Case discussion of *Mornah v Benin and 7 Others:* is the African Court on Human and Peoples' Rights prevented from implementing the right of self-determination?

*Ozioma Izuora**
https://orcid.org/0001-6815-9726

ABSTRACT: The applicant, Mornah, approached the African Court on Human and Peoples' Rights to hold the eight respondent states responsible for the violations of the human rights of the Sahrawi people of the Sahrawi Arab Democratic Republic. He alleged that the respondents failed to 'safeguard the territorial integrity and independence' of that country; and that their right to the enjoyment of their natural resources had been violated. According to him, the respondents were complicit in the alleged violations, in that they voted in favour of Morocco's readmission as a member of the African Union. The Court held that the respondents had exercised their right to vote as a prerogative of membership, which could not be interpreted as support for the alleged rights violations. This case discussion critiques the Court's judgment, which even though thoroughly analysing all arising issues, ended up with unsatisfactory conclusions. It examines the concept of the 'right to self-determination' and 'territorial integrity', as formulated in the African Charter on Human and Peoples' Rights and the African Union Constitutive Act. It also considers the works of learned authors, juxtaposing them with the objectives of the Charter. It finds that the conclusions drawn by the Court appear to favour a particular political stance, mirroring the precedents set by the Commission in similar matters. It finally recommends that the Court should boldly play its role as the supranational human rights court for the continent, by setting clear precedents in developing the jurisprudence of the African human rights system.

TITRE ET RÉSUMÉ EN FRANÇAIS

Analyse de l'arrêt *Mornah c. Bénin et 7 autres* : la Cour africaine entravée dans la mise en œuvre du droit à l'autodétermination ?

RÉSUMÉ: Dans l'affaire *Mornah c. Bénin et 7 autres*, Bernard Anbataayela Mornah, homme politique ghanéen, a saisi la Cour africaine des droits de l'homme et des peuples pour tenir huit États défendeurs responsables de violations des droits de l'homme en République arabe sahraouie démocratique (RASD). Le requérant alléguait que les défendeurs avaient manqué à leur obligation de «sauvegarder l'intégrité territoriale et l'indépendance» de la RASD et que le droit des peuples à disposer librement de leurs ressources naturelles avait été violé. Il accusait également les États défendeurs de complicité dans ces violations pour avoir voté en faveur de la réadmission du Maroc au sein de l'Union africaine. La Cour, dans sa décision, a conclu que le vote des défendeurs relevait de leur prérogative en tant que membres de l'Union africaine et ne pouvait être interprété comme un soutien aux violations alléguées. Ce commentaire critique cette approche, jugeant les conclusions de la Cour insatisfaisantes malgré une analyse approfondie des questions soulevées. L'article

* BA (Hons) (Eng), (Nigeria), M ED (Exeter, England), LLB (Hons), LLM BL (Nigeria), PhD Student (Public International Law), Nasarawa State University, Keffi, Nasarawa State, Nigeria; Lecturer, Faculty of Law, Baze University, Abuja; oziomaizuora919@gmail.com

O Izuora 'Case discussion of *Mornah v Benin and 7 Others*: is the African Court on Human and Peoples' Rights prevented from implementing the right of self-determination?' (2024) 8 *African Human Rights Yearbook* 505-522
http://doi.org/10.29053/2523-1367/2024/v8a19

explore les notions de «droit à l'autodétermination» et d'«intégrité territoriale» telles qu'énoncées dans la Charte africaine des droits de l'homme et des peuples et dans l'Acte constitutif de l'Union africaine. Il juxtapose ces concepts avec la doctrine pertinente et les objectifs de la Charte pour évaluer la pertinence de l'interprétation retenue par la Cour. L'analyse souligne que la décision semble refléter une position politique plutôt qu'une interprétation rigoureuse des normes juridiques applicables, perpétuant ainsi les précédents établis par la Commission dans des affaires similaires. En conclusion, le commentaire appelle la Cour à affirmer son rôle de juridiction supranationale des droits de l'homme en Afrique. Il recommande l'établissement de précédents audacieux pour renforcer la jurisprudence du système africain des droits de l'homme, en particulier dans les affaires touchant au droit à l'autodétermination et à l'intégrité territoriale.

KEY WORDS: self-determination; sovereignty; territorial integrity; independence; Sahrawi; African Court on Human and Peoples' Rights

CONTENT:

1 INTRODUCTION: SELF-DETERMINATION AND TERRITORIAL INTEGRITY

The right to self-determination is provided for in articles 1(2) and 55 of the United Nations (UN) Charter of 1945. The International Covenant on Civil and Political Rights (ICCPR)[1] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[2] in their common article 1 ascribe to 'all peoples' the right to self-determination, equal 'political status', and a guarantee of 'economic, social and cultural development'.[3] Instruments setting up various UN entities also echo these rights. They are usually linked with the concept of 'sovereignty' and 'territorial integrity'. Once self-determination, sovereignty and territorial integrity co-occur, a state is said to have achieved 'independence'. An independent entity enjoys unfettered control of its territory. Such a territory is defined as a 'state' in international law because it can boast of a permanent population; a defined territory; a government, and has capacity to enter into relations with other states.[4]

1 United Nations, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 23 March 1976 (in accordance with art 49 of the UN Charter).

2 United Nations International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 3 January 1976 (in accordance with art 27 of the UN Charter).

3 Art 1(1), ICCPR and ICESCR, 1966.

4 Montevideo Convention on the Rights and Duties of States, 1933, art 1.

The African Charter on Human and Peoples' Rights (African Charter) provides for the right to self-determination in article 20, along with other rights and freedoms associated with it, in subsequent articles. The right to self-determination 'has two interconnected aspects: internal and external',[5] and is concerned with the plight of dependent people seeking to break away from the boundaries set by erstwhile colonial entities. Anyangwe aptly elaborates on the internal and external elements, where he states that self-determination 'is an enabling, collective human right for asserting claim to political autonomy within a state or to sovereign statehood'.[6]

By reaffirming the pledge to eradicate all forms of colonialism from Africa in its preamble, the African Charter must be read as implicitly including the eradication of similar acts of colonialism between African Union (AU) member states. The preamble emphasises that African states would honour the pledge

> solemnly made in Article 2 of the said Charter to eradicate all forms of colonialism from Africa, to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. [7]

The right to self-determination guaranteed in articles 20 to 22 of the African Charter are not feasible without the assurance of sovereignty and territorial integrity. It is for this reason that political claims tend to be brought along with the right to enjoy the natural resources in the territory, as clarified by Anyangwe.

In view of these provisions of the African Charter, could the African Court on Human and Peoples' Rights (Cour) be barred from interrogating questions touching on self-determination, sovereignty and territorial integrity? This question arose in the context of the Court's decision in *Mornah v Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, Tunisia, Tanzania*. These states have ratified the African Court Protocol and made declarations under article 34(6) of the Protocol to the African Charter on the Establishment of an African Court on Human Peoples' Rights (Court Protocol). Mornah brought a case against these states, alleging that when they, as sitting members of the AU Assembly of Heads of State and Government, in 2017 took the decision to admit Morocco to the AU, they failed to safeguard the sovereignty, independence and territorial integrity of the Sahrawi Arab Democratic Republic (SADR) and violated the rights of the Sahrawi people to self-determination.

5 C Anyangwe 'The normative power of the right to self-determination under the African Charter and the principle of territorial integrity: competing values of human dignity and system stability' (2018) 2 *African Human Rights Yearbook* 47, 48.

6 As above.

7 Preamble to the African Charter on Human and Peoples' Rights, para 4.

Answering this question, the Court rightly asserted that as long as there were commissions or omissions that also evinced violations of human rights, it has jurisdiction to determine them.[8] In fact, article 20(2) of the Charter provides that 'colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community'. The right to self-determination is a fundamental right, without which there can be no dignity for a people who have a rightful claim to it. In addition, article 21(1) of the African Charter declares as follows:[9] 'All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.' Under article 21(3), states are exhorted to 'exercise the right to free disposal of their wealth and natural resources with a view to strengthening African unity and solidarity'. Article 22 goes on to assure that 'all peoples shall have the right to their economic, social and cultural development, with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'. It further states that 'States shall have the duty, individually or collectively, to ensure the exercise of the right to development'. It follows, therefore, that the Sahrawi Arab Democratic Republic (SADR) voluntarily contracted with Morocco to exploit its natural resources, even though doing so breaches the sovereign rights of the SADR.

The rights to self-determination, development and to a clean environment are interconnected, and have been portrayed as the pride of Africa and evidence of the progressive stance of Africa towards human rights development. In fact, Okafor and Dzah extol the African human rights system for bequeathing to the world the norms enshrined in the rights to self-determination, to environment and to development.[10] To them, the African human rights system

> has equipped diverse actors and rights systems with an enhanced toolbox, well beyond what usually is available in mainstream human rights praxis, for evolving norms and strategies for, and intervening in, contentious politico-legal affairs. The transformative force of the African human rights system thus is visible across key aspects of human rights law, especially in the way in which norms emerging from Africa socialise actors and their legal and policy choices and actions. Comprising treaty texts, protocols, declarations and resolutions as well as judicial and non-judicial processes, the African human rights system has enunciated, promoted and practised a significantly (even if only partly) organic African vision of rights, while still being responsive to the necessity for broader approaches to human rights.[11]

Robertson and Megrills reflect the above view with regards to the African Charter, stating that 'the creation of this specifically African

8 *Bernard Anbataayela Mornah v Benin and 7 Others (Sahrawi Arab Democratic Republic and Mauritius (Intervening),* Application 28/2018, Judgment, 22 September 2022.

9 Art 21(4), African Charter.

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

11 As above.

machinery represents an attempt to settle disputes on a regional basis without referring them to the Security Council, which is … consistent with Articles 52 and 53 of the UN Charter'.[12] For Africa to deserve such accolades, each organ of the system must maintain a steady tempo of engagements that dispel any shadow of doubt in the precedents they set. There can be no arbitrariness attributable to the decision-making process of the Court, nor should conclusions reached not become applicable to similar scenarios.

The Court Protocol spells out its jurisdiction in article 3, as follows:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned. … In the event of a dispute as to whether the Court has jurisdiction, the Court shall decide.

It bears emphasizing that the right to self-determination is a Charter right and should not be made inferior to the general objectives of the AU. The Court must be able to pronounce on a right once parties approach it to do so. In exercising such a wide jurisdiction and in view of the above provisions, which were exhaustively argued before the Court in *Mornah*, and which the Court scrutinised in detail, the conclusions finally reached by the Court left some questions unanswered.

Even before the Court started operating, the African Commission on Human and Peoples' Rights (Commission) has recognised that different forms of infringement of the right to self-determination persists in parts of Africa.[13] In a case concerning the Anglophone Cameroonians, it stated that 'post-colonial Africa has not been free of domination', but added that contemporary domination does not constitute colonialism 'in the classic sense'.[14] This interpretation raises the query as to whether, if slavery currently occurs within a state, it should be ignored for not corresponding with the forms as slavery that used to be practised.[15] Anyangwe decries the Commission's interpretive approach on this issue:[16]

> The exercise of the right of self-determination under the African Charter is constrained first by the equally important principle of territorial integrity, and second by the conservative and timorous interpretation of that norm by the African Commission.

In several cases, the Commission has refused to accede to claims for self-determination for fear of conflicting with the principle of territorial integrity, even though 'in all these cases, political, (cultural as well, in *Gumne*), social and economic oppression or domination is additionally

12 AH Robertson & JG Merrills *Human rights in the world – an introduction to the study of the international protection of human rights* (2005) 242.

13 *Kevin Mgwang Gunme et al v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Gunme*).

14 Gunme (n 13) para 181.

15 Gunme (n 13) 55, footnote 22.

16 Anyangwe (n 5) 55.

alleged'.[17] The Commission has not through its pronouncements advanced political solutions, to placate the yearning of the peoples of Africa who were promised that right under the Charter, even as the right is 'intertwined' with the struggle for 'decolonization' and 'independence'.[18] Anyangwe maintains that the 'territorial integrity' which the Commission prefers to defer to, exists merely as a policy or directive 'principle' of the AU Constitutive Act, which it vows to protect in its article 3.[19] It is not one of the AU's central goals. For the purpose of this case discussion, it is taken as trite that an objective does not override an assured right.

For avoidance of doubt, article 3(b) of the AU Constitutive Act provides that the Union would 'defend the sovereignty, territorial integrity and independence of its member states'. That is noble in itself, but the Constitutive Act also vows in article 3(h) to 'promote and protect human and peoples' rights in accordance with the African Charter ... and other relevant human rights instruments'. As between the SADR and Morocco, in the case under consideration, there are two sovereign states whose dispute on sovereignty and territorial integrity should not be allowed to continue to fester without a solution, making the AU appear to be a toothless bulldog. In playing its complementary role alongside the Commission, the Court must do better to fully achieve the objective of the Charter to ensure the self-determination of Africa's peoples, something that the Commission has continuously failed to do. Besides, the Court has its work cut out for it as the supranational regional court on human rights. It must be seen to give proper directions that create clear precedents to deter future violations by states. Membership of the AU comes with a mutual duty to make concerted efforts towards achieving African unity. The situation in SADR is still continuing, long after foreign occupation of African states has become a matter of history. The Court should not, like the Commission, fail to face the thorny issue of self-determination head on. It should also align itself with the Commission's decisions and appear to defer to the dominant power in that conflict.

Zewudie makes the point that

> the AU has been heavily criticised for not living up to its promises as far as human rights are concerned. Despite the establishment of human rights mechanisms, the AU, as a collective of States, has played an inadequate role in supporting and encouraging them. Discrepancies between AU's decisions and actions concerning its relation with the Commission led some scholars to conclude that the AU 'does not wish to see the

17 Anyangwe (n 5) 56 (footnotes 27-29): *Sir Dawda Jawara v Gambia* (2000) AHRLR 107 (ACHPR 2000); *DRC v Burundi, Uganda and Rwanda*, Communication 227/99, African Commission on Human and Peoples' Rights, 20th Annual Activity Report (2006) (*DRC* case); *Cabinda v Angola, Katanga v Zaire*, Communication 24/89, *Union National de Liberation de Cabinda v Angola,* African Commission on Human and Peoples' Rights, 7th Annual Activity Report.

18 B Gawanas 'The African Union: concepts and implementation mechanisms relating to human rights' in A Bösl & J Diescho (eds) *Human Rights in Africa: legal perspectives on their protection and promotion* (2009) 135.

19 Anyangwe (n 5) 67-8.

Commission to become more effective and forceful'. The AU has put inadequate effort in liberalising and democratising its members and in promoting human rights on the domestic level. It has also been observed to focus more on protecting leaders than the human rights of ordinary people. Constantly placing 'key policy issues' such as integration, peace and security and development at the centre of their discussions, leaders occasionally ignore grave human rights issues that warrant their special attention.[20]

2 BACKGROUND AND FACTS PRESENTED BY MORNAH

The applicant in this case is Bernard Anbataayela Mornah, a Ghanaian national and the national chairperson of a political party registered in Ghana. Mornah approached the Court to determine the international responsibility of the eight respondent states, who by their action of voting in favour of AU membership of Morocco, allegedly made themselves complicit in the violations of the rights of the Sahrawi people. The main violation of rights he complained of, is the continued occupation of the territory of the SADR by Morocco, which amounted to 'violations of the human rights of the Sahrawi people' and an 'erosion of the sovereignty, territorial integrity and independence of Western Sahara'.[21] The other alleged violation is that Morocco continues to exploit the natural resources of those areas under its occupation, against the rights and interests of the Sahrawi people.

The SADR had been colonised by Spain until February 1976, after which Morocco and Mauritania took over parts of its territory. The Sahrawi people resisted the occupation by the two states, resulting in Mauritania giving up its claim to any part of the country. However, Morocco remained an occupying power.[22] Different from Morocco, the SADR was a founding member of the AU. Morocco withdrew from the OAU in 1984 after the SADR had been admitted as a member of the OAU.[23] In 1992, the United Nations supervised a referendum on the independence of the SADR. Morocco scuttled that effort, by claiming that the electoral process was tantamount to secession. The bad blood between the two states continues to reverberate in international politics to this day. They remain pitted against each other, competing for the natural resources available in the territory of the SADR. As an erstwhile

20 TA Zewudie 'Human rights in the African Union decision-making processes: an empirical analysis of states' reaction to the Activity Reports of the African Commission on Human and Peoples' Rights' (2018) 2 *African Human Rights Yearbook* 295-320, 298 http://doi.org/10.29053/2523-1367/2018/v2n1a13 (accessed 12 April 2024).

21 Para 8 of the Judgment.

22 Para 9 of the Judgment.

23 Para 10 of the Judgment.

colonial power, Spain has in furtherance of its own economic interests maintained close ties with Morocco.[24]

The allegation that Morocco continues to exploit the abundant natural resources of the territory to the detriment of the Sahrawi people is an important aspect of the applicant's case. Mornah also stated that in spite of Morocco being admitted to membership of the AU in 2017, the state had not shown any intention of relinquishing its occupation of the Sahrawi territory. He alleged that in spite of the AU's recognition of Sahrawi as 'the legitimate government in exile' and the fact that 'no less than eighty-four … countries have accorded it diplomatic recognition', parts of the country remained under Moroccan occupation.[25] The applicant categorically called into question the act of the AU in unconditionally admitting Morocco as a member, stating that the action contradicted 'the established practice with regard to admission of members' to the AU (previously, the OAU). He recalled that apart from condemning illegal and unconstitutional change of governments, the OAU and AU had in the past, refused to admit colonial powers as members. Examples of these were South Africa, which only joined the OAU after the demise of the apartheid regime, and in recent times, Côte d'Ivoire, Niger, Burkina Faso and Egypt, which were sanctioned for the unconstitutional change of government through *coups d'etat*.

All the respondents have ratified the African Court Protocol and made declarations under article 34(6) of the Protocol, giving access to NGOs enjoying observer status with the Commission and individuals to bring cases against them directly to the Court.[26] While some of the respondent states had withdrawn their declaration, the Court held that such withdrawal did not have retroactive effect or bearing on matters submitted to it prior to the withdrawal of the declarations. Such withdrawal would only come into effect after one year from the date the document for withdrawal had been deposited.[27] The withdrawal of these declarations therefore had no effect on the Court's exercise of jurisdiction. SADR and Mauritius applied to and were granted the right to join in the suit as interveners, and the African Union of Lawyers (PALU) joined as *amicus curiae*.[28]

24 EuroNews, 'Algeria suspends friendship treaty with Spain over Western Sahara', Published on 9 June 2022, https://www.euronews.com/2022/06/09/algeria-suspends-friendship-treaty-with-spain-over-western-sahara (accessed 14 April 2024).

25 Paras 11-13 of the Judgment.

26 Paras 3-5 of the Judgment.

27 Para 6 of the Judgment; see footnotes 1 to 3: *Andrew Ambrose Cheusi v Tanzania*, ACtHPR, Application 4/2015, Judgment of 26 June 2020 (merits and reparations), §§ 37-39. *Houngue Éric Noudehouenou v Benin*, ACtHPR, Application 3/2020, Order of 5 May 2020 (provisional measures), paras 4-5 and corrigendum of 29 July 2020; *Suy Bi Gohore Émile and Others v Côte d'Ivoire*, ACtHPR, Application 44/2019, Judgment of 15 July 2020 (Merits and reparations), para 67; *Ingabire Victoire Umuhoza v Rwanda* (Jurisdiction) (3 July 2016) 1 AfCLR 562, para 69.

28 Para 7 of the Judgment.

3 THE COURT'S DECISION ON JURISDICTION AND ADMISSIBILITY

3.1 Jurisdiction

The respondents argued against the Court's jurisdiction to entertain the matter. According to them, the matter raised political issues, which the Court had no power to entertain, because of the constraints of 'international relations and diplomacy and the principle of non-intervention' in the affairs of sovereign entities.[29] States like Mali and Ghana, in addition to the above, threw in the palliative that the best the Court could do would be to issue an advisory opinion on the matter.[30] The interveners and the *amicus curiae* supported the case of the applicant, by insisting that by voting in favour of Morocco's membership, the respondents acquiesced to the alleged violations of the rights of Sahrawi people by Morocco.[31]

The Court started with the following general observation:[32]

> [A]n application may raise issues of a political or diplomatic nature or may seek reliefs that may require political decisions or diplomatic solutions. An application may also contain allegations that relate to a state's conduct in the arena of international relations, including its commitments or undertakings in international organisations. However, the mere fact that an application contains issues relating to State sovereignty or that it touches on political or diplomatic issues does not automatically remove the Court's competence to consider an application.... in general terms ... international law is essentially a product of the consensual undertaking of States and its consensual nature is the highest manifestation of their sovereignty and independence. Nevertheless, once States have willingly ceded their consent to the jurisdiction of an international tribunal to interpret and apply specific instruments, they cannot raise sovereignty as a defence or justification to preclude the tribunal from exercising its jurisdiction over a dispute insofar as the dispute relates to issues that fall within the scope of the tribunal's statutory competence.

The Court thus justified its power to exercise jurisdiction on the matter by emphasising aspects of the application that disclosed that the Sahrawi people had been denied their right to self-determination by Morocco with impunity from the AU, as evidenced in Morocco being admitted to become an AU member.[33] The Court also established its competence to determine whether the respondent states were responsible for the alleged violations of the rights and freedoms of the peoples of SADR, even though 'territorial disputes' also arose from the scenarios.[34] The Court vehemently countered the contention by Tunisia at the AU Conference of 2018, it was agreed that the AU would

29 Para 57 of the Judgment.
30 Paras 58 & 59 of the Judgment.
31 Paras 62 & 63 of the Judgment.
32 Paras 64 & 65 of the Judgment.
33 Paras 86 & 87 of the Judgment.
34 Para 93 of the Judgment.

leave the matter of SADR to be decided by the UN. It cited the AU document *in extenso*, and from the text, pointed out that the AU never agreed to adopt a 'hands off' approach to all matters relating to SADR. It concluded that operating under the AU, the Court remained bound by the Charter, its Protocols, and other international human rights instruments ratified by the parties before it. The Court therefore confirmed its material jurisdiction in the case.[35]

Having reviewed the submissions of the parties and the *amicus curiae* on each head, the Court also claimed both personal and temporal jurisdiction over the matter.[36]

On the challenge to its territorial jurisdiction, the Court noted that, unlike the treaties on which the European and Inter-American Courts of Human Rights are founded, neither the Charter nor the Protocol delineated the 'territorial scope of its application'. It noted that, in practice, the Court habitually examined that aspect of jurisdiction, sometimes, *suo motu*.[37] The Court further noted as follows:[38]

> ... in recent times, with the increasing extra-territorial undertakings of States and the erosion of the defence of sovereignty with respect to violations of human rights, the classical notion of territorial jurisdiction has seen some changes. International human rights jurisprudence has also continuously expanded the territorial application of international human rights conventions beyond the physical national boundaries to areas where States have effective control and to acts and omissions committed by their agents or persons under their military, political, and economic influence.

The Court further noted that the UN Human Rights Committee, in its General Comment 12, has established that where the right to self-determination is concerned, 'specific obligations on states parties exist not only in relation to their own peoples but vis-à-vis all peoples' seeking the right.[39] It concluded that viewed against the provisions of the African Charter, the violation may result from either commission and omission.[40] However, it noted that to exercise its territorial jurisdiction, 'the Court must also establish that such alleged violations must have occurred in the territory of a State Party against which an application is filed or by persons under its control'.[41] The Court went on to attribute the breach by the respondents to their omission to act in the face of the breach of the Charter in relation to the Sahrawi people, and concluded that it had territorial jurisdiction to examine the application.[42]

35 Paras 94-99 of the Judgment.
36 See paras 123 & 131 respectively.
37 Para 146 of the Judgment.
38 Para 148 of the Judgment.
39 Para 149 of the Judgment.
40 Para 153 of the Judgment.
41 Para 155 of the Judgment.
42 Para 159 of the Judgment.

3.2 Court dismissed objections to admissibility

The respondents raised numerous objections to the admissibility of the case, all of which the Court dismissed.[43] Some of these objections had to do with the identity of the applicant and the basis for bringing the case; and reliance on matters relayed through the mass media. The Court thoroughly examined each and every head of the objections. In particular, in relation to the objection against non-exhaustion of local remedies, the Court recalled the Commission's decision in *World Organisation against Torture and Others v Zaire* (*Zaire Mass Violations* case),[44] in which it stated that 'when an application involves an allegation of a series of serious and massive violations of human rights, the rule of exhaustion of local remedies becomes inapplicable'. It applied to the case the exception to the rule on the exhaustion of local remedies, as the violations have gone on for years and were still ongoing. It took a similar stance with regards to the applicability of 'reasonable time' within which to bring an application to the Court. According to the Court, it did not matter whether the matter was filed in 1975 or in 2016, since 'the alleged breach of their obligation under the Charter renews itself every day and hence, an application may be filed at any time'.[45]

4 THE COURT'S DECISION ON THE MERITS

4.1 The issues

The issues presented to the Court for determination by the applicant include: violation of the objectives and principles of the Union enshrined in articles 3, 4 and 23 of its Constitutive Act; articles 1 and 2 of the African Charter on Democracy, Elections and Governance (Democracy Charter) and articles 1, 2, 7, 13, 19, 20, 21, 22, 23 and 24 of the Charter. The applicant called for sanction against the respondent states for not having protested against the admission of Morocco at the time the AU Assembly of Heads of State and Government took the decision to admit Morocco.[46] There were, as such, two main issues before the Court.

The Court noted that in addition to the provision of article 20 of the Charter,

> ... in international law, the right to self-determination has achieved the status of *jus cogens* or a peremptory norm; thereby, generating the corollary obligation *erga omnes* on all States. As such, no derogation is permitted from the right and "all States have a legal interest in protecting

43 Para 166 of the Judgment.

44 Para 211; footnote 42 of the Judgment: Communications 25/89, 47/90, 56/91 & 100/93, *World Organisation against Torture and Others v Zaire (Zaire mass violations case),* Ninth Annual Activity Report, para 3.

45 Paras 220 & 221 of the Judgment.

46 Paras 15 & 16 of the Judgment.

> that right". Where a peremptory norm is breached, States are also under an obligation not to recognize the illegal situation resulting from such breach and not to render aid or assistance in maintaining the situation.[47]

The Court established that it had already been determined that, historically, Morocco had no right to claim the territory of Western Sahara.[48]

With regards to the respondent states, the Court relied on established international law norms in order to decide their culpability:[49]

> ...in international law, a State incurs international responsibility where three cumulative conditions are proven to have existed: an act or omission violating international law, that is, an internationally wrongful act; the act must be attributed to a State (attribution); and the act must cause a damage or loss (causal link). In addition, there should not be circumstances precluding responsibility. These conditions are spelt out in the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts and have been generally considered as reflecting customary international law.

The Court further observed that even though article 20 of the Charter imposes an obligation on AU member states to take steps to support the self-determination efforts of the peoples generally, it does not impose specific obligations. In the instant case, it observed that the respondent states refuted the applicant's allegation that they supported Morocco's violations of the stated rights, by stressing that they were fulfilling their obligations to the Sahrawi people through the instrumentality of the AU and the UN. They submitted that they could not, therefore, be said to have omitted to fulfil their obligations to the SADR and its people. Even though it expressed concern that the respondents might not have been providing adequate support to the SADR, the Court ruled that exercising the right to vote 'by a Member State cannot in itself *a priori* constitute a breach of its international obligation or in the instant application, a violation of the right to self-determination' of the SADR.[50] Noting that the requirements of article 29 of AU Constitutive Act for approving membership was by a simple majority, the Court concluded that the respondent states' 'individual decision to support or oppose the admission of Morocco does not alone necessarily determine the final outcome'.[51] The Court further stated that states' 'individual decisions to vote in favour of Morocco's admission to the Union *per se*

47 Para 298; footnote 65: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion Of 9 July 2004, § 163. See also footnotes 63 and 64: The Court also relied on the following decisions: UN Human Rights Committee (HRC), General Comment 31, para 80, The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev1/Add.13, para 6. ICJ, *Advisory Opinion on Chagos Archipelago* (2019), para 180; see also *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, ICJ Reports 1970, para 33; *East Timor (Portugal v Australia)* case, ICJ Reports 1995, p. 102, para 29.

48 Footnote 70, ICJ *Advisory Opinion on Western Sahara* (1975) para 162, among others; paras 302 & 303 of the Judgment.

49 Para 304 of the Judgment.

50 Paras 314 & 315 of the Judgment.

51 Paras 317 & 318 of the Judgment.

cannot be taken as a recognition of Morocco's occupation of the territory of the SADR'.[52]

Finally, and equally disappointingly, the Court declared as follows:[53]

> With regard to the alleged human rights violations directly ensuing from Morocco's occupation of Western Sahara, the Court finds it unnecessary to examine or pronounce itself on them, as Morocco is not a party to this case. As far as the responsibility of Respondent States' is concerned, there is no evidence available before it to attribute these violations to them. There is also no demonstrated causal link between the complained conduct of the respondent States and such violations.

The Court dismissed the case against the respondents and rejected the application for reparation; and ordered parties to bear their own costs.

The Court rightly resisted the claim by the respondents that it could not pronounce on any matter concerning sovereignty and territorial integrity. It distinguished situations where such matters also included human rights violations, in accordance with its jurisdiction. It disagreed with the position that the most it could do would be to issue an advisory opinion on such matters. In my view, the Court arrived at the right conclusion. The right to self-determination, as has been analysed above, is a Charter right, and not merely a policy thrust of the AU. If the situation were otherwise, it would be impossible for a people to ever aspire to the right to self-determination through the Court. The Charter provisions on self-determination would be inoperable too, as would be the objective of the Charter, which aims

> to achieve the total liberation of Africa, the peoples of which are still struggling for their dignity and genuine independence, and undertaking to eliminate colonialism, neo-colonialism, apartheid, zionism.[54]

The Court admitted that Morocco has been in adverse possession of parts of SADR territory since 1976. However, it was not rigorous enough in pressing the need to protect the rights assured to the SADR and its people under articles 20 to 22 of the Charter. To me, Morocco's claim that the obligation imposed on AU members by article 20 (to take steps to support the self-determination efforts of relevant peoples) does not impose specific obligations, is unconvincing. The Court fundamentally undermined the rights of the SADR by splitting hairs in the interpretative distinction it drew between 'general' and 'specific' obligations. How will the 'transformative force' that Okafor and Dzah extol burgeon from such a decision that sounds more like an extended apology for siding with the suppression of self-determination? The Court certainly did not get in the saddle as that 'African machinery' that would 'represents an attempt to settle disputes on a regional basis without referring them to the Security Council', which Robertson and Megrills envision for the Charter.

52 Para 320 of the Judgment.

53 Para 321 of the Judgment.

54 Para 8 of the Preamble to the African Charter.

The Court allowed the respondent states to dodge a bullet by finding that they did not encourage Morocco's violations of rights because they merely 'welcomed' them to the membership of the AU. Since the Court interpreted article 29 of the AU Constitutive Act by stating that an individual state's vote did not determine the final outcome of membership, it should not have shied away from upholding the applicant's argument on the effect of article 30 of the Act. Article 30 forbids the Union from admitting governments that come into power by unconstitutional means. The respondents should have been found in violation of article 30 for voting in favour of Morocco's membership while it was in adverse occupation of the SADR's territory. The Court, itself, had held respondents to have omitted to act in the face of continuing violations, against the spirit of the Charter. Its reasoning begs this question: What other 'specific obligation' was the Court searching for? The Court should have relied on the authority it cited regarding the 'corollary obligation *erga omnes* on all States' to act in concert whenever the right of self-determination is breached. However, it did not do so.

With regards to the exploitation of natural resources of the Sahrawi people in the territories that Morocco currently occupies, the Court found that it had jurisdiction because the violations were ongoing. However, it failed to find the respondents in violation for not being mindful of 'their duty to promote and protect human and peoples' rights and freedoms taking into account the importance traditionally attached to these rights and freedoms in Africa'.[55] Unfortunately, because it was not a party to the African Charter, or to the African Court Protocol (and had of course not made a declaration under article 34(6) of the Court Protocol), Morocco could not be held in violation by the Court.

5 CRITIQUE AND RECOMMENDATIONS

The Court ought to have more strongly admonished the respondent states for their apparently tolerant disposition towards Morocco. The applicant was right to insist that these states should have protested by withholding their votes allowing for Morocco's admission to the AU. The Court should have found applicable in the exercise of its inherent jurisdiction the customary international law precept of attribution and of acts that enabled the situation of violation. Such an approach would have captured justice as encapsulated in the preamble of the Charter, especially to the people of the SADR whose right to self-determination has been impeded for many years. Morocco might not have been a party to the case, but the evidence of the violations has long been a matter of judicial notice. In its finding in *Mornah*, the Court passed by an opportunity to contribute to the liberation of the SADR and its people from Morocco's domination.

55 See para 10 of the Preamble of the African Charter.

Based on the above analysis, it is my conclusion that the African Court is not barred from determining violations of human rights in claims related to sovereignty, territorial integrity and independence. The Court should in *Mornah* have adopted a more proactive stance and should have placed less 'timorous' reliance on the black letter of the law, which the judgments of the Commission has been criticised for.[56] It is my firm view that the right to self-determination is a right that urgently needs to be made accessible in view of the state of agitation in various parts of Africa. The Court spoke from two sides of its mouth on the matter. On the one hand, it noted that the right was being infringed. On the other hand, it refused to accept that the actions of the respondents in welcoming into the community of African states a state at odds with their core common precepts could be interpreted as enabling violations by that state.

How did the fact that the respondent states voted in favour of Morocco not reflect their acceptance of the country's already condemned adverse occupation of the territories of the SADR? How did the Court not see a causal link between the respondents' votes (of confidence in Morocco) and the continuing exploitation of the natural resources of SADR by Morocco? Above all, how are the respondents demonstrating their adherence to the African Charter, which exhorts them in its preamble 'to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa and to promote international cooperation'?[57] In spite of the heavy weather it made, dismissing the various objections to its jurisdiction, the Court's decision appears at the end of the day, to be an exercise in futility.

Hopefully, the views canvassed in this case discussion may redirect the Court with regards to its interpretative role concerning the objectives of the African Charter. In addition to the upbeat views of Okafor and Dzah, referred to above, such roles have been attributed to the African human rights system as evidenced in the views expressed by Solomon Dersso, a former Chairperson of the Commission, on the occasion of the Charter's 40 years of existence in 2021.[58] He identified the primacy of 'piercing the veil of sovereignty' as the main achievement of the Charter through developing the African human rights system. According to him,

> in embracing human rights and extending their scope and articulation, the African Charter ended the debate about the legitimacy of human rights in Africa. This is of particular importance as the African Charter opens further avenues for the recognition and articulation of human rights both at the continental and national levels. The Charter inspired the adoption of various human rights and democracy and governance norms within the OAU and its successor, the AU. This also accounts for the huge space given to human rights in the AU's founding treaty, the Constitutive Act. The

56 See sources cited in n 17 above.

57 Para 3 of preamble, African Charter.

58 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* 649-668, http://dx.doi.org/10.17159/1996-2096/2021/v21n2a26645 (accessed 15 June 2024).

> African Charter and the various other human rights instruments that succeeded it served as a source of inspiration in the elaboration of national bills of rights and various laws giving effect to specific human rights.[59]

The above statement communicates the need for a broader approach, rather than a restrictive one, in the Court's interpretation of the Charter rights. One of the recurring challenges in the African human rights system is the lack of state compliance. My view is that it may well be this state of affairs that accounted for the Court stepping back on holding the respondents partly responsible, thus enabling Morocco's violations against the SADR. In other words, the apprehension that the respondents would have ignored the judgment with impunity, could well have played a role in the Court arriving at the decisions it made.

Besides, this writer has noted that the demarcation of the Court's powers, relative to the other organs of the AU, is often blurred, thus chipping away at the claim to being the supranational court on human rights in Africa. The respondents relied heavily on this weakness to dare the Court to accuse them of wrongful acts enabling rights violation. This writer is of the view, further, that to liberate itself from impending obscurity, the Court must, without fear or favour, stand its ground by delivering judgments that clarify and grow its autonomous jurisprudence.

The African Court possesses unique characteristics which it must take advantage of, going by the view of Nyman-Metcalf and Papageorgiou,[60] who state that in comparison with other regional courts of human rights, the African human rights system

> emphasises the collective rights of peoples as well as those of individuals and it is the strongest on developing *actio popularis* to permit groups to support protection of human rights.

More individuals and CSOs like the applicant in the present case, ought to be encouraged to approach the Court on similar matters of public interest. It is bad enough that article 34(6) of the Court Protocol allows member states to opt in and opt out of the Court's jurisdiction at will. This exerts a huge restraint on seizing the Court's jurisdiction. To further burden the system with lacklustre and unconvincing reasoning portends badly for the development of the Court's jurisprudence. In fact, Trésor Makunya describes the effect of article 34(6) of the Protocol as a 'haemorrhagic trend' which if allowed to continue, would result in loss of opportunities for individuals 'to effectively engage the Court and that the ability of the latter to serve as a regional arbitrator of human rights violations will be significantly undermined'.[61]

59 Dersso (n 58) 654.

60 K Nyman-Metcalf & I Papageorgiou 'Why should we obey you? Enhancing implementation of rulings by regional courts' (2017) 1 *African Human Rights Yearbook* 167-190 http://doi.org/10.29053/2523-1367/2017/v1n1a9 (accessed 14 June 2024).

61 TM Makunya 'Decisions of the African Court on Human and Peoples' Rights during 2020: trends and lessons' (2021) 21 *African Human Rights Law Journal* 1230, 1235.

In addition, Makunya reviewed several cases in his article, and found that the Court has shown little rigour in the pronouncements it has been making. For instance, in respect of the *XYZ (010)* case against Benin, he criticised the Court for arriving at the conclusion that article 22(1) of the Charter was breached based on a 'single sentence-paragraph'.[62] According to him, if the Court had consulted the jurisprudence of the Commission, its reasoning would have been strengthened by placing reliance on precedents such as the following:[63]

> In *Institute for Human Rights and Development in Africa v Democratic Republic of Congo* the Commission considered that the right to development under article 22 of the African Charter was both an individual and a collective right. In *Endorois* it held that the right to development was 'both constitutive and instrumental, or useful as both a means and an end'.

Conscious of its role in the promotion of human rights in Africa, the African Court has reached out on several occasions, to seek the collaboration of stakeholders to contribute to improving the impact of its judgments on the continent. It is in that spirit that this case discussion calls on the Court to pay attention to these reviews. The Court must aim to prove itself as a supranational body which parties may resort to for refuge against violations of rights. Africa is badly in need of an even-handed arbiter to strengthen the integration and development of members of the AU. It goes without saying that a perpetual state of conflict between states will not augur well for meaningful development.

A strong recommendation was made in the communique that came out of the Conference of the African Court in November 2021,[64] namely, for an amendment to the Court Protocol to remove article 34(6), so that access to the Court would no longer be impeded at the will of state parties. It is a small gain that the Court, as already stated above, can continue to hear cases already before it, even if a state withdrew its article 34(6) declaration. Of course, the removal of the restriction will no doubt result in an influx of cases to the Court. The AU may then have to consider amending the Court's enabling instruments to increase the number of judges; and possibly, convert the tenure of judges from part time to full time, as has happened with its European counterpart. Considerations of the resulting increase in funding need not be overwhelming if member states begin to demonstrate the political will to achieve the Charter objectives. Besides, the amicable settlement option in the Protocol, if activated, should be useful in dealing with the increased load on the Court.

Whatever the anticipated difficulties, that amendment must now be seen as a *sine qua non* for the development of human rights in Africa. One must not, however, ignore the positive recorded fact that in

62 Makunya (n 61) 1262.

63 Makunya (n 61) 1262 (footnotes omitted).

64 African Court on Human and Peoples' Rights, 'Implementation and Impact of Decisions of the African Court on Human and Peoples' Rights: Challenges and Prospects', held at Julius Nyerere Convention Centre, Dar Es Salaam, Tanzania, 1-3 November 2021.

Mornah two states requested to join in a matter in the interest of the public, albeit one (the SADR) with a very direct interest. However, the intervention of Mauritius was altruistic. Mauritius's intervention is in line with both the principles of the Charter and other settled international customary law that make the question of the right to self-determination the concern of all states. One hopes that with similar interventions human rights in Africa will continue to develop with the attendant benefit of developments in other areas of governance. The AU should be wary in the face of ongoing skirmishes all over the world, not least of which is the ongoing Israeli-Palestinian war, to be alert to such eventualities between its members.