procedure or set of guidelines to determine the amount of compensation to be awarded to victims. In the Inter-American system, there is a procedure in place to determine the amount of compensation to be awarded to a victim.[104] A trend analysis on the practice of the African Commission shows that it has been referring

99 C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: What role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 81.
100 As above.
101 As above.
102 Ayeni and Von Staden (n 6) 15.
103 Murray (n 6) 12.
104 Viljoen and Louw (n 25) 22.

victims back to the domestic courts to be compensated. For instance, in *Embga Mekongo Louis v Cameroon*[105] the African Commission found that Cameroon had violated article 7 of the African Charter, which guarantees the right to a fair trial. The Commission concluded that Embga Mekongo Louis had suffered damages as a result of the violation. However, due to the Commission's inability to determine the exact amount of damages, it recommended that the quantum of compensation should be determined in accordance with the relevant laws of Cameroon.[106] The African Commission's referral to the laws of Cameroon was prompted by its lack of clear guideline to assess and determine the appropriate amount of damages for Embga Mekongo Louis.[107] Not surprisingly, Cameroon did not comply with the African Commission's decisions. Thus, the lack of a policy guideline to determine the quantum of damages in awarding compensation to victims is a factor that has negatively influenced state compliance with the decisions of the Commission. This article recommends that the Commission develop clear guidelines for awarding compensation, following consultations with state delegations, national human rights institutions, CSOs and other international bodies, a procedure that has been developed in the Inter-American human rights system.

3.7 Forging strong collaborative partnerships with AU policy organs

The involvement of AU policy organs[108] is crucial for the effective monitoring of the African Commission's decisions. These organs provide vital political support and serve as key intermediaries between the African Commission and member states. The Commission should create a strong partnership and collaboration with the Permanent Representatives Committee (PRC), which conducts the day-to-day business of the AU on behalf of the Assembly and Executive Council.[109] The PRC meets at least once a month and is empowered by its Rules of Procedure to monitor the implementation of policies, decisions, and agreements adopted by the Executive Council.[110] Many human rights-related decisions made by the Executive Council

105 *Embga Mekongo v Cameroon* (2000) AHRLR 56 (ACHPR 1995).
106 *Embga Mekongo* (n 105) para 2.
107 Viljoen & Louw (n 25) 23.
108 See also, in this Special Focus section, NR Purmah 'Diplomatic mechanisms as a springboard to enhance the implementation of decisions by the African Commission on Human and Peoples' Rights with specific reference to persons with disabilities' (2024) 24 *African Human Rights Law Journal* 962.
109 The Permanent Representative Committee, https://au.int/en/pages/permanent-representatives-committee-prc#:~:text=The%20Permanent%20Representatives%20Committee%20(PRC,are%20members%20of%20the%20PRC (accessed 10 November 2024).
110 Ayeni & Von Staden (n 6) 14.

or the AU Assembly are first debated within the PRC. Therefore, the African Commission can deepen its collaboration with the PRC by inviting its representatives to participate in key sessions, such as the Pre-Session Forum of States Parties to the African Charter on Human and Peoples' Rights.[111] In addition to political support, the PRC can assist the African Commission in securing the necessary funding to fulfil its protection and promotion mandate. It can also advocate the African Commission to operate on a full-time basis to enhance its effectiveness. The PRC can play a pivotal role in encouraging the implementation of the Commission's decisions by engaging or influencing the Executive Council to establish proper procedures for follow-up on the implementation of decisions akin to the Committee of Ministers in the Council of Europe and their role in the enforcement of European Court decisions.

4 Conclusion

It is widely recognised that the work of the African Commission is indispensable to upholding human rights across Africa. The African Commission's Rules and institutional practice could potentially be effective tools in ensuring implementation of decisions, as is evident from the rare instances in which compliance has been registered. However, the rate of implementation remains regrettably low, largely as a consequence of this potential for effectiveness not having been harnessed by the African Commission. This article concludes that the African Commission stands to register higher compliance with its remedial orders by hedging the relationships it has with core stakeholders such as NHRIs, CSOs, other human rights organs in the AU as well as the policy organs in Addis Ababa. These institutions all have roles to play within the scheme of the African Charter and the Rules of the Commission. These roles require the initiative of the African Commission to be fully exploited. It is also ever more urgent for the African Commission to implement the vital recommendations that have been made by stakeholders, chief among these the establishment of an implementation unit tasked with monitoring implementation as well as the development of an implementation database. With a concerted, systemic and consistent effort, informed by taking inventory of its performance, the African Commission is more than able to enhance its existing initiatives and develop an implementation mechanism that can bolster its mandate.

111 Invitation to the 1st Edition of the Pre-Session Forum of States Parties to the African Charter on Human and Peoples' Rights, Banjul, The Gambia, 15-16 October 2024, https://achpr.au.int/en/news/announcements/2024-09-30/1st-edition-pre-session-forum-states-parties (accessed 10 November 2024).

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Decoding implementation of African Commission on Human and Peoples' Rights decisions on communications in Botswana, Kenya and Ethiopia

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Summary: *This article evaluates the implementation status of decisions by the African Commission on Human and Peoples' Rights on individual communications involving Botswana, Ethiopia and Kenya. The analysis includes all publicly-available decisions on the merits against these countries as at the end of 2022. The primary objective is to determine whether these states have complied with the Commission's decisions. The findings indicate that none of the three countries has fully complied with the decisions. Kenya has partially implemented two of the three decisions against it, while Botswana has only partially complied with one out of four decisions. Ethiopia has not complied with either of the two decisions against it. The article also reveals that the Commission's monitoring of the implementation of its recommendations has been*

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generally inadequate, except for the Endorois *case against Kenya, where it undertook relatively commendable follow-up.*

Key words: *African Commission; communications; decisions; implementation; follow-up; Botswana; Ethiopia; Kenya*

1 Introduction

Inaugurated on 2 November 1987, the African Commission on Human and Peoples' Rights (African Commission) is the continent's oldest human rights-monitoring body, responsible for promoting and protecting human and peoples' rights by interpreting and monitoring the implementation of the African Charter on Human and Peoples' Rights (African Charter), which established and defines its roles.[1] It fulfils its protective mandate by adjudicating individual complaints[2] submitted against member states to the African Charter and rendering decisions with remedial measures, termed 'recommendations', as a matter of principle when violations are found, although 'recommendations' may also be included in exceptional cases without finding violations.[3] The 'recommendations', which are often understood as not binding by themselves,[4] arguably become binding once included in the Commission's activity reports and adopted by the political organs of the African Union (AU).[5]

In its nearly four decades of operation, the African Commission has received hundreds of alleged cases of human rights violations through its individual complaints procedure and has in many instances found states in violation. While its decisions are often progressive, they are rarely effectively implemented.[6] This implementation gap has been

1 Arts 30 & 45 African Charter.
2 Art 55 African Charter.
3 See eg *Interights & Others (on behalf of Bosch) v Botswana* (2003) AHRLR 55 (ACHPR 2003) (*Bosch*).
4 The African Commission considers the African Charter, thereby its decisions on individual communications, as imposing obligations on states per art 1 of the African Charter. R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 13. See eg *International Pen & Others (on behalf of Saro-Wiwa) v Nigeria* (2000) AHRLR 212 (ACHPR 1998) paras 113-116.
5 F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 48 *Journal of African Law*; C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 30; G Sowe & E Bizimana 'Implementation of human rights decisions in the African human rights system' in R Murray and D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 79.
6 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American*

attributed to different interplaying factors, including those related to the Commission, the decisions, and the implementing states.[7]

This article aims to contribute to the discourse by assessing the implementation status of decisions against the three states and the follow-up measures taken by the African Commission. As of 2022, there were four publicly-available Commission decisions against Botswana: *Spilg & Other v Botswana* (*Spilg*);[8] *Interights & Ditshwanelo v Botswana* (*Interights*);[9] *Modise v Botswana (Modise*);[10] and *Good v Botswana* (*Good*).[11] For Kenya, there were three decisions: *Ouko v Kenya* (*Ouko*);[12] *Centre for Minority Rights Development & Others v Kenya* (*Endorois*);[13] and *Nubian Community in Kenya v Kenya* (*Nubian*).[14] Ethiopia has had two decisions: *Haregewoin Gabre-Selassie and Institute for Human Rights and Development in Africa (IHRDA) v Ethiopia* (*Dergue Officials*);[15] and *Equality Now and Ethiopian Women Lawyers Association (EWLA) v Ethiopia* (*Equality Now*).[16]

The article is structured into five main parts. The first part is this introduction. The second part defines 'implementation' and outlines factors influencing it, laying the foundation for the discussion. The third part introduces the decisions against each state, highlighting the recommendations issued. The fourth part, which is at the crux of the article, assesses states' implementation status. The article concludes with a summary of findings and key recommendations.

Journal of International Law 2-6; F Viljoen & V Ayeni 'A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: Case studies of Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe' (2022) 26 *International Journal of Human Rights* 1651; Okoloise (n 5) 42-46; M Mutua 'Looking past the Human Rights Committee: An argument for demarginalising enforcement' (1998) 4 *Buffalo Human Rights Law Journal* 239; Murray & Long (n 4); Sowe & Bizimana (n 5) 79-80.

7 Viljoen & Louw (n 6) 12-31; GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 468. See also report of the meeting of the brainstorming meeting on the African Commission on Human and Peoples' Rights 9-10 May 2006, Banjul, The Gambia para 66.

8 *Spilg & Others v Botswana* (2011) AHRLR 3 (ACHPR 2011).

9 *Interights & Ditshwanelo v Botswana* Communication 319/06 African Commission (*Interights*).

10 *Modise v Botswana* (2000) AHRLR 30 (ACHPR 2000).

11 *Good v Botswana* (2010) AHRLR 43 (ACHPR 2010).

12 *Ouko v Kenya* (2000) AHRLR 135 (ACHPR 2000).

13 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).

14 *The Nubian Community in Kenya v Kenya* Communication 317/2006 African Commission, 38th Annual Activity Report (2015).

15 *Haregewoin Gabre-Selassie and IHRDA v Ethiopia* Communication 301/05, African Commission (*Dergue Officials*).

16 *Equality Now EWLA v Ethiopia* Communication 341/2007, African Commission (*Equality Now*).

2 Conceptualising implementation

Drawing on existing scholarly works,[17] the article approaches implementation as the process and steps that states take in response to decisions against them by the African Commission. It is the linchpin in the long journey toward vindication of victims of rights violations; as rightly observed, '[a] decision is as good as its implementation and what matters to victims is that decisions are complied with'.[18]

The issue of implementation defies a single explanation, as it is not a linear process but rather a dynamic one shaped by different factors.[19] Thus, any inquiry into the implementation status of decisions and the variables at play requires consideration of these dynamics. It typically entails gathering information on the measures states adopt to implement decisions, evaluating their progress based on this data, and systematically categorising their compliance level.[20] In this regard, extensive research exists across various forms, including case studies on specific human rights bodies and rulings, country-level analyses, and comparative approaches across different judicial bodies or states, where scholars and other stakeholders assess and gauge the extent of compliance.[21] Viljoen and Louw investigate the steps taken by states to comply with the recommendations made in those decisions and classify the implementation status into five categories: full compliance, where states fully and timely comply with the recommendations; non-compliance, where states fail to implement any recommendations; partial compliance, where states make partial progress without full compliance; situational compliance, where compliance, either full or partial, results from changes in 'circumstances (or situations)' that coincidentally align with the Commission's decisions; and unclear compliance, where there is no information on compliance status.[22] This article uses this categorisation to assess states' implementation status.

The investigation of factors influencing implementation status is another critical aspect of research on implementation that is relevant

17 R Murray & D Long 'Introduction to the research handbook on implementation of human rights in practice' in Murray & Long (n 5) 2; J Biegon 'Implementation in the African regional human rights system: Profiling case studies on trends and patterns in East Africa' in J Biegon (ed) *Silver granules in stretches of sand: Implementation of decisions of regional human rights treaty bodies in East Africa* (2020) 12-13; Viljoen & Louw (n 6) 4-8; R Murray 'Addressing the implementation crisis: Securing reparation and righting wrongs' (2020) 12 *Journal of Human Rights Practice* 6; Murray & Long (n 4) 27.
18 Sowe & Bizimana (n 5) 79-80 (abstract).
19 Viljoen & Louw (n 6) 7; Murray (n 17) 2.
20 Viljoen & Louw (n 6) 4-8.
21 Refer to the sources cited between nn 5 & 10.
22 Viljoen & Louw (n 6) 4-8.

to the article. Existing research has pinpointed various factors,[23] with the key factors relevant to the article discussed in four groups as follows.

The first category pertains to the issues involved in a specific decision and the nature of the remedies prescribed therein.[24] For example, decisions with clear and specific remedies are often seen as more effective in promoting their implementation than those with vague or general remedies.[25] In the context of the rulings made against the selected states, the article considers, in passing, how these factors play out.

The second category includes factors relating to the institution from which the decisions emanate. It has been argued that several factors linked to the decision-making body, including perceptions of the binding or non-binding nature of its findings (though considered to have limited impact),[26] its legitimacy, and the extent of its follow-up measures, may play a role in explaining status of implementation.[27] In this article, the primary focus is on 'monitoring and follow up' as a factor in the implementation process, while leaving out other factors such as its quasi-judicial nature and the non-binding nature of its decisions, as these apply uniformly to all case studies and do not account for variations in compliance.[28]

The third set of factors influencing implementation stems from the legal, political and social conditions within the states responsible for implementation.[29] For example, it has been suggested that states with stronger human rights records at the time of implementation tend to comply more readily than those with weaker ones.[30] In this regard, the article highlights whether the implementation status of the selected states correlates with their human rights records, assessing whether Botswana, with a stronger human rights record, exhibits better compliance than Kenya and Ethiopia.

The final set of factors concerns the role different stakeholders play in the implementation of decisions. For example, it is suggested that the involvement of complainants (victims and their legal

23 See eg Viljoen & Louw (n 6) 4-8; Murray & Long (n 4) 31-43; Murray & Long (n 17) 3-13.
24 Viljoen & Louw (n 6) 4-8; Murray & Long (n 17)10.
25 Murray (n 17) 4-5; Viljoen & Louw (n 6) 7; Murray & Long (n 4) 22.
26 Murray (n 17) 9.
27 For a more detailed discussion on factors related to the African Commission, see Viljoen & Louw (n 6) 13-17.
28 Viljoen & Louw (n 6) 12.
29 Murray & Long (n 17) 11; Viljoen & Louw (n 6) 23-28.
30 Viljoen & Louw (n 6) 23-28; Sowe & Bizimana (n 5) 79.

representatives) in follow-up efforts, along with increased awareness and active participation from civil society organisations and media in the concerned states, enhances the likelihood of implementation.[31] As far as available information allows, this article considers how these factors play out in the selected states. It is important to note that the factors discussed in the four groups above are not exhaustive, and the presence of one or more factors does not automatically result in implementation, as the process involves a complex interplay of various dynamics.

3 Communications: African Commission's decisions against Botswana, Kenya and Ethiopia

3.1 Justifying the selection of countries

The African Commission has rendered decisions against many African states, and due to limitations of space and time, it is not feasible to address all decisions. Therefore, the authors have chosen to focus on three states as case studies, taking into account various criteria. These criteria include their representation of varying human rights records, the presence of two or more decisions against them, the reasonable time they have had to implement the decisions, and the landmark nature of the decision.

The first criterion, the representation of states with varied human rights records, is used in selecting the case study states as it provides an opportunity to highlight whether a correlation exists between a country's human rights record and its adherence to the Commission's decisions. The human rights records used to select the three countries are based on assessments from Freedom House and the Cato Institute at the time the Commission's decisions were expected to be implemented. Freedom House has rated Botswana as 'free' since 1973, and all decisions made by the Commission against it, along with their expected implementation times, fall within this period.[32] Ethiopia has been rated 'not free' since 2011,[33] and both

31 Murray (n 17) 11; Murray & Long (n 4) 69-86.

32 R Lekalake 'Botswana's democratic consolidation: What will it take?' (2016) 30 Afrobarometer Policy Paper 1, https://www.afrobarometer.org/wp-content/uploads/2022/02/ab_r6_policypaperno30_democracy_in_botswana.pdf (accessed 11 August 2024); Freedom House 'Freedom in the world 2024: Botswana', https://freedomhouse.org/country/botswana/freedom-world/2024 (accessed 11 August 2024).

33 The findings of Freedom in the World 2011 include events from 1 January 2010 to 31 December 2010. See 'Freedom in the World 2011' 232, https://freedomhouse.org/sites/default/files/2020-02/FIW_2011_Report_PDF.pdf (accessed 23 August 2024); Freedom House 'Freedom in the World 2024:

Commission's decisions against it fall within this period. Turning to Kenya, since 2003 (covering events from a January to 31 December 2002) it has been rated 'partly free',[34] and the implementation periods for all three decisions against it, including the *Ouko* case from before January 2002, fall within this 'partly free' status. Although *Ouko* was decided in November 2000, Kenya could only be notified about the decision after the Assembly of the Organisation of African Unity (OAU) (now the African Union (AU)) considered and adopted the Commission's annual activities report (which included the *Ouko* case) in July 2001, marking the start of the implementation period.[35] Since Kenya did not implement the decision during the five-month window between July 2001 and the start of its 'partly free' status in January 2002, the implementation period for the decision extended into the 'partly free' period, aligning logically with the selection criteria for this article.[36] These Freedom House ratings correspond with Cato Institute's annual Human Freedom Index rankings of the three countries. When comparing the rankings of the three countries by the Cato Institute during the periods when the decisions against them were expected to be implemented, Botswana consistently ranks highest among the three, followed by Kenya and Ethiopia.[37]

The second criterion considered is the issuance of two or more decisions against the states in question by the Commission, allowing for an analysis of whether states respond differently to different decisions and, if so, what factors might explain these differences. Consequently, the selected countries each had two or more decisions rendered against them: Botswana had four, Kenya had three, and Ethiopia had two.

Ethiopia', https://freedomhouse.org/country/ethiopia/freedom-world/2024 (accessed 24 August 2024).

34 Freedom House 'Freedom in the world-2003' (2003) 299, https://freedomhouse.org/sites/default/files/2020-02/Freedom_in_the_World_2003_complete_book.pdf (accessed 23 August 2024).

35 The 14th Annual Activity Report of the African Commission, which included the decision in *Ouko,* was adopted by the Assembly of OAU in July 2001. See the 14th Annual Activity Report of the Commission (2000-2001) 73-77. The Ouko decision text states July 2000 as the notification date, but this likely reflects a typographical error, as notification would have occurred after the Assembly of OAU's adoption of the Commission's annual activities report in July 2001, in line with art 59 of the African Charter and the codified practices in subsequent Rules of Procedure of the Commission (2010 and 2020).

36 The findings of Freedom in the World 2003 include events from 1 January 2002 to 31 December 2002. See Freedom House (n 34).

37 The Cato Institute 'The human freedom index 2019' (2019) 95, 153 & 213, https://www.cato.org/sites/cato.org/files/human-freedom-index-files/human-freedom-index-2019.pdf (accessed 12 October 2024). The ranking from 2008 to 2017 for the three countries is included in this report. See 'Human freedom index 2019' for the rankings of the three countries from 2000 onwards 91, 153 & 213, https://www.cato.org/sites/cato.org/files/2023-12/human-freedom-index-2023-full-revised.pdf (accessed 22 August 2024).

Building on this, the third criterion is whether a reasonable amount of time had elapsed, considered sufficient for compliance, between the issuance of the decisions against the states and the time of writing this article. Recognising that the 'reasonable time' for implementation differs based on the nature of recommendations and a country's capacity, both of which play a role in assessing the reasonableness of the time needed for implementation in a specific decision, the authors chose to select states against which decisions were made as long ago as possible. This strategy is used to ensure, as much as possible, that sufficient time has passed for compliance with each decision under consideration, irrespective of the nature of the recommendations issued or the capacities of the states urged to implement them. Thus, the selection of the three states was made with this consideration, as the decisions against them were rendered several years ago, albeit with differences in the exact duration, with the most recent decisions being approximately a decade old. This relatively long implementation window minimises the risk of premature judgments about states' implementation statuses. It also prevents the differences in elapsed time from becoming a primary explanation for variations in implementation, whether by decision or among states, allowing for greater emphasis on other factors that influence implementation and avoiding skewed comparisons among the states.

The other factor that influenced the selection of the three states as case studies for this article is the ground-breaking and celebrated nature of some of the Commission's decisions against them. These decisions were notable for establishing norms, setting precedents, or addressing critical domestic concerns. For instance, *Endorois* was celebrated as the first legal recognition of African indigenous peoples' rights over traditionally-owned land,[38] and *Equality Now* is the Commission's first decision on rape, abduction and the forced marriage of a child.[39] Likewise, complaints decided against Botswana are worthy of follow up, as the issues addressed in these complaints, particularly those related to the use of capital punishment, are contentious human rights issues in the country.

38 Human Rights Watch 'Kenya: Landmark ruling on indigenous land rights' 4 February 2010, https://www.hrw.org/news/2010/02/04/kenya-landmark-ruling-indigenous-land-rights (accessed 23 August 2024); ESCR-Net 'The *Endorois* case' 5 June 2018, https://www.escr-net.org/resources/the-endorois-case/ (accessed 23 August 2024). See also G Pentassuglia 'Indigenous groups and the developing jurisprudence of the African Commission on Human and Peoples' Rights: Some reflections' (2010) *UCL Human Rights Review* 150 163.

39 Equality Now 'Victory for Makeda' 3 March 2016, https://equalitynow.org/news_and_insights/victory-for-makedavictory_for_makeda/ (accessed 23 August 2024); Tackling Violence against Women website 'Equality Now and *EWLA v Ethiopia*', https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/makeda/ (accessed 11 August 2024).

In the next part the article discusses, country by country, the nature of the complaints where these countries were found in violation and the recommendations issued by the Commission.

3.2 Botswana

The four merit decisions against Botswana involve causes of action related to the use of capital punishment, erasure of citizenship and deportation. Each is discussed in turn.

3.2.1 Spilg & Others v Botswana

The *Spilg* case dealt with the imposition of capital punishment on Kobedi for murder and his secret execution, which occurred after the complaint had reached the Commission but before it acted.[40] The complaint challenged Botswana's actions and omissions related to capital punishment as violations of the African Charter, specifically, the mandatory death penalty for murder, execution by hanging, the disregard of crucial evidence presented in Kobedi's defence, and the denial of farewells before executions.[41] These conducts, according to the complaint, violated articles 2, 3, 4, 5 and 7 of the African Charter.[42]

The Commission, however, found Botswana responsible for only one of these claims, namely, failing to notify the family or legal representatives of the pending execution, which was deemed a violation of article 5.[43] This decision echoed the Commission's prior stance in *Bosch*, where it emphasised the importance of a humane approach to executions, including granting condemned individuals time with family and access to spiritual support.[44] The remaining claims, including one that challenged 'hanging' as cruel, inhuman or degrading punishment, were not deemed violations.

In terms of remedy, the Commission issued three explicit recommendations to Botswana:[45] first, to align with the resolution urging states to envisage a moratorium on the death penalty; second, to abolish capital punishment; and, third, to submit a compliance report (as part of its periodic report). The first and the third recommendations were also issued in *Bosch*, despite no

40 *Spilg* (n 8) para 9.
41 *Spilg* (n 8) paras 4-9.
42 *Spilg* (n 8) para 6.
43 *Spilg* (n 8) para 177.
44 *Bosch* (n 3) para 41.
45 *Spilg* (n 8) para 9.

violations having been found.[46] Implicitly, the Commission also suggests banning executions without prior notice, deeming it cruel and inhumane punishment.[47]

3.2.2 Interights & Ditshwanelo v Botswana

The *Interights* case was brought in 2006 on behalf of Ping, who was sentenced to death for murder.[48] The complainant argued violations of the African Charter on several grounds: first, that the death penalty violates the right to life; second, that Botswana's system of appointed (*pro deo*) counsel in capital cases uses inexperienced and unqualified lawyers, leading to arbitrary decisions on the death penalty; third, that mandatory capital punishment without considering mitigating circumstances is arbitrary; fourth, that failing to notify the victim's family and legal counsel before execution, and that the subsequent denial of handing the body to the family for burial violated the African Charter; and, finally, that using hanging as an execution method constitutes cruel and inhuman punishment.[49] The Commission found violations of the Charter, but solely on the last two grounds. It emphasised that the use of 'hanging' as an execution method, and the secrecy surrounding the process of execution, which deprived the victim's family and lawyers of final farewells, amounted to cruel and inhuman treatment.[50] This ruling is landmark because it differs from *Spilg* above, where 'hanging' was deemed not to violate article 5 unless its application to a specific individual was shown to be cruel, inhuman or degrading.[51]

The Commission issued four explicit recommendations to Botswana:[52] first, to review its laws aimed at compensating the victim's family; second, to impose a moratorium on the death penalty; third, to take steps toward the abolition of the death penalty; and, fourth, to submit a report within 180 days detailing measures taken to implement these recommendations. Implicit recommendations, such as banning 'hanging' due to its cruelty, and ensuring pre-execution notice and family visits, could also be implied from the Commission's findings.

46 *Bosch* (n 3) para 52.
47 *Spilg* (n 8) para 177.
48 *Interights* (n 9) para 2.
49 *Interights* (n 9) paras 6, 39, 57-59, 67-68 & 87-96.
50 *Interights* (n 9) paras 87-96.
51 As above.
52 *Interights* (n 9) para 99.

3.2.3 Modise v Botswana

The *Modise* case, a prominent case on 'citizenship erasure', addresses state persecution of a political figure through citizenship revocation.[53] It involved a political figure named John Modise. Born in South Africa to Botswanan parents, Modise grew up in Botswana and lived as a citizen without citizenship issues for years. [54] However, in 1978, shortly after establishing and leading an opposition party, he was declared a non-citizen without the opportunity to contest the decision, and deported to South Africa.[55] Despite multiple attempts to re-enter Botswana, Modise failed each time.[56] This forced him to stay in the 'homeland' of Bophuthatswana for eight years, 'and then for additional time in "No Man's Land"'.[57] Eventually, he was permitted to re-enter Botswana on humanitarian grounds but was granted temporary residence, renewable every three months at the discretion of the authorities.[58]

In its decision in 2000, the African Commission held Botswana responsible for multiple breaches of the African Charter. Botswana was found culpable for depriving Modise of his nationality and deporting him four times, thereby subjecting him to personal anguish and indignity in violation of article 5 of the Charter.[59] The Commission also found violations of the right to political participation (article 13) due to the denial of citizenship and deportations resulting from his political activity; the right to property (article 14) due to Botswana's confiscation of his belongings; the right to family life (article 18) due to disruption caused by his deportations; the right to equal protection (article 3(2)) and the right to recognition of one's legal status (article 5) due to the unjustified denial of his citizenship; and the right to freedom of movement (article 12) due to his incessant deportations and their resulting hardships.[60]

To redress these violations, the Commission urged Botswana to compensate Modise and grant him citizenship by descent. It, however, did not require Botswana to report on steps taken to implement these recommendations.

53 B Manby 'Citizenship erasure: The arbitrary retroactive non-recognition of citizenships' in The Institute on Statelessness and Inclusion *The world's stateless: Deprivation of nationality* (2020) 197.
54 *Modise* (n 10) para 89.
55 *Modise* (n 10) para 3.
56 *Modise* (n 10) paras 4-5.
57 *Modise* (n 10) para 92.
58 As above.
59 *Modise* (n 10) para 92.
60 *Modise* (n 10) paras 89-97.

3.2.4 Good v Botswana

The *Good* case dealt with the deportation in 2005 of Mr Good, an Australian national and former political science professor at the University of Botswana. His deportation followed a declaration by the country's President labelling him a 'prohibited immigrant' after he co-authored an article criticising presidential succession in Botswana.[61] This declaration was made without providing reasons to Mr Good or giving him an opportunity to contest it.[62] His expulsion was carried out with less than three days' notice, depriving him of time to arrange for the care of his minor daughter.[63] Pursuant to the Botswana Immigration Act, such declarations are not subject to judicial review, and Mr Good's petition to domestic courts proved futile.[64]

The Commission, in its first decision that looked at academic freedom in detail, held Botswana responsible for violating the victim's right to a fair trial, due to the lack of opportunity for Mr Good to be heard regarding his expulsion;[65] the right to access information, as he was denied knowledge of the reasons for his expulsion;[66] the right to freedom of expression, since he was expelled for expressing his views;[67] protection from arbitrary expulsion under article 12(4), as the expulsion was not justified by legitimate reasons and he was not given a chance to contest the decision; [68] the protection to family life under article 18, due to the hasty manner in which the expulsion was carried out without allowing Mr Good to make arrangements for the care of his minor daughter;[69] the right to equality and non-discrimination, because he was expelled for his political views;[70] and general state obligations under article 1 of the Charter, due to the violations listed above.[71]

In light of these violations, the Commission issued two recommendations.[72] It urged Botswana to pay adequate compensation to Mr Good for the losses and costs incurred because of the violations, including lost remuneration and benefits due to his expulsion, and legal costs incurred during litigation in domestic

61 *Good* (n 11) paras 3-4, 119 & 126.
62 *Good* (n 11) paras 4, 124-126, 160-180 & 213.
63 As above.
64 *Good* (n 11) paras 179-180.
65 *Good* (n 11) paras 160-180.
66 *Good* (n 11) para 195.
67 *Good* (n 11) para 200.
68 *Good* (n 11) paras 201-208.
69 *Good* (n 11) paras 209-215.
70 *Good* (n 11) paras 216-225.
71 *Good* (n 11) para 241.
72 *Good* (n 11) para 244.

courts and before the Commission. It also urged Botswana to ensure that the provisions of the Botswana Immigration Act and its practices conform to international human rights standards, particularly the African Charter. As in the *Modise* case above, the Commission did not require Botswana to report on steps taken to implement these recommendations.

3.3 Kenya

The African Commission made three decisions on merit against Kenya: one on persecution for criticising the government, and two on human rights violations against peoples, including issues related to eviction from land and discriminatory practices. The details of each case, including findings and recommendations, are discussed below.

3.3.1 Ouko v Kenya

The *Ouko* case involved human rights violations against Mr Ouko, a former Kenyan student union leader, who was arbitrarily arrested, detained in inhumane conditions, and forced into exile for criticising the government, particularly regarding the lack of justice in his uncle's murder.[73] Fearing further persecution, he fled Kenya to Uganda and then to the Democratic Republic of the Congo (DRC), where he was kidnapped and forced to work for rebels.[74] In his complaint to the Commission, Mr Ouko alleged violations of his rights to dignity, liberty, expression, association and movement.[75]

In its 2000 decision, the African Commission found Kenya in violation of nearly all of Mr Ouko's alleged rights, including liberty, freedom of expression, association and freedom of movement.[76] Despite these findings, the Commission stopped short of issuing strong recommendations, merely urging Kenya to facilitate Mr Ouko's return if he chose to do so.[77] The Commission, as in *Modise* and *Good* above, also did not require Kenya to submit a report on the implementation.

73 *Ouko* (n 12) paras 1-11.
74 As above.
75 *Ouko* (n 12) paras 20-31.
76 As above.
77 As above.

3.3.2 Centre for Minority Rights Development & Others v Kenya

The African Commission's decision in *Endorois* marked a landmark recognition of the Endorois community as 'indigenous' and held Kenya responsible for violating their rights under the African Charter.[78] This included the dispossession of their ancestral land, disrupting their special connection to the land, and impacting their livelihoods. For centuries, the Endorois community thrived in Kenya's Lake Bogoria region, practising traditional pastoralism and relying on the land for sustenance, cultural rites and religious practices.[79] However, in 1973 Kenya designated the area as protected without adequately consulting the Endorois community, leading to their forced relocations to unsuitable land.[80] This relocation devastated their livestock and livelihoods, while restricting access to Lake Bogoria disrupted their cultural and religious practices.[81] In response to these measures, which significantly disrupted their way of life and cultural practices, the Endorois community challenged the Kenyan government's actions in a domestic court without success.[82]

In 2003 they submitted, through their representatives, a complaint to the African Commission, alleging violations of their rights under the African Charter.[83] The Commission in 2009 ruled in favour of the Endorois community, finding Kenya guilty of breaching the African Charter, specifically their property rights (article 14); rights to development (article 22); rights to free disposition of natural resources (article 21); and rights to practise religion and culture (articles 8 and 17), alongside the general obligation under article 1.[84]

The Commission issued seven recommendations to Kenya to address these violations.[85] Five recommendations focused on remedial actions: recognising the Endorois community's ownership rights over their ancestral land and restoring it; ensuring unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and grazing; compensating for their losses; ensuring benefits from royalties and employment opportunities within the game reserve; and registering the Endorois Welfare Committee. The remaining two recommendations instructed Kenya to engage in dialogue with the community for implementing these recommendations and to submit

78 *Endorois* (n 13) paras 162 & 298.
79 *Endorois* (n 13) paras 1-21.
80 *Endorois* (n 13) paras 1-21 & 281.
81 As above.
82 As above. See *William Yatich Sitetalia & Others v Baringo County Council & Others* Civil Case 183 of 2000, High Court.
83 *Endorois* (n 13) para 23.
84 *Endorois* (n 13) para 298.
85 *Endorois* (n 13) paras 298(a)-(g).

a report on the implementation progress within three months from the decision notification.

3.3.3 The Nubian Community in Kenya v Kenya

The *Nubian* case involved human rights violations against the Nubia community of Kenya, descendants of Sudanese brought as soldiers over a century ago during the British colonial era.[86] The Nubian community, residing in Kibera, now part of Nairobi, faced discrimination and human rights violations due to their identity and origin, even after Kenya had gained independence.[87] They were denied land titles to the land on which they had lived for a century, including Kibera, resulting in forced evictions and threats of eviction.[88] They also faced difficulties acquiring identity cards and even birth certificates.[89]

Two non-governmental organisations (NGOs), Open Society Justice Initiative (OSJI) and the Institute for Human Rights and Development in Africa (IHRDA), submitted complaints to address these issues. In 2006 a complaint was submitted to the African Commission on behalf of the Nubian community and, in 2009, another was submitted to the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) on behalf of Nubian children,[90] alleging violations of the African Charter and the African Charter on the Rights and Welfare of the Child (African Children's Charter) respectively.

Although first submitted to the African Commission, the African Children's Committee issued its decision earlier in 2011, likely due to a lighter case load, marking its first merit decision. The African Children's Committee held Kenya responsible for violating different provisions of the African Children's Charter.[91] In 2015 the Commission also found Kenya in violation of articles 2, 3, 5, 12, 13, 14, 15, 16, 17(1) and 18 of the African Charter.[92] The Commission recommended that Kenya establish 'objective, transparent, and non-discriminatory' criteria for determining citizenship, recognise Nubian land rights over Kibera, and ensure evictions comply with human

86 *Nubian* (n 14) paras 2-6.
87 As above.
88 *Nubian* (n 14) paras 84-88.
89 *Nubian* (n 14) paras 5, 65-70 & 116.
90 *IHRDA & Another v Kenya* (2011) AHRLR 181(ACERWC) (*Children of Nubian Descent*).
91 These are arts 6(2), (3) and (4), art 3, arts 14(2)(b), (c) and (g), and art 11(3). See *Children of Nubian Descent* (n 90) para 69.
92 *Nubian* (n 14) para 171.

rights standards.[93] It also requested progress reports from Kenya within six months from the decision's notification.[94]

3.4 Ethiopia

The two merit decisions of the African Commission against Ethiopia – *Dergue Officials*, concerning the fair trial rights of former Dergue regime officials, and *Equality Now*, concerning the rights of a girl subjected to repeated sexual violence – are discussed in this part.

3.4.1 Haregewoin Gabre-Selassie and IHRDA v Ethiopia

This complaint was filed to the African Commission in 2004 on behalf of former Ethiopian officials who were detained after the fall of Mengistu's regime in 1991, alleging violations of the African Charter, particularly the right to fair trial.[95] After examining submissions from both parties, the Commission rendered its decision in 2011, declaring Ethiopia responsible for violating articles 7(1)(b) and (d), as well as articles 1 and 2 of the African Charter.[96] The Commission ruled that the establishment of the special prosecutor's office, with the explicit purpose of recording 'brutal offences', violated the presumption of innocence by assuming guilt.[97] It also found that the extended pre-trial detentions amounted to *de facto* punishment before guilt was established, and violated the right to fair trial. To address these violations, the Commission recommended Ethiopia to pay adequate compensation to the victims and to submit an implementation report within three months of being notified of the decision.[98]

3.4.2 Equality Now and EWLA v Ethiopia

The *Equality Now* case concerned a 13 year-old girl who was kidnapped and subjected to sexual violence on two separate occasions, as part of a harmful traditional practice (HTP) in the country. Initially, Mr Jemma (the main suspect), with assistance from his accomplices, abducted and raped the victim.[99] The crime was reported to the police, who rescued her and arrested Jemma and his accomplices.[100] However, despite evidence showing the commission

93 As above.
94 As above.
95 *Dergue Officials* (n 15) paras 1-19.
96 *Dergue Officials* (n 15) paras 180 & 240.
97 *Dergue Officials* (n 15) paras 186 & 187-239.
98 *Dergue Officials* (n 15) para 240.
99 *Equality Now* (n 16) para 2.
100 As above.

of the crime, the suspects, including Jemma, were released on bail,[101] after which Jemma kidnapped the victim again, held her captive in his brother's house for several days, and coerced her into signing a marriage contract.[102] A month later, the victim escaped and reported the incident, leading to the re-arrest of the suspects.[103] They were convicted by a lower court, but the High Court overturned the decision and acquitted them, noting that 'the act was consensual'.[104] Further attempts to obtain justice for the victim were unsuccessful.[105] This led EWLA and Equality Now to bring the case before the African Commission in 2007.[106]

The Commission in its 2015 decision held Ethiopia responsible for failing to prevent the violence against the victim and for not ensuring justice, finding it in violation of articles 3, 4, 5, 6 and 18(3) of the African Charter.[107] It, however, did not find a violation of the non-discrimination principle under article 2, as it rigidly adhered to the criticised male comparator standard established in *Egyptian Initiative*.[108]

To remedy the violations, the Commission requested Ethiopia to pay the victim compensation worth US $150 000 for moral damages; to adopt and implement escalated measures to specifically deal with marriage by abduction and rape; monitor such instances; and diligently prosecute and sanction offenders.[109] Ethiopia was also requested to continue training judicial officers on specific human rights themes including on handling cases of violence against women.[110] The Commission further urged Ethiopia to report within 180 days the measures adopted to implement the recommendations and to include in its next periodic report yearly statistics on the prevalence of marriages by abduction and rape, cases of successful prosecutions, and challenges faced, if any.[111]

Having introduced the decisions and their recommendations against the three states, the article now turns to its core objective: assessing the implementation status of these decisions.

101 *Equality Now* (n 16) paras 3-4.
102 As above.
103 As above.
104 *Equality Now* (n 16) para 5.
105 *Equality Now* (n 16) paras 7-9.
106 As above.
107 *Equality Now* (n 16) para 160.
108 *Egyptian Initiative for Personal Rights and Interights v Egypt II* (2011) AHRLR 90 (ACHPR 2011) paras 129-138 (*Egyptian Initiative*).
109 *Equality Now* (n 16) para 160.
110 As above.
111 As above.

4 Status of implementation

4.1 Nature of recommendations

This part undertakes an examination of the degree to which the Commission's recommendations in the discussed decisions have been implemented. Before delving into the implementation status, it is important to underline the nature of these recommendations, as the type of remedy can influence compliance, non-compliance, and the extent or progress of compliance by the countries. This aligns with the discussion in part 2 above, which highlights how the nature of recommendations affects their implementation, including the length of time compliance practically demands. For instance, recommendations such as paying compensation are generally believed to be straightforward and are seen as both more likely to be implemented and quicker to implement than those requiring policy or legislative changes or shifts in public attitude.[112] Similarly, recommendations that demand minimal or no resources and are specific are often seen as more likely to be implemented and to be implemented sooner than those that require substantial resources.[113] Furthermore, those that cause less disruption to existing systems, including societal norms, are thought to be more likely to be implemented and to be carried out sooner than those that cause significant disruption.[114] However, this should be approached with caution, as other factors, such as regime type, effectiveness of follow-up measures, the role of various actors, including government agencies, civil society organisations, intergovernmental organisations, and other relevant stakeholders, the level of public knowledge and awareness of the decision, the visibility of the body rendering the decision, and prevailing political and social context, may also influence compliance, making it difficult to reach a definitive conclusion.[115]

The nature of recommendations made to the three states, as discussed above, can generally be categorised into four broad

112 V Fikfak 'Compliance and compensation: Money as a currency of human rights' in Murray & Long (n 5) 98-100; D Hawkins & W Jacoby 'Partial compliance: A comparison of the European and Inter-American American courts for human rights' (2010) 6 *Journal of International Law and International Relations* 35; Sowe & Bizimana (n 5) 97.

113 Viljoen & Louw (n 6) 12-31; Murray & Long (n 5) 22; TM Antkowiak 'An emerging mandate for international court: Victim-centred remedies and restorative justice' (2011) 47 *Stanford Journal of International Law* 312-314.

114 Viljoen & Louw (n 6) 12-31.

115 Murray & Long (n 4); Murray & Long (n 17) 3-12; Sowe & Bizimana (n 5) 84-88; Viljoen & Louw (n 6) 6.

categories: legislative and policy measures, compensation, administrative measures and compliance reports. Legislative and policy measures require significant time and effort as they involve changes in policy or legislation.[116] All three countries have received such recommendations.

The second category involves payment of compensation. Botswana was directed to pay compensation in all but one merit decision (*Spilg, Modise* and *Good*). Kenya was also advised to compensate the Endorois community for their losses (*Endorois*). Ethiopia was instructed to pay compensation in both decisions (*Dergue Officials* and *Equality Now*). However, the only case where the compensation amount was specified is *Equality Now*. In other cases, including those against Botswana and Kenya, compensation amounts were not specified. The presence or absence of a specific amount is noted as a possible factor that may affect implementation,[117] and whether this plays out in the selected cases will be examined.

The third category consists of administrative measures, which vary in their resource requirements, complexity and implementation time. Some recommendations may involve routine administrative tasks that are relatively easy to implement, while others require more resources and present greater challenges. It is suggested that 'states are more likely to comply with remedies that require them to take some administrative action than with those that press them to amend legislation or compensate victims'.[118] In the cases assessed in this article, recommendations, such as avoiding secrecy during execution of capital punishment (*Spilg* and *Interights*), granting citizenship by descent (*Modise*), registering the Endorois Welfare Committee, ensuring access to Lake Bogoria and surrounding sites for religious and cultural rites and grazing (*Endorois*),[119] can be regarded as requiring minimal resources. Other recommendations, such as ensuring compliance with human rights standards during evictions (*Nubian*) and facilitating safe returns of the victim to his country (*Ouko*), require moderate resources but are presumably manageable. However, the implementation of some recommendations may involve significant resources and time, such as taking measures

116 Viljoen & Louw (n 6) 21. The Commission itself acknowledged the challenge of quickly changing laws and practices in its decision against Sudan, suggesting it be done gradually; *Amnesty International v Sudan* (2000) AHRLR 297 (ACHPR 1999) para 83.
117 Viljoen & Louw (n 6) 22-23.
118 As above.
119 This might also require legislative action, such as repealing laws that restrict the Endorois community's access to the game reserve.

against marriage by abduction and rape (*Equality Now*), as it also requires shifts in public attitudes.

Lastly, all the three countries are also required to submit implementation reports. These reporting requirements generally demand minimal resources.

The following subparts will explore the measures taken by each country in response to these recommendations.

4.2 Botswana

Botswana's implementation status is evaluated across two themes: capital punishment (*Interights* and *Spilg*) and citizenship/immigration (*Modise* and *Good*).

4.2.1 Recommendations regarding capital punishment

The African Commission's recommendations in decisions made on complaints concerning capital punishment can be categorised into four groups for structured discussion due to their overlap.

First, Botswana was urged to declare an official moratorium on all executions and, eventually, to work towards completely abolishing capital punishment. Compliance with this recommendation requires legislative or policy measures, but Botswana has taken no steps to implement it, even though more than 20 years have passed since this recommendation was first issued in *Bosch* in 2003 and reiterated in *Spilg* in 2011 and *Interights* in 2015. Despite international pressure, Botswana retains capital punishment for certain crimes, including murder and treason,[120] and remains the sole country in Southern Africa to continue executing individuals,[121] with routine executions occurring since its independence in 1966.[122] For example, one execution took place in 2016, two in 2018, one in 2019, three in 2020, and three in 2021.[123] Botswana's non-compliance status with this recommendation can generally be attributed to its subscription

120 Ditshwanelo and others 'Stakeholder report for the United Nations Universal Periodic Review' (2022) para 2.

121 International Federation for Human Rights (IFHR) 'Botswana continues with cruel and regressive execution' 19 February 2018, https://www.fidh.org/en/issues/death-penalty/botswana-continues-with-cruel-and-regressive-execution (accessed 12 August 2024).

122 As above.

123 Amnesty International 'Death sentences and executions 2016' (2017) 35; Amnesty International 'Death sentences and executions 2018' (2019) 39; Amnesty International 'Death sentences and executions 2019' (2020) 44; Amnesty International 'Death sentences and executions 2020' (2021) 47;

to the alleged benefits of death penalty, as propagated in theoretical debates by the retentionist camp. However, the specific explanations within the country context, often cited by the government as justification for its non-compliance, include widespread public support for capital punishment, partly rooted in over a century of its use, and the perception that rising crime in neighbouring South Africa is linked to its abolitionist stance.[124] This suggests that a decision's alignment with public opinion may influence its implementability. However, this remains inconclusive, as Botswana has also failed to implement decisions that do not require shifts in public attitudes, as discussed in the next subparts.

Second, if Botswana persists with capital punishment, it has been implicitly urged to allow condemned individuals to have final moments with their closest family members (*Spilg* and *Interights*) and not to use 'hanging' as a method of execution (*Interights*). Providing advance notice before executions requires only political will, as it poses no substantial burden on the country, whereas discontinuing the use of 'hanging' as a method of execution necessitates legislative change since this method is currently sanctioned by Botswana's Criminal Code. However, Botswana has ignored these recommendations, failing to ban or replace 'hanging' as a method of execution during amendments to its Criminal Code, such as in 2018,[125] and continues to execute individuals in secrecy without informing families. For instance, in 2018 Joseph Poni was executed by 'hanging' without prior notice to his relatives and lawyers,[126] followed by Seabelo Mabiletsa and Matshidiso Tshid in 2020,[127] and Wedu Mosalagae and Kutlo Setima in 2021,[128] all of whom were executed by 'hanging'.

Amnesty International 'Death sentences and executions 2021' (23 May 2022) 51.

124 E Macharia-Mokobi 'The death penalty in Botswana: Time for a re-think?' 67, https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/GOAL-16-Book-Mokobi.pdf (accessed 10 September 2024); KB Tshosa 'The death penalty in Botswana in the light of international law: The case for abolition' 6, https://www.biicl.org/files/2216_tshosa_death_penalty_botswana.pdf (accessed 13 August 2024).

125 Penal Code (Amendment) Act 21 of 2018.

126 IFHR (n 121); Amnesty International reports (n 123).

127 'Botswana executes two convicted murderers' *Eye Witness News* 28 March 2020, https://ewn.co.za/2020/03/28/botswana-executes-two-convicted-murderers?fbclid=IwAR1_Ey4ClzQQ7Nx1ZsBae1id2eVG_oP_xnVqOeRWeHW7hRllJ8S1qioysyg (accessed 11 August 2024).

128 'Botswana hangs two men who murdered women, drawing mixed reaction on social media' IOL 8 February 2021, https://www.iol.co.za/news/africa/botswana-hangs-two-men-who-murdered-women-drawing-mixed-reaction-on-social-media-e00e19f9-93e9-59d5-bd0d-153cb0039cc1 (accessed 27 September 2024).

This defiance demonstrates Botswana's lack of political will to honour the African Commission's rulings. Unfortunately, this defiance has not prompted significant actions from the Commission. For example, while it condemned Poni's execution in 2018, it did not even reference these rulings against Botswana on the same issue, missing an opportunity to remind the country of its obligations and signal that its defiance was being noted.[129]

Third, Botswana was urged to revise its laws to compensate Oteng Ping's family for his inhuman execution by 'hanging' without a final farewell with his family, as deemed under article 5 of the Charter (*Interights*). Implementation of this recommendation requires legislative measures to establish a legal basis for compensating the victim's family and future victims' families in similar cases. However, Botswana has neither revised its laws to enable such compensation nor provided evidence of compensation to the victim's family. Given Botswana's ongoing practices such as using 'hanging' for executions and denying farewell opportunities, the likelihood of implementing this recommendation seems low.

Lastly, Botswana has been urged to submit compliance reports. In two of the decisions (*Spilg* and *Bosch*) Botswana was expected to report on implementation as part of its periodic report. Since the Commission's 2003 decision in *Bosch*, Botswana has submitted two periodic reports, but only one has been submitted since the 2015 decision in *Spilg*. The first report, covering 1986 to 2007 and presented in 2010, was expected to include information about the status of *Bosch*. However, it neither included any discussion about this decision nor addressed the recommendation to 'take measures to comply with the resolution urging states to envisage a moratorium on the death penalty', and instead discussed the continued imposition of the death penalty for serious crimes.[130] The second report, submitted in 2015 and covering 2011 to 2015, was also expected to address both *Bosch* and *Spilg*, particularly for the latter case, which fell within the temporal scope of the report. However, it made no mention of these decisions. Nevertheless, the report included a brief discussion on capital punishment, which provides insight into the implementation status of these decisions, with Botswana stating it is 'yet to make a determination as to whether it retains, places a moratorium, or abolishes the death penalty'.[131] In the third case

129 O Windridge 'Two times too many: Botswana and the death penalty' *EJIL Talk* 30 March 2018, https://www.ejiltalk.org/two-times-too-many-botswana-and-the-death-penalty/ (accessed 30 October 2024).
130 Botswana: 1st periodic report, 1986-2007 34-37.
131 Botswana: 2nd & 3rd periodic report, 2011-2015 20.

(*Interights*), Botswana was urged to submit a stand-alone report on the implementation within six months, but it never complied.

In summary, Botswana has wholly defied the Commission's recommendations regarding capital punishment, which renders its status with respect to these decisions as 'non-compliance'. While the failure to comply with the request to adopt an abolitionist approach may be attributed to prevailing public support for retention, its continued disregard for other recommendations, including the secret execution of death row inmates despite the Commission's condemnation, underscores a deeper lack of political will to meet its human rights obligations under the African Charter. The Commission also appears to have done little in terms of following up. For example, in its two Concluding Observations on Botswana's periodic reports, one from May 2010 and another from July 2019, the Commission did not explicitly address its decisions or call out Botswana for its defiance in complying. Instead, it merely reiterated some of the recommendations from these decisions.[132]

4.2.2 Recommendations regarding citizenship and immigration

This subpart examines the status of the African Commission's recommendations in *Good* and *Modise*.

The *Good* case exemplifies a gross lack of political will and failure by states to uphold the Commission's recommendations. In this case, the recommendations were twofold: first, to adequately compensate the victim and, second, to revise Botswana's Immigration Act of 1966 to align some of its provisions with the country's human rights obligations. However, Botswana has not complied with either recommendation, even though nearly 15 years have passed since the Commission's decision. Botswana's refusal to compensate the victim was immediate and unambiguous. The Minister of Foreign Affairs of Botswana at that time explicitly stated that the government would not provide compensation, arguing that the Commission lacked authority to issue binding orders.[133] 'We are not going to follow on

132 Concluding Observations and recommendations on the 2nd and 3rd combined periodic report of Botswana on the implementation of the African Charter (Concluding Observations 2019) paras 41 & 62, https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-botswana-2nd-3rd-periodic-rep (accessed 30 October 20240); Concluding Observations and recommendations on the initial periodic report of the Republic of Botswana (Concluding Observations 2010) paras 26, 36 & 57, https://achpr.au.int/en/state-reports/concluding-observations-and-recommendations-botswana-1st-periodic-report-196 (accessed 30 October 2024).

133 Southern Africa Litigation Centre 'Botswana defies African Commission ruling 16 August 2010, https://www.southernafricalitigationcentre.org/press-release-

the recommendation made by the Commission. It does not give orders, and it is not a court. We are not going to listen to them. We will not compensate Mr Good.'

Botswana's outright rejection, despite its relatively better democratic credentials on the continent, shocked many. The Botswana Law Society called this rejection 'regrettable',[134] and the Southern Africa Litigation Centre expressed surprise, given Botswana's reputation for good governance and commitment to the rule of law.[135] This refusal also prompted the Commission to bring Botswana's non-compliance to the attention of the Executive Council of the AU.[136] However, regardless of any actions the AU may have taken, the recommendations remain unimplemented. Likewise, Botswana has continued to defy the second recommendation, which called for a revision of its 1966 Immigration Act – specifically the provisions that blocked judicial review of 'prohibited immigrant' designations and prevented the disclosure of the reasons for such decisions. Although Botswana introduced a new Immigration Act in 2011 and made further amendments, the problematic provisions deemed incompatible with human rights standards by the Commission have been retained in nearly the same form.[137]

Turning to *Modise*, the Commission recommended that Botswana grant Modise citizenship by descent and compensate him. Botswana complied with the first request by reinstating the citizenship of Modise and his children, though only after significant confrontation and protracted negotiations, where the role of his advocates (from Interights) was said to be crucial.[138] However, regarding compensation for rights violations, despite several years of negotiations between Modise and his family on one side and the Botswana government on the other, facilitated by Modise's advocates, Modise passed away without receiving the compensation

botswana-defies-african-commission-ruling/ (accessed 23 September 2024).

134 Interights 'Botswana's immigration legislation inconsistent with international human rights law', https://www.interights.org/good/index.html (accessed 24 August 2024).

135 Southern Africa Litigation Centre (n 133).

136 Combined 32nd and 33rd Activity Report of the Africa Commission on Human and Peoples' Rights para 24, https://archives.au.int/handle/123456789/5359 (accessed 23 October 2024).

137 See Immigration Act 3 of 2011 arts 41(1)(c), 41(5) & 48(1) & (2).

138 CA Odinkalu 'Three decades on, the protection of human rights in Africa comes of age?' 31 May 2017, https://blogs.lse.ac.uk/africaatlse/2017/05/31/three-decades-on-the-protection-of-human-rights-in-africa-comes-of-age/ (accessed 30 October 2024). Odinkalu, along with Ibrahima Kane and other advocates, made multiple trips to Botswana to ensure compliance with the recommendation for Modise's citizenship. Open Society Justice Initiative (OSJI) 'From judgment to justice: Implementing international and regional human rights decisions' (2010) 24, 98 & 104; see also Viljoen & Louw (n 6) 11 fn 50.

owed to him. The Commission's failure to specify the amount can be seen as one of the factors contributing to the impasse and, arguably, the non-implementation.[139] The negotiations repeatedly stalled over disputes regarding the sum, with Modise insisting on a higher amount than the Botswana government was willing to pay.[140] The government claimed that it could not provide the requested amount to an opposition politician and instead offered much less, arguing that he might use the reparation funds against the government. Efforts to find a middle ground included a settlement package such as granting Modise land in Lobatse to build a house, giving the standard financial support offered to citizens over the age of 60 (he was 78 at the time of negotiation), and a modest sum for his family's suffering (with the government proposing between 100 000 and 300 000 Pula). However, these proposals were rejected by Modise and his family, and no agreement was reached before his death. This highlights the broader implications of the Commission's omission in specifying the amount or its failure to set clear guidelines, which may have exacerbated the government's reluctance to implement the recommendation. The Botswana government's refusal to meet Modise's demands underscores an underlying political bias, where concerns over potential misuse of compensatory payment overshadowed the obligation to deliver justice. This perhaps suggests that the identity of decision beneficiaries may influence whether states implement the decision.

The *Modise* case exemplifies the complexities and challenges regarding implementation of human rights decisions, including those of the Commission, particularly when political interests interfere with the delivery of justice. It also is a testament for the need for a clear remedial framework to determine the amount of compensation to be awarded to a victim.[141] Likewise, but on a positive note, it highlights the importance of zealous follow up, as demonstrated by Modise's advocates, in ensuring the implementation of recommendations.[142]

Therefore, although the *Modise* case is often cited as an implementation success – partly because the Botswana government agreed in principle to comply with the recommendations and entered into negotiations with Modise – in reality, the recommendation for the payment of compensation was not complied with until the

139 The Botswana government in 2005 expressed difficulty in quantifying the amount to be paid to Mr Modise. See Africa Commission 'Report of the promotional mission to the Republic of Botswana' (2005) 42; Viljoen & Louw (n 6) 22-23; OSJI (n 19) 162 endnote 16.
140 OSJI (n 138) 98.
141 OSJI (n 138) 104; Viljoen & Louw (n 6) 11 fn 50.
142 OSJI (n 138) 104.

victim's death. However, whatever progress was made in this case can be attributed to the restless efforts of Modise's advocates, whose role should be praised and taken as a lesson, as noted above. The Commission also undertook some follow up on the status of the case, although this may not have been adequate. For instance, during its 2005 promotional visit to Botswana, the Commission inquired about the status of implementation and was informed that negotiations were in progress to implement the recommendations.[143] However, since then, there have been no publicly-available follow-ups from the Commission, nor has Botswana provided any updates on the case. Notably, the case was not mentioned in the two periodic reports submitted by Botswana in 2010 and 2015,[144] nor did the Commission address these issues in its Concluding Observations on those reports. It also remains unclear if the Commission's delegation revisited the matter during its promotional mission to Botswana in 2018, as it did in 2005.[145]

4.3 Kenya

The African Commission has issued key recommendations to Kenya, facilitating the safe return of John Ouko, addressing forced evictions faced by the Endorois, and ensuring non-discriminatory citizenship and land rights for the Nubians.

4.3.1 Recommendations regarding safe return for the Ouko *case*

In the 2000 *Ouko* case the African Commission recommended that the Kenyan government facilitate the safe return of John Ouko, a student leader forced into exile after being arbitrarily arrested, detained and tortured.[146] While the Commission's directive to 'facilitate the safe return' was not fully defined, international standards suggest this would involve providing transportation, ensuring security, offering humanitarian aid and supporting reintegration.[147] To comply, the Kenyan government would have needed to expend resources for

143 See Promotional Mission report (n 152).
144 See Botswana: 1st Periodic Report, 1986-2007; Botswana: 2nd & 3rd Periodic Report, 2011-2015.
145 Press statement at the conclusion of the promotion mission of the African Commission on Human and Peoples' Rights to the Republic of Botswana 17 July 2018, https://achpr.au.int/index.php/en/news/press-releases/2018-07-17/press-statement-conclusion-promotion-mission-african-commis (accessed 23 September 2024).
146 *Ouko* (n 12).
147 United States Institute of Peace 'Return and resettlement of refugees and internally displaced populations' (2024), https://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/social-well-being/return-and-res (accessed 23 October 2024).

Mr Ouko's safe return, rather than making legislative changes or addressing societal attitudes.

However, there is no evidence that the government took any steps to implement this recommendation. A 2011 report by the Open Society Foundation revealed that more than a decade after the decision, the government had not acted on it.[148] As of 2023, over two decades later, there remains no new information to suggest any progress. Based on the compliance classification espoused by Viljoen and Louw,[149] the implementation status of this decision can thus be categorised as 'non-compliance' until 2011 and as an 'unclear compliance' thereafter, due to the lack of publicly-available updates. The lack of updated information may be attributed to Kenya's failure to provide updates on the implementation of the decision in its periodic reports, partly because the Commission did not urge this in its decision. The Commission has also not made any publicly-known efforts to monitor implementation or addressed the case in its Concluding Observations on Kenya's periodic reports submitted after the decision.[150] The limited availability of information about the decision also makes it impossible for the authors to assess any other factors that might explain its compliance status. For instance, it is unclear whether Kenya's non-participation during the litigation stage contributed to its implementation status.[151]

4.3.2 Recommendations regarding forced evictions for the Endorois *case*

Embracing the decision in words, evading implementation in deeds

The *Endorois* case marked a historic victory for the indigenous Endorois community of Kenya. The Commission found that the Kenyan government had violated the Endorois's rights by evicting them from their ancestral lands in Lake Bogoria, and issued recommendations

148 Open Society Foundation 'Kenya: Justice sector and the rule of law (a review by AfriMAP and the Open Society Initiative for Eastern Africa) (2011) 6, https://www.opensocietyfoundations.org/uploads/38762285-51db-4bac-b8f9-285cf0ef2efc/kenya-justice-law-20110315.pdf (accessed 24 August 2024).

149 Viljoen & Louw (n 6) 5-7.

150 Concluding Observations and recommendations on the 8th to 11th periodic report of the Republic of Kenya (25 February 2016) (Second Concluding Observation Kenya); Concluding Observations and Recommendations – Kenya: initial report, 1992-2006 (30 May 2007) (Initial Concluding Observation Kenya).

151 International Environmental Law Research Centre 'Kenya: Justice sector and the rule of law' (2011) 32, https://www.ielrc.org/Content/a1104.pdf (accessed 23 October 2024).

that included land restitution, compensation and greater community involvement in issues affecting them.[152] Initially, Kenya seemed committed to implementing these recommendations. On 2 February 2010, in Lake Bogoria, the Minister for Lands stated that Kenya had 'no option but to implement the Commission's recommendations',[153] a commitment reaffirmed during the Commission's November 2010 ordinary session, as well as during the Commission's promotional mission to Kenya in March 2010.[154] This optimism was supported by Kenya's adoption of an indigenous-friendly land policy in December 2009 and a new Constitution in August 2010 that were perceived as favourable to indigenous rights and suggested a positive trajectory toward implementation.[155]

However, more than a decade later, Kenya's promises have largely gone unfulfilled. The government's early excuse that it had not received an authenticated copy of the Commission's decision was dismissed as obstructionist.[156] Even after receiving an authenticated copy of the decision, Kenya implemented few meaningful changes.[157] In fact, the government took steps that contradicted the Commission's ruling by passing the 2011 Kenya Wildlife Bill and nominating Lake Bogoria as a United Nations Educational, Scientific and Cultural Organisation (UNESCO) world heritage site, both actions made without regard for the Commission's recommendations.[158] The Wildlife Bill disregarded

152 As above.

153 A Kiprotich 'Will state respect community's land rights?' *The Standard* 22 March 2010, https://www.standardmedia.co.ke/article/2000006073/will-state-respect-communitys-land-rights (accessed 12 August 2024); E Ashamu '*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v Kenya*: A landmark decision from the African Commission' (2011) 55 *Journal of African Law* 300-311; International Work Group for Indigenous Affairs 'Kenya: Ruling in the *Endorois* case' 8 April 2010, https://web.archive.org/web/20170716074001/http:/www.iwgia.org/news/search-news?news_id=124 (accessed 13 August 2024).

154 F Viljoen 'The African human rights system and domestic enforcement' in M Langford and others (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 379-386. See the Report of the African Commission's Working Group on Indigenous Populations/Communities (the Commission's WGIP): Research and information visit to Kenya, 1-19 March 2010 (2012) 16 (WGIP Mission report 2012).

155 CN Maina Sozi 'Law and its impact on Kenya's indigenous communities' land rights: The opportunities' PHD thesis, University of London, 2019 7; J Cerone '*Endorois Welfare Council v Kenya* (Af Comm'n H & Peoples' R): Introductory note' (2010) 49 *International Legal Materials* 860; Republic of Kenya Ministry of Lands Sessional Paper 3 of 2009 on National Land Policy (August 2009) secs 3.3.1, 3.3.2, 3.4.3.1 & 3.3.4.1, https://www.refworld.org/legal/decreees/natlegbod/2009/en/121327 (accessed 17 August 2024).

156 Viljoen (n 154) 380; G Lynch 'Becoming indigenous in the pursuit of justice: The African Commission on Human and Peoples' Rights and the Endorois' (2011) 111 *African Affairs* 41.

157 As above.

158 Minority Rights Group International (MRGI) 'The *Endorois* decision – Four years on, the Endorois still await action by the government of Kenya' 23 September 2014, https://minorityrights.org/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 16 August 2024).

the decision in two ways: It was passed without consulting the Endorois people, despite the Commission's recommendation for consultation on issues affecting them, and it imposed entrance fees for Lake Bogoria and criminal penalties for activities potentially threatening wildlife, without exceptions for the Endorois's rights to access Lake Bogoria for their religious and cultural practices, which the Commission recommended should be guaranteed.[159] Likewise, the nomination and inclusion of Lake Bogoria on the UNESCO world heritage list in 2011 contradicted the Commission's recommendations by failing to consult the Endorois community and by not including a representative from the community in the proposed stakeholder list for managing the Lake Bogoria Reserve.[160] Perhaps most notably, the nomination document submitted to UNESCO is said to conspicuously omit any mention of the Endorois community,[161] raising questions about whether Kenya remains stuck in a 1970s mindset, even post-Commission ruling. This scandalous process, which undermined the Commission's ruling, faced serious opposition. It included a petition submitted to UNESCO by civil society groups and a resolution from the Commission, both asserting that the designation decision was made without obtaining the free, prior and informed consent of the Endorois people, and was inconsistent with the Commission's recommendations.[162]

These reactions, coupled with other advocacy efforts, led to significant positive developments for indigenous peoples, including the Endorois, concerning the designation process of world heritage sites. For instance, in 2012 the World Conservation Congress adopted a resolution, which stipulates that no world heritage sites should be established in indigenous peoples' territories without their free, prior and informed consent; urges Kenya to involve the Endorois fully in managing the Kenya Lake System World Heritage Site; and to implement the *Endorois* decision.[163] Further,

159 As above.

160 KS Abraham 'Ignoring indigenous peoples' rights: The case of lake Bogoria's designation as a UNESCO world heritage site' in S Disko & H Tugendhat (eds) *World heritage sites and indigenous peoples' rights* (2014) 177, https://www.iwgia.org/images/documents/popular-publications/world-heritage-sites-final-eb.pdf (accessed 14 August 2024).

161 As above.

162 Letter to UNESCO reiterating concerns over the designation of the Lake Bogoria site as a world heritage site without obtaining the FPIC of the Endorois (19 November 2013); Resolution on the Protection of Indigenous Peoples' Rights in the Context of the World Heritage Convention and the Designation of Lake Bogoria as a World Heritage site ACHPR/Res 197(L) 2011, https://achpr.au.int/en/adopted-resolutions/197-resolution-protection-indigenous-peoples-rights-context (accessed 10 August 2024).

163 S Disko and others 'World heritage sites and indigenous peoples' rights: An introduction' in Disko & Tugendhat (n 160) 29. See the Resolution, https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2012_RES_47_EN.pdf (accessed 14 August 2024).

a memorandum of understanding, which established the Lake Bogoria National Reserve Management Committee, was signed in 2014 between Endorois representatives, Kenya government officials and the Kenyan Commission to UNESCO (Kabarnet Declaration).[164] This memorandum of understanding recognises the Endorois as a community and the EWC as their representative organisation, granting the EWC a seat on the Management Committee.[165]

The next subpart examines the specific measures taken by Kenya to implement the decision and the follow-up actions undertaken by the Commission.

Low cost and piecemeal implementation

Despite reversing its initial commitment, Kenya has taken some steps to implement the recommendations, but these measures are largely cosmetic and tentative, focusing only on 'low-hanging fruits'.[166] It registered Endorois Welfare Council (EWC) as a civil society organisation, and the subsequent signing of the Kabarnet Declaration enabled the EWC's participation in the Lake Bogoria Reserve's Management Committee. Kenya also established a task force to advise on land restitution and compensation for the Endorois community, but this produced no significant results, leaving the decision largely unimplemented. To put it briefly, Kenya's compliance with the Commission's seven recommendations may be summarised as fully compliant with one, partly compliant with three, and non-compliant with the remaining three.

The only fully-implemented recommendation is the registration of EWC. Established in 1985 to advance Endorois land rights and indigenous recognition, the EWC was initially denied registration by the Kenya government at least twice.[167] This denial appeared to be a strategy to negotiate with select Endorois members rather than with organised EWC representation.[168] The Commission's urging led to the EWC's registration, which subsequently enabled it to obtain observer status with the Commission.[169]

164 MRGI (n 158); J Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in Biegon (n 17) 35.
165 As above.
166 J Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in Biegon (n 17) 34.
167 *Endorois* (n 13) para 74; Lynch (n 169) 32-35.
168 *Endorois* (n 13) para 20; Biegon & Ahmed (n 166) 35.
169 As above.

Turning to the three recommendations that fall into the partial compliance category, as classified by Viljoen and Louw, they involve the payment of royalties, the provision of employment opportunities and access to the reserve, and involvement in decision making. Kenya has partially complied with the recommendation to pay royalties to the Endorois people and to ensure that they benefit from employment opportunities within the Reserve. This recommendation arose from the submission in the complaint that Kenya violated the Endorois people's rights by denying them 25 per cent of tourism revenues from the reserve and failing to provide 85 per cent of employment opportunities, as promised when the government forcibly evicted them from their land.[170] Thus, for full compliance, Kenya was required to ensure that the Endorois people received at least 25 per cent of the tourist revenue and 85 per cent of employment opportunities, as it had promised.

However, Kenya's response to the Commission's recommendation can only be described as partial compliance at best. Although the Commission's recommendation was issued in 2010, sharing of royalties only begun in 2014, four years later.[171] Even after this, the Endorois received only 10 per cent of the annual earnings from the reserve, rather than the promised 25 per cent.[172] Further still, this 10 per cent was calculated based on the net income of the reserve, not the gross income as implied in the Commission's recommendation.[173] Transparency issues and limited access to the reserve's annual audit reports further obscure whether the Endorois community was receiving this 10 per cent share properly.[174] These issues prompted the EWC to advocate full compliance, leading to a 2020 reform that increased the royalty share to 25 per cent. However, this total amount is not fully allocated to the community; instead, it is divided into 15 per cent for community grants and 10 per cent for infrastructure development. This division led the EWC to continue its objections, arguing that the Reserve still retains 75 per cent, which can be used for management and infrastructure development, rather

170 *Endorois* (n 13) para 7.
171 Centre for Minority Rights Development (CEMIRIDE) 'Implement Endorois decision 276/03: Report on the impact of non-implementation of the African Commision's Endorois decision' (2022) 10-12, https://minorityrights.org/resources/implement-endorois-decision-276-03-report-on-the-impact-of-non-implementation-of-the-african-commissions-endorois-decision/#:~:text=This%20report%20demonstrates%20that%20the,and%20a%20life%20of%20destitution (accessed 14 August 2024); B Xanne 'Empowering indigenous voices: Challenges and pathways in the African human rights system' (analysis of the implementation of the *Endorois* and *Ogiek* decisions in Kenya) (2023) 10-12 (on file with authors).
172 CEMIRIDE (n 171).
173 As above.
174 As above.

than cutting 10 per cent from the amount meant for the community in the form of grants.[175] This ongoing objection has not resulted in any changes, and the increase from 10 to 15 per cent for community grants remains unimplemented due to resistance from some county officials. [176]

Regarding employment opportunities, despite the lack of official data, civil society reports reveal poor implementation of the recommendation.[177] For instance, a 2020 shadow report on Kenya's combined twelfth and thirteenth periodic reports to the Commission highlighted that the Endorois community's representation in the Reserve remains minimal, with only 47 employees and three senior staff members, amounting to only 6 per cent of the workforce, despite the government's promise of 85 per cent employment.[178] Likewise, the progress with recommendations to grant unrestricted access to Lake Bogoria and surrounding areas for religious and cultural rites and for grazing their cattle has been criticised as inadequate, with only superficial compliance evident.[179] Their access has been described as '*ad hoc*', 'uncertain' and 'tokenistic'.[180]

Kenya's compliance with the Commission's recommendation to engage and collaborate with the Endorois people in implementing the decision has also been unsatisfactory and can be classified as partial compliance due to some positive steps taken. For example, when Kenya established the task force to implement the Commission's recommendations, it neglected to consult the Endorois community or the EWC, and the task force lacked representation from these groups.[181] Moreover, the task force's terms of reference did not mandate community consultation.[182] This reluctance to engage and collaborate with the Endorois people is further demonstrated by Kenya's failure to attend a workshop organised by the Commission's

175 As above.
176 As above.
177 As above.
178 Alternative report to the Kenyan government's combined 12th to 13th periodic report on the African Charter on Human and Peoples' Rights submitted to the African Commission on Human and Peoples' Rights 71st ordinary session (21 April-13 May 2022) para 67, https://www.forestpeoples.org/sites/default/files/documents/Shadow%20Report%20-%20Kenya%2012th%20%2013th%20Periodic%20Review%20%28OPDP%20%20Others%29.pdf (accessed 13 August 2024).
179 ESCR-Net 'ESCR-Net stands with Endorois and Ogiek communities: Urging justice from the Kenyan government' 2 February 2024, https://www.escr-net.org/news/2024/escr-net-stands-with-endorois-and-ogiek-communities-urging-justice-from-the-kenyan-government/ (accessed 30 October 2024).
180 Biegon & Ahmed (n 166); CEMIRIDE (n 171) 1.
181 Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in Biegon (n 17).
182 CEMIRIDE (n 171) 9; Biegon & Ahmed (n 166).

Working Group on Indigenous Populations and EWC on the status of implementation of the decision in 2013.[183] Moreover, the adoption of the Kenya Wild Life Bill and the inclusion of Lake Bogoria on the UNESCO world heritage list in 2011, which occurred without consulting the Endorois community, further illustrate deviations from the Commission's recommendation.

However, this should not be taken to mean that no efforts have been made to engage the community and EWC in decision making. For example, the adoption of the Kabarnet Declaration, which formally recognises the Endorois as a community and the EWC as their representative organisation in managing Lake Bogoria, represents a notable advancement in granting the Endorois community greater agency over their affairs.[184] Furthermore, the development of the Lake Bogoria National Reserve Management Plan 2019-2029, which involved significant community participation, including that of the EWC, is a positive step.[185] These advancements, while small, could pave the way for the full and effective participation envisioned by the Commission.

Moving on to the remaining three recommendations – two substantive and one procedural – Kenya's implementation status falls under the 'non-compliance' classification within the Viljoen and Louw framework, as it has entirely failed to implement these recommendations. The substantive recommendations involve the restitution of land and payment of compensation. Although a task force was established with a one-year mandate to advise on these issues, its efforts were minimal; it visited the Endorois only once, without proper notice, failed to produce any report, and was not extended beyond its initial term.[186] Furthermore, Kenya's decision to restrict the task force's mandate to a 'feasibility study' could be seen as an indication of its intention not to return the land, using feasibility as a pretext for inaction. Regardless of the intent, by framing it this way, the government implies that if the study finds a 'lack of feasibility' (whether based on legitimate research or potentially manipulated results) it may not implement the recommendations. If this is the case and the land is not restituted, this could strike at the core of the decision, as all the recommended remedies hinge on the

183 R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 846.
184 UNESCO World Heritage Committee 'Convention concerning the protection of the world cultural and natural heritage' 28 June to 8 July 2015 66-67, https://whc.unesco.org/en/conventiontext/ (accessed 30 October 2024).
185 UNESCO World Heritage Committee (n 184) 273.
186 ESCR-Net (n 179).

restitution of the land, and severely impact the Endorois community, for whom their ancestral land is essential for their livelihood, cultural and religious practices.

Kenya also did not comply with the Commission's procedural recommendation, which urged it to report back on the status of the decision's implementation within three months from the date of the decision notification in February 2010.[187] By the time the report was supposed to be sent to the Commission in May 2010, it had taken no measures to implement the decision, let alone submitting a report on the measures it had taken. Kenya also failed to comply with subsequent requests for implementation reports, as evidenced by its non-compliance with the Commission's request after the implementation hearing.[188] However, Kenya included updates on the decision's implementation in its twelfth and thirteenth combined reports, noting that it had complied with the recommendation to register the EWC.[189] Regarding the remaining recommendations, particularly the restitution of land and payment of compensation, Kenya cited resource constraints, competing national priorities, and the complexity of implementation which, it argued, required consideration of other existing laws and policies, as well as environmental, political and security impacts, as reasons for its non-compliance.[190]

Despite Kenya's limited progress in implementing the Commission's recommendations in this case, it stands out from other decisions discussed in this article due to the active monitoring and follow up by different actors, including the African Commission, civil society and the complainant, who have continued to pressure the Kenyan government for compliance. For instance, in stark contrast to its typically lenient approach, the Commission has adopted a stringent stance on the *Endorois* case. It took only a month after its decision for the Commission to dispatch its Working Group on Indigenous Populations to Kenya from 1 to 19 March 2010,[191]

187 MRGI (n 158).
188 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150, 160.
189 Kenya combined reports 2021 (n 152) paras 144-146. In contrast, in its 8th to 11th periodic report the Kenyan government provided no information about the implementation of the case. This did not, however, prevent the Commission from raising the issue of implementation in its Concluding Observations on the same combined reports. See Second Concluding Observation Kenya (n 153) paras 24(i), 47(i) & 63(i).
190 Kenya combined reports 2021 (n 152) paras 144-146.
191 See the Report of the African Commission's Working Group on Indigenous Populations/Communities (the Commission's WGIP): Research and information visit to Kenya, 1-19 March 2010 (2012) 16 (WGIP Mission report 2012).

to, among others, assess the situation of indigenous peoples, and the Working Group's mission report stressed the urgency of implementing the *Endorois* decision.[192] This was followed by a 2011 resolution condemning Kenya's nomination of Lake Bogoria as a UNESCO world heritage site, citing insufficient consultation with the Endorois community and underscoring the need for compliance with its decision.[193] The Commission also continued its follow-up measures using other means available at its disposal. For instance, in its Concluding Observations on Kenya's eighth 8 to eleventh periodic report, the Commission urged the government to comply with the decision.[194] The Commission also organised an implementation hearing at its fifty-third ordinary session in April 2013 to discuss progress with both the Kenyan government and the complainants.[195] Following the hearing, it issued a *note verbale* on 29 April 2013, requesting Kenya to submit a detailed roadmap for implementing the recommendations by the fifty-forth ordinary session, but Kenya failed to comply.[196] To further this effort, the Commission, through its Working Group, also organised a workshop in Nairobi, Kenya on 23 September 2013.[197] This workshop aimed to bring together the Kenyan government and other stakeholders, including civil societies, to assess the implementation status, and develop a joint implementation roadmap. However, Kenya did not attend, raising further doubts about its commitment.[198] Kenya's absence from the workshop and its defiance to submit the requested report following the implementation hearing, coupled with the lack of progress on key recommendations, prompted the Commission to adopt Resolution 257 on 5 November 2013, urging the government to promptly implement the decision and submit a report detailing the steps taken.[199] Despite these efforts, key recommendations, including land restitution and compensation, remain unresolved, highlighting a significant gap between Kenya's promises and actual implementation.

192 As above.
193 See ACHPR/Res 197(L) 2011.
194 Second Concluding Observation Kenya (n 153) paras 24(i), 47(i) & 63(i).
195 34th Activity Report of the African Commission 5, https://archives.au.int/handle/123456789/6856 (accessed 13 August 2024).
196 R Murray and others (n 188).
197 As above.
198 As above.
199 African Commission's Resolution Calling on the Republic of Kenya to Implement the Endorois Decision ACHPR/Res 257(LIV)2013 (5 November 2013), https://achpr.au.int/en/adopted-resolutions/257-resolution-calling-republic-kenya-implement-endorois-decision (accessed 12 August 2024).

4.3.3 Recommendations regarding rights to citizenship, land, and freedom from arbitrary evictions for the Nubian community cases

The *Nubian* decisions, one by the African Commission in 2015 and another by the African Children's Committee in 2009, were celebrated as landmark rulings for the Nubian community. Despite these advances, achieving full implementation of the recommendations remains a distant goal.

The African Commission's 2015 decision included three substantive recommendations for Kenya:[200] establishing objective and non-discriminatory citizenship criteria; recognising Nubian land rights over Kibra; and ensuring that evictions comply with human rights standards. Unfortunately, the core recommendation for non-discriminatory citizenship, which was also echoed by the African Children's Committee in *Children of Nubian Descent*, remains unfulfilled. Nubians continue to endure a lengthy and discriminatory vetting process for obtaining national identification cards, crucial for their citizenship recognition. In response, the Nubian Community Council of Elders petitioned the National Assembly in 2021 to address these issues, including the removal of the discriminatory vetting process, but these efforts have not succeeded.[201] As of 2024, the Nubians are the only non-border ethnic community in Kenya that are subject to vetting procedures to obtain a national identification card.[202] There is also little optimism that Kenya will comply with the recommendation in the near future, given that the discriminatory vetting process[203] was legitimised by the Security Laws (Amendments) Act in 2014,[204] five years after facing legal challenges before the Commission and three years after the African Children's Committee declared it discriminatory and recommended its removal. The Security Act not only legalised the vetting process

200 *Nubian* (n 15).

201 See Departmental Committee on Administration and National Security of the National Assembly of the Republic of Kenya 'Report on the public petition 023 of 2021 regarding accessing national identity card by the Nubian Community' November 2021 187-191, http://www.parliament.go.ke/sites/default/files/2021-11/Report%20on%20consideration%20of%20public%20petition%20No.023%20regarding%20accessing%20National%20Identity%20cards%20by%20the%20Nubian%20Community%281%29.pdf (accessed 15 September 2024).

202 F Nasubo & D Ngira ' Citizenship rights: The quest for identification' 10 July 2024, https://citizenshiprightsafrica.org/kenya-citizenship-rights-the-quest-for-identification/ (accessed 11 August 2024).

203 Vetting procedures were established administratively until amendments to the Registration of Persons Act adopted in 2014 provided for 'identification committees … to assist in the authentication of information furnished by a parent or guardian'. See B Manby (study for UNHCR) 'Statelessness and citizenship in the East African Community' (2018) 32, https://citizenshiprightsafrica.org/kenya-citizenship-rights-the-quest-for-identification/ (accessed 11 August 2024).

204 Security Laws Amendment Act 2014 sec 23.

but also intertwined citizenship issuance with counterterrorism measures, a move that could exacerbate xenophobia among ethnic groups subject to vetting, such as the Nubians.[205] The only progress achieved in this regard, if it can be considered such, since the decision is the attempt to ease the process, among others, by including Nubian representatives in the vetting committee.[206]

In terms of the second recommendation, which urged Kenya to recognise Nubian land rights over Kibra, there has been some progress. In 2017 Kenya issued to the Nubian community title deeds for 238 acres of land in Kibra,[207] a fraction of the original 4 197 acres taken when the Kibra military reserve was established in 1902. While this move marks a commendable first step, it is imperative that Kenya pursue full compliance by returning the remaining acres to the community or, if this is not feasible, for example, due to the land being used for investment or development, and its return causing significant disruption, it must at least compensate the evicted members to honour the Commission's ruling and uphold basic standards of justice.

The granted title deeds, despite being limited to only 238 acres of the total 4 197 acres taken, can also be seen as progress toward complying with the third recommendation, which calls on Kenya to ensure that any eviction aligns with human rights standards. These deeds, at least psychologically, alleviate the Nubian community's fear of arbitrary loss of at least the portion of land for which they received the deeds, a fear they endured regarding all their lands until they received title deeds for these portions in 2017. Nevertheless, this must be paired with a tangible reduction in arbitrary evictions. Reports reveal that, even after the Commission's ruling, the Nubian community has continued to face unwarranted evictions.[208] This

205 Open Society Justice Initiative and Institute for Human Rights 'The Nubian Community in Kenya/Kenya – Communication 317/06 Comments under Rule 112 relating to implementation' 17 February 2016 para 11, https://www.justiceinitiative.org/uploads/4079106f-dce4-4e4a-bc1c-00ffbeb099bb/litigation-nubian-adults-rule112-submission-20170512.pdf (accessed 11 August 2024).

206 Kenya National Commission on Human Rights 'Briefing report on the implementation of the African Charter on the Rights and Welfare of the Child' August 2020 9, https://www.knchr.org/Portals/0/KNCHR%20Briefing%20Report%20on%20the%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child%20.pdf (accessed 14 August 2024).

207 UN Human Rights Council 'Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance' 25 April 2018 para 50.

208 US Department of State 'Report on international religious freedom: Kenya' 2 June 2022, https://www.state.gov/reports/2021-report-on-international-religious-freedom/kenya/ (accessed 12 August 2024); A Ochieng 'Kenya: Court – Kenya Railways violated rights of Nubians in Kisumu evictions' *allafrica* 28 August 2021, https://allafrica.com/stories/202108300280.html (accessed 15 August 2024).

problem also affects other communities, such as the Ogiek, who, despite the African Court's 2017 ruling recognising their ancestral land rights and calling for the return of their land and cessation of forced evictions,[209] continue to suffer ongoing evictions, including as recently as in 2023 and 2024.[210]

The Commission's final recommendation required Kenya to report within six months on steps taken to implement the decision, but Kenya failed to do so, and no publicly-available information suggests that it submitted the report later, nor is there any indication that the Commission responded to this failure or addressed the broader lack of implementation. For instance, in its 2016 Concluding Observation on Kenya's combined eighth to eleventh periodic report, the Commission neither mentioned the decision nor reminded Kenya to implement the recommendations thereof. This omission might be because the decision year is outside the temporal scope of Kenya's combined report, but since the Commission released its Concluding Observation in 2016, one year after the decision, and considering Kenya failed to submit a progress report within the required six months, it could have used the opportunity to highlight the issue of implementation. It is hoped that the Commission will address this in its next Concluding Observations on Kenya's combined twelfth to thirteenth periodic report, although Kenya did not include progress about the *Nubian* case in its combined report, unlike the *Endorois* case.

Thus, while Kenya has made progress in implementing the Commission's decision in this case, particularly regarding the recognition of land rights and addressing arbitrary evictions, its status remains in the 'partial compliance' category under Viljoen and Louw's compliance framework, as it has not given complete effect to the recommendations. The status of each recommendation in this case, as discussed above, reiterates the fact that implementation is influenced by an interplay of various factors, which may vary from one instance to another. It reveals, for instance, that resource implications or administrative ease are not always determinative

209 African Court on Human and Peoples' Rights *African Commission on Human and Peoples' Rights v Republic of Kenya* Application 6/2012 Judgment 26 May 2017; African Court on Human and Peoples' Rights *African Commission on Human and Peoples' Rights v Republic of Kenya* Application 6/2012 Judgment on reparations 23 June 2022.

210 Minority Rights Group 'Kenyan government must end illegal evictions of Ogiek in Mau Forest' 4 November 2023, https://minorityrights.org/kenyan-government-must-end-illegal-evictions-of-ogiek-in-mau-forest/ (accessed 16 August 2024); 'Joint statement on forced evictions of indigenous peoples in Kenya' November 2023 5 December 2023, https://www.amnesty.org/en/documents/afr32/7499/2023/en/ (accessed 23 August 2024).

factors in whether to implement a recommendation. In this regard, Kenya's failure to end the discriminatory vetting process for the Nubian community, which entails no resource burden, has been attributed to a lack of political will, rooted largely in deeply-entrenched institutional discrimination, where authorities still view the Nubians as non-Kenyans.[211] This contrasts with its partial compliance with the resource-heavy recommendation requiring recognition of the Nubian land rights. By doing so, Kenya, at least theoretically, commits to relinquishing the resources it previously gained by arbitrarily evicting the Nubian community and transferring their land to state and private developers.

In terms of follow-up, the complainants have engaged in different activities such as organising public dialogues, and submitting implementation status reports.[212] However, the extent to which these efforts have directly contributed to the implementation of the decision remains uncertain. Turning to the Commission itself, as briefly noted above, there are no publicly-available steps it has taken to ensure the implementation of the decision. In this regard, it is worth noting that the African Children's Committee has relatively better monitored the implementation of its ruling in *Children of Nubian Descent*, although whether this led to improved implementation requires further investigation and is beyond the scope of the article. For instance, the Chairperson of the African Children's Committee visited Kenya in 2013 to assess progress and presented its visit report in 2017 during the Committee's twenty-ninth session.[213] Coinciding with or influenced by this report, Kenya submitted its own progress report that year, detailing measures taken to implement the ruling,[214] although this was five years after the decision and missed the six-month deadline set by African Children's Committee Guidelines for Communications.[215] In its Concluding Observation on Kenya's first

211 E Fokala 'Do not forget the Nubians: Kenya's compliance with the decisions of African regional treaty bodies on the plight and rights of Nubians' (2021) 54 *De Jure Law Journal* 482.

212 IHRDA 'Fostering implementation of decisions of African regional human rights mechanisms: IHRDA organises public dialogue on implementation of decisions on Kenya Nubian cases' 22 July 2022, https://www.ihrda.org/2022/07/fostering-implementation-of-decisions-of-african-regional-human-rights-mechanisms-ihrda-organises-public-dialogue-on-implementation-of-decisions-on-kenya-nubian-cases/ (accessed 12 August 2024).

213 Fokala (n 211) 487-488.

214 Report of the 29th session of the African Committee of Experts on the Rights and Welfare of the Child 2-9 May 2017, Maseru, Lesotho 16-17, https://national-cases.acerwc.africa/sites/default/files/2022-07/Report_29th_Ordinary_Session_ACERWC_English.pdf (accessed 11 August 2024).

215 Revised Guidelines for the Consideration of Communications of the Committee sec XXII(1)(i), https://www.acerwc.africa/sites/default/files/2022-09/Guidelines%20for%20Consideration%20of%20Communications%20and%20Monitoring%20Implementation%20of%20Decisions.pdf (accessed 11 August 2024).

periodic report, the African Children's Committee also highlighted the issue with regard to the implementation of the decision and urged Kenya to take further action. [216] The decision in *Children of Nubian Descent* was also among those featured in a workshop organised by the African Children's Committee in 2023 on the implementation of its decisions and recommendations with national human rights institutions and civil society actors.[217]

4.4 Ethiopia

Ethiopia failed to comply with the recommendations of the Commissions in both decisions rendered against it on the merits.

4.4.1 Equality Now and *EWLA v Ethiopia*

The Commission issued three recommendations in *Equality Now*, and an evaluation of Ethiopia's adherence to these recommendations reveals near-total non-compliance.

First, Ethiopia was requested to compensate the victim with US $150 000, but this payment remains outstanding.[218] Instead of complying, Ethiopia requested a review of the decision, claiming that an alleged amicable settlement with EWLA (the organisation that initially co-submitted the complaint but was later removed by the victim) had already been reached.[219] This motion for review was misplaced, as it did not present new information warranting a review under the African Commission's Rules of Procedure; the Commission had already considered and rejected this settlement claim before issuing its decision.[220] In 2021 the Commission dismissed Ethiopia's motion for review as unfounded, noting that EWLA no longer was

216 Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on the Kenyan 1st periodic report on the Status of Implementation of the African Charter on the Rights and Welfare of the Child paras 12, 15(a) & 23, https://www.acerwc.africa/sites/default/files/2022-06/kenya_Concluding_Observation_final.pdf (accessed 14 August 2024).

217 African Children's Committee 'Final report: Workshop on implementation of ACERWC decisions and recommendations: 23-24 February 2023' (March 2023), https://www.acerwc.africa/sites/default/files/2023-04/Final%20Report_EN_Workshop%20on%20Implementation%20of%20ACERWC%20Decisions%20and%20Recommendations-March%2024%202023.pdf (accessed 12 August 2024).

218 H Ashagrey 'The impact of the Maputo Protocol in Ethiopia' in S Mutambasere and others (eds) *The impact of the Maputo Protocol in selected African states* (2023) 108.

219 See the decision of the African Commission on Review, https://achpr.au.int/en/decisions-communications/equality-now-federal-women-lawyers-association-ewla-republic-ethiopia (accessed 12 August 2024).

220 See *Equality Now* (n 16) paras 100-106 & 155-157.

the victim's representative at the time of the purported settlement, which the victim did not accept or agree to.[221] However, three years after the motion for review was rejected and eight years after the original decision, Ethiopia has still not paid the recommended compensation to the victim, who now resides abroad. This issue was raised by Commissioner Litha Musymi-Ogana during a conference on the implementation of Commission decisions organised by the Centre for Human Rights, University of Pretoria, in collaboration with the Commission from 13 to 15 September 2023.[222] The commissioner suggested the creation of a fund to compensate victims by contributing a percentage while awaiting state compliance.[223]

Second, the Commission recommended that Ethiopia adopt and implement measures to combat marriage by abduction and rape, monitor instances, diligently prosecute and sanction offenders, and provide judicial officers with training on specific human rights issues, particularly on handling cases of violence against women. Although Ethiopia has indeed taken various steps including legislative, administrative and judicial measures to address marriage by abduction and rape both before and after the Commission's recommendation, these actions appear to be part of broader national policy initiatives that have been intensified since the early 1990s and continued to be enforced today.[224] These initiatives, supported by both domestic and international actors, have long aimed to eradicate harmful traditional

221 See the decision of the African Commission on Review (n 219).

222 Centre for Human Rights 'Centre for Human Rights holds a conference on implementation and domestic impact of the decisions of the African Commission on Human and Peoples' Rights' 22 September 2023, https://www.chr.up.ac.za/latest-news/3580-centre-for-human-rights-holds-a-conference-on-implementation-and-domestic-impact-of-the-decisions-of-the-african-commission-on-human-and-peoples-rights#:~:text=From%2013%2D15%20September%202023,Human%20and%20Peoples'%20Rights%20(African (accessed 12 August 2024).

223 The authors attended the conference and listened to the presentation by the commissioner.

224 Over the past three decades, Ethiopia has implemented robust measures to tackle the plight of women and girls in the country, grounded in its 1993 Women's Policy and the 1995 FDRE Constitution, although challenges persist. See Federal Democratic Republic of Ethiopia: 7th to 10th periodic reports (2015-2023) paras 8, 34, 45, 53, 56-66, 104, https://achpr.au.int/en/state-reports/ethiopia-7th-10th-periodic-reports-2015-2023 (accessed 10 August 2024); MA Salmot & A Birhanu 'The Ethiopian legal frameworks for the protection of women and girls from gender-based violence' (2021) 2 *PanAfrican Journal of Governance and Development* 82-102; Iris Group 'Child, early, and forced marriage: A political economy analysis of Ethiopia' (2020), https://www.girlsnotbrides.org/documents/1621/Ethiopia_Mini_PEA_Final_Doc.pdf (accessed 11 August 2024); UNICEF 'Child marriage and Ethiopia's productive safety net programme: Analysis of protective pathways in the Amhara region final report' (2020), https://www.unicef.org/innocenti/reports/view-all (accessed 11 August 2024); Ministry of Foreign Affairs of Denmark 'Ethiopia: Supporting women and girls survivors of violence', https://um.dk/en/danida/results/stories/ethiopia-support-to-survivors-of-gender-violence (accessed 11 August 2024); WHO 'WHO Ethiopia and UNFPA Ethiopia launch training on clinical management of rape for first-line service providers' 15 February 2022, https://www.afro.who.int/

practices and violence against women.[225] Thus, in the absence of clear evidence that Ethiopia undertook these measures specifically to comply with the Commission's recommendation, it is plausible that Ethiopia's efforts were more about continuing its pre-existing policy initiatives rather than directly responding to the Commission's recommendation. This interpretation is reinforced by Ethiopia's failure to implement specific recommendations from the Commission in the same case, such as paying compensation to the victim. The apparent alignment between Ethiopia's broader policy measures and the Commission's recommendation might thus be viewed as what Viljoen and Louw describe as 'situational compliance', where the measures taken coincide with the Commission's recommendation but are not motivated by a commitment to comply with the ruling itself.[226] Therefore, while Ethiopia's general policies against harmful traditional practices and violence against women align with the Commission's recommendation, this alignment should not be mistaken for compliance *per se*, as key and specific recommendations, such as compensating the victim, remain unmet.

However, this should not be taken to mean that the story of the victim and the denial of justice at the domestic arena has had no impact. It has, in fact, fuelled the movement against harmful traditional practices and violence against women in the country, contributing to increased awareness and advocacy. Even before the case reached the Commission, the victim's story, along with similar incidents, spurred civil society groups, including EWLA and Equality Now, to pressure the Ethiopian Parliament to address the plight of women and girls in the country through the 2004 Revised Criminal Code of Ethiopia, which banned harmful traditional practices, including marriage by abduction, set the minimum marriageable age at 18 years, eliminated the exception for rape if the rapist marries the victim, and imposed stiffer penalties for rape.[227] Ethiopia also implemented various legislative, administrative, judicial and awareness-creating measures to combat harmful traditional practices and violence against women, including marriage by abduction and rape during the period while the case was pending and after the

countries/ethiopia/news/who-ethiopia-and-unfpa-ethiopia-launch-training-clinical-management-rape-first-line-service (accessed 12 August 2024).

225 As above.

226 Viljoen & Louw (n 6) 5-7.

227 Thomson Reuters Foundation 'Ethiopia to pay $150 000 in landmark case of girl abducted and raped 15 years ago' 10 March 2016, https://news.trust.org/item/20160310084946-lv4fy (accessed 13 August 2024); Equality Now 'Spotlight on: Violence against girls in Ethiopia: Marriage by abduction and rape' 2002, https://www.feminist.com/violence/spot/ethiop.html (accessed 11 August 2024).

Commission's decision.[228] These included training for judges and law enforcement, with support from NGOs and embassies, on handling human rights cases, including violence against women.[229] However, despite these efforts, marriage by abduction and rape and other forms of discriminatory practices against women persist,[230] highlighting the long and winding road to go.

The Commission also urged Ethiopia to submit two types of reports on its progress in implementing the decision. First, it was requested to submit a report within six months detailing the measures taken to implement the decision. However, Ethiopia did not submit this report within the specified time frame or afterwards, nor did it include information about the decision in its combined seventh to tenth periodic report submitted in January 2024.[231] Second, the Commission recommended that Ethiopia include in its next periodic report yearly statistics on marriage by abduction and rape prevalence, successful prosecutions, and any challenges faced. The only periodic report Ethiopia submitted after the Commission's decision is the combined seventh to tenth report in 2024. This report neither mentioned *Equality Now* nor provided the required statistics. Instead, it offered general information on legislative, judicial and other measures taken to address harmful traditional practices and violence against women, including abduction, early marriage and rape, and included some statistics on the percentage of women who have experienced physical violence, sexual violence and female genital mutilation.[232]

To sum up, Ethiopia's response to the Commission's decision in *Equality Now* is characterised by defiance, with the exception of one recommendation, which arguably may fall under Viljoen and Louw's concept of 'situational compliance'. Despite its recognition as a landmark decision, its implementation thus represents yet another instance of failure. This may be attributed to various factors, including a lack of political will but, most critically, the lack of pressure

228 See Federal Democratic Republic of Ethiopia (n 224).
229 Ethiopia's 7th to 10th combined reports (n 224) paras 37 & 45; Ministry of Foreign Affairs of Denmark (n 224); WHO (n 224).
230 Ethiopia's 7th to 10th combined reports (n 224) para 376; TG Getaneh 'Developing case: Abduction of Tsega Belachew in Hawassa by mayor's bodyguard raises allegations of police neglect, suspect's connections, and cultural factors' *GHR* 16 June 2023, https://ghrtv.org/developing-case-abduction-of-tsega-belachew-in-hawassa-by-mayors-bodyguard-raises-allegations-of-police-neglect-suspects-connections-and-cultural-factors/ (accessed 12 August 2024); UNICEF 'Children's rights fighting child marriage in Ethiopia' 28 March 2024, https://www.unicefusa.org/stories/fighting-child-marriage-ethiopia (accessed 11 August 2024).
231 Ethiopia's 7th to 10th combined reports (n 224).
232 Ethiopia's 7th to 10th combined reports (n 224) paras 8, 23, 53, 56-58, 62 & 104.

on Ethiopia to comply with its obligations under the decision. No publicly-known follow-up actions have been taken by the Commission to ensure compliance, nor is there any publicly-available information on steps taken by the complainants. This situation is doubly regrettable: first, because the recommendations remain unimplemented; and, second, because the lack of implementation has not even generated public commentary or reaction, including in academic publications. This contrasts with the cases of Botswana and Kenya, where non-compliance with the Commission's decisions has at least drawn attention and criticism from various corners. Ethiopia's continuous defiance of the Commission's ruling without facing the slightest consequences, even naming and shaming to mention the least, can be further explained by other factors: the low visibility of the Commission and its rulings within Ethiopia; limited engagement of Ethiopia's human rights organisations in the African human rights system and with the Commission; a lack of media awareness or interest in reporting on human rights decisions, including those from the Commission; and a historically-low culture of strategic litigation by Ethiopia's human rights organisations, both domestically and before the Commission, at least until recently.

4.4.2 Haregewoin Gabre-Selassie and *IHRDA v Ethiopia*

Despite this case being ground-breaking as the first African Commission decision against Ethiopia, no steps have been taken to enforce it. The former Dergu officials, whose right to a fair trial was declared violated by the Commission, have not received their compensation. Ethiopia has not paid the compensation and has never submitted the required report on the measures it took to implement the decision, which was supposed to be submitted within three months but remains outstanding even after more than 13 years. Furthermore, Ethiopia did not provide information about the decision or the actions taken in its two combined periodic reports submitted to the Commission afterwards.[233] The Commission also has not conducted any publicly-known monitoring to review the progress. For example, the Commission did not address the implementation status of this decision in the only Concluding Observations and recommendations it issued on Ethiopia's combined fifth to sixth periodic report (2009-2013) after the decision.[234]

233 Ethiopia: 5th and 6th periodic report, 2009- 2013, https://achpr.au.int/en/state-reports/ethiopia-fifth-and-sixth-periodic-report-2009-2013 (accessed 14 August 2024); Ethiopia's 7th to 10th combined reports (n 224).

234 Concluding Observations and recommendations – Ethiopia: 5th and 6th periodic report, 2009-2013, https://achpr.au.int/en/state-reports/concluding-

Several factors might explain Ethiopia's non-compliance with this decision, many of which are those discussed regarding *Equality Now* above. These include the Commission's low profile in the country; a lack of publicity of the decisions;[235] insufficient follow up from the Commission; limited engagement by Ethiopian civil society with the African human rights system; and minimal local media interest in human rights decisions in Ethiopia. In addition, the sensitive nature of *Dergue Officials* provides a specific context that might explain its non-implementation during the tenure of the TPLF-led EPRDF government. This case involved officials from the former Dergue regime, known for its brutality and overthrown by the TPLF-led EPRDF government in 1991 after a prolonged civil war. The TPLF-led EPRDF government, which was itself authoritarian and in power until 2018, oversaw the initial eight years of the decision's implementation. Given the historical enmity between the TPLF-led EPRDF regime and the former Dergue officials, who were charged with serious crimes such as genocide, it is plausible that the TPLF-led EPRDF government's reluctance to pay compensation to the victims was influenced by these historical tensions. Regarding the ongoing non-implementation under the current Abiy administration, which came to power in 2018 and has maintained a similarly autocratic governance style, the broader issues mentioned earlier, such as the visibility of the Commission's rulings within the domestic sphere and deficiencies in follow up, coupled with other possible factors, such as a lack of political will, may account for the sustained non-implementation of the decision. It is also possible, albeit presumptive, that the victims lack interest in pursuing compensation since they were released from prison through a pardon.

Overall, the Commission's decisions in *Equality Now* and *Dergue Officials* have been met with defiance, with Ethiopia facing no significant repercussions – not even naming and shaming – to enforce compliance. Beyond their non-implementation, these decisions have not been leveraged as advocacy tools at the domestic level. This can be attributed, as noted earlier, to general and case-specific factors, such as the sensitive nature of the *Dergue Officials* case, which may have dissuaded local civil society organisations from pushing for its implementation due to fears of potential backlash or any other reasons, possibly including their views on the former officials. What is particularly striking, however, is the absence of publicity and

observations-and-recommendations-ethiopia-fifth-and-sixth-period (accessed 14 August 2024).

235 MG Techane 'The impact of the African Charter and the Maputo Protocol in Ethiopia' in VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 70.

advocacy around *Equality Now*, particularly among women's rights groups in Ethiopia. The ruling should have been championed as an advocacy tool and a catalyst for increased engagement by Ethiopian human rights organisations in international litigation, including before the African Commission, but that opportunity appears to have been squandered.

5 Conclusion

The article examined the status of implementation of the African Commission's decisions against Botswana, Kenya and Ethiopia. The analysis revealed a troubling pattern of poor adherence across all three states. Botswana displayed almost complete defiance in all decisions made against it, except in *Modise*, where it partially complied by reinstating Modise's citizenship and, consequently, that of his children. Non-adherence included an outright rejection to implement the *Good* decision. It also did not comply with the Commission's calls in its decisions on the death penalty, failing not only to impose a moratorium and eventually abolish death penalty, but also to provide death row inmates and their families advance notice before execution. Furthermore, Botswana disregarded the Commission's condemnation of 'hanging' as an inhumane execution method by continuing to use it in practice and law, despite having the opportunity to amend the Penal Code after the Commission's decision.

In contrast, Kenya demonstrated some progress in two out of the three of the Commission's decisions against it, while the third decision (*Ouko*), according to the latest publicly-available information, was met with complete non-compliance. Its partial compliance included some largely tokenistic measures, such as registering the EWC and making some progress in royalty payments as recommended in *Endorois*. Kenya also partially complied with the recommendation to recognise Nubian land rights by granting them community title deeds for 238 acres in the Kibra neighbourhood, although this acreage was less than the original land the community had. However, Kenya did not implement resource-intensive recommendations, such as compensating the Endorois community, or those requiring ambivalent measures such as restoring their ancestral land – a *sine qua non* for truly vindicating the rights of the Endorois community, whose religion, culture and subsistence are intrinsically tied to their land. Likewise, Kenya did not abolish the discriminatory vetting procedure for granting identity cards, as recommended in the *Nubian* decision.

Turning to Ethiopia, it displayed almost complete non-compliance with the *Equality Now* decision and complete non-compliance in *Dergue Officials*. While Ethiopia did take measures to tackle marriage by abduction and rape, in alignment with one of the recommendations in *Equality Now*, these measures can only be viewed as 'situational compliance'. No other recommendations in *Equality Now* were followed, and none of the recommendations in *Dergue Officials* were complied with.

Different factors may have contributed to the lack of or poor implementation of these decisions. However, the discussions revealed no clear link between the broader human rights records and democratic protections of states and their level of compliance with the Commission's decisions. On the one hand, despite Botswana's relatively strong human rights record and democratic protections, it exhibited complete defiance in four of the five discussed decisions (including *Bosch*), even outrightly rejecting one of the Commission's decisions. This contrasts with Kenya which, despite a lower standing in human rights and democratic protections compared to Botswana, at least partially implemented some of the Commissions' recommendations in *Endorois* and *Nubian*. This suggests that a strong human rights record and democratic protection do not necessarily correlate with higher compliance levels. On the other hand, the finding that Kenya, which has a better human rights record and more democratic protections than Ethiopia, demonstrated partial compliance with Commission's decisions, whereas Ethiopia remains totally defiant, indicates a possible correlation between broader human rights records and democratic protections and the extent of compliance with the Commission's decisions. This disparity demonstrates that while a strong human rights record and democratic protections may influence implementation, they do not automatically guarantee it.

Effective implementation requires the alignment of various factors, with political will being a critical determinant. The discussion in this article also indicates that a lack of political will is a factor behind the implementation of each case, although its manifestation – either explicit or implicit – and the extent of its role may vary, acting independently or in conjunction with other factors, depending on the case and country. For instance, Botswana's lack of political will is evident in its outright rejection of the *Good* decision and its non-compliance with less demanding recommendations, such as providing advance notice to death row inmates and their families before executions – a recommendation that requires no resources or legislative changes to comply with. Furthermore, Botswana's failure

to outlaw the use of 'hanging' as a method of execution, despite having the opportunity to do so during amendments to other provisions of the Penal Code following the Commission's decision, further underscores this issue. Likewise, in Ethiopia, a lack of political will, combined with other variables such as the politically-sensitive nature of the decision and the low visibility of the Commission's decisions domestically, likely contributed to the non-implementation of the recommendation in *Dergue Officials*.

The discussion also revealed that the nature of recommended remedies – whether they require substantial resources, legislative or policy changes, significant alterations to the *status quo*, or shifts in public attitudes or not – may have an impact on implementation. This impact is evident in the *Endorois* decision, where compliance was better for recommendations that did not demand significant resources or major changes, such as registering the EWC and sharing royalties, while there was hesitance with resource-intensive recommendations such as paying compensation to the Endorois community, and land restoration which, it was argued, would significantly alter the *status quo*, including the world heritage status of Lake Bogoria National Reserve. However, the discussion also demonstrated that the simpler and straightforward nature of remedies does not automatically guarantee implementation, as seen in non-implemented compensation payments in *Equality Now*, *Dergue Officials* and *Modise*, and the recommendation to Botswana to give advance notice to death row inmates and their families before execution, which arguably requires no resources and no legislative changes. This suggests that while the nature of recommended remedies matters, many other variables, including political will, influence implementation.

The specificity, or lack thereof, of the recommended remedies, such as the amount of compensation to be paid to victims, may also influence implementation. This issue was evident in *Modise*, where the Commission's failure to specify the compensation amount led to disagreements between the Botswana government and the victim, resulting in non-implementation. Likewise, the Kenyan government has cited difficulties in determining compensation amounts as a reason for delaying compensation to the Endorois community. However, it is worth noting that specificity in recommendations does not also automatically lead to implementation. For instance, in *Equality Now*, even though the Commission specified the amount of compensation, it did not result in implementation. This is another indication that implementation is a complex interplay of various factors, and specificity alone is insufficient to ensure compliance.

The other issue that emerged from the discussion in this article is the inconsistent reaction to non-implementation of the Commission's decisions across different states. While Kenya, despite making some progress and partially complying with the recommendations in two cases, has faced scrutiny for not addressing critical recommendations, and Botswana has been scrutinised for non-compliance, Ethiopia has largely avoided scrutiny and remains off the radar despite its own non-compliance. This discrepancy appears to stem partly from the Commission's uneven follow-up efforts. For example, while the Commission's follow-up actions in *Endorois* – such as raising the status of implementation of the case during consideration of Kenya's combined periodic reports, holding hearings on implementation progress, issuing resolutions about non-compliance, and organising workshops to discuss progress – may or may not have directly led to Kenya's partial compliance, they have at least contributed to the sustained public scrutiny and kept Kenya's non-compliance in the spotlight. Similarly, while less intensive, the Commission's follow up on Botswana included key steps such as referring the *Good* case to the Executive Council of the AU and inquiring about the *Modise* case during a field mission. These efforts, supported by academic articles, NGO reports, and updates from complainants, helped keep the issue of non-implementation in the public eye. However, the Commission has not undertaken publicly-known follow-up actions for the *Equality Now* and *Dergue Officials* cases against Ethiopia. This lack of follow up, combined with limited public awareness of the Commission and its decisions in Ethiopia, minimal involvement of Ethiopian NGOs in the African human rights system, and insufficient engagement by the Ethiopian Human Rights Commission, has allowed Ethiopia to evade repercussions and avoid public scrutiny for its non-compliance. This situation may be seen as a green light for Ethiopia to continue its defiance without facing consequences, potentially discouraging adherence to similar rulings in the future.

Overall, the assessment highlights substantial challenges in translating the Commission's rulings into positive human rights impacts through better national implementation. The authority of the Commission and the effectiveness of the African human rights framework depend on robust efforts to ensure that its recommendations are not only issued but also effectively implemented to safeguard the rights and dignity of individuals across the continent. This requires states to uphold their human rights commitment under the African Charter by complying, among others, with the decisions and recommendations of the African Commission. It is also incumbent upon the Commission to diligently monitor the implementation of its rulings and provide public updates. This

should be the case even when the states concerned show defiance, either explicitly or through their actions, as it keeps these states in the spotlight for failing to comply. However, it is crucial to emphasise that while the primary responsibility for taking measures to comply with human rights obligations arising from the African Charter or the African Commission's rulings lies with the states, and the monitoring role falls to the Commission, implementation is a collective effort that involves not only states and the Commission, but also other entities such as complainants, victims, national human rights institutions, academics, medias and civil societies.

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The impact of country-specific resolutions of the African Commission on Human and Peoples' Rights, 1994-2024

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Summary: *This article analyses the impact of the country-specific resolutions of the African Commission on Human and Peoples' Rights using a theoretical framework constructed around the concept of 'naming and shaming'. The Commission's country-specific resolutions focus on the human rights situation in named countries. While the Commission has consistency adopted these resolutions since 1994, very little is known about their impact. The article attempts to fill this gap in the literature by presenting evidence of the extent to which country-specific resolutions issued by the Commission have been complied with. It analyses nine resolutions, selected because they contain specific recommendations that would allow for the possibility of analysing impact with some level of accuracy. An analysis of these resolutions, adopted in seven countries (Eritrea, Eswatini, Ethiopia, The Gambia, Kenya, Nigeria and Zimbabwe) reveals that immediate full compliance is rare. At best, the Commission's country-specific resolutions have triggered discursive engagements that have resulted in tentative changes in human rights practices or situational compliance as a result of changes in government or political circumstances.*

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Key words: *African Commission on Human and Peoples' Rights; country-specific resolutions; impact; naming and shaming; implementation; compliance*

1 Introduction

A typical function of the African Commission on Human and Peoples' Rights (African Commission) is to monitor the situation of human rights on the continent. When it detects a reason for serious concern or a dire situation is brought to its attention, the Commission often responds through a variety of means. First, it may send an urgent appeal or a letter of concern to the concerned government. Urgent appeals mostly deal with time-sensitive cases including those that present the danger of irreparable harm.[1] Second, the African Commission may publish a press statement on its website.[2] Third, the Commission may adopt a country-specific resolution outlining its concern(s) and recommending specific action(s) to be undertaken by the targeted country.

The above three options serve more or less the same purpose. The choice of one option over the other appears to be an issue of timing. On the one hand, urgent appeals, letters of concern and press statements are mainly issued during the Commission's inter-session periods.[3] They are initiated and signed off by individual commissioners in their capacity as country rapporteurs or special mechanism mandate holders. A vote or consensus among the commissioners is not a prerequisite for their issuance, although the Commission's bureau ordinarily gives its approval prior to publication. On the other hand, country-specific resolutions are exclusively considered during and issued at the end of the formal sessions of the Commission. They reflect the position taken by the majority of the commissioners either by way of a vote or consensus.

This article is concerned with the impact of the African Commission's country-specific resolutions. The aim of such resolutions is to put public pressure on the target countries to align their conduct with the African Charter on Human and Peoples' Rights (African Charter)

1 Urgent appeals play a similar role to 'provisional measures' that the Commission issues in the context of its communications procedure. See Rules of Procedure of the African Commission on Human and Peoples' Rights 2020, Rule 100.

2 For recent press releases by the African Commission, see News | African Commission on Human and Peoples' Rights (accessed 12 November 2024).

3 The Commission normally holds four ordinary sessions in a year, two of which are open for public participation. The sessions often take place in February/March, April/May, July/August and October/November. The inter-session periods are the months in between the ordinary sessions.

and/or its applicable protocols. The resolutions shine a spotlight on and call international attention to human rights violations and abuses. The mobilisation of this kind of public pressure, commonly known as 'naming and shaming', is an entrenched methodology for advancing human rights. Popularised by international human rights organisations,[4] naming and shaming is so rooted a strategy that it has become 'the principal weapon of choice among many international organisations and governments'.[5] The strategy has gained significant traction given the rapid diffusion of news and information in the present world.

To the extent that they are intended to mobilise public pressure through naming and shaming, the African Commission's country-specific resolutions operate in ways similar to those of the United Nations (UN) Human Rights Council (HRC).[6] The resolutions are also comparable to those that were routinely adopted by the UN Commission on Human Rights (UNCHR) before it was disbanded and replaced by the HRC.[7] Likewise, the Commission's country-specific resolutions serve a purpose similar to that of country reports of the Inter-American Commission on Human Rights (Inter-American Commission).[8] These reports gained prominence during the 1970s and 1980s, a period during which many countries in Latin America were under authoritarian rule. Through publication of country reports, the Inter-American Commission established itself as a fierce critic of human rights violators in the region.[9]

Scholars have examined the impact of the resolutions of both the HRC and its predecessor. Through extensive research, we now

4 Amnesty International and Human Rights Watch are specifically and globally known for their naming and shaming campaigns. See S Hopgood *Keepers of the flame: Understanding Amnesty International* (2006); K Roth 'Defending economic, social and cultural rights: Practical issues faced by an international human rights organisation' (2004) 26 *Human Rights Quarterly* 63.

5 J Meernik and others 'The impact of human rights organisations on naming and shaming campaigns' (2012) 56 *Journal of Conflict Resolution* 233. See also J Franklin 'Shame on you: The impact of human rights criticism on political repression in Latin America (2008) 52 *International Studies Quarterly* 187 (describing naming and shaming as 'the most commonly used weapon in the arsenal of human rights proponents'); Roth (n 4) 63 (describing naming and shaming as 'the core methodology' of Human Rights Watch).

6 See T Piccone & N McMillen 'Country-specific scrutiny at the United Nations Human Rights Council: More than meets the eye' (accessed 13 November 2024).

7 For an analytical overview of the CHR's country-specific resolutions, see M Lempinen *The United Nations Commission on Human Rights and the different treatment of governments: An inseparable part of promoting and encouraging respect for human rights* (2005) 193-221.

8 On the role and value of these reports, see T Farer 'The future of the Inter-American Commission on Human Rights: Promotion vs exposure' in J Mendez & F Cox (eds) *The future of the inter-American human rights system* (1998) 515.

9 See T Farer 'The rise of the Inter-American human rights regime: No longer a unicorn, not yet an ox' (1997) 19 *Human Rights Quarterly* 510, 512.

know that despite the fact that the targeting of states by the UNCHR through resolutions was encumbered by political bias,[10] an increasing number of repressive states were forced to engage with the body if only to defend themselves.[11] We also know that countries that were often the subject of UNCHR resolutions experienced reductions in foreign aid from multilateral financial institutions such as the World Bank.[12] Beyond the resolutions of the UNCHR/HRC, a considerable amount of ink has also been spilt examining the naming and shaming effect of the rulings of the UN Human Rights Committee,[13] as well as the nature of state responses to country-specific activities of UN special procedures.[14] Scholars have also scrutinised the impact of the Inter-American Commission's country reports,[15] with some reaching the conclusion that the pressure accompanying the reports has contributed to a reduction of human rights violations in specific countries.[16]

On the contrary, very little is known about the impact of the country-specific resolutions of the African Commission.[17] Do states care if they are criticised or condemned by the Commission? Do they respond to the Commission's country-specific resolutions? If they do not respond, what explains their silence or indifference? If they respond, what is the nature of the response? Have the resolutions impelled any form of change in state conduct? If naming and shaming serves as a megaphone for building pressure,[18] are the Commission's country-specific resolutions loud enough or loud at all? Building upon previous research on naming and shaming, the analysis in this article is an attempt to respond to these questions with a view to filling the gap in the literature.

10 See generally Report of the Secretary-General 'In larger freedom: Towards development and human rights for all' UN Doc A/49/2005, 21 March 2005.

11 J Lebovic & E Voeten 'The politics of shame: The condemnation of country human rights practices in the UNCHR' (2006) 50 *International Studies Quarterly* 861.

12 J Lebovic & E Voeten 'The cost of shame: International organisations and foreign aid in the punishing of human rights violators' (2009) 46 *Journal of Peace Research* 79.

13 W Cole 'Institutionalising shame: The effect of Human Rights Committee rulings on abuse, 1987-2007' (2012) 41 *Social Science Research* 539.

14 T Piccone 'The contribution of the UN's special procedures to national level implementation of human rights norms' (2011) 15 *International Journal of Human Rights* 206.

15 R Goldman 'History and action: The Inter-American human rights system and the role of the Inter-American Commission on Human Rights' (2009) 31 *Human Rights Quarterly* 856; Farer (n 9).

16 Goldman (n 15) 873.

17 For a very brief analysis of the indirect impact of a select number of the Commission's country-specific resolutions, see F Viljoen *International human rights law in Africa* (2012) 380-382; for a more comprehensive view, see J Biegon 'The impact of the resolutions of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2016 (on file with author).

18 K Kinzelbach & J Lehmann *Can shaming promote human rights? Publicity in human rights foreign policy: A review and discussion paper* (2015) 5.

In terms of structure, this article is divided into five parts. This part introduces the subject of discussion. Part 2 provides a description of the nature and role of the African Commission's country-specific resolutions. This includes a statistical analysis showing trends and patterns in the Commission's practice of adopting country-specific resolutions. Part 3 presents the conceptual framework that underpins the analysis of the impact of the country-specific resolutions. It categorises impact into two broad categories: direct impact (changes in states' human rights practices) and indirect impact (states' discursive responses to the Commission's resolutions). This part also discusses the methodology used to gather data for the study. Part 4 presents evidence of the impact of the Commission's country-specific resolutions. In addition to broad overviews of cases of compliance and non-compliance in Eritrea, Eswatini, Ethiopia, Kenya and Zimbabwe, the part provides in-depth impact analyses in The Gambia and Nigeria. Part 5 draws the article to a conclusion.

2 Nature and role of country-specific resolutions

Country-specific resolutions focus on the human rights situation in specific countries. Described as an expression of 'audacity on the part of [Commission] members',[19] country-specific resolutions shine a spotlight on and seek to mobilise public pressure against repressive practices and gross human rights violations and abuses. In this context, the Commission utilises country-specific resolutions as a naming and shaming tool, although on at least one occasion it has adopted a resolution applauding positive developments in the targeted country.[20]

Country-specific resolutions follow a common pattern in their structure. After citing relevant provisions of the African Charter or any other relevant instrument, and after recalling pertinent previous developments, the African Commission expresses its 'concern' or 'deep concern', or it indicates that it is 'disturbed' or 'alarmed' by the human rights situation in the target country. It then 'condemns', 'deplores' or 'regrets' this situation and 'calls upon' the target country to address or remedy the situation. The condemnatory language used by the Commission in country-specific resolutions has been described by one commentator as 'very robust'.[21]

19 F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) 549.
20 Resolution on Nigeria's Return to a Democratic System, ACHPR/Res.28(XXIV)98 adopted at the 24th ordinary session, Banjul, The Gambia, 22-30 October 1998.
21 Ouguergouz (n 19) 544.

The African Commission has also used country-specific resolutions to alert countries to the potential of certain developments to increase the likelihood of human rights violations.[22] In this way, country-specific resolutions play the role of an early warning or preventive tool. Country-specific resolutions may also serve as a follow-up tool, that is, when they are used to push a state to implement a previous decision of the African Commission taken, for instance, under its complaint or communications procedure.[23] They may also be used to highlight the plight of a particular group of people in a country such as human rights defenders,[24] journalists and media practitioners,[25] and women.[26]

Although country-specific resolutions are adopted as part of the African Commission's promotional mandate, they may also serve a quasi-protective role.[27] They provide the Commission with the opportunity to consider and comment on the human rights situation in countries against which no complaint has been lodged. The Commission has not had the opportunity to adjudicate a complaint involving several countries targeted by country-specific resolutions, including Comoros, Guinea Bissau and Somalia. Country-specific resolutions are also relevant in respect of countries that have never complied with their reporting obligation (Comoros, Guinea Bissau, Somalia and South Sudan) or which complied at some point but subsequently lapsed into non-compliance (for example, Burundi, Central African Republic (CAR), Guinea and Sudan).[28]

Despite its consistency in adopting country-specific resolutions, the Commission has not developed any guidelines outlining

22 See Resolution on the Prevention of Women and Child Trafficking in South Africa during the 2010 World Cup Tournament, ACHPR/Res.165(XLVII)10 adopted at the 47th ordinary session, Banjul, The Gambia, 12-26 May 2010.

23 See Resolution on the Human Rights Situation in Eritrea, ACHPR/Res.91(XXXVIII)05 adopted at the 38th ordinary session, Banjul, The Gambia, 21 November-5 December 2005; Resolution Calling on the Republic of Kenya to Implement the Endorois Decision, ACHPR/Res.257(2013) adopted at the 54th ordinary session, Banjul, The Gambia, 22 October-5 November 2013; Resolution on the Human Rights Situation in the Kingdom of Swaziland, ACHPR/Res.216(LI)2012 adopted at the 51st ordinary session, Banjul, The Gambia, 18 April-2 May 2012.

24 Resolution on the Situation of Human Rights Defenders in Tunisia, ACHPR/Res.56(XXIX)01 adopted at the 29th ordinary session, Tripoli, Libya, 23 April-7 May 2001.

25 Resolution on the Attacks against Journalists and Media Practitioners in Somalia, ACHPR/Res.221(LI)2012 adopted at the 51st ordinary session, Banjul, The Gambia, 18 April-2 May 2012.

26 Resolution on the Crimes Committed against Women in the Democratic Republic of Congo, ACHPR/Res.173(XLVIII)10 adopted at the 48th ordinary session, Banjul, The Gambia, 10-24 November 2010.

27 Viljoen (n 17) 380.

28 For the list of non-compliant states, see 'Paper on the status of submission of periodic reports by states parties to the Charter' African Commission on Human and Peoples' Rights, 81st ordinary session, Banjul, The Gambia, 17 October to 6 November 2024 (on file with author).

the circumstances that warrant their issuance. In April 2016 the Commission established the Resolutions Committee, an internal subsidiary mechanism mandated with the task of 'collect[ing] data and information on situations of human rights violations on the continent that may be addressed in resolutions and make proposals to the Commission'.[29]

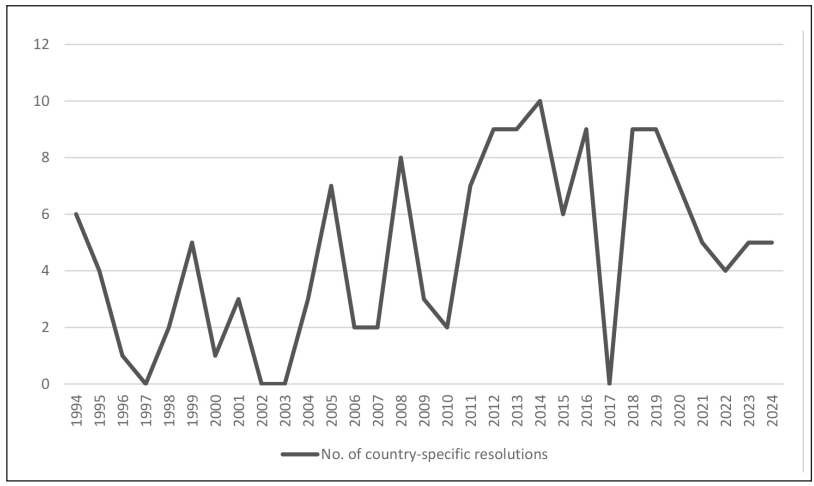
As of mid-November 2024, the African Commission had adopted a total of 141 country-specific resolutions targeting 39 state parties to the African Charter. The Commission also adopted four omnibus resolutions focusing on the human rights situation on the entire continent during the same period. The Commission should ordinarily be concerned with the human rights situation in state parties to the African Charter. However, it has adopted two resolutions on the situation in Palestine, a non-state party to the African Charter.[30]

Graph 1 below shows the number of country-specific resolutions adopted each year from 1994 to 2024. It reveals that the number of resolutions adopted on an annual basis by the African Commission has progressively increased over the last 30 years. From 1994 to 2003, the Commission adopted a total of 22 country-specific resolutions, which translated to an average of 2,2 resolutions per year. The rate of adoption more than doubled in the second decade (2004-2013) to a total of 50 resolutions and an annual average of five resolutions. From 2014 to 2024, the annual average increased to 6,8 resolutions.

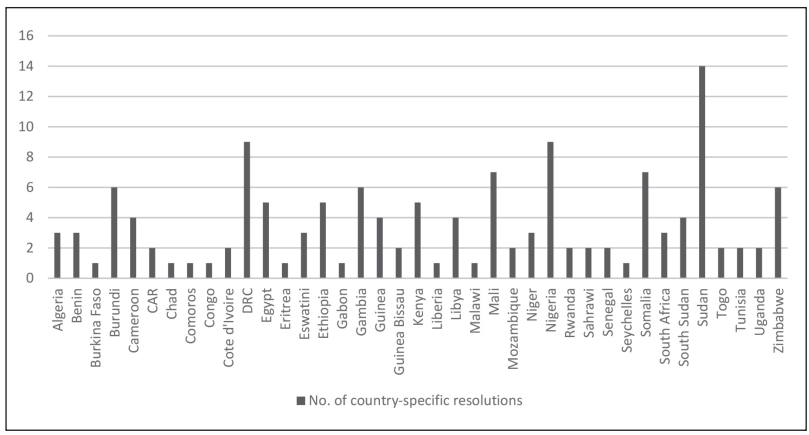
29 Resolution on the Establishment of a Resolutions Committee, ACHPR/Res.338 (LVIII) 2016 adopted at the 58th ordinary session, Banjul, The Gambia, 6-20 April 2016.

30 See Resolution on the Situation in Palestine and the Occupied Territories, ACHPR/Res.48(XXVIII)00 adopted at the 28th ordinary session, Cotonou, Benin, 26 October-6 November 2000; Resolution on the Situation in Palestine and the Occupied Territories adopted at the 81st ordinary session, Banjul, The Gambia, 17 October-6 November 2024.

Graph 1: Annual adoption of country-specific resolutions, 1994-2024



Graph 2: Target countries of country-specific resolutions, 1994-2024



Graph 2 above shows the number of resolutions adopted in respect of each of the 39 state parties. With 14 resolutions, Sudan has attracted the most country-specific resolutions (10 per cent). The timing of these resolutions largely corresponds to the periods in the country's history when it has been engulfed in conflict. In descending order, Sudan is followed by the Democratic Republic of the Congo (DRC) (nine); Nigeria (nine); Mali (seven) and Somalia (seven), all of which have also grappled with protracted conflicts. Other countries that have attracted a relatively large number of resolutions are

Burundi, Egypt, Ethiopia, The Gambia, Kenya and Zimbabwe. With 33 resolutions in total, these countries cumulatively account for 24 per cent of all country-specific resolutions. They have experienced episodes of human rights crisis and repression at particular points in their history.

The human rights violations and abuses that motivate the African Commission to adopt country-specific resolutions are myriad. A textual analysis of the resolutions revealed six broad categories: conflict and violence; elections or unconstitutional changes of governments or *coups d'état*; socio-economic rights; non-compliance with Commission decisions or state reporting obligations; repression; and the rights of marginalised groups, especially women. Table 1 below shows the results of the classification of the resolutions into the six broad categories.[31]

Table 1: Subject-matter of country-specific resolutions, 1994-2024

Subject	Number of resolutions	%
Conflict/violence	61	45
Election/coup	17	13
ESCR	6	4
Non-compliance	2	2
Repression	43	32
Marginalised groups	6	4

Nearly half (45 per cent) of all the country-specific resolutions address human rights violations committed in the context of conflict or widespread violence. Long before the African Commission created the Focal Point on Human Rights in Conflict Situations in February 2016,[32] country-specific resolutions were already playing the crucial role of highlighting human rights violations committed in conflict.[33] The resolutions still play this crucial role and often reflect

31 Omnibus resolutions and the resolutions on Palestine were not included in the count used to generate the table.

32 Resolution on Human Rights in Conflict Situations, ACHPR/Res.332 (EXT. OS/XIX) 2016 adopted at the 19th extraordinary session, The Gambia, 16-25 February 2016.

33 See R Murray 'Serious or massive violations under the African Charter on Human and Peoples' Rights: A comparison with the Inter-American and European mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights* 109, 126-127.

the convergence of international human rights law and international humanitarian law in the work of the Commission.[34]

Repressive practices account for the second most important motivation for the Commission's country-specific resolutions. Out of the 141 country-specific resolutions adopted by the Commission in the last three decades, 43 (or 32 per cent) relate to situations in which the Commission is concerned about systemic or an upsurge of violations of civic freedoms in a context of repression of dissent and critical voices. In this regard, repressive practices covered in country-specific resolutions include the following: arrest and detention of government critics and human rights activists; torture, killings and enforced disappearances; and clampdown on freedoms of expression, association and assembly.

Closely related to the scourge of conflict in Africa is the phenomenon of electoral violence and *coups d'état* or unconstitutional changes of governments. The African Commission has adopted 17 resolutions on this subject. Its position on invalidity of *coups d'état*, as expressed in these resolutions, predates both the African Union (AU) Declaration on Unconstitutional Changes of Government and the African Charter on Democracy, Elections and Governance (African Democracy Charter). Table 1 above reveals that socio-economic rights and the rights of marginalised groups have not featured prominently in country-specific resolutions. This may suggest a preference to address concerns relating to the two subjects through thematic resolutions.

3 Conceptualising and measuring impact

This article analyses the impact of the African Commission's country-specific resolutions using a theoretical framework constructed around the concept of naming and shaming. This is the 'act of framing and publicising human rights information in order to pressure states to comply with human rights standards'.[35] In this context, naming and shaming falls under the broader category of 'human rights pressures', which Hawkins defines as 'non-violent activities carried out by transnational networks and states with the primary purpose of

34 See F Viljoen 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 303.

35 A Clark 'The normative context of human rights criticism: Treaty ratification and UN mechanisms' in T Risse and others (eds) *The persistent power of human rights: From commitment to compliance* (2013) 125, 126.

improving individual rights by creating economic and political costs for a repressive government'.[36]

Naming and shaming countries, as the African Commission does in country-specific resolutions, may trigger two possible forms of impact. It may have a *direct impact* by contributing to changes in the state's conduct. Executions may be stayed, detainees released, investigations opened, or forced evictions suspended. Alternatively, or additionally, naming and shaming may have an *indirect impact* by jolting the concerned state into a discursive engagement with the African Commission. Naming and shaming may also influence policy decisions of third parties regarding the target country, or it may empower and support the human rights activism of domestic constituencies.

3.1 Direct impact

The underlying logic of direct impact is that 'action' is impact. Naming and shaming achieve what Franklin describes as the 'highest level of influence' when the target state changes its conduct or behaviour to conform to human rights norms and principles.[37] In this context, direct impact may be defined as 'an immediate and acknowledged shift in state repressive practices'.[38] Direct impact essentially connotes *compliance* with the Commission's country-specific resolutions. The term 'compliance' refers to 'a state of conformity or identity between an actor's behaviour and a specified rule'.[39] In this study, compliance thus means the alignment of the factual situation in a target country with the Commission's recommendations in a country-specific resolution.

Human rights change is naturally a process rather than an event. As such, compliance often occurs slowly as small and gradual steps build up to a point where the state's behaviour conforms to or attains the expected standard. This brings into focus the related concept of *implementation* which is the process of putting in place measures to give effect to international commitments or decisions or recommendations of human rights treaty bodies.[40] As is done in this article, the terms 'compliance' and 'implementation' are often

36 D Hawkins *International human rights and authoritarian rule in Chile* (2002) 20.
37 Franklin (n 5) 189.
38 A Brysk 'From above and below: Social movements, the international system, and human rights in Argentina' (1993) 26 *Comparative Political Studies* 259, 273.
39 K Raustiala & A Slaughter 'International law, international relations and compliance' in W Carlsnaes, T Risse & B Simmons (eds) *Handbook of international relations* (2002) 538, 539.
40 As above.

used interchangeably, although the former is an outcome while the latter is the process that produces that outcome. As an outcome, a state's level of compliance is best understood as a status that could potentially shift from non-compliance to either partial or full compliance.

It is also worth noting that compliance may be achieved independently of implementation. This may happen due to sheer coincidence or a change in circumstances that brings a state's conduct into conformity with the expected behaviour, but without the state having taken the necessary deliberate steps to comply. This form of compliance is referred to as 'situational' or *sui generis* compliance.[41]

3.2 Indirect impact

The underlying logic of indirect impact is that 'reaction' or 'response' is impact.[42] The African Commission adopts country-specific resolutions with the hope that they will elicit some form of response from a variety of actors, including the target country, a third party such as a donor or a multilateral institution, or from the local population in the target country. Such response may in the long run trigger the expected human rights change by prompting discourse, making information available to relevant actors, and creating or invigorating impetus for more pressure to be piled on the target country.

Although state responses to naming and shaming are context-specific, it is possible to identify a common pattern. Cohen classifies state responses to human rights criticism into three mutually-inclusive categories, namely, denial, counteroffensive and acknowledgment.[43] Most probably, a target country will first deny the allegation levelled against it. The country will argue that what it is criticised for never happened (literal denial) or that whatever happened is different from what it is accused of (interpretive denial). Alternatively, it will

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

42 For examples of studies that use this logic to analyse impact, see European Inter-University Centre for Human Rights and Democratisation *Beyond activism: The impact of the resolutions and other activities of the European Parliament in the field of human rights outside the European Union* (2006); M O'Flaherty & J Fisher 'Sexual orientation, gender identity and international human rights law: Contextualising the Yogyakarta principles' (2008) 8 *Human Rights Law Review* 207.

43 S Cohen 'Government responses to human rights reports: Claims, denials and counterclaims' (1996) 18 *Human Rights Quarterly* 517.

argue that what happened was justified for one reason or the other (implicatory denial).

Denial is usually accompanied by the second form of response: counter-offensive. When it responds in this manner, a target country will attempt to counter the criticism by making arguments that challenge the content of the criticism as well as the authority, credibility or the motive of the source. Lastly, a target country may acknowledge the wrongs for which it is criticised. Acknowledgment often is a 'disarming type of response' and may range from partial to full acknowledgment.[44] That a target country acknowledges that it is in the wrong does not necessarily mean that it will remedy the wrong. In many cases, target countries initiate cosmetic changes to pacify criticism.

By responding to criticism, target countries inadvertently initiate a discourse that may push them into a corner where they are gradually socialised into proper human rights behaviour. In the literature, this process is referred to as 'rhetorical entrapment'.[45] The entrapment often begins when the target state denies the allegations levelled against it. The mere act of denial sets in motion a socialisation process.[46] It sends a message to relevant actors that the target country cares about its human rights record even if it does so for instrumental reasons. With this knowledge, more pressure may be applied to the target country leading it to a stage where it acknowledges the wrong and makes tactical concessions. These concessions become the basis for even more demands. In effect, rhetorical entrapment converts words that were initially empty gestures into concrete action in favour of human rights.

Numerous case studies demonstrate that rhetorical entrapment has resulted in human rights changes in many parts of the world,[47] including in Africa where there are compelling analyses of how the

44 As above.
45 For detailed elaboration of the concept of rhetorical entrapment, see F Shimmelfennig 'The community trap: Liberal norms, rhetorical action, and the Eastern Enlargement of the European Union' (2001) 55 *International Organisation* 47.
46 T Risse & K Sikkink 'The socialisation of international human rights norms into domestic practices: Introduction' in T Risse and others (eds) *The persistent power of human rights: From commitment to compliance* (2013) 23.
47 See generally Risse and others (n 46).

mechanism has operated in Kenya,[48] Morocco,[49] South Africa,[50] Tunisia[51] and Uganda.[52] New research, however, reveals that states can engage in 'reverse-rhetorical entrapment'.[53] This means that state responses to human rights criticism may also entrap the source of the criticism and shape its strategy.

3.3 Methodological approach and caveat

This article uses the process-tracing methodology to establish causal links between the African Commission's country-specific resolutions and state behaviour. It relies on information collected through an extensive desk research, involving a review of documents produced by the states, the African Commission, other regional or international bodies and civil society organisations. The bulk of the research was conducted as part of the author's doctoral research at the Centre for Human Rights, Faculty of Law, University of Pretoria.[54]

It is important to note that searching for evidence of the impact of the African Commission's country-specific resolutions is fraught with methodological challenges. One intractable problem relates to the fact that when they violate human rights, countries usually are subjected to criticism by multiple actors, including international or regional human rights bodies. Moreover, human rights criticism is frequently accompanied by other forms of human rights pressures, such as the threat of economic sanctions or the withdrawal of donor funding. Thus, it is difficult to tell which pressure is specifically responsible for particular state action. As Kamminga observes, few governments will openly admit that they have taken an action in response to international pressure.[55]

It follows that it is difficult to establish causal links between the African Commission's country-specific resolutions and state behaviour. This problem is further exacerbated by the dearth of information on state responses to the Commission's country resolutions. The

48 H Schmitz 'Transnational activism and political change in Kenya and Uganda' in Risse and others (n 46) 39.
49 S Granzer 'Changing discourse: Transnational advocacy networks in Tunisia and Morocco' in Risse and others (n 46) 109; V Hullen 'The "Arab Spring" and the spiral model: Tunisia and Morocco' in Risse and others (n 46) 182.
50 D Black 'The long and winding road: International norms and domestic political change in South Africa' in Risse and others (n 46) 78.
51 Granzer (n 49); Hullen (n 49).
52 Schmitz (n 48).
53 S Katzenstein 'Reverse-rhetorical entrapment: Shaming and naming as a two-way street' (2013) 46 *Vanderbilt Journal of Transnational Law* 1079.
54 Biegon (n 17).
55 T Kamminga 'The thematic procedures of the UN Commission on Human Rights' (1987) 34 *Netherlands International Law Review* 299, 317.

Commission has not established a robust mechanism for gathering information about the impact of its work.

Another challenge relates to the low levels of precision and clarity in a good number of the Commission's country-specific resolutions. As Viljoen observes, '[s]ome country-specific resolutions are so imprecise that they are almost meaningless'.[56] Researchers seeking to determine the impact of country-specific resolutions of other international human rights bodies have experienced a similar problem.[57] The analysis in this article focuses on resolutions that have a clear and specific demand on the target country.

4 Impact of the African Commission's country-specific resolutions

On the occasion of its twentieth anniversary, a member of the African Commission claimed that the Commission's country-specific resolutions had influenced state policies as well as public opinion on human rights practices in African countries.[58] The task in this part is to find and analyse evidence of this influence or impact. The part begins with an explanation of the process undertaken to identify resolutions with clear and specific demands on the target country. It then provides a broad overview of the impact of the identified resolutions on the human rights practices of the target countries. This is followed by detailed case studies of the impact of the Commission's country-specific resolutions in The Gambia and Nigeria.

4.1 Selection of resolutions

For purposes of analysing the impact of the African Commission's country-specific resolutions, several resolutions were discounted or excluded from the scope of the study. A two-stage process was used to determine which resolutions to exclude. In the first stage, 17 resolutions were discounted because of the following six reasons:

(a) *The resolution has the entire continent as its focus*: Four omnibus resolutions on the situation of human rights in the entire

56 F Viljoen 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights' in M Baderin (ed) *International human rights law: Six decades after the UDHR and beyond* (2020) 411, 426.

57 See, eg, Lempinen (n 7) 193-196.

58 A Abbas 'Refugees and displaced people in Africa: An interview with commissioner Bahame Tom Mukirya Nyanduga, Special Rapporteur on Refugees and Displaced Persons in Africa' in H Abbas (ed) *Africa's long road to rights: Reflections on the 20th anniversary of the African Commission on Human and Peoples' Rights* (2007) 37, 48.

continent were left out because they are concerned about the human rights situation on the entire continent.[59]

(b) *The resolution is concerned about human rights issues beyond the continent*: Two resolutions were discounted because they address the situation in Palestine, a non-African country.

(c) *The resolution is not condemnatory*: Five resolutions were eliminated because they are not framed in a naming and shaming language. Either they praise, show support for, or welcome a particular development. In other words, they are not condemnatory, and it thus is futile to apply the naming and shaming framework to determine the impact of these resolutions. For instance, Resolution 28 on Nigeria (1998) praised the country for reinstating democratic governance after several years of military rule.[60] Similarly, Resolution 49 on Burundi (2000) expressed support for a peace agreement signed to end conflict in the country.[61]

(d) *The resolution has no specific recommendation*: Resolution 32 of 1998 on the Peace Process in Guinea Bissau was omitted because it makes no specific recommendation.[62]

(e) *The resolution does not address a human rights situation*: Resolution 39 on Seychelles was omitted because it is concerned with the country's refusal to present its periodic state party report.[63]

(f) *The main recommendations are not addressed to the target country*: Four resolutions were omitted because they address their main recommendations to the Organisation of African Unity (OAU)/ AU and other international bodies. These are Resolution 56 on

59 Resolution on the Situation of Human Rights in Africa, ACHPR/Res.14(XVI)94 adopted at the 16th ordinary session, Banjul, The Gambia, 25 October-3 November 1994; Resolution on the Human Rights Situation in Africa, ACHPR/Res.40(XXVI)99 adopted at the 26th ordinary session, Kigali, Rwanda, 1-15 November 1999; Resolution on the General Human Rights in Africa, ACHPR/Res.157(XLVI)09 adopted at the 46th ordinary session, Banjul, The Gambia, 11-25 November 2009; Resolution on the General Human Rights Situation in Africa, ACHPR/Res.207(L)11 adopted at the 50th ordinary session, Banjul, The Gambia, 24 October-5 November 2011.

60 Resolution on Nigeria's Return to a Democratic System, ACHPR/Res.28(XXIV)98 adopted at the 24th ordinary session, Banjul, The Gambia, 22-30 October 1998.

61 Resolution on Compliance and Immediate Implementation of the Arusha Peace Agreement for Burundi, ACHPR/Res.49(XXVIII)00 adopted at the 28th ordinary session, Cotonou, Benin, 23 October-6 November 2000.

62 Resolution on the Peace Process in Guinea Bissau, ACHPR/Res.32(XXIV)98 adopted at the 24th ordinary session, 22-31 October 1998.

63 Resolution Concerning the Republic of Seychelles' Refusal to Present its Initial Report, ACHPR/Res.39(XXV)99 adopted at the 25th ordinary session, 26 April-5 May 1999.

Tunisia, Resolution 340 on Sahrawi Republic,[64] Resolution 478 on Niger[65] and Resolution 610 on Zimbabwe.[66]

In the second stage, the remaining 124 resolutions were examined to determine whether they contained specific recommendations that would allow for the possibility of analysing impact with some level of accuracy. Only nine resolutions were found to contain specific recommendations that suit the aims of this study. The recommendations in the other resolutions were deemed to be overly broad or imprecise. For example, they require the target country to restore peace or end continuing conflict or violence,[67] respect or protect human rights in general,[68] or they send mixed signals to the target country.[69]

The nine resolutions with specific recommendations relate to seven countries: Eritrea, Eswatini, Ethiopia, The Gambia, Kenya, Nigeria and Zimbabwe. The resolutions fall into three broad overlapping categories, as shown in Table 2 below.

64 Resolution on the Situation of Human Rights Defenders in Tunisia, ACHPR/Res.56(XXIX)01 adopted at the 29th ordinary session, Tripoli, Libya, 23 April-7 May 2001; Resolution on the Human Rights Situation in the Sahrawi Arab Democratic Republic, ACHPR/Res.340 (LVIII) 2016 adopted at the 58th ordinary session, Banjul, The Gambia, 6-20 April 2016.

65 Resolution on the Human Rights Situation in Niger, ACHPR/Res.478 (LXVIII) 2021 adopted at the 68th ordinary session, virtual, 14 April-4 May 2021.

66 Resolution on the Impact of Sanctions on the Realisation of Human Rights in Zimbabwe, ACHPR/Res.610 (LXXXI) 2004 adopted at the 81st ordinary session, Banjul, The Gambia, 17 October-6 November 2024.

67 See, eg, Resolution on the Human Rights Situation in Côte d'Ivoire, ACHPR/Res.182(EXT.OS/IX)11 adopted at the 9th extraordinary session, Banjul, The Gambia, 23 February-3 March 2011 (urging Côte d'Ivoire to 'work towards the restoration of peace and security').

68 See, eg, Resolution on Nigeria, ACHPR/Res.70(XXXV)04 adopted at the 35th ordinary session, Banjul, The Gambia, 21 May-4 June 2004 (asking the Nigerian government to 'bring perpetrators of *any* human rights violations to justice').

69 As an illustration, Resolution 57 on Algeria (2001) addressed the violence that took place on 18 April 2001 in the north-eastern part of the country and in which 50 people were reportedly killed. The Commission adopted the Resolution about two weeks after the Algerian government had established a commission of inquiry to investigate the killings. The Resolution noted that it was satisfied by Algeria's response, yet it went ahead to ask the Chairperson to send a letter to the Algerian government raising concerns detailed in the resolution. See also Resolution on the Situation of Human Rights Defenders in Tunisia, ACHPR/Res.56(XXIX)01 adopted at the 29th ordinary session, Tripoli, Libya, 23 April-7 May 2001.

Table 2: Country-specific resolutions with specific recommendations

	Recommendation	Resolution
1	Release specific detainees/conduct targeted investigations	• Resolution 16 on Nigeria (1995) • Resolution 91 on the Human Rights Situation in Eritrea (2005) • Resolution 134 on Human Rights Situation in The Gambia (2008) • Resolution 360 on the Human Rights Situation in The Gambia (2016) • Resolution 554 on the Situation of Human Rights in the Kingdom of Eswatini (2023)
2	Implement specific decision	• Resolution 91 on the Human Rights Situation in Eritrea (2005) • Resolution 216 on the Human Rights Situation in the Kingdom of Swaziland (2012) • Resolution 257 Calling on the Republic of Kenya to Implement the Endorois Decision (2013)
3	Repeal or reform specific law	• Resolution 218 on Human Rights Situation in Ethiopia (2012) • Resolution 89 on the Situation of Human Rights in Zimbabwe (2005)

Resolutions in the first category call for the release of specific detainees or for investigations into the death of detainees in custody. Resolution 16 on Nigeria called for the release of political prisoners, including 25 Ogoni community activists, detained in May 1994 after a riot. Resolution 134 on The Gambia called for the immediate and unconditional release of Chief Ebrima Manneh and Kanyie Kanyiba detained in the aftermath of an attempted *coup d'état* in March 2006.[70] Resolution 360 on The Gambia called for investigations into the May 2016 death in custody of political activist Ebrima Solo Sandeng. Resolution 91 on Eritrea recommended the release of 11 former government officials detained in the country from 2001 without trial.[71] Resolution 554 on Eswatini called for the release two members of parliament (MPs), Mduduzi Bacede Mabuza and Mthandeni Dube, who were arrested during pro-democracy protests

70 Resolution on the Human Rights Situation in The Gambia, ACHPR/Res.134(XXXXIV)08 adopted at the 44th ordinary session, Abuja, Nigeria, 10-24 November 2008.

71 Resolution on the Human Rights Situation in Eritrea, ACHPR/Res.91(XXXVIII)05 adopted at the 38th ordinary session, Banjul, The Gambia, 21 November-5 December 2005.

in June 2021.[72] The Resolution also recommended that the Eswatini government should establish an independent panel of inquiry to investigate the January 2023 killing of human rights lawyer, Thulani Maseko.

Resolutions in the second category call for implementation of specific decisions adopted in the complaints procedure of the African Commission. There are three resolutions in this category. Resolution 91 on Eritrea called on the government to comply with the Commission's decision in the case of *Zegveld & Another v Eritrea*.[73] This decision declared the detention without trial of 11 former government officials to be a violation of the African Charter and recommended their immediate release. Resolution 216 on Swaziland called for the implementation of the Commission's decision in the case of *Lawyers for Human Rights v Swaziland*.[74] In this case the Commission found that the 1973 Proclamation repealing the country's 1968 Constitution and Bill of Rights violated a range of provisions in the African Charter insofar as it vested all executive, judicial and legislative powers in the King. The Commission recommended that the Proclamation be 'brought in conformity with the provisions of the African Charter' and that 'the state engages with other stakeholders, including members of civil society in the conception and drafting of the new Constitution'.

Resolution 257 on Kenya called on the government to implement the African Commission's 2009 decision in the case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (*Endorois*).[75] In this decision the Commission found that the forceful removal of the Endorois indigenous community from their traditional land violated the African Charter. The Commission made six substantive recommendations, including that the traditional land be returned to the Endorois; the community be allowed unrestricted access to the land; royalties and adequate compensation be paid to the

72 Resolution on the Situation of Human Rights in the Kingdom of Eswatini, ACHPR/Res.554 (LXXV) adopted at the 75th ordinary session, Banjul, The Gambia, 3-23 May 2023.

73 *Zegveld & Another v Eritrea* (2003) AHRLR 85 (ACHPR 2003). The African Commission has adopted at least two other resolutions calling for compliance with its previous decisions: Resolution on the Human Rights Situation in the Kingdom of Swaziland, ACHPR/Res.216(LI)12 adopted at the 51st ordinary session, Banjul, The Gambia, 18 April-2 May 2012; and Resolution Calling on the Republic of Kenya to Implement the Endorois Decision, ACHPR/Res.257 adopted at the 54th ordinary session, Banjul, The Gambia, 22 October-5 November 2013.

74 (2005) AHRLR 66 (ACHPR 2005).

75 (2009) AHRLR 75 (ACHPR 2009).

community; and that the community's welfare organisation be registered.

Resolutions in the third category call for the repeal or reform of specific domestic laws. Resolution 218 on Ethiopia called on the government to '[a]mend the Charities and Civil Societies Proclamation in accordance with the UN Declaration on Human Rights Defenders'.[76] Following its enactment in February 2009, the Proclamation was widely criticised for its excessive restrictions on human rights organisations.[77] Resolution 89 on Zimbabwe called on the government to repeal or amend the Access to Information and Protection of Privacy Act (AIPPA), Broadcasting Services Act, and the Public Order and Security Act (POSA).[78] In its 2002 report of the fact-finding mission to Zimbabwe, the Commission found that the use of these laws to require the registration of journalists or to prosecute them for publishing false information had a combined chilling effect on freedom of expression and had introduced 'a cloud of fear in media circles'.[79]

4.2 Broad impact overviews

This part broadly examines the impact of the resolutions listed in Table 2 above in five countries: Eritrea, Eswatini, Ethiopia, Kenya and Zimbabwe. As discussed below, the available evidence suggests that the concerned resolutions have been fully or partially complied with in Ethiopia, Kenya and Zimbabwe, but no similar impact has been recorded in Eritrea, Eswatini and Zimbabwe.

4.2.1 Cases of compliance

Ethiopia has implemented the recommendation in Resolution 218 to amend the 2009 Charities and Civil Societies Proclamation. Immediately after the adoption of Resolution 218, Ethiopia reacted negatively. At the Commission's fifty-second ordinary session held in October 2012, the Ethiopian delegation expressed disapproval for

76 Resolution on Human Rights in Ethiopia, ACHPR/Res.218(LI)2012 adopted at the 51st ordinary session, Banjul, The Gambia, 18 April-2 May 2012.

77 See, eg, Amnesty International, Ethiopia: The 2009 Charities and Societies Proclamation as a serious obstacle to the promotion and protection of human rights in Ethiopia', https://www.amnesty.org/download/Documents/16000/afr250072012en.pdf (accessed 18 November 2024).

78 Resolution on the Situation of Human Rights in Zimbabwe, ACHPR/Res.89(XXXVIII)05 adopted at the 38th ordinary session, Banjul, The Gambia, 21 November-5 December 2005.

79 African Commission on Human and Peoples' Rights *Zimbabwe: Report of the fact-finding mission* (2002) 29.

the resolution and insinuated that it was prompted by ill motive and based on a draft resolution submitted to the Commission by the NGO Forum.[80]

However, following a change of government in 2018 that briefly ushered in a new era for human rights in the country, Ethiopia commenced the process of revising the 2009 Proclamation. This culminated in the enactment of a new CSO law in March 2019, the Organisation of Civil Societies Proclamation. The new law has created a generally-conducive legal and administrative environment for civil society operations, although some concerns remain.[81] In its latest state party report to the Commission, dated January 2024, Ethiopia described the enactment of the new law as a 'bold measure' aimed at addressing the shortcomings of the 2009 Proclamation.[82]

On the face it, the repeal of the 2009 Proclamation presents evidence of the direct impact of Resolution 218 in Ethiopia. However, it is more accurate to conclude that the action of the Ethiopian government amounts to situational compliance. It was prompted by the change of government and internal circumstances in the country rather than a deliberate decision to implement the Commission's resolution.

Resolution 257 on the implementation of the *Endorois* decision by Kenya has been partially complied with and it has thus registered some limited impact. A 2015 study found that out of the six substantive recommendations that the Commission made in the *Endorois* decision, only the one requiring registration of the Endorois Welfare Council had been fully implemented.[83] The implementation of the other five recommendations was either 'unclear' or 'pending'.[84] A subsequent study found that a mechanism for the involvement of the Endorois in the management of the Lake Bogoria National Reserve

80 International Service for Human Rights *Kumulika: The African Commission on Human and Peoples' Rights – 25th anniversary* (2012) 11.

81 See D Townsend 'Ethiopia's new civil society law' 11 March 2019, Ethiopia's new civil society law - INCLUDE Platform (accessed 15 November 2024).

82 The 7th to 10th Periodic Country Reports (2015-2013) of the Federal Democratic Republic of Ethiopia on the Implementation of the African Charter on Human and Peoples' Rights, January 2024, Federal Democratic Republic of Ethiopia: 7th to 10th Periodic Reports (2015-2023) | African Commission on Human and Peoples' Rights (accessed 18 November 2024).

83 H Ekefre 'Implementation of the decisions of the African human rights treaty bodies: A study of the *Endorois* and *Nubian Children's* decisions' unpublished LLM dissertation, University of Pretoria, 2015 40. See also 'The *Endorois* decision: Four years on, the Endorois still await action by the government of Kenya', http://minorityrights.org/2014/09/23/the-endorois-decision-four-years-on-the-endorois-still-await-action-by-the-government-of-kenya/ (accessed 18 November 2024).

84 As above.

had been established and that the community had been granted access to the reserve, albeit on an *ad hoc* basis.[85] In September 2014, about 10 months after the Commission adopted Resolution 257, the Kenyan government established a task force for the implementation of the *Endorois* decision.[86] This was initially viewed as a step in the right direction, but an analysis of the mandate and operations of the task force has led to the conclusion that it was but a smokescreen.[87] More importantly, the task force has not published a report of its recommendations ten years after it was established.

Despite its initial negative reaction, Zimbabwe has also taken steps to comply with Resolution 89 of 2005 requiring it to amend or repeal three specific draconian pieces of legislation. In a January 2006 reply to the resolution, Zimbabwe demanded that the Commission revokes the resolution in its entirety because it was an 'improper reproduction' of a draft resolution submitted to it by non-governmental organisations (NGOs), particularly Amnesty International.[88] Later in its periodic report submitted to the Commission in October 2006, Zimbabwe gave its strongest indication yet that it would not revise the impugned laws. It argued that the laws were progressive and 'drew extensively from, and are similar, to laws from other countries particularly, the security and "gag" laws in other democracies like Britain, the USA, Australia and Canada'.[89] In particular relation to the Access to Information and Protection of Privacy Act, Zimbabwe argued that it was enacted to bring accountability because private media operators had previously misinformed the public and used the media to advocate for regime change.[90]

In 2017 Zimbabwe underwent a political transition when Robert Mugabe resigned as President. Through a military-assisted transition, Emmerson Mnangagwa took over. In 2018 he was formally elected President in a general election. Building on the country's 2013

85 J Biegon & A Ahmed 'State implementation of regional decisions on the rights of indigenous communities in Kenya' in J Biegon (ed) *Silver granules on stretches of sand: Implementation of decisions of regional human rights treaty bodies in East Africa* (2020) 30, 34-35.

86 Kenya Gazette Notice 6708 of 26 September 2014.

87 D Inman and others 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *African Human Rights Yearbook* 400, 416-417.

88 The 20th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/279, Annex III (The Response by the Government of the Republic of Zimbabwe to the Resolution on the Human Rights Situation in Zimbabwe adopted by the African Commission on Human and Peoples' Rights during its 38th ordinary session held in Banjul, The Gambia from 21 November to 5 December 2005).

89 As above.

90 Government of Zimbabwe 7th, 8th, 9th and 10th Combined Report of Zimbabwe (2006) xxxv.

Constitution, the Mnangagwa administration promised a new vision for Zimbabwe. Some of the reforms it has undertaken so far include the repeal of two of the impugned laws. In August 2019 Zimbabwe enacted the Maintenance of Peace and Order Act (MOPA) to replace the POSA. Another new law, the Freedom of Information Act, came into effect in July 2020. It repeals the AIPPA. The Zimbabwean government has also commenced the process of revising the third law. In September 2024 the Cabinet adopted the Broadcasting Services Amendment Bill which will introduce changes to the Broadcasting Services Act.[91]

The steps taken by Zimbabwe to repeal or revise the impugned laws present another case of situational compliance. These steps, taken 15 years after the adoption of Resolution 89, were largely catalysed by the change of government and by more recent local and international pressure. For example, one of the possible recent local factors that contributed to the repeal of AIPPA was a recommendation by a government-sponsored Information and Media Panel of Inquiry.[92] For the repeal of POSA, one of the immediate triggers was a 2018 domestic court judgment that declared a key provision of the Act unconstitutional.[93] In Zimbabwe's own admission to the Commission in its 2019 combined eleventh to fifteenth periodic report, another trigger was a recommendation from the Universal Periodic Review (UPR).[94] It is important to note that despite the enactment of the new laws, repressive practices remain entrenched in Zimbabwe. According to Amnesty International, Mnangagwa's administration has failed to break from the past and continues to use law as an instrument of oppression.[95]

91 O Ndori 'Govt adopts Broadcasting Services Amendment Bill' *ZBC News* 17 September 2024, Govt adopts Broadcasting Services Amendment Bill – ZBC NEWS (accessed 18 November 2024).

92 See N Ngwenya 'Compliance through decoration: Access to information in Zimbabwe' in O Shyllon (ed) *The model law on access to information for Africa and other regional instruments: Soft law and human rights in Africa* (2018) 143, 160.

93 Amnesty International 'Zimbabwe: Landmark court ruling against draconian protests legislation opens a new chapter for human rights' 18 October 2018, Zimbabwe: Landmark court ruling against draconian protests legislation opens a new chapter for human rights (accessed 18 November 2024).

94 'Zimbabwe', Laws on the Right to Peaceful Assembly, The right of peaceful assembly in Zimbabwe | Peaceful Assembly Worldwide (accessed 18 November 2024).

95 Amnesty International *Human rights under attack: A review of Zimbabwe's human rights record in the period 2018-2023* (2023).

4.2.2 Cases of non-compliance

Eritrea has not taken any concrete steps to implement Resolution 91 of 2005. The country's immediate reaction to the resolution was to object to its publication as an integral part of the Commission's nineteenth activity report. As a result, the AU Executive Council expunged the resolution from the report, as it did in the case of the resolutions concerning Ethiopia, Sudan, Uganda and Zimbabwe after these had also raised objections.[96] The Executive Council also gave Eritrea and the four other states a period of three months to file replies to those resolutions. All the concerned states, except for Eritrea, filed their replies.

With Eritrea failing to take the opportunity to respond to Resolution 91 as directed by the Executive Council, the African Commission did not receive a formal reply until 13 years later when the country submitted its initial state party report in 2018. In the report, Eritrea categorically denied that the 11 former government officials were political prisoners.[97] It asserted that the claim that the 11 officials were detained because of exercising their freedom of expression is 'factually unfounded and far from the truth', and that their arrest was not arbitrary because it was duly sanctioned by the national assembly.[98]

Basically, the 11 former government officials remain incarcerated more than two decades after their arrest and detention without trial.[99] Perhaps due to the long lapse of time, the African Commission did not reiterate the call for the release of the detainees in its 2018 Concluding Observations on Eritrea's initial state party report. Instead, the Commission recommended that Eritrea should take measures to urgently address the denial of basic rights to all detained persons, including the former government officials.[100]

96 Decision on the 19th Activity Report of the African Commission on Human and Peoples' Rights, EX.CL/Dec. 257 (VII) adopted during the 8th ordinary session of the AU Executive Council, 16-21 January 2006, Khartoum, Sudan.

97 Initial National Report of Eritrea 1999-2016 para 293, Eritrea: 1st Periodic Report, 1999-2016 | African Commission on Human and Peoples' Rights (accessed 15 November 2024).

98 Initial National Report of Eritrea (n 97) para 294.

99 See Amnesty International 'Eritrea: Release journalists and politicians arrested 20 years ago' 17 September 2021, Eritrea: Release journalists and politicians arrested 20 years ago - Amnesty International (accessed 15 November 2024).

100 Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the State of Eritrea, 1999-2016 adopted at the 63rd ordinary session, Banjul, The Gambia, 24 October-13 November 2018, available at Concluding Observations and Recommendations on the Initial and Combined Periodic Report of the State of Eritrea, 1999-2016 | African Commission on Human and Peoples' Rights (accessed 15 November 2024).

Eswatini has not complied with Resolution 216 of 2012 requiring it to implement the Commission's decision in the case of *Lawyers for Human Rights v Swaziland* by amending or repealing the 1973 Proclamation. In 2005 Swaziland adopted a new Constitution, but it left the 1973 Proclamation intact. With the Proclamation continuing to exist side by side with the Constitution, the country's executive, judicial and legislative powers still vest in the King. In terms of the Proclamation, political parties remain banned in Eswatini. Under the UPR, Eswatini has previously accepted recommendations to repeal the Proclamation but has yet to take actual steps in that regard.[101]

Eswatini has also not complied with Resolution 554 of 2023 calling for the release of MPs Mduduzi Bacede Mabuza and Mthandeni Dube. Barely two weeks after the adoption of the Resolution, the two MPs were convicted under the country's terrorism and sedition laws for allegedly inciting unrest during the pro-democracy protests of June 2021. They were later sentenced to prison terms of 25 years and 18 years respectively. Human rights groups have condemned their convictions and sentences, with Amnesty International describing them as 'unjust and baseless'.[102] Eswatini has also taken no effective steps to investigate the killing of Thulani Maseko. In August 2023 the police stated that an investigation was progressing, but there has been no tangible proof of such an investigation.[103]

4.3 In-depth impact studies

In this part, the impact of the resolutions adopted in respect of The Gambia and Nigeria is examined in detail. These two countries allow for some level of comparison of state responses to similar kinds of criticism or pressure from the African Commission. The in-depth analysis of these two countries also allows for a closer scrutiny of the political, social and economic contexts in which compliance with the Commission's country-specific resolutions takes place.

101 Report of the Working Group on the Universal Periodic Review: Swaziland, A/HRC/19/6/Add.1 para 10.

102 Amnesty International 'Eswatini: Authorities must quash convictions and sentences of former MPs' 16 July 2024, Eswatini: Authorities must quash convictions and sentences of former MPs - Amnesty International (accessed 18 November 2024).

103 Amnesty International 'Eswatini: One year after Thulani Maseko's killing, justice remains elusive' 22 January 2024, https://www.amnesty.org/en/latest/news/2024/07/eswatini-authorities-must-quash-convictions-and-sentences-of-former-mps/ (accessed 18 November 2024).

4.3.1 Nigeria

The 1990s was a period of severe repression in Nigeria. On 12 June 1993 Nigeria held presidential elections in order to transition the country from military to civilian rule. Despite the fact that the elections were free and fair according to observers, the military ruler at the time, General Ibrahim Babangida, nullified the results. He was later forced by domestic and international pressure to hand over power to a transitional government, but the new administration did not last long. Sani Abacha, the defence minister, took control in November 1993. Among his immediate actions upon seizing power was the abolition of *habeas corpus* procedures for political detainees and the suspension of the jurisdiction of courts in human rights matters.[104] He installed an authoritarian regime that lasted until his death in office in June 1998.

Throughout the 1990s, the African Commission followed the events in Nigeria with keen interest. It published its first resolution on the country in November 1994 (Resolution 11),[105] about a year into Abacha's rule. Resolution 11 established the foundation of the Commission's future engagement with the military regime. It was short, running to slightly more than half a page, but it carried a strong message. The resolution regretted the nullification of the 12 June 1993 elections and condemned the suspension of the application of the African Charter, the exclusion of military decrees from the jurisdiction of courts, disregard for court judgments, and unprocedural enactment of penal laws with retroactive effect. The resolution also condemned the closure of newspaper houses and the detention of pro-democracy activists and journalists.

Among those who had been detained by the Abacha regime was Ken Saro-Wiwa, an internationally-renowned Ogoni activist. He was detained in May 1994 together with other Ogoni community activists after a riot during which some Ogoni community leaders were killed. The resolution boldly called upon the military regime to 'hand over the government to duly elected representatives of the people without unnecessary delay'. It also took a decision to send a delegation to the country in order to verbally express to the government its concerns about gross human rights violations and the need for urgent transfer of power to a civilian authority.

104 See Human Rights Watch 'World report 1995 – Nigeria', http://www.refworld.org/docid/467fca9c1e.html (accessed 18 November 2024).
105 Resolution on Nigeria, ACHPR/Res.11(XVI)94 adopted at the 16th ordinary session, Banjul, The Gambia, 25 October-3 November 1994.

In March 1995, amidst strong opposition from Nigeria,[106] the African Commission adopted another resolution on the situation of human rights in Nigeria (Resolution 16).[107] Resolution 16 reiterated the concerns contained in Resolution 11 but went further and called upon the military government to 'release all prisoners, reopen all closed media and respect freedom of the press, lift arbitrarily imposed travel restrictions, allow unfettered exercise of jurisdiction by the courts and remove all military tribunals from the judicial system'.

In early October 1995, Resolutions 11 and 16 had begun to bear some fruit when the military government sent a delegation to the Commission's eighteenth ordinary session held in Praia, Cape Verde. At the session, the Nigerian delegation mounted a protest against the adoption of condemnatory resolutions against the country.[108] The delegation argued that article 59 of the African Charter did not permit the African Commission to publish its resolutions before they are considered and adopted by the OAU Assembly of Heads of State and Government. In other words, the Commission had breached 'article 59 confidentiality' by publishing the resolutions as it did.

The African Commission rejected Nigeria's argument, rightly observing that the adoption of resolutions does not fall under the purview of article 59.[109] It clarified that article 59 falls under chapter III of the African Charter which deals with communications. Therefore, the Commission concluded that '[t]he resolution on Nigeria does not refer to communications in any way' and that '[t]here is no bar on resolutions of the Commission being disseminated however the Commission sees fit'.[110]

Despite the fact that it objected to the adoption of Resolutions 11 and 16, the African Commission managed to obtain a concession from the Nigerian delegation. Specifically, the delegation extended an official invitation to the Commission to conduct a country visit to Nigeria in February 1996.[111] However, the situation in Nigeria rapidly

106 OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 120.
107 Resolution on Nigeria, ACHPR/Res.16(XVII)95 adopted at the 17yh ordinary session, Lomé, Togo, 13-22 March 1995.
108 'Account of internal legislation on Nigeria and the dispositions of the Charter of African Human and Peoples' Rights' reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 467, 472.
109 On the scope of art 59, see M Killander 'Confidentiality versus publicity: Interpreting article 59 of the African Charter on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 572.
110 Account of Internal Legislation in Nigeria (n 112).
111 '*Note verbale* to AH Yadudu requesting dates for mission to Nigeria' reprinted in Murray & Evans (n 108) 474.

deteriorated after the conclusion of the Commission's eighteenth ordinary session. On 31 October 1995, Saro-Wiwa and eight other Ogoni activists were sentenced to death for incitement to murder following a trial that had been roundly condemned. In spite of a request from the African Commission to stay the executions,[112] the nine were secretly hanged to death in November 1995. At the time the nine were executed, 19 other Ogoni activists (Ogoni 19) were standing trial on charges of murder.

In December 1995 the African Commission convened an extraordinary session in Kampala, Uganda, to specifically deliberate about the worsening situation in Nigeria. This served to pile more pressure on the military regime. As Murray observes, the session was crucial because of the publicity that it gave to the situation in Nigeria.[113] Further concessions were obtained at the session. While lamenting that the country had been the subject of 'slanderous campaigns', Nigeria's High Commissioner to Uganda emphasised 'the will of the Nigerian government to cooperate with the Commission'.[114] Once again, an official invitation was extended to the Commission to visit the country.[115] The Commission also used the session to further push for the release of the Ogoni 19.[116]

The country visit did not take place in February 1996 as expected. It materialised a year later, in March 1997. The visit came as a pleasant surprise. The Commission's delegation met various groups during the visit, including government officials, the national human rights institution, and a few of the Ogoni 19. However, it did not spend much time with representatives of NGOs, an oversight for which it was heavily criticised.[117]

112 '*Note verbale* to Minister of Foreign Affairs regarding Saro-Wiwa communications' reprinted in Murray & Evans (n 108) 475.

113 R Murray 'Decisions by the African Commission on individual communications under the African Charter on Human and Peoples' Rights' (1997) 46 *International and Comparative Law Quarterly* 412, 415.

114 Final Communiqué of the 2nd extraordinary session of the African Commission on Human and Peoples' Rights, Kampala, 19 December 1995, ACHPR/FINCOMM/2nd EXTRA ORDINARY/XX para 15.

115 As above.

116 At the session, the Commission resolved to 'ask the current president of OAU and the Secretary-General to express to the Nigerian authorities that no irreparable prejudice is caused to the 19 Ogoni detainees whose trial is pending'. See Final Communiqué of the 2nd extraordinary session of the African Commission on Human and Peoples' Rights, Kampala, 19 December 1995, ACHPR/FINCOMM/2nd EXTRA ORDINARY/XX para 17(i).

117 See 'Nigeria human rights NGOs have mixed feelings on OAU mission', www.ipsnews.net/1997/03/nigeria-human-rights-ngos-have-mixed-feelings-on-oau-mission/ (accessed 14 August 2016).

Despite the delay in undertaking the mission, it is evident that Resolutions 11 and 16 contributed to the decision of the military government to allow the visit.[118] According to Okafor,

> the acceptance of this mission by the executive in Nigeria at a time when it was controlled by the army, is significant evidence of the proposition that the executive was clearly concerned to act in ways that pleased the Commission, in ways that might soften the Commission's censure (however non-binding that was).[119]

In Okafor's words lie the true motive of the military government. It allowed the country visit so as to soften international pressure; it had no immediate interest in changing its repressive practices. The military government used the visit to depict itself as an internationally-cooperative regime. It also used the visit to counter pressure for it to allow country visits by UN thematic rapporteurs.[120]

The Ogoni 19 were not released from detention until September 1998 when General Abdulsalami Abubakar took over the reins of power following the death of Abacha. In October 1998 the African Commission adopted a resolution on Nigeria that welcomed 'the positive evolution in the field of human rights, the promises and democratic advances made by the Nigerian government since the end of June 1998'.[121] The resolution also praised the release of the Ogoni 19.

There are those who partly attribute their release to the pressure exerted on the Nigerian government by the African Commission through its resolutions (and other mechanisms).[122] While there is little doubt that the military regime cared about the Commission's criticism of its human rights record, an accurate assessment is that the release of the Ogoni 19 amounted to situational compliance with Resolutions 11 and 16.

It is also important to bear in mind that Resolutions 11 and 16 did not work in isolation. The resolutions were part of a large global campaign involving both coercive sanctions and naming and shaming. The major actors included the United States of America (USA), the United Kingdom (UK), the UN, the European Union (EU), the Commonwealth, and international non-governmental

118 Okafor (n 106) 117-119; Viljoen (n 17) 346.
119 Okafor (n 106) 119.
120 Viljoen (n 17) 347.
121 Resolution on Nigeria's Return to a Democratic System, ACHPR/Res.28(XXIV)98 adopted at the 24th ordinary session, Banjul, The Gambia, 22-30 October 1998.
122 Okafor (n 106) 122-123.

organisations (INGOs).[123] Pressure was also mounted from within Nigeria such that the government was targeted from above and below. Indeed, the Commission adopted Resolutions 11 and 16 after intense lobbying by Nigerian NGOs.[124] These NGOs also filed numerous cases against Nigeria before the African Commission, piling pressure on the government to change its practices.[125]

After 1998, African Commission resolutions on Nigeria have been few and far between. In response to ethnic and religious violence in the northern part of Nigeria in 2004, the Commission adopted Resolution 70 condemning attacks against civilians and urging the government to 'bring the perpetrators of any human rights violations to justice, and to compensate victims and their families'. With an active conflict in North-Eastern Nigeria since 2009, the Commission's resolutions on Nigeria in the last 15 years have largely focused on violations and abuses committed in that conflict, primarily by the armed group Boko Haram. These resolutions have not received much publicity and evidence of their impact is relatively difficult to assess.

4.4 The Gambia

The Gambia has a special and sentimental connection with the African Commission. The bulk of negotiations leading to the adoption of the African Charter took place in Banjul, The Gambia's capital city, with the country's President at the time, Dawada Jawara, playing a central role in facilitating the process. Banjul is also the Commission's seat or headquarters. It started operating out of Banjul in June 1989, and for about five years it enjoyed a cordial relationship with the host country. The Commission routinely praised The Gambia for its impressive human rights record and treated it with noticeable deference.[126] However, the Commission's relationship with the host country dramatically changed in July 1994 when Jawara's government

123 For a brief review of international action on Nigeria during this period, see Human Rights Watch *World report 1997– Nigeria*, www.refworld.org/docid/3ae6a8bf20.html (accessed 14 August 2016).

124 Okafor (n 106) 122 observing that '[t]hese local actors pressured the African system to pass every single one of these resolutions that were generated against the relevant Nigerian junta. Although the African Commission was in itself willing to pass the said resolutions, pressure from the activist forces was quite important in ensuring that the resolutions were in fact passed and did contain sufficiently strong language.'

125 Viljoen & Louw (n 41) 26.

126 Eg, thanking the country for hosting the Commission's first extraordinary session in June 1989, the Chairperson at the time, Isaac Nguema, observed that The Gambia 'flows with milk and honey and justice flowers'. See introductory note of Mr Isaac Nguema, president of the African Commission to the Second Report of Activities of the African Commission on Human and Peoples' Rights, 25th session of the AHSG of the OAU, Adis Ababa, 24-26 July 1989.

was toppled in a military *coup*. The *coup's* ringleader, Yahya Jammeh, took over control of the government and subsequently announced that elections would be held after a transitional period of four years.

Meeting in Banjul in October 1994, the African Commission adopted Resolution 13 on the situation in The Gambia.[127] It contained scathing criticism of the *coup*, describing it as 'a clear setback to the cause of democracy' and a 'flagrant and grave violation of the right of the Gambian people to freely choose their government'. It called upon the military government to transfer power to the 'freely-elected representatives of the people'. It also requested the government to ensure that (a) the Bill of Rights contained in the Gambian Constitution remains supreme; (b) the independence of the judiciary is respected; (c) the rule of law, as well as the recognised international standards of fair trial and treatment of persons in custody are observed; and (d) all individuals detained during or in the aftermath of the *coup* are either charged with an offence or released.

Although the military government subsequently reduced the transitional period from four to two years, the human rights situation in The Gambia did not improve following the adoption of Resolution 13. Instead, it worsened. In March 1995 the African Commission adopted another resolution on the situation in The Gambia (Resolution 17).[128] The content of the resolution suggests that somehow the Commission had by this time surrendered to the fact that the military government would be there to stay. Although it expressed 'great concern' about reports of serious allegations of human rights and called on the government to set up an independent commission of inquiry to investigate the allegations, the Commission recommended that the economic sanctions imposed on the country be lifted.[129] It premised this recommendation on the fact that the government had announced a reduction of the transitional period.

In Resolution 17 the African Commission reduced rather than increased the pressure on the Gambian government. The global spotlight on the country also subsided with time, giving Jammeh the time to entrench authoritarian rule. A state of fear permeated

127 Resolution on The Gambia, ACHPR/Res.13(XVI)94 adopted at the 16th ordinary session, Banjul, The Gambia, 25 October-3 November 1994.

128 Resolution on The Gambia, ACHPR/Res.17(XVII)95 adopted at the 17th ordinary session, Lomé, Togo, 13-22 March 1995.

129 The rather soft stance taken in Resolution 17 would become apparent in 1995 when the Commission considered the first communication against The Gambia. Viljoen observes that by this time the Commission had 'settled comfortably into life under the new regime'. See Viljoen (n 17) 292.

the country in his more than two decades of autocratic leadership.[130] Intimidation and crackdown on critics and opposition leaders, extra-judicial killings, enforced disappearances and torture became routine in the country. These violations intensified after an attempted *coup d'état* in March 2006, in the aftermath of which at least 63 suspected *coup* plotters and perceived government opponents were arrested.[131] Later that year a prominent journalist, Chief Ebrima Manneh, and an opposition supporter, Kanyiba Kanyie, were arrested by state security forces. The two went missing after they were arrested. The government denied that they were in state custody. In June 2008 the Economic Community of West African States (ECOWAS) Court of Justice dismissed the claim that Chief Ebrimah was not in state custody and ordered his release.[132]

In November 2008 the African Commission adopted a resolution on The Gambia (Resolution 134) expressing deep concern for and condemning the 'severe deterioration' of the human rights situation in the country.[133] The resolution accused The Gambia's state security forces for unlawful arrests and detentions, torture, extra-judicial killings and enforced disappearances. The resolution made a specific call for the immediate release of Chief Ebrima and Kanyie Kanyiba in compliance with the judgment of the ECOWAS Court of Justice. Rather than improving, the human rights situation in the country deteriorated. On 21 September 2009 President Jammeh threatened to kill human rights defenders whom he claimed were sabotaging and destabilising his government.[134]

The African Commission swiftly adopted a strongly-worded resolution (Resolution 145) in which it observed that President Jammeh's utterances had implications for the safety of the members and staff of the Commission as well as for the participants of the Commission's forty-sixth ordinary session, which was scheduled to take place in Banjul in November that year.[135] The demands in Resolution 145 arguably are the boldest that the Commission has

130 Human Rights Watch *State of fear: Arbitrary arrests, torture, and killings* (2015); Amnesty International *Gambia: Fear rules* (2008).
131 Amnesty International *State of fear: Arbitrary arrests, torture, and killings* (2008) 8.
132 *Chief Ebrimah Manneh v Republic of The Gambia* ECW/CCJ/APP/04/07 (5 June 2008).
133 Resolution on the Human Rights Situation in The Gambia, ACHPR/Res.134(XXXXIV)08 adopted at the 44th ordinary session, Abuja, Nigeria, 10-24 November 2008.
134 'UN experts sound the alarm for safety of human rights defenders in The Gambia', UN experts sound the alarm for safety of human rights defenders in the Gambia | UN News (accessed 18 November 2024).
135 Resolution on the Deteriorating Human Rights Situation in the Republic of The Gambia, ACHPR/Res.145(EXT.VII)09 adopted at the 7th extra-ordinary session, Dakar, Senegal, 5-11 October 2009.

ever made in a country-specific resolution. They are worth repeating here in full:

> The African Commission on Human and Peoples' Rights
>
> (1) *Calls on* the African Union to intervene with immediate effect to ensure that HE President Sheikh Professor Alhaji Dr Yahya AJJ Jammeh withdraws the threats made in his statement;
> (2) *Further calls on* the African Union to ensure that the Republic of The Gambia guarantees the safety and security of the members and staff of the African Commission, human rights defenders, including journalists in The Gambia, and all participants in the activities of the African Commission taking place in The Gambia;
> (3) *Requests* the African Union to authorise and provide extra-budgetary resources to the African Commission to ensure that the 46th ordinary session is convened and held in Addis Ababa, Ethiopia, or any other member state of the African Union, in the event that His Excellency the President of the Republic of The Gambia does not withdraw his threats and the government cannot guarantee the safety and security of the members and staff of the African Commission and the participants of the 46th ordinary session;
> (4) *Requests* the African Union to consider relocating the Secretariat of the African Commission in the event that the human rights situation in the Republic of The Gambia does not improve;
> (5) *Urges* the government of the Republic of The Gambia to implement the recommendations of its previous Resolutions, in particular, Resolution No ACHPR/Res. 134(XXXXIV)2008, adopted during the 44th ordinary session held in Abuja, Nigeria, from 10 to 24 November 2008, and to investigate the disappearance and/or killing of prominent journalists Deyda Hydara and Ebrima Chief Manneh.

In addition to adopting the resolution, the Commission sent a letter to the Gambian government and published a press release that contained the text of the resolution.[136] Immediately after the adoption of Resolution 145, the Gambian government responded with mixed sentiments. On the one hand, it emphasised that it was committed to human rights and to host the forty-sixth ordinary session of the Commission.[137] On the other hand, it launched an attack on the Commission and the African Centre for Democracy and Human Rights Studies (ACDHRS), a Banjul-based NGO, which it believed had lobbied for the adoption of Resolution 145.[138]

136 African Commission on Human and Peoples' Rights 'Press release', www.achpr.org/english/Press%20Release/press_release-gambia.pdf (accessed 27 October 2009).
137 Letter from the Gambian Attorney-General and Minister of Justice to the African Commission, AG/C/144//Part 5/44, 15 October 2009 (on file with author).
138 Letter from the Gambian Office of the Secretary-General, President's Office, 28 October 2009, OP 209/400/01/Temp A/(22) (on file with author).

It threatened to review its relationship with the ACDHRS and described Resolution 145 as 'obnoxious and based on ulterior motives', and questioned the reasons for its adoption 'in a meeting held outside The Gambia'.[139]

Resolution 145 definitely raised the costs for The Gambia. The pressure eventually yielded positive results when a high-level Gambian delegation, comprising the Ministers of Foreign Affairs, Justice and Interior, held a meeting with the then Acting Chairperson of the African Commission together with Jean Ping, who at the time was the Chairperson of the AU Commission.[140] In the meeting, the Gambian delegation assured the Commission that participants of the forty-sixth ordinary session would be safe and entitled to freely express themselves during the session.[141] The session eventually took place in Banjul without any incident.

That The Gambia softened its extreme stand was also a function of human rights pressures emanating from other sources. A number of NGOs issued press releases in support of Resolution 145 and declared that they would not attend the Commission's forty-sixth ordinary session unless President Jammeh withdrew his threat.[142] Two UN Special Rapporteurs sent a joint letter of appeal to the Gambian government demanding that it guarantees the safety of human rights defenders.[143] Resolution 145 shows how the Commission's country-specific resolutions may impact on state behaviour if the Commission simultaneously deploys a number of mechanisms available to it. Resolution 145 was followed by an urgent appeal, a press release, and diplomacy.

In pledging to ensure the safety of human rights defenders, The Gambia made a tactical concession that cooled down the pressure. When it ceased to be in the spotlight, it resumed its repressive practices. In the years following the adoption of Resolution 145, the human rights situation in The Gambia worsened, prompting the

139 As above.
140 The meeting was held in Kampala, Uganda, on the margins of the AU Special Summit on Force Displacement which took place on 20 and 21 October 2009.
141 African Commission on Human and Peoples' Rights 'Press release on the Human Rights Situation in The Gambia', Press Release on the Human Rights Situation in The Gambia | African Commission on Human and Peoples' Rights (accessed 18 November 2024).
142 See, eg, 'Public statement: We will not participate in the 46th session of the African Commission on Human and Peoples' Rights to be held in The Gambia', "We will not Participate in the 46th Session of the African Commission on Human and Peoples' Rights to be held in the Gambia" (accessed 18 November 2024).
143 See 'UN experts sound the alarm for safety of human rights defenders in The Gambia', UN experts sound the alarm for safety of human rights defenders in the Gambia | UN News (accessed 18 November 2024).

African Commission to adopt further resolutions on the country,[144] and other regional and international actors to renew their human rights pressures on The Gambia. The landscape of human rights in the country eventually changed when President Jammeh lost the December 2016 election to Adama Barrow.

5 Conclusion

This article sought to analyse the impact of these African Commission's country-specific resolutions using a theoretical framework premised on the concept and practice of naming and shaming or human rights criticism. On face value, it is possible to dismiss naming and shaming as cheap talk. However, studies reflecting on the utility of naming and shaming have shown that it does affect state behaviour. Naming and shaming may directly influence human rights conduct by raising the stakes for the target country. Alternatively, naming and shaming may elicit a discursive response from the target country setting in motion a socialisation process that may ultimately lead to changes in the conduct of the state.

If it were possible to look at the impact of the African Commission's country-specific resolutions from an aerial or bird's eye view, what picture would one see? As expected, the size of the impact will depend on one's distance from the ground. From thousands of feet up in the sky, the impact will appear minute and inconsequential. Closer to the ground, the impact will look big and enormous. In actual terms, this means that at a macro-level, it may appear that the Commission has shone a spotlight on many countries to no apparent effect. Consider the two case studies of direct impact analysed in this article.

The African Commission named and shamed Abacha's regime in Nigeria, but human rights violations continued unabated until the end of his reign. For The Gambia, the Commission raised the stakes by recommending the relocation of its headquarters from the country, but human rights violations persisted and intensified over the next few years. From a micro-level, the Commission's country-specific resolutions have inspired tentative actions which are no small

144 See Resolution on Human Rights Situation in the Republic of The Gambia, ACHPR/Res.299(EXT.OS/XVII)2015 adopted at the 17th extraordinary session, Banjul, The Gambia, 19-28 February 2015; 'Press statement of the African Commission on Human and Peoples' Rights on the events of 14 and 16 April 2016 in the Islamic Republic of The Gambia', Press Statement of the African Commission on Human and Peoples' Rights on the events of 14 and 16 April 2016, in the Islamic Republic of The Gambia | African Commission on Human and Peoples' Rights (accessed 18 November 2024).

achievements considering the environment in which those actions came about. The decision of the Abacha government to allow the Commission to visit Nigeria and The Gambia's guarantee of safety to participants of the Commission's forty-sixth ordinary session are examples of successes worth cherishing. In other instances, such as in Ethiopia, Kenya and Zimbabwe, this article presents evidence of situational compliance with the Commission's country-specific resolutions. The challenge for the Commission is to move the impact of its country-specific resolutions from tentative actions or cases of situational compliance to macro-level changes in state practices.

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The role of the Kenyan judiciary in the implementation of decisions and recommendations of African regional mechanisms on human and peoples' rights

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Summary: *Africa's human rights mechanisms, such as the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights, have made significant strides in interpreting the content of human rights guaranteed under the African Charter on Human and Peoples' Rights and setting standards on the implementation of state obligations thereto. These standards may be derived from various mechanisms, including the African Commission's decisions on individual communications, its resolutions, Concluding Observations on reports of state parties, guidelines on various human rights and General Comments. This article seeks to consider how the Kenyan judiciary has contributed to the implementation of the decisions of Africa's human rights mechanisms generally. However, more focus*

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is placed on the recommendations of the African Commission. In this regard, the article considers two types of recommendations: those that are targeted to Kenya and those that are not specific to the country. In addressing these issues, both domestic and continental decisions and recommendations of the mechanisms are analysed. The article concludes that since the promulgation of Kenya's Constitution 2010, the courts have largely adopted an avoidance approach towards decisions and recommendations of African human rights mechanisms. As a result, the value of continental decisions and mechanisms has been greatly diminished.

Key words: *African Commission decisions; approaches; domestic law; interpretation; Kenya*

1 Introduction

Judicial authority in Kenya is provided for under article 159 of the Constitution of Kenya (Constitution).[1] Article 159 establishes the composition, powers and functions of the judiciary. Apart from the Constitution, courts are also influenced by the country's cultural, social and political environment. This means that, generally, courts in Kenya are a product of the country's polity.

Often, when adjudicating disputes before them, Kenyan courts rely on both domestic and international law. The Constitution under article 2(6) has radically altered the position of international law in the Kenyan domestic legal system. Under the provision, treaties or conventions ratified by Kenya form part of Kenyan law. This means that with the promulgation of the Constitution, the recommendations of the African Commission on Human and Peoples' Rights (African Commission) and other continental mechanisms pertaining to ratified treaties are part and parcel of the Kenyan domestic legal system.[2] This is known as the monist approach. The opposite is the dualist system, which requires the legislature to enact a statute to incorporate the treaty into domestic law.[3] In practice, however, Kenyan courts defer to the political branches before applying international and regional treaties.[4] The challenge facing Kenyan courts at the moment, and which is the main focus of this article, is how the decisions of the

1 Constitution of Kenya, 2010.
2 Art 2(6) Constitution.
3 D Sloss 'Domestic application of treaties' in D Hollis (ed) *The Oxford guide to treaties* (2012) 370.
4 *David Njoroge Macharia v Republic* (2011) eKLR para 45.

African Commission should be interpreted, especially in relation to ratified African human rights treaties, and the hierarchical status that should be given to the decisions.

Against this background, this article examines domestic reception of the African Commission's decisions by the Kenyan judiciary. After this brief introduction, the article in part 2 discusses the domestic importance of continental mechanisms, such as the African Commission's recommendations, particularly in the interpretation of rights and fundamental freedoms. Part 3 undertakes an overview of the functions of the Kenyan judiciary in the implementation of the decisions and recommendations of African human rights mechanisms, while part 4 analyses the approach adopted by Kenyan courts in relation to these decisions. Part 5 deals with the challenges and prospects of implementing the decisions in Kenya, which is followed by a conclusion. In this article, recommendations and decisions refer to case law of the African Commission and other regional mechanisms, such as the African Court on Human and Peoples' Rights (African Court), resolutions, General Comments, principles and guidelines on thematic issues, among other soft law instruments adopted by the African Commission.

2 Importance of the African regional human rights mechanisms in the promotion and protection of rights and fundamental freedoms

The core functions of Africa's regional human rights mechanisms, such as the African Commission, include promoting and ensuring the protection of human and peoples' rights in line with the African Charter on Human and Peoples' Rights (African Charter).[5] Since its establishment, the Commission has made great strides in interpreting the human rights guarantees in the African Charter and setting human rights standards for state parties to the Charter through its various decisions. For instance, it has defined the content and import of the right to life and freedom from torture and ill-treatment through recommendations in communications and General Comments.[6] Soft law documents, such as the Principles on

5 Organisation of African Unity (OAU) African Charter on Human and Peoples' Rights adopted 27 June 1981, entered into force 21 October 1986; (1981) 1520 UNTS 217 art 45.

6 See, eg, General Comment 3: The right to life (art 4), adopted during 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 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 (art 5) adopted 4 March 2017.

the Decriminalisation of Petty Offences in Africa[7] and the Guidelines on the Policing of Assemblies by Law Enforcement Officials in Africa,[8] have also provided an important basis for advocacy on law reform at the national level.

While the steps taken by the African Commission are important for the advancement of human rights, they may only serve the purpose of reflecting what an ideal situation should look like, unless they are fully implemented at the domestic level. Given that the African Commission has no means of enforcing its decisions at the national level, it is critical that state parties to the African Charter develop mechanisms to implement the decisions of the African Commission at the domestic level. In this regard, national courts play a particularly important role in implementing the Commission's decisions. This role can be played mainly through reliance on the Commission's recommendations in the interpretation of human rights and obligations at the domestic level, thereby enhancing their jurisprudential value. In addition, where the recommendations are adopted by courts at the domestic level, national enforcement mechanisms for judicial decisions can be applied. This in turn would fill the enforcement gap. Consequently, how Kenyan courts approach the African Commission's recommendations and the value they attach to these have implications for implementation of the decisions at the national level.

3 Conceptual framework of the implementation function of domestic judicial organs

The term 'function' in the judicial sense may take various forms depending on the context. This means that it can be defined from either a descriptive or a normative point of view. Alternatively, it may also be viewed from the lens of domestic or international law. The term may also be analysed from a sociological, psychological or legal perspective. The latter can be done by highlighting the duties and obligations of judicial institutions under state laws.[9] Overall, the term 'function' may differ depending on the source, norm and substantive area of international law under scrutiny. In this case, scholarship addressing the 'function' of domestic courts in the interpretation of

7 Principles on the Decriminalisation of Petty Offences in Africa, adopted during the 63rd ordinary session of the African Commission held in October 2018 in Banjul, The Gambia.

8 Guidelines for the Policing of Assemblies by Law Enforcement Officials in Africa (2017), adopted at the 21st extraordinary session of the African Commission held from 23 February 2017 to 4 March 2017 in Banjul, The Gambia.

9 O Ammann *Domestic courts and the interpretation of international law: Methods and reasoning based on the Swiss example* (2020) 135.

the African Commission's decisions may be likened to the proverbial thicket that is hard to penetrate.[10] In this article, the functionalist approach or functionalism as an epistemic method focuses on the role or purpose Kenyan courts serve in relation to the decisions of the African Commission.[11]

Scholars have enumerated several modes of engagement between domestic courts and regional law and the range of 'functions' that the courts fulfil when interpreting such regional laws and decisions. According to Sloss and Van Alstine, the primary question that Kenyan courts should confront before applying any international or regional norm is whether the said norm has passed from the realm of politics to law.[12] In particular, in order for an international norm to be

> legalised, it must contain three essential attributes, each of which, according to Abbott, is 'a matter of degree and gradation'.[13] These attributes are (1) 'obligation' – the extent to which the norm is legally binding on a state or other actor; (2) 'precision' – the extent to which the norm unambiguously defines the required, authorized or proscribed conduct; and (3) 'delegation' – the extent to which third party institutions (especially domestic courts, independent agencies and international courts) have authority 'to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules'.[14]

The ultimate effect of the 'judicialisation' of regional laws such as the African Commission decisions is to 'shift … the balance of power between law and politics [to] favour judicial institutions over representative and accountable institutions'.[15] To achieve this shift, courts have developed various techniques towards the decisions of the African Commission, which include harmonisation and avoidance techniques. These approaches as used by Kenyan courts are discussed next.

10 The legal effect of domestic rulings in international law 135, https://brill.com/display/book/9789004409873/BP000007.xml (accessed 4 August 2023).
11 P Jessup *The functional approach as applied to international law: Proceedings of the Third Conference of Teachers of International Law* (1928).
12 D Sloss & M van Alstine 'International law in domestic courts' in W Sandholtz, JA McCone & CA Whytock (eds) *Research handbook on the politics of international law* (2017) 81.
13 KW Abbott and others 'The concept of legalisation' (2000) 54 *International Organisation* 404.
14 As above.
15 RA Miller 'Lords of democracy: The judicialisation of "pure politics" in the United States and Germany' (2004) 61 *Washington & Lee Law Review* 590.

4 Harmonisation and avoidance: Approaches of Kenyan courts to the implementation of recommendations of the African human rights mechanisms

In Kenya there have been two broad trends when it comes to the implementation of the recommendations of the African Commission and other continental human rights mechanisms. These are the avoidance and harmonisation techniques. The cases discussed in this part have been classified as either harmonising or avoiding the recommendations of continental mechanisms such as the African Commission, beginning with the former.

4.1 Harmonisation approach

The function of harmonisation covers a wide variety of practices employed by Kenyan courts to give effect to the African Commission's decisions in the county's domestic legal system.[16] In several instances, the Kenyan judiciary has found certain African Commission decisions applicable in the domestic legal system. The harmonisation technique was explained by the Supreme Court of Kenya in the case of *Mitu-Bell Welfare Society (Mitu Bell)*.[17]

Mitu-Bell concerned the unlawful eviction and demolition of the homes of more than 3 000 families residing in an informal settlement on public land known as Mitumba Village, located near Wilson Airport in Nairobi. The informal settlers had lived there for over 19 years. The forced eviction took place without due notice and despite a court order prohibiting government authorities from conducting the evictions pending the hearing of an application with respect to the matter. The trial court's decision was positive as it recognised that forced evictions without relocation or compensation negatively affected the equal enjoyment of the right to housing by vulnerable groups. However, for largely procedural reasons, the Court of Appeal overturned the High Court's entire decision. According to the Appeal Court judges, the High Court erred in delivering a judgment and then reserving outstanding matters to be dealt with by the Court. This procedure violated the *functus officio* principle which requires that upon delivery of judgment, a court ceases to have authority

16 Preliminary Report: Principles on Engagement of Domestic Courts with International Law (ILA Study Group 2013) 6-9.

17 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa* (*amicus curiae*) Petition 3 of 2018 [2021] KESC 34 (KLR) (11 January 2021) (Judgment).

to further act on the matter.[18] It then proceeded to hold that the application of supervisory orders is 'unknown to Kenyan law'.[19]

With regard to international law, the Kenyan Supreme Court in *Mitu-Bell* held that articles 2(5) and (6) of the Constitution embraces both international custom and treaty law. It stated that the provisions are both outward and inward looking. By outward looking, it means Kenya, as a state, is committed to conducting its international relations in accordance with its obligations under international law. In this sense Kenya, as a member of the international community, is bound by its obligations under customary international law and its undertakings under the treaties to which it is a party.[20] Despite this proclamation, the Court did not apply any regional or international law when making its determination on the issue of the right to housing by the claimants. Instead, it purported to apply the supremacy clause and rejected, for example, the application of United Nations (UN) Guidelines on Evictions on the grounds that they were not general rules of international law.[21] As a result, the decision originated neither expressly nor by implication from any recommendations of the African Commission.

Prior to *Mitu Bell,* which was decided in 2021, there were other cases that sought to employ the harmonisation approach to the recommendations by the African Commission. These cases gave effect to regional treaties of the African Commission that had been formally ratified by the country. During this period, Kenyan courts applied decisions of the African Commission indirectly as a guide to interpreting domestic statutory or constitutional provisions. For example, in *CORD*[22] the High Court cited article 14 of the African Charter and article 3 of the Organisation of African Unity (OAU) Convention Governing Specific Aspects of Refugee Problems in Africa[23] in order to determine the constitutionality of the Security Laws (Amendment) Act (SLAA).[24] The SLAA had amended the provisions of 22 other Acts of Parliament concerned with matters of national security in Kenya. The petitioners raised four fundamental questions relating to the process of the enactment of SLAA as well as its contents.

18 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others* Court of Appeal paras 72 & 142 (*Mitu-Bell*).
19 *Mitu-Bell* (n 17) para 71.
20 *Mitu-Bell* (n 17) para 131.
21 *Mitu-Bell* (n 17) paras 141-142.
22 *Coalition for Reform and Democracy (CORD) & 2 Others v Republic of Kenya &10 Others* [2015] eKLR (*CORD*).
23 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, May 2019.
24 Security Laws (Amendment) Act of 2014.

The first question concerned the extent to which the Court may inquire into the processes of the legislative arm of government and, in particular, whether the Court could interrogate parliamentary proceedings. The second question concerned the nature and scope of the constitutional obligation of the legislature to facilitate public involvement and participation in its legislative processes, and the consequences of the failure to comply with that obligation. The third question was whether the amendments to various Acts of Parliament contained in SLAA that were impugned by the petitioners limited or violated the Bill of Rights or were otherwise inconsistent with the Constitution of Kenya.

Apart from making a finding on limitation, violation or inconsistency, the Court also determined whether the limitation was justifiable in a free and democratic society. The last issue was whether or not the prayers sought in the petition should be granted. In the end, the Court found sections 12, 16, 20, 26, 34, 48, 64 and 95 to be unconstitutional for violating the rights to freedom of expression and the media guaranteed under articles 33 and 34 of the Constitution, the rights of accused persons under article 50 of the Constitution, and the principle of *non-refoulement* as recognised under the 1951 UN Convention on the Status of Refugees, which is part of the laws of Kenya by dint of articles 2(5) and (6) of the Constitution.

In some instances, the courts have given effect to decisions of the African Commission that do not formally qualify as domestic law. This is what the Kenyan Supreme Court in *Mitu Bell* meant when it held that articles 2(5) and (6) of the Constitution is inward looking because it requires Kenyan courts to apply international law (both customary and treaty law) in resolving disputes before them, as long as they are relevant, and not in conflict with the Constitution, domestic legislation, or final judicial pronouncement. According to the Court, where a trier of fact is faced with a dispute, the elements of which require the application of a rule of international law, due to the fact that there is no domestic law on the same, or there is a lacuna in the law, which may be filled by reference to international law, the court must apply international law, because it forms part of the law of Kenya. In other words, articles 2(5) and (6) of the Constitution recognise international law (both customary and treaty law) as a source of law in Kenya. By the same token, a court of law is at liberty to refer to a norm of international law, as an aid in interpreting or clarifying a constitutional provision.[25]

25 *In the Matter of the Principle of Gender Representation in the National Assembly and the Senate* SC Advisory Opinion 2 of 2012 (eKLR) para 132.

In this vein, courts have given effect to unincorporated treaties, resolutions, Concluding Observations on reports of state parties, guidelines on various human rights and General Comments. Courts have also applied interpretive presumptions to ensure that there is conformity between domestic statutes and regional law, decisions and norms. This means that courts in this category will be inclined to special 'friendliness' towards the African Commission decisions. They aim at ensuring a fertile ground for the development of domestic law in existing and even developing rules of international and regional law. For example, in the High Court case of *Okuta*[26] Justice Mativo relied on Resolution 169 on Repealing Criminal Defamation Laws in Africa[27] of the African Commission before declaring the offence of criminal defamation in Kenya unconstitutional. The matter dealt with the constitutionality or otherwise of the offence of criminal defamation created under the provisions of section 194 of the Penal Code.[28] In particular, the petitioners questioned whether or not criminal defamation is a ground on which a constitutional limitation on the rights of freedom of expression could be legally imposed. It also addressed the issue of whether defamation law in Kenya infringed the people's right to freedom of expression as guaranteed under the Constitution, or whether it was one of the reasonable and justifiable limitations in an open democratic society. The Court allowed the petition and found the offence of criminal defamation to be unreasonable and unjustifiable in a democratic society. It held that criminal sanctions on speech ought to be reserved for the most serious cases particularised under articles 33(2)(a) to (d) of the Constitution whose aim is to protect public interest.

In cases where domestic law is silent or inadequate in relation to a particular issue, Kenyan courts have relied on international law, including decisions of the African Commission. For instance, in *Satrose Ayuma*[29] the High Court of Kenya considered the question of forced evictions and the right to adequate housing. In interpreting what a 'forced eviction' meant and its human rights implications, the Court looked to the UN Committee on Economic, Social and Cultural Rights (ESCR Committee) and the African Commission. It referred to the ESCR Committee's UN Basic Principles and Guidelines on Development-Based Evictions and Displacements (2007) and the African Commission's Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in

26 *Jacqueline Okuta & Another v Attorney General & 2 Others* (2017) eKLR.
27 Resolution on Repealing Criminal Defamation Laws in Africa ACHPR/Res.169(XLVIII)10.
28 Penal Code Cap 63 Laws of Kenya.
29 *Satrose Ayuma & 11 Others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 Others* High Court Petition 65 of 2010.

the African Charter. The Court went on to state that the African position on the right to housing was aptly outlined by the African Commission in *SERAC*,[30] where the Commission, while addressing the question of the homelessness of the Ogoni people caused by the military operations of the Nigerian military, stated the following:[31]

> The state's obligation to respect housing rights requires it, and thereby all of its organs and agents, to abstain from carrying out, sponsoring or tolerating any practice, policy or legal measure violating the integrity of the individual or infringing upon his or her freedom to use those material or other resources available to them in a way they find most appropriate to satisfy individual, family, household or community housing needs … Its obligations to protect obliges it 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, and where such infringements occur, it should act to preclude further deprivations as well as guaranteeing access to legal remedies … The right to shelter extends to embody the individual's right to be let alone and to live in peace, whether under a roof or not.

The African Commission also emphasised that the right to adequate housing as implicitly protected under the African Charter also protected against forced evictions. In *Satrose Ayuma* the High Court recognised that at the time of hearing the case, Kenya did not have a law governing evictions.[32] Consequently, the Court sought guidance from international law, including the decisions of the African Commission and the ESCR Committee. The Court specifically stated that where Kenyan laws are silent or inadequate in relation to a particular issue, it is good practice to rely on international law.[33] Having noted that the petitioners' right to adequate housing, among other rights, had been violated, and cognisant of the fact that in the absence of a proper legal framework more violations would occur, the Court directed the government of Kenya to establish 'an appropriate legal framework for eviction based on internationally acceptable guidelines'.[34] The Evictions and Resettlement Procedures Bill, 2012 was developed during the pendency of the case, although it was never enacted. Still, the principles in *Satrose Ayuma*, drawn from the decisions of the African Commission and the ESCR Committee, continue to provide fundamental guidance on the right to housing and protection from forced evictions in Kenya.

30 *Social Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).
31 *SERAC* (n 30) para 61.
32 *Satrose Ayuma* (n 29) para 79.
33 As above.
34 *Satrose Ayuma* (n 29) para 109.

The *Endorois* case[35] has also been an important reference point for Kenyan courts adjudicating on issues touching on evictions. The case concerned the Kenyan government's eviction of the indigenous Endorois community from their traditional lands around the Lake Bogoria area in the Rift Valley in order to pave the way for the establishment of a game reserve. After unsuccessfully pursuing redress at the national level, CEMIRIDE and MRG, on behalf of the Endorois Welfare Council, lodged the case with the African Commission, alleging the violation of their freedom of religion, right to development, right to property and right to culture, among other rights. The African Commission agreed with the complainants and found that the Kenyan government had breached its obligations under the African Charter by violating the said rights of the members of the Endorois community.

This landmark case has since been relied upon severally by Kenyan courts, especially when interpreting various issues touching on the rights of indigenous people, including who indigenous people are,[36] the impact of evictions on their rights,[37] and their meaningful participation in decisions affecting them.[38] For instance, in *CEMIRIDE* the High Court cited and relied upon the *Endorois* definition of who indigenous people are, linking it to the Constitution of Kenya's provisions on marginalised groups, and proceeded to affirm that protection of the marginalised is one of the national values and principles of governance espoused in the Constitution. As with *Endorois*, where the African Commission determined the question of effective involvement of the Endorois in shaping policies or decisions that affect them,[39] the High Court also affirmed that marginalised people had the right to be represented in public policy formulation and implementation.[40] *CEMIRIDE* concerned the Kenyan government's development and use of a web application called the integrated political parties management system (IPPMS) to manage political party records. The complainants argued that the implementation of the IPPMS would amount to a breach of the political rights of indigenous and marginalised groups, especially because they had no access to internet services and there was no sufficient legislative framework dealing with the rights of such groups. The High Court held that there was no sufficient statutory or

35 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) *(Endorois*).
36 *Simion Swakey Ole Kaapei & 89 Others v Commissioner of Lands & 7 Others* [2014] eKLR.
37 *Satrose Ayuma* (n 29).
38 *Centre for Minority Rights Development (CEMIRIDE) & 2 Others v Attorney General & 2 Others* Petition E002 of 2022 [2022] KEHC 955 (KLR) (*CEMIRIDE*).
39 *Endorois* (n 35) paras 281-282.
40 *Endorois* (n 35) paras 135, 137-138.

regulatory regime dealing with the rights of the marginalised groups or indigenous communities in Kenya and that the government had failed to uphold the rights of these groups. Further, the Court held that the government had failed to conduct effective and meaningful public participation among the marginalised and indigenous groups.

Yet another landmark case that Kenyan courts have adopted is the case of *African Commission on Human and Peoples' Rights v Republic of Kenya* (*Ogiek*).[41] The case was referred to the African Court by the African Commission and concerned the eviction of members of the Ogiek community from the Mau Forest by the government of Kenya. The Ogiek community had been living in the forest since time immemorial, a fact of which the government was aware but which was ignored. The government also refused to recognise the Ogiek as an indigenous community, in spite of the guidance the government had already received in the earlier *Endorois* case where the African Commission defined who indigenous people were. In a final decision on the merits, the African Court found that the government of Kenya had violated the rights of the members of the Ogiek community to land, to disposing of the wealth and natural resources of their land, their right to religion and their right to culture. The failure by the government to recognise the Ogiek as an indigenous community that requires special protection was also found to be a violation of their freedom from discrimination. Kenya was subsequently ordered to pay to the Ogiek compensation for the harm suffered, and to take all necessary measures to identify Ogiek ancestral land and to grant them collective title to such land.

This case provided a strong foundation for the High Court of Kenya in *Keny,*[42] which concerned the eviction of members of the Ogiek community from the South West Mau Forest that they had inhabited since time immemorial. Their houses were also razed down. The complainants had alleged that the eviction violated their rights to human dignity, property, equal benefit of the law, fair administrative action and access to justice. The High Court recognised that the same issues had already been addressed by the African Court in *Ogiek* and that the African Court's decision was binding by virtue of article 2(6) of the Constitution of Kenya 2010.[43] This was a particularly important affirmation of the decision of the African Court and it has since been

41 *In the Matter of the African Commission on Human and Peoples' Rights v Republic of Kenya* Application 6/2012 (*Ogiek*).
42 *John K Keny & 7 Others v Principal Secretary Ministry of Lands, Housing and Urban Development & 4 Others* [2018] eKLR (*Keny*).
43 *Keny* (n 42) para 42.

cited in other cases touching on the rights of members of the Ogiek community.

The recommendations of the African Commission in relation to the freedom of association have also proved pivotal in protecting the right, especially with respect to minorities. For instance, in *EG*[44] the High Court of Kenya lay emphasis on the state obligation not to interfere with the free formation of associations. In this case, the petitioners, who had been prohibited from registering an organisation for gay and lesbian people, alleged a violation of their freedom of association. The High Court recalled that the right to freedom of association was a critical right that had been jealously guarded in various judicial forums, including the African Commission. The Court proceeded to cite various decisions[45] of the African Commission and its Resolution on the Right to Freedom of Association. In the Resolution the Commission emphasised that 'authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the Constitution and international human rights standards'[46] and that 'the regulation of the exercise of the right to freedom of association should be consistent with state's obligations under the African Charter'.[47]

The harmonisation approach was also used in *Federation of Women Lawyers-Kenya*[48] where the petitioners sought to enforce the rights of persons who were internally displaced during the 2007-2008 post-election violence in Kenya. In addition, they had sought but had been denied certain information from the state pertaining to the investigations around the cases. In addressing the question of the right of access to information, the Kenyan High Court made reference to the African Commission's Declaration of Principles on Freedom of Expression in Africa[49] which, according to the Court, 'gave an authoritative statement on the scope of article 9 of the African Charter'. The Court fully adopted the Commission's view that the right of access to information held by public bodies and

44 *EG v Non-Governmental Organisations Co-ordination Board & 4 Others* [2015] eKLR (*EG*).
45 Eg, *Dawda Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000); *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999); *Law Office of Ghazi Suleiman v Sudan* (II) (2003) AHRLR 144 (ACHPR 2003); *Civil Liberties Organisation (in respect of Bar Association) v Nigeria* (2000) AHRLR 186 (ACHPR 1995).
46 Resolution on the Freedom of Association ACHPR/Res.5 (XI) 92 para 1.
47 Resolution on the Freedom of Association (n 46) para 3.
48 *Federation of Women Lawyers-Kenya & 28 Others v Attorney General & 8 Others* (2015) eKLR.
49 The Declaration of Principles on Freedom of Expression in Africa adopted by the African Commission on Human and Peoples' Rights 32nd session, 17-23 October, 2002, Banjul, The Gambia.

companies enables greater public transparency and accountability, good governance and democracy.[50]

Admittedly, in certain instances courts have 'silently' applied recommendations of other regional mechanisms, such as the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) without mentioning the sources. This may mean that the state has accepted, from its conduct, to engage with the recommendations of the African Children's Committee.[51] For instance, the High Court of Kenya 'silently' applied the provisions of General Comment 2 on article 6 of the African Charter on the Rights and Welfare of the Child (African Children's Charter): The right to a name, registration at birth, and to acquire a nationality in the case of *LNW*.[52] The case concerned the insertion of the name of the biological father in the birth certificate of a child born outside wedlock. The Court declared that all children born out of wedlock have a right to have the names of their fathers entered in the country's birth registers. As a result, the Court declared unconstitutional section 12 of the Registration of Persons Act,[53] which required the name of the father of a child born outside of marriage to be entered in the register of births upon the joint request of the father and mother, or upon proof of marriage.

According to the Court, section 12 denied children born out of wedlock identity and the right to have a name, which is stipulated by paragraph 5.1 of General Comment 2 on article 6 of the African Children's Charter. The Court found that the situation discriminated against both the children and their mothers, which is contrary to Kenya's transformative Constitution. The implication of this case is acquiescence or tacit recognition by the courts to the effects of the provisions of General Comment 2 on article 6 of the African Children's Charter. In such a situation, the state may be precluded through estoppel from changing its position on the rights of children born out of wedlock to have the names of their fathers entered in the register of births without the latter's consent.[54]

50 *Federation of Women Lawyers-Kenya* (n 48) para 16.
51 JS Carvalho 'The powers of silence: Making sense of the non-definition of gender in international criminal law' (2022) 35 *Leiden Journal of International Law* 984.
52 *LNW v Attorney General & 3 Others* (2016) eKLR.
53 Registration of Births and Deaths Act Cap 149.
54 *Case Concerning the Temple of Preah Vihear* (Cambodia/Thailand) (Merits) [1962] ICJ Rep 131, 62.

4.2 Avoidance approach

The avoidance approach refers to a range of contrasting techniques used by some courts in Kenya so as 'to by-pass otherwise … applicable international legal provisions'.[55] Some of these courts relegate claims founded in international law to politics or diplomacy.[56] These courts have recognised a 'political question' and 'ripeness' doctrines for issues with particularly important or sensitive foreign policy implications.[57] These doctrines may be used to oust the jurisdiction of Kenyan courts when interpreting the Constitution, especially with regard to the effect of African Commission's resolutions, declarations, General Comments and guidelines and their norm-generating quality in international law. According to the Kenyan Supreme Court, such resolutions, declarations and Comments do not ordinarily amount to norms of international law.[58] However, the Supreme Court also conceded that in certain instances, regional declarations and resolutions can ripen into norms of customary international law, depending on their nature and history leading to their justiciability in courts.[59]

Some courts also have afforded deference to the executive branch in interpreting international and regional legal norms. Courts may avoid matters on grounds of separation of powers or the fact that they lack jurisdiction, which means that neither the ordinary courts nor any other court can consider the dispute.[60] In Kenya, the Supreme Court has cautioned against judicial overreach. It has urged that when issuing orders, courts must be realistic and avoid the temptation of judicial overreach, especially in matters of policy.[61] This was also the holding in *Small Scale Farmers Forum*.[62] In this case the High Court of Kenya emphasised the doctrine of separation of powers as follows:

> Firstly, it has to be borne in mind that this court is not called upon to carry out an appraisal of the impugned agreement or negotiations to satisfy itself whether or not they are good for Kenya. Those are matters

55 Sloss & Van Alstine (n 12) 81.
56 E Benvenisti 'Reclaiming democracy: The strategic uses of foreign and international law by national courts' (2008) 102 *American Journal of International Law* 242.
57 *Baker v Carr* (1962) 369 US 186.
58 *Mitu-Bell* (n 17) para 141.
59 As above.
60 *Presidency of the Council of Ministers v Markovic* [2002] 85 Rivista di diritto internazionale 799 ILDC 293 (IT 2002) (*Markovic*) para 5.
61 *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 Others; Initiative for Strategic Litigation in Africa* (*amicus curiae*) (Petition 3 of 2018) [2021] KESC 34 (KLR) (11 January 2021) (Judgment) para 122.
62 *Kenya Small Scale Farmers Forum & 6 Others v Republic of Kenya & 2 Others* Petition 1174 of 2007.

> of policy of which this court is not best suited to handle. The dissenting decision of the Supreme Court in *US v Butler*, 297 US 1 [1936], is apposite in this regard that 'courts are concerned only with the power to enact statutes, not with their wisdom ... For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government.'

The role of the legislature, executive and judiciary is to make, implement and interpret laws and policies.[63] These functions take seriously concerns relating to checks and balances, accountability, participation, responsiveness and transparency. However, from the above paragraph, it may be concluded that the doctrine of separation of powers as a component of the avoidance technique may be used by judicial officers to oust the application of international law in the country.

Additionally, courts in some instances apply the doctrine of 'non-self-executing' treaties as an avoidance technique. In *Mitu Bell* the Supreme Court elaborated on this issue as follows:[64]

> Having dealt with this issue, we must conclude by stating that article 2(5) and (6) of the Constitution has nothing or little of significance to do with the monist-dualist categorisation. Most importantly, the expression 'shall form part of the law of Kenya' as used in the article does not transform Kenya from a dualist to a monist state as understood in international discourse. As already demonstrated, the phrase was in fact first embraced by the pioneer dualist states, ie the United Kingdom and the United States. At any rate, given the developments in contemporary treaty making, the argument about whether a state is monist or dualist, is increasingly becoming sterile, given the fact that, a large number of modern-day treaties, conventions, and protocols are non-self-executing, which means that they cannot be directly applicable in the legal systems of states parities, without further legislative and administrative action.

In other words, before a court can invoke article 2(5) of the Constitution, it must be satisfied that the rule of international law being invoked is a general rule of international law and not simply a rule of international law. Accordingly, regional bodies such as the African Commission are neither a supplementary nor complementary legislature for Kenya. It means that the African Commission does not legislate for Kenya. Therefore, it is impermissible to use articles 2(5) and (6) of the Constitution as a basis to justify any or all rules and principles of international law as part of the laws of Kenya.

63 *Kenya Airports Authority v Mitu-Bell Welfare Society & 2 Others* [2016] eKLR.
64 *Mitu-Bell* (n 17) para 133.

In other avoidance techniques, courts will refuse to uphold the decisions of the African Commission if those decisions are in conflict with the Constitution. For example, in *East African Community v Republic*[65] the Court of Appeal for East Africa in 1970 stated that any law, including treaties ratified by Kenya, which is in conflict with the Constitution of Kenya, is void to the extent of the conflict.

This means that the decisions of the African Commission will only be applicable in Kenya if they are founded on provisions that are in compliance with the Constitution.[66] This approach is more complex compared to other models such as monism and dualism. Although it regards the state to be somewhat constrained by international law and obligated to set up domestic political and legal institutions so as to ensure compliance, it aims to rank international human rights norms contained in ratified international human rights treaties at a hierarchically-lower position than national legislation. In other words, the approach aims to subject international law to the authority of domestic legislation.[67] It emphasises nationalism, whose aim is to progressively give more prominence to the country's domestic law at the expense of international human rights law. This, in turn, may not generate the much-needed 'compliance pull' whose aim is to improve the possibility of international law and norms in changing state behaviour.[68]

In some cases the courts have been silent in instances where they could have contributed to the implementation of the decisions of the African Commission. For example, in *Nubian Rights Forum*[69] the petitioners had argued that the implementation of an integrated digital civil registration system would further the discrimination and exclusion of members of the Nubian community in Kenya. Among the orders sought was 'a declaration that the state must implement the decisions of the African Commission on Human and Peoples' Rights and the African Committee on the Rights and Welfare of the Child in the cases of, respectively, *Nubian Community v Kenya* and *Children of Nubian Descent v Kenya*'. While the High Court allowed the petition, it did not at all address the prayer concerning the

65 *East African Community v Republic* (1970) EA 457.
66 *Beatrice Wanjiku & Another v Attorney General & Others* High Court Petition 190 of 2011 [2012] eKLR.
67 M Kumm 'The legitimacy of international law: A constitutionalist framework of analysis' (2004) 15 *European Journal of International Law* 928.
68 T Kabau & C Njoroge 'The application of international law in Kenya under the 2010 Constitution: Critical issues in the harmonisation of the legal system' (2011) 44 *Comparative and International Law Journal of Southern Africa* 296.
69 *Nubian Rights Forum & 2 Others v Attorney General & 6 Others; Child Welfare Society & 9 Others (Interested Parties)* [2020] eKLR.

implementation of the African Commission's decisions in respect of the Nubian community in Kenya.

5 Prospects and challenges of implementing recommendations of the African Commission and other continental mechanisms in Kenya

Generally, Africa's human rights mechanisms, such as the African Commission, have no follow-up mechanisms to ensure the implementation of their decisions. The system is designed with significantly limited enforcement capacity.[70] As a result, the observance and implementation of the decisions of the African Commission differ from country to country. Some states have continuously neglected to submit reports to the Commission as required by article 62 of the African Charter. Other African Charter member states are so adamant and unwilling or lack adequate infrastructure to enforce the recommendations of the African Commission.

Kenya is a party to several human rights treaties in Africa. However, this ratification largely applies in principle and not in practice. This has been very frustrating especially to successful parties who have to pursue the execution of the decisions on their own behalf. Since there has generally been little pressure from the African Commission on states to ensure that its recommendations are implemented, countries such as Kenya have a tendency of disregarding and avoiding victims' pleas for compliance with the resolutions of the African Commission. The lack of implementation may be due to various reasons. For example, the vagueness in the definition of rights under the African Charter may have provided an escape route to state parties in the fulfilment of their obligations.

Where the executive arm of government sets out to implement the Commission's decisions, they can be easily implemented through various ways, including through administrative actions of government departments that do not require lengthy and resource intensive processes to be put in place. However, where the willingness to implement is absent, and parliamentary oversight over the executive also is inadequate, the judiciary can be the arm of government that gives meaning to the Commission's decisions. Kenya has an independent judiciary, which is capable of 'judicialising' or 'legalising' the recommendations of the African Commission.

70 The African Commission's Rules of Procedure, eg, do not provide for enforcement mechanisms.

They play an important role in the implementation of the African Commission's decisions by issuing authoritative judgments in litigated disputes. Using the African Commission's decisions to build the will and capacity of the government of Kenya to act domestically offers great opportunities to enhance the overall effectiveness of the African human rights system. Domestic institutions will grow stronger, and their strength can be harnessed in pursuit of regional objectives. The Kenyan government can thus respond to its human rights obligations more effectively and efficiently.

A key role of the decisions of the African Commission is to assist domestic courts in interpreting constitutionally-recognised rights, especially given that these decisions are based on regional treaties that have influenced the constitutions of many African countries, including Kenya. The decisions of the African Commission may offer a more robust jurisprudence than what is available from domestic precedent, allowing for more expansive interpretations and firmer defence of progressive principles.

One of the criticisms against the use of the African Commission's decisions in Kenya is the potential of abuse by the government of this newfound power.[71] Kenya has a strong constitutional framework, transparent political process, and embedded systems of checks and balances that are least likely to appropriate the decisions of the African Commission for their own purposes. In this environment, Kenyan domestic courts can easily prevent government abuse by counter-balancing the strength of the other arms of government. Nevertheless, there are a number of challenges that stand in the way of the implementation of these decisions.

According to Murray and Mottershaw, political factors have a greater bearing on compliance with decisions of the African Commission than legal factors.[72] Thus, while the judiciary plays an important role in the implementation of the Commission's decisions, the role of the executive and legislature arguably is even more important. Additionally, the political environment created by these two arms of government can influence the attitudes of the judiciary towards the application of the African Commission's decisions in the interpretation of rights and obligations. In Kenya, there has been limited engagement with the African Commission's decisions by

71 WW Burke-White & A Slaughter 'The future of international law is domestic (or, the European way of law)' (2006) 47 *University of Pennsylvania Carey Law School* 348.

72 R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 356.

the executive and legislative branches of government. A review of 15 sampled government policies revealed that only one had relied on principles developed by the African Commission to reinforce rights.[73] In an environment where there is little or no political will to implement the decisions of the African Commission, the value of such decisions certainly is diminished regardless of whether or not courts adopt them.

Another challenge has been the issuance of conflicting decisions or interpretations of the place of the African Commission's decisions under Kenyan law. While some judges rely on and fully adopt the decisions in their interpretation of rights (for example, the High Court in *Satrose Ayuma* discussed above), others (for instance, the Supreme Court in *Mitu-Bell* cited above) attach little value to the decisions and emphasise that such decisions play a persuasive role and are secondary to decisions by Kenyan courts. Given that the highest Court in Kenya (the Supreme Court) has taken an approach to international law that places them below all domestic laws in Kenya, including decisions of Kenyan courts, it is expected that courts that would otherwise have attached a high jurisprudential value to the African Commission's decisions may no longer do so.

Yet another challenge has been the general limited awareness about the decisions. Regardless of how consequential the Commission's decisions are, their impact would be low if there is limited knowledge about them among both judicial officers and other court users. To address this challenge and improve the prospects of its decisions being implemented by courts at the national level, the African Commission needs to enhance its engagements with justice actors of member states to the African Charter with a view to encouraging key actors, such as judiciaries, to establish internal mechanisms for enhancing incorporation of human rights standards in the African human rights system into national standards. For instance, judiciaries can systematically track developments within the African human rights system, assess the extent to which they incorporate the Commission's decisions, and develop ways of incorporating these in the matters before them. While this may not necessarily entail implementing specific decisions of the Commission, the adoption of the decisions in the adjudication of disputes before them will increase their jurisprudential value.

73 Republic of Kenya, Ministry of Lands, Eviction and Resettlement Guidelines: Towards Fair and Justifiable Management of Evictions and Resettlements (2009), https://www.refworld.org/pdfid/5b3e2eb44.pdf (accessed 16 August 2023). The Guidelines make reference to the decision of the Commission in *SERAC* (n 30) and emphasised that forced evictions contravened the African Charter.

Another step that can be taken to enhance reliance on the African Commission's decisions is the development and wide dissemination by the Commission of thematic case digests on cases with which the Commission has dealt. Apart from creating greater awareness on the Commission's cases, such a digest can equally enable the Commission to enhance consistency in decision making, thereby enhancing the strength of its own decisions. The digests can also act as useful guides for both judicial officers and legal practitioners who can rely on them to adjudicate human rights disputes before national courts. In time, there would be more reliance on the Commission's decisions and the principles and standards drawn from the decisions can be entrenched in national practice.

6 Conclusion

The future of the African Commission is domestic. By virtue of being a party to the African Charter, the Kenyan government must accept the responsibilities of membership flowing from their ratification of the African Charter. Noting that the executive and legislative arms of government hardly ever implement the Commission's recommendations, the 'judicialisation' of the decisions by Kenyan courts presents an opportunity for the norms and standards developed by the Commission to have effect at the domestic level. The enforcement mechanisms for judicial decisions at the national level can act as powerful tools through which the African Commission can influence domestic socio-political and legal outcomes. As discussed above, whether or not this happens depends on the will of national governments, and the appreciation by the judiciary of their role in implementing the Commission's recommendations. The seemingly emerging trend of the Kenyan judiciary hardening its avoidance approach and adopting a hierarchical approach that reduces the value of the African Commission's recommendations points to a bleak future for the Commission's recommendations in Kenya.

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A contextual approach to strengthening state capacity to implement the decisions of the African Commission on Human and Peoples' Rights

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Summary: *The African Commission on Human and Peoples' Rights plays a pivotal role in promoting and protecting human and peoples' rights across the continent. Despite widespread ratification of the African Charter on Human and Peoples' Rights and related treaties, state parties continue to face significant challenges in implementing the African Commission's recommendations, largely due to governance and democracy deficits. These challenges are exacerbated by resource constraints, limited state capacity, poor inter-agency coordination and a lack of effective monitoring mechanisms. To address these issues, this article argues for a contextual approach to strengthening state capacity for implementing the African Commission's decisions. Proposed strategies*

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include fostering constructive engagement with states, building political will, and empowering national human rights institutions and civil society organisations to provide targeted support. Adopting an exploratory approach to the discourse, the article finds that only by deploying a tailored and context-specific approach can the African Commission work collaboratively with states to improve compliance with the African Charter, so as to foster a stronger human rights culture in Africa and enhance the legitimacy of the African Union's human rights framework.

Key words: *context approach; state capacity; implementation; recommendations; African Commission*

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission), Africa's premier human rights institution, was inaugurated on 2 November 1987.[1] It has a mandate to promote and ensure the protection of human and peoples' rights in Africa, and has adopted several landmark decisions and resolutions on the protection and promotion of human rights in Africa.[2] In some cases, these decisions have influenced positive attitudes of states and their approach to human rights in Africa. As Ssenyonjo notes, there have been instances showing the influence of 'the African Commission's case law on African judiciaries as a guide to the interpretation and application of national law'.[3] The African Commission has provided extensive normative guidance to states, clarifying and interpreting human rights standards as enshrined in the African Charter on Human and Peoples' Rights (African Charter) and its supplementary

1 NJ Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45, 64. Also see African Commission 'Brief overview', https://achpr.au.int/en/about (accessed 14 November 2024).

2 R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349.

3 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* 18. Also see, eg, *Ts'epe v The Independent Electoral Commission & Others* (2005) AHRLR 136 (LeCA 2005) paras 16 & 20; *Eric Gitari v Non-governmental Organisation Coordination Board & 4 Others* Petition 440 of 2013 [2015] eKLR (High Court of Kenya, Nairobi, 24 April 2015), in which the Kenyan High Court referred to the jurisprudence of the African Commission in the interpretation of the Bill of Rights of Kenya; *Sabally v Inspector General of Police & Others* (2002) AHRLR 87 (GaSC 2001) paras 11-12, in which the Supreme Court of The Gambia referred to the jurisprudence of the African Commission in *Constitutional Rights Project & Others v Nigeria* (2000) AHRLR 227 (ACHPR 1999).

protocols.[4] Since its establishment, the work of the Commission has aided states to better understand their obligations under the African Charter and its supplementary Protocols, promoting consistency in human rights interpretations, policy, development and legislative reforms.[5]

Despite the normative and institutional advances made by the African Commission, numerous governance and human rights challenges persist on the African continent and are significantly impeding the enjoyment of the human and peoples' rights of African peoples.[6] As Okoloise argues, the current relationship between state parties to the African Charter is 'one mired by defiance'.[7] State compliance with the decisions of the Commission remains an aspiration among African citizens. For Viljoen, 'compliance' is 'the fulfilment of a state obligation under a treaty'.[8] Consequently, states, particularly less democratic states, are failing or experiencing significant challenges in implementing the decisions and recommendations of the African Commission.[9] It is against this backdrop that the Commission needs to adopt a contextual approach (particularly in less democratic states) to strengthening the capacity of states to implement its decisions and recommendations domestically.

Despite the African Commission making normative and institutional advances, the state as the most important actor in the realisation of human rights at the domestic level is often slackened by numerous persisting challenges that significantly impede the

4 African Charter on Human and Peoples' Rights 1981; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2003; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa 2016; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities 2018; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security 2022; Protocol to the African Charter on Human and Peoples' Rights Relating to the Specific Aspects of the Right to a Nationality and the Eradication of Statelessness in Africa 2024.

5 Human Rights Watch 'African Rights Commission's work more important than ever' 2 November 2022, https://www.hrw.org/news/2022/11/02/african-rights-commissions-work-more-important-ever (accessed 8 September 2023).

6 Africa Renewal 'Prioritising human rights in Africa' 22 March 2023, https://www.un.org/africarenewal/magazine/april-2023/prioritising-human-rights-africa (accessed 8 September 2023).

7 C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights (2018) 18 *African Human Rights Law Journal* 27-57.

8 F Viljoen & N Orago 'An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights in the light of its importance and implications' (2014) 17 *Potchefstroom Electronic Law Journal* 2555.

9 S Lagoutte 'The role of state actors within the national human rights system' in S Lagoutte, S Lorion & SLB Jensen (eds) *The domestic institutionalisation of human rights* (2021) 13-30; JD Mujuzi 'The rule of law: Approaches of the African Commission on Human and Peoples' Rights and selected African states' (2012) 12 *African Human Rights Law Journal* 94-95.

enjoyment of human and peoples' rights.[10] For instance, poor governance and leadership crises in many parts of the continent continue to affect the relationship between states and the African Commission.[11] Most recently, since 2020, Africa has experienced a resurgence of *coups*,[12] armed conflicts, terrorism, violent extremism, environmental pollution in the extractive industries by multinational corporations, and development-induced displacement of local communities that often lead to forced migration within and across local and international borders.[13] In some cases, the non-accountability of government institutions, pervasive corruption of public officials, excessive use of force by security services, the lack of access to information, non-consultation of vulnerable and marginal communities (including indigenous populations) in development projects, electoral irregularities, and ethnic domination continue to threaten the stability of African nations.[14] Given these numerous challenges, it is doubtful if states in this context of crisis have the capacity and the will to prioritise the implementation of decisions by the African Commission. In addition, it is argued that democracy on the continent is in steady decline, as evidenced by various democracy indicators focusing on Africa.[15] These factors undoubtedly raise questions and suspicion as to whether such crises provide a breeding ground for states to implement the decisions of the African Commission.

This article, therefore, attempts to articulate a contextual approach to strengthening the capacity of states to implement the decisions of the African Commission. It aims to assist the Commission to come out of the quagmire of state defiance by adopting a tailored

10 United Nations General Assembly Resolution 60/251 Human Rights Council (2006) A/RES/60/251, https://www2.ohchr.org/english/bodies/hrcouncil/docs/a.res.60.251_en.pdf (accessed 15 November 2024).

11 ISS 'Poor governance in Africa hampers progress', https://issafrica.org/pscreport/psc-insights/poor-governance-in-africa-hampers-progress (accessed 8 September 2023).

12 *Coups* have occurred in Mali (2020 and 2021), Chad (2021), Guinea (2021), Sudan (2021) and Burkina Faso (2022). See A Mendy & O Mendy 'The resurgence of military *coups* and implications for democratic stability in sub-Saharan Africa' (2024) 10 *Jurnal Politik Indonesia* 1-16; CF Chigozie & PT Oyinmiebi 'Resurgence of military *coups* in West Africa: Implications for ECOWAS' (2022) 5 *African Journal of Social Sciences and Humanities Research* 52-64.

13 UN Press 'Root causes of conflicts in Africa must be addressed beyond traditional response, special adviser tells Security Council debate on silencing guns', https://press.un.org/en/2023/sc15249.doc.htm (accessed 8 September 2023).

14 United Nations 'World Social Report 2020: Inequality in a rapidly changing world', World Social Report 2020: Inequality in a Rapidly Changing World | DESA Publications (accessed 14 November 2024).

15 ISSAfrica.org 'Democracy in decline in Africa? Not so fast' *ISS Africa* 4 November 2021, https://issafrica.org/iss-today/democracy-in-decline-in-africa-not-so-fast (accessed 8 September 2023); Freedom House 'Freedom in the world 2024' February 2024 1; Varieties of Democracies 'Pandemic backsliding: Democracy during COVID-19 (March 2020 to June 2021)', https://v-dem.net/pandem.html (accessed 8 November 2011).

and practical approach in its engagement with states based on the socio-political context and economic landscape of state parties to the African Charter. Currently, the African Commission applies the same engagement process to all state parties regardless of apparent disparities in their historical, political, economic, social and cultural setting and challenges. A contextual approach is one that prioritises the differentials between various state parties by taking into consideration the unique human rights challenges that each country faces in state-African Commission engagements. It requires that the Commission considers tailoring its recommendations and engagements to align with each country's unique political situation, economic realities and legal traditions. As Moka-Mubelo rightly states, 'there is an urgent need for a context-oriented approach to human rights' in order to better appreciate why some societies that do not protect some of their members should correctly be blamed for human rights violations.[16] Essentially, in Africa there is a need for the African Commission to adapt measures to the prevailing context of each state party to the African Charter, rather than stick to its historical straight-jacket approach to the application of the Charter to the state parties concerned.

The arguments in the article are presented in five parts. This part having introduced the rationale for adopting a contextual approach, the next part considers the mandate of the African Commission for ensure state party compliance with the provisions of the African Charter. The third part examines how the African Commission can navigate the challenges of democratic regression, *coups*, conflict and instability in order to support states implement the decisions of the Commission. The fourth part of the article considers the way forward for the African Commission considering challenges faced by national human rights institutions (NHRIs) and civil society organisations (CSOs) in Africa. The last part summarises the key points of the article and concludes the analysis.

2 The African Commission's mandate on monitoring states' compliance with the African Charter

The African Commission is established under article 45 of the African Charter.[17] The Commission was created as the primary treaty-monitoring mechanism responsible for promoting and protecting human and peoples' rights, redressing violations, and interpreting the

16 W Moka-Mubelo 'Towards a contextual understanding of human rights' (2019) 12 *Ethics and Global Politics* 40, 44.
17 Art 45 African Charter.

provisions of the African Charter and its supplementary protocols as well as any other international human rights treaty ratified by a state party.[18] Over more than the last three decades of its establishment, the African Commission has firmly and successfully established itself as the principal human rights body on the continent.[19] As part of its operational standards, the Commission regularly engages states through the reporting process and its monitoring of state party compliance, the adjudication of communications containing allegations of human and peoples' rights violations, and interpretation of the African Charter. In more than the three decades of its existence, the African Commission offers guidance to state parties on their obligations under the African Charter and its supplementary protocols.

Under article 62 of the African Charter, state parties are required to submit periodic reports to the Commission on the legislative and other measures taken domestically to give effect to the rights and freedoms enshrined in the Charter.[20] Similarly, article 26 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol),[21] 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)[22] and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities (African Disability Protocol)[23] all also require state parties to submit periodic reports on compliance with their obligations under the respective thematic Protocols.[24] As a matter of practice, the content of the report includes information on the measures adopted to implement the African Charter and its supplementary instruments domestically, the progress made so far, and the challenges affecting their implementation in the state party concerned. Even though states have been shown

18 These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003 (African Women's Protocol); the African Charter on Democracy, Elections and Governance adopted by the AU in 2007; the African Disability Protocol (the Protocol was adopted in 2018 as the Disability Protocol to the African Charter on Human and Peoples' Rights).

19 African Commission 'About ACHPR', https://achpr.au.int/en (accessed 8 September 2023).

20 Art 62 African Charter.

21 Art 26 African Women's Protocol.

22 Art 22(1) Protocol on the Rights of Older Persons 2016.

23 Art 34(1) Protocol on the Rights of Persons with Disabilities 2018.

24 See the State Reporting Guidelines and Principles on Articles 21 and 24 of the African Charter relating to Extractive Industries, Human Rights and the Environment 2018; State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 2012 (Tunis Reporting Guidelines); State Reporting under the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2010; Guidelines for National Periodic Reports under the African Charter 1989.

to respond favourably to the progress and challenges identified in the Concluding Observations and recommendations of the African Commission,[25] implementation challenges remain.[26]

Besides the reporting process, the African Commission adjudicates on communications received from individuals or groups (or even state parties) who allege that there has been a violation of the African Charter or other relevant international human rights instruments. In this regard, such communications need to comply with the admissibility conditions laid down in article 56 of the African Charter,[27] including the requirement that local remedies be exhausted. The conditions for receiving communications exist to afford the state party concerned ample opportunity to utilise its domestic system of justice to address grievances and prevent the African Commission from acting as a tribunal of the first instance.

In its three and a half decades of existence, the African Commission has considered and determined approximately 900 communications presented to it, over two-thirds of which have been decided.[28] These include notable communications such as *SERAC*,[29] *Endorois*[30] and *Jawara v The Gambia*.[31] More importantly, decisions made by the African Commission are recommendatory in nature; their implementation is dependent on the political will of state parties.[32] Under the framework of the African Union (AU), the African Commission continues to receive support to fulfil its mandate. Extra support is also given by partner institutions within and beyond the African continent such as the support enjoyed from the Norwegian Centre for Human Rights in 2012 and 2021.[33] Although this type of support is mainly technical and financial, they are often beclouded by

25 See eg African Commission 'Republic of Namibia: Promotion Mission, 12 to 16 June 2023' 18 June 2024, https://achpr.au.int/index.php/en/mission-reports/namibia-promotion-mission-12-16-june-2023 (accessed 8 November 2024).
26 Ssenyonjo (n 3) 30.
27 Art 56 African Charter.
28 African Commission 'Decisions on communications', https://achpr.au.int/en/category/decisions-communications (accessed 8 November 2024).
29 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).
30 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).
31 *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).
32 EA Ankumah *The African Commission on Human and Peoples' Rights: Practices and procedures* (2023) 74, 196; RH Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 55.
33 F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 351, 391.

uncertainty, external priorities, the risk of politicisation and concerns that state parties might limit support to the African Commission.[34]

In dispensing its mandate of interpreting the provisions of the African Charter, the African Commission adopts resolutions, principles and guidelines, General Comments and model laws. Through these declaratory and interpretive instruments, the Commission gives clarity to the textual content of the rights and freedoms recognised in the African Charter and its supplementary Protocols. It is noted that at present, the Commission has adopted almost 600 resolutions,[35] 11 guidelines, seven General Comments and one model law.[36] However, most of these have been adopted in the last two decades of the AU's establishment. Furthermore, in carrying out its mandate of promoting rights, the African Commission operates through what is called 'special mechanisms'.[37] These 'special mechanisms' comprise experts, or a body of experts assigned to deal with specific thematic issues under the African human rights system.[38] At the African Children's Charter Secretariat, there are two categories of special mechanisms – Special Rapporteurs and working groups. Special Rapporteurs are single mandate holders, usually a commissioner, assigned to work on a particular thematic human rights area, while a working group is a body of experts in a particular field of human rights led by one of the commissioners. [39]

In the past decades, the African Commission has undertaken and continues to undertake numerous country visits and investigative missions to the territory of state parties whenever human and peoples' rights issues are involved.[40] As part of its promotional mandate, country visits to the territory of state parties are at the request of the African Commission and subject to the approval of the

34 African Commission 'Strategic Framework 2021-2025', https://achpr.au.int/en/achpr-2021-2025-strategic-plan (accessed 8 November 2024).
35 As of 6 November 2024, there were 604 African Commission resolutions. See African Commission 'Final Communiqué of the 81st ordinary session of the African Commission on Human and Peoples' Rights' 7 November 2024 para 31, https://achpr.au.int/en/news/press-releases/2024-11-07/final-communique-81st-ordinary-session (accessed 8 November 2024).
36 African Commission 'Soft law', https://achpr.au.int/index.php/en/category/soft-law (accessed 8 November 2024).
37 African Commission 'Special mechanisms', https://achpr.au.int/en/special-mechanisms (accessed 8 September 2023).
38 As above.
39 BTM Nyanduga 'Working Groups of the African Commission and their role in the development of the African Charter on Human and Peoples' Rights' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system in practice 1986–2006* (2008) 379-405.
40 Conscientious Objector 'A conscientious objector's guide to the international human rights system', https://co-guide.info/mechanism/african-commission-human-and-peoples-rights-overview (accessed 8 September 2023).

state party concerned.[41] Such country visits and missions are often led by a Special Rapporteur or the Chairperson of the Commission. In the past two decades, a number of these visits have been successfully conducted by the Commission, while others have been met with resistance. On the one hand, the promotion mission to Namibia in June 2023, for example, was considered a success.[42] On the other hand, in 2006 Uganda vehemently objected to Resolution 94 on the human rights situation in Uganda, even though the government expressed its willingness to maintain constructive engagement with the African Commission,[43] and several requests to states for purposes of undertaking promotion/sensitisation missions have all fallen on deaf ears.[44] The Commission's mechanisms often fell short due to reliance on approval from states. Less democratic states often exercise control over these visits, and in some cases the work of the 'special mechanisms' is subject to surveillance by the host state.[45] States that are overly obsessed with the idea of state sovereignty in most cases could be problematic when it comes to subjecting themselves to scrutiny.

In spite of sovereignty concerns, the work of the African Commission has had a significant impact on the normative development of human and peoples' rights in Africa. It is noted that in its decisions on communications and thematic resolutions, it has given clarity to the tenor of the African Charter rights and provided a framework for the development of human rights in domestic law. It has been argued that this impact is more evident in its adoption

41 Rules of Procedure of the African Commission 2020 Rule 83(2).

42 African Commission 'Republic of Namibia: Promotion mission 12 to 16 June 2023' 18 June 2024, https://achpr.au.int/index.php/en/mission-reports/namibia-promotion-mission-12-16-june-2023 (accessed 8 November 2024).

43 The Republic of Uganda 'Executive summary of the government of Uganda's response to the African Commission on Human and Peoples' Rights Resolution on the human rights situation in Uganda (99. ACHPR/Res. 94 (XXXVIII) 5 presented at the 39th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia' 18 May 2006, https://achpr.au.int/sites/default/files/files/2022-09/achpr39actrep202006eng.pdf (accessed 15 November 2024). Also see F Viljoen 'Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: Compliance at a crossroads' in R Grote, MM Antoniazzi & D Paris (eds) *Research handbook on compliance in international human rights law* (2021) 362-390; Murray & Long (n 32) 62.

44 African Commission 'Intersession activity report of the Working Group on Death Penalty, Extrajudicial, Summary or Arbitrary Executions and Enforced Disappearances in Africa – 81OS' 26 October 2024. Also see African Commission 'Intersession activity report of the Committee on the Protection of the Rights of People Living with HIV and those at Risk, Vulnerable to and Affected by HIV in Africa (Committee) – 81OS' 25 October 2024 para 62; African Commission 'Intersession activity report of the Working Group on Extractive Industries, Environment and Human Rights Violations – 81OS' 26 October 2024 paras 51 & 54.

45 M Ackermann 'Survey of detention visiting mechanisms in Africa' (2013) 10 fn 60, file:///C:/Users/chair/Downloads/DetentionVisitMechanisms.pdf (accessed 15 November 2024).

of the Principles on the Freedom of Expression 2002;[46] the Robben Island Guidelines on Torture (2002);[47] the Principles and Guidelines on the Right to a Fair Trial (2003);[48] Access to Health and Needed Medicines in Africa (2008);[49] the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2011);[50] and, more recently, the Guidelines on the Right to Water in Africa (2019),[51] to mention but a few. Of note, the African Commission has in line with its mandate undertaken research studies expounding on the contents of the rights recognised in the African Charter and has covered several thematic issues. These include the most contentious issues around climate change, land reforms, extractive industries, illicit financial flows and pastoralism in Africa.

Despite the strides made by the African Commission in the advancement of human rights and democratic accountability in Africa, it must be stated that its decisions, recommendations, standard-setting instruments and resolutions are only as good as the extent to which these are domestically implemented. To date, implementation of the Commission's decisions remains significantly low, as stated in its latest Activity Report,[52] and 'and the lack of implementation calls for an evaluation of the system in practice'.[53] So far, of all 54 state parties to the African Charter, only 19 states have submitted up-to-date reports.[54] About 13 states have failed to submit between five and 13 reports.[55] Roughly 16 states have defaulted by less than five reports.[56] Six state parties have never submitted an initial periodic report to the African Commission since ratifying the African Charter.[57]

46 The Principles on the Freedom of Expression 2002.
47 The Robben Island Guidelines on Torture 2002.
48 The Principles and Guidelines on the Right to a Fair Trial 2003.
49 Access to Health and Needed Medicines in Africa 2008.
50 The Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights 2011.
51 Guidelines on the Right to Water in Africa 2019.
52 African Commission '54th and 55th Activity Reports of the African Commission on Human and Peoples' Rights' (2024) paras 44-48, https://achpr.au.int/en/documents/2024-03-08/54th-55th-combined-activity-reports (accessed 15 November 2024).
53 GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465-492.
54 Angola, Benin, Cameroon, Chad, Côte d'Ivoire, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Malawi, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Senegal, Uganda and Zambia.
55 Burundi, Cabo Verde, Central African Republic, Gabon, Ghana, Guinea, Libya, Madagascar, Republic of Congo, Seychelles, Sudan, Tanzania and Tunisia.
56 Algeria, Botswana, Burkina Faso, Djibouti, Democratic Republic of the Congo, The Gambia, Lesotho, Liberia, Mali, Niger, Rwanda, Sahrawi, Sierra Leone, South Africa, Togo and Zimbabwe.
57 Comoros, Equatorial Guinea, Guinea-Bissau, São Tomé and Príncipe, Somalia and South Sudan. See African Commission 'State reporting status', https://achpr.au.int/en/states-reporting-status (accessed 15 November 2024).

The disparity between the volume of African Commission recommendations and non-compliance suggests that while some progress has been made at a decision-making level, there may be substantial non-alignment with the socio-political realities on the ground. The implicit disconnect between the work of the Commission and states' incapacity or unwillingness to comply necessitates that the former should address the challenge of non-compliance with a made-to-measure attitude to its engagement with states. To realign its mission to the local context, it should pay closer attention to the multifaceted challenges bedevilling each state, including challenges such as political instability, *coups*, conflict and poverty, in order to remain relevant domestically to assess capacity for action. Its recommendations to states can no longer be a do-it-or-leave-it directive.

There are opportunities for the African Commission to leverage on its collaborative partnerships with international institutions such as the United Nations Human Rights Council (UNHRC) and the Office of the High Commissioner for Human Rights – under the framework of the Addis Ababa Roadmap on cooperation between the Special Procedures of the African Commission and the UNHRC[58] – to support and capacitate struggling states to better respond to local human rights challenges. As the UNHRC has noted, the capacity-building support to states 'must be based on the needs of the country concerned, as voluntarily expressed by that country – and not imposed – based on a mechanism's own reading of the situation'.[59] In the same way, the African Commission can strive to adapt its engagement and capacity-building efforts in collaboration with states based on the individual needs of states in order to improve compliance.

58 UN Special Procedures 'The Addis Ababa roadmap 2012-2022: A work in progress', https://www.ohchr.org/sites/default/files/documents/hrbodies/special-procedures/2022-10-17/10-years_Addis-Ababa-Roadmap-brochure.pdf (accessed 15 November 2024). Also see OHCHR 'Treaty body capacity building programme', https://www.ohchr.org/en/treaty-bodies/treaty-body-capacity-building-programme (accessed 15 November 2024).

59 M Limon '"A diamond in the rough": How to strengthen the Human Rights Council's delivery of technical assistance and capacity-building support (Item 10 reform)' June 2023 7, https://tinyurl.com/Strengthen-Human-Rights (accessed 15 November 2024).

3 Navigating the context of democracy regression, *coups*, conflict and instability to support state compliance

It is clear from the above parts that the context in which Africa finds itself requires the African Commission to adopt new skills and strategies to help states implement its decisions. Unlike in the past, the present circumstances of conflict and instability, the resurgence of *coups*, armed conflicts, terrorism, violent extremism, environmental pollution in the extractive industries by multinational corporations, and development-induced displacement of local communities, to mention but a few, position the continent as complex and requiring a multiplicity of solutions in improving state relations with the African Commission. Given these numerous governance challenges, it is doubtful to imagine uniform approaches in building the capacity of states and their will to implement decisions of the Commission. The state of governance and democracy in Africa does not provide a breeding ground for states to implement the decisions of the Commission.

3.1 African Commission's support for NHRIs and CSOs should be contextual

The African Commission has immensely contributed to the growth and development of a progressive human rights culture in member states through active support for NHRIs[60] and vibrant CSOs on the continent.[61] In recognition of the work that NHRIs and CSOs do in the promotion and protection of human rights at the domestic level, the African Commission has endeavoured to not only promote their involvement in the development of the normative frameworks, but also consults and welcomes their participation in its public processes.[62] At the occasion of the eighty-first ordinary session held in Banjul from 17 October to 6 November 2024, the Commission noted that 38 NHRIs now have affiliate status with the Commission, while 579 CSOs enjoy observer status with the Commission.[63] The expanding participation of NHRIs and civil society in the Commission's activities is a highly commendable achievement despite the several challenges

60 African Commission 'NHRIs' 24 October 2022, https://achpr.au.int/en/nhris (accessed 8 September 2023).
61 H Shire 'State of civil society/strengthening regional mechanisms: Good practices for CSO participation at the African Commission on Human and Peoples' Rights' (2023) *Pan African Human Rights Defenders Network* 124.
62 African Commission 'Report of the promotion mission to the Republic of Namibia' (n 43) para 6.
63 African Commission 'Final Communiqué of the 81st ordinary session of the ACHPR' (n 35) para 24.

that they continue to experience within AU member states.[64] NHRIs and CSOs in less democratic or authoritarian states face enormous challenges compared to those in democratic states.

It is observed that some of the key challenges faced by NHRIs in less democratic states include limited independence, repressive legal frameworks, harassment and intimidation by the state, resource constraints, lack of cooperation from state authorities, and limited opportunity to ensure access to justice for victims of human rights violations.[65] NHRIs in less democratic states often face limitations on their independence and autonomy. They are subjected to government interference, restricted mandates and a lack of adequate legal protection, compromising their ability to operate impartially and effectively for citizens of African states.[66] It is noted that NHRIs operating in less democratic states may also encounter repressive legal frameworks that restrict their activities, limit their access to information, impede their investigations, and hinder their ability to advocate human rights.[67] These legal barriers can undermine the effectiveness and independence of the NHRIs. Furthermore, NHRIs in less democratic states are often susceptible to harassment, intimidation and threats from the state. Human rights defenders and staff members of NHRIs may face surveillance, arbitrary arrests, physical attacks, or even forced closure of their organisations.[68] These in the past have created a hostile working environment and impacted NHRIs' ability to freely carry out their mandates.[69]

The more obvious reason has been an issue of resources. It is noted that NHRIs in less democratic states often operate with limited financial resources and face resource constraints due to restrictive

64 R Carver 'A new answer to an old question: National human rights institutions and the domestication of international law' (2010) 10 *Human Rights Law Review* 24.

65 CM Peter 'Human rights commissions in Africa – Lessons and challenges' 17 September 2013, https://gsdrc.org/document-library/human-rights-commissions-in-africa-lessons-and-challenges/ (accessed 8 September 2023).

66 L Chiduza 'The Zimbabwe Human Rights Commission: Prospects and challenges for the protection of human rights' (2015) 19 *Law, Democracy and Development* 148.

67 T Pegram 'Diffusion across political systems: The global spread of national human rights institutions' (2010) 32 *Human Rights Quarterly* 737-739; R Murray 'National human rights institutions: Criteria and factors for assessing their effectiveness' (2007) 25 *Netherlands Quarterly of Human Rights* 189-220; LC Reif 'Building democratic institutions: The role of national human rights institutions in good governance and human rights protection' (2000) 13 *Harvard Human Rights Journal* 30-50.

68 United Nations Human Rights 'UNDP-OHCHR Toolkit: for collaboration with National Human Rights Institutions' 2010.

69 United Nations Development Programme 'Study on the state national human rights institutions (NHRIs) in Africa', https://www.undp.org/africa/publications/study-state-national-human-rights-institutions-nhris-africa (accessed 8 September 2023).

government policies or lack of donor support.[70] Therefore, insufficient funding often hampered NHRIs' abilities to conduct investigations, provide adequate support to victims of human rights violations, and to effectively fulfil their monitoring and reporting functions.[71] In many cases, NHRIs face non-cooperation or resistance from the authorities. For instance, government officials may ignore or dismiss their recommendations, refuse to provide information, or impede their access to detention facilities or other relevant places to conduct their work.[72] This obstructs the NHRIs' efforts to effectively address human rights violations and promote accountability. In Zimbabwe this has been reported to be the case regarding victims of political violence or political crimes.[73] Further, access to justice is a challenge in less democratic states. NHRIs in these states may encounter challenges in ensuring access to justice for victims of human rights violations. It is observed that the judiciaries in these states are often compromised and lacking independence, making it difficult for NHRIs to seek legal remedies or advocate justice for victims.

Finally, NHRIs may play a critical role in documenting human rights abuses, providing support to victims of human rights abuses, and advocating human rights reforms in spite of very challenging conditions. NHRIs in this context work under difficult circumstances to promote accountability, raise awareness, and empower civil society in advocating human rights and democratic principles.[74] To sum up, the African Commission's support for NHRIs and CSOs should consider context, as states face unique challenges and opportunities. Technical assistance and financial resources may impact on implementing African Commission decisions, especially in less democratic or hostile states.

70 KE Dupuy, J Ron & A Prakash 'Who survived? Ethiopia's regulatory crackdown on foreign-funded NGOs' (2015) 22 *Review of International Political Economy* 419-456.

71 Peter (n 65).

72 United Nations Office of the High Commissioner for Human Rights 'National human rights institutions: History, principles, roles and responsibilities' (2010), https://www.ohchr.org/en/publications/policy-and-methodological-publications/national-human-rights-institutions-history (accessed 8 November 2024).

73 C Nyere 'The continuum of political violence in Zimbabwe' (2016) 48 *Journal of Social Sciences* 94-107.

74 Zimbabwe Human Rights NGO Forum 'The role of the Zimbabwe Human Rights Commission, Human Rights Bulletin' (2012) 66, 1, http://www.hrforumzim.org/wpcontent/uploads/2012/03/The-role-of-the-human-rights-commission-66-WT-20337.pdf (accessed 7 November 2024).

3.2 Support for civil society should vary given variations in their needs

As noted above, by November 2024, 579 CSOs enjoyed observer status with the African Commission.[75] In spite of this progress, CSOs in less democratic states are facing enormous challenges, such as repressive legal frameworks, in doing their work.[76] Less democratic states often impose restrictive laws and regulations that limit the space for CSOs. These laws may require excessive registration processes, impose burdensome reporting requirements, or criminalise activities deemed unfavourable by the government. Such legal frameworks are used to control and restrict the activities of CSOs. For example, the introduction of the Private Voluntary Organisations (PVO) Bill in Zimbabwe has been an attempt to shrink the CSO space and its activities. Amnesty International has expressed concern that the PVO Amendment Bill, in its current form, poses significant risks to CSOs engaged in human rights advocacy in Zimbabwe because it would severely restrict civic space by mandating that all CSOs register as PVOs. If passed, it would render unregistered organisations illegal, thereby stifling freedoms of association and expression critical for human rights work in Zimbabwe.[77]

The concern voiced by Amnesty International is not misplaced. If enacted, the Bill could block human rights organisations from registering based on their activities, such as defending freedoms of expression, association and assembly. This would worsen the crackdown on civil society, heighten human rights abuses, and go on to hinder public accountability of the government. More so, NGO staff and board members risk arrest and punishment, including imprisonment, for their work.[78]

Considering the above, CSOs in less democratic states are subject to harassment and intimidation. Not only are their rights to freedom of expression and peaceful assembly often curtailed, but they struggle to secure adequate funding due to restrictive government policies, limited donor support or donor restrictions. Financial and resource constraints are a major hindrance to the effectiveness and sustainability of their work. In addition, CSOs are stigmatised and

75 African Commission 'Final Communiqué of the 81st ordinary session of the ACHPR' (n 35) para 24.
76 USAID 'Zimbabwe Civil Society Assessment' 2021, https://pdf.usaid.gov/pdf_docs/PA00XM8W.pdf (accessed 8 November 2024).
77 Amnesty International 'Zimbabwe: President Mnangagwa must reject proposed new law that threatens rights and civic space' 2 February 2023, https://www.amnesty.org/en/latest/news/2023/02/zimbabwe-president-mnangagwa-must-reject-proposed-new-law/ (accessed 8 September 2023).
78 As above.

labelled, portrayed as unpatriotic, foreign agents, or threats to national security, which undermines their credibility.[79] States often control the flow of information, making it challenging for CSOs to access reliable data and information essential for their work.[80] Finally, repressive states are often unresponsive to civil society's advocacy efforts and exclude them from decision-making processes, leading to no meaningful engagements and consultation, which hampers the ability of CSOs to contribute to policy development and democratic governance.[81] Thus, support for civil society as they help their states implement decisions of the African Commission should be contextual and vary given disparities in their needs.

3.3 Capacitating administration of the Secretariat of the African Commission

It is observed that administratively, the African Commission is composed of 11 commissioners selected from among African personalities of the highest reputation, recognised for their high morality, integrity, competence and impartiality in matters of human and peoples' rights. Although they perform an official function, members of the Commission serve in their personal capacities for a period of six years and are eligible for re-election.[82] The Secretariat of the Commission is hosted in Banjul, The Gambia.

The Commission organises its public meetings in the form of ordinary and extraordinary sessions. So far, the Commission has held 81 ordinary sessions and 36 extraordinary sessions.[83] The African Commission has approximately 12 legal officers assisting the commissioners and few supporting technical staff.[84] Considering this small number of administrative staff, it may seem beyond reason

79 V Madziyauswa 'The role of civil society organisations in shaping livelihoods under Zimbabwe's hybrid political system' (2024) 10 *International Journal of Scientific Research in Multidisciplinary Studies* 58, 59; M Oosterom 'The implications of closing civic space for sustainable development in Zimbabwe' (2019) *Mimeo, IDS and ACT Alliance* 1, 8 & 12; J Alexander & J McGregor 'Introduction: Politics, patronage and violence in Zimbabwe' (2013) 39 *Journal of Southern African Studies* 749, 761.

80 Amnesty International 'Zimbabwe: President's signing of "Patriotic Bill" a brutal assault on civic space' 15 July 2023, https://www.amnesty.org/en/latest/news/2023/07/zimbabwe-presidents-signing-of-patriotic-bill-a-brutal-assault-on-civic-space/ (accessed 8 September 2023).

81 As above.

82 Arts 31 & 36 African Charter.

83 Centre for Human Rights (University of Pretoria) *A guide to the African human rights system* (2021) 19.

84 While there currently is no publicly available information on the staff capacity of the African Commission, both authors rely on their personal knowledge having previously served at the Secretariat between 2021 and 2023 in a technical capacity.

to assume that the Commission has requisite capacity to serve 54 state parties to the African Charter, several NHRIs and over 579 CSOs enjoying observer status with the Commission. It thus is in the interest of the AU to have the African Commission Secretariat capacitated to speed up its operation for the benefit of states, particularly less democratic states.

4 What is next for the African Commission?

Considering human rights and democracy and governance challenges in many African states, which have impacted the capacity of states to implement the decisions of the African Commission, it is imperative that the Commission adopts new strategies in its engagements with states. First, one of the significant challenges faced by the Commission is the lack of political will on the part of member states to fully implement its decisions.[85] These states are often reluctant to take the necessary actions to comply with the decisions due to various reasons, such as competing priorities or perceived threats to their sovereignty. Below are some of the ways that may be employed by African Commission to help speed up states' capacity and will to implement its decisions.

4.1 Strategic advocacy informed by context

It is our view in this article that the African Commission should within its promotional mandate adopt targeted strategic advocacy in engaging hostile and less democratic states. Strategic advocacy maybe referred to as a deliberate and planned approach to promoting a specific cause or advocating a particular issue.[86] It involves developing a comprehensive strategy and employing targeted tactics to achieve desired outcomes. For instance, strategic advocacy begins with defining clear and achievable goals. This means that the Commission should channel more resources to archivable goals.

85 G Bekker 'The African Commission on Human and Peoples' Rights and remedies for human rights violations' (2013) 13 *Human Rights Law Review* 499-528; F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 15.

86 ME Keck & KA Sikkink *Activists beyond borders: Advocacy networks in international politics* (2014) 3; M Ganz 'Leading change: Leadership, organisation, and social movements' in N Nohria & R Khurana (eds) *Handbook of leadership theory and practice* (2010) 527-528.

In this regard, these goals should be specific, measurable, attainable, relevant and time-bound (SMART).[87] If the African Commission is to always have well-defined short-term goals that are commensurate with the available financial resources, it may help guide the advocacy efforts and measure success. It is more helpful for the Commission to have small gains than to have no gains at all within the available resources. To elaborate on this, it is crucial to have more resources allocated to NHRIs and CSOs to states that have potential, than where resistance is high and chances of success are little. This is not to say that effort and engagement must be stopped. Thus, reading context on the part of the African Commission may have some benefits and help to see states developing capacity to implement its decisions.

Legal scholars are starting to see the African Commission set the foundation for constructive engagement between it and state parties beyond the traditional template of the state reporting process. For instance, in 2024, as part of the programmes of its eighty-first ordinary session, the Commission took an innovative step towards breaking down states' resistance to the Commission's compliance monitoring by convening the first edition of the Pre-Session Forum of State Parties to the African Charter, held in Banjul from 15 to 16 October 2024. The Forum was structured similar to the Pre-Session CSOs Forum. While the primary aim of the Forum is to establish 'a genuine opportunity for strengthening the ACHPR's cooperation with the member states and exchanging on questions of common interest in relation to the promotion and protection of human and peoples' rights on the continent', the African Commission also seeks to use it as a conduit for address thematic priorities such as disability rights, older persons' rights, statelessness, and social protection and security.[88] There is reason to believe that the success of this cordial engagement with states will set the scene for the African Commission to adopt a tailored approach to engaging states on the need for compliance with their obligations under the African Charter.

Based on documentation supporting the convening of the Pre-Session Forum of State Parties, the African Commission proposed the Forum for Regular Engagement with the Permanent Representatives'

87 SR Lane & S Pritzker *Political social work: Using power to create social change* (2018) 130, 412; JM Cook 'The Advocacy Action Plan' in M Pope and others (eds) *Social justice and advocacy in counselling* (2019) 74-81.

88 African Commission 'Invitation to the 1st Edition of the Pre-Session Forum of States Parties to the African Charter on Human and Peoples' Rights, Banjul, October 15-16, 2024' 30 September 2024, https://achpr.au.int/en/news/announcements/2024-09-30/1st-edition-pre-session-forum-states-parties (accessed 8 November 2024).

Committee (PRC).[89] The Forum aims to enhance dialogue, cooperation and experience sharing among state parties, the Commission and the PRC. It seeks to improve collaboration in addressing human rights concerns, fostering mutual learning and promoting adherence to regional and international human rights standards. The rationale of the Forum was predicated by the African Commission on the need to create a 'platform for constructive dialogue'; 'improved collaboration'; an avenue for sharing experiences; 'better understanding and appreciation of human and peoples' rights issues in Africa'; and an 'institutionalised and structured engagement' with state parties.[90]

Critically, the agenda of the first day of the Forum featured a session on the obligations of state parties under the African Charter, the special mechanism of the African Commission and an interactive dialogue (session I).[91] This was immediately followed by the Commission's state reporting procedures and promotion missions to the territories of state parties, the Commission's communications procedure and an interactive dialogue. The third session started off with an interactive dialogue on the AU Human Rights Strategy and the AU-UN Joint Human Rights Framework, followed by a consideration of the AU Second Ten-Year Implementation Plan and the Contributions of the African Commission. The fourth session discussed current human rights trends and priorities in Africa followed by an interactive dialogue. The last session of the day gave an outlook of the Commission's eighty-first ordinary session and again followed by an interactive discussion. On the second day of the Forum, the Forum's agenda was divided into five sessions that centred priority themes for the African Commission, namely, statelessness, disability rights, social protection and social security, a dialogue on the Commission's engagement with member states and how the PRC could better support the Commission's mandate, and a discussion of the future of the Pre-Session Forum with States. Each of these sessions was immediately followed by an interactive dialogue.[92]

By institutionalising constructive engagement in this way (that is, under the banner of 'interactive dialogues'), we believe that the

89 African Commission 'Concept Note: ACHPR 81st ordinary session – State Party Pre-Session Forum, Banjul, 15 and 16 October 2024' paras 2(a)-(e) (acting pursuant to AU Executive Council decisions EX.CL/1045(XXXIV) and EX.CL/1065(XXXV)).

90 As above.

91 African Commission 'Draft agenda: ACHPR 81st ordinary session – State Party Pre-Session Forum, Banjul, 15 and 16 October 2024' in African Commission (n 89) para 7.

92 As above.

Forum could lessen the tensions that arise from the state reporting process and in the long run bolster transparency, accountability and capacity-building. The initiative to introduce a less formal dialogue with and among states would also facilitate a deeper understanding of Africa's complex human rights landscape. This will bootstrap collaborative efforts between the African Commission and state parties to ensure effective, coordinated and tailored responses to national and continental human rights challenges.

There are several points of engagement at which the Commission can implement a bespoke approach to capacitating state parties. First, collaborative mechanisms developed from states' engagement in the interactive dialogues at the Forum can help customise or simplify the African Commission's recommendations to national realities in a way that enhances local ownership and state compliance. Second, the Commission and concerned state parties can work together with the support of CSOs to create advocacy and implementation mechanisms and action plans within the structures of NHRIs that specifically manage and report on the implementation progress of African Commission recommendations at the domestic level.[93] Third, the Commission, in collaboration with international partners and the AU, could initiate targeted capacity-building programmes that would provide legal and technical assistance tailored to specific national conditions, judicial bodies, training officials[94] and enforcement agencies on implementing African Commission recommendations within a realistic framework. Finally, a 'peer review' process modeled on the African Peer Review Mechanism (APRM) could be established within the framework of the Pre-Session Forum, where states regularly review one another's implementation efforts. We believe that this kind of regular inter-state dialogue within the structure of the Forum could further encourage states to adopt best practices from peers, exchange experiences, and collectively address obstacles to African Commission implementation.

However, we acknowledge that there is no silver bullet to the challenge of implementing the African Commission's recommendations. Additionally, coordinated research and analysis between Commission, NHRIs and CSOs can go a long way towards taking a measured approach that is suitable to the unique situation of each state party to the African Charter. It is our view that effective strategic advocacy requires a thorough understanding of the human rights issues at hand in each country, including its root causes, relevant

93 Lagoutte (n 9).
94 W Cole 'Mind the gap: State capacity and the implementation of human rights treaties' (2015) 69 *International Organizations* 405.

policies, stakeholders, and potential barriers to overcoming these. Conducting coordinated research and analysis of all stakeholders may help to inform the development of informed and evidence-based advocacy strategies. This may strengthen the efforts of the African Commission. Unlike in the past where the Commission has issued statements of concern and glib messages about violations of human rights, such as the failure by Swaziland (now Eswatini) to implement Resolution 216,[95] and Sudan's failure to heed the Commission's 2023 letter of urgent appeal,[96] targeted messaging through unified efforts between the Commission, NHRIs across the continent and CSOs may yield positive results with far-reaching implications. Regularly crafting persuasive and targeted messaging, tailoring messages to resonate with policy makers and decision makers may increase the likelihood of gaining the support of concerned states. Like-minded organisations and individuals (of good influence) can enhance the impact of advocacy efforts.

4.2 Strategic capacity-building efforts of NHRIs and CSOs informed by context and challenges

Strategic capacity-building efforts for NHRIs in less democratic states involve targeted interventions to enhance their effectiveness, independence and impact. Conducting a comprehensive needs assessment (for every state) is an essential first step. This entails evaluating the capacity and specific challenges faced by the NHRI, including its mandate, structure, resources and human rights knowledge and expertise.[97] Identifying gaps helps focus capacity-building initiatives on areas that require the most attention. In addition, strengthening the legal framework surrounding the NHRI is crucial. This may involve advocating legal reforms to provide the NHRI with sufficient independence, mandate and protection, enabling it to operate without undue interference. Building alliances with other stakeholders (NHRIs and CSOs) engaged in legal advocacy can help advance this agenda.

Furthermore, providing tailored training programmes and professional development opportunities for NHRI staff and likeminded CSOs is critical to enhance their knowledge and skills

95 ACHPR 'Resolution on the Human Rights Situation in the Kingdom of Swaziland' ACHPR/Res.216 (LI) 2012 (2 May 2012) paras i-iv.
96 ACHPR 'Statement on joint letter of urgent appeal to the Republic of Sudan' 31 December 2023 <https://achpr.au.int/en/news/press-releases/2023-12-31/statement-joint-letter-urgent-appeal-republic-sudan> (accessed 8 November 2024).
97 Lagoutte (n 9).

on human rights monitoring, investigation, documentation and advocacy in a state party concerned. These programmes can cover various areas, including research methodologies, international human rights standards, complaint handling and report writing. Assisting NHRIs in developing effective internal structures and systems is essential for their long-term sustainability and impact. This may involve strengthening governance structures, fostering transparent and accountable processes, improving strategic planning and management, and enhancing coordination within the NHRI and with external stakeholders. Capacity-building efforts should also focus on strengthening the NHRIs' capacity to conduct thorough and evidence-based research and documentation of human rights violations. This includes developing methodologies for data collection, analysis and reporting, as well as ensuring the integrity and confidentiality of sensitive information.

In less democratic states, the calibre of NHRIs' staff could be problematic due to interference by the state. Equipping NHRIs with skills in advocacy and communication is vital for effectively influencing public opinion and policy change. This may involve training on strategic advocacy techniques, media engagement, public awareness campaigns, and effective communication strategies to disseminate findings and recommendations. Finally, the African Commission should take a context-based approach in supporting NHRIs in resource-mobilisation efforts, which is crucial for their sustainability and independence. Some NHRIs need more support than others. Having targeted approaches in supporting NHRIs could yield better and much more measurable results.

4.3 Strategic diplomatic engagements aimed at supporting states to develop positive attitudes towards the African Commission

The several ambassadors that have a relationship with the African Commission could be given recognition by the Commission, as human rights ambassadors to spearhead some of the promotional activities of the Commission. When engaging less democratic states, there is a need to utilise diplomatic channels, such as engaging other organs of the AU, regional economic communities (RECs), to encourage non-compliant states to comply with the Commission's decisions. Strategic peer pressure can play a significant role in encouraging adherence to human rights standards.[98] The use of

98 B Kioko 'The right of intervention under the African Union's Constitutive Act: From non-interference to non-intervention' (2003) 85 *International Review of the*

leaders in other organs of the AU, such as the Pan-African Parliament, could also yield results in advancing diplomatic engagements that may help states change their attitudes towards the work of the African Commission.[99]

4.4 Enabling traditional and religious leaders to be champions of domestic implementation of African Commission decisions

Adopting a localised approach that includes empowerment and capacity building of traditional leaders, religious leaders and the youth may be helpful to speed up implementation of African Commission decisions. Adopting a localised approach also entails using pan-African symbols, languages and other accepted localised ways of communication, to unpack and simplify what states are required to do by the African Commission. It is crucial to recognise the influence that traditional and religious leaders can have in their communities and governments. Engaging with these leaders to advocate the implementation of decisions of the Commission can be a valuable strategy. These leaders often have the trust and respect of their constituencies, and their support can help to garner broader public backing for important human rights issues. Additionally, their involvement can contribute to a more inclusive and diverse approach to advocacy and government engagement.

4.5 Sanctions on states non-complying with the decisions of the African Commission

At the AU level, there is need for the African Commission to recommend to the AU Commission (AUC) the possibility of exploring the use of targeted sanctions, as means of last resort, where state parties to the African Charter are found to have violated its provisions and subsequently wilfully flouted African Commission recommendations on compliance. Under the AU's Constitutive Act, member states are obligated to comply with AU laws, decisions, principles and policies, with non-compliance potentially resulting in

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Red Cross 807, 816; EM Hafner-Burton 'Sticks and stones: Naming and shaming the human rights enforcement problem' (2008) 62 *International Organisation* 692-696, 700-705; R Goodman & D Jinks 'How to influence states: Socialisation and international human rights law' (2004) 54 *Duke Law Journal* 626, 632-642.

99 M Killander 'The African Peer Review Mechanism and human rights: The first reviews and the way forward' (2008) 30 *Human Rights Quarterly* 41-75; T Murithi 'The African Union's evolving role in peace operations: The African Union mission in Burundi, the African Union mission in Sudan, and the African Union mission in Somalia' (2008) 17 *African Security Studies* 69-82. Also see OC Okafor *The African human rights system, activist forces, and international institutions* (2007) 141-162.

sanctions.[100] Non-implementation of Assembly decisions, directives and regulations can attract appropriate sanctions under article 23.[101] We argue here that sanctions may be triggered by a state party's violation of the fundamental human rights principles enshrined in the Constitutive Act and AU decisions, including decisions targeted at a state party's compliance with the African Charter and African Commission recommendations. The imposition of such sanctions, while discretionary, is guided by the Rules and Procedures of the AU Assembly, which set forth basic conditions for their application.[102] Conversely, there is a need to provide incentives such as increased development assistance or preferential trade treatment to states that demonstrate a commitment to implementing the Commission's decisions, and in the process discourage non-compliant states.

4.6 Strengthening states' capacity and available regional mechanisms

There is a need for partners to collectively support the African Commission and other regional human rights bodies to enhance their effectiveness, resources and enforcement mechanisms. This includes ensuring compliance-monitoring mechanisms and enhancing their capacity to investigate and report on human rights violations. This is possible where there are no resource constraints and a more coordinated approach among partners may make this possible. In addition to supporting regional bodies, it is crucial to strengthen the capacity of individual state parties, as they often tend to lack the resources needed to effectively uphold their human rights commitments under African and international human rights instruments.[103] Enhancing state capacity will enable governments to implement human rights policies, monitor compliance and respond to violations within their jurisdictions. By providing technical assistance, funding and training, partners can help bridge gaps that hinder states from independently fulfilling their human rights obligations.

100 Art 23(2) Constitutive Act.
101 Rule 33(2) AU Assembly Rules.
102 AU 'Rules of Procedure of the AU Assembly of the African Union' (ASS/AU/ 2(I)-a) 1st ordinary session 9-10 July 2002, Durban, South Africa.
103 VO Nmehielle 'The African Union and African Renaissance: A new era for human rights protection in Africa?' (2004) 8 *Singapore Journal of International and Comparative Law* 412-446.

4.7 Regular monitoring and evaluation of the work of the African Commission and its decisions

Monitoring and evaluating the impact of advocacy efforts is essential to assess the effectiveness of strategies and tactics. This involves tracking progress towards goals, collecting feedback, measuring changes in policies or public opinion and adjusting advocacy approaches as needed. Strategic advocacy requires a long-term perspective and adaptability to respond to changing circumstances. By employing a well-planned and targeted approach, strategic advocacy can effectively bring about change and advance important human rights causes, particularly on the implementation by states of the decisions of the African Commission.

5 Conclusion

The African Commission has done a great deal of work in the protection and promotion of human rights in Africa. Its decisions continue to influence positive attitudes among states, including their approach to human rights in Africa. This article highlights the Commission's role in supporting states to better understand their obligations, promoting consistency in human rights interpretations, policy, development and legislative reforms. It also argued that, despite the advances made by the African Commission, numerous governance and human rights challenges persist on the African continent and significantly impede the enjoyment of human and peoples' rights of African peoples. As a result, states, particularly less democratic states, are failing or experiencing challenges in implementing the decisions and recommendations of the African Commission, thereby undermining their effectiveness.

In response to these challenges, the Commission has taken steps to strengthen engagement with state parties, notably through the establishment of the Pre-Session Forum. While it is intended to foster mutual learning and enhance understanding of human rights obligations, institutionalising 'interactive dialogues' for bootstrapping better African Commission-state collaboration, experience sharing and tracking implementation is only the first step to the complex national human rights challenges that African states often face. We propose that, to achieve greater compliance at the national level, the African Commission should adopt contextual approaches, particularly in less democratic states, with a view to strengthening the capacity of states to implement its decisions. Collaborative mechanisms, such as customised recommendations, capacity-building programmes and peer review processes, can help

improve state compliance with Commission decisions. However, we also note that while no solution is perfect, these efforts offer a promising path forward for strengthening the African Commission's impact and fostering greater state accountability in the long term.

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The role of the African Commission in enhancing implementation monitoring through dialogue and documentation

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Summary: *This article examines how the African Commission on Human and Peoples' Rights may use two critical tools – dialogue and documentation – in order to improve implementation of its decisions. Dialogue is understood as conversation between the African Commission and national actors. Implementation documentation is understood as the process of putting in place a publicly accessible database on the communications finalised by the Commission, the recommendations contained in those communications and any possible implementation measures taken by states. Several studies have demonstrated that judicial and quasi-judicial bodies have a role to play in monitoring the implementation of their decisions. In Africa, judicial monitoring is crucial due to the ineffectiveness of political monitoring by African Union policy organs. While the African Commission has several tools to choose from in monitoring the implementation of its decisions, this article focuses on dialogue and documentation. The African Commission is an adept user of dialogue through the state reporting process (which has been described as a form of 'constructive dialogue'), implementation hearings, promotional visits to states and other dialogue-based processes. However, there is a general lack of consistency, coherence and clarity in*

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how the Commission uses these tools in monitoring the implementation of its decisions. While these tools may appear overly political, the African Commission is by design mandated to interface with national political actors as a direct consequence of its promotional mandate under article 45 of the African Charter. Using a combination of desk research and document analysis, based on existing scholarship in this area of law, this article argues that dialogue and implementation documentation are requisites for monitoring state compliance with decisions of the Commission. It further argues that the African Commission is better suited (compared to the African Court on Human and Peoples' Rights) to these discursive and dialogic processes as a result of its institutional design. Effective use of these processes could turn states from acting or positioning themselves as 'uncooperative and reluctant bystanders' to gradually becoming cooperative and enthusiastic compliance partners.

Key words: *African Commission on Human and Peoples' Rights; implementation; dialogue; documentation; state reporting process; implementation hearings; promotional visits*

1 Introduction

The effectiveness of a treaty system is determined by the extent to which the treaty regime has influenced policies, legislation, judicial decisions and human rights outcomes at the domestic level.[1] As a general statement, quantitative studies have shown that the adoption of human rights treaties has resulted in notable positive outcomes at the domestic level.[2] Several theories have been developed to explain why international law or international human rights treaties usually have effects at the domestic level.[3] Some of these theories focused

1 CH Heyns & F Viljoen (eds) *The impact of the United Nations human rights treaties on the domestic level* (2002) 1; CH Heyns, F Viljoen & R Murray (eds) *The impact of the United Nations human rights treaties on the domestic level: Twenty years on* (2024); F Viljoen *International human rights law in Africa* (2012) VO Ayeni (ed) *The impact of the African Charter and the Maputo Protocol in selected African states* (2016) 1; D Cassel 'Does international human rights law make a difference?' (2001) 2 *Chicago Journal of International Law* 121.

2 E Neumayer 'Do international human rights agreements improve respect for human rights?' (2005) 49 *Journal of Conflict Resolution* 925; BA Simmons *Mobilising for human rights* (2009); C Hillebrecht *Domestic politics and international human rights tribunals: The problem of compliance* (2014).

3 See, generally, M Burgstaller *Theories of compliance with international law* (2005) 13-140; VO Ayeni 'Why states comply with decisions of international human rights tribunals: A review of the principal theories and perspectives' (2019) 10 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 1-11; ES Bates 'Sophisticated constructivism in human rights compliance theory' (2015) 25 *European Journal of International Law* 1170; AT Guzman 'A compliance-based theory of international law' (2002) 90 *California Law Review* 1849; WC Bradford, 'International legal compliance: An annotated bibliography' (2004) 30 *North*

on power and self-interest (realist theory); cooperation, reciprocity and reputation (institutionalism); internal democracy and adherence to democratic norms (liberalism), while others focused on identity, ideas, beliefs, social norms, non-state actors and international institutions (constructivism). Of particular interest to this article are the process-based theories that concern the actual process of human rights change such the 'spiral model of human rights change' and 'transnational legal process theory'.[4] These theories have been applied to African human rights treaties such as the African Charter on Human and Peoples' Rights (African Charter) as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol).[5] One central theme common to most studies of international human rights treaty compliance is that domestic treaty effects usually depend on the domestic peculiarities of each state and factors specific to each treaty regime.[6]

This article is not concerned with what legal scholars refer to as 'first-order compliance', which is a branch of international law compliance focused on whether states comply with human rights treaties and why they do so.[7] Rather, the article is concerned with 'second-order compliance', that is, compliance with decisions of the several bodies set up under the various human rights treaties to monitor the implementation of the treaties. In Africa, the primary human rights monitoring bodies are the African Court on Human and Peoples' Rights (African Court), the African Commission on Human and Peoples' Rights (African Commission) and the African Committee of Experts on the Rights and Welfare of the Child (African

Carolina Journal of International Law and Commercial Regulation 379-423; A-M Slaughter 'International relations: Principal theories', www.princeton.edu/~slaughtr/Articles/722_IntlRelPrincipalTheories_Slaughter_20110509zG (accessed 9 September 2023); HH Koh 'How is international human rights law enforced?' (1999) 74 *Indiana Law Journal* 1398; HH Koh 'The 1998 Frankel lecture: Bringing international law home' (1998) 35 *Houston Law Review* 626.

4 T Risse, SC Ropp & K Sikkink 'The socialisation of international human rights norms into domestic practices: Introduction' in T Risse, SC Ropp & K Sikkink (eds) *The power of human rights: International norms and domestic change* (1999) 1; HH Koh 'The 1994 Roscoe Pound lecture: Transnational legal process' (1996) 75 *Nebraska Law Review* 181.

5 See Ayeni (n 1) 1-12.

6 DW Hill 'Estimating the effects of human rights treaties on state behaviour' (2010) 72 *Journal of Politics* 1161; GW Downs, DM Rocke & PN Barsoom 'Is the good news about compliance good news about cooperation?' (1996) 50 *International Organisation* 379; Simmons (n 2).

7 BA Simmons 'Compliance with international agreements' (1998) 1 *Annual Review of Political Science* 78; N Strain and others 'Compliance politics and international investment disputes: A new dataset' (2024) 27 *Journal of International Economic Law* 73; C Romano, K Alter & Y Shany (eds) *Oxford handbook of international adjudication* (2014) 377; MP Ryan 'The logic of second order compliance with international trade regimes' (1992) *Working Paper No 694 of the University of Michigan* 2-3.

Children's Committee). Various studies have shown that human rights bodies can and do play some roles in triggering compliance with their decisions.[8] Of course, the roles the respective African human rights bodies would play in each case would depend on their institutional design. According to Çalı and Koch, 'institutional design of supranational human rights bodies and the properties of respondent states … constitute key variables influencing outcomes'.[9]

African human rights bodies have a variety of tools at their disposal to monitor the implementation of their judgments and decisions. These tools include implementation hearings, resolutions, judicial referral, political referral, state reporting process as well as advocacy visits, missions and other promotional activities. Aspects of these measures have been examined in previous studies.[10] Despite its limited resources, the African Commission has used a number of the measures or tools to monitor states' implementation of its decisions, including facilitating workshops and seminars; the amendment of its Rules of Procedure; extending the mandate of its Working Group on Communications to capture implementation monitoring; active engagements with civil society organisations (CSOs) and national human rights institutions (NHRIs); and requesting states to appoint national focal persons.[11]

This article examines the role of the African Commission in implementing its decisions, asking in particular how the Commission may use two critical tools – dialogue and documentation – in order to improve state compliance, implementation and domestic impact of their decisions. Ayeni and Von Staden assessed and compared African human rights bodies' implementation monitoring measures against 17 indicators comprising a total of 34 points,[12] finding that

8 C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: What role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 72.

9 B Çalı & A Koch 'Lessons learnt from the implementation of civil and political rights judgments' (2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id¼1858663 (accessed 9 September 2023); C Hillebrecht 'Compliance: Actors, context and causal processes' in W Sandholtz & CA Whytock (eds) *Research handbook on the politics of international law* (2017) 27-54.

10 VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 1-27; R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 838; R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150.

11 Murray & Long (10) 836.

12 The 17 indicators are as follows: 'the status of the decision, whether binding of recommendatory; whether the AHRB issues detailed periodic compliance reports; whether the compliance reports are widely disseminated; the existence of an up-to-date database on the status of implementation; whether the implementation database is available on electronic platforms; active engagement with CSOs in

the African Commission scores 13 points (representing 38 per cent) while the African Children's Committee scores 11 points (32 per cent) and the African Court scores 9 points (representing 27 per cent of the total).[13] With each African human rights body scoring less than 50 per cent of the total possible points, there thus is significant room for improvement for each African human rights body.

Starting with the African Commission, this article asks the following question: What implementation-monitoring measures or tools, if improved upon by the Commission, could have the greatest impact in improving states' compliance with decisions of the Commission? This author believes that the two most impactful measures that could change the compliance narrative in relation to the African Commission are dialogue and documentation. However, before delving into the main substance of the analysis and how the African Commission may improve state compliance with its decisions through the effective use of dialogue and documentation, it is apposite to consider within the available data the status of compliance with the Commission's decisions.

2 Status of compliance with decisions of the African Commission

It is generally agreed that effective implementation of the decisions of human rights bodies remains a significant challenge across the three regional human rights systems and the United Nations (UN).[14] Thus, non-compliance is not peculiar to the African human rights system. Even relatively more advanced regional human rights systems, such as the European and Inter-American systems, still battle with the problem of non-compliance by states. Hillebrecht, for example, in 2014 combined quantitative method with case studies from seven countries selected from Europe and the Americas.[15] Her

implementation monitoring; the existence of a dedicated implementation unit within the Secretariat of the AHRB; the establishment of a dedicated special rapporteur for follow-up; the use of implementation hearings to follow up on decisions; whether or not the AHRB uses innovative implementation hearing formats such as joint hearings and hearings in situ; and whether or not the AHRB uses resolutions, press releases, state reporting process as well as promotional state visits for monitoring its decisions; whether or not the AHRB is able to refer its decisions to a judicial body for implementation review; whether or not the AHRB is mandated to refer its decisions to a political body and whether there is evidence of a direct or indirect impact of monitoring'. See Ayeni & Von Staden (n 10) 19.

13 Ayeni & Von Staden (n 10) 19-21.

14 Sandoval and others (n 8) 71. See also KF Principi 'Implementation of decisions under treaty body complaints procedures: Do states comply? How do they do it?' (2017) 9 Sabbatical Report, Treaty Bodies Branch, UN Office of the High Commissioner for Human Rights (OHCHR).

15 Hillebrecht (n 2) 3.

empirical results revealed that the European Court of Human Rights (European Court) has 49 per cent compliance rate while the Inter-American Court of Human Rights (Inter-American Court) has 34 per cent compliance rate.[16]

There is no systematic study by the African Commission of the status of compliance with its decisions from inception to date. As early as 1997, barely 10 years of the Commission's existence, the Chairperson of the Commission observed that none of the decisions of the Commission had been implemented.[17] The issue of non-compliance with its decisions was further discussed by the Commission in 1998 during the Commission's deliberation on a document prepared by its Secretariat, which showed that only one of the several recommendations of the Commission had been implemented by states.[18] Also writing in the same year, Odinkalu and Christensen stated: 'In those few cases that have been decided on their merits there remains, as yet, no evidence that the states complied either habitually or at all with the views of the Commission.'[19] Several scholars writing in the early years have put the blame for states' non-compliance at the feet of the Commission.[20]

The African Commission responded to the various criticisms on non-implementation of its decisions by holding a retreat in Addis Ababa, Ethiopia, in September 2003 where the issue of follow-up was reiterated by participants,[21] and subsequently in 2005 established a Working Group on Specific Issues Relevant to the Commission's Work

16 Hillebrecht (n 2) 11. It should be noted that in another study published in 2007 by Hawkins and Jacoby, the compliance rate for the Inter-American Court was put at 6%. Partial compliance and non-compliance were put at 83% and 11% respectively. See D Hawkins & W Jacoby 'Partial compliance: Comparison of the European and Inter-American courts of human rights' (2010-2011) 6 *Journal of International Law and International Relations* 35-85.

17 J Biegon 'Compliance studies and the African human rights system: Reflections on the state of the field' in A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 15. See also R Murray 'Report of the 1997 session of the African Commission on Human and Peoples' Rights – 21st and 22nd sessions: 15-25 April and 2-11 November 1997' (1998) 19 *Human Rights Law Journal* 169, 170.

18 See 'Non-compliance of state parties to adopted recommendations of the African Commission: A legal approach' 24th ordinary session, Banjul, 22-31 October 1998, Doc/OS/50b/(XXIV), reprinted in R Murray & M Evans (eds) *Documents of the African Commission on Human and Peoples' Rights* (2001) 758.

19 C Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communications procedure' (1998) 20 *Human Rights Quarterly* 279-280.

20 See, eg, N Ndombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 45. See also J Oloka-Onyango 'Human rights and sustainable development in contemporary Africa: A new dawn or retreating horizon' (2000) 6 *Buffalo Human Rights Law Review* 39.

21 See Report of the Retreat of Members of the African Commission on Human and Peoples' Rights (24-26 September 2003). See also Biegon (n 17) 16.

with clear mandate to follow up on the Commission's various decisions and recommendations.[22] In May 2006 the Commission again held a brainstorming session with the African Union (AU) Commission where the issue of non-compliance with decisions of the African Commission was the subject of discussion. It was suggested at the session that the Peace and Security Council could assist in 'enforcing' decisions of the Commission.[23] Further, in November 2006, the Commission adopted a resolution calling on all state parties to the African Charter to respect all existing decisions of the Commission 'without further delay, and for any future decisions, to report on steps taken to comply within 90 days of being notified'.[24] The timeline was later increased to 180 days (six months) under Rule 112 of the Commission's Rules of Procedure 2010[25] and, more recently, Rule 125 of the 2020 Rules of Procedure of the Commission.[26]

Despite the provisions of the 2010 and 2020 Rules of Procedure, 'the Commission in many cases has no information regarding the implementation of its recommendations, and without such information it is extremely difficult to measure the level of implementation'.[27] As a result, scholars engaged only in armchair commentary on the status of compliance and factors responsible for compliance with decisions of the African Commission.[28] There was no empirical analysis or data to back up the claims, until Frans Viljoen and one of his doctoral students, Lirette Louw, took up the challenge. The seminal study by Viljoen and Louw, which analysed the status of compliance with recommendations contained in 44 merit decisions of the African Commission as at 2004, put the compliance rate of the African Commission at 14 per cent (representing six out of the 44 study cases).[29] Partial compliance was recorded in 14 cases, representing 32 per cent of the finalised cases, while non-compliance

22 See Resolution on the Creation of a Working Group on Specific Issues Relevant to the Work of the African Commission on Human and Peoples' Rights, adopted at the 37th ordinary session, ACHPR/Res 77(XXXVII)05.

23 Report of the Brainstorming Meeting on the African Commission on Human and Peoples' Rights: 9-10 may 2006, Banjul, The Gambia, 20th Activity Report, Annex II.

24 Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights by State Parties adopted during the 40th ordinary session, Banjul, The Gambia, 29 November 2006 ACHPR/Res 97/(XXXX)06.

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

26 Rules of Procedure of the African Commission 2020, Rule 125(1).

27 Ayeni & Von Staden (n 10) 8.

28 See, generally, G Mukundi & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 465.

29 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 5; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005 61.

was found in 13 cases, representing 30 per cent of the finalised cases.[30] Following Viljoen and Louw's ground-breaking study, the era of doctrinal analysis of compliance with decisions of the Commission was gone; there emerged increased use of empirical research and preference for in-depth case studies. Popular assumptions are now being challenged on the basis of hard data, and there is an attempt to redirect the analytical lens towards the sub-regional court system.[31]

2.1 Nigeria, The Gambia and Zimbabwe as case studies

Viljoen and Ayeni compared state compliance in respect of decisions and judgments of regional and sub-regional human rights tribunals (HRTs) in Africa, decided or delivered over a period of 15 years (between 1 January 2000 and 31 December 2015), using five countries – Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe – as case studies. See Table 1 below:[32]

Table 1: Number of cases decided by HRT per country (2000-2015)

Country	African Commission	African Court	Children's Committee	ECCJ	EACJ	SADC Tribunal
Nigeria	4	–	–	6	–	–
The Gambia	2	–	–	3	–	–
Tanzania	–	2	–	–	1	–
Uganda	–	–	1	–	4	–
Zimbabwe	6	–	–	–	–	3
Total	12	2	1	9	5	3
Group total	**Regional: 15 cases**			**Sub-regional: 17 cases**		

As a part of the broader analysis, the authors assessed the status of compliance with decisions of the African Commission between the

30 Viljoen & Louw (n 29) 5-6; Louw (n 29) 61.
31 Biegon (n 17) 22-28.
32 See F Viljoen & V Ayeni 'A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: Case studies of Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe' (2022) 26 *International Journal of Human Rights* 5.

same time period (2000 to 2015) in relation to three states, namely, Nigeria, The Gambia and Zimbabwe.[33] From 1994 to 2015, the African Commission found Nigeria in violation of various provisions of the African Charter in 20 individual communications.[34] A majority of these cases were decided before 2000 when Nigeria was under military dictatorship. However, between the study period (2000 to 2015), the Commission found Nigeria in violation of the African Charter only in six cases, and only four of the six cases are included in the study because the decision of the Commission in one has not been published,[35] while the Commission did not issue any remedial order for the state to implement in the other.[36] Between 2000 and 2015, 17 communications were submitted to the Commission against the government of Zimbabwe, but only eight resulted in merit decisions.[37] The Commission found no violation against Zimbabwe in two of the eight decisions.[38] As at 2015, the Commission has found The Gambia in violation of the African Charter only in two cases, namely, *Jawara*[39] and *Purohit*.[40] In total, the study compared the status and pattern of compliance with the 12 selected decisions of the Commission involving the three studied countries.

The analysis in Table 1 shows some form of regression, with non-compliance cases toppling the table, followed by partial compliance cases and then full compliance. The Commission in the 12 cases issued a total of 27 remedial orders for the three states to implement.[41] Only five (19 per cent) of the 27 orders were fully complied with by the studied states. The result above aligns with the findings of Viljoen and Louw, which put the rate of full compliance at 14 per cent of the cases finalised by the Commission as at 2003.[42]

33 VO Ayeni 'State compliance with and influence of reparation orders by regional and sub-regional human rights tribunals in five selected African states' LLD thesis, University of Pretoria, 2018.
34 See Ayeni (n 33) 97. See also African Commission 'Nigeria', http://www.achpr.org/states/nigeria/ (accessed 9 September 2023). This figure is based on an analysis of the communications decided by the African Commission (on file with author).
35 Communication 270/03 *Access to Justice v Nigeria*, decided by the African Commission at its 13th extraordinary session in February 2013. See M Killander & B Nkrumah 'Recent developments: Human rights developments in the African Union during 2012 and 2013' (2014) 14 *African Human Rights Law Journal* 275, 286. See also Ayeni (n 1) 198.
36 *Huri-Laws v Nigeria* (2000) AHRLR 273 (ACHPR 2000).
37 See Ayeni (n 33) 97. See also African Commission 'Zimbabwe', http://www.achpr.org/states/zimbabwe/ (accessed 20 September 2023).
38 For a list of the six cases where the African Commission found violations against Zimbabwe between 2000 and 2015, see Ayeni (n 33) Annexure I, 384.
39 *Sir Dawda Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000) (*Jawara*).
40 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit*).
41 Viljoen & Ayeni (n 32) 5-7.
42 Viljoen & Louw (n 29) 5.

Table 2: Status of compliance in the studied countries (2000 -2015)[43]

Countries	Total number of cases	Remedial orders issued	Full compliance	Partial compliance	Non-compliance
Nigeria	4[44]	9	n = 3	n = 5	n = 1
The Gambia	2[45]	4	n = 0	n = 3	n = 1
Zimbabwe	6[46]	14	n = 2	n = 1	n = 11
TOTAL	12	27	5	9	13
Percentages	**100%**	**100%**	**18.5%**	**33%**	**48%**

Specifically, out of the nine remedial orders issued by the African Commission for Nigeria between 2000 and 2015, only three were fully implemented.[47] The Commission issued four orders against The Gambia between 2000 and 2015. None of the orders have been fully complied with.[48] In the case of Zimbabwe, the Commission issued 14 remedial orders between 2000 and 2015. The government of Zimbabwe complied fully with only two of the remedial orders. The above are not isolated cases; they are representative of the pattern of state compliance with decisions of the African Commission. At the end of 2020, the Commission had adopted 147 decisions on the merits, and only a handful of these decisions have been implemented by states.[49]

2.2 Lessons from the various compliance studies

Since the Viljoen and Louw's study, three questions have preoccupied second-order compliance researchers in relation to the decisions

43 See Viljoen & Ayeni (n 32) 9.
44 *Aminu v Nigeria* (2000) AHRLR 258 (ACHPR 2000); *Media Rights Agenda v Nigeria* (2000) AHRLR 262 (ACHPR 2000); *Civil Liberties Organisation & Others v Nigeria* (2001) AHRLR 75 (ACHPR 2001); *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (*SERAC*).
45 The two cases are *Jawara* (n 39) and *Purohit* (n 40).
46 *Zimbabwe Human Rights NGO Forum v Zimbabwe* (2006) AHRLR 128 (ACHPR 2006); *Zimbabwe Lawyers for Human Rights & Another v Zimbabwe* (2009) AHRLR 235 (ACHPR 2009); Communication 294/2004 *Zimbabwe Lawyers for Human Rights and IHRD v Zimbabwe* (2009) AHRLR 268 (ACHPR 2009); *Scanlen & Holderness v Zimbabwe* (2009) AHRLR 289 (ACHPR 2009); Communication 288/2004 *Shumba v Zimbabwe*; and Communication 295/04 *Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzisi v Zimbabwe*.
47 Ayeni (n 33) 120-121.
48 Ayeni (n 33) 121.
49 Ayeni & Von Staden (n 10) 8; Report on the Status of Communications and Intersession Report of the Working Group on Communications, August-November 2020 para 25, https:/ /www.achpr.org/sessions/sessionsp?id=354 (accessed 9 September 2023).

of the African Commission: To what extent do states comply with decisions of the African Commission? What factors are responsible for the possible low rate of compliance? Is compliance rate a true and accurate reflection of the overall influence and impact of decisions of the African Commission? Several scholars have attempted to answer one or more of these questions in the African human rights system. I, too, have alone and in collaboration with other scholars interrogated aspects of these questions.[50] What have we learned from the various studies?

As early as 1995, writing on ways to improve states' compliance with human rights standards, Chayes and Chayes emphasised the need to replace the 'enforcement model' with a 'managerial model' that entails the use of 'iterative process of justificatory discourse'.[51] Some of the instruments in aid of the managerial model include transparency, reporting, monitoring, dispute settlement and strategic review. Koh suggested what he called a transnational legal process theory involving interaction, interpretation and internalization, whereby human rights norms and standards are continuously interpreted through the interactions of transnational actors before being internalised into the domestic legal system.[52] Risse, Ropp and Sikkink's 'spiral model' of human rights change demonstrates that states pass through five distinct phases before implementing human rights, and dialogic engagement using information politics helps propel them from one phase to another.[53] Concluding, based on a study of the impact of the African Charter and the African Women's Protocol in selected African states, Ayeni noted that human rights impact, including the impact of human rights decisions, depend, among others, on 'the level of interaction, persuasion and pressure applied on states by domestic and international compliance partnerships'.[54]

The focus on state compliance has also been criticised with some scholars recommending an adjustment of the analytical lens towards implementation, impact or effectiveness,[55] for instance,

50 See, eg, Ayeni (n 33) Viljoen & Ayeni (n 32). See also VO Ayeni 'Implementation of the decisions and judgments of African regional human rights tribunals: Reflections on the barriers to state compliance and the lessons learnt' (2022) 30 *African Journal of International and Comparative Law* 560-581; VO Ayeni 'Beyond compliance: Do decisions of regional human rights tribunals in Africa make a difference?' in Adeola (n 17) 35.

51 A Chayes & AH Chayes *The new sovereignty: Compliance with international regulatory agreements* (1995) 135.

52 Koh (n 4) 181.

53 Risse and others (n 4) 8.

54 Ayeni (n 1) 15.

55 See Ayeni 'Beyond compliance' (n 50) 35; R Howse & R Teitel 'Beyond compliance: Rethinking why international law really matters' (2010) 174 *New*

that too much focus on compliance 'obfuscates the character of international legal normativity'.[56] Compliance centric analysis does not provide the complete picture, focuses only on state actors as well as state institutions, and they are 'ill-designed to evaluate the vertical and horizontal influences of the interpretive enterprise in which HRTs are engaged'.[57] The most debilitating shortcoming of the compliance-centric approach is its limited appreciation of the criticality of interpretation, interaction and internationalisation to how decisions and reparation orders of HRTs obtain their meaning, become transported through national borders and are eventually implemented.[58] There is significant legal scholarship in support of the proposition that human rights decisions are finished goods, but a part of transnational legal process within a broader social context.[59]

Alkoby pointed out – quite rightly – that 'even after binding commitments are made, their clarification, interpretation and implementation is constantly renegotiated and reflected upon in light of changing circumstances, new information, or a deepening consensus among the key actors'.[60] Accounts of rates of compliance are, to say the least, simplistic and reductionist and do not capture the repeated interactions, pressure, persuasion, activist struggle and socio-political contexts that resulted in the implementation.

Overall, most studies on human rights judgment compliance agree on three key factors that predict whether a decision issued by a human rights tribunal (HRT) would be implemented or complied with. These are (a) the nature of the remedial orders issued in the decision;[61] (b) the domestic composition or peculiarities of the state required to take action;[62] and (c) the degree of follow-up and monitoring by various actors, including by the HRT that issued the decision.[63] Remedial orders followed up by the human rights bodies that issued them are much more likely to be complied with than those without

York University Public Law and Legal Theory Working Papers 1; OC Okafor *The African human rights system: Activist forces and international institutions* (2007) 276.

56 Howse & Teitel (n 55) 2.

57 Ayeni 'Beyond compliance' (n 50) 37.

58 As above.

59 See Koh (n 4) 181-207; A Alkoby 'Theories of compliance with international law and the challenge of cultural difference' (2008) 4 *Journal of International Law and International Relations* 151.

60 Alkoby (n 59) 152.

61 Eg, minimalist measures on the average tend to attract higher compliance than broad structural measures.

62 Authoritarian regimes are less likely, and harder to persuade, to comply with human rights decisions than open, stable and democratic states.

63 Viljoen & Ayeni (n 32) 12; Ayeni (n 33) 214-227; F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 360.

such follow-up and monitoring by the HRTs themselves and other pro-compliance partners.[64] This article examines two of the power tools that African human rights bodies may use – namely, dialogue and documentation – to monitor and enhance the implementation of their decisions.

3 Using dialogue to enhance state compliance

The case for dialogue is straightforward. Whenever difficulties exist and progress is stalled in any sphere of life, dialogue has always been the first option offered to resolve the difficulty, and compliance complexities ought not to be an exception.[65] In the context of implementation monitoring, Sandoval, Leach and Murray define dialogue as

> the reviewing process carried out by supranational human rights mechanisms of the implementation of their decisions, which includes the utilisation of tools to encourage the parties to explore ways of moving implementation forward, either between themselves or with the direct help of the monitoring body.[66]

Implementation dialogue entails a back-and-forth process of engaging diverse compliance actors at national, sub-national and supra-national level with a view to sharing and obtaining information about implementation and possible challenges to implementation, listening to parties, cajoling and buying them over and, most importantly, reinforcing the merits of the decision in line shared values in an atmosphere of mutual trust.

Implementation dialogue is a consequence of the principle of subsidiarity. States generally have primary responsibility for the protection of human rights of those under their jurisdiction subject to the minimum threshold of international law.[67] This is why dialogue with national actors is crucial. I advance four arguments in favour of reconceptualising dialogue as a tool for monitoring the implementation of the decisions of the African Commission:

(a) *Failure of political monitoring:* Political mechanisms for monitoring the implementation of decisions and judgments of African

64 Sandoval and others (n 8) 71; Ayeni & Von Staden (n 10) 5; see Murray & Long (n 10) 838.
65 EL Abdelgawad 'Dialogue and the implementation of the European Court of Human Rights' judgments' (2016) 34 *Netherlands Quarterly of Human Rights* 352.
66 Sandoval and others (n 8) 78.
67 Viljoen (n 1) 21.

human rights bodies are largely ineffective.[68] Implementation monitoring, which ought to be largely a political process, has remained mostly judicial and administrative in the African human rights system. Rules 125(8) and (9) of the Rules of Procedure of the African Commission 2020 require the Commission to refer cases of non-compliance by states to competent AU organs. The Commission may also request the AU Assembly to 'take necessary measures to implement its decisions'.[69] AU policy organs do not take enforcement actions subsequent to receiving reports of non-compliance from African human rights bodies. In fact, the Executive Council, which ought to take these actions, has no internal mechanisms for monitoring the execution of decisions and judgments of AHRBs.[70] Ayeni and Von Staden stated that post-judgment, African human rights bodies may need to 'focus primarily on developing dialogical processes with critical compliance constituencies in respondent states rather than hoping that AU political organs will enforce its decisions through sanctions and other measures'.[71] The authors concluded that since there are limited prospects for political monitoring due to a lack of political will by members of the AU Executive Council, implementation monitoring, at least in the immediate future, will depend on civil society actors and the African human rights bodies themselves,[72] and effective dialogue remains the most important tool in the arsenal of African human rights bodies.

(b) *Dialogue is the Commission's unique advantage:* The African Commission is not a judicial body in the same sense as the African Court. Being a quasi-judicial body, its decisions are legally speaking not binding in the same sense as judgments of the African Court.[73] The Commission itself does not regard its recommendations as binding, but emphasises that states must respect and implement these.[74] Being a quasi-judicial body, the African Commission is less constrained than the African Court in following up its decisions through a variety of tools. The greatest merit of quasi-judicial bodies over judicial human rights monitoring bodies is their leverage over dialogue.

68 See Okafor (n 55) 41. See also Murray & Long (n 10) 838.
69 Rules of Procedure of the African Commission 2010, Rule 125(1).
70 Ayeni & Von Staden (n 10) 22.
71 Ayeni & Von Staden (n 10) 26.
72 Ayeni & Von Staden (n 10) 33.
73 Viljoen (n 1) 339. See also F Viljoen & L Louw 'The status of the findings of the African Commission: From moral persuasion to legal obligation' (2004) 8 *Journal of African Law* 1.
74 See Resolution on the Importance of the Implementation of the Recommendations of the African Commission on Human and Peoples' Rights, adopted at the Commission's 40th session, November 2006.

The Commission's attitude to incorporating dialogue broadly in its work is best demonstrated through the Commission's disposition towards amicable settlement of communications. Despite using the amicable settlement procedure in only a few cases, the Commission's record in this regard has been criticised for being too deferential to the state, and showing little regard for human rights and the victims' interests.[75] In several cases where the amicable settlement procedure was used, it is not clear that the consent of the victims or their legal representatives was obtained. The genius of the drafters of the African Charter was to create an African Commission whose strength would depend on its power of relationship with the AU (formerly the Organisation of African Unity (OAU)) and also with each member state. Accordingly, dialogue and dialogical processes remain the Commission's strength and leverage, and these tools are no less effective if used effectively. According to Huneeus, courts exert a kind of 'soft power' when they mobilise 'compliance constituencies',[76] and there is a plethora of literature on the far-reaching impact of soft power diplomacy (the capacity to co-opt rather than coerce) as well as the transformative effects of soft law in promoting greater cooperation and inclusivity.[77] In a previous study, it has been found that the African Commission, being less constrained than the African Court, has more implementation-monitoring tools at its disposal and more opportunities to engage in continuous dialogue and engagement with states than the African Court and other judicial human rights bodies.[78]

(c) *Dialogue is a darling of international law compliance theories:* The post-judgment phase of any international judicial body is a 'communicative phase'. As a result, most theories of international law compliance are unanimous that incorporation, transformation and persuasion are the mechanisms by which international law norms cascade or transfuse into the domestic level.[79] What several decades of research in international law compliance have revealed is that social mobilisation, persuasion and interactions are the principal pathways to

75 VO Ayeni & TO Ibraheem 'Amicable settlement of disputes and proactive remediation of violations under the African human rights system' (2019) 10 *Beijing Law Review* 411-414.

76 AV Huneeus 'Compliance with judgments and decisions' in CP Romano, KJ Alter & Y Shany (eds) *Oxford handbook of international adjudication* (2014) 438-459.

77 See D Shelton *Commitment and compliance: The role of non-binding norms in the international legal system* (2003) 1; DL Shelton 'Soft law' in D Armstrong (ed) *Routledge handbook of international law* (2008) 1.

78 Ayeni & Von Staden (n 10) 26.

79 See D Shelton (ed) *International law and domestic legal system: Incorporation, transformation and persuasion* (2011) 1.

making international human rights law have significant effect at the domestic level.[80] These mechanisms create ripples that result in massive waves of social change. According to Helfer, 'compliance with international law increases when international institutions, including tribunals, can penetrate the surface of the state to interact with government decision-makers'.[81] It is not so much the hardness of the law or the binding nature of the decision, but the ways in which the decisions have been deployed by pro-compliance partners and the partnership forged with national actors by the HRT. Human rights decisions are tools, and their effects depend on how they are deployed to negotiate certain outcomes from state actors.

(d) *Dialogue has intrinsic value:* Dialogue 'strengthens relationship and trust, forge(s) alliances, find(s) truths that bind together, and bring(s) people into alignment on goals and strategies'.[82] Without trust, cooperation is limited, and without cooperation, there is no progress. It is only through dialogical process that the African Commission could more effectively forge alliances with pro-compliance constituencies and partners. Several activities of human rights bodies, including engagements with representatives of states, are framed as 'debates'. Dialogue is not debate. In a debate, the point of departure is that there is only one right or best answer and there is no willingness to see another person's point of view.[83] In dialogue, it is assumed that several people may have parts of the answer and the goal is to bring the diverse pieces together to form one new whole.[84] It should be noted that there is absolutely no basis for debating the merits findings of the Commission in a communication. Doing so may be counter-productive and would be unwise. The substantive finding of the Commission in respect of a communication is final. However, the actual process and the modalities for implementing the Commission's remedial recommendations may be debated or discussed.

80 See Simmons (n 2).
81 LR Helfer 'Redesigning the European Court of Human Rights: Embedded-ness as a deep structural principle of the European human rights regime' (2008) 19 *European Journal of International Law* 132.
82 D Yankelovich *The magic of dialogue: Transforming conflict into cooperation* (1999) 217.
83 C Watson and others 'Fostering constructive dialogue: Building toward more effective communication in the educational technology field' (2004) 44 *Educational Technology* 54.
84 As above.

3.1 Principles of dialogic engagements

According to Kent and Taylor, dialogic theory comprises five major principles, namely, 'mutuality, propinquity, empathy, risk and commitment'.[85] A dialogic engagement should end with a feeling that the other side has been treated as valued, and there should be repeated interactions, on the basis of trust and the dialogic activities or engagements should be perceived as mutually satisfying.[86] In order for the African Commission to effectively use dialogue as a tool of enhancing compliance with its decisions, the following dialogic orientations should be deployed: positive regard to the other actors (in conversational tone, politeness and cultural sensitivity), mutuality (recognising other actors as colleagues or partners, not enemies or detractors to be vanquished); empathy (being supportive and sympathetic); genuineness (being honest and truthful); commitment to the conversation (non-competitive conversation and admitting when the organisation is wrong); and commitment to interpretation (seeking to understand how others perceive their work).[87] This approach also supports organisational listening.[88] In this regard, the Commission should employ Macnamara's four elements of organisational listening, namely, culture of openness, willingness to listen, adopting policies that allow for listening and putting in place structures and processes for large scale listening.[89]

The use of dialogue in the European human rights system, albeit not totally new, has become 'much more critical and visible in recent years'.[90] Dialogue is aimed at an exchange of opinions with the view to reaching an amicable settlement of issues.[91] At the European human rights system, where enforcement measures by the political organs are strong, yet 'supervision of execution is treated as a co-operative task and not an inquisitorial one'.[92] According to Sundberg, 'confidential dialogue with Ministries of Foreign Affairs and permanent representations in Strasbourg has been progressively

85 ML Kent & M Taylor 'Toward a dialogic theory of public relations' (2002) 28 *Public Relations Review* 21-37.
86 ML Kent & M Taylor 'Understanding the rhetoric of dialogue and the dialogue of rhetoric' in O Ihlen & RL Heath (eds) *Handbook of organizational rhetoric and communication: Foundations of dialogue, discourse, narrative, and engagement* (2018) 315-327.
87 As above.
88 J Macnamara *Organizational listening: The missing essential in public communication* (2016) 116.
89 As above.
90 Abdelgawad (n 65) 341.
91 As above.
92 See Council of Europe 'Human rights working methods – Improved effectiveness of the Committee of Ministers' supervision of execution of judgments' (7 April 2004) cited in Abdelgawad (n 65) 343.

replaced by more public dialogue involving more actors'.[93] Because of the complexity of cases, dialogue in relation to judgments of the European Court is gradually moving from 'collective, political and confidential' to 'more bilateral, technical and public dialogue'.[94] In their piece, Cheng and Sin described a court judgment as dialogue or a dialogic problem to be solved.[95] According to them, a court judgment is a multi-layered dialogue between judges and between courts and the legislature.

3.2 Appraising the use of dialogue by the African Commission

Within the African human rights system, the African Commission could be described as an adept user of dialogue. The Commission uses dialogical engagements through various channels, including correspondences with domestic actors at regular intervals, protective missions, promotional visits and review of state party reports via the process of 'constructive dialogue'.[96] However, the goal of the analysis in this part is to demonstrate, first, that the Commission should take more seriously its dialogic mandate and should more often hold implementation dialogues with states and other actors; second, that the existing constructive dialogue framework should be reconfigured to give more room and attention to monitoring the implementation of decisions of the Commission; and, third, that the Commission should redefine its role in the dialogic process not as that of a supervisor or an adjudicator but as a co-equal partner with state actors in the process of implementation. Implementation dialogue, especially during the state reporting process and implementation hearings, should be framed more as a cooperative task and not an inquisitorial exercise.

The African Commission has several opportunities for implementation dialogue and dialogical engagements. Written dialogue or correspondence with parties is at the heart of the implementation monitoring process.[97] Traditionally, much of the procedure for monitoring the implementation of decisions of the Commission takes place in writing. For example, the revised Rules of Procedure of the Commission 2020 contain several provisions

93 F Sundberg 'Le dialogue entre le CM et les autorités nationales' in P Boillat and others (eds) *Les mutations de l'activité du Comité des Ministres, la surveillance de l'exécution des arrêts de la CourEDH par cet organe du Conseil de l'Europe* (2012) 70, cited in Abdelgawad (n 65) 343.
94 Abdelgawad (n 65) 343.
95 L Cheng & KK Sin 'A court judgment as dialogue' in E Weigand *Dialogue and rhetoric* (2008) 267-284.
96 Viljoen (n 1).
97 Ayeni & Von Staden (n 10) 13; Sandoval and others (n 8) 81.

mandating exchanges of information between the parties to a case and the Commission. Written correspondence is a form of dialogue and is a measure of choice because it is less costly and requires limited logistics compared to holding a physical meeting. In many cases, the Commission's interlocutor on behalf of the state is the Ministry of Foreign or External Affairs. Rule 125 requires that parties report within 180 days to the African Commission on actions taken to implement the Commission's decisions. Within 60 days, the Commission under the provisions of the Rules must forward any information received from the state to the other party. The Commission may also request additional information within three months.[98]

Implementation hearing is another opportunity for dialogue. Unfortunately, the African Commission seldom holds this form of hearing.[99] While the Commission in 1995 devoted its second extraordinary session to monitoring the implementation of its decisions in Nigeria,[100] and has held fully-fledged implementation hearings in two cases, namely, *Malawi African Association & Others v Mauritania*[101] and *Endorois*,[102] it has no coherent approach nor consistent practice on implementation hearing, including 'when and where to hold an implementation hearing, who should be present at such hearing and what the expectations are for the parties involved'.[103] Seen as a form of compliance dialogue, implementation hearings should be held more frequently or consistently. A great deal of the obstacles besetting the implementation of the Commission's decisions, including a lack of information from states, could be addressed if the Commission holds periodic implementation hearings. The African Commission also needs to adopt guidelines for the conduct of implementation hearings, including for joint hearings and hearing *in situ*.

The state reporting process is yet another great opportunity for constructive dialogue on the status of implementation of the Commission's decisions. The Commission has always emphasised the non-confrontational nature of the encounter.[104] The review takes place in public session in the presence of other states. The process

98 Rules of Procedure of the African Commission (2020) Rule 125.
99 See Ayeni & Von Staden (n 10) 13.
100 See Second Extraordinary Session Final Communiqué, 18-19 December 1995 para 1 and Account of Internal Legislation of Nigeria and the Dispositions of the Charter of African Human and Peoples' Rights, Second Extraordinary Session, Kampala, 18-19 December 1995, DOC. II/ES/ACHPR/4.
101 (2000) AHRLR 149 (ACHPR 2000).
102 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois*).
103 Ayeni & Von Staden (n 10) 15.
104 Viljoen (n 1) 350.

of preparing the report is an opportunity for national dialogue and introspection involving not only multiple government agencies but also CSOs and other actors.[105] However, implementation dialogue does not occupy a central place in the state reporting process, which it ought to. The Commission should give decision monitoring a pride of place in the state reporting process. Implementation dialogue is also a part of missions and promotional visits to states. In all of these activities, the Commission ought to be guided by the principles of dialogic engagements: positive regard to the other actors, mutuality, empathy, genuineness, commitment to the conversation, commitment to interpretation and organisational listening.

3.3 The African Commission and national dialogue

Compliance with human rights decisions is a domestic affair.[106] In the European system, national actors are obligated by the Council of Europe to improve dialogue with the European Court and other Strasburg actors and also dialogue with one another.[107] According to Mottershaw and Murray, 'the flow of timely and detailed information between stakeholders within the country is an important component of implementation'.[108] The authors also advocate that 'a central coordinating point has the potential to improve gathering and disseminating information'. Along this line, in March 2015 the Brussels Conference enjoined its state parties to

> establish 'contact points', wherever appropriate, for human rights matters within the relevant executive, judicial and legislative authorities, and create networks between them through meetings, information exchange, hearings or the transmission of annual or thematic reports and newsletters.[109]

The African Commission must insist that the national focal person should hold regular meetings with human rights implementation coordinators across government ministries to meet with officers of the Ministry of Justice and the Ministry of Foreign Affairs to discuss decisions and judgments relating to each country. The practice is already well established in the European system.[110] The state periodic report, for example, ought to capture the steps taken in each state to

105 Viljoen (n 1) 351.
106 Hillebrecht (n 2) 39.
107 Abdelgawad (n 65) 354.
108 E Mottershaw & R Murray 'National responses to human rights judgments: The need for government co-ordination and implementation' (2012) 6 *European Human Rights Law Review* 639, 646.
109 Abdelgawad (n 65) 355.
110 As above.

hold periodic national dialogue on the implementation of decisions of the Commission.

4 Role of implementation documentation and database

The African Commission has a rich repository and robust documentation practice. Within the Commission's Secretariat, there is the Information and Documentation Centre (IDOC) which provides 'appropriate, reliable, timely and efficient information services to the Commission, the Secretariat, and other users, as appropriate'.[111] Information at the disposal of IDOC includes audiovisual materials (CD, DVD, VHS); professional and scholarly texts and journals; initial/periodic reports of AU member states; regional and international instruments; journals, periodicals, reports and newsletters; constitutions (including the amended texts) of all AU member states; and official documents of government institutions, non-governmental organisations (NGOs) and agencies.[112]

The Commission's website also has information about its past sessions, mission reports, state reports and adopted resolutions,[113] including decisions on communications.[114] However, an area where the records of the Commission fall short is in relation to information on the status of implementation of its several decisions. In this area, the African Court, without doubt, deserves more credit than the Commission.

Table 3: Comparison of African human rights bodies' implementation documentation practice

S/N	Indicator[115]	African Court	African Commission	ACERWC
1.	Dedicated Special Rapporteur/working group with mandate to follow up Decisions	0	1	1

111 African Commission 'The Information and Documentation Centre', https://achpr.au.int/index.php/en/commission/idc (accessed 4 September 2023).
112 As above.
113 African Commission 'Sessions statistics table', https://achpr.au.int/en/sessions-statistics-table (accessed 4 September 2023).
114 African Commission 'Decisions on communications', https://achpr.au.int/index.php/en/category/decisions-communications (accessed 4 September 2023).
115 Note on score: AHRBs that meet the requirements of an indicator receive 1 point; those that do not meet the requirements at all receive zero points.

2.	Existence of a dedicated implementation unit within the secretariat of the AHRB	1	1	0
3.	Issuance of detailed periodic compliance reports	1	0	0
4.	Dissemination of compliance report	1	0	0
5.	Regular update of the compliance report	1	0	0
6.	Up-to-date database on the status of implementation	0	0	0
7.	Availability of implementation database on electronic platforms	0	0	0
	Total	**4**	**2**	**1**

With a cumulative score of two (representing only 29 per cent) compared to the African Court's score of four (58 per cent), the African Commission clearly lags behind the African Court in implementation documentation. As at September 2024, there is no section of the Commission's web page where visitors can systematically access information about the status of implementation of the Commission's decisions. The primary purpose of international human rights law is to take 'root at the national level' as well as 'flourish in the soil of states and to bear fruits in the lives of people'.[116] It is ironic, according to a former president of the International Court of Justice, Robert Jennings J, that 'courts' work up to delivery of judgment is published in lavish details, but it is not at all easy to find out what happened afterwards'.[117] A decision does not translate into automatic protection of human rights; it is through implementation and the impact of decisions that the human rights of real people is protected, and human rights cannot be said to have been protected unless the wrong or injury suffered is in fact remedied.

Although it is accepted that several states are reluctant to provide the African Commission with information on the implementation of decisions concerning them, a handful of states are willing to supply at least some information. There should be a platform where the limited information may be accessed. Fortunately, a handful of empirical scholarships have emerged in this area, pioneered by Viljoen and his

116 Viljoen (n 1) 529.
117 Robert Jennings J cited in C Paulson 'Compliance with final judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434.

doctoral students.[118] The findings of these various studies could be re-evaluated by a committee or working group set up by the African Commission (Committee/Working Group on the Implementation of Decisions of the African Commission) with a view to proposing an official implementation report for the adoption of the Commission, which report would from time to time be published and updated. The Committee may propose appropriate categorisation criteria for the Commission. Interestingly, this progressive and piece-meal approach could inspire NGOs and other domestic agents, including state actors that have relevant information not yet captured or inappropriately captured in the Commission's initial implementation report, to come forward. Eventually, the content of the report may be migrated to the web page of the Commission for easy accessibility by stakeholders and everyone having an interest in the work of the Commission.

The Inter-American Court monitors its owns decisions.[119] The Court directs states to report on their compliance efforts within set dates, summons parties to a compliance hearing, and issues its own compliance reports.[120] It conducts individual hearings and joint hearings for several cases involving the same state.[121] In 2015 the Inter-American Court established a unit, the Unit for Monitoring Compliance with Judgments, exclusively dedicated to monitoring implementation and compliance.[122] The European Court and the Inter-American Court each has a system of grading or categorising implementation status. The European Court has an electronic platform – HUDOC-EXEC (coe.int) – which provides access to the documents relating to the execution of the judgments of the European Court. The Human Rights Committee (HRC), for instance, formally established a follow-up procedure in July 1990. The HRC currently has a Special Rapporteur on Follow-up on Views, which submits reports to the Committee annually on the status of implementation of the Committee's views. The African Court publishes in its Annual Report the status of implementation of each of its final judgments, and the Court has been more consistent and effective than both

118 Louw (n 29); Ayeni (n 33); see also Adeola (n 17).
119 See A Huneeus 'Court resisting court: Lessons from the Inter-American Court's struggle to enforce human rights' (2011) 44 *Cornell International Law Journal* 501.
120 As above. See also JL Cavallaro & SE Brewer 'Re-evaluating regional human rights litigation in the twenty-first century: The case of the Inter-American Court' (2008) 102 *American Journal of International Law* 768, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1404608 (accessed 9 September 2023).
121 See Annual Report of the Inter-American Court of Human Rights (2016) 70-74, http://www.corteidh.or.cr/tablas/informe2016/ingles.pdf (accessed 9 September 2023).
122 As above.

the African Commission and the African Children's Committee in preparing, updating and disseminating its compliance reports.[123]

5 Conclusion

The role of multi-level dialogue, proper documentation and comprehensive databases in monitoring the implementation of decisions of the African Commission is generally underestimated. In international law compliance, the only viable substitutes for the dialogical process are sanctions and enforcement measures. Unfortunately, these political tools are unavailable or ineffective in the African human rights system due to the reluctance of AU policy organs to take enforcement actions against non-compliant states following their consideration of the Activity Report of the African Commission. In the absence of political monitoring, the African Commission, at least in the interim, has a major role to play in monitoring the implementation of its decisions.

While the African Commission may, as highlighted in various studies, resort to an array of tools to monitor the implementation of its decisions, the main contribution of this article is to expound on the role of dialogue and documentation in the implementation process. Given that the prospect of political enforcement is bleak and the recommendations arising from the Commission's decisions are generally not considered binding, the article argues that the Commission should more fully and consistently explore its comparative strength of engaging in various dialectical process with national actors.

Regarding the form of implementation dialogue required, it is suggested that the African Commission should constantly engage in respectful implementation dialogue with state, non-state and civil society actors. The suggestions in this regard include holding regular implementation hearings; giving more time slots to monitoring the implementation of the Commission's decisions during the state reporting process; and raising the implementation of the Commission's decisions during promotional visits to states. The Commission is urged to make its decisions and monitoring of these more transparent, and publicly accessible. Also, a more robust compliance-monitoring framework should be considered for the African Commission. The Commission should develop a more formalised structure and consistent practice of holding

123 See Ayeni & Von Staden (n 10) 26.

implementation hearings, including adopting guidelines on implementation hearings. Sustained implementation dialogue could help to address problems of delay, neglect or negligence in implementation, track progress, eliminate obstacles and bottlenecks, clarify misconceptions and ambiguities, and assist the Commission in appreciating the practical challenges that complainants and state actors face in the implementation of the Commission's decisions.

In order to effectively carry out implementation dialogue and documentation, the African Commission should establish a special mechanism, such as a working group, dedicated to monitoring the implementation of its decisions, or revise the mandate and terms of reference of the Working Group on Communications to unequivocally include implementation monitoring. Similarly, the Commission should adequately equip the implementation unit within its secretariat to provide technical and secretarial assistance to its special mechanism responsible for monitoring implementation. Members of the unit should be exposed to training, especially the exchange of ideas with the European Court's Department for Execution of Judgments and the Inter-American Court's Implementation Monitoring Unit.

The African Commission should set up an implementation database and prepare periodic compliance reports for presentation to AU policy organs alongside its Activity Reports. The Commission should increase the frequency and quality of its dialogic engagements with state, non-state and civil society actors with regard to the implementation of the its decisions. A state that complies with decisions of the African Commission is more likely to comply with the provisions of the African Charter and soft law standards of the African Commission. Accordingly, the state reporting process should prioritise the implementation of the Commission's decisions. A state in defiance of clear recommendations of the African Commission has (already) lost the standing to demonstrate its respect for the African Charter.

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Diplomatic mechanisms as a springboard to enhance the implementation of decisions by the African Commission on Human and Peoples' Rights with specific reference to persons with disabilities

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Summary: *This article examines the role of diplomatic mechanisms in enhancing the implementation of decisions by the African Commission on Human and Peoples' Rights, with a specific focus on the rights of persons with disabilities. With the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa in 2024, it is anticipated that more communications dealing with the rights of persons with disabilities will be submitted to and decided by the African Commission. Diplomatic and political mechanisms are identified as pragmatic and effective avenues for ensuring compliance with African Commission decisions, especially given the complex interplay between human rights norms, state sovereignty and political considerations. These diplomatic mechanisms facilitate constructive engagement and the formulation*

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of tailored recommendations that align with the internal dynamics of states. Notwithstanding these benefits, many African states continue to struggle with fulfilling their obligations, particularly regarding the rights of persons with disabilities. This non-compliance weakens the Commission's effectiveness. The article highlights the detrimental impact of non-compliance relating to persons with disabilities, who face persistent attitudinal, environmental and systemic barriers. It argues that the failure to implement the Commission's decisions undermines the Commission's credibility and hampers the development of a robust human rights culture for persons with disabilities. To address these deficiencies, the article advocates the use of diplomatic mechanisms, such as negotiations, dialogue and cooperation, as catalysts for change. Through sustained engagement and dialogue, diplomatic efforts can encourage states to ensure that disability rights and inclusive policies are placed at the forefront of national policies, thereby strengthening implementation mechanisms. Ultimately, it is hoped that the African Commission and other stakeholders can play a more active role in advancing the rights and well-being of persons with disabilities across Africa.

Key words: *implementation; diplomacy; negotiations; dialogue; cooperation; persons with disabilities; African Commission; Working Group on the Rights of Older Persons and Persons with Disabilities in Africa*

1 Introduction

The African Commission on Human and Peoples' Rights (African Commission) has made large and innovative strides in the promotion and protection of human rights across the African continent.[1] Nonetheless, the lack of effective implementation of its decisions has seriously undermined its ability to deliver justice overall and, in particular, to persons with disabilities. This article explores the lack of domestic implementation of decisions by the African Commission in relation to persons with disabilities. It explores this lack of compliance by highlighting the pressing need to address the challenges that are hindering the realisation of the rights for persons with disabilities in Africa. 'Decisions' by the African Commission are understood in this article as encompassing a range of findings, recommendations and resolutions, including individual communications and Concluding Observations emanating from state reports. While all these decisions

1 See eg F Viljoen *International human rights law in Africa* (2012) 289-390.

carry significant weight, their true impact lies in their effective implementation at the domestic level. Many actors play various roles in carrying out this implementation process. This article considers the role of the African Commission in tandem with the role of other actors, such as states and civil society organisations.

While the African Commission has a communications procedure that allows for individuals or states to lodge complaints for human rights adjudication, this article only briefly mentions this procedure to illustrate the issue of non-compliance. It is difficult to precisely assess the impact of diplomatic mechanisms to ensure compliance with the African Commission's communications insofar as there already are various mechanisms that elicit responses from the state to comply. For instance, the African Union (AU) Executive Council has repeatedly exhorted states to implement the recommendations made in individual communications against them.[2]

This article deliberately adopts a narrow focus on two specific mechanisms related to the African Commission itself in order to underscore the pressing need to prioritise diplomatic mechanisms as catalysts for change in implementing decisions by the Commission relating to persons with disabilities. The two mechanisms are the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa (Working Group), the state reporting process and, particularly, the resulting Concluding Observations. The central argument of the article is that these two mechanisms can be used as springboards to enhance compliance with decisions of the African Commission, generally, and communications relating to persons with disabilities, specifically.

It is argued that by leveraging negotiations, dialogue and cooperation, the African Commission can collaborate with African states and relevant stakeholders to strengthen their commitment to human rights and uphold the rights of persons with disabilities. Diplomatic efforts offer an avenue for sustained engagement and dialogue, leading to the development of tailored action

2 Decision on the 44th Activity Report of the African Commission on Human and Peoples' Rights. Decision on the Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/1205(XXXVI), Decisions of the 36th ordinary session of the Executive Council 6-7 February 2020, Addis Ababa, Ethiopia EX.CL/Dec.1073-1096(XXXVI), https://au.int/en/decisions/decisions-thirty-sixth-ordinary-session-executive-council; Decision on the Activity Report of the African Commission on Human and Peoples' Rights Doc EX.CL/1259(XXXVIII), Decisions of the 38th ordinary session of the Executive Council 3-4 February 2021, Addis Ababa, Ethiopia EX.CL/Dec.1107-1125(XXXVIII), https://au.int/en/decisions/decisions-thirty-eighthordinary-session-executive-council (accessed 12 November 2024).

plans, capacity-building initiatives as well as technical assistance programmes that support effective implementation. The selected issues that are discussed accordingly highlight the relevance and importance of compliance with 'remedial recommendations' and 'remedial orders',[3] as both an analytical framework and a set of guiding principles for improving disability rights and, ultimately, the lived experiences of persons with disabilities on the African continent.

The article first describes the role of the African Commission in the context of the promotion and protection of the rights of persons with disabilities. It highlights its various functions as well as its Rules of Procedure relating to the implementation of its decisions. The next part examines the problems of non-compliance or non-implementation with the decisions of the African Commission. As will be seen, a myriad operational and other factors exert a significant gravitational field on the implementation – or lack thereof – of these decisions. Third, the article sketches the outlines of the Working Group, followed by the state reporting procedure. Finally, the article provides insights on how diplomatic means should be used as a springboard to enhance the implementation of the African Commission's decisions, zooming in on the theory of compliance through dialogue and persuasion. Diplomatic means accentuate the potential for positive change in the African human rights landscape, where the African Commission can work concomitantly and collaboratively with African states and other stakeholders to strengthen their commitment to human rights, generally, and uphold the rights of persons with disabilities.

2 Role of the African Commission

The African Commission is the principal monitoring body on matters relating to human rights at the African regional level.[4] The African Charter on Human and Peoples' Rights (African Charter) is the regional instrument that establishes the African Commission as an autonomous and quasi-judicial body tasked with the promotion and protection of individual human rights and collective rights of peoples.[5] The Commission is also mandated to monitor and evaluate compliance with human rights norms as enshrined under the African Charter. Within this mandate, the African Commission has a wide array of responsibilities encompassing the review of state reports,

3 F Viljoen 'Forging a credible African system of human rights protection by overcoming state resistance and institutional weakness: Compliance at a crossroads' in R Grote, M Morales Antoniazzi & D Paris (eds) *Research handbook on compliance in international human rights law* (2021) 362.
4 Viljoen (n 1) 293.
5 Arts 45 & 46 African Charter.

the consideration of individual and inter-state communications, the issuing of advisory opinions, and engagement in promotional activities aimed at increasing awareness and understanding of human rights principles across the African continent.[6]

It could be argued that one of the most important mechanisms through which the African Commission fulfils its role is through the consideration of individual communications. Individuals and groups can submit complaints to the African Commission alleging violations of their rights. The Commission has the power to receive, examine and make recommendations on these communications.[7] It should be noted that in recent years, it has taken steps to enhance its monitoring of the implementation of its decisions on individual communications by organising panels and seminars, amending its Rules of Procedure, and by extending the mandate of its Working Group on Communications.[8] The African Commission's decisions on individual communications can accordingly have a significant impact on the protection and promotion of the rights of persons with disabilities. These decisions can serve as precedents and guide the actions of states in implementing and enforcing human rights and, more specifically, disability rights.

The African human rights system has not always been effectively used to advance disability rights, as evidenced by the very limited number of cases brought before the African Commission to vindicate the rights of persons with disabilities. This underutilisation is partly due to the perception of individuals with disabilities as objects of charity rather than as holders of human rights.[9] *Purohit* is the only communication decided by the African Commission that specifically addressed the rights of persons with disabilities.[10] *Purohit* deals with the violation of the right to dignity and health under The Gambia's Mental Health Law. In its communication, the African Commission laid emphasis on the importance of non-discriminatory access to healthcare services of persons with disabilities and the need

6 R Murray *The African Charter on Human and Peoples' Rights: A commentary* (2019) 629-653.

7 R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 836.

8 As above.

9 D Msipa & P Juma 'The African Disability Protocol: Towards a social and human rights approach to disability in the African human rights system' in MH Rioux and others (eds) *Handbook of disability: Critical thought and social change in a globalising world* (2023) 7.

10 *Purohit & Another v The Gambia* (2003) AHRLR 96 (ACHPR 2003) (*Purohit*). On implementation of this decision, see F Viljoen 'The African human rights system and domestic enforcement' in M Langford, C Rodríguez-Garavito & J Rossi (eds) *Social rights judgments and the politics of compliance: Making it stick* (2017) 376-379.

for equitable resource allocation.[11] The case thus set a significant precedent by affirming the rights of persons with disabilities to equal protection and non-discrimination, although the overall recognition of these rights remains limited in Africa.

Moreover, other mechanisms of the African Commission can supply various roadmaps to contribute to the effective implementation of its decisions and the promotion and protection of human rights in Africa. For instance, in the context of promoting the rights of persons with disabilities, the state reporting procedure through its Concluding Observations can be a valuable tool for assessing progress, identifying challenges and advocating the rights and needs of persons with disabilities. Before this state reporting procedure is considered in more details below, it is important to contextualise the discussion by providing an overview of the Rules of Procedure of the African Commission.

The African Commission promulgated its revised Rules of Procedure in 2020, which is a significant development stemming from the Commission's ongoing commitment to enhancing the efficacy and accountability of its operations.[12] However, it has been reported that 'due to a faltering application of the Rules, the Commission has not succeeded in putting a credible follow-up procedure in place'.[13] Yet, it should be noted that in contrast to the earlier 2010 Rules of Procedure, the 2020 version demonstrates a heightened focus on compliance and implementation.[14] The 2020 Rules of Procedure present innovations in terms of access to the Commission and the expeditious processing of cases, in particular on the implementation of the Commission's decisions.[15] This is manifest in the provisions that strengthen the Commission's authority to monitor and ensure the execution of its decisions by state parties. Rule 125 now provides for a specific procedure for follow up on decisions.

Rule 125(1) provides an effective follow-up mechanism by requiring a state to inform the African Commission in writing of any action taken by the state in question to implement the decision of the Commission within 180 days from the date the decision was communicated to it. Rule 125(2) further allows the Commission to request a national or specialised human rights institution with affiliate status to inform it of any action it has taken to monitor or

11 *Purohit* (n 10) paras 80-83.
12 Rules of Procedure of the African Commission on Human and Peoples' Rights 2020.
13 Viljoen (n 3) 364.
14 As above.
15 As above.

facilitate the implementation of the Commission's decision. Rule 125(5) further allows the rapporteur for the communication, or any other member of the Commission designated for this purpose, to monitor the measures taken by the state party to give effect to the Commission's decision. The follow-up measures under Rule 125 may be regarded as a seismic shift, which is instrumental in not only enhancing the Commission's accessibility but also in fostering a culture of compliance as a greater engagement of stakeholders often engenders higher levels of compliance.

Comparatively, and was noted earlier, the previous version of the 2010 Rules of Procedure exhibited a more rudimentary approach to compliance.[16] By now explicitly granting the Commission the authority to request information from states regarding their implementation efforts, the 2020 Rules of Procedure bolster the accountability of state parties with respect to their human rights obligations. This proactive engagement is a departure from the earlier Rules, which lacked such a comprehensive mechanism for monitoring implementation.[17] The mechanisms for monitoring the execution of the Commission's decisions were less structured and lacked the depth and specificity that are now reflected in the 2020 Rules of Procedure.[18]

While the African Commission's commitment to compliance was inherent in its mandate, the procedural framework had not adequately evolved to address the complexities of ensuring state parties' adherence to its decisions. Some have even gone so far as to state that '[i]n the area of protection of human rights, the Commission stands as a toothless bulldog' and that it 'can bark – it is, in fact, barking' but it 'was not, however, created to bite'.[19] In its latest 2023 Activity Report, the African Commission itself has yet again highlighted that the level of compliance by state parties with the Commission's decisions 'is still low'.[20] A more detailed account of lack of compliance with the decisions of the African Commission is given in the following part.

16 As above.
17 Murray & Long (n 7).
18 Murray (n 6).
19 N Udombana 'Toward the African Court on Human and Peoples' Rights: Better late than never' (2000) 3 *Yale Human Rights and Development Law Journal* 64.
20 52nd and 53rd Combined Activity Reports, African Commission on Human and Peoples' Rights 8 June 2023 para 41.

3 Non-compliance with the decisions of the African Commission

The terms 'compliance' and 'implementation' are often used interchangeably, but it must be noted that they have different meanings. Compliance is 'the alignment between the factual situation at the domestic level and a decision of a regional body' insofar as it 'connotes conformity with a regional decision'.[21] Implementation is 'the action of putting in place measures to give effect to a regional decision'.[22] Compliance, therefore, is outcome-based, while implementation is process-based.[23] What should be noted at this juncture is that implementation of decisions in the African human rights protection system is 'in its infancy' and 'still a work in progress'.[24]

In an oft-cited empirical study analysing 44 cases decided on the merits, Viljoen and Louw found that there was an overall lack of state compliance with the recommendations of the African Commission.[25] Full compliance was recorded in 14 per cent of cases, non-compliance accounted for 30 per cent, while there was partial compliance in 32 per cent of cases. The study also examined situational compliance on the basis of other factors such as a change in government, which accounted for 16 per cent of the cases. A more recent study conducted an examination of the implementation of two specific decisions involving Kenya and the Democratic Republic of the Congo (DRC).[26] The findings of this study exhibit but an illusory promise of compliance. It can therefore be inferred that the African Commission saw very little state compliance with its recommendations since its founding in 1987. Viljoen and Ayeni have also analysed whether three countries – Nigeria, The Gambia and Zimbabwe – have complied with 12 decisions that were rendered by the African Commission during the study period of 2000 to 2015.[27] The authors introduced

21 J Biegon 'Compliance studies and the African human rights system: Reflections on the state of the field' in A Adeola (ed) *Compliance with international human rights law in Africa: Essays in honour of Frans Viljoen* (2022) 13.
22 As above.
23 A von Staden 'Implementation and compliance' in R Murray and D Long (eds) *Research handbook on implementation of human rights in practice* (2022) 17.
24 Viljoen (n 3) 367.
25 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1993-2004' (2007) 101 *American Journal of International Law* 1; L Louw 'An analysis of state compliance with the recommendations of the African Commission on Human and Peoples' Rights' unpublished LLD thesis, University of Pretoria, 2005.
26 D Inman and others 'The (un)willingness to implement the recommendations of the African Commission on Human and Peoples' Rights: Revisiting the *Endorois* and the *Mamboleo* decisions' (2018) 2 *African Human Rights Yearbook* 400.
27 F Viljoen & V Ayeni 'A comparison of state compliance with reparation orders by regional and sub-regional human rights tribunals in Africa: Case studies of

the innovative concept of aggregate compliance, 'a concept that accords weight to both full and partial compliance' and 'avoid the rigid juxtaposition of full and partial compliance, which suggests that nothing has *really* been accomplished until *everything* has been achieved'.[28] The findings of the study revealed that there was an aggregate compliance of 61 per cent for Nigeria, 38 per cent for The Gambia, and 18 per cent for Zimbabwe. The differing levels of compliance among these three states can be explained by a range of factors. These include characteristics unique to each state; the clarity and detail of the reparation orders issued by the human rights tribunals; the level of follow up by domestic entities supporting compliance; the volume of cases handled by each tribunal; the development stage of the tribunals involved; and variations in the time elapsed since the decisions were made.[29]

While the assessment of how well the African Commission's recommendations have been put into action might be a topic of debate, there is widespread agreement that the overall implementation rate is unsatisfactory.[30] Ayinla and Wachira offer various reasons for this poor implementation rate.[31] These include a lack of political will on the part of state parties, and good governance. They also mention outdated concepts of sovereignty and the absence of an institutionalised follow-up mechanism for ensuring the implementation of recommendations. In addition, they highlight the Commission's weak powers of investigation and enforcement and the non-binding character of the its recommendations. The non-binding character in fact is one of the most frequently-cited reasons for the reluctance of states to enforce its recommendations.

Scholars such as Murray and Long have explained how the African Commission has over the years evolved from making brief decisions to issuing more detailed ones that included reparations to address findings on violations.[32] However, they argue that there has been limited focus on how states actually implement the decisions of supranational human rights bodies such as the African Commission. They highlight how the past decades have thus seen growing

Nigeria, The Gambia, Tanzania, Uganda and Zimbabwe' (2022) 26 *International Journal of Human Rights* 1651, 1654.

28 Viljoen & Ayeni (n 27) 1658.

29 Viljoen & Ayeni (n 27) 1662.

30 DC Baluarte *From judgment to justice: Implementing international and regional human rights decisions* (2010), https://www.justiceinitiative.org/uploads/62da1d98-699f-407e-86ac-75294725a539/from-judgment-to-justice-20101122.pdf (accessed 17 August 2023).

31 A Ayinla & GM Wachira 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 456.

32 Murray & Long (n 7).

interest in this area due to concerns about an 'implementation crisis' that impacts the legitimacy of such bodies.[33] While the African Commission operates with a broad mandate and limited resources, it possesses various means to monitor and facilitate the implementation of its decisions. Yet, it has struggled to systematically employ these methods in order to establish a coherent implementation role. There indeed are contrasting views on enforcement mechanisms for achieving implementation.

Some authors argue for clear consequences and processes, for instance, in terms of increasing the role of civil society as a complementary domestic source of pressure with the aim of raising domestic costs in pressuring member states towards compliance.[34] It should be noted that Rule 125(8) of the 2020 Rules of Procedure provides for a more forceful approach to the extent that if the Commission finds that the state party's conduct may raise issues of non-compliance with its decision, it may refer the matter to the attention of the competent policy organs of the AU for more concrete steps to be taken.[35]

Other authors advocate persuasion, dialogue and cooperation.[36] Murray and Long suggest that the African Commission can enhance the likelihood of implementation by clarifying its role and strategically using both soft and forceful approaches at different stages after decisions are made.[37] This approach is in line with Rule 125(9) of the 2020 Rules of Procedure, which provides that the 'Commission shall indicate in its Activity Report the status of implementation of its decisions, including by highlighting any issues of possible non-compliance by a state party'. Rule 125(9) provides for a hybrid approach whereby the Commission can use at the same time a soft and forceful approach where non-compliant states are publicly named and strongly encouraged to comply for fear of blemish to their international reputation. It nonetheless is submitted that soft approaches should take primacy over forceful ones insofar as the former are more likely to cajole states to comply with the decisions

33 Murray & Long (n 7) 838.
34 AE Etuvoata 'Towards improved compliance with human rights decisions in the African human rights system: Enhancing the role of civil society' (2020) 21 *Human Rights Review* 415.
35 M Jimoh 'Investigating the responses of the African Commission on Human and Peoples' Rights to the criticisms of the African Charter' (2023) 4 *Rutgers International Law and Human Rights Journal* 1, 34.
36 C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: What role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71.
37 As above.

of the African Commission, particularly when viewed from a human rights perspective in an African context.

There is no doubt that the African Commission should play a more active role in engaging with all stakeholders, including political actors, in view of implementing its own decision. Sandoval, Leach and Murray contend that dialogue encompasses the use of tools by supranational bodies to incite all stakeholders 'to explore ways of moving implementation forward, either between themselves or with the direct help of the monitoring body'.[38] These scholars also advance that supranational human rights bodies, including the African Commission, make use of myriad tools that best foster or cajole implementation.[39] What can be gleaned from their study is that dialogue between different stakeholders should be the first port of call in ensuring the effective implementation of the decisions of these human rights bodies. Stronger measures would eventually be warranted for recalcitrant states that fail to implement or comply with decisions of treaty bodies. By contrast, it can be argued that diplomatic means, including dialogue, discussion and deliberation, play a critical and effective role in 'cajoling',[40] inducing or influencing states and other stakeholders to tackle implementation and compliance imaginatively and effectively.

The African Commission has certainly devised a wide array of tools that it can use to 'cajole' implementation. This implementation is effectively carried out by diplomacy or dialogue rather than forceful measures upon which states usually frown. Ayeni and Von Staden argue that the African Commission as a quasi-judicial body is less constrained and has more leeway in monitoring and following up on its decisions.[41] Their study found that the promotional mandate of a human rights body such as the African Commission provides 'immense opportunity for continuous engagement and dialogue with states through state missions and country visits as well as the review of periodic state reports'.[42]

The following part of this article describes in greater detail the use of some of these tools that can be used to cajole implementation of decisions of the African Commission in the context of the rights of persons with disabilities in Africa.

38 Sandoval and others (n 36) 78.
39 As above.
40 As above.
41 VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3.
42 As above.

4 Working Group on the Rights of Older Persons and Persons with Disabilities

Article 18(4) of the African Charter provides that the 'aged and the disabled shall also have the right to special measures of protection in keeping with their physical or moral needs'. Criticism has been levelled at clustering together disability with age under this provision of the Charter, as this conflation curtailed the development of a complete, nuanced and comprehensive understanding of disability.[43] According to Msipa and Juma, disability has historically, especially in Africa, been associated with harmful beliefs about disease, sin and shame, which they categorise as the deficient approach to disability.[44] The rights of persons with disabilities in Africa were scattered across various general and group-specific human rights instruments within the African human rights framework.[45] These instruments primarily reflected outdated and limited perspectives on disability, rooted in the medical and welfare models. These shortcomings eventually led to calls for the adoption of an instrument specifically providing for the promotion and protection of the rights of persons with disabilities in the African context, in line with international standards such as the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD).[46] The result was the adoption by the African Union Assembly of Heads of State and Government of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Protocol) on 29 January 2018 – in large part a product of the Working Group, discussed below.[47] According to article 2 of this Protocol, its objective is to 'promote, protect and ensure the full and equal enjoyment of all human and people's rights by all persons with disabilities' in Africa.

The African Disability Protocol entered into force on 3 May 2024, after it had been ratified by 15 of the 54 state parties to the

43 Murray (n 5) 476, citing SAD Kamga 'A call for a protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2013) 21 *African Journal of International and Comparative Law* 219; J Biegon 'The promotion and protection of disability rights in the African human rights system' in I Grobbelaar-Du Plessis & T van Reenen (eds) *Aspects of disability law in Africa* (2011) 63.

44 Msipa & Juma (n 9) 5.

45 As above.

46 F Viljoen & J Biegon 'The feasibility and desirability of an African disability rights treaty: Further norm elaboration or firmer norm implementation?' (2014) 30 *South African Journal on Human Rights* 348-352.

47 E Guematcha 'The need for a comprehensive overhaul of disability rights in the African Union' in O Quirico (ed) *Inclusive sustainability* (2022) 223; Y Basson 'The right to an adequate standard of living in the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa' (2019) 7 *African Disability Rights Yearbook* 258.

African Charter.[48] The African Disability Protocol can be described as a unique instrument that 'addresses gaps in the approach to disability found in the African human rights system by abandoning the medical and welfare approaches and employing the social and human rights models of disability'.[49] The African Disability Protocol espouses a human rights model similar to that found under CRPD. There are many CRPD rights that have been directly transposed into the African Disability Protocol. For instance, articles 5 and 6 of the Disability Protocol largely replicate article 5 of CRPD on the right to equality and discrimination.[50] However, even if CRPD is the most comprehensive international instrument providing for the respect, protection and fulfilment of the rights of persons with disabilities, it does not adequately capture the lived experiences of persons with disabilities in Africa.[51] The African Disability Protocol has redressed this balance by offering a better window into the reality of Africans with disabilities. It includes issues and rights that are specific to the African context, such as ritual killings (article 1); harmful practices (article 11(1)); youths with disabilities (article 29); older persons with disabilities (article 30); persons with disabilities as duty bearers (article 31); definition of deaf culture (article 1); and the role of the family, care givers and community (article 25). The Disability Protocol also includes marginalised groups such as persons with albinism.[52] It is argued that the Working Group can leverage the African Disability Protocol to prompt states into ratifying and complying with their obligations under the African Disability Protocol, as well as promoting dialogue and cooperation in implementing decisions relating to persons with disabilities. It is anticipated that the entry into force of the African Disability Protocol would inspire the submission of more communications dealing with then rights of persons with disabilities to the African Commission.

The Working Group is a special mechanism, established by the African Commission in 2007 as a focal point on the rights of older

48 See Centre for Human Rights 'Centre for Human Rights welcomes the coming into force of the African Disability Protocol' 3 October 2024, https://www.chr.up.ac.za/images/centrenews/2022/Press_Statement_-_Ratification_status_of_the_African_Disability_Protocol.pdf (accessed 15 November 2024). Regrettably, at the time of writing, the official information on the AU website was not updated to reflect the updated status of ratification and the fact that the treaty has entered into force. See Status List of Countries which have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa, https://au.int/sites/default/files/treaties/36440-sl-PROTOCOL_TO_THE_AFRICAN_CHARTER_ON_HUMAN_AND_PEOPLES_RIGHTS_ON_THE_RIGHTS_OF_PERSONS_WITH_DISABILITIES_IN_AFRICA_0.pdf (accessed 8 November 2024).
49 Msipa & Juma (n 9) 13.
50 Msipa & Juma (n 9) 14.
51 Viljoen & Biegon (n 46) 352-354.
52 Msipa & Juma (n 9); Viljoen & Biegon (n 46); Kamga (n 43).

persons in Africa.[53] The purpose of setting up this unique mechanism was to work with the Commission in convening a group of experts and take the lead in formulating a protocol on the rights of older persons. The focal point then became a working group, which had the additional responsibility of looking at disability rights in conjunction with the African Commission.[54] With this added responsibility came new tasks for the Working Group, including convening meetings, doing research on various groups of peoples' rights, and establishing best practices.[55] The Working Group was originally tasked with the duties to draft legal instruments on the rights of older and disabled persons in Africa, which culminated in the Disabilities Protocol, as well as the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa.[56] It can safely be assumed that the Working Group can play a vital role in enhancing the implementation of African Commission decisions relating to persons with disabilities through their expertise, advocacy and collaboration as the current Chairperson of the Working Group, Commissioner Marie-Louise Abomo, implicitly recognised in her latest Intersession Activity Report.[57]

With their knowledge and expertise, the Working Group members can provide valuable insights through webinars, awareness-raising campaigns and engagement with member states. As such, it can raise awareness and advocate the ratification and domestic implementation of the African Disability Protocol. Further, the Working Group's technical assistance and capacity-building support can help member states align their national frameworks with international standards. By collaborating with stakeholders, such as member states, civil society organisations and international partners, the Working Group can foster knowledge-sharing and coordinated actions. Additionally, its reporting and engagement in dialogue can stimulate ongoing discussions, accountability and transparency. Overall, the Working Group's involvement in diplomatic mechanisms can strengthen the

53 Resolution on the Establishment and Appointment of a Focal Point on the Rights of Older Persons in Africa, African Commission /Res.118 (28 November 2007).
54 Resolution on the Transformation of the Focal Point on the Rights of Older Persons in Africa into a Working Group on the Rights of Older Persons and People with Disabilities in Africa, African Commission /Res.143 (27 May 2009).
55 Murray (n 6) 482.
56 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (31 January 2016); DM Chirwa & RI Chipo 'Guarding the guardians: A critical appraisal of the Protocol to the African Charter on the Rights of Older Persons in Africa' (2019) 19 *Human Rights Law Review* 53.
57 Working Group on the Rights of Older Persons and Persons with Disabilities in Africa, Intersession Activity Report 20 May 2023, https://achpr.au.int/en/intersession-activity-reports/working-group-rights-older-persons-and-persons-disabilities-af (accessed 20 August 2023).

implementation of African Commission decisions. It can also promote the rights and well-being of persons with disabilities across Africa.

The Working Group presents an avenue through which the African Commission can amplify compliance with its decisions across various forms of communication and recommendations. The establishment of the Working Group in and of itself signifies the African Commission's commitment to addressing the specific rights concerning older persons and persons with disabilities, a recognition that was somewhat limited in earlier iterations of its human rights discourse.[58] By focusing on these marginalised groups, the Working Group effectively supplements the Commission's broader efforts to engender a human rights culture on the African continent. Such targeted mechanisms facilitate the elaboration of context-sensitive recommendations that can spur states towards compliance with human rights obligations.

The collaboration between the African Commission and the Working Group offers a potential springboard for increasing compliance with the Commission's decisions in multiple ways.

First, the Working Group's engagement in researching and formulating recommendations for older persons and persons with disabilities can catalyse an enhanced awareness of their rights among states. When incorporated into the African Commission's Concluding Observations on state reports or in other thematic reports, these recommendations can serve as a touchstone for states to align their policies with international human rights standards. For instance, if the Working Group highlights gaps in the right to accessibility of persons with disabilities, and the African Commission subsequently incorporates these concerns in its recommendations to states, this interconnected approach can stimulate targeted policy changes, thereby fostering compliance.

Second, the commissioners of the African Commission who are members of the Working Group[59] can use their mandate to foster collaboration between the African Commission and other stakeholders such as civil society organisations that advocate the rights of persons with disabilities, thus engendering a more holistic approach to human rights promotion. It should be noted that the Working Group also comprises experts from civil society

58 Murray (n 6) 482-483.
59 Resolution on the Reconstitution of the Working Group on the Rights of Older Persons and People with Disabilities in Africa, African Commission /Res 506 (LXIX)2021 5 December 2021.

organisations.[60] Civil society organisations often play a pivotal role in monitoring state compliance and advocating rights fulfilment.[61] The expert members are well placed to coordinate with civil society organisations and other stakeholders to facilitate the dissemination of African Commission decisions and recommendations at the grassroots level, which in turn can create a groundswell of pressure for compliance. For example, the Working Group can collaborate with disabled persons' organisations to promote the implementation of African Commission decisions on inclusive education for children with disabilities. This joint advocacy can augment the visibility of the Commission's decisions and expedite compliance efforts.

However, it is essential to acknowledge the potential challenges inherent in leveraging the Working Group as a springboard for compliance. The voluntary nature of compliance mechanisms in the African human rights system, as elucidated by many scholars, underscores the importance of political will and cooperation from state parties.[62] The recommendations put forth by the Working Group must be underpinned by a conducive environment that encourages states to incorporate these suggestions into their domestic legal frameworks. Nonetheless, the African Commission should remain the driving force behind the Working Group's involvement in ensuring this effective collaboration with persons with disabilities and their representative organisations.

So far, this article has focused on a mechanism that tangentially involves the role of the African Commission to ensure compliance with its decisions. The following part will discuss how the African Commission can take centre stage in the implementation process by using mechanisms at the political or diplomatic end of the compliance spectrum as opposed to putative formal legal processes.

5 Concluding Observations on state reports

Among the various roles of the African Commission highlighted in the preceding part, its responsibility in the examination of state reports, where it conducts thorough evaluations of member states' compliance with their obligations under the African Charter, is of particular significance. The Commission derives this responsibility to examine state reports and issue its Concluding Observations under

60 Resolution on the Renewal of the Mandate of the Working Group on the Rights of Older Persons and Persons with Disabilities in Africa and on the Appointment of its Chair and Members ACHPR/Res.589 (LXXX) 2024.
61 Etuvoata (n 34) 415.
62 Viljoen (n 3).

article 62 of the African Charter. Under this provision, state parties are required to submit periodic reports that should provide an indication of the legislative and other measures that they have undertaken in view of giving effect to the rights enshrined under the Charter.[63] The Commission is then tasked to evaluate these reports with a view to assessing the extent to which state parties have made progress in aligning their laws and policies with the human rights standards set out under the African Charter. This assessment is informed by the Charter's principles and provisions as well as relevant international human rights norms.

Upon receipt and examination of the state periodic reports, the African Commission formulates Concluding Observations, which constitute a comprehensive analysis and evaluation of the human rights situation in the respective state party. These Concluding Observations are directed towards highlighting achievements, identifying challenges as well as providing recommendations to enhance the state party's human rights obligations. These observations serve as a tool for holding states accountable and guiding them in improving their human rights record. They also provide guidance to civil society organisations and human rights advocates in their efforts to promote and protect human rights.[64] The African Commission's monitoring role thus is of crucial significance in ensuring that its decisions and Concluding Observations are effectively implemented. It allows for the identification of challenges and obstacles to implementation as well as provides an opportunity for dialogue and cooperation between the Commission and state parties.

To enhance the effectiveness of this procedure, the African Commission has employed promotional missions – a proactive approach aimed at facilitating a deeper understanding of the human rights landscape within member states.[65] These missions serve to supplement the information provided in state reports, identify issues that may require further attention and engage in a constructive dialogue with state authorities and relevant stakeholders. Promotional missions organised by the African Commission thus are characterised by their multifaceted nature, incorporating both information

63 Murray (n 6) ch 38 'Article 62: State reporting'.
64 R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015).
65 See eg Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the United Republic of Tanzania, 23-28 January 2023, https://achpr.au.int/en/news/press-releases/2023-02-24/press-statement-promotion-mission-united-republic-tanzania (accessed 21 August 2023).

gathering and interactive engagement. The missions typically entail visits to member states by representatives of the African Commission, including commissioners or Special Rapporteurs, who have specialised knowledge in various human rights domains. The missions thus afford commissioners the opportunity to engage directly with state officials, civil society organisations and other stakeholders, thereby fostering an open and comprehensive dialogue on the human rights situation in the country under review.

During these missions, the African Commission representatives engage in a rigorous examination of the legislative, institutional and policy frameworks that underpin the protection and promotion of human rights. This examination extends to the identification of challenges and gaps that may hinder the full realisation of human rights in the state. By conducting meetings, interviews and site visits, the African Commission aims to gather first-hand information that complements the state reports submitted. This approach not only enriches the Commission's understanding of the context, but also enables a holistic assessment of the human rights situation on the ground. It is suggested that the interactive nature of promotional missions is a hallmark of the African Commission's commitment to fostering collaboration and cooperation with member states. Through face-to-face dialogues, stakeholders are afforded the opportunity to express their concerns, share perspectives and propose solutions to the challenges they face. Such engagement is instrumental in establishing a collaborative framework for addressing human rights issues and promoting positive change. It is submitted that these approaches have more chances of success than adopting forceful measures.[66]

Furthermore, the insights garnered during these missions enable the African Commission to provide tailored recommendations and technical assistance to member states, thereby fostering a more effective implementation of human rights standards. In relation to the promotion of the rights of persons with disabilities, the African Commission's state reporting procedure can be a valuable tool. For instance, in its promotional mission to Namibia, the Commission noted the challenges related to unequal access and lack of inclusiveness in healthcare services, education, public buildings, and transportation for persons with disabilities.[67] As such, by requiring

66 M Jimoh 'Investigating the responses of the African Commission on Human and Peoples' Rights to the criticisms of the African Charter' (2023) 4 *Rutgers International Law and Human Rights Journal* 1; Murray (n 5) 805.

67 Conclusion of the Promotion Mission of the African Commission on Human and Peoples' Rights to the Republic of Namibia 12-16 June 2023, https://achpr.au.int/en/news/press-releases/2023-06-17/press-statement-conclusion-

state parties to report on the measures they have taken to implement the rights of persons with disabilities, the Commission can assess the progress made and identify areas where further action is needed. The promotional missions in tandem with the state reporting procedure can also provide an opportunity for civil society organisations and disabled persons' organisations to engage with the Commission and raise awareness about the rights and needs of persons with disabilities.

Diplomatic mechanisms can ultimately bridge the gap between African Commission decisions and state compliance through the Concluding Observations. For instance, while the Commission has provided recommendations on inclusive policies relating to persons with disabilities in its Concluding Observations on The Gambia, the country has encountered challenges in effectively implementing these.[68] In its Concluding Observations, the Commission acknowledges how The Gambia, in general, is largely compliant with its obligations, but also made specific recommendations in relation to prison conditions and detention centres.[69] Some of these areas of concerns and ensuing recommendations have been highlighted in the Report of the Human Rights Promotion Mission to the Republic of The Gambia from 19 to 24 April 2017.[70] Diplomatic means, such as sustained dialogue and cooperation through the promotion mission to The Gambia in 2017,[71] can therefore facilitate constructive exchanges between the African Commission and states, identify feasible solutions and develop tailored action plans, capacity-building initiatives as well as technical assistance programmes. In its 2017 promotional mission to The Gambia, the Commission also noted the efforts 'to sustain and support the social and rehabilitation facilities existing in the country for vulnerable persons, including vulnerable children, older persons, and persons with disabilities'.[72] It can therefore be argued that states, through diplomatic efforts, can be supported to implement the Commission's recommendations, thereby improving the lives of persons with disabilities, specifically.

promotion-mission-african#:~:text=The%20Delegation%20commends%20the%20Government,regional%20and%20international%20human%20rights (accessed 21 August 2023).

68 African Commission Concluding Observations and Recommendations on the First Periodic Report of The Gambia 3 November 1994, https://achpr.au.int/index.php/en/state-reports/concluding-observations-and-recommendations-gambia-1st-periodic-report-199 (accessed 11 November 2024).

69 Report of the Special Rapporteur EVO Dankwa 'Prison conditions and detention centres in Africa' DOC/05 (XXVI) 123 Mission to The Gambia 21-26 June 1999 31.

70 African Commission Report of the Human Rights Promotion Mission to the Republic of The Gambia 19-24 April 2017, 6 September 2019 50, https://achpr.au.int/en/node/549 (accessed 11 November 2024).

71 As above.

72 African Commission Report (n 70) 2.

This is not to say that the African Commission should not use other mechanisms to ensure compliance with its recommendations. Even while there are legitimate reasons to criticise the article 62 procedure, there are some advantages that can be ascribed to this particular mechanism. In their roles as Special Rapporteurs and participants in working groups of the African Commission, each commissioner has used it to question states about the actions they have taken to address particular challenges.[73] As noted in its Concluding Observations, the Commission has also questioned states about the implementation of their decisions on specific communications.[74] Through these different 'follow-up' mechanisms, the Commission has essentially been able to request the state party to provide information on the steps taken to implement the recommendations, with the possibility to engage further in a dialogue in order to assess progress in subsequent reporting cycles. It is contended that dialogue can and has, to a large extent, become a swift and mighty sword in the hands of the Commission to cajole and induce member states into complying with its decisions. This dialogue should remain as the first port of call before considering other means of implementation.

6 Diplomatic mechanisms to improve implementation and compliance

What emerges from the foregoing discussion is that diplomatic mechanisms stand out as a more viable means to foster compliance with the decisions of the African Commission due to the intricate interplay between state sovereignty, political will and the implementation of human rights norms. It has been noted earlier in this article that the compliance landscape within the African human rights system is often influenced by complex diplomatic considerations that underlie states' engagement with international human rights mechanisms. This is in line with Terman's thesis, which postulates that human rights norms are deeply intertwined with geopolitics and national interests.[75] The international community's response to state violations of citizens' rights, through moral pressure and urging state reform, is influenced by complex geopolitical relationships.[76] Terman thus postulates that while shaming tactics are commonly employed to induce compliance and improve human rights conditions, the outcomes of these efforts are deeply political.

73 Murray (n 5).
74 Murray (n 5), citing, eg, Concluding Observations on Mauritania's Report (16 February 2012).
75 R Terman *The geopolitics of shaming: When human rights pressure works – and when it backfires* (2023).
76 As above.

It follows that particular attention should be paid to how diplomatic mechanisms – as opposed to purely legal or sanctioning mechanisms – can be used to encourage and cajole states to engage in constructive dialogues in working towards aligning their domestic priorities with the observations and recommendations of the African Commission. Such dialogues can potentially enhance the likelihood of compliance by creating an environment that fosters cooperation rather than confrontation. Scholars such as Murray and Long have argued that 'effective monitoring requires a strategic consideration of various tools of monitoring implementation, persuasive and more forceful'.[77] However, they do agree that there needs to be a more nuanced understanding to appreciate at what stages they might be best used. Political mechanisms, different from these forceful measures, tap into the intrinsic link between state governance and human rights compliance. Scholars such as Kittichaisaree argue that human rights implementation often hinges on states' political systems and the alignment of policies with public sentiments.[78] Political mechanisms offer an avenue for states to internalise human rights values through domestic legislation and policies, thereby making compliance a holistic endeavour rather than a mere external obligation.

Examples from the practices of the African Commission as discussed previously in this article underscore the efficacy of diplomatic and political approaches. For example, when the African Commission issues Concluding Observations, it provides recommendations that are contextualised within each state's specific circumstances. These recommendations often take into account the state's socio-economic and political context. It follows that a diplomatic approach has a greater chance of ensuring that the state will be willing to implement these measures. Nonetheless, it is important to acknowledge potential limitations in relying solely on diplomatic and political mechanisms. The voluntary nature of compliance mechanisms and varying state commitments can and do pose challenges in ensuring uniform and effective implementation. Moreover, the slow pace of diplomatic negotiations and political changes can hinder timely human rights improvements.

It follows that the African Commission can create a more conducive atmosphere for diplomatic mechanisms to be used as a springboard for states to comply with its decisions. It is submitted that diplomatic mechanisms of the Commission through the Working Group and

77 Murray & Long (n 7) 852.
78 K Kittichaisaree *International human rights law and diplomacy* (2020).

the state reporting process emerge as vital tools in improving the implementation and compliance with African Commission decisions. This is applicable to all decisions of the Commission, but the focus of this article has been on persons with disabilities. As discussed previously, the Working Group provides a specialised forum in which states can engage with experts and stakeholders to receive targeted advice and support. Meanwhile, the state reporting process facilitates the process of a structured dialogue, whereby states can evaluate their human rights records and receive constructive feedback tailored to their specific socio-economic and political contexts.

What is abundantly clear is that by emphasising negotiations, dialogue and cooperation, these mechanisms can cultivate a sense of ownership and commitment among states, encouraging them to integrate human rights norms into their domestic policies and practices. This approach not only enhances the likelihood of compliance but also promotes a cooperative rather than confrontational environment. In view of maximising the effectiveness of these diplomatic efforts, it is crucial to complement them with strategies that address their inherent limitations, such as the voluntary nature of compliance and the varying levels of state commitment. Combining diplomatic mechanisms with capacity-building initiatives, robust monitoring and, where necessary, persuasive and forceful measures, it is hoped that we can collectively create a more comprehensive and effective framework for upholding the rights of persons with disabilities across Africa.

7 Conclusion

Diplomatic and political mechanisms offer a more pragmatic and effective path to compliance with the decisions of the African Commission. Recognising the intricate interplay between human rights norms, state sovereignty and political considerations, these mechanisms create space for constructive engagement and tailored recommendations that resonate with states' internal dynamics. While challenges remain, the application of these mechanisms acknowledges the complexities of human rights implementation and fosters an environment conducive to compliance. Regrettably, many African states struggle to fulfil their obligations, in particular with regard to the rights of persons with disabilities, thereby weakening the effectiveness of the treaty body system and other instruments such as the African Disability Protocol.

By examining the implications of non-compliance with African Commission decisions, this article sheds light on two potential

mechanisms to counteract the myriad ways in which persons with disabilities continue to face attitudinal, environmental and systemic barriers. It underlines how the lack of implementation to a certain extent undercuts the Commission's credibility, thereby hampering the development of a culture of human rights for persons with disabilities. With the entry into force of the African Disability Protocol, it is anticipated that more communications dealing with the rights of persons with disabilities will be submitted to and decided by the African Commission. In order to address these chronic deficiencies, diplomatic mechanisms such as negotiations, dialogue and cooperation can serve as catalysts for change in respecting, protecting and fulfilling the rights of persons with disabilities. Particular attention should thus be paid in fostering diplomatic relations between the African Commission, African states and relevant stakeholders, such as disability rights and civil society organisations. In particular, the Working Group and the state reporting process can be used to enhance compliance with the various decisions of the African Commission. Through sustained engagement and dialogue, diplomatic efforts can eventually encourage states to prioritise disability rights, mainstream disability inclusion into national policies, and strengthen implementation mechanisms.

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Systematising monitoring: The case for a special mechanism for following up on the implementation of decisions by the African Commission on Human and Peoples' Rights

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Summary: *The African Commission on Human and Peoples' Rights has, since its inauguration on 2 November 1987, struggled to follow up on the implementation of its decisions and recommendations. Despite having received roughly 133 state reports and approximately 900 communications, only about two-thirds of these are estimated to have been considered and determined. Due to several setbacks, including budgetary considerations, understaffing and a backlog of pending cases, the Commission's mandate to ensure the protection of human and peoples' rights and interpret the provisions of the African Charter on Human and Peoples' Rights is often complicated by the continental scope*

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and complexity of its equally-important mandate to promote human and peoples' rights. As if these challenges were not enough, the Commission is continuously overwhelmed by the responsibility not only to convene its ordinary sessions four times a year during which it considers state reports and contentious cases submitted to it, but also to ensure that its decisions are implemented by the state parties concerned. To offset the imbalance foisted by these responsibilities against the multifaceted human rights challenges pertaining to individuals, marginalised and vulnerable groups and particular human rights themes, the Commission created special mechanisms. However, after more than four and a half decades, the Commission is yet unable to address – in a systematic way – the growing spate of non-compliance by state parties with its decisions and recommendations. This article, therefore, seeks to articulate that the growing volume of non-implemented decisions and recommendations has reached a critical point, necessitating the establishment of a special mechanism dedicated to the follow-up and implementation of its decisions and recommendations handed down in contentious and non-contentious cases. The article adopts an institutional approach in making the case that a dedicated special mechanism has become a necessity for enabling the Commission to routinely and systematically follow up, track and better monitor state party compliance with its decisions. The article finds that such a special mechanism will aid the Commission to better engage state parties on their obligations under the African Charter and consistently report on its implementation mandate.

Key words: *special mechanism; implementation; decision; recommendations; African Commission on Human and Peoples' Rights*

1 Introduction

The decisions and recommendations of the African Commission on Human and Peoples' Rights (African Commission) would be meaningless if domestic implementation is unmonitored. The decisions and recommendations of the African Commission are the inferences and propositions reached on state party reports, individual and inter-state communications, the reports on country or thematic human rights issues and missions, resolutions, and other instruments adopted by the African Commission. Under the African Charter on Human and Peoples' Rights (African Charter), the African Commission is the primary treaty body responsible for monitoring

the implementation of the provisions of the African Charter.[1] Its mandate is broad, comprising the following elements: the promotion of human and peoples' rights; ensuring the protection of human and peoples' rights in Africa; and interpretation of the provisions of the African Charter.

The African Commission's mandate to *promote* human and peoples' rights requires the performance of an extensive list of functions. This includes the responsibility to receive and analyse documents; undertake studies and research on human and peoples' rights challenges in Africa; organise conferences, seminars and symposiums; disseminate information; inspire national human rights institutions (NHRIs) and local organisations; and give guidance to states on the domestic implementation of their obligations under the African Charter.[2] As part of its function to promote human and peoples' rights under article 45(1)(a) of the African Charter, the African Commission is empowered to formulate and prescribe principles and rules targeted at solving legal issues pertaining to human and peoples' rights that should influence domestic legislation in African countries. The promotion mandate also requires the Commission to cooperate with other African and international institutions working in the field of human and peoples' rights. Additional to the extensive bandwagon of promotion functions of the Commission is the mandate to *ensure the protection of human and peoples' rights* in Africa and interpret the provisions of the African Charter. The choice of the phrase 'ensure the protection of human and peoples' rights' rather than 'protect human and peoples' rights', as used in the Africa Charter, is particularly instructive. It is instructive in that it presupposes that the responsibility to protect human and peoples' rights ultimately is that of states. This is because, at the inception of the African Charter, the Organisation of African Unity (OAU), now the African Union (AU), did not consider that 'the protection of human rights has been regarded as an overriding consideration'.[3]

The African Commission's broad mandate to promote and protect human rights is fortified by the imperative of state action. On the

1 African Charter art 45; R Murray & D Long 'Monitoring the implementation of its own decisions: What role for the African Commission on Human and Peoples' Rights?' (2021) 21 *African Human Rights Law Journal* 837-838; F Viljoen *International human rights law in Africa* (2012) 340-341; H Onoria 'The African Commission on Human and Peoples' Rights and the exhaustion of local remedies under the African Charter' (2003) 3 *African Human Rights Law Journal* 1-2.

2 R Murray & D Long *The implementation of the findings of the African Commission on Human and Peoples' Rights* (2015) 3, 33, 44, 64, 210 & 242.

3 GJ Naldi 'Future trends in human rights in Africa: The increased role of the OAU?' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights: The system of practice, 1986-2000* (2002) 1, 3.

one hand, the promotion of human and peoples' rights requires the African Commission to 'collect' information on the situation of human rights in a state and 'give its views or make recommendations to governments'.[4] This responsibility is reinforced by the obligation of state parties to submit periodic reports to the Commission on the respective measures that they have adopted to give effect to the rights and freedoms enshrined in the African Charter.[5] On the other hand, ensuring the protection of human and peoples' rights requires the Commission to receive, consider and determine complaints alleging violations of the provisions of the African Charter by a state party concerned. After consideration of the reports and complaints submitted to it, the Commission presents its findings and recommendations for domestic implementation.

This article seeks to address the widespread concern among scholars of the African human rights system that the (in)effectiveness of the Commission's monitoring role has reached a critical point necessitating the establishment of a special mechanism for following up on the implementation of its findings and recommendations to states.[6] Murray and others argue that while some measures have been taken previously by the Commission to establish processes to monitor the implementation of decisions, the role assigned in doing so 'is confused' and does little to capitalise on their institutional strengths.[7] Utilising an institutional approach, I argue that for the African Commission to effectively monitor domestic implementation, it needs to have in place an appropriate and well-coordinated system for following up on the implementation of its findings and commendations. *Follow-up*, in this article, refers to the process by which the Commission methodically monitors and seeks information on the steps taken by a state party after the delivery of its findings and recommendations.[8]

An often-repeated criticism against the African Commission's weak supervisory role is its lack of an enforcement mechanism to track implementation at the domestic level.[9] Some scholars argue

4 African Charter art 45(1)(a).
5 African Charter art 62; Rule 78 of the Rules of Procedure of the African Commission 2020.
6 R Murray and others 'Monitoring implementation of the decisions and judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150, 158.
7 Murray and others (n 6) 150.
8 Murray & Long (n 2) 30.
9 VO Ayeni & A von Staden 'Monitoring second-order compliance in the African human rights system' (2022) 6 *African Human Rights Yearbook* 3, 5; GM Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and Peoples' Rights: A possible remedy' (2006) 6 *African Human Rights Law Journal* 468.

that to ensure domestic compliance, clear monitoring processes are necessary for better implementation outcomes.[10] Strangely, since inception to date, the African Commission is yet to systematise its processes for following up on domestic implementation by states. In the recent past and currently, it has had to embellish this task within the framework of 'commissioners' promotion activities to the states parties concerned'[11] pursuant to the 2010 and, subsequently, the 2020 Rules of Procedure. In other words, the Commission's main point of engaging with follow-up activities has been during its promotion and fact-finding missions to the territories of state parties. The Commission has also had to adopt the haphazard approach of occasionally convening regional conferences on the implementation of its decisions and recommendations.[12] Such *ad hoc* activities trivialise the high stakes associated with engaging states on their implementation of the Commission's decisions and recommendations, which an institutionalised follow-up mechanism would better address.

The institutional approach to follow-up proposes that for the Commission to achieve a measurable and evidence-based system of domestic implementation of its decisions and recommendations, it is imperative to establish within the Commission's internal processes a dedicated mechanism for that purpose. I make this proposal for several reasons. First, as Murray and Mottershaw argue, 'national mechanisms cannot be the only approach to follow up and implementation'.[13] An institutionalised mechanism will help to effectively coordinate the Commission's engagement with national authorities in a way that keeps track of the nature and scope of domestic implementation of its findings and propositions. While states' perceptions remain a critical neutralising factor fuelling non-implementation and non-compliance with Commission decisions domestically, the outright lack of a well-directed system of bureaucratically and diplomatically engaging states on the Commission's end may have deepened state reticence. Second, a coordinated consideration of how states implement the Commission's decisions and recommendations will assist the Commission with a feedback loop that informs the practicality and impact of such recommendations on the ground.

10 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights between 1993 and 2004' (2007) 101 *American Journal of International Law* 33; Wachira & Ayinla (n 9) 466, who argue that '[a] human rights guarantee is only as effective as its system of supervision'.

11 Rules of the Procedure of the African Commission 2020 Rule 83(2).

12 Murray & Long (n 1) 843.

13 R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349, 352.

Third, a systematised internal process of monitoring will afford the Commission an opportunity to frequently assess state party implementation and compliance and receive periodic inter-session activity reporting from the proposed follow-up mechanism, which is a practice that is not currently in place. More importantly, Rule 25 of the Rules of Procedure of the African Commission 2020 makes this proposal workable because it allows the Commission to establish a special mechanism that will 'present a report on its work to the Commission at each ordinary session'.[14]

In undertaking this analysis, the article adopts a five-part structure to justify the call for the immediate establishment of a special mechanism responsible for follow-ups. This introductory part has set the scene for the Commission to consider adopting an institutional approach to better monitor state implementation of its conclusions and recommendations. The next part considers the current challenges associated with implementing the Commission's decisions and recommendations. The third part vindicates the necessity for a special mechanism for follow-up. The fourth part, thereafter, considers the role of the proposed special mechanism, while the final part summarises and concludes the analysis.

2 Current challenges in implementing the African Commission's decisions

The effectiveness of the treaty-monitoring role of the African Commission significantly rests not on the loudness of its proclamations, but on the respect and seriousness that state parties to the African Charter ascribe to its views and suggestions.[15] Handing down decisions and recommendations for compliance without necessarily monitoring domestic implementation by state parties weakens the guiding authority of the African Commission to subsequently give decisions and recommendations to governments.[16] In this part I consider the various factors militating against the domestic implementation of the Commission's decisions and recommendations.

14 Rules of Procedure of the African Commission 2020 Rule 25(3).
15 CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedures' (1998) 20 *Human Rights Quarterly* 235, 279.
16 African Charter art 45(1)(a).

2.1 The deficit of systematically monitoring domestic implementation

For the almost four decades of its establishment, the African Commission has barely been able to keep up with the task of tracking the status of implementation of its decisions and recommendations. Attempts to justify the reasons for the seemingly weak monitoring of how its findings are implemented have often been attributed to a number of drawbacks, which I will deal with very briefly.

First, the equivocal phrasing of the substantive provisions of the African Charter text itself, including the provision of 'claw-back' clauses[17] and the quasi-judicial character of the African Commission, seem to allow states some leg room to consider whether or not to implement the Commission's determinations.[18] This textual deficit and absence of any express wording mandating the Commission to follow up beyond the periodic reporting requirements under the African Charter and its supplementary protocols suggest that domestic enforcement of the Commission's decisions and recommendations is at the discretion of relevant national authorities.[19] The lack of an express provision in the African Charter conferring on the Commission the authority to monitor domestic implementation may have left the Commission hanging as to the intendments of the drafters and created an enduring puzzle on whether it can constitutionally formalise the follow-up process without attracting a punchy backlash from states. Viljoen argues that despite the absence of any express wording, the African Charter 'implicitly allows for and, in fact requires, follow-up'.[20]

Second, beyond the textual limits of the African Charter, the African Commission was initially not sufficiently proactive in taking advantage of the opportunity it has to make its own rules for monitoring domestic implementation. Under the African Charter, the Commission is empowered to 'lay down its rules of procedure'.[21] On the strength of this provision, it has over the years enacted a number of procedural rules to guide the execution of its treaty mandate. However, until the 2010 revision of the Commission's Rules of Procedure, 'there was no institutionalised procedure to follow up on decisions'.[22] A careful look at the historical iteration of the Commission's rules will reveal that earlier versions of the

17 Naldi (n 3) 6.
18 As above.
19 As above. See Grand Bay Declaration para 15; Kigali Declaration para 27.
20 Viljoen (n 1) 341.
21 African Charter art 42(2).
22 Murray & Long (n 1) 842.

Rules made no provision for following up on implementation. For instance, the Commission adopted its first Rules of Procedure on 13 February 1988, pursuant to article 42(2) of the African Charter.[23] The 1988 Rules of Procedure were subsequently revised in 1995, which led to the adoption of the Rules of Procedure on 6 October 1995.[24] Even this subsequent revision, about a decade after the Commission's establishment, did not feature any transformative provision for monitoring states' implementation of its decisions and recommendations through an institutionalised process.

The omission in the Commission's Rules in respect of a formalised follow-up system was subsequently partly addressed, with the adoption of an improved version of the Rules of Procedure in 2010 and 2020, respectively.[25] I say 'partly' because the provision for follow-up in these subsequent Rules of Procedure merely formally stipulated a process for following up on domestic implementation. They did not seek to establish a dedicated mechanism within the internal processes of the Commission to undertake the follow up of states' implementation of the findings and recommendations contained in the Commission's Concluding Observations and decisions on contentious cases.[26] Under Rules 78, 90 and 112 of the Rules of Procedure of the African Commission 2010 respectively, the Commission took the first step to prescribe its procedural processes for monitoring domestic implementation of its Concluding Observations, on the one hand, and decisions on cases settled amicably or determined on the merit, on the other.

23 The first Rules of Procedure of the African Commission was adopted on 13 February 1988 during its 2nd ordinary session in Dakar, Senegal, held from 2-13 February 1988. Also see UO Umozurike 'The procedures of the African Commission on Human and Peoples' Rights for the protection and promotion of human rights' (1992), https://policycommons.net/artifacts/1155972/the-procedures-of-the-african-commission-on-human-and-peoples-rights-for-the-protection-and-promotion-of-human-rights/ (accessed 21 July 2023).

24 The second Rules of Procedure of the African Commission were adopted on 6 October 1995 during its 18th ordinary session in Praia, Cabo-Verde, held from 2 to 11 October 1995.

25 27th extraordinary session held in Banjul, The Gambia from 19 February to 4 March 2020.

26 Concluding Observations refer to the findings and recommendations by a treaty-monitoring body on the reports of state parties submitted under a particular human rights treaty. In the context of the African Commission, Concluding Observations are the observations made on state party reports submitted pursuant to art 62 of the African Charter and relevant provisions of the supplementary protocols. They contain general and specific recommendations for state parties to comply with their obligations under the African Charter and other relevant regional and international human rights instruments. Conversely, communications resolved by amicable settlement or determined on the merits are cases that have been submitted before the Commission for a determination as to whether or not there has been a violation of the rights and freedoms enshrined in the African Charter and any other relevant African human rights instrument.

With regard to Concluding Observations, Rule 78(2) of the 2010 Rules of Procedure required members of the Commission to 'ensure the follow-up on the implementation of the recommendations from the Concluding Observations within the framework of their promotion activities to the states parties concerned'. A main consequence of the obligation under this Rule is this: Unless promotion activities such as convening the ordinary sessions of the Commission or conducting thematic activities and meetings, country visits or missions to the territory of a state party were undertaken by the Commission, commissioners or the Commission did not have to undertake follow-up actions with states. In other words, Rule 78(2) of the 2010 Rules of Procedure did not create an institutional mechanism for conducting follow-up actions in the absence of any formal convenings or promotion activities to state parties.

Remarkably, Rule 78(2) of the 2010 Rules of Procedure is largely retained in Rule 83(2) of the Rules of Procedure of the African Commission 2020.[27] However, though similarly worded, Rule 83(2) goes a step further by providing that 'members [of the Commission] may request or take into account contributions by interested parties or invited institutions, on the extent to which those recommendations have been implemented'. This addition to the original wording of Rule 78(2) of the 2010 Rules of Procedure in Rule 83(2) of the 2020 Rules of Procedure takes into consideration the importance of infusing the opinions and support of civil society organisations (CSOs) in the process of monitoring domestic implementation of the Concluding Observations and recommendations made by the African Commission after the consideration of state party reports. Unfortunately, it does no more than that. The improved Rule 83(2) of the 2020 Rules also does not create a dedicated mechanism for monitoring domestic implementation when no sessions are convened, or missions undertaken to the territory of state parties.

With regard to cases (communications) submitted before the African Commission, follow-up actions are mandated by the post-2010 Rules of Procedure in respect of two categories of cases: cases resolved amicably, and cases decided on the merit. With respect to the first category, Rule 90 of the 2010 Rules of Procedure made provision for follow up on complaints resolved through the parties' amicable settlement. Specifically, Rule 90(8) required the Commission, acting

27 The 2020 Rules of Procedure of the African Commission were adopted during the 27th extra-ordinary session held in Banjul, The Gambia, from 19 February to 4 March 2020.

through the commissioner rapporteur of a communication,[28] to undertake follow up and report on monitoring the implementation of the terms of the settlement agreement to each subsequent ordinary session of the Commission until the settlement is concluded. Such a report was to subsequently form part of the Activity Report of the Commission to the AU Assembly.

The provision of the 2010 Rules of Procedure on monitoring the implementation of amicable settlements is revised in the 2020 Rules of Procedure of the African Commission. Rule 112(7) of the 2020 Rules of Procedure provides that '[t]he Commission's confirmation of a settlement shall be regarded as a decision requiring implementation and related follow-up for the purposes of these Rules'. However, unlike the 2010 Rules that required follow-up of implementation of the Settlement Agreement by the commissioner rapporteur responsible for the communication concerned, the 2020 Rules does not expressly impose that responsibility on the rapporteur.[29] This leaves to conjecture whether it can be nevertheless implied because sub-Rule (3) provides for the appointment of a rapporteur to lead the settlement process or whether it is the responsibility of the bureau of the Commission to undertake the necessary follow-up.

With respect to the second category, under the 2010 Rules, the parties have an obligation to inform the Commission in writing, within 180 days of being notified of the decision, of all measures taken by the state party to implement the decision of the Commission. The Commission could request the state party concerned to supply further information on the measures taken in respect of the decision within 90 days of receiving the state's response. If no response is received, the Commission could send the state a reminder to furnish the information within 90 days of the date of the reminder. However, Rules 112(5) to (9) of the 2010 Rules of Procedure of the African Commission mandated the rapporteur for a communication or any other commissioner specifically designated for that purpose to monitor the measures taken by a state party concerned to give domestic effect to the Commission's recommendations on the communication.

The rapporteur had a discretion as to the national authorities to contact and the appropriate actions to take to discharge this

28 Under the Rules of Procedure, a commissioner rapporteur is designated to be in charge of a communication submitted before the Commission. See Rules of Procedure of the African Commission 2010 Rules 88(2), 90(4)(a) & 97(1); and Rules of Procedure of the African Commission 2020 Rules 93(1), 112(3)(a) & 110(2).

29 Rules of Procedure of the African Commission Rule 123(7).

monitoring responsibility, including making recommendations for further action by the Commission. The rapporteur was also required to present, at each ordinary session, the report during the public session on the implementation of the Commission's recommendations. Furthermore, the 2010 Rules required the African Commission to draw the attention of the Sub-Committee of the Permanent Representatives Committee and the AU Executive Council to any situations of non-compliance with the Commission's decisions and include information on any follow-up activities in its Activity Report. In practice, however, it remains unclear the extent to which commissioner rapporteurs responsible for cases have submitted or presented *intersession activity reports* on the state of implementation of the Commission's decisions on the merits during the ordinary sessions of the African Commission since the adoption of the 2010 Rules. To be clear, *intersession activity reports* refer to the reports of commissioners on the various activities undertaken in respect of their country monitoring and special mandates after the last ordinary session of the African Commission. Such intersession activity reports are often considered during the public session of the Commission.

A cursory look at the intersession activity reports of commissioners between 2010 and 2020 shows mostly broad references to non-implementation of decisions by particular states in a number of reports. These references have often bordered on the general state neglect to implement recommendations in Concluding Observations and decisions on communications or letters of commendation given to a state for enacting legislation striking off one or few line items in the Commission's recommendations.[30] The intersession activity reports have contained very negligible information on the state of implementation of Commission decisions in particular cases. It may seem that this weak observance of Rule 112 by commissioner rapporteurs over the course of a decade contributed to the declining authority of the African Commission to follow up on cases requiring national authorities to take urgent implementation measures. More importantly, the low performance by commissioners in this regard may have also snowballed into the weak implementation of the 2020 Rules.

The 2020 Rules of Procedure of the African Commission substantially improve upon the provisions of the 2010 Rules with regard to the follow up of cases decided on the merit. Much like Rule

30 Under Rule 7(e) of the 2020 Rules of Procedure of the Commission, commissioners have a responsibility to facilitate 'the implementation of a provision of the Charter or its Protocols'.

112 of the 2010 Rules, Rule 125 of the 2020 Rules of Procedure of the African Commission imposes a duty on the parties to inform the Commission in writing, within 180 days of the date of transmitting the decision to them, of all action taken by the state party to implement the Commission's decision.[31] Within 90 days of receiving the state's written response, the Commission may request further information from a state concerned on the measures taken in response to its decision.[32] If the Commission receives no response, it may send a reminder to the state party concerned to furnish an update within 90 days from the date of the reminder.[33] The African Commission may also ask a national or specialised human rights institution with affiliate status to notify it of any measure it has taken to monitor or facilitate the implementation of the Commission's decision.[34]

As in the case of the 2010 Rules, it is the commissioner rapporteur or any other designated commissioner who is responsible for monitoring the actions taken by the state party to give effect to the Commission's decision under the 2020 Rules of Procedure.[35] The rapporteur may contact such national authorities and take such action 'as may be appropriate to fulfil his or her assignment, including recommendations for further action by the Commission as may be necessary'.[36] They may also request or consider, at any stage of the follow-up proceedings, information from interested stakeholders regarding the extent of the state party's compliance with the Commission's decision. However, unlike the 2010 Rules, it is the bureau of the African Commission rather than the rapporteur for the communication that has a duty to report at the ordinary session on the implementation of its decisions.[37] Rules 125(8) and (9) of the 2020 Rules allow the Commission to highlight in its Activity Report or refer matters of non-compliance with its decisions to the competent policy organs of the AU as provided in Rule 138 in order for 'those organs to take the necessary measures for the implementation of its decisions'.[38]

Again, the absence of an institutionalised process of monitoring domestic implementation of decisions and recommendations under the 2020 Rules continues to be a fundamental setback for the African

31 Rules of Procedure of the African Commission 2020 Rule 125(1).
32 Rules of Procedure of the African Commission 2020 Rule 125(3).
33 Rules of Procedure of the African Commission 2020 Rule 125(4).
34 Rules of Procedure of the African Commission 2020 Rule 125(2). *Cf* Rule 70(3) of the 2020 Rules of Procedure of the African Commission 2020.
35 Rules of Procedure of the African Commission 2020 Rule 114(6); Rules of Procedure of the African Commission 2020 Rule 125(5).
36 Rules of Procedure of the African Commission 2020 Rule 125(6).
37 Rules of Procedure of the African Commission 2020 Rule 125(7).
38 Rules of Procedure of the African Commission 2020 Rule 138.

Commission. From March 2020 to date, no institutionalised system has been put in place to track state party compliance with previously-handed down and newer decisions and recommendations. In the wake of the novel coronavirus 2019 (COVID-19), the Commission's activities and missions to the territories of state parties for 2020 and 2021 were severely hampered by the global COVID-19 lockdowns. Consequently, the switch to online activities meant that commissioners could not undertake promotion activities and missions through which to follow up on outstanding decisions and recommendations that have not yet been implemented by states. Only until 2022 did the Commission return to physical meetings and activities. Since then, the African Commission has been pre-occupied with a slouch of programmes and activities, enough to keep it distracted from the significant task of following up on domestic implementation.

Third, the lack of any institutionalised mechanism for tracking and following up on the extent of state parties' domestic implementation has often left that part of the Commission's monitoring role on autopilot. So far since 1986, the Commission has considered upwards of 133 state party reports. It has given its Concluding Observations on a majority of those reports, with a few still outstanding. Correspondingly, the Commission has received roughly 900 communications, approximately two-thirds of which have been determined. However, there is no indication of what decisions have and what decisions have not been implemented or the extent to which state parties have implemented any of the Commission's historical findings.[39] Despite having a rebranded website, the Commission is yet to have a stable and sustainable monitoring system in place – either at the Secretariat or online – to keep track of the status of domestic implementation. Lacking such a dedicated mechanism and having commissioners come and go periodically increase the danger of blotting out the Commission's institutional memory on state implementation over time.

In the fairly recent past, the African Commission has organised three regional seminars on the implementation of its various decisions and recommendations for state parties and other stakeholders in Africa. The first seminar was convened in Dakar, Senegal from 12 to 15 August 2017 with a focus on the sub-regions of Central and West;[40] the second seminar was convened in Zanzibar, Tanzania from

39 Murray & Long (n 1) 842.

40 African Commission 'Report of the Regional Seminar on the Implementation of Decisions of the African Commission on Human and Peoples' Rights 12-15 August 2017, Dakar, Senegal' 29 August 2018, https://achpr.au.int/en/news/statements/2018-08-29/report-regional-seminar-implementation-decisions-african (accessed 4 July 2023).

4 to 6 September 2018 with a focus on East and Southern Africa; and the third seminar was held in Pretoria, South Africa from 13 to 15 September 2023.[41] The objective of the three regional seminars was specifically to assess the progress made in state party implementation of the Concluding Observations and other decisions issued by the African Commission. At the end of the seminars, stakeholders noted that some of the reasons for the poor implementation of the African Commission's decisions were multi-dimensional and affected various stakeholders; that is, they bordered on challenges faced not only by the African Commission, but also by concerned states and the applicable NHRIs and CSOs engaged in human rights at the domestic level.[42]

2.2 Too many responsibilities exceeded by too few resources

The lack of an efficient follow-up mechanism is exacerbated not only by the enormity of the African Commission's mandate but also by the meagre resources available to it. Currently, the human and material resources at the Commission's disposal are distressingly disproportionate to the magnitude and continental scope of its broad mandate under the African Charter and other relevant instruments. Since its establishment in 1986, the African Commission has been bogged down by a growing number of setbacks. This includes the absence of a permanent headquarters; low budgetary allocation commensurate to its mandate; extreme understaffing; and a backlog of hundreds of pending cases.

In spite of the several limitations facing it, the African Commission is expected to discharge its promotion and protection mandate in respect of the 54 state parties to the African Charter, each with its own socio-political and economic challenges and complexities. While grappling with the continental scale of its responsibilities, the African Commission is continuously overawed by the task of convening its ordinary sessions at least four times a year. During the sessions, the Commission publicly engages states on the contents of their periodic reports, reviews the inter-session activities of commissioners and the respective special mechanisms they lead, and considers in private

41 African Commission 'Press Release: Regional Seminar on Implementation of the Decisions of the Commission' 5 August 2018, https://achpr.au.int/en/news/press-releases/2018-08-05/press-release-regional-seminar-implementation-decisions-commis (accessed 4 July 2023); Centre for Human Rights (University of Pretoria) 'Centre for Human Rights holds a conference on implementation and domestic impact of the decisions of the African Commission on Human and Peoples' Rights' 22 September 2023, https://t.ly/vp5Ix (accessed 31 October 2023).

42 Murray & Mottershaw (n 13) 360-361.

the complaints (cases) submitted to it. The retinue of back-to-back activities before, during and after the ordinary sessions and their impact on commissioners and the small professional staff at the Secretariat suggests that the African Commission often has barely any resources left to monitor the implementation of its decisions by state parties concerned.

2.3 Weak monitoring as the African Commission's albatross

The African Commission's credibility and guiding authority is at a crossroads. The pivotal role that the Commission plays in upholding and safeguarding human rights across the African continent all the more makes it important to proactively address the challenge of non-compliance by states from an institutional standpoint. To preserve its guiding authority, it is imperative that the Commission's monitoring and guiding authority is maintained to effectively address the challenges it faces. One of the most pressing issues is the inadequate commitment displayed by certain state parties. Many state parties to the African Charter demonstrate a lack of political will in implementing the Commission's decisions and recommendations, including provisional measures. This undermines the authority of the Commission and weakens its ability to ensure the protection of human rights.

Yet, addressing functional shortcomings is crucial for the Commission's efficacy. For example, clarity in the types of remedies granted and the responsible institutions for monitoring implementation at the national level is necessary to ensure measurability in the implementation process, consistency and accountability. The Commission is yet to take full advantage of its rule-making powers under the African Charter to, at the very least, monitor the enforcement of its decisions at the national level, thereby fostering a stronger commitment to its recommendations and recommendatory authority. As Odinkalu notes:[43]

> The Commission was not created to be a weak institution entirely at the mercy of forces outside its control and beyond its influence. Quite to the contrary, the Commission enjoys a wide but grossly under-utilised latitude for independent initiative, especially through its promotional and advisory mandates.

Also, non-compliance by state parties with their commitments under article 62 of the African Charter and the reporting obligations

43 CA Odinkalu 'Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights' in Evans & Murray (n 3) 176, 216.

under the supplementary protocols erodes the effectiveness of the Commission's oversight mechanism.[44] It is disconcerting that some states prioritise the Universal Periodic Review (UPR) over their obligations under these critical provisions. This not only diminishes the importance of the Commission's decisions but also hampers the progress towards a unified human and peoples' rights framework in Africa. Another critical challenge to the Commission's credibility is states' perception that implementation of recommendations in the Concluding Observations and decisions on communications is voluntary due to its quasi-judicial nature. This perception must be rectified to reinforce the implicit bindingness of the Commission's decisions, which draw from the binding obligations enshrined in the African Charter.[45] In other words, while the African Commission's decisions may be, rightly or wrongly, considered by states to be non-binding, the omnibus obligations to comply with the African Charter, establishing the same Commission, should be understood to imply that state parties have agreed in principle and in law to be bound by the Commission's recommendations.[46] Therefore, the quasi-judicial nature of the Commission and the sovereign authority of states should not be an excuse for non-implementation of recommendations that protect human rights and advance democratic accountability, as the recommendations are designed to strike a balance between domestic contexts and universal human rights norms.

Financial and institutional capacity constraints continue to impede the Commission's efficiency. Inadequate financial resources and limited human resources hinder timely adoption, the publication of Concluding Observations, and handling of correspondences and communications. Sometimes delayed publication or non-publication of recommendations also obstructs the effective dissemination of the Commission's decisions for appropriate action. Timely publication of decisions is crucial for the public to be aware of and demand accountability from their governments. To overcome these barriers, increased investment in the Commission's human and material resources is essential to ensure its ability to effectively fulfil its mandate. Establishing sustained communication and engagement with state parties is equally necessary to foster cooperation and compliance. Unfortunately, the Commission's relatively weak communication with

44 M Evans, T Ige & R Murray 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 3) 36, 37.

45 C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 39-42; Viljoen & Louw (n 10) 13 are of the opinion that '[t]he implementation of treaty body findings depends on the will of state parties'.

46 Okoloise (n 45) 39-42.

states and the general public tends to hinder its visibility and impact. As such, a well-defined and integrated communication strategy that efficiently supports an institutionalised follow-up mechanism is vital to promote the Commission's visibility within Africa and beyond.

3 The necessity for a new special mechanism for follow up

Addressing the challenges faced by the African Commission with respect to efficiently following up on the status of implementation of decisions and recommendations requires a robust institutional approach. Currently, the Commission has 16 special mechanisms, comprising 12 single and group thematic mechanisms and four internal mechanisms (see Figure 1 below for the current list of special mechanisms).[47] While the Commission has made notable strides in various thematic areas through the work of its special mechanisms, none of these specifically deals with the issue of follow up. Even the Working Group on Specific Issues, which should ideally have been tasked with the important role of following up on implementation, has largely had a nebulous mandate, low public engagement and unclear impact. Even although the African Charter does not specifically list 'follow-up' as a direct responsibility of the Commission, the Commission must not resign to the fate, poignantly described by Odinkalu, that it is 'a juridical misfit with a treaty basis that is dangerously inadequate and an institutional mechanism liable, ironically, to be slated as errant when it pushes the envelope of interpretation positively'.[48]

The essence of an institutionalised system of conducting follow ups and monitoring is bolstered by the existence of such implementation monitoring mechanisms at the level of the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) and the African Court on Human and Peoples' Rights (African Court). In the case of the African Children's Committee (which has a strikingly similar mandate to that of the Commission) the lack of an express provision for following up on implementation of its decisions and recommendations to state parties to the African Charter on the Rights and Welfare of the Child (African Children's Charter) has not prevented the Committee from establishing a mechanism for monitoring domestic implementation.

47 African Commission 'Special mechanisms', https://achpr.au.int/en/special-mechanisms (accessed 14 August 2023).
48 Odinkalu (n 43) 179.

On 8 September 2020 the African Children's Committee established the Working Group on Implementation of Decisions (WGID), with no comparable mechanism at the African Commission since its establishment.[49] The WGID was established pursuant to article 38(1) of the African Children's Charter and Rule 58 of the Revised Rules of Procedure of the African Children's Committee to monitor progress in implementing its decisions and recommendations. The goal is to ensure state parties fully implement all decisions and recommendations through ongoing review and targeted activities. In the Resolution establishing the WGID, the Committee noted that the need 'to regularly assess [*sic*] whether the actions taken by states constitute a satisfactory remedial response' and 'the fact that regular and continued monitoring of states' compliance with the decisions and recommendations of ACERWC is key to the full realisation of children's rights' were important considerations for deciding to establish a special mechanism on implementation of decisions.[50] In 2022 the African Children's Committee adopted an amendment to the 2020 Resolution in order to expand the scope of decisions to be monitored by the WGID to include decisions by other AU policy organs and institutions relating to children in Africa.[51]

One of the very first activities to be undertaken by the WGID is the draft study on the status of implementation of decisions and recommendations of the African Children's Committee.[52] The primary objective of the study is to evaluate the implementation status of the Committee's decisions and recommendations. Although yet to be adopted, the study's methodology involved a comprehensive review of the Committee's decisions and data collection conducted by the consultant. To enrich the study with practical insights, questionnaires were distributed to all member states, NHRIs and CSOs. The study received responses from only nine state parties, seven NHRIs and three CSOs.[53] The study presents major findings, recommendations

49 African Children's Committee 'Working Group on Implementation of Decisions' 8 September 2020, https://www.acerwc.africa/en/special-mechanisms/working-groups/working-group-implementation-decisions (accessed 31 October 2023); African Children's Committee 'Final Report: Workshop on implementation of ACERWC decisions and recommendations' (23-24 February 2023) 17, https://www.acerwc.africa/sites/default/files/2023-04/Final%20Report_EN_Workshop%20on%20Implementation%20of%20ACERWC%20Decisions%20and%20Recommendations-March%2024%202023.pdf (accessed 6 June 2024).

50 African Children's Committee 'Resolution on the Establishment of a Working Group on Implementation of Decisions and Recommendations' adopted during the 35th ordinary session of the African Children's Committee held virtually from 31 August to 8 September 2020.

51 African Children's Committee 'AMENDMENT: Resolution on the Establishment of a Working Group on Implementation of Decisions and Recommendations' adopted during the 40th ordinary session of the African Children's Committee held from 23 November to 1 December 2022 in Maseru, Lesotho.

52 African Children's Committee 'Final Report' (n 49) 17.

53 As above.

and conclusions, offering an overview of the present status of the implementation of decisions on communications and assessing the challenges faced by state parties in executing the Committee's decisions. The draft also examines the role of the Committee in encouraging state parties to enhance the effectiveness and efficiency of NHRIs. The recommendations specifically emphasise the significant role NHRIs could play in implementing and monitoring the follow-up of its decisions and recommendations.[54]

To deepen the effectiveness of the WGID, the African Children's Committee at its 43rd ordinary session held from 15 to 25 April 2024 decided to expand the WGID's membership to include four external experts in the field knowledgeable on the subject matter of state party compliance and domestic implementation. The expansion is intended to drive its activities and programmes on monitoring implementation.[55] Those selected as experts will be appointed immediately after the 13 June 2024 deadline and their responsibilities will include supporting the WGID in disseminating the Committee's findings and recommendations; providing expertise and drafting documents, standards, guidelines, and policy briefs; offering technical assistance to the Committee; and regularly gathering information from civil society actors and NHRIs on the implementation of the Committee's decisions and recommendations.[56] On 1 April 2022 the Committee adopted Resolution 16/2022 on implementation of decisions and recommendations of the African Children's Committee by calling upon states, NHRIs and CSOs to establish and coordinate domestic mechanisms for the implementation of its decisions and recommendations.[57]

From 23 to 24 February 2023 the African Children's Committee's convened a continental workshop on implementation of its decisions and recommendations in Nairobi, Kenya, led by the WGID.[58] The workshop aimed to achieve several critical objectives, including raising awareness about the Committee's findings and recommendations; outlining the structures and roles of NHRIs in child rights protection; sharing best practices from NHRIs and CSOs on implementing the

54 As above.
55 African Children's Committee 'Appointment of External Experts for the Working Group on the Implementation of Decisions' (2024), https://www.acerwc.africa/en/opportunities/consultancy/appointment-external-experts-working-group-implementation-decisions (accessed 7 June 2024).
56 As above.
57 African Children's Committee 'Resolution No 16/2022 of the ACERWC Working Group on Implementation of Decisions and Recommendations' adopted during the 39th ordinary session of the African Children's Committee held virtually from 21 March 2022 to 1 April 2022.
58 African Children's Committee 'Final Report' (n 49).

Committee's decisions and recommendations at the local level. Additionally, the workshop sought to identify key areas for future recommendations to ensure effective and continuous collaboration between NHRIs, CSOs and the Committee in implementing the latter's decisions, as well as to explore ways in which NHRIs and CSOs can better engage at both national and regional levels to support the implementation of the African Children's Charter. This may be contrasted with the African Commission's inability to convene stock-taking workshops on implementation without external support or to do so on a regular and sustainable basis. Also, at the Working Group and subsequently during its 41st ordinary session, the Committee constructively engaged with NHRIs[59] and key AU organs and institutions such as the Economic, Social and Cultural Council and the African Peer Review Mechanism on bootstrapping their relationship through better inter-institution coordination for more effective monitoring of domestic implementation of the African Children's Charter.[60]

More so, as part of its interest in systematically tracking implementation of children's rights and welfare in Africa, the African Children's Committee undertook a rigorous study to evaluate the extent of state party implementation of its Agenda 2040 focusing on fostering an Africa fit for children, adopted in 2015, during its commemoration of the twenty-fifth anniversary of the African Children's Charter. This aspirational policy document seeks to achieve ten key goals for the advancement of children's rights and welfare in Africa by 2040. After five years of its launch, the African Children's Committee considered it timely to evaluate the extent of implementation of the 2020 Agenda particularly as it relates to state parties' implementation of recommendations contained in decisions on communications submitted to the Committee; reports on investigative missions of the Committee; national reports on implementation of child rights; and reports on various initiatives within the AU related to children's rights.' In March 2021, at the occasion of the celebration of the thirtieth anniversary of the African Children's Charter, the Committee published an evaluation study to determine the status of the implementation of the Agenda.[61]

59 African Children's Committee 'Final Report' (n 49) 7-9.

60 African Children's Committee 'Report: 41st session of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)' 26 April to 6 May 2023 ACERWC/RPT (XLI) paras 20, 24, 47, 49 & 53, https://www.acerwc.africa/sites/default/files/2023-08/ACERWC%2041st%20Session%20Report_English_1.pdf (accessed 27 May 2024).

61 African Children's Committee 'Agenda 2040 – Fostering an Africa fit for children: An assessment of the first phase of implementation (2016-2020)' March 2021, https://www.acerwc.africa/sites/default/files/2022-10/Agenda2040-

However, the WGID is still at its infancy stage, having been established only recently during the COVID-19 lockdowns in 2020. As such, not much of its work on tracking implementation has yet been published to convince of its effectiveness or otherwise. Much of what it has done has been to lay the ground work for demonstrably and effectively monitoring domestic implementation. So far, a preliminary assessment of state parties' implementation under the draft study suggests that challenges still persist. This is confirmed in the recent work of Kangaude and Murungi evaluating the status of implementation of the African Children's Charter in 10 African countries, where they concluded that while ratification of the Children's Charter has 'brought notable impacts in various countries' with regard to the rights and welfare of children, there remain 'immerging challenges'.[62] In comparison to the African Commission which is yet to conduct such a detailed study, the draft study currently being considered by the African Children's Committee will enable the latter to have its finger on the pulse of implementation down to the beat. It will potentially have disaggregated data on domestic implementation from its inception. This information will no doubt enable the Committee to better taylor its engagement with non-complying or non-implementing state parties to the African Children's Charter.

In the case of the African Court, under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), state parties agree to comply with the decisions of the Court in any case in which they are parties.[63] Unlike the African Charter, the African Court Protocol makes express provision for monitoring state party compliance with the Court's decisions by reposing that responsibility on the Council of Ministers of the AU.[64] To support this monitoring process, the African Court must also submit its annual activity report to the AU Assembly, which report 'shall specify, in particular, the cases in which a state party has not complied with the Court's judgment'.[65] This is with a view to allowing the Assembly to consider the report and engage the state party concerned. Much unlike the African

Assessment%20of%20the%20first%20phase%20of%20implementation%20 2016-2020_0.pdf (accessed 28 May 2024).

62 GD Kangaude & N Murungi 'Implementation of the African Charter on the Rights and Welfare of the Child: A comparative analysis of the study' in E Fokala, N Murungi & M Aman (eds) *The status of the implementation of the African Children's Charter: A ten-country study* (2022) 47.

63 African Court Protocol art 30; Rules of Court Rules 72 & 80. Also see Rule 59(6) on the bindingness of provisional measures.

64 African Court Protocol art 29(2); 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* 31.

65 African Court Protocol art 31.

Commission and the African Children's Committee, the African Court does not undertake monitoring of domestic implementation through a working group or standing committee.

This suggests that the institutional responsibility for following up and monitoring domestic compliance with the decisions of the African Court is that of the Council of Ministers and the Assembly, complemented by the human rights-monitoring role of the African Commission under the African Charter. As a judicial body, once the Court has issued a decision, it becomes *functus officio* (which means that it lacks the power to re-examine its decision). It is not the Court's responsibility to subsequently undertake promotional activities to convince state parties to comply with its decision. That responsibility lies with the Council of Ministers and the Assembly and, in the past, has been supported by the Commission when on promotion missions to the territory of a state party concerned. Although the Court conducts 'outreach' and 'sensitisation missions' to raise awareness about the African Court Protocol, such extra-judicial activities do not constitute follow-up or monitoring roles.[66] Indeed, it would be highly improper for the Court to hand down a decision and subsequently seek to 'follow up' on its implementation during its outreach or sensitisation missions.

In practice, however, the African Court relies on the provisions of its 2020 Rules to monitor compliance with its decisions. Under Rule 81 of the Rules of Court, state parties concerned in a case decided by the Court are by order of court obliged to submit reports on compliance with the decisions of the Court which will be transmitted to the applicant(s) for observations.[67] The Court may obtain relevant information on state parties' implementation from other reliable sources in order to assess compliance with its decisions. If there is a dispute as to whether or not a state party has complied with the decision of the Court, the Court can convene a hearing to assess the status of implementation and make a finding including issuing a compliance order.[68] Where a state party fails to comply with its

66 African Court 'The African Court on Human and Peoples' Rights undertook a three-day sensitisation mission in the Republic of Cape Verde from 16 to 18 October 2023', https://www.african-court.org/wpafc/the-african-court-on-human-and-peoples-rights-undertook-a-three-day-sensitizationmission-in-the-republic-of-cape-verde-from-16-to-18-october-2023/ (accessed 31 October 2023); African Court 'The African Court on Human and Peoples' Rights to carry out an outreach mission in the Republic of Cape Verde from 16 to 18 October 2023', https://www.african-court.org/wpafc/the-african-court-on-human-and-peoples-rights-to-carry-out-an-outreach-mission-in-the-republic-of-cape-verde-from-16-to-18-october-2023/ (accessed 31 October 2023).

67 Rules of Court Rule 81(1).

68 Rules of Court Rule 81(2)(3).

decision, the Court must report the non-compliance to the Assembly and forward all relevant information for the purpose of execution.[69]

The Court accurately keeps track of non-implementation of its decisions by state parties to the African Court Protocol by annexing to its annual activity reports to the AU policy organs a list of decisions with which state parties have not yet complied.[70] It does this with the expectation that such policy organs will exert their power under the AU Constitutive Act and the respective Rules of Procedure of the AU Executive Council and the AU Assembly to make binding decisions on states, non-compliance of which could attract sanctions.[71] As part of its diplomatic engagement with states, the African Court undertakes courtesy visits (which are similar to missions undertaken by the African Commission and the African Children's Committee) and uses such visits as an auspicious occasion to encourage non-state parties to ratify the African Court Protocol.[72] It could hold regular judicial dialogues to encourage domestic courts, litigation attorneys and human right-focused organisations to incorporate its jurisprudence in domestic cases.[73] In contrast, while the African Commission does cover the issue of non-implementation of its decisions and recommendations in its activity reports, it does not do so with the same venir, detail and comprehensiveness as the African Court. This lack of detail in the Commission's reports suggests that it does not yet have up-to-date records, figures and statistics of implementation and non-implementation of its decisions by state parties.

Argubaly, the existence of dedicated mechanisms for ensuring follow ups and monitoring implementation notwithstanding, there is still an increasing spate of non-compliance with the decisions of the African Children's Committee and the African Court.[74] While the presence of dedicated mechanisms for monitoring implementation at the African Children's Committee and the African Court has not resulted in greater implementation of itself, it is achieving the underlying need for both bodies to have their fingers on the

69 Rules of Court Rule 81(4)(5).
70 African Court 'Activity report of the African Court on Human and Peoples' Rights (AfCHPR)' EX.CL/1492(XLIV) (44th ordinary session) para 24 & Annex II.
71 Okoloise (n 45) 48-50; Viljoen (n 1) 158; Viljoen & Louw (n 10) 1.
72 African Court 'Liberia commits to ratification of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' 20 April 2024, https://www.african-court.org/wpafc/liberia-commits-to-ratification-of-the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-establishment-of-an-african-court-on-human-and-peoples-rights/ (accessed 6 June 2024).
73 African Court 'Sixth judicial dialogue: Final communiqué' 11 December 2023, https://www.african-court.org/wpafc/sixth-judicial-dialogue-final-communique/ (accessed 6 June 2024).
74 See Adjolohoun (n 64) 7-26, 38.

information pulse on implementation. This is because the issue of compliance is external and hardly in the control of both these institutions. Yet, with these bespoke institutional processes established to help them properly engage states on their implementation and compliance obligations, these institutions are better able to follow up and monitor domestic implementation. For instance, at the Court, a dashboard and documentary matrix have been created to help the Court track cases and provide the public with up-to-date information on decisions handed down by the Court. At the African Children's Committee, the relatively recent creation of the WGID and the draft study on implementation will help the Committee better engage states to '[e]stablish a comprehensive national reporting and monitoring mechanism for the implementation and compliance with the Committee's decisions and recommendations as well as reporting on the status of implementation of decision to the Committee'.[75]

With respect to the African Commission, its activity reports year in, year out reveal that the rate of compliance by state parties with its decisions, requests for provisional measures, and letters of urgent appeal 'remains low'.[76] Yet, there is no information, dashboard or matrix of data showing which decisions have been implemented and which have not. At the moment, the only reliable source of any sketchy data on non-implementation by state parties is the activity reports.[77] I argue that, if anything, the seemingly increasing number of cases of unimplemented decisions recounted by the Commission in its activity reports has reached a critical point, necessitating the creation of a dedicated special mechanism to follow up on domestic implementation, as can be seen at the African Children's Committee. A special mechanism of the Commission is any mechanism established pursuant to Rule 25 of the 2020 Rules of Procedure of the African Commission. The provision of Rule 25 allows the African Commission to create subsidiary mechanisms such as Special Rapporteurs, committees and working groups.[78] While not a controversial recommendation, the Rules of Procedure of the African Commission anticipate potential divergences of opinions among members of the Commission on such matters. As such, should the creation and membership composition of such a follow-up special mechanism become debatable or divisive, the Rules make provision for the matter to be decided by voting if consensus cannot be achieved.[79] Under the Rules, the African Commission is required to determine

75 African Children's Committee (n 51) para iii.
76 African Commission '52nd and 53rd Activity Report of the African Commission on Human and Peoples' Rights' (8 June 2023) para 41.
77 As above.
78 Rules of Procedure of the African Commission 2020 Rule 25(1).
79 Rules of Procedure of the African Commission 2020 Rule 25(2).

the mandate and terms of reference of such a mechanism at the time of its creation. From an institutional perspective, the proposal for a special mechanism responsible for follow-up should encompass several key elements to ensure its effectiveness, sustainability and transparency.

In the next few paragraphs I list the institutional benefits of having a systematic approach to tracking and monitoring state party compliance with the African Commission's decisions and recommendations.

Special mechanisms	Year created
Committee on the Protection of the Rights of People Living with HIV (PLHIV) and Those at Risk, Vulnerable to and Affected by HIV	2010
Working Group on Extractive Industries, Environment and Human Rights Violations	2009
Working Group on the Rights of Older Persons and People with Disabilities in Africa	2007
Working Group on Death Penalty, Extra-Judicial, Summary or Arbitrary Killings and Enforced Disappearances in Africa	2005
Special Rapporteur on Human Rights Defenders and Focal Point on Reprisals in Africa	2004
Special Rapporteur on Freedom of Expression and Access to Information	2004
Special Rapporteur on Refugees, Asylum Seekers, Internally Displaced Persons and Migrant in Africa	2004
Committee for the Prevention of Torture in Africa	2004
Working Group on Economic, Social and Cultural Rights	2004
Working Group on Indigenous Populations/ Communities and Minorities in Africa	2000
Special Rapporteur on Rights of Women	1999
Special Rapporteur on Prisons, Conditions of Detention and Policing in Africa	1996
Internal mechanisms	**Year created**
Committee on Resolutions	2016
Working Group on Communications	2011

Special mechanisms	Year created
Advisory Committee on Budgetary and Staff Matters	2009
Working Group on Specific Issues Related to the work of the African Commission	2004

Figure 1: List of Subsidiary Mechanisms established by the African Commission

First, while national level mechanisms are important for the domestic implementation of Commission decisions, it is equally crucial that 'implementation is carried out in combination with an effective regional follow up system'.[80] As such, the African Commission should clearly stipulate the mandate, composition and terms of reference of a special mechanism dedicated almost entirely to follow up. This includes specifying the types of decisions and recommendations it will monitor (for example, Concluding Observations, decisions on communications and, possibly, resolutions); its membership composition, which may include the states it will cover; and the human rights issues on which it will focus. A well-defined mandate ensures that the mechanism's efforts are targeted and coherent. The special mechanism should also be empowered to develop internal follow-up processes that guarantee that its work is methodical and measurable. In the next part of this article I will make an effort to articulate the role of the special mechanism in addressing, in a practical way, the challenges faced by the African Commission in effectively monitoring the implementation of its findings.

Second, the African Commission needs to formalise the establishment and functioning of the special mechanism responsible for follow-ups within its Rules of Procedure. This formalisation will ensure that the follow-up process becomes an integral part of the Commission's institutional framework, making it less susceptible to changes and loss of institutional memory with periodic shifts in leadership. Ideally, this may require that the current *ad hoc* arrangement of having a commissioner rapporteur for a communication should be replaced with a standing Committee or Working Group on Follow-up on Implementation of the Decisions of the African Commission. The membership composition, as proposed in the earlier point, may be inclusive of various stakeholders – representatives of national authorities, NHRIs, CSOs and human rights experts. The African Commission can set this in motion by converting

80 Murray & Mottershaw (n 13) 352.

the current Working Group on Specific Issues to a Working Group on (Follow-up on) Impementation of Decisions through a resolution to that effect. To achieve practical results, membership may be designed in either of two ways: one, being inclusive of a particular group of states for which the Commission seeks to prioritise implementation; two, allowing the state parties that are the focus of implementation at any given time to participate in the proceedings in order to foster a cordial and constructive engagement with the Commission in the process. The resolution establishing or reconstituting the working group can authorise this process in clearer details.

Third, the creation of a special mechanism would require that adequate human and financial resources are allocated for the smooth functioning of the Commission's follow-up activities. This may include appointing dedicated staff with expertise in human and peoples' rights monitoring, data collection and analysis. Adequate funding within the existing framework of programme allocations should be allocated to support the mechanism's activities, such as travel for on-site visits, research or engagement with national authorities, NHRIs, civil society and other stakeholders, who can play a crucial role in providing information and monitoring implementation on the ground.[81] The special mechanism will essentially maintain formal channels of communication and collaboration with these stakeholders to monitor domestic implementation of the African Commission's decisions.

Fourth, the African Commission also needs to develop comprehensive operational guidelines that outline the step-by-step procedures and methodologies for conducting follow-up activities. These guidelines should specify how and when the mechanism will engage with state parties, what information it will seek, and how it will report findings.

Last, and perhaps the most pressing need for a dedicated special mechanism on follow-ups, is the need to prepare and submit regular reports to the Commission, summarising its findings, activities and recommendations. The continuity of its programmes and the regularity of reporting by the special mechanism will not only institutionalise the follow-up process, but also preserve the institutional memory of the Commission with respect to its implemented and non-implemented decisions. Ideally, the reports of the mechanism should be made available to the public to ensure transparency and accountability.

81 Murray and others (n 6) 165.

By adopting a comprehensive institutional approach based on the above justifications, the African Commission can establish a special mechanism for follow-up that is well-equipped to address the challenges in monitoring domestic implementation of decisions and recommendations, promote human rights, and hold state parties accountable for their obligations under the African Charter and other relevant regional and international human rights instruments.

4 Structure and role of the special mechanism

The establishment of a special mechanism on follow-up under Rule 25 of the 2020 Rules of Procedure of the African Commission should come with clearly-defined functions and responsibilities. By default, it is expected that the special mechanism will closely monitor the implementation of decisions and recommendations made by the African Commission in cases involving state parties. This includes tracking timelines and assessing the progress of implementation. Also, the special mechanism should engage with state parties to facilitate compliance with Commission decisions and recommendations. This may involve consultations, diplomatic negotiations, providing technical support and assistance, and clarification of obligations under the African Charter. Through the support of the Secretariat, the special mechanism should maintain detailed records of the implementation process, including correspondence, meetings, and any challenges faced. These records should be made available to the Commission and the public, in order to ensure transparency and accountability.

In Figure 2 below, I propose a relatively novel structure for the special mechanism to be created. It should be in the form of a Working Group on the Follow-up and Implementation of Decisions and Recommendations as against a single mandate holder, much like the WGID of the African Children's Committee. The working group will function in accordance with the Standard Operating Procedures of Special Mechanisms of the African Commission (SOPs). It will have a composition structure of either of two options (Structure A or Structure B) as in Figure 2, which is consistent with the Commission's SOPs. That is, it will be composed of three commissioners and five expert members.

Under Structure A, the working group will have a Chairperson, Vice-Chairperson, an *ex officio* commissioner and five expert members experienced in implementation of and compliance with the decisions of human rights bodies as well as feature state representatives as *ex officio* members. The purpose of this structure

would be to engage volunteer states intentionally and diplomatically in meetings where domestic implementation and compliance actions can be determined, measured and tracked. The volunteer states will then be replaced by another set of volunteer states after substantial implementation or compliance, in the opinion of the Commission, has been achieved and documented.

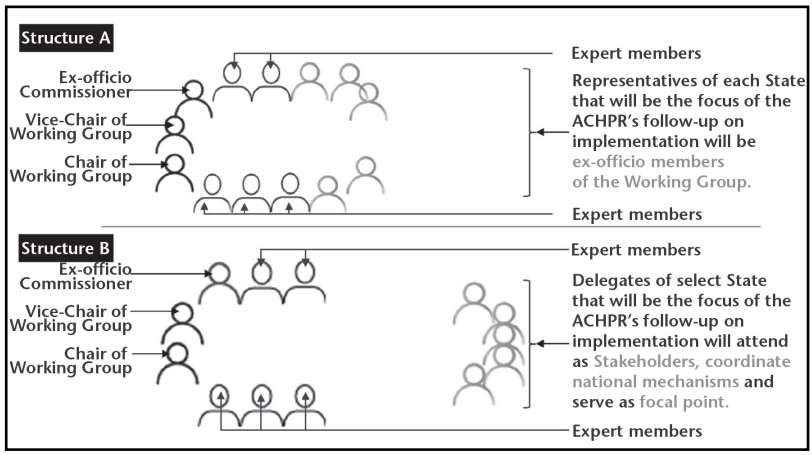

Figure 2: Proposed composition of the Working group on follow-ups and implementation of decisions and recommendations

On the other hand, under Structure B, which may be the preferred structure, the working group will have three commissioners (Chairperson, Vice-Chairperson and *ex officio* commissioner) and five expert members experienced in implementation of and compliance with decisions of the human rights bodies. At the same time, the working group will invite to its meetings state delegates of no more than five representing a number of states prioritised by the Commission for monitoring implementation over a specific period of time. By participating in the sessions, the delegates will serve as focal points and be responsible for engaging and coordinating the activities of relevant national authorities to ensure that each aspect of the Commission's decisions and recommendations is implemented and providing timely and accurate feedback.

Regardless of which structure is adopted, the special mechanism will enable the Commission to more effectively engage state parties on their human and peoples' rights obligations under the African Charter. If challenges or obstacles arise during the implementation process, the special mechanism or the bureau of the African Commission will be able to work with national authorities (and mobilise the support of NHRIs and accredited CSOs on the ground) to

resolve these. This should be done through dialogue and diplomacy and, in the process, promote cooperation between the state party and the African Commission in accordance with article 45(1)(c) of the African Charter.[82] Furthermore, as part of promoting cooperation, the mechanism should support capacity-building efforts within state parties to enhance their ability to fulfil their obligations under the African Charter. This can include training programmes, sharing best practices and having special dialogue sessions with national authorities.

To be effective in the follow up of domestic implementation, the special mechanism must promptly get to work soon after decisions and recommendations are made by the African Commission and in line with the Commission's Rules of Procedure. This timely intervention will serve to prevent prolonged non-compliance and promote the prompt realisation of human rights within state parties. In so doing, the special mechanism should diplomatically engage state parties in respect of which decisions and recommendations have been made in order to foster a constructive and cooperative relationship. This approach is more likely to yield positive results compared to confrontational tactics.[83] The special mechanism should also readily offer technical assistance and clarification of obligations in order to demonstrate its commitment to helping state parties meet their obligations under the African Charter. This will reduce misunderstandings, promote a sense of partnership and contribute to its effective engagement with state parties. In all of this, it is pertinent to emphasise the need to provide training support to the Secretariat's staff and relevant stakeholders, including state officials, CSOs and human rights defenders, to enhance their understanding of the implementation process and the necessity for effective monitoring.

With respect to improving reporting on the African Commission's mandate to monitor state party implementation of its decisions and recommendations, the special mechanism's detailed documentation and reporting will increase transparency with respect to the implementation process. This transparency will operate to enhance the Commission's credibility and enable the public to hold both the Commission and state parties accountable. In this regard, the special mechanism may establish feedback channels through which

82 Murray & Long (n 1) 839.

83 C Sandoval, P Leach & R Murray 'Monitoring, cajoling and promoting dialogue: What role for supranational human rights bodies in the implementation of individual decisions?' (2020) 12 *Journal of Human Rights Practice* 71; OC Okafor *The African human rights system, activist forces and international institutions* (2007) 83-86.

state parties can provide updates on their progress in implementing recommendations. This two-way communication will ensure that the African Commission's monitoring efforts remain dynamic and responsive. Moreover, periodic evaluations of the special mechanism's effectiveness should be conducted, as has been done recently with the existing special mechanisms at the Commission's Secretariat. These evaluations should assess its impact on state party compliance. This will allow the Commission to gauge the effectiveness of its decisions and recommendations.

The records and insights of the special mechanism may also be used to refine the African Commission's strategies and approaches to implementation. This adaptive approach will ensure that the Commission's efforts become increasingly effective over time. Not only that, granting access to records and reports maintained by the special mechanism has the potential to empower CSOs and human rights defenders to raise awareness and advocate the implementation of Commission findings and recommendations. This, I believe, will strengthen the overall impact of the Commission's work. Furthermore, the African Commission may also explore opportunities for peer review with and learning from other regional and international human rights bodies with successful follow-up mechanisms and approaches. This exchange of best practices can inform the development and improvement of the Commission's follow-up mechanism.

5 Conclusion

Based on the foregoing, it is clear that the African Commission cannot continue to rely on the current *ad hoc* arrangement for monitoring implementation, if its decisions and recommendations are to achieve the impact for which they are intended – that is, of promoting and protecting human and peoples' rights domestically. For there to be a positive shift from the current state of weak implementation, it must do something differently, drastically and urgently. The mounting challenges of state parties' non-implementation of and non-compliance with the African Charter have reached an inflection point that demand impact-driven approaches for significant results. There is a pressing need for a special mechanism to address the growing issue of non-compliance with the Commission's decisions and recommendations. This analysis provides ample justifications for why the African Commission should set up a dedicated special mechanism responsible for the follow-up of domestic implementation.

A special mechanism will play a crucial role in ensuring compliance with the provisions of the African Charter and ultimately enhancing the African Commission's effectiveness in advancing human rights in Africa. This will come about by the mechanism's ability to systematically monitor the implementation measures adopted by national authorities, diplomatically engage with state parties, document progress, and report on its activities to the Commission and the wider public during the ordinary sessions of the Commission. Going by the achievements of existing special mechanisms at the Commission, there is an added advantage of adopting an institutionalised approach to the follow-up of state implementation. This includes applying a uniformly-coordinated operational methodology for routinely engaging states and having organised reporting obligations through the inter-session activity reporting process. These will constantly keep the Commission up to date on the state of implementation as well as put the Commission on its toes with regard to its performance on this aspect of its mandate.

Establishing a special mechanism for follow-ups is also essential for upholding the credibility and impact of the African Commission. The challenges facing the Commission demand a multifaceted institutional response to ensure that its credibility and guiding authority are upheld. To enhance its monitoring function, the Commission may consider revising the provisions of Rules 93, 110, 112 and 125 in its 2020 Rules of Procedure for the implementation of recommendations to bring this objective of a special mechanism for follow up to fruition. It is only by addressing the inadequate commitment of states, its communication deficits and functional shortcomings with regard to follow-ups that the Commission can strengthen its role as a guardian of human and peoples' rights in Africa. This will contribute to a more just and rights-respecting continent, where human and peoples' rights are protected for all.

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The role of the Peace and Security Council in implementing the decisions of the African Commission on Human and Peoples' Rights

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Summary: *The African Commission on Human and Peoples' Rights plays a crucial role in upholding African human rights standards. However, challenges arise when it comes to implementing and enforcing the Commission's decisions by member states. This article examines the role of the African Union Peace and Security Council in implementing the findings and recommendations of the African Commission and examines the challenges faced. An extensive desktop review of relevant literature, including academic articles, reports and official documents, is conducted. The article argues that while the Commission primarily focuses on human rights, its decisions have significant implications for peace and security in member states and, through the PSC's proactive*

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involvement, the Commission can contribute to the realisation of peace, security and the protection of human rights in Africa. Additionally, effective collaboration is crucial for the African Commission to execute its mandate, especially in overseeing member states' adherence to its decisions and recommendations. This study contributes to the existing literature by proposing actionable strategies to enhance the synergy between the PSC and the African Commission, thereby improving the enforcement of human rights decisions and their impact on peace and security in Africa.

Key words: *peace; security; African Union; Peace and Security Council; human rights; peace building; implementation; African Commission*

1 Introduction

Despite the continent's various efforts in advancing human rights – those rights that are inherent to individuals by being human[1] – ongoing conflict and war continue to infringe upon the rights of its people. The African Union (AU) has made contributions to the continent's establishment of a human rights system. The AU, which is a confederation of numerous independent states, works to advance both regional political stability and economic integration.[2] The organisation is composed of various structures, including the Pan-African Parliament, the African Court on Human and Peoples' Rights (African Court), the Economic and Cultural Council and the Peace and Security Council (PSC).[3] Most importantly, outsiders with stakes in the organisation include academics, think tanks, independent consultants and members of civil society.[4] They support the organisation's objective of regional stability and development along with the organs.

The African Commission on Human and Peoples' Rights (African Commission)'s mandate was established by the African Charter on Human and Peoples' Rights (African Charter). As a quasi-judicial oversight body,[5] it is tasked with interpreting, defending

1 O Nweke 'Understanding human rights' Kings University College Law Students Union Seminar Accra (2020), http://doi.org/10.13140/Rg.2.2.20322.35522 (accessed 30 October 2024).
2 T Tieku 'The African Union: Successes and failures' (2019) *Oxford Research Encyclopaedia of Politics*, http://doi.org/10.1093/acrefore/9780190228637.013.703 (accessed 30 October 2024).
3 As above.
4 As above.
5 F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1-34.

and advancing the rights enshrined in the African Charter. The African Commission conducts missions to investigate human rights violations in member states for country reports, drawing on specific complaints and general observations and offering recommendations to deal with these problems.[6] These choices and suggestions have the potential to address human rights concerns in Africa, but that potential can only be attained through actualisation.[7] It is significant to note that because these decisions are not legally binding, states are free to decide whether or not to implement them. There have been cooperation issues, with states failing to comply,[8] even though all member states have expressed their commitment to upholding the African Charter's obligations.[9] As a result, efforts are being made to address the problem of state non-compliance as it undermines the fundamental goal of the African Commission. The causes of non-compliance are the non-binding nature of the decisions, state sovereignty issues and implementation difficulties. States' non-compliance can be attributed from a global standpoint to the African Commission's limited ability to carry out follow-ups and enforcement mechanisms.[10] However, the Commission does not lack internal and external stakeholders, including emerging implementation committees and bodies, that can effectively perform this function on its behalf by monitoring, advocating and facilitating state compliance with the Commission's recommendations.[11]

The following parts advance the argument that the African Commission cannot perform its duties without effective collaboration, particularly when it comes to ensuring that its recommendations and findings are implemented by member states. As their responsibilities frequently overlap, such collaboration can involve external stakeholders with vested interests in its affairs or those of other AU organs. To ensure that the decisions made by the Commission are implemented in African states, this study specifically examines the role of the PSC, which oversees the promotion of peace and security in Africa. In this context, the article further argues that although the African Commission is primarily concerned with human rights, its decisions have broad ramifications for peace and security among

6 K Bojosi & G Wachira 'Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 382-406.
7 R Murray & E Mottershaw 'Mechanisms for the implementation of decisions of the African Commission on Human and Peoples' Rights' (2014) 36 *Human Rights Quarterly* 349-372.
8 Bojosi & Wachira (n 6); Viljoen & Louw (n 5).
9 S Keetharuth 'Major African legal instruments' in A Bösl & J Diescho (eds) *Human rights law in Africa: Legal perspectives on their protection and promotion* (2009) 163-231.
10 Murray & Mottershaw (n 7).
11 Murray & Mottershaw (n 7).

member states, highlighting how the PSC contributes to the achievement of peace, security and the preservation of human rights in Africa through its proactive involvement. This article also buttresses the PSC's obligations and the difficulties it faced in achieving this goal.

The article is structed in five parts. The second part, which follows the introduction, explores the background history of the PSC, its role and mandate in the region, the organisation of its operations and African Commission decisions and challenges. The third part explores the roles of the PSC in bridging human rights and peace building, while the fourth part explores the PSC track record on implementation of decisions and effects on African Commission decisions, including case studies. The conclusions are summarised in the concluding part, which also makes suggestions for improving the PSC's effectiveness and helping it overcome its obstacles.

2 The PSC and African Commission decisions: History and challenges

In the early 1990s a decision was made to reassess the peacekeeping efforts of the then Organisation of African Unity (OAU) after member states had elected to abstain from such endeavours.[12] The increasing frequency of intra-state conflicts and *coups d'état*[13] that followed the era of African independence served as the impetus for this reevaluation.[14] African institutions' sub-regional bodies were crucial in resolving many of these intra-regional conflicts,[15] which prompted member states to question the OAU's efficacy and call for reforms.[16] As a result, the OAU was reorganised into the AU, a new organisation built around a central decision-making body. The AU established the PSC.[17] The PSC was established as a body responsible for peace and security issues in Africa by the Protocol on the PSC, which was adopted in 2002[18] and entered into force in 2003.[19] Specifically, articles 3, 4, 5, 6, 7, 8, 11, 12 and 13 of the Protocol describe the

12 P Williams 'The Peace and Security Council of the African Union: Evaluating an embryonic international institution' (2009) 47 *Journal of Modern African Studies* 603-626.
13 C Majinge 'Regional arrangements and the maintenance of international peace and security: The role of the African Union Peace and Security Council' (2010) 48 *Canadian Yearbook of International Law* 97-150.
14 As above.
15 Williams (n 12).
16 K Powell & T Tieku 'The African Union's new security agenda' (2005) 60 *International Journal* 937-952.
17 Majinge (n 13).
18 Williams (n 12).
19 J Cilliers & K Sturman 'Challenges facing the AU's Peace and Security Council' (2004) 13 *African Security Review* 97-104.

institutional structure, authority and objectives of the PSC.[20] Its 15 members, who each have equal authority, are elected for terms ranging from two to three years. However, there are no permanent members. Additionally, the PSC's specific mandate is clear when it comes to handling the difficult, protracted conflicts that tragically plague and bedevil the African continent at both the interstate and intrastate levels.[21] This is why it was established with a focus on conflict avoidance, management and resolution.

According to article 3 of the Protocol on the objectives of the PSC,

> these include the facilitation and implementation of peace building and post-conflict reconstruction initiatives, the coordination and harmonisation of continental efforts to counter the multiple threats posed by international terrorism, the formulation of a unified defense policy for the Union, and the promotion of democratic practices, good governance, the rule of law, as well as the protection of human rights and fundamental freedoms.[22]

In terms of its functionality, the PSC additionally acts as the cornerstone of all peace and security initiatives in Africa.[23] Since it is a vital component of the regional African human rights framework, its contribution to advancing peace and security in Africa is immeasurable.[24]

However, rough patches of resistance are evident in the interactions between the African Commission and the AU member states. The Commission's monitoring role is constantly at odds with the role that states take on when they pledge to put its recommendations into practice. The African Commission is unable to make decisions or recommendations that are enforceable against member states, which prevents it from carrying out its mandate of advancing and defending human and peoples' rights.[25] The Commission tracks and identifies violations of human and peoples' rights and, based on that information, makes recommendations to states on how to strengthen

20 African Union 'Protocol Relating to the Establishment of the Peace and Security of the African Union' (2002).

21 S Gumedze *The Peace and Security Council of the African Union: Its relationship with the United Nations, African Union, and sub-regional mechanisms* (2011) 39-48.

22 African Union (n 20).

23 J Lawrence 'Africa, its conflicts, and its traditions: Debating a suitable role for tradition in African peace initiatives' (2005) 13 *Michigan State Journal of International Law* 417.

24 J Levitt 'The Peace and Security Council of the African Union: The known unknowns' (2003) 13 *Transnational Law and Contemporary Problems* 110.

25 C Okoloise 'Circumventing obstacles to the implementation of recommendations by the African Commission on Human and Peoples' Rights' (2018) 18 *African Human Rights Law Journal* 27-57.

their adherence to those rights.[26] The African Commission conducts promotional visits to and communicates with states, while channels for state involvement in decision making and recommendations are established. States are urged to submit biennial reports to the African Commission.

Even though the African Commission has made efforts to monitor the application of its recommendations through missions and the biennial state report, it has not suggested any appreciable changes in that application.[27] The Commission relies on the expectation that states will cooperate rather than try to impose their decisions in the end.[28] Despite the Commission's diligent efforts to focus its decisions and recommendations on the African continent, in addition to the member states' opposition, the recommendations required rigorous processes of coordination and collaboration that frequently combine the use of legal instruments, diplomatic measures, capacity-building programmes and resource allocation. The PSC and other institutions, among other stakeholders, become crucial for the African Commission's decisions to be enforced because they possess the mandate, resources and authority to ensure compliance, facilitate dialogue between member states, and mobilise the necessary political will to effectively implement African Commission's recommendations. The next part shifts its focus to the roles of the Peace and Security Council in bridging human rights and peace building.

3 Role of the PSC in bridging human rights and peace building

The promotion of international peace and security is powerfully aided by the defence of human rights. Because of this, adherence to human rights laws serves as a potent conflict deterrent.[29]

In light of this, it is important to recognise the role played by the PSC in upholding the AU's mandate to advance human and peoples' rights. This relationship is viewed as an interdependent partnership to elevate the status of human rights as a vital tool for achieving global security, enduring peace and sustainable development. The necessity of peace and stability as a fundamental precondition for the

26 As above.
27 C Odinkalu 'The individual complaints procedures of the African Commission on Human and Peoples' Rights: A preliminary assessment' (1998) 8 *Transnational Law and Contemporary Problems* 359-406.
28 As above.
29 Gumedze (n 21).

long-term realisation of socio-economic rights is also emphasised.[30] For instance, by its mandate, the PSC works to support the African Commission's recommendations by promoting peace and security drills with the support of the member states. Because of this, even though Commission's main focus is on human rights, its decisions have broad ramifications for international peace and security. An example is how the PSC, in coordination with member states, acts as a mediator to implement African Commission decisions and declarations. When the Commission identifies human rights violations that could escalate into conflict or pose a risk to regional security, the PSC facilitates diplomatic efforts, peace negotiations and security interventions to prevent further deterioration of the situation.

To achieve international security, it is legitimate for states to protect their populations from human rights abuses.[31] However, situations characterised by escalating political unrest, difficult disputes, increased use of force, rivalries and human rights violations necessitate PSC intervention. This intervention may include diplomatic mediation, the imposition of sanctions, peacekeeping operations or, in extreme cases, military intervention, depending on the nature and scale of the conflict. In article 7 of the Protocol, the PSC is given authority to handle all matters relating to peace and security over the member states. As a result, the PSC gains some of the power currently held by member states, and member states are not allowed to disagree with any decisions made by the Council. They are required by the Constitutive Act to 'accept' and 'implement' such decisions.[32] In this situation, it may be determined that the PSC's involvement in member states sparks discussion that results in the adoption of policies that support human rights. This involvement promotes and facilitates the execution of initiatives aimed at defending and advancing the human rights ideals that are at the core of the African Commission agenda and mission.

The previous paragraphs provided insight into the roles of PSC in bridging human rights and peace building. The PSC's track records on the implementation of African Commission decisions and the impact on Commission decision forms the focus of the following part. To support the claims, it specifically highlights a few case studies.

30 F Viljoen *International human rights law in Africa* (2012) 469-514.
31 Gumedze (n 21).
32 African Union (n 12); Williams (n 12).

4 PSC's track record on implementation of decisions and effects on African Commission decisions

To achieve the pan-African Vision of 'an integrated, prosperous, and peaceful Africa, driven by its citizens, representing a dynamic force in the international arena', as well as Agenda 2063's goal of 'a peaceful and secure Africa', the PSC is essential to the AU's efforts to defend human rights, particularly when there are serious or widespread violations on the African continent. According to the recommendations of the African Commission, the PSC can address such violations as a consequence of its mandate. Article 19 of the Protocol concerning the PSC establishes a mechanism for information sharing between the PSC and the African Commission. The question then arises as to whether the African Commission can utilise the institutional support of the PSC. With the help of the Council, the Commission can work together to raise awareness of important issues that are under the PSC's purview by creating recommendations, enforcing sanctions, keeping an eye on compliance through follow-up procedures, and acting in conflict areas to safeguard human rights.

The peace and security that the PSC is committed to promoting and preserving are jeopardised by these issues that are typically raised. In practice, the PSC's compliance with its mandates results in the execution of the suggestions and directives approved by the African Commission. In other words, this results in the PSC mainstreaming human rights throughout its conflict states. The PSC's role in implementing the recommendations and decisions of the Commission involves a variety of activities, including the formulation of recommendations, promoting peace through missions, diplomacy and mediation, as well as the imposition of sanctions on AU member states. These actions are a result of the power provided by article 7 of the Protocol. Preventing, mitigating and ultimately resolving conflicts is the overarching goal of these strategies. The PSC effectively shapes the landscape of human rights, which are not only related to the African Commission,[33] but also to peace and security by integrating these conflict resolution mechanisms.[34]

The follow-up mechanism of the PSC is one of its duties. This mechanism takes on a role in overseeing and assessing the execution of the PSC's decisions, recommendations and resolutions.[35] As a result, the area of preventing, managing and resolving conflict includes

33 B Gawanas 'The African Union: Concepts and implementation mechanisms relating to human rights' in Bösl & Diescho (n 9) 135-163.
34 Okoloise (n 25 above).
35 Murray & Mottershaw (n 7 above).

this follow-up mechanism. The Protocol established the continental early warning system (CEWS), which keeps tabs on events in African nations and provides the Council with information and advice.[36] Most of the PSC's decisions are based on this. Serious human rights violations may necessitate the heads of state and government's attention and collective action, as provided for in article 58 of the African Charter. This provision serves as a mechanism for increasing awareness of such violations.

This clause enables the African Commission to recognise early indicators of regional insecurity using its communicative tools.[37] The provision enables the Commission to carry out missions, examine the current situation and offer recommendations. The AU has several organisations that can monitor and guarantee that states follow the African Commission's recommendations. The PSC can then evaluate the Commission's recommendations as indicators within its early warning system. Using this information as a foundation, the PSC, therefore, can monitor and follow up on the implementation of these recommendations in the context of conflict prevention.[38]

For instance, the PSC requested the African Commission to send a fact-finding mission to Burundi in 2015.[39] In 2015 there were demonstrations against former President Pierre Nkurunziza's bid for a third term in office.[40] Human rights violations had been brought to this governing body's attention. Following the mission, the Commission put together a report on its findings and advised the state and non-state actors to resolve the issue through negotiation.[41] In response to this fact-finding mission, the PSC took action to ensure that the parties settled an open inter-Burundian peace dialogue, which influenced the political development of the nation and contributed to the holding of a successful election in 2020.[42] Refugees' gradual

36 H Solomon 'African solutions to Africa's problems? African approaches to peace, security, and stability' (2015) 43 *Scientia Militaria: South African Journal of Military Studies* 45; Levitt (n 24).

37 G Wachira & A Ayinla 'Twenty years of elusive enforcement of the recommendations of the African Commission on Human and People's Rights: Possible remedy' (2006) 6 *African Human Rights Law Journal* 465-492.

38 Murray & Mottershaw (n 7); Wachira & Ayinla (n 37).

39 African Union 'Fact-finding mission of the African Commission on Human and Peoples' Rights to Burundi' 15 December 2015, https://www.peaceau.org/en/article/fact-finding-mission-of-the-african- commission-on-human-and-peoples-rights-to-burundi (accessed 30 October 2024).

40 B Ayuk 'ACHPR urges Burundi to prosecute perpetrators of extrajudicial killings, torture during 2015 popular protests' 19 June 2023, https://www.ihrda.org/2023/06/achpr-urges-burundi-to-prosecute-perpetrators-of-extrajudicial-killings- torture-during-2015-popular-protests/ (accessed 30 October 2024).

41 AU (n 39).

42 African Union 'Report of the Peace and Security Council on its activities and the state of peace and security in Africa, for the period from February 2019 to February 2020' 10 February 2020, Addis Ababa, Ethiopia.

return to the nation also helped to address humanitarian issues. In particular, the term of office was one of the commitments to the rule of law made by the President.[43] Additionally, the nation acted on its own through several consultations with non-state actors and the creation of an independent electoral commission. The joint effort of the PSC and the African Commission enabled the successful completion of the elections in Burundi in May 2020, protecting both the country's peace and security as well as the political and social rights of its citizens. Notably, the PSC actively oversaw the application of the recommendations made by Commission because of a fact-finding mission that the PSC encouraged. As a result, Burundi was able to effectively implement the Commission's recommendations, supporting the PSC's overarching mission to advance peace and security.

The African Commission's recent recommendation for Burundi and its historical violations of human rights calls for the same course of action. The law enforcement response to the protest that occurred in Burundi in 2015 resulted in the torture and disappearance of civilians.[44] In its resolution from that year, the African Commission urged the government to carry out the advice provided following the fact-finding mission.[45] According to the Commission's 2018 report, the Burundian government should investigate and prosecute those who violated human rights back in 2015. The African Commission took no further action and, in most cases, the responsible civil society organisations or the parties that filed the complaint will undertake further action for investigation and prosecution.[46] Therefore, it was not surprising that a complaint was made to the Commission about this non- compliance by some organisations, and the Commission once more urged the government to address this.[47] It is even more essential for compliance because these forms of torture continue to be used.[48] This is a red flag that the relative stability Burundi has enjoyed in recent years might be in jeopardy. As it relates to its primary mandate of peace and security, the PSC could continue to take the lead, as it has in the past, by keeping track of and overseeing this recommendation's implementation.

43 As above.
44 Ayuk (n 40).
45 African Commission on Human and Peoples' Rights Draft Resolution: Burundi ACHPR/Res 9 April 2018, 396 (LXII) 2018, https://achpr.au.int/index.php/en/adopted-resolutions/396-draft-resolution-burundi-achprres-396-lxii-2018 (accessed 30 October 2024).
46 Murray & Mottershaw (n 7).
47 Ayuk (n 40).
48 L Mudge 'African Commission calls for justice in Burundi' 9 March 2023, https://www.hrw.org/news/2023/03/09/african-commission-calls-justice-burundi (accessed 30 October 2024).

The Protocol's Rules, specifically article 7(3) of the Protocol Relating to the Establishment of the Peace and Security Council of the African Union, make the PSC's decisions binding on member states. This article states that 'the member states agree to accept and implement the decisions of the Peace and Security Council, in accordance with the Constitutive Act'. This arrangement results from the shared understanding that council members permit the body to act on their behalf, encouraging cooperative engagement.[49] The binding nature of the decisions of the PSC is in direct contrast to the nature of decisions made by the African Commission.

To make the African Commission's recommendations binding, it was proposed that the AU adopt them. However, the AU might have established a similar enforcement mechanism for the Commission through the provision of article 19 of the Protocol,[50] which should allow the policy-making organ to supplement the work of the Commission by enforcing the judgments and suggestions of the Commission. According to the premise that state non-compliance opens the door to questions about the effectiveness of both the organ in question and the AU as a whole,[51] it is essential to advance the AU's overall mandate by having the PSC adopt the African Commission's recommendations that deal with the relevant issues.

The PSC also has the authority to impose penalties or take other legal action against people who violate peace and security. The provisions of article 7(1)(g) of the Protocol of its establishment give the PSC authority to exercise this jurisdiction. Although the follow-up mechanism has value, adding an enforcement framework is encouraged.[52] This authority was used in 2010 when Laurent Gbagbo of Côte d'Ivoire lost the election but refused to resign, which led to its suspension from the AU.[53]

Since its inception, the PSC has had a remarkably successful track record of enforcing sanctions. Most of these cases have been the result of *coups*, most notably in Togo (2005), Mauritania (2005, 2008), Guinea (2008) and Madagascar (2009).[54] Nevertheless, the situation in Sudan serves as a better illustration because it has resulted in significant humanitarian problems and has required AU military and diplomatic intervention.[55] Most of the nation's history has been

49 Okoloise (n 25).
50 Wachira & Ayinla (n 37).
51 Okoloise (n 25).
52 Wachira & Ayinla (n 37).
53 Majinge (n 13).
54 Williams (n 12).
55 Majinge (n 13).

marked by crises, but the conflict's height, which affected Sudan's northern, western and southern regions, occurred in 2003.[56] As a result, victims from different tribes suffered horrific atrocities such as rape, murder, kidnappings and extensive destruction of property.[57] Due to widespread protests that broke out because of the economy's decline in 2018, Sudan's stability faced a serious threat. To protect the rights of civilians, the African Commission urged the government to address its security concerns.[58]

Then, in 2019, a military *coup* overthrew the government led by President Omar Al-Bashir.[59] Following its authority, the PSC expelled Sudan from all AU activities due to its unconstitutional change of government.[60] The Forces for Freedom and Change, which were established by the Constitutional Declaration Agreement, and the military agreed to share power after the PSC intervened.[61] After that, the suspension was lifted.[62] However, that power-sharing agreement was soon compromised, as tensions between the civilian and military factions resurfaced. This led to renewed instability, undermining the progress made by the PSC and resulting in further political upheaval.

General Abdel Fattah Al-Burhan, Sudan's *de facto* President, and General Muhammad Hamdan 'Hemedti' Dagolo, commander of the Sudanese Armed Forces (SAF), are currently engaged in a bitter conflict in Sudan. Conflicts broke out on 15 April 2023, because of the intended transition to civilian government not being followed and tensions between these military factions.[63] With increasing human rights abuses and a worsening humanitarian crisis, there was a need for the government to quickly restore constitutional order. As a result, it was not unexpected that Sudan's participation in AU affairs was suspended for the second time since the fall of the al-Bashir regime in the country. It was clear that the African Commission and the PSC worked together, but it is important to emphasise that the Sudanese situation presented difficulties that might have put the PSC's mission in danger. Each action taken by the PSC appeared to emphasise how important the African Commission's conclusions and suggestions

56 J Hagan & A Palloni 'Death in Darfur' (2006) 313 *Science* 1578.
57 J Brosché & D Rothbart *Violent conflict and peacebuilding: The continuing crisis in Darfur* (2013).
58 African Cimmission (n 45).
59 E Pichon & A de Martini 'Sudan crisis: Developments and implications' European Parliamentary Research Service (2023), https://www.erps.ata.org (accessed 30 October 2024).
60 AU (n 42 above).
61 Pichon & De Martini (n 59).
62 AU (n 42).
63 C Winsor & A Al-Tawy 'What is happening in Sudan?' *ABCNews* 31 May 2023, https://abcnews.go.com/International/sudan-conflict-2023-explained/story?id=98897649 (accessed 30 October 2024).

were in this case. Notably, the PSC's use of its sanctioning power helped the Commission's decisions to be implemented by member states by encouraging their adherence. The PSC also seeks to persuade and/or influence its intended audiences, especially those involved in conflict or crises, by strategically using official pronouncements and mechanisms to articulate the AU's perspective on issues of peace and security, such as sanction and enforcement.[64]

Conflict prevention, management and resolution are the main duties of the PSC. Through efforts to mediate disputes, encourage communication between parties and promote respect for human rights during peace negotiations, the PSC can step in before human rights violations turn into fully-fledged conflicts. The Protocol established the Panel of the Wise to aid in preventive diplomacy. The personality of the Panel is essential as a conflict-prevention strategy, because it will affect the way in which parties to a conflict view the panel.[65] Thus, the Protocol emphasises its membership, which consists of five well-known African leaders. The PSC has used the Panel's support in the case of Sudan.[66]

However, while the PSC plays a significant role in carrying out its mandate regarding human rights violations, several difficulties remain. These include a lack of resources, political limitations and member state differences in interests. Additionally, coordination issues between the PSC and the African Commission may occasionally prevent recommendations from being implemented. Political will is the determination of political leaders to address issues despite obstacles. According to the Institute for Security Studies' Peace and Security Report,[67] the commitment of member states is one factor that affects the effectiveness of the PSC. Without the states, the organisation will not be effective. This emphasises the significance of political will for the PSC. Even though article 7(1) of the Protocol gives the PSC the power to impose sanctions on member states in the event of unconstitutional changes of government, this power is limited in cases where non-compliance issues do not involve a change of government. It appears that member states still have the option to follow or disregard the PSC's decisions and recommendations, even though they are binding.[68]

64 Williams (n 12).
65 Levitt (n 24).
66 Majinge (n 13).
67 Institute for Security Studies 'Going digital is an early highlight as the PSC Secretariat navigates peace and security challenges' 26 July 2023, https://issafrica.org/pscreport/psc-insights/psc-interview-innovative-approaches-for-a-dynamic-environment (accessed 30 October 2024).
68 As above.

First, states' willingness to abide by a decision appears to depend on how highly they regard the body that made the decision.[69] The composition of the PSC is crucial, and the selection criteria stated in article 5(2) of the Protocol make the Council respectable. However, this questions the PSC's current membership, arguing that the members do not meet the criteria for election. Uganda, Chad and Rwanda were elected between 2008 and 2010, but there is a claim that these nations had a history of violating human rights and, in the case of Sudan, it had an ongoing crisis on all fronts.[70] More so, states' willingness to participate in a decision is determined by the respect they show to the person making the decision.[71] How, then, were they chosen for a council that upholds peace and stability? Additionally, political consideration refers to the strategic choices made by member states based on their domestic and international political priorities. So, how can members who disobey the mandate they seek to serve offer recommendations for another country to follow? Therefore, the AU member states' ability to implement decisions made by the PSC may also depend on how closely those decisions align with their interests.[72]

The Council's restricted budget is yet another obstacle that has an impact on its operations. Technical know-how and financial backing are necessary for a stronger PSC mission. Despite efforts, member state contributions fall short of what is needed.[73]

The PSC undertook a mission in Sudan in 2004 to aid in bringing about peace in the Darfur region.[74] The assumption that the state would provide financial support for the mission led to problems. The size of the mission changed, placing a burden on the PSC's financial resources. The United Nations (UN) later took on the financial responsibility and supported this mission.[75] The funds given are occasionally not used to their full potential, which results in a sub-par mission carried out by the Council. In the case of the mission sent to the Central African Republic, the operation failed because of insufficient use of the funds provided by the European Peace Facility. Due to human resource issues brought on by the limited budget, the ability to complete the work is also constrained.[76]

69 Murray & Mottershaw (n 7).
70 Majinge (n 13).
71 Murray & Mottershaw (n 7).
72 Majinge (n 13).
73 ISS (n 67).
74 Majinge (n 13).
75 AU (n 42).
76 ISS (n 67).

Another difficulty that has been raised is related to the ambiguity in the PSC Protocol and policy. Starting with the establishment of the Council and continuing through the development of its Protocol, it has been argued that the institution's Protocol lacks a sound legal foundation.[77] The observation that the wording and clauses of the Protocol are subject to different interpretations, which could result in inconsistencies in their actual application, gives rise to this issue.[78] The PSC Protocol, for instance, states in article 16(1) that the AU 'has the primary responsibility for promoting peace, security and stability in Africa,' while article 17(1) states that the UN Security Council 'has the primary responsibility for the maintenance of international peace and security'.[79] The two articles appeared to take somewhat different positions on the subject, which led to a problem. While the PSC plays a key role in supporting the African Commission's enforcement efforts, we contend that if the Protocol that establishes the PSC lacks a strong legal framework as identified, this may limit the PSC's ability to effectively carry out its responsibilities, which in turn affect its capacity to assist the African Commission. Determining the precision and clarity of the Protocol, which are both essential for successfully guiding the PSC's operational initiatives, must be done immediately in light of this challenge.

The previous paragraph covered the track records of the PSC and the few difficulties the PSC has in carrying out its duties. The recommendations offered in the next part will help the PSC and the African Commission to be more effective and continue to carry out their respective mandates.

5 Recommendation and conclusion

The PSC's work and activities, in particular the African Standby Force (AFS) and Continental Early Warning System (CEWS), require both technical and financial strength to be completed. In that case, member states must increase their payment to the Peace Fund. Furthermore, the Peace Fund's funding should not be heavily dependent on its member states, each of which has its financial issues. It is important to diversify the sources of these funds, making international contributions a 'must' source rather than a 'could be' source.

77 Williams (n 12).
78 Levitt (n 24).
79 Williams (n 12); AU (n 42).

The PSC should be able to help itself first before it can help other organs. The PSC should be able to use sanctions and incentives to penalise non-compliance and reward compliance, although it has resources such as diplomacy, dialogue, follow-ups and leveraging of international organisations at its disposal. This ought to apply not only in the event of an unconstitutional change in power, but also in cases where the goal of maintaining peace and security is compromised. Additionally, it is important to strictly follow the criteria used to choose PSC members. As was stated, the composition of a body and its suitability for its intended purpose can influence whether states are willing to abide by its decisions.

Additionally, the CEWS's main task of gathering and analysing data from all member states can only be accomplished with qualified personnel. However, the technology that can be used to complete the task is just as important as training and skill development. To complete the task, it is necessary to train staff members and supply the necessary technical infrastructure.

In addition, the framework within which the PSC executes its duties needs to be reorganised because global challenges are dynamic in nature. Global problems, such as wars, terrorism, political instability and humanitarian crises are ever-changing. To restructure the framework, it will be necessary to review its decision-making procedures, improve its mechanisms for preventing and resolving conflicts, enhance its coordination and communication with member states, and revise its plans for preserving peace and security on the continent.

Following the recommendations of the African Commission, the PSC of the AU has enormous potential to address grave human rights violations. More so, as an organ of the AU, several sections of the African Commission have implications for peace and security, and PSC support for the Commission boosts the political monitoring and implementation of decisions. The PSC can play a significant role in promoting peace, security and the protection of human rights throughout the continent by mainstreaming human rights standards and principles in conflict prevention, management and post-conflict restructuring by making the most of its mandate. Therefore, in the spirit of 'working together', the African Commission needs the support of the AU organs, including the PSC. However, several factors, such as the lack of political will on the part of member states, technical and financial challenges and inherent contradictions in the PSC Protocol, can make the PSC's contribution to the effectiveness of the African Commission less effective. Promoting political commitment, increasing and diversifying the PSC's funding sources, utilising

technological advancements, and reorganising the PSC's operational framework are all methods that can improve the effectiveness of the PSC. These actions may enhance the PSC's function and guarantee the organisation's ongoing work to make Africa a safer, more peaceful place for all its citizens.

THE CENTRE FOR HUMAN RIGHTS

UNIVERSITY OF PRETORIA

The Centre for Human Rights, founded in 1986, is part of the Faculty of Law of the University of Pretoria. The main focus of the Centre is human rights law in Africa.

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- Implementation and Compliance Project

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- Freedom from Violence Unit
- Litigation and Implementation Unit
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- *African Disability Rights Yearbook*
- *African Human Rights Yearbook*

AFRICAN HUMAN RIGHTS LAW JOURNAL
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- Subsequent references to footnote in which first reference was made: eg Patel & Walters (n 34) 243.
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  1
  2
  3.1
  3.2.1
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CHART OF RATIFICATIONS: AU HUMAN RIGHTS TREATIES

Position as at 31 July 2024
Compiled by: I de Meyer
Source: http//www.au.int (accessed 13 November 2024)

	African Charter on Human and Peoples' Rights	AU Convention Governing the Specific Aspects of Refugee Problems in Africa	African Charter on the Rights and Welfare of the Child	Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights	Protocol to the African Charter on the Rights of Women	African Charter on Democracy, Elections and Governance
COUNTRY	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**	**Ratified/ Acceded**
Algeria	01/03/87	24/05/74	08/07/03	22/04/03	20/11/16	10/01/17
Angola	02/03/90	30/04/81	11/04/92		30/08/07	08/06/21
Benin	20/01/86	26/02/73	17/04/97	10/06/14	30/09/05	28/06/12
Botswana	17/07/86	04/05/95	10/07/01			
Burkina Faso	06/07/84	19/03/74	08/06/92	31/12/98*	09/06/06	26/05/10
Burundi	28/07/89	31/10/75	28/06/04	02/04/03		
Cameroon	20/06/89	07/09/85	05/09/97	09/12/14	13/09/12	24/08/11
Cape Verde	02/06/87	16/02/89	20/07/93		21/06/05	12/10/23
Central African Republic	26/04/86	23/07/70	07/07/16			24/04/07
Chad	09/10/86	12/08/81	30/03/00	27/01/16		11/07/11
Comoros	01/06/86	02/04/04	18/03/04	23/12/03	18/03/04	30/11/16
Congo	09/12/82	16/01/71	08/09/06	10/08/10	14/12/11	
Côte d'Ivoire	06/01/92	26/02/98	01/03/02	07/01/03	05/10/11	16/10/13
Democratic Republic of Congo	20/07/87	14/02/73	31/01/17	31/01/17	09/06/08	
Djibouti	11/11/91		03/01/11		02/02/05	02/12/12
Egypt	20/03/84	12/06/80	09/05/01			
Equatorial Guinea	07/04/86	08/09/80	20/12/02		27/10/09	11/07/17
Eritrea	14/01/99		22/12/99			
Eswatini	15/09/95	16/01/89	05/10/12		05/10/12	
Ethiopia	15/06/98	15/10/73	02/10/02		18/07/18	05/12/08
Gabon	20/02/86	21/03/86	18/05/07	14/08/00	10/01/11	
The Gambia	08/06/83	12/11/80	14/12/00	30/06/99*	25/05/05	11/06/08
Ghana	24/01/89	19/06/75	10/06/05	25/08/04*	13/06/07	06/09/10
Guinea	16/02/82	18/10/72	27/05/99		16/04/12	17/06/11

Guinea-Bissau	04/12/85	27/06/89	19/06/08	4/10/21*	19/06/08	23/12/11
Kenya	23/01/92	23/06/92	25/07/00	04/02/04	06/10/10	07/01/21
Lesotho	10/02/92	18/11/88	27/09/99	28/10/03	26/10/04	30/06/10
Liberia	04/08/82	01/10/71	01/08/07		14/12/07	23/02/14
Libya	19/07/86	25/04/81	23/09/00	19/11/03	23/05/04	
Madagascar	09/03/92		30/03/05	12/10/21		23/02/17
Malawi	17/11/89	04/11/87	16/09/99	09/09/08*	20/05/05	11/10/12
Mali	21/12/81	10/10/81	03/06/98	10/05/00*	13/01/05	13/08/13
Mauritania	14/06/86	22/07/72	21/09/05	19/05/05	21/09/05	07/07/08
Mauritius	19/06/92		14/02/92	03/03/03	16/06/17	
Mozambique	22/02/89	22/02/89	15/07/98	17/07/04	09/12/05	24/04/18
Namibia	30/07/92		23/07/04		11/08/04	23/08/16
Niger	15/07/86	16/09/71	11/12/99	17/05/04*		04/10/11
Nigeria	22/06/83	23/05/86	23/07/01	20/05/04	16/12/04	01/12/11
Rwanda	15/07/83	19/11/79	11/05/01	05/05/03	25/06/04	09/07/10
Sahrawi Arab Democratic Rep.	02/05/86			27/11/13	19/03/22	27/11/13
São Tomé and Príncipe	23/05/86		18/04/19		18/04/19	18/04/19
Senegal	13/08/82	01/04/71	29/09/98	29/09/98	27/12/04	
Seychelles	13/04/92	11/09/80	13/02/92		09/03/06	12/08/16
Sierra Leone	21/09/83	28/12/87	13/05/02		03/07/15	17/02/09
Somalia	31/07/85					
South Africa	09/07/96	15/12/95	07/01/00	03/07/02	17/12/04	24/12/10
South Sudan	24/01/13	04/12/13			24/02/23	13/04/15
Sudan	18/02/86	24/12/72	30/07/05			19/06/13
Tanzania	18/02/84	10/01/75	16/03/03	07/02/06	03/03/07	
Togo	05/11/82	10/04/70	05/05/98	23/06/03	21/10/05	24/01/12
Tunisia	16/03/83	17/11/89		21/08/07*	23/08/18	
Uganda	10/05/86	24/07/87	17/08/94	16/02/01	22/07/10	
Zambia	10/01/84	30/07/73	02/12/08	28/12/22	02/05/06	31/05/11
Zimbabwe	30/05/86	28/09/85	19/01/95		15/04/08	06/04/22
TOTAL NUMBER OF STATES	**54**	**46**	**50**	**34**	**44**	**39**

Ratifications after 31 July 2024 are indicated in bold

* State parties to the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights that have made a declaration under article 34(6) of this Protocol, which is still valid.