The Evolutive Interpretation of the African Charter on Human and Peoples' Rights

Article *in* SSRN Electronic Journal · June 2023

DOI: 10.2139/ssrn.4489765

CITATIONS
0

READS
19

1 author:

Mujib Jimoh
Duke University
12 PUBLICATIONS **2** CITATIONS

SEE PROFILE

The Evolutive Interpretation of the African Charter on Human and Peoples' Rights

Mujib Jimoh

O.P. Jindal Global University

E-mail: mujibjimoh@yahoo.com

This article regionalizes the discourse on the evolutive interpretation of human rights treaties to Africa. In it, three broad issues are discussed. First, it discusses the extent to which the African Human Rights Commission and Court may adopt the evolutive interpretation in interpreting the African Charter. Second, it examines the challenges to this interpretation method. Third, it discusses the counterarguments to the challenges. The article argues that two main groups of provisions may support an evolutive interpretation of the African Charter – the "any other status" clause in Article 2; and Articles 60 and 61, referred to as the "decompartmentalization articles." It finds that the popular notion that evolutive interpretation is contrary to the traditional international law principle of intent and consent and the potential clash of evolutive interpretation with African values are the main challenges to adopting the evolutive interpretation of the African Charter. In turn, the article provides counterarguments to these challenges.

The Indonesian Journal of International & Comparative Law
ISSN: 2338-7602; E-ISSN: 2338-770X
http://www.ijil.org

INTRODUCTION

This Article situates the discourse on the evolutive interpretation of treaties[1] within the African human rights system.[2] In scope, three broad issues will be addressed. First, to what extent can the African Commission on Human and Peoples' Rights[3] and the African Court on Human and Peoples' Rights[4] use the evolutive interpretation to interpret the

1. There are a lot of works on this. These works have adopted varying term. They include "evolutive interpretation;" "evolutionary interpretation;" "dynamic interpretation;" "living instrument interpretation;" "progressive interpretation." *See* Sondre Torp Helmersen, *Evolutive Treaty Interpretation: Legality, Semantics and Distinctions*, 6 Eur J. Leg. Stud. 161, 162 (2013); Malgosia Fitzmaurice, *Dynamic (Evolutive) Interpretation of Treaties*, 21 Hague Y. B. Int'l 101 (2008); Eirik Bjorge, The Evolutionary Interpretation of Treaties (2014); Nidhi Rajesh Doshi, *The Law of Treaties with Special Focus on Evolutionary Interpretation of the Treaties*, 4 Int' J. L. Mgmt. & Hum. 2596 (2021); Jared Wessel, *Relational Contract Theory and Treaty Interpretation: End-Game Treaties v. Dynamic Obligations*, 60 N.Y.U. Ann. Surv. Am. L. 149 (2004); Dimitris Liakopoulos, *Evolutionary, Dynamic or Contemporary Interpretation in WTO System,* 5 CJGG 21 (2019); Robin McCaig, *The Further Evolution of the Evolutionary Approach to Treaty Interpretation*, 69 Cambridge L. J. 250 (2010). George Letsas, A Theory of Interpretation of the European Convention on Human Rights (2009). This article adopts "evolutive interpretation."

2. The African Charter on Human and Peoples' Rights [hereinafter referred to as the African Charter] is the foundation of the human rights system in Africa. See Mujib Jimoh, *Investigating the Responses of the African Commission on Human and Peoples' Rights to the Criticisms of the African Charter* 4 Rutgers Int'l L. & Hum. Rts. J. (2023) [forthcoming]; Christof Heyns, *The Human Regional Human Rights System: In Need of Reform?* 2 Afr. Hum. Rts L. J. 155, 156 (2001).

3. The African Commission on Human and Peoples' Rights [hereinafter referred to as the African Commission] is established by the African Charter, art. 30. For some discussion on the African Commission, *see* Emmanuel Bello, *The Mandate of the African Commission on Human and Peoples' Rights* 1 Afr. J. Int'l L. 55 (1988); Kofi Oteng Kufuor, *Safeguarding Human Rights: A Critique of the African Commission on Human and Peoples' Rights,* 18 Hum. Rts. Q. 65, 71 (1993).

4. The African Court on Human and Peoples' Rights [hereinafter referred to as the African Court] was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights [hereinafter referred to as the African Court Protocol]. For discussion, see for instance**,** N. Barney Pityana, *Reflections on the African Court on Human and Peoples' Rights*, 4 Afr. Hum. Rts. L. J. 121 (2004).

African Charter? Second, what are the challenges[5] and implications of such evolutive interpretation? Third, what are the counterarguments to challenges? The gist of the Article is its regionalization of the discourse on the evolutive interpretation of human rights treaties to the African human rights system, for, generally, "it seems that everything has been said—and written—about the interpretation of international treaties…" and "each new addition to the existing literature on this subject is therefore faced with the suspicion—and with the risk—of being a mere restatement of things already stated eloquently by the most prestigious scholars and practitioners of international law."[6]

Though the Vienna Convention on the Law of Treaties (VCLT)—now considered customary international law[7]—contains the rules for treaty interpretation,[8] its provisions are said to be imperfect because it is "not unequivocal."[9] Before the VCLT, there were extensive contributions to theories of treaty interpretation from scholars like Hersch Lauterpacht, Arnold McNair, and Gerald Fitzmaurice.[10] After the VCLT, numerous scholars,[11] including the United Nations International Law Commission

5. Challenges include the textual constraint in the African Charter and arguments contained in other scholarship which may disfavor the use of the evolutive interpretation within the African human rights system. *See* for instance Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights*, 2 Afr. Hum. Rts. L. J. 223, 226 (2002) discussed in section 4.A.1. below.

6. Alexis Massot, *The Evolutionary Interpretation of Treaties by Eirik Bjorge,* 14(3) World Trade Rev. 543 (2015).

7. Richard Gardiner, Treaty Interpretation 3 (2015).

8. *See* VCLT, arts 31–33; Dalton Luiz Dallazem, *What Rules, if not Customary International Law—Articles 31-32 of the VCLT—Are the U.S. Courts Relying upon while Applying and Interpreting Tax Treaty Provisions?* 211 Assehr 122 (2018).

9. icelandic human rights centre, *Interpretation of Human Rights Treaties,* https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/part-i-the-concept-of-human-rights/interpretation-of-human-rights-treaties.

10. *See* Isabelle van Damme, Treaty Interpretation by the WTO Appellate Body (2009).

11. See for instance, Maarten Bos, *Theory and Practice of Treaty Interpretation*, 27Neth Int'l L. Rev. 3 (1980a); Maarten Bos, *Theory and Practice of Treaty Interpretation*, 27 Neth Int'l L Rev. 135 (1980); Anthony Aust, Modern Treaty Law and Practice (2007).

(ILC), the International Court of Justice,[12] and regional courts,[13] have espoused different approaches/theories of treaty interpretation. Over the years, the most notable approaches that have emerged—some describe them as now part of customary international law[14]—are the textual[15] and teleological approaches.[16] However, the application of these approaches is not without controversies. For instance, Aust doubts the textual approach, arguing for the "(con)textual approach"[17] instead. Other scholars speak of a "golden approach"[18]—much like the Golden Rule of interpretation in domestic courts—and a "contemporaneity approach."[19] Considering the scope of this article, the controversies and debates on these theories are left out.[20] Instead, this article focuses

12. Liliana E. Popa, *The Holistic Interpretation of Treaties at the International Court of Justice*, 87 Nordic J. Int'l L. 249 (2018); James Crawford & Amelia Keene, *Interpretation of the Human Rights Treaties by the International Court of Justice,* 24(7) Int'l J. Hum. Rts 935 (2019).

13. Laurence Burgorgue-Larsen, *"Decompartmentalization": The Key Technique for Interpreting Regional Human Rights Treaties,* 16 Int'l J. Const. L. 187 (2018) (stating that "judicial and quasi-judicial bodies of the African, Inter-American, and European human rights systems have all developed interpretation techniques which, although based on customary norms codified in the Vienna Convention on the Law of Treaties, regularly distance themselves from such norms.").

14. See Francisco Pascual-vives, Consensus-based Interpretation of Regional Human Rights Treaties 73 (2019) (describing the textual, systematic or teleological interpretation as part of customary international law).

15. *See* Arnold D. McNair, The Law of Treaties (1986).

16. Oreste Pollicino, *Legal Reasoning of the Court of Justice in the Context of the Principle of Equality Between Judicial Activism and Self-restraint* 5(3) 283 German L. J. (2004).

17. Aust, *supra* note 11 at 184-204.

18. Frans Viljoen, *The African Charter on Human and Peoples' Rights: The Travaux Préparatoires in the Light of Subsequent Practice* 25 Hum. Rts L. J. 313 (2004).

19. Pascual-vives, *supra* note 14, at 74 citing Gerald G Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951–4: Treaty Interpretation and Other Treaty Points* 33 Brit. Y. B. Int'l L. 203, 212 (1957); see also Inagaki Osamu, *Evolutionary Interpretation of Treaties Re-examined. The Two-stage Reasoning* 22 J. Int'l Comp. Stud. 127 (2015).

20. There are a lot of scholarship on this controversy. see Burgorgue-Larsen, *supra* note 13, at 189-90 also refusing to consider the theories on the basis that "we can find, for example, that "special issues" of *European Journal of*

on evolutive interpretation. The peculiarity of issues on evolutive interpretation will be regionalized to the African human rights system.

In Europe, there is a lot of scholarship on evolutive interpretation within the European human rights system.[21] There are also some on the Inter-American human rights system.[22] In Africa, however, much literature has focused on the teleological approach.[23] The finding from the jurisprudence of both the African Commission and Court is that their decisions are "inconsistent." There is evidence of applying the textual, golden, and teleological approaches in their jurisprudence.[24] Killander was one of the few scholars to discuss and trace the application of the evolutive theory to the communication decisions of the African Commission. However, his work did not consider the legal basis and the challenges posed by this approach.[25] Nor could Killander find any express reference to this theory by the African Commission when he wrote in 2010.[26] On the contrary, this article seeks to, among others, discuss the legal basis for the use of evolutive interpretation and the challenges posed by such use by the African Commission and Court.

International Law, the German Law Journal, and the *RGDIP* (Revue Générale de Droit International Public) have all been published on this theme in 2010, and in 2011, presenting the representations of all doctrinal developments with regard to the techniques of interpretation developed by the international jurisdictions."

21. See for instance, Alastair Mowbray, *The Creativity of the European Court of Human Rights* 5(1) Hum. Rts L. Rev. 57 (2005); Dragoljub Popovic, *Prevailing of Judicial Activism Over Self-restraint in the Jurisprudence of the European Court of Human Rights* 42 Creighton L. Rev. 361 (2008–2009).

22. Pascual-vives, *supra* note 14.

23. Anneth Amin, *The Potential of African Philosophy in Interpreting Socio-Economic Rights in the African Charter on Human and Peoples' Rights*, 5 Afr. Hum. Rts. Y. B. 23 (2021); Anneth Amin, *A Teleological Approach to Interpreting Socio-Economic Rights in the African Charter: Appropriateness and Methodology*, 21 afr. hum. rts. l.j. 204 (2021); Anneth Amin, *Assessing Violations of States' Socio-Economic Rights Obligations in the African Charter: Towards a Model of Review Grounded in the Teleological Approach*, 4 Afr. Hum. Rts. Y. B. 16 (2020).

24. *Id.* at 18 stating that "in its jurisprudence, the African Commission has been inconsistent regarding the model of review it applies."

25. Magnus Killander, *Interpreting Regional Human Rights Treaties*, 7 Int'l J. Hum. Rts 145 (2010).

26. *Id.* at 150.

By way of a very brief introduction to the African human rights system, the African Charter, since its adoption in 1981 and entry into force in 1986, has served as the leading regional human rights instrument in Africa.[27] It is the primary source from which the African Commission and the African Court draw human rights applicable in Africa. Nevertheless, there are other sources.[28] The African Charter allows inspiration to be drawn from "international law on human and peoples' rights, particularly from . . . other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members"[29] and also from "customs generally accepted as law."[30] Other treaties to which African States are parties are also another source.[31] This article will answer the question: To what extent may the African Commission and Court adopt an evolutive interpretation of these sources in the interpretation of the African Charter?

Section 2 of this article will examine the evolutive interpretation of human rights treaties. It will be divided into three parts. The first will briefly provide an overview of evolutive interpretation. The second part will examine the uses of the evolutive interpretation by international and regional human rights [quasi] judicial courts and tribunals. The third part will highlight some of the criticisms of evolutive interpretation. Section 3 discusses the various basis in the African Charter that may support evolutive interpretation. It will address two broad provisions: the provision on non-discrimination; and articles 60 and 61, considered together. Section 4 will examine the challenges in adopting an evolutive

27. Moussa Samb, *Fundamental Issues and Practical Challenges of Human Rights in the Context of the African Union,* 15 Ann. Surv. of Int'l & Comp. L. 61, 62 (2009).

28. For discussion, see Mujib Jimoh, *The Status of New Rights before the African Human Rights Commission and Court* 25 Oregon Rev. Int'l L. (2024) [forthcoming].

29. African Charter, art. 60.

30. African Charter, art. 61.

31. African Court Protocol, arts. 3 & 7. *See* Pierre De Vos, *A New Beginning: The Enforcement of Social, Economic and Cultural Rights under the African Charter on Human and Peoples' Rights*, 8 Law, Democr. Dev. 1, 24 (2004); N. Barney Pityana, *Reflections on the African Court on Human and Peoples' Rights,* 4 Afr. Hum. Rts. L. J. 121 (2004).

X Indonesian Journal of International & Comparative Law 43-73 (January 2023)

interpretation of the African Charter and the counterarguments to these challenges. Section 5 will conclude the article.

I. THE EVOLUTIVE INTERPRETATION OF HUMAN RIGHTS TREATIES

A. Overview of Evolutive Interpretation of Human Right Treaties

Treaty interpretation practices by the international and regional human rights courts and tribunals negate the traditional notion that "all treaties, regardless of their subject matter, are governed by the same rules."[32] Human rights treaties, generally, are treated differently. They are classified as "development and improvement"[33] instruments rather than "end game"[34] instruments isolated from modern realities. As such, originalism—the intent of the State Parties—is given less deference.[35] The approach aims to apply and interpret a treaty in line with the current and modern conditions.[36] The idea behind the evolutive interpretation of human rights treaties is to ensure that human rights remain "contemporary and effective."[37]

In Europe, where the evolutive interpretation is well-ground in the jurisprudence of the European Court on Human Rights (ECtHR), the theory is usually discussed contemporaneously with other concepts such as "consensus" and "Margin of Appreciation."[38] The consensus of States' doctrine serves as the basis for the ECtHR to determine the current

32. Peter malanczuk, Akehurst's Modern Introduction to International Law, 130 (1997).

33. Kanstantsin Dzehtsiarou, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights,* 12German L. J. 1730 (2011).

34. Wessel, *supra* note 1, at 174.

35. Killander, *supra* note 25, at 151.

36. *See* Bernadette Rainey, Pamela Mccormick & Clare Ovey, The European Convention on Human Rights 47 (2006).

37. Dzehtsiarou, *supra* note 33, at 1730.

38. *See* Lawrence R. Helfer, *Consensus, Coherence and the European Convention on Human Rights* 26 Cornell Int'l L. J. 133 (1993).

realities of human rights amongst the European States in interpreting the European Convention on Human Rights texts.[39] The Margin of Appreciation doctrine is a deference given to an individual State in interpreting human rights in the Convention.[40] However, in Africa, both discussions on consensus[41] and the Margin of Appreciation[42] are rarely found in the jurisprudence of the African Commission and Court. Notwithstanding, the "decompartmentalization" of the provisions of the African Charter—significantly Articles 60 and 61—may be helpful in the African Commission and Court achieving an evolutive interpretation.[43]

Although the preceding description of evolutive interpretation may suggest its synonymity with judicial activism—some scholars believe that they are the same[44]—both concepts are different.[45] On the one hand, judicial activism usually involves going outside the apparent confines of the text of a law.[46] Within the international law regime, it is "a tendency to impose on States legal limits or constraints *not justified*

39. Alexander Morawa, *The "Common European Approach," "International Trends," and the Evolution of Human Rights Law—A Comment on Goodwin and I v the United Kingdom* 3 German L. J. (2002).

40. *See for instance*, Gary Born, Danielle Morris & Stephanie Forrest, *"A Margin of Appreciation": Appreciating Its Irrelevance in International Law,* 61 Harv. Int'l L. J. 65 (2020).

41. Killander, *supra* note 25, at 151 (stating that "regional consensus has played a negligible role in the jurisprudence of the African Commission…"). *See also*, Burgorgue-Larsen, *supra* note 13, at 190 (stating that "thus, while the notion of consensus is certainly fundamental in Europe, it is not as important in Latin America, and it is non-existent in Africa.").

42. Killander, *supra* note 25, at 152.

43. Burgorgue-Larsen, *supra* note 13. For further discussion, *see* section 3[B] *infra*.

44. For discussion on this, *see* Leoni Ayoub, *Judicial Activism in the Evolution of a Judicial Function for the International Courts: The Role of Compétence de la Compétence*, 69 Neth Int'l L. Rev. 29, 36 (2022). (Stating that "in fact, many authors attach activism to the method of interpretation, usually teleological or evolutive interpretation, which, if the issues presented above are indicatory, may not necessarily be an effective way of determining activism or restraint.").

45. *Id.* at 37.

46. Fuad Zarbiyev, *Judicial Activism in International Law—A Conceptual Framework for Analysis* 2 J. Int'l Dispute Sett. 247 (2012).

by the strict rule of international law."[47] Thus, the idea is heavily criticized.[48] Evolutive interpretation, on the other hand, though it modifies the law,[49] attempts to ground its basis within the confines of a treaty, so international and regional human rights courts and tribunals do refuse to adopt it if doing so would create an unfounded right within the text of an instrument.[50]

Importantly, evolutive interpretation is not a license for judicial rascality and eccentricity.[51] Given that evolutive interpretation may contradict the parties' intention and may create obligations beyond the contemplation of States Parties,[52] Bjorge argues that if it is assiduously applied, it is nothing but a restatement of the parties' intention.[53] Evolutive interpretation may be justified under Article 31 of the VCLT if seen in this light.[54] Outside Africa—in Europe[55] and the Inter-American human rights system[56] – the legitimacy of the evolutive interpretation is firmly entrenched in the jurisprudence of the regional human rights bodies. There are a lot of decisions and scholarships on

47. Robert Howse, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence on the Nature and Limits of the Judicial Power, in* The Role of the Judge in International Trade Regulation 35 (Thomas Cottier & Petros C Mavroidis eds, 2003).

48. Zarbiyev, *supra* note 46, at 275.

49. Dimitris Liakopoulos, *Evolutionary, Dynamic or Contemporary Interpretation in WTO System?* 5 Chinese J. of Global Gov. 21 (2019).

50. *Johnston v. Ireland*, 112 Eur. Ct. H.R. (ser. A) at 25 (1986) ruling that "the Court cannot, by means of an evolutive interpretation, derive from these instruments a right that was not included therein at the outset"

51. Bjorge, *supra* note 1, at 121.

52. Basak Cali, *Specialized Rules of Treaty Interpretation:Human Rights*, *in* the Oxford Guide to Treaties 547 (Duncan B. Hollis ed., 2012).

53. Bjorge, *supra* note 1.

54. James Crawford, State Responsibility: The General Part 247 (2013).

55. There are so many cases on this, the first of which was *Tyrer v. United Kingdom* (1978) 2 EHRR 1.

56. *Mapiripán Massacre v. Colombia,* Series C No. 122, Inter-American Court of Human Rights (IACrtHR), 15 September 2005.

this.[57] The concept has rarely been considered and used in Africa:[58] It has only been implied in some of the African Commission and Court's decisions but never explicitly considered.

A. Uses of the Evolutive Interpretation for Human Rights Treaties

There are many uses of evolutive interpretation. The most popularly documented uses are the "flexibility"[59] and the "practicality"[60] it brings to the international human rights law corpus. Another use is that evolutive interpretation removes human rights treaties from "stagnation."[61] As such, it makes human rights treaties effective in light of current situations.[62] Evolutive interpretation may further prevent arbitrariness from States where State Parties to a human rights treaty have legislated the meaning of a right domestically, contrary to the notion of the right understood by the international community and other contracting States. Considering the enormous claw-back clauses in the African Charter, this benefit is significant to the African human rights system.[63] The claw-back clauses give State Parties to the African Charter the ability to "take away"[64] rights contained in the African Charter through their domestic law.[65] With evolutive interpretation, the African Commission and Court will be able to determine the meaning

57. Lee Ka Yee Rosa, *Expansive interpretation of the European Convention on Human Rights and the Creative Jurisprudence of the Strasbourg's Court,* 1 HKU J. of Undergraduate Hum. 70 (2014).

58. Killander, *supra* note 25.

59. Fitzmaurice, *supra* note 1, at 29.

60. Letsas, *supra* note 1, at 79.

61. Dzehtsiarou, *supra* note 33, at 1732.

62. Luzius Wildhaber, *European Court of Human Rights*, 40 Can. Y. B. Int'l L. 310 (2002).

63. For discussion on clawback clauses in the African Charter, *see* Richard Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis,* 22(4) Va. J. Int'l L. 667 (1982).

64. William Edward Adjei, *Re-Assessment of Claw-back Clauses in the Enforcement of Human and Peoples' Rights in Africa*, 24 J. Leg. Stud. 1, 10 (2019).

65. Sandhiya Singh, *The Impacts of Clawback Clauses on Human and Peoples' Rights in Africa* 18:4 Afr. Secur'y Rev. 95 (2009).

of the rights contained in the African Charter as understood at a given time under international law.[66]

Further, evolutive interpretation benefits the changing circumstances of human rights and fits the understanding of human rights considering the current situation. In effect, it may be used to achieve derived rights from existing human rights without new treaties or protocols to recognize the derived rights expressly.[67] Since the treaty-making process is complex,[68] an evolutive interpretation allows for the possibility of derived rights in line with modern realities. Under the derivative method, new rights are extracted from existing human rights.[69] For instance, in 2010, the United Nations recognized the right to water and sanitation[70] after the trending understanding that the right is inherent in the right to health.[71] Though the African Charter does not expressly recognize "a right to water and sanitation," it contains a right to health[72] that may be interpreted evolutively to recognize the right to water and sanitation.[73] Similarly, the United Nations recognized the new "right to a clean, healthy, and sustainable environment" in 2022.[74]

66. See Communication 275/03 - *Article 19 v Eritrea;* Communication 297/05 —*Scanlen & Holderness v. Zimbabwe;* Communication No. 224/98—*Media Rights Agenda and Others v Nigeria*.

67. Pierre-Marie Dupuy, *Evolutionary interpretation of Treaties: Beyond memory and prophecy*, *in* The Law of Treaties Beyond the Vienna Convention 124 (E. Cannizaro ed., 2011).

68. Francois Stewart Jones, *Treaties and Treaty-Making*, 12 Pol. Sci. Q. 420 (1897); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000).

69. Brandon L. Garrett, Laurence L. Helfer & Jayne C. Huckerby, *Closing International Law's Innocence Gap,* 95 South. Cal. L. Rev. 311 (2021); Mart Susi, *Novelty in New Human Rights: The Decrease in Universality and Abstractness Thesis, in* the Cambridge Handbook of New Human Rights: Recognition, Novelty, Rhetoric 21 (Andreas von Arnauld & Kerstin von der Decken eds, 2020).

70. GA. Res. 54/292, The Human Right to Water and Sanitation, (Aug. 3, 2010).

71. Takele Soboka Bulto, *The Human Right to Water in the Corpus and Jurisprudence of the African Human Rights System*, 11 Afr. Hum. Rts. L. J. 341, 350 (2011).

72. African Charter, art. 16.

73. *See generally,* Jimoh, *supra* note 25.

74. *See* G.A. Res. A/76/L.75, The Human Right to a Clean, Healthy and

While the African Charter also does not contain this right, it contains the right to a "general satisfactory environment,"[75] which may be interpreted together with the right to health in Article 16, to give effect to the view that there is an understanding for about "five decades"[76] that the "right to a clean, healthy and sustainable environment" relates to "other rights and existing international law."[77]

C. Criticisms of Evolutive Interpretation[78]

In recent times, one of the most vocal critics of the evolutive interpretation is Thioa.[79] His criticism of the theory stands on two main grounds: First, that the theory is against the parties' intent, and second, that under the theory, judges assume their preference is better than that of the majority. He states:

> "Living tree" approaches may be endorsed in certain jurisdictions, but they also attract criticisms of judicial overreach or juristocracy…discounting historical intent—and allow their preferred value-laden interpretations to be advanced. This renders texts infinitely malleable, enlisted to serve whatever the interpreter deems a worthy cause. This type of interpretive method discounts historical intent, precedent, and even principle, in favor of the judicial imposition of subjective political preferences as an exercise in counter-majoritarianism. It is unclear why a judge would do a better job than "majoritarian politics" in discerning what a progressive rights interpretation might be . . . .[80]

Sustainable Environment (July 26, 2022).

75. African Charter, art. 24.

76. UNGA Recognizes Human Rights to Clean, Health, and Sustainable Environment, IISD (Aug. 3, 2022), https://sdg.iisd.org/news/unga-recognizes-human-right-to-clean-healthy-andsustainable-environment.

77. G.A. Res. A/76/L.75, *supra* note 74, Cl. 2.

78. For comprehensive discussion, *see* Christian Djeffal, Static and Evolutive Treaty Interpretation: A Functional Reconstruction (2015).

79. Li-ann Thioa, *Equality and Non-Discrimination in International Human Rights Law*, The Heritage Foundation 1 (2020).

80. *Id.* at 20.

Evolutive interpretation is said to have a "shocking"[81] effect on State Parties to treaties because it implicates the classical view that State Parties are only bound by what they agreed to under international law.[82] Evolutive interpretation is said to erode the consent and sovereignty of State Parties.[83] Critics argue that the fact that human rights treaties are unique does not validate the interpretation of human rights treaties in violation of the established rule of international law.[84] The theory empowers the international and regional [quasi] judicial courts and tribunals to assume legislative functions.[85] By implication, evolutive interpretation tampers with the legitimacy of the international and regional [quasi] judicial courts and tribunals.[86] Schabas expresses the view that the theory creates uncertainty and impacts the reliability of precedent.[87] Within the African human rights system, the African Commission, in particular,[88] has, at least, concerning the claw-back clause, treated the African Charter as a living treaty.[89] Despite this evolutive approach by the African Commission, some scholars are critical of it. To Heyns:

> From this point of view, it could be argued that while it is true that the Commission has in substantial respects reinvented the Charter and compensated for its flaws, this is not a healthy development overall if these new interpretations are not

81. Dzehtsiarou, *supra* note 33, at 1743.

82. Malcolm n. Shaw, International Law 95 (6th ed. 2008) (stating that "parties that do not sign and ratify the particular treaty in question are not bound by its terms.").

83. Dzehtsiarou, *supra* note 33.

84. Killander, *supra* note 25, at 146.

85. Leonard Hoffmann, *The Universality of Human Rights*, 125 L. Q. Rev. 416, 428 (2009).

86. For discussion, *see* Dzehtsiarou, *supra* note 33.

87. William a. Schabas, The Customary International Law of Human Rights 4-5 (2021)

88. The jurisprudence of the African Court is still developing. it first issued a full merits judgment in 2013. See Tom Gerald Daly & Micha Wiebusch, *The African Court on Human and Peoples' Rights: Mapping Resistance against a Young Court*, 14 Int'l J. L. Context 294 (2018).

89. Burgorgue-Larsen, *supra* note 13.

followed up by the reform of the Charter itself. The rule of law demands that law is predictable, and as a result words used in legal texts should be given their ordinary meaning as far as is possible. To retain its integrity, the Charter should in this sense be understood to say what it means, and to mean what it says. Where there are deviations, these need to be rectified, even if that means that the Charter must be amended.[90]

III. THE BASIS FOR THE ADOPTION OF EVOLUTIVE INTERPRETATION IN THE AFRICAN CHARTER

For the African Commission and Court to enjoy legitimacy, they must be able to situate the basis for adopting evolutive interpretation under clear international law principles.[91] This is because even concerning the decisions of the African Commission and Court, which are well-grounded in international law, African States struggle to comply.[92] As such, the African Commission and Court should avoid "capricious"[93] and unfounded innovation. Otherwise, African States could classify their decisions as judicial overreach—a further justification to neglect such decisions. This section discusses the various basis for adopting an evolutive interpretation of the African Charter by the African Commission and Court.

A. Non-discrimination

The right to non-discrimination saturates the essence of human rights.[94]

90. Heyns, *supra* note 2, at 158.

91. Thioa, *supra* note 79, at 24 (Stating that "the development and application of human rights law must adhere to general international law principles").

92. Jimoh, *supra* note 25.

93. *Id. See also* Victor Oluwasina Ayeni, *Implementation of The Decisions and Judgments of African Regional Human Rights Tribunals: Reflections on the Barriers to State Compliance and the Lessons Learnt,* 30 Afr. J. Int'l & Comp. L. 560 (2022).

94. Noelle Higgins, *The Right to Equality and Non-Discrimination Regarding*

Of the nine-core international human rights treaties, only two—the Convention Against Torture and the Convention for the Protection of All Persons from Enforced Disappearance—reasonably do not contain a provision on non-discrimination.[95] Unlike the European human rights system, the African human rights system considers the right to non-discrimination a "freestanding right."[96] Under international and regional human rights systems, a few grounds of non-discrimination are now regarded as *jus cogen*.[97] In some, nonetheless, all grounds of non-discrimination are considered *jus cogens*.[98] From textual analysis, provisions on non-discrimination usually take three formats.[99] The first format is the "open-textured" format, which does not enumerate the grounds of prohibition in the text of a treaty or legislation, but provides for a blanket provision.[100] The second format provides an "exhaustive list" of the prohibited grounds.[101] The third format stipulates the prohibited

Language, 10 Murdoch U. Ej. L. 7 (2003); Jerome Shestack, *The Jurisprudence of Human Rights*, *in* Human Rights in International Law: Legal and Policy Issues 101 (Theodore Meron ed., 1984).

95. *See for instance,* International Covenant on Civil and Political Rights, art.2(1); European Convention on Human Rights, art. 14; Specific human rights treaties on non-discrimination includes the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities.

96. OHCHR, *Protecting Minority Rights, A Practical Guide to Developing Comprehensive Anti-Discrimination Legislation* 50 (2023), https://www.ohchr.org/sites/default/files/documents/publications/2022-11-28/OHCHR_ERT_Protecting_Minority%20Rights_Practical_Guide_web.pdf (stating that "unlike its regional counterparts, it [European Convention on Human Right] does not provide for a free-standing right to non-discrimination.").

97. Shaw, *supra* note 82, at 124; *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)* Judgment, I.C.J. Reports 1970, paras. 33–34.

98. Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03 of 17 September 2003, Ser A No 18, para 101.

99. Li Weiwei, Equality and Non-discrimination under International Human Rights Law, 12 (2004).

100. *Id.* (stating that "this approach leaves it to judges to decide when a classification is prohibited. For example, the U.S. constitution simply states, in the Fourteen Amendment, that no state may "deny to any person within its jurisdiction the equal protection of the law.").

101. *Id.* (stating that "th[is] choice of ground leaves no discretion to the judges. Grounds can be added or removed only legislatively, and not judicially.")

grounds but contains an omnibus clause, "any other status."[102] Evolutive interpretation may be grounded in the first and third formats. The African Charter adopts the third format.

1. Non-discrimination Under the African Charter

Three articles in the African Charter contain non-discrimination provisions.[103] Nevertheless, article 2 is the all-encompassing provision.[104] It provides that "every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without *distinction* of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or *other status*." While the word "distinction" is employed in article 2, the African Commission has held that it has "an element of discrimination."[105] The African Commission has a richer jurisprudence on the right to non-discrimination than the African Court.[106] This is not unusual: The former was created in 1987, and the latter in 2006. Notwithstanding, though the jurisprudence of the African Court is still developing,[107] it has made some pronouncements on the right to non-discrimination, generally showing a tendency to treat the right and the right to equality in Article 3 of the African Charter as interwoven.[108]

102. *Id.*

103. These are African Charter, arts. 2, 18(3) and 28.

104. For a comprehensive discussion on this, see Jamil Ddamulira Mujuzi, *The African Commission on Human and Peoples' Rights and its promotion and protection of the right to freedom from discrimination* 17(2) Int. J. Discrim. L. 86 (2017).

105. Communication 323/06—*Egyptian Initiative for Personal Rights and INTERIGHTS v Egypt*, at para 115.

106. *See* the following communications, Communication 361/08 – *J.E. Zitha & P.J.L. Zitha (represented by Prof. Dr. Liesbeth Zegveld) v. Mozambique;* Communication 277/03—*Spilg and Mack & DITSHWANELO v. Botswana;* Communication 335/06—*Dabalorivhuwa Patriotic Front v. South Africa.*

107. *See for instance* Trésor Muhindo Makunya, *Decisions of the African Court on Human and Peoples' Rights during 2020: Trends and Lessons*, 21 Afr. Hum. Rts. L. J. 1230, 1239 (2021) (stating that "an analysis of various decisions adopted in 2020 exposes the poor quality of argument by both states and litigants, and of the reasoning of the Court itself").

108. See Application No. 031/2015 – *Dismas Bunyerere v. United Republic*

2. Evolutive Interpretation of "other status" under the African Charter

Treaty bodies[109] and the ECtHR[110] have expressed that "other status" should be interpreted flexibly and widely. The Inter-American Commission, too, has expressed the view that it should be "interpreted in the context of the most favorable option for human beings in light of the *evolution* of fundamental rights in contemporary international law."[111] The jurisprudence in Africa is, however, inconsistent.[112] The African Court has not been straightforward: In one decision, it held that "concerning discrimination, it is defined as a differentiation of persons or situations based on one or several unlawful criterion/criteria."[113] It missed the opportunity to enumerate those "unlawful" criteria.

On the part of the African Commission, it has shown three different tendencies—strict, mild, and flexible. First, it has held that the prohibited ground must be expressly contained in Article 2 of the African Charter.[114] This approach is aversive to the evolutive interpretation. Second, it has held that the prohibition is based on any grounds of non-discrimination contained in Article 2 or on "grounds similar" to them.[115] Third, it has expressed that the "list under Article

of Tanzania, para 79 (stating that "court notes that the right to non-discrimination as enshrined under Article 2 of the Charter proscribes any differential treatment to individuals found in the same situation on the basis of unjustified grounds."); see Application No. 013/2017 – *Sebastien Germaina Javon v. Republic of Benin*, para 217 & 218.

109. *See for instance*, Committee on Economic Social and Cultural Rights, General Comment No. 20 (2009).

110. *Carson v. United Kingdom,* Application No. 42184/05, Judgment, 16 March 2010, para 70.

111. *Duque v. Colombia*, Case 12.841, Report No. 5/14, Merits, 2 April 2014, para. 64. *See also* OHCHR, *supra* note 99, at 21.

112. Mujuzi, *supra* note 104, at 91.

113. Application 001/2014—*Actions Pour La Protection Des Droits Del'homme v. The Republic of Cote D'ivoire*, para 147.

114. Communication 335/2006—*Dabalorivhuwa Patriotic Front v. the Republic of South Africa*, at para 115 (stating that the "Complainants have not established how their dignity as human beings was infringed on by the distinction, nor whether the grounds on which they were purportedly distinguished is one that is prohibited under the Charter.")

115. Communication 253/02—*Antonie Bissangou v. Congo*, at para 69 (stating that "his complaint is not based on any of the grounds of discrimination listed out in Article 2 or on grounds similar to the latter.").

2 is neither absolute nor comprehensive. It is merely indicative."[116] This third approach allows for a broad interpretation. The evolutive interpretation may be grounded in the second approach, to some extent, and in the third approach.

The Office of the United Nations High Commissioner for Human Rights compiled a non-exhaustive list of thirty-three grounds of non-discrimination explicitly recognized under international law—by treaties, treaty bodies, human rights bodies, courts, and tribunals.[117] Of these thirty-three, with the inclusion of albinism, the African Commission has, through its communication decisions, resolutions, concluding observations, and recommendations, recognized age, albinism, disability, gender, gender identity, living with HIV/AIDS, poverty and illiteracy and sexual orientation, as grounds of non-discrimination within the African human rights system, though, none of these is contained in article 2 of the African Charter.[118] In two decisions—one in 2006; the other in 2009— the African Commission has included "sexual orientation" as a prohibited ground.[119] Nevertheless, it is unclear why the reference was made to "sexual orientation" in the decisions, as both communications had no relation with a claim of violation of the right to non-discrimination on sexual orientation grounds. As such, it has been submitted that the inclusion of "sexual

116. Communication 318/06—*Open Society Justice Initiative v. Coˆte d'Ivoire*, at para 145 (stating that "furthermore, the list under Article 2 of the Charter is neither absolute nor comprehensive. It is merely indicative. It is a form of unjustified discrimination which is of a prohibitory nature, and there is, therefore, the possibility of conducting unjustified discrimination prohibition compliance test when a standard or act is alleged to have gone beyond this prohibition.").

117. They are: age; birth; civil, family or carer status; colour; descent, including caste; disability; economic status; ethnicity; gender expression; gender identity; genetic or other predisposition towards illness; health status; indigenous origin; language; marital status; maternity or paternity status; migrant status; minority status; national origin; nationality; place of residence; political or other opinion, including human rights defender status, trade union membership or political affiliation; pregnancy; property; race; refugee or asylum status; religion or belief; sex and gender; sex characteristics; sexual orientation; social origin; social situation; or any other status. See OHCHR, *supra* note 99, at 19.

118. Mujuzi, *supra* note 104, at 94.

119. Communication 245/2002—*Zimbabwe Human Rights NGO Forum v Zimbabwe,* at para 169; Communication 284/2003—*Zimbabwe Lawyers for Human Rights & Associated NewsNotes of Zimbabwe v Zimbabwe,* at para 155.

X Indonesian Journal of International & Comparative Law 43-73 (January 2023)

orientation" in these decisions was an *obiter*,[120] more so, considering that in December 2022, the African Commission denied Observer Status for three NGOs—Alternative Cote d'Ivoire; Human Rights First Rwanda; and Synergía–Initiatives for Human Rights—on the ground that "sexual orientation is not an expressly recognized right or freedom under the African Charter, and contrary to the virtues of African values, as envisaged by the African Charter."[121] The African Court's jurisprudence also does not indicate this.

Notwithstanding the controversy on the inclusion of "sexual orientation" as part of "other status," but subject to some of the challenges discussed below,[122] the "other status" provision in article 2 of the African Charter may be interpreted evolutively by the African Commission and Court to give effect to other grounds of non-discrimination reflecting the changing circumstances of human rights and to fit the understanding of human rights in the African Charter in light of the modern and current situation.

B. The "Decompartmentalization Process"—Articles 60 and 61 of the African Charter

Article 60 of the African Charter provides:

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United

120. *See* African Comm. on Hum. & Peoples' rights and Others, Ending Violence and Other Human Rights Violations-based on Sexual Orientation and Gender Identity: A Joint Dialogue of the African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights, and United Nations 31 (2016) https://www.ohchr.org/sites/default/files/Documents/Issues/Discrimination/Endingviolence_ACHPR_IACHR_UN_SOGI_dialogue_EN.pdf.

121. *See* Final Communiqué of the 73rd Ordinary Session of the African Commission on Human and Peoples' Rights (20 October–9 November 2022), para 58.

122. *Infra* Section 4.A.

> Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

Article 61 provides that:

> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member States of the Organization of African Unity, African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.

The preceding provisions are unique to the African human rights system, as they are not contained in the European and Inter-American regional human rights treaties.[123] Notably, while the two provisions mention "the Commission," considering article 7 of the Protocol of the African Court, it is safe to conclude that the provisions also apply to the African Court *mutatis mutandis*.[124] Articles 60 and 61 "do not match…," "the list in article 61 is meant to complete the list in article 60."[125] In any event, these two articles remain the main ground for adopting the evolutive interpretation under the African human rights system by the African Commission and Court.

123. Both articles 60 & 61 are hereinafter referred to as the "decompartmentalization articles."

124. Protocol to the African Court, art. 7 provides that "the Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned." In a forthcoming work, I had argued that: "I note that the word "Commission" is referred to in article 60 of the African Charter. But the Protocol supplements the African Charter, which is the main treaty and will be interpreted to harmonize it. Since the African Court came later, and there is nothing exclusionary in the Protocol excluding the African Court's power to apply any provisions of the African Charter, article 60 may be said to also apply mutatis mutandis to the African Court." See also Burgorgue-Larsen, *supra* note 13, at 191 (stating "this interpretation function naturally expanded to the African Court following the adoption of the Protocol on its establishment.").

125. *Id.* at 193 (arguing that this "derives from the first sentence in art. 61: "The Commission shall also take into consideration…").

According to Burgorgue-Larsen, both articles 60 and 61 underscore the notion of "decompartmentalization."[126] To him, "decompartmentalization is a process allowing the use of various external sources to interpret the rights enshrined in the African, Inter-American, and European human rights instruments and allowing pursuit of the greatest possible protections for the human being."[127] This process relegates the importance of States' consent under international law.[128]

Burgorgue-Larsen's notion of "decompartmentalization" is relevant to the question of evolutive interpretation because decompartmentalization may be used both as interpretative and substantive.[129] Because the African Commission and Court frequently rely on the decisions of other international and regional human rights courts and tribunals, especially the European and Inter-American human rights courts, by using these two decompartmentalization articles,[130] the evolutive interpretation of human rights contained in the European Convention on Human Rights and the American Convention on Human Rights by the ECtHR and the Inter-American Court, respectively—two regions with rich jurisprudence on evolutive interpretation—may find their way to the interpretation of the rights contained in the African Charter. Numerous decisions of the African Commission and Court abound, where principles lacking in the African Charter have been upheld.[131]

For instance, through evolution, there is a change in the scope of a fair trial as contained in the African Charter. "Fair trial standards that might have been deemed acceptable half a century ago," states Schabas, "are no longer adequate, and the development can be expected to continue."[132] The African Commission, relying on the Human Rights Committee General Comment No. 13, has applied this progressive and evolutive interpretation of the right to fair trial contained in Article 7 of the African Charter to include publicity. However, the

126. *Id.* at 191.

127. *Id.* at 188.

128. *Id.*

129. *Id.* at 192.

130. *See generally,* Killander, *supra* note 25.

131. Burgorgue-Larsen, *supra* note 13, at 202.

132. Schabas, *supra* note 87, at 277.

publicity requirement is absent in the African Charter.[133] In other communications, the African Commission had relied on the United Nations subsidiary instruments to place obligations on State Parties for actions of non-State Actors.[134] The African Commission has also cited the decisions of the ECtHR and Inter-American Court, with their evolutive jurisprudence reflecting in these decisions.[135] Also, the African Court has applied the jurisprudence of the Human Rights Committee, the ECtHR, the Inter-American Court, and the International Covenant on Civil and Political Rights, among others, to impliedly reflect the evolutive state of human rights in the African Charter.[136]

IV. THE CHALLENGES AND COUNTERARGUMENT TO THE CHALLENGES

This section will be divided into two parts. Part A will examine the challenges, and Part B will discuss the counterarguments to the challenges.

A. Challenges to the Adoption of Evolutive Interpretation of the African Charter

While, by implication, some decisions of the African Commission and Court have reflected an evolutive approach, this author is unaware of any decision of the African Commission or Court where express mention was made of evolutive interpretation. This lack of a direct and express reference to this interpretation approach is likely due to the challenges discussed below.

133. Communication 218/98—*Civil Liberties Organisation, Legal Defence Center, Legal Defense and Assistance Project v. Nigeria*, para 36.

134. *See for example,* Communication Nos. 279/03 & 296/05—*Centre on Housing Rights and Evictions v. Sudan*.

135. *See for instance SERAC* citing ECtHR's *X and Y v. the Netherlands* and inter-American Court's *Velásquez Rodríguez v. Honduras*.

136. Application 009/2011 & 011/2011—*Tanganyika Law Society and Reverend Mtilika* v.*Tanzania*.

1. Evolutive Interpretation and the Traditional Principle of International Law Challenge

Under classical international law, consent is an essential requirement for the functioning of the international legal order.[137] Generally, as an international law principle, parties are only bound by the treaties they consented to and ratify.[138] The African Commission[139] and Court[140] have on numerous occasions upheld this principle and will not proceed on a question of violation of the African Charter unless the respondent State has ratified the African Charter. One main criticism against evolutive interpretation is its raid on this traditional international law principle.[141] The evolutive approach is said to expand the provisions of treaties beyond what parties intended and consented to.[142] Support for this challenge against the evolutive interpretation under the African human rights system may be found in the extreme view of some African human rights scholars. The view posits that, at all times, notwithstanding the decompartmentalization articles, "the African Commission may not interpret or apply any human rights instrument other than the African Charter under its contentious jurisdiction…and all reference in its decision must be based on the African Charter."[143] This view is dismissive of evolutive interpretation

137. *See* Shaw, *supra* note 82, at 95.

138. Schabas, *supra* note 87, at 78. Except norms that have become *jus cogen* and customary international law. *See* Magdalena Matusiak-Fracczak, *Jus Cogens Revisited*, 26 Rev. Comp. L. 55 (2016); Anthony J. Colangelo, *Procedural Jus Cogens*, 60 Colum. J. Transnat'l L. 377 (2022).

139. Communication 742/20—*African Freedom of Expression Exchange & 15 Others (Represented by FOI Attorneys) v. Algeria & 27 Others* (declining jurisdiction against Somaliland and Morocco since they had not ratified the African Charter).

140. *See* Application No. 001/2011—*Femi Falana v. African Union* (declining to proceed against the African Union).

141. *See supra* 2.C.

142. *See generally*, Thioa, *supra* note 79.

143. Robert Wundeh Eno, *The Jurisdiction of the African Court on Human and Peoples' Rights*, 2 Afr. Hum. Rts. L. J. 223, 226 (2002). *See also* Sabelo Gumedze, *Bringing Communications before the African Commission on Human and Peoples' Rights,* 3 Afr. Hum. Rts. L. J. 118, 123 (2003) (stating that "the Charter is the yardstick for testing whether or not there has been a violation of an international standard within the African human rights system.").

because if all reference had to be made only to the African Charter, the purpose of evolutive interpretation—to give effect to the understanding of a right in the present condition—would not be realized.[144] This view effectively emphasizes the traditional principle of intent and consent under international law.[145] Because the African Commission and Court have not been asked directly to pronounce the evolutive interpretation of a provision in the African Charter, when faced with such a question, they have to address how evolutive interpretation can co-exist with the traditional principle of States' intent and consent under international law.

2. Evolutive Interpretation and the African Traditional Values Challenge

One unique feature of the African Charter is its emphasis on African traditional values.[146] The Preamble states the spirit and foundation of the African human rights system. Two provisions in the Preamble pose a challenge to evolutive interpretation. The first is the clause recognizing the "virtues of historical tradition."[147] The second is the clause on "elimination of colonialism."[148] These clauses have implications for a request to apply evolutive interpretation to the African Charter.[149] The main implication is that a claim for evolutive interpretation of the African Charter must be conscious of the cultural relativity of such interpretation. Otherwise, such interpretation may be met with bitter

144. *See generally,* Dzehtsiarou, *supra* note 33.

145. Manisuli Ssenyonjo, *Analysing the Economic, Social and Cultural Rights Jurisprudence of the African Commission: 30 Years since the Adoption of the African Charter,* 29 Neth. Q. Hum. Rts. 358, 378 (2011).

146. For discussion on the uniqueness of the African Charter and the African traditional value, *see* Josiah Cobbah, *African Values and the Human Rights Debate: An African Perspective* 9 Hum. Rts. Q. 309 (1987); Ebow Bondzie-Simpson, *A Critique of the African Charter on Human and Peoples' Rights,* 31 How. L. J. 643 (1988); Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 hastings int'l & comp. l. rev. 373 (1989); Julia Swanson, *The Emergence of New Rights in the African Charter*, 12 N.Y.L. Sch. J. Int'l. & Comp. L. 307 (1991).

147. African Charter, prmbl. cl. 4.

148. *Id.* cl. 3.

149. For discussion, *see* Paul Johnson, *Homosexuality and the African Charter on Human and Peoples' Rights: What Can Be Learned from the History of the European Convention on Human Rights?* 40(2) J. L. & Soc'y 249 (2013).

X Indonesian Journal of International & Comparative Law 43-73 (January 2023)

controversy and tagged a "neo-colonialism" idea that does not consider the "virtues of historical tradition" – especially where the origin of the evolution is from the European human rights jurisprudence.[150]

Article 61 of the African Charter may be read to permit an evolutive interpretation recognizing the consensus of African States in interpreting a human right.[151] Though attaining a consensus in Africa is complex,[152] the notion that consensus is non-existent is incorrect.[153] For instance, on the evolutive interpretation of "other status" to include sexual orientation in order to legalize homosexuality, for a long time, African States have rejected this attempt.[154] The two decisions of the African Commission, including "sexual orientation" as a prohibited ground of non-discrimination in the African Charter, are regarded as *obiter,* with no African States reading any meaning to the decisions as an obligation to recognize the rights of homosexuals.[155] Due to the African consensus tilting against the practice as contrary to traditional African values, neither the African Commission nor Court has been directly asked to evolutively interpret "other status" to include "sexual orientation." Johnson gives elongated reasons:

> Nor is it to ignore the significant difficulties posed by relying on [European Convention on Human Rights] jurisprudence in the [African Commission] and the [African Court], where it may provoke the hostility that is a regular feature of debates in some African states about 'Western' human rights discourse on sexual orientation. There is substantial potential for [European Convention on Human Rights] jurisprudence to be rejected

150. *Id.* at 255.

151. Article 61 talks about "African practices consistent with international norms on human and peoples' rights, customs generally accepted as law, general principles of law recognized by African States."

152. Motala, *supra* note 146, at 385.

153. Burgorgue-Larsen, *supra* note 13, at 190 (stating that "thus, while the notion of consensus is certainly fundamental in Europe, it is not as important in Latin America, and it is non-existent in Africa.").

154. Thirty-two African countries still criminalize it. See *Countries That Still Criminalize Homosexuality* https://antigaylaws.org/regional/africa/; Siri Gloppen & Lise Rakner, *LGBT Rights in Africa, in* Research Handbook on Gender, Sexuality and the Law 194 (Chris Ashford & Alexander Maine eds. 2020).

155. *See* note 120 *supra.*

> as a form of post-colonial imperialism and propaganda that attempts to import the 'insanity' of European sexual culture into Africa… Because of a fear that any complaint to the [African Commission] will produce a 'backlash' against gay men and lesbians, the International Gay and Lesbian Human Rights Commission has also actively discouraged individual complaints: "In most human rights systems […] individual complaints [are] important. However, we do not recommend sending formal complaints about violations based on sexual orientation or gender identity to the African Commission. The Commission has never heard such a case. A complaint coming to it without prior preparation or lobbying might end with the Commission endorsing the idea that homosexuality is opposed to 'African values.' Such a precedent would be extremely difficult to reverse."[156]

One of the few *travaux préparatoires* documents[157] on the African Charter shows that it was intended to reflect African philosophy and conception of human rights.[158] As such, where an evolutive interpretation is sought in a way that contradicts African consensus on certain rights, the African Commission and Court face a challenge.[159] Nevertheless, where an evolutive interpretation will not create tension with traditional African values, there is less likely to be any significant challenge from State Parties, except maybe the respondent State. For instance, under African humanism,[160] arbitrary detention

156. Johnson, *supra* note 149, at 255, 260.

157. For discussion on the scarcity of the *travaux préparatoires* of the African Charter, see Misha Ariana Plagis & Lena Riemer, *From Context to Content of Human Rights: The Drafting History of the African Charter on Human and Peoples' Rights and the Enigma of Article 7,* 25 J. Hist. Int'l L. 556, 563 (2021).

158. Bondzie-Simpson, *supra* note 146, at 655.

159. I note however that the argument on homosexuality presents the main problem in contemporary times. Evolutive interpretation on other grounds of non-discrimination, for instance, should pose less problem.

160. African humanism is also called "ubuntu". For discussion on it, *see* Lovemore Mbigi & Jenny Maree, Ubuntu: The Spirit of African Transformation Management (1995); Thaddeus Metz, *Ubuntu as a Moral Theory and Human Rights in South Africa* 11 Afr. Hum. Rts. L. J. 532 (2011); Christian Gade, *The Historical Development of the Written Discourses on Ubuntu* 30(3) S. Afr. J. Phil. 303 (2011).

was prohibited.[161] An evolutive interpretation of the provision on the prohibition of arbitrary detention in Article 6 of the African Charter is, thus, unlikely to be controversial.

Evolutive interpretation clashing with African values risks compliance problems. Compliance is one of the main challenges facing the international and regional human rights law regime.[162] However, it has been opined that one of the best ways human rights [quasi] judicial courts and tribunals may overcome the compliance challenge is to ensure that they are "impartial, efficient and reliable."[163] Schabas and Heyns have expressed the view that evolutive interpretation erodes reliability.[164] If the African Commission and Court adopt a blanket evolutive interpretation clashing with African values, it could dilute the African human rights system. A diluted human rights system leads to weakened human rights protection.[165]

B. Counterarguments to the Challenges

This part will consider counterarguments to the two challenges discussed above.

1. Counterarguments to the Traditional Principle of International Law Challenge

The traditional principle of international law challenge rests on the idea that evolutive interpretation implicates the intention and consent of State Parties. However, some commentators do not see the evolutive interpretation violating any international principle. There are two subdivisions of this group. The first group situates evolutive interpretation within the VCLT—it is considered as giving effect to

161. Motala, *supra* note 146, at 387.

162. Ayeni *supra* note 96, at 565; Rachel Murray & Elizabeth Mottershaw, *Mechanisms for the Implementation of Decisions of the African Commission on Human and Peoples' Rights*, 36(2) HUM. RTS. Q. 349 (2014); RACHEL MURRAY & DEBRA LONG, THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (2015).

163. Thioa, *supra* note 79, at 23, citing Joseph Raz, *Human Rights in the Emerging World Order* 1 TRANSNAT'L LEG. 31 (2010).

164. Note 87 & 90, *supra.*

165. Gina Bekker, *The African Court on Human and Peoples' Rights: Safeguarding the Interests of African States*, 51 J. AFR. L. 151, 169 (2007).

the parties' intention, which is valid under Article 31.[166] This negates Thioa's thesis that evolutive interpretation "discounts" historical intent.[167] Bjorge is a famous proponent of this group and argues that evolutive interpretation is a restatement of the parties' intention.[168] The second group posits that evolutive interpretation is an offshoot of "good faith," also rooted in the VCLT.[169] "Evolutionary interpretation may be explained through the principle of good faith," states Bjorge, "because of the legitimate expectations engendered by the promises which the parties made in the treaty."[170] Citing Waldock,[171] Bjorge submits that evolutive interpretation is implied and inherent in the "good faith" provision of the VCLT.[172]

In light of the views of the forgoing subgroups, when directly called upon to apply the evolutive interpretation, the African Commission and Court may overcome the traditional principle of international law challenge by applying these views. In addition, because the ICJ,[173] ECtHR, and Inter-American human rights jurisprudence is rich in the application of evolutive interpretation of human rights treaties, the African Commission and Court may use the decompartmentalization articles to introduce this jurisprudence to the African human rights system.

2. Counterarguments to the African Traditional Values Challenge

It is argued that applying the evolutive interpretation in the European human rights system is well-grounded within the spirit and preamble of the European Convention on Human Rights.[174] While the

166. *See generally*, Bjorge, *supra* note 1.

167. Thioa, *supra* note 79, at 20.

168. Bjorge, *supra* note 1.

169. Humphrey Waldock, *The Effectiveness of the System Set up by the European Convention on Human Rights*, 1 Hum. Rts L. J. 1, 3 (1980).

170. Bjorge, *supra* note 1, at 64.

171. Waldock, *supra* note 169, at 3.

172. Bjorge, *supra* note 1.

173. *See generally*, note 12, *supra*.

174. Dzehtsiarou, *supra* note 33, at 1739, citing Janneke Gerards, J*udicial Deliberations in the ECtHR, in* The Legitimacy of Highest Courts' Rulings: Judicial Deliberations and Beyond (Nick Huls, Maurice

decompartmentalization articles may also ground the basis for adopting the evolutive interpretation of the African Charter, its preamble and fear of compliance with any evolutive interpretation in tension with African values pose a challenge. Thus, the counterarguments on the African tradition values challenge require balancing with the challenge to attain compliance from State Parties.[175]

There are two main ways this challenge may be addressed. The first is through African consensus—or special customary international law of Africa—showing the trends by African States in the understanding of individual human rights in modern times, which supports such evolutive interpretation. Though, the problem with this approach is the difficulty in attaining African consensus.[176] The second is through general customary international law.[177] Going by the text of the decompartmentalization articles, it seems that the customary international law the African Commission and Court may draw inspiration from, as contemplated in the provisions, is *general customary international law* rather than *special customary international law.*[178] So, while the African Commission and Court have relied on the decisions of the ECtHR and the Inter-American Court, special customary international human rights law applicable only in Europe or America, if they clash with African values, may not be applied by the African Commission and Court.

Where, however, a rule which clashes with African values has

Adams & Jacco Bomhoff eds., 2009) that "an evolutive approach means that the provisions of the ECHR should be interpreted according to the object and purpose of the ECHR as defined in the Preamble."

175. *Id.* at 1730 discussing in the context of the European Convention on Human Rights that "first that balance must be struck. If proper balance is achieved, the case law of the ECtHR will attain two purposes at the same time: firstly, the practical and effective nature of rights provisions will be maintained, and secondly, acceptance and domestic implementation of judgments by the Contracting Parties to ECHR will be ensured."

176. Motala, *supra* note 146, at 385.

177. For discussion on the idea of customary international law of human rights, *see* Schabas, *supra* note 87.

178. For discussion, *see* Anthony D'Amato, *The Concept of Special Custom in International Law*, 63 Am. J. Int'l L. 211, 212 (1969) (stating that "the distinction between special and general custom is conceptually simple. General customary law applies to all states, while special custom concerns relations between a smaller set of states.").

developed into general customary international law, and an African State is not a persistent objector,[179] it is reasonable to expect the African Commission and Court to adopt an evolutive interpretation of the African Charter to give effect to such general customary international law.[180] This view finds scholarship support. For instance, strong critics[181] of the evolutive interpretation of "sex" to include "sexual orientation" accept customary international law to overcome this challenge. However, such custom must enjoy general acceptance and proof of *opinio juris as usual.*[182] Thus, where the rule that the death penalty amounts to torture, cruel, inhuman, and degrading punishment develops into general customary international law,[183] and an African State is not a persistent objector to it, the African Commission and Court may adopt an evolutive interpretation reflecting this general customary international law to interpret article 5 of the African Charter prohibiting torture, cruel, inhuman and degrading punishment.[184]

IV. CONCLUSION

Two groups of provisions—the provision on non-discrimination in Article 2 and the decompartmentalization Articles (Articles 60 and 61)—represent the basis for the African Commission and Court to adopt an

179. For discussion on persistent objector, *see* Shelly Aviv Yeini, *The Persistent Objector Doctrine: Identifying Contradictions,* 22 Chi. J. Int'l L. 581 (2022); Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom,* 120 Yale L. J. 202, 233 (2010).

180. This question has not been considered. But the African Commission and Court should be able to uphold a rule of general customary international law in the event of such clash.

181. *See* Thioa, *supra* note 79, at 18 (stating that "to read sexual orientation into "sex" is a method that has no basis in historical intent or, indeed, the conventional method of treaty interpretation, as set out in the Vienna Convention of the Law of Treaties (VCLT).").

182. Jordan J. Paust, *The Complex Nature, Sources and Evidences of Customary Human Rights*, 25 Ga J. Int'l & Comp. L. 147 (1995); Sean D. Murphy, Principles of International Law 102 (3rd ed. 2018).

183. This is not yet a rule of customary international law. *See* Schabas, *supra* note 87, at 96.

184. *See* Communication 277/2003—*Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana.*

evolutive interpretation of the African Charter. Nevertheless, there are two main challenges to such adoption under the African human rights system. One is the general view that evolutive interpretation is contrary to traditional international law principles of intent and consent of the parties. Evolutive interpretation gives effect beyond what State Parties intended and consented to. The second is the potential for evolutive interpretation to clash with African values. In turn, these challenges may be countered. The challenge to the view that an evolutive interpretation implicates traditional international law principles may be countered with the argument that evolutive interpretation is ingrained in the VCLT, which has become customary international law. The challenge of the potential clash between evolutive interpretation and African values may as well be countered by customary international law. If a rule clashes with African values but has developed into a general customary international law, and an African State is not a persistent objector, such an African state may be bound by such general customary international law.