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THE UNIQUE JURISDICTION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS: PROTECTION OF HUMAN RIGHTS BEYOND THE AFRICAN CHARTER

*Yakaré-Oulé (Nani) Jansen Reventlow
Rosa Curling**

INTRODUCTION

This Article seeks to explore the jurisdiction of the African Court on Human and Peoples' Rights (the Court) to consider human rights violations under treaties other than the African Charter on Human and Peoples' Rights (the Charter).¹ Unlike its regional counterparts—the Inter-American Court of Human Rights or the European Court of Human Rights (the Inter-American Court and the European Court, respectively)—the African Court does not restrict itself to considering human rights violations exclusively under the regional human rights system under which it was established. This raises questions as to how the Court exercises its jurisdictional powers as it establishes its jurisprudence, which we seek to take initial stock of here.

First, the authors summarize the legal mandate given to the Court by the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol).² Second, an overview is provided of the Court's case law as it relates to the interpretation of this mandate, focusing on the issue of the Court's approach to violations of other treaties than the Charter, either at its own initiative or in response to submissions made by the parties. Analysis reveals that the Court does not yet have a consistent approach on matters of jurisdiction, which, in the interests of the applicants and participating Member States, we would invite it to cultivate. In the third section, the authors sketch a number of possible routes the Court could consider taking in this regard.

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¹ African Charter on Human and Peoples' Rights, Jun. 27, 1981, 21 I.L.M. 58 (1982).

² Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 10, 1998, Org. of African Unity [OAU] [hereinafter the Protocol]. (Entered into force on June 25, 2004. The Court started operations in 2006.); *see also African Court in Brief*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, <http://www.african-court.org/en/index.php/2-uncategorised/47-african-court-in-brief> (last visited Nov. 7, 2018).

I. THE UNIQUE JURISDICTION OF THE COURT

A. *The Parameters of the Court's Mandate*

The Court's powers and responsibilities are set out in the Protocol, which states that the Court's mandate complements the protective mandate of the African Commission on Human and Peoples' Rights (the Commission).³ Article 3 of the Protocol asserts that the Court has jurisdiction to make decisions on all cases and disputes, that concern the interpretation and application of the Charter and Protocol, as well as "any other" relevant human rights instrument ratified by the States concerned.⁴ The Court therefore has jurisdiction to consider human rights violations under treaties other than its foundational treaty, the African Charter. This, as is set out in the following section, is a unique feature compared to other regional human rights courts, which in their contentious jurisdiction—as opposed to the courts' advisory competence—are limited to the human rights treaties whose implementation they were established to oversee.

It is important to note that the comparison drawn in this article is one between the Court and other regional human rights courts—the Inter-American Court and the European Court—that have the power to issue binding decisions under the human rights instruments they were established to oversee. Within the African human rights system, the Court's powers cannot be considered unique: the Commission has the same jurisdiction, but its decisions are not binding. The sub-regional courts with human rights jurisdiction—the Economic Community of West African States (ECOWAS) Community Court of Justice⁵ and the East African Court of Justice⁶—arguably have a similar jurisdictional scope but were

³ Protocol, *supra* note 2, at 2; see Solomon T. Ebovrah, *Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations*, 22 EUR. J. INT'L L. 663, 663–88 (2011) (exposing the issue of complementarity in the African human rights system); see also Frans Viljoen, *A Human Rights Court for Africa, and Africans*, 30 BROOK. J. INT'L L. (2004) (explaining the background on the African Court).

⁴ See Protocol, *supra* note 2, at 3, 7. This issue will be considered further, below.

⁵ Article 3(4) of the Supplementary Protocol mandates that the Economic Community of West African States (ECOWAS) Court determine the "violation of human rights that occur in any Member State." Supplementary Protocol A/SP.1/011/05 (amending the Preamble and Articles 1, 2, 9, and 30 of Protocol A/P.1/7/91 relating to the Community Court of Justice and Article 4 Paragraph 1 of the English version of the said Protocol). art. 3, ¶4, http://www.courtecowas.org/site2012/pdf_files/supplementary_protocol.pdf [hereinafter Supplementary Protocol].

⁶ The Treaty for the Establishment of the East African Community, (EAC Treaty) gave the Court jurisdiction to hear human rights cases, but the East African Community's policy organs did not follow up to activate this power. Treaty for the Establishment of the East African Community, Nov. 30, 1999, Kenya-Tanz.-Uganda, available at http://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf [hereinafter EAC Treaty]. In the case of *Katabazi v. Uganda* the Court used the Treaty principles of rule of law and human rights to assert jurisdiction over claims that are presented to it as

not established as courts intended to oversee compliance with the region's human rights treaty: the Charter.

The wording of Article 3 shows that the drafters of the Protocol chose to explicitly bestow the Court with this extended jurisdictional scope, but there are unfortunately no *travaux préparatoires* to assist in interpreting the intention of Article 3. The information that exists is contained in a handful of reports on the state meetings that took place in the course of the drafting process.⁷ Unfortunately, none refers to Article 3 or the intent behind the Court's jurisdictional scope more generally.

Judgments of the Court on contentious matters are binding.⁸ At the request of a Member State or the African Union, the Court also has the power to issue non-binding advisory opinions.⁹ The Commission can refer cases before it on to the Court¹⁰ so long as the State in question has ratified the Protocol. At the time of writing, thirty states have ratified the Protocol.¹¹ Individuals and non-governmental organizations (NGOs) can also submit complaints directly to the Court¹² if the Member State has made a declaration to this effect, under Article 34(6) of the Protocol. At the time of writing, this was possible only against eight countries.¹³

human rights violations. *Katabazi v. Uganda*, No. 1/2007, Ruling, East African Court of Justice, (Nov. 1, 2007), http://eacj.org/wp-content/uploads/2012/11/NO_1_OF_2007.pdf. For more information on the EAC Treaty's principles regarding the rule of law and human rights, see Art. 6(d) of the Treaty.

⁷ See Government Legal Experts Meeting on the Question of the Establishment of an African Court of Human and Peoples' Rights, Sept. 6–12, 1995, Cape Town, South Africa, OAU/LEG/EXP/AFC/HPR (I), 8 AFR. J. INT'L & COMP. L. 493, 493–500 (1996); see also Organisation of African Unity (OAU), CM/Res.1674 (LXIV), Resolution on Measures Taken to Implement Resolution AHG/Res.230 (XXX) Relating to the Strengthening of the African Commission on Human and Peoples' Rights and the Establishment of an African Court on Human and Peoples' Rights (July 1–5, 1996); see also OAU, Decisions Adopted by the Sixty-Sixth Ordinary Session of the Council of Ministers, CM/Dec.348 (LXIV) Report of the Secretary-General on the Draft Protocol on the Establishment of an African Court on Human and Peoples' Rights, 9 AFR. J. INT'L & COMP. L. 457, 466 (1997).

⁸ See generally RACHEL MURRAY, THE IMPLEMENTATION OF THE FINDINGS OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS 50–51 (2015) (debating the binding nature of the African Commission's decisions, which includes varying viewpoints expressed by the Commission itself).

⁹ Protocol, *supra* note 2, at 4.

¹⁰ African Commission on Human and People's Rights [Afr. Comm'n H.P.R.], Rules of Procedure, at rule 84(2) and 118.

¹¹ African Union, *List of Countries Which Have Signed, Ratified/Acceded to the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights* (June 15, 2017), www.au.int/web/sites/default/files/treaties/7778-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf [hereinafter *List of Countries*].

¹² Protocol, *supra* note 2, at 5(3).

¹³ African Union, *supra* note 11 (showing that nine countries in total have made the Art. 34(6) declaration, but Rwanda withdrew its declaration in 2016); see also *Umuhzo v. Rwanda*, Application No. 003/2014, African Court on Human and People's Rights [Afr. Ct. H.P.R.], ¶ 21 (Mar.18, 2016) (holding that a sunset period of 1 year applied, resulting in its ability to receive direct complaints from Rwandan citizens and NGOs ending on

B. *A Comparison with the Inter-American and European Human Rights Courts*

The African Court has the mandate under Article 3 of the Protocol to decide cases that concern not only the Charter and its Protocol, but also any other relevant human rights instrument ratified by the Member State concerned.¹⁴ This is a unique mandate that is not directly matched by either of the Court's regional counterparts: the Inter-American Court or the European. The following section sets out the mandate of these two regional human rights courts in making binding decisions on cases brought before them.

Article 1 (Nature and Legal Organization) of the Inter-American Court's Statute confirms that the Court's mandate is the application and interpretation of the American Convention on Human Rights only.¹⁵ Article 2 (Jurisdiction), addresses the Inter-American Court's adjudicatory and advisory jurisdiction¹⁶ and determines that contentious matters are restricted to findings relating to the Inter-American Convention itself.

In relation to advisory opinions, the Inter-American Court is given a wider scope: Member States may consult the Court regarding the interpretation of this Convention *or of other treaties concerning the protection of human rights in the American states*.¹⁷ The Inter-American Court has acknowledged and exercised this possibility of using "other treaties" to interpret the scope of the American Convention¹⁸ in advisory opinions.¹⁹ Similarly, the Inter-American Court has adopted definitions from other international treaties when such definitions are lacking in the American Convention. For example, the American Convention does not include a definition of a child, so the Inter-American Court adopted the one used by the U.N. Convention on the Rights of the Child.²⁰ However, the

March 1, 2017).

¹⁴ See Protocol, *supra* note 2, at 3, 7.

¹⁵ *Statute of the Inter-American Court of Human Rights* art. 1, Oct. 31, 1979, 19 I.L.M. 634 [hereinafter IACtHR Statute].

¹⁶ IACtHR Statute, art. 2.

¹⁷ IACtHR Statute, art. 64 (emphasis added).

¹⁸ "Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82, Inter-Am. Ct. H.R. (ser. A) No. 1, ¶ 52 (Sep. 24, 1982).

¹⁹ Organization of American States, American Convention on Human Rights art. 29, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123, <http://www.cidh.org/basicos/english/basic3.american%20convention.htm>. Article 29 of the American Convention of Human Rights contains rules governing the interpretation of the Convention and expressly prevents an interpretation of the Convention which limits the effect that "other international acts of the same nature have." *Id.*

²⁰ Villagrán Morales v. Guatemala, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 188 (Nov. 19, 1999); see also *The Rights of the Child in the Inter-American Human Rights System*, OEA/Ser.L./V/II.133, doc. 34, ¶¶ 31–33 (2008).

Inter-American Court also made clear that *interpretation* differs from direct *applicability*.²¹

The European Court has a narrower jurisdiction. The European Convention on Human Rights (ECHR) states that the European Court considers and applies the European Convention and provides no authority to find violations regarding “other” human rights treaties, whether in advisory or adjudicatory issues.²²

The drafters of the American Convention and the European Convention bestowed a mandate upon the courts established to oversee these respective treaties, requiring them to apply only the relevant regional treaty in their contentious decision-making. The Court’s mandate to consider human rights violations under a much broader range of instruments raises important questions, including issues regarding the application of treaties created in international settings.

C. *What Are the Implications for the Decision-making Powers of the Court?*

The Court’s authority to issue binding decisions on “any other relevant human rights instrument ratified by the States concerned” means that its jurisdiction extends beyond applying and interpreting just the African Charter.²³ For example, the Court would be able to determine whether States have fallen short of obligations under, *inter-alia*, the International Covenant on Civil and Political Rights (ICCPR),²⁴ the Convention Against Torture (CAT);²⁵ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).²⁶ The committees that were established under these treaties to oversee their implementation by States Parties do not have the power to issue binding decisions.²⁷ As a result, the Court potentially has a greater influence than

²¹ See *Bámaca-Velásquez v. Guatemala*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70 (Nov. 25, 2000); *Las Palmeras v. Colombia*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000).

²² Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, art. 32, 47 ¶¶ 1–2, Nov. 4, 1950, E.T.S. No. 5, http://www.echr.coe.int/Documents/Convention_ENG.pdf (Nov. 19, 2018).

²³ Organisation of African Unity [OAU], *Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights*, Charter art. 3 ¶ 1, OAU Doc. OAU/LEG/AFCHPR/PROT (III), June 9, 1998.

²⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. [hereinafter ICCPR].

²⁵ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

²⁶ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S.13. [hereinafter CEDAW].

²⁷ The U.N. Human Rights Committee, Committee Against Torture, and CEDAW Committee only have advisory powers. See Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16,

the U.N. Human Rights Committee on the interpretation and application of rights contained in the ICCPR.

The Court's broad adjudication powers also mean that where a particular right is not covered in the African Charter, a citizen of a Member State falling within the Court's jurisdiction still could be protected if that right is contained in another international human rights treaty. Privacy is a good example of such a right. It is not protected by the Charter but is contained in Article 17 of the ICCPR.²⁸ In the current age of intensified surveillance, both in our physical and virtual lives, this increased layer of protection for citizens of Member States could prove significant. The same is also true for LGBTQI rights. These rights are not explicitly protected by the African Charter,²⁹ but case law clearly establishes that they are protected by other human rights treaties such as the ICCPR.³⁰

In due course, the Court will likely need to determine whether it is willing to resolve complaints relating to these rights. This will entail careful consideration and a balancing of the scope of rights as intended by the drafters of the Charter with those protected by other human rights treaties.

The extensive scope of the Court's jurisdiction might lead to some challenges given the slightly fragile buy-in of some of the African Union Member States: as set out above, the number of ratifications of the Protocol is still relatively low, and only a handful of states have made declarations allowing

1966, 999 U.N.T.S. 17; Convention Against Torture, *supra* note 25, arts. 17–24; CEDAW, art. 2–5; Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83.

²⁸ ICCPR, *supra* note 24, art. 17.

²⁹ Illustrative of this situation is the case of the Coalition of African Lesbians, which was not granted observer status by the African Commission on this basis for a long time. *Statement on Decision of the African Commission on Human and Peoples' Rights to Grant Observer Status to the Coalition of African Lesbians [CAL]*, COALITION OF AFRICAN LESBIANS (Apr. 25, 2015), <https://www.cal.org.za/2015/04/25/statement-on-decision-of-the-african-commission-on-human-and-peoples-rights-to-grant-observer-status-to-the-coalition-of-african-lesbians-cal/>. Their admission was ultimately only possible due to very persistent work and active assistance from some Commission members. *Id.*

³⁰ The development has been particularly noticeable in relation to non-discrimination cases. *See* Toonen v. Australia Communication (488/1992), U.N. Doc. CCPR/C/50/D/488/1992 (1994) (considering that the reference to "sex" in articles 2, paragraph 1, and 26 [of the ICCPR] is to be taken as including 'sexual orientation'). *Id.* at 2, 26 ¶ 8.7. The HRC therefore decided that sexual orientation-related discrimination is a suspect category both in terms of the enjoyment of Covenant rights. *Id.* at 2, ¶¶ 8.7–11. *See generally id.* at 26, ¶¶ 6.14, 11 (discussing equality before and equal protection of the law); *In Karen Atala and Daughters v. Chile*, Case 1271-04, Inter-Am. Comm'n H.R., Inter-Am. Comm'n H.R., Report No. 42/08, OEA/Ser.L./V/II.130, doc. 22 rev. 1, ¶¶ 2, 4 (2008) (involving a lesbian mother and her daughters, who sought redress for a decision by the Chilean authorities to deny custody based on the mother's sexual orientation).

their citizens to directly access the Court.³¹ These numbers indicate the delicacy of the relationship between the Court and the Member States³² and the risk that if the Court is overly proactive in its decisions, the support of Member States might be lost.

II. THE COURT'S JURISDICTION IN PRACTICE: A WASTED GIFT?

A. *The Court's Practice So Far*

The Court's case law to date reveals a somewhat inconsistent approach to finding violations under legal instruments other than the Charter. Initially, the Court only found violations of the Charter, even where the applicant explicitly referenced other treaties. The Court's approach has progressed since then, but its jurisprudence is not yet clearly motivated or consistent. What follows is a chronological overview of the Court's approach to its own jurisdiction. This compact snapshot of the current state of play in the Court's jurisdictional jurisprudence shows where in its case law the Court found a violation of other human rights treaties and why it did so—as far as can be gleaned from the text of its decisions.

The Court rendered its first judgment on the merits in *Tanganyika Law Society v. Tanzania*,³³ guaranteeing the rights of citizens to participate in the government of their country, either directly or through freely-chosen representatives.³⁴ The applicants in the matter contested the legality of the Eighth and Eleventh Amendments to the Tanzanian Constitution, which required all persons running for presidential, parliamentary, and local elections to be members of and/or be sponsored by political parties, thus prohibiting

³¹ See African Union, *supra* note 11, at 2; Ingabire Victoire Umuhoza v. Republic of Rwanda, *supra* note 13, ¶ 21.

³² See generally Karen J. Alter, James T. Gathii, & Laurence R. Helfer, *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences* 27 EUR. J. INT'L L. 293, 293–328 (2016); Tom Daly & Micha Wiebusch, *The African Court on Human and Peoples' Rights: Mapping Resistance Against a Young Court*, 14 INT'L J.L. IN CONTEXT 294 (2018). But see Karen J. Alter et al., *Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences*, 27 EUR. J. INT'L L. 293 (2016); James Gathii, *Mission Creep or a Search for Relevance: The East African Court of Justice's Human Rights Strategy*, 24 DUKE J. COMP. & INT'L L. 249, 292 (2013–2014) (exploring how the East African Court of Justice, is steadily carving out its own human rights mandate).

³³ In the Consolidated Matter of Tanganyika Law Society and the Legal and Human Rights Centre v. Tanzania and Mtikila v. Tanzania, No. 009/2011 & 011/2011, Judgment, Afr. Ct. H.P.R., (June 14, 2013), <http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania-1.pdf> [hereinafter In the Consolidated Matter of Tanganyika Law Society].

³⁴ *Id.* ¶ 99.

independent candidates from standing in elections.³⁵ The applicants alleged violations of the rights to participate in the government of one's country and to equality before the law under both the Charter and the ICCPR.³⁶

The Court commenced by considering the alleged violations under the Charter and found a violation on all points with the exception of the more general complaint of a "rule of law" violation.³⁷ The Court then found it unnecessary to go on to address the alleged violations under the ICCPR, which addressed the same wrong:

The Court notes that it has jurisdiction to interpret the said Treaties vide Article 3(1) of the Protocol which provides that "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." [] The Court, having considered the alleged violations under the relevant provisions of the Charter, does not, however, deem it necessary in this case to consider the application of these treaties.³⁸

In 2014, the Court handed down two judgments that concerned the rights of journalists, both in cases brought against Burkina Faso. The first was *Zongo v. Burkina Faso*,³⁹ which concerned the failure by Burkina Faso to investigate the killing of journalist Norbert Zongo in December 1998.⁴⁰ The applicants seized the Court in December 2011, arguing violations under the Charter, ICCPR, and the revised ECOWAS treaty of the rights to have one's case heard before a competent national court, to equal protection of the law and equality before the law, to freedom of expression—protection of journalists in particular—and to life.⁴¹ The applicants also argued a violation of Article 1 of the Charter, which contains the obligation to take appropriate measures to give effect to Charter rights, and the right to an effective remedy under Article 8 of the Universal Declaration of Human Rights (UDHR).⁴²

³⁵ *Id.* ¶ 89.2.

³⁶ *Id.* ¶¶ 91–92.

³⁷ *Id.* ¶¶ 120–21.

³⁸ *Id.* ¶¶ 122–23 (emphasis in original).

³⁹ Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablass. . . , Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement, No. 013/2011, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.], (Mar. 28, 2013) [hereinafter *Zongo v. Burkina Faso*].

⁴⁰ *Id.* ¶ 14.

⁴¹ *Id.* ¶¶ 7–15.

⁴² *Id.* ¶¶ 8, 11.

Having found the Respondent State in violation of Article 7 of the Charter for failing to uphold the right to have one's case heard before a competent national court, the Court used similar reasoning as in *Tanganyika Law Society v. Tanzania*, holding that it was unnecessary to consider the fair trial "allegations made in the same vein" under the ICCPR and the UDHR.⁴³

The Court declined to examine the other claims for a variety of reasons. It considered that Article 1 of the Charter was simultaneously violated in the course of the Respondent State's violation of Article 7.⁴⁴ When considering the applicants' allegation that the lack of investigation into the murder of Norbert Zongo violated the rights of journalists in Burkina Faso in general, the Court stated that Article 66(2)(c) of the revised ECOWAS treaty and Article 9 of the Charter "should be read jointly."⁴⁵ However, the Court did not end up investigating these claims due to lack of jurisdiction *rationae temporis* and standing of the applicants.⁴⁶ The claim of a violation of the rights to equal protection of the law and equality before the law was dismissed by the Court, finding that this principle did not necessarily mean that all cases have to be disposed of within the same length of time by judicial institutions.⁴⁷ The judgment did not address the right to life claim.⁴⁸

The second judgment concerning the rights of journalists was *Konaté v. Burkina Faso*,⁴⁹ which presented the first opportunity for the Court to consider a criminal defamation case.⁵⁰ Journalist Lohé Issa Konaté sought to challenge his one-year imprisonment and the closure of his newspaper for publishing articles that criticized a local public prosecutor.⁵¹ The Court found that the Respondent State violated its obligations concerning the right to freedom of expression under not only the Charter, but also the ICCPR, and revised ECOWAS treaty,⁵² as argued by the applicant.⁵³ Here, the Court did not explicitly explain why, as opposed to its previous judgments, it found a violation of multiple instruments protecting the same right.⁵⁴

⁴³ *Id.* ¶ 157.

⁴⁴ *Id.* ¶ 199.

⁴⁵ *Id.* ¶ 180.

⁴⁶ *Id.* ¶¶ 182, 185.

⁴⁷ *Id.* ¶ 158–70.

⁴⁸ *Zongo v. Burkina Faso*, No. 013/2011.

⁴⁹ *Konataté v. Faso*, No. 004/2013, Judgment, Afr. Ct. H.P.R., (Dec. 5. 2014).

⁵⁰ *Id.* ¶ 3.

⁵¹ *Id.* ¶¶ 5, 28.

⁵² *Id.* ¶ 170.

⁵³ *Id.* ¶¶ 9, 12.

⁵⁴ *Zongo v. Burkina Faso*, No. 013/2011.

Notably, in *Konaté*, the Court also gave very detailed orders to the Respondent State to bring its domestic legislation in line with the Charter, ICCPR, and Revised ECOWAS Treaty.⁵⁵ In other words, the Court not only found a violation of these human rights treaties, but also included specific orders in its judgment for measures and remedies:

[The Court o]rders the Respondent State to amend its legislation on defamation in order to make it compliant with article 9 of the Charter, article 19 of the Covenant and article 66 (2)(c) of the Revised ECOWAS Treaty: [1] by repealing custodial sentences for acts of defamation; and [2] by adapting its legislation to ensure that other sanctions for defamation meet the test of necessity and proportionality, in accordance with its obligations under the Charter and other international instruments.⁵⁶

After finding a violation of the same right under all the different applicable human rights instruments in *Konaté v. Burkina Faso*, the Court took a mixed approach in *Alex Thomas v. Tanzania*.⁵⁷ The case concerned an applicant serving a thirty-year prison term for charges of armed robbery.⁵⁸ The applicant seized the Court, arguing a number of violations of his right to a fair trial, all of which were formulated as violations of the Charter only.⁵⁹ The Court, however, at its own initiative, included Tanzania's obligations under the ICCPR in its considerations when assessing the alleged fair trial violations⁶⁰ and went on to find a violation of both treaties.⁶¹ However, having raised the ICCPR at its own initiative, the Court subsequently left out any discussion of the corollary ICCPR Articles to Charter Articles 3, 5, 6, 7(1)(b), and 9(1), which protect the rights of equality before the law, freedom from torture, personal liberty, presumption of innocence, and freedom of expression. The Court found that these rights were not violated, contrary to the applicant's assertions.⁶²

A similarly mixed approach was adopted in *Onyango Nganyi & Ors. v. Tanzania*.⁶³ The case concerned a series of fair trial violations argued by a group of applicants who had been arrested and detained by Mozambican, Kenyan, and

⁵⁵ *Konaté v. Burkina Faso*, No. 004/2013, at ¶ 170.

⁵⁶ *Id.* ¶ 176 (8).

⁵⁷ *Thomas v. Tanzania*, No. 005/2013, Judgment, Afr. Ct. H.P.R., (Nov. 20, 2015).

⁵⁸ *Id.* ¶ 3.

⁵⁹ *Id.* ¶ 19.

⁶⁰ *Id.* ¶ 88.

⁶¹ *Id.* ¶ 161 (vii). *See also id.* ¶¶ 81–99, 111–31.

⁶² *Id.* ¶¶ 138–54, 161 (vi).

⁶³ *Nganyi v. Tanzania*, No. 006/2013, Judgment, Afr. Ct. H.P.R., (Nov. 20, 2015).

Tanzanian police forces.⁶⁴ Applicants argued a violation of Article 7 of the Charter, as well as a violation of Tanzania’s criminal procedure code.⁶⁵

When determining if the applicants’ right to legal representation had been violated, the Court stated: “In view of the fact that the Respondent ratified the [ICCPR] . . . the Court can not only interpret Article 7(1)(c) of the Charter in light of the provisions of Article 14(3)(d) of the ICCPR but also apply the latter provision.”⁶⁶ This suggests that the Court was prepared to examine the alleged violation under not only the Charter, but also the ICCPR. In reality, however, the Court used Article 14 ICCPR only as an interpretative aid in determining whether a violation had taken place under Article 7 of the Charter—which it decided in the affirmative.⁶⁷

A similar approach was taken in *Christopher Jonas v. Tanzania*:⁶⁸

The relevant section of Article 7 (1) (c) of the Charter provides that: “Every individual shall have the right to have his cause heard [. . .] This Article may be interpreted in light of the provisions of Article 14 (1) of the Covenant which provides that: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [. . .]”⁶⁹

In the end, however, the Court found a violation of the Charter only.⁷⁰ In *Abubakari v. Tanzania*,⁷¹ the Court departed from this approach and undertook a full review. It assessed the alleged violation of the applicant’s fair trial rights under Article 7 of the Charter, as well as Article 14 of the ICCPR, and referenced both treaties in its judgment.⁷² References to the applicant’s arguments throughout the Court’s judgment show that the complaints had been formulated as a violation of both treaties.⁷³ The Court found a partial violation of the applicant’s rights under both the Charter and the ICCPR.⁷⁴

⁶⁴ *Id.* ¶ 2.

⁶⁵ *Id.* ¶ 46.

⁶⁶ *Id.* ¶ 165.

⁶⁷ *Id.* ¶¶ 184, 193 (viii).

⁶⁸ *Jonas v. Tanzania*, No. 011/2015, Afr. Ct. H.P.R., (Nov. 20, 2015).

⁶⁹ *Id.* ¶¶ 63–64.

⁷⁰ *Id.* ¶ 100.

⁷¹ *Abubakari v. Tanzania*, No. 007/2013, Judgment, Afr. Ct. H.P.R., (June 3, 2016).

⁷² *Id.* ¶ 242.

⁷³ *Id.* ¶ 127.

⁷⁴ *Id.* ¶ 242(6).

In *African Commission v. Libya*, adopted a more limited approach.⁷⁵ This case concerned the detention of Saïf Al Islam Kadhafi in a secret location.⁷⁶ The applicant framed the complaint in terms of Charter violations.⁷⁷ Nevertheless, in its judgment, the Court referred to various provisions of the ICCPR alongside the Charter.⁷⁸ The Court also made reference to the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.⁷⁹ However, in spite of these references,⁸⁰ the Court ultimately only found a violation of only Articles 6 and 7 of the Charter.⁸¹

The case of *Actions pour la Protection des Droits de l'Homme v. Côte d'Ivoire* offered an opportunity for the Court to interpret what it considered to be a “human rights treaty” in the sense of Article 3 of the Protocol.⁸² In this case, the applicants argued that by adopting a new law on the Independent Electoral Commission, Côte d'Ivoire violated the right of all citizens to equality before the law, as well as the right to an independent and impartial electoral body.⁸³ These complaints were framed as violations of:

Articles 3 and 13(1) and (2) of the [African] Charter on Human [and Peoples'] Rights, Articles 10(3) and 17(1) of the African Charter on Democracy[, Elections and Governance], Article 3 of the ECOWAS Democracy Protocol [ECOWAS Protocol on Democracy and Good Governance], Article 1 of the Universal Declaration of Human Rights and Articles 26 of the International Covenant on Civil and Political Rights⁸⁴

The Court engaged in a detailed discussion as to whether the African Charter on Democracy, Elections and Governance (African Charter on Democracy),⁸⁵ and the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol),⁸⁶ could be considered human rights treaties in the sense

⁷⁵ Afr. Comm'n on Human and Peoples' Rights v. Libya, No. 002/2013, Judgment, Afr. Comm'n H.P.R., ¶ 97 (June 3, 2016).

⁷⁶ *Id.*

⁷⁷ *Id.* ¶ 9–11.

⁷⁸ *Id.* ¶ 77.

⁷⁹ *Id.* ¶ 92.

⁸⁰ *Id.* ¶¶ 86–93.

⁸¹ *Id.* ¶ 97.

⁸² *Actions pour la Protection des Droits de L'homme v. Côte d'Ivoire*, No. 001/2014, Judgment, Afr. Ct. H.P.R., (Nov. 18, 2016) [hereinafter *APDH v. Côte d'Ivoire*].

⁸³ *Id.* ¶ 20.

⁸⁴ *Id.*

⁸⁵ *Id.* ¶¶ 49–51. *See generally* African Charter on Democracy, Elections and Governance, Jan. 30, 2007 [hereinafter *African Charter on Democracy*].

⁸⁶ *APDH v. Côte d'Ivoire*, No. 001/2014 at ¶ 63. *See generally* Protocol on Democracy and Good Governance, Dec. 21, 2001.

of Article 3 of the Protocol.⁸⁷ The Court concluded that, since both instruments either expressly enunciate the subjective rights of individuals or place mandatory obligations on State Parties for the enjoyment of such rights, the instruments fall within the scope of Article 3.⁸⁸

Interestingly, the Court appeared to find that a violation of the African Charter on Democracy and the ECOWAS Democracy Protocol led to a violation of the African Charter on Human and Peoples' Rights:

[The Court r]ules that the Respondent State has violated its obligation to establish an independent and impartial electoral body as provided under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol, and consequently, also violated its obligation to protect the right of the citizens to participate freely in the management of the public affairs of their country guaranteed by [Article 13(1) and (2)] of the African Charter on Human and Peoples' Rights[.]⁸⁹

The Court also found that Côte d'Ivoire did not fulfill its obligation to protect the right to equal protection of the law under Article 10(3) of the African Charter on Democracy, Article 3(2) of the Charter, and Article 26 of the ICCPR.⁹⁰ No mention was made of the UDHR, even though the applicants explicitly mentioned it as one of the legal bases for their complaint.⁹¹ Arguably, the Court did not consider the UDHR as imposing mandatory obligations on states, one of the elements it used to determine whether the African Charter on Democracy and the ECOWAS Democracy Protocol had been violated—although this was not explicitly clarified.⁹² The Court ordered the Respondent State to amend its national legislation to be “compliant with the aforementioned instruments to which it is a Party,”⁹³ including treaties other than the Charter, as it had previously ordered in *Konaté v. Burkina Faso*.⁹⁴

After fully utilizing its jurisdictional mandate in *APDH v. Côte d'Ivoire*, the Court again adopted a limited approach in *Ingabire v. Rwanda*.⁹⁵ The case concerned the arrest, detention, and trial of Victoire Ingabire, the acting leader

⁸⁷ APDH v. Côte d'Ivoire, No. 001/2014 at ¶ 65.

⁸⁸ *Id.* ¶¶ 58–65.

⁸⁹ *Id.* ¶ 153(5).

⁹⁰ *Id.* ¶ 153.

⁹¹ *Id.*

⁹² *Id.* ¶¶ 57–65.

⁹³ *Id.* ¶ 153(7).

⁹⁴ *Konaté v. Burkina Faso*, No. 004/2013, ¶ 176(8).

⁹⁵ *Umuhoza v. Rwanda*, No. 003/2014, Judgment on the Merits, Afr. Ct. H.P.R., ¶ 173 (ix) (Nov. 24, 2017).

of a Forces Democratiques Unifiees (FDU Inkingi) political party in Rwanda. The applicant argued violations of her rights to a fair trial and freedom of expression under a range of different international treaties, as well as the Charter: namely Articles 1, 7, 10, 11, 18, and 19 of the UDHR; Articles 3, 7 and 9 of the Charter; and Articles 7, 14, 15, 18, and 19 of the ICCPR.⁹⁶

The Court found a breach of the applicant's right to a defense under Article 7(1)(c) of the Charter without mentioning the claim under the ICCPR.⁹⁷ In finding a violation of her right to freedom of expression, the Court however did reference both Article 9 of the Charter and Article 19 of the ICCPR.⁹⁸ The Court did not clarify why it referred solely to the Charter for one of the alleged violations, yet included the ICCPR alongside the Charter for the freedom of expression claim.

Having previously had the opportunity to clarify the scope of the term "human rights treaty" in *APDH v. Côte d'Ivoire*, the Court's decision in *Anudo v. Tanzania*⁹⁹ was the first case in which it explicitly found a violation of customary international law.¹⁰⁰ The applicant, Mr. Anudo, claimed a violation of his right to nationality under Article 15 of the UDHR, after Tanzanian authorities had withdrawn his nationality and deported him to Kenya. Subsequently, Kenya expelled him, leaving Mr. Anudo stateless and unable to enter either country.¹⁰¹ He further alleged a violation of his right to freedom of movement under Article 12 of the Charter, and the right to have his case heard under Article 7 of the Charter and Article 15 of the ICCPR.¹⁰² As a consequence of his expulsions and having to reside in a "no man's land" between the Tanzanian and Kenyan border, Mr. Anudo also claimed a violation of a number of rights under the Charter, the ICCPR, and the International Covenant on Economic, Social and Cultural Rights (ICESCR) including his rights to use public services, to work, to enjoy the best attainable state of physical and mental health, and to take part in cultural life.¹⁰³

In determining Mr. Anudo's claim of a violation of his right to nationality, the Court first noted that neither the Charter nor the ICCPR contained an article

⁹⁶ *Id.* ¶ 9, 77.

⁹⁷ *Id.* ¶ 98, 173 (viii).

⁹⁸ *Id.* ¶ 163, 173 (ix).

⁹⁹ *Anudo v. Tanzania*, No. 012/2015, Judgment on the Merits, Afr. Ct. H.P.R., ¶ 88 (Mar. 22, 2018).

¹⁰⁰ *Id.* ¶ 75–78, 88.

¹⁰¹ *Id.* ¶ 4–13.

¹⁰² *Id.* ¶ 14.

¹⁰³ *Id.*

that deals specifically with the right to nationality,¹⁰⁴ but that it was recognized as part of customary international law (as illustrated by) Article 15 of the UDHR).¹⁰⁵ Without further reflecting on the status of rules of customary international law or the relevance of the U.N. Convention Relating to the Status of Stateless Persons,¹⁰⁶ which Tanzania had not ratified,¹⁰⁷ the Court determined that the burden of proof concerning Mr. Anudo's nationality lay with Tanzania. Finding that Tanzania had failed to meet this burden, the Court concluded that the withdrawal of Mr. Anudo's nationality had been arbitrary, in violation of UDHR Article 15(2).

Interestingly, the applicant's claim of a violation of his right to freedom of movement was framed under Article 12 of the Charter, but reframed by the Court as primarily concerning Mr. Anudo's right to return to his country after having left the territory involuntarily.¹⁰⁸ It is not clear why the Court then proceeded to focus on Article 13 of the ICCPR, which the applicant had not relied on,¹⁰⁹ focusing on the question of whether Mr. Anudo had been arbitrarily expelled.¹¹⁰ The Court concluded that there had been a violation of Article 13 of the ICCPR in this regard, without further mentioning the original complaint under Article 12 of the Charter.¹¹¹

The Court found a violation of Mr. Anudo's right to be heard under both the Charter and ICCPR,¹¹² as argued,¹¹³ and found that the other violations argued were the consequences of his expulsion.¹¹⁴ The Court deferred consideration of these violations, related to the "major violations" it had found, to the reparations stage of the proceedings.¹¹⁵

¹⁰⁴ The African Commission held in two cases that the complainants' rights to nationality, as legal statuses, had been violated under Article 5 of the Charter. *See* *The Nubian Community in Kenya v. Kenya*, No. 317/2006, Merits, Afr. Comm'n H.P.R., ¶ 74, 140, 151 (May 30, 2016); *Open Society Justice Initiative v. Côte d'Ivoire*, No. 318/2006, Merits, Afr. Comm'n H.P.R., ¶ 118–20, 138 (May 27, 2016).

¹⁰⁵ *Anudo v. Tanzania*, No. 012/2015, Judgment on the Merits, Afr. Ct. H.P.R., ¶ 76 (Mar. 22, 2018).

¹⁰⁶ *Id.* ¶ 76–79; *see also* United Nations Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.

¹⁰⁷ *Convention Relating to the Status of Stateless Persons*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (last visited Nov. 21, 2018).

¹⁰⁸ *Anundo v. Tanzania*, No. 012/2015, Afr. Ct. H.P.R., ¶¶ 95–96.

¹⁰⁹ *Id.* ¶ 14.

¹¹⁰ *Id.* ¶¶ 100–05.

¹¹¹ *Id.* ¶ 106.

¹¹² *Id.* ¶¶ 107–15.

¹¹³ *Id.* ¶ 14.

¹¹⁴ *Id.* ¶ 115.

¹¹⁵ *Id.* ¶¶ 117–21.

In *Mango v. Tanzania*, the Court again took a limited approach when considering a complaint framed as a violation of both the Charter and the UDHR.¹¹⁶ The applicants had been convicted for armed robbery and claimed a series of fair trial and other human rights violations before the Court based on Article 7 of the Charter and Articles 8 and 10 of the UDHR.¹¹⁷ The Court reviewed these claims based on the Charter only.¹¹⁸ The alleged violation of the right to be provided with legal counsel was upheld, but all other claims were dismissed.¹¹⁹ In relation to its finding that the right to access to legal counsel had been violated, the Court explicitly held that Articles 8 and 10 of the UDHR were reflected in Article 7 of the Charter and that it was not necessary to make a separate determination on the violation of these articles.¹²⁰ The Court further stated that the claimed violation of Article 1 of the Charter was automatic due to the finding of a violation of Article 7.¹²¹ The applicants also claimed a number of violations related to non-discrimination, equality, and dignity, based on Articles 2, 3, 5, 19, and 28 of the Charter and Articles 1, 2, 5, 6, and 7 of the UDHR,¹²² all of which were dismissed by the Court for lacking substantiation.¹²³ Interestingly, the judgment mentions that the applicants alleged violations of the ECHR and the American Convention on Human Rights (ACHR) in their application as well,¹²⁴ but these were not further mentioned, due to their lack of applicability to the Respondent State.

*APDF v. Mali*¹²⁵ was the first case in which the Court applied provisions of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (the Maputo Protocol).¹²⁶ The applicants had alleged that

¹¹⁶ *Mango v. Tanzania*, No. 005/2015, Decision, Afr. Ct. H.P.R., ¶ 12 (May 11, 2018).

¹¹⁷ *Id.* ¶ 11.

¹¹⁸ *Id.* ¶¶ 60–27.

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 130.

¹²¹ *Id.* ¶¶ 149–50.

¹²² *Id.* ¶ 142.

¹²³ *Id.* ¶¶ 145–46.

¹²⁴ *Id.* ¶ 12.

¹²⁵ *Ass'n pour le Progrès et la Défence des Droits de Femmes Maliennes v. Mali*, No. 04DF2016, Decision, Afr. Ct. H.P.R., at 2 (May 11, 2018) [hereinafter *APDF v. Mali*].

¹²⁶ OAU, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, July 11, 2003, OAU Doc. CAB/LEG/66.6. As mentioned above, the ECOWAS Community Court of Justice has a comparably extensive human rights jurisdiction as the Court. *See* Supplementary Protocol, *supra* note 6. In 2017, the ECOWAS Court was the first regional adjudicatory body to issue a ruling on the basis of the Protocol. *Njemanze v. Nigeria*, ECW/CCJ/JUD/08/17, (Oct. 12, 2017), <https://africanlii.org/ecowas/judgment/ecowas-community-court-justice/2017/10>. For a discussion of the case and its implications for the African human rights system, see Sègnonna Horace Adjolohoun, *The Njemanze ECOWAS Court Ruling and "Universal" Jurisdiction: Implications for the "Grand African Human Rights System"*, BLOG OF THE INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, (Nov. 16, 2017), <http://www.iconnectblog.com/2017/11/>

Mali's Family Law violated the Maputo Protocol, the African Charter on the Rights and Welfare of the Child (ACRWC),¹²⁷ and CEDAW,¹²⁸ specifically its provisions on the "minimum age of marriage for girls," the "consent to marriage," "right to inheritance," and the "obligation to eliminate traditional practices and conduct harmful to the rights of women and children."¹²⁹ The Court found in favor of the applicants on all points, considering the alleged violations in the context of the Maputo Protocol, ACRWC, and CEDAW as argued by the litigants,¹³⁰ and ordered the Respondent State to "harmonize its laws with the international instruments."¹³¹

III. THE COURT'S JURISDICTION: WHAT NEXT?

There are many variables that impact the Court's judgment and reasoning and a simple review of the Court's case law may therefore not be entirely reliable. For example, the strategy of the legal representation of the parties is a relevant factor: have they argued violations of other international standards and presented the Court with persuasive comparative and international jurisprudence? The expertise available amongst the legal staff at the Commission and the Court is another factor: have they supplemented the arguments of the parties where necessary?

While the key arguments made by the parties will be reflected in the decisions and judgments of the Court, only studying the casefile in its entirety will reveal the Court's level of openness and he proactivity in assessing violations of international treaties or standards other than the Charter.

That being said, the Court is explicitly mandated to consider violations under any relevant human rights instruments as ratified by the concerned Member State under Article 3 of the Protocol.¹³² As demonstrated by the survey in section 3, the Court in some of its cases so far did not engage with the applicants'

the-njemanze-ecowas-court-ruling-and-universal-jurisdiction-implications-for-the-grand-african-human-rights-system.

¹²⁷ OAU, African Charter on the Rights and Welfare of the Child, July 11, 1990, OAU Doc. CAB/LEG/24.9/49.

¹²⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 13.

¹²⁹ *APDF v. Mali*, No. 046/2016, Afr. Ct. H.P.R., ¶ 9.

¹³⁰ *Id.* ¶¶ 78, 95, 115, 125.

¹³¹ *Id.* ¶ 135.

¹³² Protocol, *supra* note 2, art. 3.

arguments of human rights violations based on instruments other than the Charter.¹³³

In cases in which arguments are made solely under the Charter, the Court is inconsistent in supplementing those claims by finding violations of other relevant treaties applicable to the case, even if the Court uses them as an interpretative tool.¹³⁴ Yet, the Court is explicitly mandated to consider violations under any relevant human rights instruments as ratified by the concerned Member State under Article 3 of the Protocol.¹³⁵ This indicates that the Court is currently not systemically following principles of international adjudication such as the *iura novit curia* principle.¹³⁶ By way of example, the International Court of Justice considers that:

The Court . . . [a]s an international judicial organ, is deemed to take judicial notice of international law, and is therefore required in a case falling under Article 53 of the Statute, as in any other case, to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court.¹³⁷

¹³³ *Zongo v. Burkina Faso*, No. 013/2011, Afr. Ct. H.P.R., ¶¶ 2, 8, 104; In the Consolidated Matter of Tanganyika Law Society, No. 009/2011 & 011/2011, Afr. Ct. H.P.R., ¶¶ 85, 91, 92, 122.

¹³⁴ *Compare* Thomas v. Tanzania, No. 005/2013, Afr. Ct. H.P.R., ¶ 88 with *Nganyi v. Tanzania*, No. 006/2013, Judgment, Afr. Ct. H.P.R. at ¶¶ 58, 113, 115–16, 169–79 (analyzing two claims of human rights violations, both under the Charter, but using other instruments for interpretation).

¹³⁵ Protocol, *supra* note 2, art. 3.

¹³⁶ Takane Sugihara, *The Principle of Jura Novit Curia in the International Court of Justice: With Reference to Recent Decisions*, 55 JAPANESE Y.B. INT'L L. 77, 84–85 (2012).

¹³⁷ ICJ Reports 1974, p. 9, ¶ 17, p. 181, ¶ 18. *Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 29 (June 27, 1986) (capitalization in original). This view was also referenced by Judge Ouguergouz (on a different topic) in his separate opinion in *Afr. Comm'n on Human & Peoples' Rights v. Libya*, No. 002/2013, Separate Opinion of Judge Fatsah Ouguergouz on Order for Provisional Measures, Afr. Ct. H.P.R., ¶¶ 5–6 (Mar. 15, 2013). In this context, see also *Onyachi v. Tanzania*, No. 003/2015, Judgment, Afr. Ct. H.P.R., ¶ 13 (Sept. 28, 2017) (including the applicants' argument that both the Kenyan and Tanzanian governments had violated "all accepted principles of human rights and international law"). The Court dismissed the case for lack of personal jurisdiction but held the following on the applicant's general claims:

[T]he Court has previously decided that it can only examine a specific allegation of human rights violation only when either the facts indicating such violation or the nature of the right which was allegedly violated is adequately stated in the Application. The instant allegation lacks precision in both respects. The Applicants have not clearly stated the specific right or principle of human rights or international law, which is said to be violated nor have they sufficiently indicated the factual basis of such alleged violation. As a result, the Court is unable to make a determination on the merits of the substance of the Applicants' allegation because of its generalised nature and

Following this reasoning from the International Court of Justice, the Court not only has the discretion to bring into its consideration relevant human rights treaties other than the Charter, but also, as a court, has a duty to do so.

The Court did this, on its own initiative, in the *Abubakari* case,¹³⁸ as discussed above.¹³⁹ Also, in the case of *Chacha v. Tanzania*,¹⁴⁰ in which the applicants had cited only national law as a basis for their claims,¹⁴¹ the Court stated that “where only national law or constitution has been cited and relied upon in an application, the Court will look for corresponding articles in the Charter or any other human rights instrument and base its decision thereon.”¹⁴²

While these cases suggest that the Court might have an intention to establish a more consistent practice in this regard, this approach does not yet appear to have been structurally embedded. Possibly, this ambivalent approach reflects the challenges the Court faces in balancing what are likely to be competing interests: expansively interpreting the human rights it is mandated to protect and potentially losing buy-in among the states that established it versus a more cautious approach that could result in the Court not fulfilling its potential as a custodian of human rights.

Of course, there can be significant drawbacks to adopting strict rules in this regard. Most courts want to remain flexible and able to address the needs of litigants over time, and this is especially true for a young court in its early phase of development. However, this does not preclude the, perhaps informal, formulation and use of a framework of guiding principles, which would increase the legal certainty for litigants as well as the internal consistency of the Court’s jurisprudence.

One such criterion could be remedial consequences for the applicant: if a violation of the Charter has already been found, then does finding a parallel violation under another human rights instrument make a difference in the acknowledgment of the human rights violation that occurred? Arguably, there can be extra weight from a symbolic viewpoint in finding a violation of not one,

finds no violation of a right protected in the Charter or other international human rights instruments ratified by the Respondent.

Id. ¶¶ 156–57 (citation omitted) (capitalization in original).

¹³⁸ See *Abubakari v. Tanzania*, No. 007/2013, Afr. Ct. H.P.R. at ¶ 32.

¹³⁹ See discussion *supra* Part 3.

¹⁴⁰ *Chacha v. Tanzania*, No. 003/2012, Ruling on Admissibility, Afr. Ct. H.P.R., ¶ 157 (Mar. 28, 2014) (failing to make it to a judgment on the merits as it was declared inadmissible).

¹⁴¹ *Id.* ¶¶ 3–4. Tanzania used this fact to argue for inadmissibility. *Id.* ¶ 95.

¹⁴² *Id.* ¶ 113.

but a series of human rights treaties. Yet, if this has no further impact on the orders issued by the Court or the implementation that can be pursued by the applicant, should the Court examine these parallel violations?

This raises another interesting question: if the recourse for redress offered is different under another treaty than the Charter itself or if the Charter offers no grounds for a human rights claim (such as a violation of the right to privacy mentioned above),¹⁴³ then should the Court explore the possibility of finding a violation under another applicable human rights framework? The Court has answered this question when it comes to applicants having cited only national law in their submissions,¹⁴⁴ as set out above, but not yet explicitly clarified its position when it comes to international human rights instruments.

Whichever avenue the Court chooses, it would be beneficial for it to make a clear choice and begin to consistently develop its jurisprudence in that direction, not least for the sake of legal certainty for applicants seeking its assistance.

¹⁴³ *Id.* ¶ 113.

¹⁴⁴ *Id.*