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The African Charter: Just one treaty among many? The development of the material jurisdiction and interpretive mandate of the African Court on Human and Peoples' Rights

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Summary: *In contentious cases the material jurisdiction of the African Court is the jurisdiction to interpret and apply the instruments that are provided for in article 3(1) of the African Court Protocol. For the African Court to appropriately apply these instruments it must perform an interpretive role and utilise, at its discretion, information available from sources other than those that fall under its material jurisdiction and the sources of law stipulated in article 7 of the Court Protocol. In a 2001 article Heyns brought to our attention a number of potential problems related to the material jurisdiction of the African Court. He particularly pointed us to the loss of the 'African' in article 3, the narrow approach to the applicable sources of law in article 7 and the uncertainty of the position of articles 60 and 61 of the African Charter in guiding the interpretive mandate of the African Court. Through an analysis of the Court's jurisprudence, guided by these three essential issues, the article explores how the Court has approached its material jurisdiction during its first*

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ten years of its existence. It further aims to establish what methodology the Court has developed to address the lack of an interpretive provision in the Court Protocol with specific reference to the application of articles 60 and 61 of the Charter. The analysis demonstrates a pragmatic approach to material jurisdiction, firmly grounded in the principle of complementarity.

Key words: *African Court; material jurisdiction; complementarity; interpretive mandate*

1 Introduction

The term 'jurisdiction' can best be described as the power that signifies the scope within which an adjudicatory body can act with integrity over persons, matters and territory. As any other court, the African Court on Human and Peoples' Rights (African Court) possesses jurisdiction over matters only as far as it has been granted such power. The main argument raised in this article is that to fulfil two of the Court's core values, namely, to apply and interpret the provisions of the African Charter on Human and Peoples' Rights (African Charter), the Protocol to the African Charter on Human and Peoples' Rights Establishing an African Court on Human and Peoples' Rights (African Court Protocol), the 2020 Rules of the Court (Rules) and other relevant international human rights instruments in a fair and impartial way and to be responsive to the needs of those who approach it, the Court must clearly define its material jurisdiction and apply it consistently.[1] In this regard the main focus of the article is to analyse the sources applied by the African Court in the consideration of cases submitted to it in the first ten years of its existence, to present some thoughts on the approach of the Court in defining its material jurisdiction.

The final stretch of negotiations leading up to the adoption of the African Court Protocol saw an addition of important qualifiers to the Court's material jurisdiction. These changes involved adding references to 'ratification' and 'relevant' and, more importantly, dropping the reference to 'African' before 'human right instruments'.[2] Consequently, article 3(1) refers to the 'interpretation and application of the Charter, th[e] Protocol and any other relevant human rights instrument ratified by the states concerned'. This mandate is

1 https://www.african-court.org/wpafc/basic-information/ (accessed 1 December 2021).
2 Addis Ababa Draft (1997) OAU/LEG/EXP/AFCHPR/PROT (III) Rev 1.

confirmed in article 7 and Rule 29(1)(a) of the Rules. Accordingly, article 3(1), together with article 7, governs the norms the African Court is authorised to employ as part of its adjudicatory function.

Therefore, when the Court assumed its functions in November 2006, it was set to act under a far broader material jurisdiction than its European and Inter-American counterparts.[3] From this perspective, it is understandable that much of the early debate around the Court's material jurisdiction focused on the possible outcomes, and even dangers, of the broad mandate created under articles 3(1) and 7 of the Protocol. In one of the earliest commentaries, by Naldi and Magliveras, the jurisdiction of the newly-conceived Court was described as a 'radical, but welcome, development', not 'without problems, especially as regards their application and enforcement'.[4]

Furthermore, it is common cause that international human rights instruments are drafted in general terms, as a common standard of achievement of the state parties that ratify these. Thus, for the Court to appropriately interpret and apply the instruments referred to in articles 3(1) and 7, it must utilise, at its discretion, information available in sources outside those under its material jurisdiction. However, the Court Protocol lacks an interpretation clause such as those that exist, for example, under the African Charter on Human and Peoples' Rights (African Charter). Under articles 60 and 61 of the African Charter, the African Commission on Human and Peoples' Rights (African Commission) must interpret the Charter pursuant to international human rights law and jurisprudence.

3 In comparison, the material jurisdiction, in contentious matters before the European Court of Human Rights (European Court) is set out in art 32 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), stipulating that 'jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto'. Similarly, art 1 of the Statute of the Inter-American Court of Human Rights stipulates that the purpose of the Inter-American Court is to apply and interpret the American Convention. This is further confirmed in art 62(3) of the American Convention on Human Rights. Added to this is the limited jurisdiction over arts 8 and 13 of the Protocol of San Salvador. Art 19(6) of the Protocol of San Salvador stipulates that violations of arts 8 (trade union rights) or 13 (right to education) 'may give rise, through participation of the Inter-American Commission on Human Rights and, when applicable, of the Inter-American Court of Human Rights, to application of the system of individual petitions governed by Article 44 through 51 and 61 through 69 of the American Convention on Human Rights'. See YONJ Reventlow & R Curling 'The unique jurisdiction of the African Court on Human and Peoples' Rights: Protection of human rights beyond the African Charter' (2019) 33 *Emory International Law Review* 206-207; A Rachovitsa 'On new "judicial animals": The curious case of an African Court with material jurisdiction of a global scope' (2019) 19 *Human Rights Law Review* 256.

4 GJ Naldi & K Magliveras 'Reinforcing the African system of human rights: The Protocol on the Establishment of a Regional Court of Human and Peoples' Rights' (1998) 16 *Netherlands Quarterly of Human Rights* 435.

In his seminal article Heyns highlighted several potential problems related to the material jurisdiction of the then yet-to-be established Court. In responding to the interpretation of the material jurisdiction as presented by other scholars at the time, he raised the concern that if the Court's jurisdiction would extend to 'any' human rights treaty ratified by a member state of the Court Protocol this could, potentially, cause 'jurisprudential chaos'.[5] Heyns further suggested that such a broad material jurisdiction would have an adverse effect on the ratification of the Protocol as well as 'any [other] human rights treaty'.[6] In further elaborating on the danger of the broad material jurisdiction of the Court, Heyns particularly pointed to the loss of 'African' in article 3(1) which, in his opinion, could lead to the abandonment of the 'unique conception of human rights in Africa' and the acceptance of international norms 'with open arms in an uncritical fashion'.[7] He also emphasised the potential problems with utilising article 7 as an interpretation clause as the wording of this article would not provide the African Court with the same opportunity as that of the African Commission under articles 60 and 61 to correct the 'flaws of the Charter system'.[8]

Guided by these two essential issues, the first objective of this article is to determine how the Court has demarcated its material jurisdiction through an analysis of the Court's originating jurisprudence.[9] The second objective is to establish what methodology the Court has developed to address the lack of a specific interpretive provision in the Protocol with specific reference to the application of articles 60 and 61 of the African Charter. To achieve these objectives, building on Heyns's methodology, part 2 presents how the Court has delineated its material jurisdiction in its first decade. Part 3 focuses on the relationship between articles 3(1) and 7 and the methodology the Court has developed to address the lack of an interpretive provision in the Court Protocol with specific focus on articles 60 and 61 of the African Charter. Part 4 presents the concluding observations, responding to some of Heyns's concerns.

5 CH Heyns 'The African regional human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 167; see also F Viljoen *International human rights law in Africa* (2012) 438.
6 Heyns (n 5) 167.
7 Heyns (n 5) 168.
8 Heyns (n 5) 157, 168-169.
9 This analysis includes jurisprudence originating from the first 10 years of the Court's existence, ie 2008-2018.

2 Establishing its material jurisdiction

The material jurisdiction of the African Court in contentious cases is the jurisdiction to interpret and apply the instruments that are provided for under article 3(1) of the African Court Protocol. As set out in article 1, the jurisdiction of the Court is governed by the Court Protocol. The Court therefore is a 'creature of the Protocol and … its jurisdiction is clearly prescribed by the Protocol'.[10] During the different phases of its existence, the Court has explored the length and breadth of its jurisdictional mandate to develop a framework within which it justifies its material jurisdiction.[11] This, in itself, is an outcome of the Court's mandate to interpret and apply the Protocol.[12] This part discusses critical, inter-linked issues relating to the interpretation and application of the Protocol with regard to the Court's material jurisdiction. This discussion aims to highlight the significance of the reference to 'relevant' and 'human rights' instruments as referred to in article 3(1) of the Court Protocol. Notwithstanding the fact that the Court has not explicitly stated how it defines a 'relevant' human rights instrument, the following part discusses what can be understood as such an instrument through an analysis of the jurisprudence handed down between 2013 and 2016. Considering the Court's broad interpretation of 'relevant', part 2.2 then focuses on how the Court has defined a 'human rights' instrument.

2.1 'Relevant' human rights instrument

In his 2001 article, Heyns suggested that the only treaties that could, theoretically, become 'relevant' for the purposes of article 3(1) would be treaties that 'make express provision for adjudication by the African Human Rights Court'.[13] He supported this argument by the fact that at the time there were no other treaties that contained such a provision, and therefore article 3(1) should be interpreted to include the African Charter, the African Court Protocol and any future treaty that included such a provision.[14]

10 *Femi Falana v African Union* (Jurisdiction) (2012) 1 AfCLR 118 para 73.
11 For a discussion on the different phases of the Court's jurisprudence, see the Separate Opinion of Achourn J & Tchikaya J to *Fidele Mulindahabi v Rwanda* Applications 4, 5, 10 and 11/2017 (African Court) (Judgment) 26 June 2020.
12 Arts 3(1), 4 and 27 African Court Protocol.
13 Heyns (n 5) 168.
14 As above. Heyns refers to art 23 of the Draft Protocol to the African Charter on Human and Peoples Rights on the Rights of Women, which later became art 27 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol) appointing the Court as the primary body seized with its interpretation. In addition, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (African Disability Rights Protocol) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons

Based on the 'express provision', as proposed by Heyns, it is of interest to explore the earliest jurisprudence of the African Court. In 2013 the Court presented its first judgment on the merits in *Tanganyika Law Society v Tanzania*.[15] In *Tanganyika Law Society* the Court, importantly, set out the first parameters of its material jurisdiction, which has guided its jurisprudence going forward. The applicants in this case alleged violations of the African Charter, the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (Universal Declaration).[16] As a point of departure, the Court confirmed that it has jurisdiction over the African Charter, as listed under article 3(1), but, importantly also over ICCPR and the Universal Declaration.[17] However, in its findings it did not find it necessary to consider the application of ICCPR and the Universal Declaration as it had considered the alleged violations under the relevant provisions of the African Charter.[18] Consequently, as a point of departure the Court clarified that it interprets article 3(1) to enable it to assume jurisdiction over United Nations (UN) treaties, such as ICCPR; but that it will not resort to the application of such treaties when the African Charter finds application in a comparable manner. Conclusively, it concluded that it exercises jurisdiction over the entire body of human rights treaties that have been ratified by a state party to the African Court Protocol.

In *Norbert Zongo* the Court further clarified the relationship between the African Charter and other human rights instruments. It also presented its views on the relationship between the Charter and another human rights instrument where the latter is more detailed than the Charter. In this case the claims of the applicants were based on the African Charter, ICCPR, the Universal Declaration and the

in Africa (Older Persons Protocol) contain provisions where the Court plays a subsidiary role to the African Commission where the African Commission may refer matters of interpretation to the Court and where individuals and NGOs in states with direct access to the Court under arts 5(3) and 34(6) of the Protocol can approach the Court with matters of application or implementation. See arts 34(4) and (5) of the African Disability Rights Protocol and arts 22(3) and (4) of the Older Persons Protocol.

15 *Tanganyika Law Society, Legal and Human Rights Centre and Reverend Christopher R Mtikila v Tanzania* (Merits) (2013) 1 AfCLR 34 (*Tanganyika Law Society*).

16 *Tanganyika Law Society* (n 15) paras 76 and 92.

17 *Tanganyika Law Society* (n 15) paras 85 and 91-92. However, in *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo, Blaise Ilboudo and Mouvement Burkinabe des Droits de l'Homme et des Peuples v Burkina Faso* (Merits) (2014) 1 AfCLR 219 (*Norbert Zongo*) para 48 (fn 2) the Court confirmed that the Universal Declaration is a declaration and not a treaty and as such it does not fall under the scope of art 3(1).The Court applied a similar approach in *Sebastien Germain Ajavon v Benin* App 13/2017 (African Court) 29 March 2019 para 45, where it concluded that the 1789 Declaration of the Rights of Man and of the Citizen did not fall under its material jurisdiction because this Declaration is not an international instrument, open for ratification, but rather is a text of French internal law which imposes no obligation on the respondent state.

18 *Tanganyika Law Society* (n 15) paras 122-123.

Economic Community of West African States (ECOWAS) Revised Treaty (Revised Treaty). After a preliminary examination of its material jurisdiction, the Court assumed jurisdiction over the treaties, but not the Universal Declaration.[19] The Court took the same position as in *Tanganyika Law Society* and did not find a violation directly based on ICCPR. Having ruled on the relevant obligations in the Charter, in the Court's opinion there was no need to consider the allegations made pursuant to ICCPR.[20]

However, in *Norbert Zongo* three of the four deceased individuals, on behalf of which claims were presented, were journalists. Thus, considering article 66(2)(c)[21] of the Revised Treaty, explicitly ensuring the respect for the rights of journalists, the African Court took a different approach. Instead of ruling on article 9(2) of the African Charter, the general right to freedom of expression of all, the Court took the view that the Revised Treaty and the Charter should be read together. Therefore, the Court found a violation of both rights.[22] This signalled that the Court approaches its material jurisdiction primarily under the African Charter, but once a more detailed, specific, or extensive right is located in another treaty under its jurisdiction, the Court considers and applies such a right in conjunction with the Charter. By applying the Revised Treaty the Court also, arguably, confirmed that the Revised Treaty, the founding treaty of ECOWAS, was a 'relevant' human rights instrument, confirming the sentiments of Naldi and Magliveras, as discussed by Heyns.[23]

In the following case, *Lohe Isa Konaté v Burkina Faso*,[24] the issue of freedom of expression of journalists was once again brought before the Court. In this case the applicant similarly relied on the African Charter, ICCPR and the Revised Treaty.[25] In the operative paragraph of the judgment the Court assumes jurisdiction over these three instruments.[26] However, in contrast to the decision in *Norbert Zongo*, the Court in *Konaté* found several violations based on the African Charter, ICCPR and the Revised Treaty.[27] Thus, in *Konaté* the Court,

19 As above.
20 *Norbert Zongo* (n 17) paras 157 & 188.
21 Arts 66 (1) and (2)(c) reads: 'In order to involve more closely the citizens of the Community in the regional integration process, Member States agree to co-operate in the area of information … [t]o this end they undertake as follows … to ensure respect for the rights of journalists.'
22 *Norbert Zongo* (n 17) para 203.5. This decision was taken with a narrow majority of five to four, where Niyungeko J, Ouguergouz J, Guisse J and Asa J voted against and presented a separate opinion.
23 Heyns (n 5) 166-167.
24 *Lohé Issa Konaté v Burkina Faso* (Merits) (2014) 1 AfCLR 314 (*Konaté*).
25 *Konaté* (n 24) paras 9-12.
26 *Konaté* para 36.
27 *Konaté* paras 176.3, 176.5, 176.6 & 176.7.

without explicitly stating it, provided proof that UN treaties are deemed 'relevant'. By applying ICCPR, it established that it would not merely use it as an interpretive tool. Arguably, considerable conceptual clarity could have been provided by the Court on this matter if it had offered a clear statement on its considerations in this regard.

The first three cases in a long string of cases, bringing to the African Court's attention violations related to the Tanzanian criminal justice system, further delineated the Court's approach to its material jurisdiction. In Alex Thomas v Tanzania[28] the Court found violations based on the African Charter and ICCPR by applying article 7(1)(c) of the African Charter 'in light' of article 14(3)(d) of ICCPR.[29] The Court furthered this argument in *Wilfred Onyango Nganyi & Others v Tanzania*[30] by concluding that where, in comparison to the Charter, a right is more detailed in another human rights instrument, such an instrument will be applied by the Court. The Court stated the following:[31]

> In view of the fact that the Respondent ratified the International Covenant on Civil and Political Rights (ICCPR) on 11 June 1976, in accordance with Article 7 of the Protocol, 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 provisions.

Thus, in determining whether Tanzania had violated the applicants' rights to a fair trial, the African Court found recourse in the elements of the right to fair trial as guaranteed under both the African Charter and ICCPR. The Court noted that article 14(3)(d) of ICCPR is more elaborate than article 7(1)(c) of the Charter and that, therefore, measures should have been taken by Tanzania, in the interests of justice, to ensure that the applicants were afforded legal assistance.[32]

However, in *Wilfred Onyango* the Court did not follow its approach in *Alex Thomas*. Instead, in applying the methodology set out in *Tanganyika Law Society*, the Court based its findings only on the African Charter.[33] In other words, it referred to the application of the more specific provision in ICCPR, but in essence used the provisions in ICCPR as an interpretive tool to give further contents to the

28 *Alex Thomas v Tanzania* (Merits) (2015) 1 AfCLR 465 (*Alex Thomas*).
29 *Alex Thomas* (n 28) para 114.
30 *Wilfred Onyango Nganyi & Others v Tanzania* (Merits) (2016) 1 AfCLR 507 (*Wilfred Onyango*).
31 *Wilfred Onyango* (n 30) para 165 (my emphasis).
32 *Wilfred Onyango* (n 30) paras 162-168. See also *Armand Guehi v Tanzania* (Merits and Reparations) (2018) 2 AfCLR 477 (*Armand Guehi)* paras 35-38.
33 *Wilfred Onyango* (n 30) para 193(viii).

Charter.[34] This approach does not make sense in light of what the Court held in *Onyango*, as quoted above, where the Court refers to article 7 of the Court Protocol, not as an interpretive clause but as an instruction to apply ICCPR as a relevant human rights treaty ratified by Tanzania. Curiously, in the following case, *Mohamed Abubakari v Tanzania*,[35] the Court returned to its approach in *Alex Thomas* and found a violation of article 7 of the African Charter as well as article 14 of ICCPR.

In summary, the first six judgments on the merits, handed down between June 2013 and June 2016, all have in common that they are focused on the African Charter. Departing from *Tanganyika Law Society* the Court has chiselled out a space for other human rights treaties where it is deemed relevant for purposes of scope and detail. In these judgments the Court developed the three cardinal principles that it has continued to apply in determining its material jurisdiction: first, the preference for the application of the African Charter; second, that it can, and will, assume jurisdiction over sub-regional and UN treaties; and, third, that it will resort to other human rights treaties, that is, such treaties become 'relevant' only when they provide additional detail and scope. However, regarding the latter, the Court has not been consistent in its application of additional treaties as such treaties have been applied, namely, a violation found based on ICCPR, as in *Alex Thomas*[36] and *Mohamed Abubakari*,[37] and used for interpretive purposes as in *Wilfred Onyango*[38] where a reference to ICCPR does not appear in the operative part of the judgment.

2.2 Characterisation of a 'human rights instrument'

The ostensibly simple task of characterising a treaty as a human right treaty is complicated by several factors. As treaties deal with human rights in different ways, to a different extent and sometimes without the express objective of protecting individual rights, the act of pinpointing the object and purpose of a treaty, its rights, and state obligations enunciating individual rights often leaves ample room

34 See 3.2.
35 *Mohamed Abubakari v Tanzania* (Merits) (2016) 1 AfCLR 599 (*Abubakari)*. This case was concluded at the same session as the judgment in *African Commission on Human and Peoples' Rights v Libya* (*Libya*) (Merits) (2016) 1 AfCLR 153 where Ouguergouz J, in his separate opinion, points out that '[u]nder Articles 3 … and 7 … of the Protocol, the Court is however authorised to "apply" the provisions of the [ICCPR], same as the relatively detailed clauses of the May 2004 Arab Charter on Human Rights to which Libya is also party'.
36 *Alex Thomas* (n 28) para161(vii).
37 *Abubakari* (n 35) para 242(ix).
38 *Wilfred Onyango* (n 30) para 193(viii).

for interpretation.[39] As referred to by Heyns, '[p]resumably even environmental treaties and those related to mercenaries etc would become justiciable, in so far as they have human rights implications'.[40]

2.2.1 'Object' and 'purpose'

For an instrument to be classified as a human rights instrument, in general terms, it must secure individual rights, that is, include a direct expression of rights, and its object and purpose must be to promote and/or protect human rights. The importance of the object and purpose of a treaty was first highlighted in the International Court of Justice (ICJ)'s Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide[41] and later repeatedly referred to in the Vienna Convention on the Law of Treaties (VCLT).

The emphasis on the purpose of a treaty finds its reference in, for example, article 31(1) of the VCLT. Critically, however, the VCLT affords no ny explanation as to the contents of this concept or concepts.[42] Seemingly synonymous, the terms 'object' and 'purpose', in international law, cover two different aspects of a treaty: first, as suggested by Linderfalk, the rights and obligations that a treaty enunciates, that is, its normative content; and, second, the outcomes envisioned by the parties accomplished by the application of the treaty, that is, the fulfilment of the normative content.[43] Hence, the two are linked, but nonetheless representing two different aspects of what often is regarded as a single concept.

2.2.2 Categories of human rights instruments

In reflecting on the methodology that the African Court has developed, primarily in *APDH v Côte d'Ivoire*,[44] at least three different categories of human rights treaties can be uncovered:[45] first,

39 G Niyungeko 'The African Charter on Democracy, Elections and Governance as a human rights instrument' (2019) 63 *Journal of African Law* 65.
40 Heyns (n 5) 167.
41 *Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (28 May 1951) (1951) ICJ Reports 15.
42 D Kritsiotis 'The object and purpose of a treaty's object and purpose' in MJ Bowman & D Kritsiotis (eds) *Conceptual and contextual perspectives on the modern law of treaties* (2018) 240.
43 U Linderfalk 'On the meaning of the "object and purpose" criterion, in the context of the Vienna Convention on the Law of Treaties, Article 19' (2003) 72 *Nordic Journal of International Law* 433-434.
44 *Actions Pour la Protection des Droits de l'Homme (APDH) v Côte d'Ivoire* (Merits) (2016) 1 AfCLR 668 (*APDH*) further discussed under 3.2.4.
45 Niyungeko (n 39) 65-70.

treaties with human rights promotion and/or protection as its main object and purpose, which treaties contain provisions that directly enunciate human rights; second, treaties that do not have human rights promotion and/or protection as its main object and purpose, or which have different objectives and purposes of which one is human rights protection, but which contain provisions that directly or indirectly enunciate human rights; finally, treaties that do not have human rights promotion and/or protection as its main object and purpose but which contain provisions that have some – indirect – bearing on human rights.

The first category of treaties, treaties that contain provisions that directly enunciate human rights, arguably is the most distinct category. However, based on their internal structure and phraseology these too can be divided into different sub-groups. These are, first, instruments that directly enunciate human rights and specific human rights protection is envisaged as the outcome, such as the African Charter; the African Charter on the Rights and Welfare of the Child (African Children's Charter); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol); the African Youth Charter; the African Disability Protocol; and the nine core UN human rights treaties.[46] Second, there are instruments that essentially set out obligations of state parties from which individual human rights can be inferred, such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa; the Older Persons Protocol; and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Finally, there are the instruments that constitute the continental human rights bodies: the African Charter; the African Children's Charter; and the African Court Protocol (the African Charter and the African Children's Charter also qualifying in the first sub-category). The contents of the latter two sub-categories arguably are more challenging to clearly distinguish. The second sub-category, the 'intermediate' category, from the perspective of the wide variety of AU treaties with human rights protection as one of

46 ICCPR; the International Covenant on Economic, Social and Cultural Rights (ICESCR); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW); the International Convention for the Protection of All Persons from Enforced Disappearance (CPED); and the Convention on the Rights of Persons with Disabilities (CRPD). This category also includes the Second Optional Protocol to ICCPR, aiming at the abolition of the death penalty; the Optional Protocol to CRC on the involvement of children in armed conflict and the Optional Protocol to CRC on the sale of children, child prostitution and child pornography.

their objectives, albeit not the main objective, is the most populated category.[47] This also is the category of treaties that is most difficult to distinguish as there are arguments on both sides as to why a treaty in this category should or should not be included under the African Court's jurisdiction.

When considering the object and purpose and the presence of direct/indirect rights, the second category of treaties includes the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the ECOWAS Protocol on Democracy and Good Governance, as was confirmed by the African Court in *APHD*, as further discussed under 3.2.4 below. It also, arguably, includes treaties such as the Cultural Charter for Africa; the African Union Convention on Preventing and Combating Corruption; the Charter for African Cultural Renaissance; the African Union Convention on Cyber Security and Personal Data Protection; the Revised African Convention on the Conservation of Nature and Natural Resources; the African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development; the OAU Convention on the Prevention and Combating of Terrorism and the Road Safety Charter;[48] again confirming the fear as expressed by Heyns.[49]

These treaties do not manifest a direct human right objective and purpose. Similarly, these instruments do not set out clear, direct individual rights. However, as an example, article 7(2) of the Revised Convention on Conservation stipulates an obligation on the state to 'establish and implement policies for the planning, conservation, management, utilisation and development of underground and surface water', where the state must attempt to 'guarantee for their populations a sufficient and continuous supply of suitable water'. This statement may be interpreted to present individuals in a state that has ratified the Revised Convention on Conservation with an inferred right to safe drinking water. Furthermore, and perhaps the most discussed example in this category, is the AU Convention on Corruption. One of the objectives of this Convention, as referred to in its Preamble, is to 'respect human dignity and to foster the promotion of economic, social, and political rights'. While most of the articles in this Convention are framed as state obligations to adopt domestic laws, policy and regulations to combat corruption, it infers, as suggested by Viljoen, the right to dignity and related civil

47 Niyungeko (n 39) 69-70.
48 Where, as an example, state parties must safeguard the needs of vulnerable road users and ensure that they are adequately considered in the planning, design and provision of road infrastructure arguably spelling out a right for such road users to have their physical integrity protected.
49 Heyns (n 5) 167.

and political rights.[50] The AU Convention on Corruption alongside the Convention on the Combating of Terrorism also directly set out the right to a fair trial.[51]

In the third category of treaties, the most obvious example would be the AU Constitutive Act. The Preamble together with articles 3[52] and 4[53] of the Constitutive Act contains general references to human rights, which begs the question whether it can be classified as a human rights treaty. The human rights references in the Act refer to the objectives and principles of the AU, conferring the obligation upon its members to act in accordance with these principles. However, it could be argued that such obligations have some indirect bearing on human rights. Furthermore, the application of the AU Constitutive Act clearly envisaged the promotion and protection of human rights.[54]

Even though the reliance on the AU Constitutive Act before the African Court would certainly be sparse, it is not, as suggested by Niyungeko, a purely academic question.[55] In *Atabong Denis Atemnkeng v African Union*[56] the applicant raised the question of whether the optional jurisdiction clause in article 34(6) of the Protocol was compatible with the principles and objectives of the AU Constitutive Act. The African Court, however, did not consider the merits of this case as it found that it lacked personal jurisdiction to hear the case.[57]

The argument that the AU Constitutive Act would indeed fall under the Court's material jurisdiction could further be substantiated by the ease with which the Court assumed jurisdiction over the Revised Treaty in *Norbert Zongo* and *Konaté*.[58] Neither of these cases

50 Viljoen (n 5) 436-437.
51 Art 14 of the AU Convention on Corruption and art 7(3) of the Convention on the Combating of Terrorism.
52 Arts 3(e) and (h).
53 Arts 4(l) and (m).
54 Preamble to the AU Constitutive Act, '[d]etermined to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law'.
55 Niyungeko (n 39) 68. He suggests that '[the AU Constitutive Act] would surely be a human rights instrument "by default", since many other specific human rights instruments directly address human rights issues'.
56 *Atabong Denis Atemnkeng v African Union* (Jurisdiction) (2013) 1 AfCLR 182 (*Atabong Atemnkeng)* paras 17, 20-21 & 24. See also *Request for Advisory Opinion by Rencontre Africaine pour la Défense des Droits de l'Homme* (Advisory Opinion) (2017) 2 AfCLR 594 where the NGO sought clarification on whether it was possible to institute legal action before the Commission or the Court against a state following an unconstitutional change of government. Part of this request was based on art 4 of the AU Constitutive Act. The request for the Advisory Opinion was denied based on the lack of standing of the NGO.
57 *Atabong Atemnkeng* (n 56) paras 40 and 46(a).
58 See 3.1.

contains an explanation as to why the treaty constituting the revised ECOWAS would be a classified as a 'human rights instrument' under the ambit of article 3(1) of the Court Protocol.[59] Similarly to articles 3 and 4 of the AU Constitutive Act, article 4(g) of the Revised Treaty, albeit in a more direct manner, refers to the 'recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'. The objective of the Revised Treaty, namely, to establish an economic Union in West Africa, must thus be fulfilled with adherence to the rights set out in the African Charter, that is, it is not the main purpose of the treaty. However, as with the AU Constitutive Act it could be argued that this obligation has an indirect bearing on human rights. Considering this, the Treaty for the Establishment of the East African Community would equally fall under the Court's material jurisdiction.[60]

2.2.3 'Individual rights' as 'human rights'

As indicated in the general discussion on the different categories of treaties under 2.2.2 above, the presence of provisions that directly or indirectly enunciate human rights is of key interest in characterising a treaty as a human rights instrument. In this regard, a distinction must be drawn between an 'individual right' and an 'individual human right'.[61] The African Court had the opportunity to clarify this matter in *Armand Guehi* where the applicant relied on the Vienna Convention on Consular Relations (VCCR) to substantiate a claim that he had been denied consular assistance during the time he was arrested, detained, and later sentenced to death. Of interest is the analysis of the African Court of the status of the VCCR, considering the fact that the purpose of this treaty cannot, even in the broadest sense, be classified as focusing on human rights, but containing, in articles 36(1)(b) and (c), what arguably are individual rights. To assume jurisdiction under article 3(1) of the Protocol the VCCR would have to be classified as a 'human rights instrument', articles 36(1)(b) and (c) as 'human rights', and due regard would have to be taken of

59 *Norbert Zongo* (n 17) para 48; *Konaté* (n 24) paras 36 & 37.

60 See eg the application of art 6(d) of the Treaty for the Establishment of the East African Community in, eg, *James Katabazi v Secretary-General of the EAC* (Reference 1 of 2011) [2013] EACJ 4 (14 February 2013); *Plaxeda Rugumba v Secretary-General of the EAC and Attorney-General of Rwanda* (Appeal 1 of 2012) [2012] EACJ 10 (1 June 2012); *East African Centre for Trade Policy and Law v Secretary-General of the EAC* (Reference 9 of 2012) [2013] EACJ 10 (9 May 2013); and *Samuel Mukira Mohochi v Attorney-General of Uganda* (Reference 5 of 2011) [2013] EACJ 8 (24 May 2013).

61 G Waschefort 'The subject-matter jurisdiction and interpretive competence of the African Court on Human and Peoples' Rights in relation to international humanitarian law' (2020) 20 *African Human Rights Law Journal* 64-66.

the bearing on the purpose of the former considering the presence of the latter.[62] This matter has been debated by other regional and international courts. Already in 1999 the Inter-American Court of Human Rights (Inter-American Court), in a request for an Advisory Opinion[63] by Mexico, was faced with the question of whether article 36 of the VCCR should be interpreted as containing provisions concerning the protection of human rights.[64] This question was put forward with specific reference to detainees in ten states in the United States who, like Arman Guehi, had been sentenced to death.[65]

In its analysis the Inter-American Court importantly distinguished between the purpose of the VCCR and the concern of one provision in the VCCR with the protection of human rights.[66] In this regard the Inter-American Court concluded that

> while some of the comments made to the Court concerning the principal object of the [VCCR] to the effect that the treaty is one intended to 'strike a balance among states' are accurate, this does require that the Treaty be dismissed outright as one that may indeed concern the protection of an individual's fundamental rights.[67]

It further concluded that article 36 of the VCCR endows a detained foreign national with individual rights that are the counterpart to the host state's correlative duties.[68] This, the Inter-American Court resolved, does not automatically mean that this right is a human right.[69] However, because measures included under article 36 may include providing legal representation and monitoring the conditions under which the detainee is being held, the Inter-American Court found that article 36 concerned the protection of the 'rights of the national of the sending state [that] may be of benefit to him'; thus the Inter-American Court classified these as human rights.[70]

62 This matter has been debated before other regional and international courts; see Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999, *Requested by the United Mexican States 'The Right To Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law'; Germany v United States of America* ICJ (27 June 2001) (2001) ICJ Reports 466; *Mexico v United States of America* (31 March 2004) (2004) ICJ Reports 2004 12. For further discussion, see also Rachovitsa (n 3) 265.

63 Inter-American Court of Human Rights Advisory Opinion OC-16/99 of 1 October 1999 Requested by the United Mexican States 'The Right To Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law' (Right to Information on Consular Assistance Opinion).

64 Inter-American Court of Human Rights (n 63) para 4.1.

65 Inter-American Court of Human Rights (n 63) para 2.

66 Para 76.

67 As above.

68 Para 84.

69 Para 85.

70 Paras 86-87.

Arguments related to a violation of article 36 of the VCCR have further been heard by the ICJ. In LaGrande[71] the ICJ concluded that the text of articles 36(1)(b) and (c) 'creates individual rights' but did not entertain the discussion as to whether these are human rights.[72] In *Avena & Other Mexican Nationals*[73] Mexico contended that the individual rights contained in articles 36(1)(b) and (c) were fundamental human rights. The ICJ found the United States to be in violation of the VCCR, but concluded that

> [w]hether or not the Vienna Convention rights are human rights is not a matter that this Court need decide. The Court would, however, observe that neither the text nor the object and purpose of the Convention, nor any indication in the travaux préparatoires, support the conclusion that Mexico draws from its contention in that regard.[74]

Evidently, the status of the individual rights in the VCCR is debatable and the ICJ's conclusion in *Avena & Other Mexican Nationals* stands in stark contrast to the Inter-American Court's findings in the *Right to Information on Consular Assistance Opinion*. However, the reasoning in *Avena* does not support, as has been suggested, the conclusion that the ICJ has concluded, in an *obiter dictum*, that the rights set out in article 36(1) of the VCCR are individual rights, but not human rights.[75] In this regard it is essential to point out that the ICJ focused on whether this article contained individual rights, not whether the VCCR could be classified as a human rights instrument.[76]

In returning to the African Court's position in *Armand Guehi*, it neither confirmed the status of the VCCR nor discussed the nature of articles 36(1)(b) and (c). Instead, the Court assumed jurisdiction over the VCCR based on article 7(1)(c) of the African Charter. Similarly to the approach in *Tanganyika Law Society* the Court subsumed the rights in the VCCR under the African Charter, with the significant difference that the right to consular assistance, as set out in articles 36(1)(b) and (c) of the VCCR, does not find any corresponding right under the Charter, as the rights to non-discrimination and to freely participate in government found its counterparts in ICCPR. Thus, the finding of the Court, in favour for the respondent, that it had not violated the right to consular assistance under article 7(1)(c) of the African Charter, arguably found no support in law.[77]

71 *Germany v United States of America* (27 June 2001) (2001) ICJ Reports 466.
72 *Germany v United States of America* (n 71) para 77.
73 *Mexico v United States of America* (31 March 2004) (2004) ICJ Reports 2004 12.
74 *Mexico v United States of America* (n 73) paras 124 & 153.
75 Rachovitsa (n 3) 255, 265.
76 Waschefort (n 61) 41, 65.
77 *Armand Guehi* (n 32) para 205.

2.2.4 APDH v Côte d'Ivoire

Putting some of the ideas discussed above into practice the African Court in *APDH* pioneered its methodology in terms of how it characterises 'human rights' instruments. Faced with submissions based on the African Democracy Charter and the ECOWAS Protocol on Democracy and Good Governance, it had to clarify whether these instruments qualified as human rights instruments within the meaning of article 3(1) of the Court Protocol.[78] In terms of the African Democracy Charter it is worth noting that it does not appoint the Court to be seized with matters of interpretation relating to it, but refers in general terms to 'the competent court of the Union' to specifically try individual perpetrators of 'unconstitutional change of government defined as illegal means of accessing or maintaining power'.[79] This reference speaks to a specific type of jurisdiction, namely, individual criminal jurisdiction, which arguably is different from the Court's jurisdiction under article 3(1).[80]

In *APDH* the African Court sought assistance from the AU Commission and the African Institute for International Law (AIIL) to establish its methodology.[81] The AU Commission essentially pointed to the objectives of the treaty in question, indicating, as an example, that the African Democracy Charter includes an obligation on state parties to 'promote adherence … to the universal values and principles of democracy and respect for human rights' and that these objectives conform to the rights and obligations in the African Charter.[82] Based on this analysis it concluded that the African Democracy Charter 'may be described as "a relevant human rights instrument" which the Court has jurisdiction to interpret and implement'.[83] AIIL suggested that a state that violates its obligations under article 17 of the African

78 *APDH* (n 44) para 49. The applicant also alleged violations of arts 3, 13(1) and (2) of the African Charter, art 1 of the Universal Declaration and art 26 of ICCPR; see para 20.

79 Arts 25(5) & 23. In the Draft of the African Charter on Democracy, Elections and Governance, contained in the Report of the Ministerial Meeting on the Draft African Charter on Democracy, Elections and Governance and on the Revision of the Lomé Declaration on Unconstitutional Changes of Government in Africa, Executive Council 9th ordinary session 25-29 June, 2006 Banjul, The Gambia EX.CL/ 258(IX) art 27(5) referred to the African Court of Justice and Human and Peoples' Rights (Merger Court) as having the jurisdiction to try perpetrators of unconstitutional changes of government. With the adoption of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights on 27 June 2014 the jurisdiction to try individuals for the 'crime of unconstitutional change of government' was delegated to the international criminal law section of the Merger Court under art 17. See M Wiebusch et al 'The African Charter on Democracy, Elections and Governance: Past, present and future' (2019) 63 *Journal of African Law* 29-30.

80 Wiebusch et al (n 79) 30.

81 *APDH* (n 44) para 50.

82 *APDH* (n 44) para 51.

83 *APDH* para 52.

Democracy Charter would automatically be in violation of several human rights guaranteed in the African Charter.[84]

AIIL furthermore implied that an important link between democracy and human rights had already been established by several other international human rights instruments, especially by the Universal Declaration. Therefore, once there is enough reference between the instrument in question and other recognised human rights instruments such as, for example, the Universal Declaration and ICCPR, such an instrument will qualify as a 'human rights' instrument. AIIL proposed that the African Democracy Charter confers rights and freedoms directly on individuals, in effect explaining, interpreting and enforcing the rights and freedoms enshrined in the African Charter and other related instruments.[85] Consequently, when the Court defines a treaty as a 'human rights' instrument it should consider whether the instrument forms part of the continental human rights architecture and whether it has been integrated into, for example, decisions of the African Commission, in line with the principle of complementarity.[86]

Essentially, both the AU Commission and AIIL pointed to the objective and purpose of the treaty, as discussed above under 2.2.1. The AIIL furthermore joined the objective and purpose test with a test as to whether a treaty confers rights and freedoms directly on individuals. However, notwithstanding the fact that the analysis of references between regional, continental and international instruments was mainly used to detect synergies to corroborate the purpose of a treaty, the repeated reference to the African Charter and the level of integration of the treaty in question into the continental human rights architecture is not supported by the Court Protocol. The principle of complementarity arguably is an important feature in the continental human rights system, as is further discussed under 4 below. However, it is questionable whether it can be used to define the Court's material jurisdiction as it is fundamentally different to the jurisdiction of the African Commission.

Nevertheless, relying on these submissions, the Court formulated a framework within which it tests whether an instrument indeed is a human rights treaty. It concluded that 'in determining whether a Convention is a human rights instrument, it is necessary to refer

84 *APDH* para 55.
85 *APDH* para 54, referring to the Constitutive Act of the African Union, the Grand Bay Declaration and Plan of Action, the Declaration on the Principles Governing Democratic Elections in Africa and the Kigali Declaration of 2003.
86 *APDH* (n 44) para 54.

in particular to the purposes of such Convention'.[87] The reference by the Court to the plural 'purposes' indicates that a treaty falling under its material jurisdiction can have more than one purpose, leaving room for both a holistic and norm-based classification of the treaty, including the second category of treaties as discussed under 2.2.2. Such purposes, the Court explained, are revealed 'either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on State Parties for the consequent enjoyment of the said rights'.[88] The explicit expression of subjective rights, according to the Court, is 'illustrated by provisions, which directly confer the rights in question'.[89] Importantly, the Court noted that when a state ratifies a human rights treaty, international law compels it to take positive measures to give effect to the individual exercise of such rights.[90] Essentially, the Court set out the test to entail an object and purpose test, determined either by the explicit enunciation of subjective rights or where such rights can be derived from the expressed state obligations.

The main critique that can be directed at the *APDH* judgment is not aimed at the conclusion of the Court to classify the African Democracy Charter and ECOWAS Protocol on Democracy as human rights treaties falling under the material jurisdiction of the Court *per se*. As was discussed above, these instruments fall under the second category of treaties which are subsumed under article 3(1) of the Protocol. Instead, it is the fact that the Court did not systematically engage with the different aspects of the test devised by it that presents a challenge.

The point of departure in the Protocol, and subsequently in the test, is that each treaty must be judged in its own right, based only on its purpose, as intimately linked with the presence of expressly-enunciated rights or where such rights can be derived from the expressed state obligations. For the Court to be able to determine this, it would have had to analyse the relevant treaties and their provisions, as relied upon by the applicant. However, this was never done. Instead, the Court investigated whether the relevant provisions in the African Democracy Charter and ECOWAS Protocol on Democracy were 'aimed at implementing' the right to participate in article 13(1) of the African Charter. In this regard the Court arguably asked the wrong question: It asked whether the relevant articles in the African Democracy Charter and ECOWAS Protocol on Democracy

87 *APDH* para 57.
88 As above.
89 *APDH* (n 44) para 58.
90 *APDH* para 61.

implement an existing right in the African Charter, not whether these articles in themselves contain a legal entitlement that speaks to the objective and purpose of the treaty. Thus, notwithstanding the fact that the Court found Côte d'Ivoire to have violated the relevant articles in the African Democracy Charter and ECOWAS Protocol on Democracy, there is no clarity on whether these provisions contain an express enunciation of subjective rights, or whether such rights can be derived from the expressed state obligations.

Noticeably, individual rights could have been inferred from the express state obligation in the African Democracy Charter to 'protect the right to equality before the law' and the obligation to hold 'transparent, free and fair elections' and in the ECOWAS Protocol on Democracy the obligation to ensure that bodies responsible for organising elections are independent.[91] With this in mind, and considering the purpose of these norms in the African Democracy Charter, to 'promote the universal values and principles of democracy, good governance, human rights and the right to development', and in the ECOWAS Protocol on Democracy referring to rights that have been recognised and guaranteed in 'all international human rights instruments, notably the Universal Declaration of Human Rights, the African Charter on Human and Peoples Rights and the Convention on the Elimination of all forms of Discrimination Against Women' it is fair to reason that even if the main objective of these treaties is not to protect human rights, it is one of their subsidiary objectives. With regard to the object and purpose of the African Democracy Charter, it is further relevant to note that article 17 refers directly to the AU Declaration on the Principles Governing Democratic Elections in Africa, which in turn refers to the African Charter.[92]

It is evident from the discussion above that the characterisation of a 'human rights' instrument was complicated by the references of the AU Commission and AIIL, to, on the one hand, the general relationship between the instruments in question and other recognised human rights instruments and, on the other, the specific relationship between the instruments in question and the African Charter. The key questions in this regard, of which the Court arguably did not take notice, are whether such relationships are relevant in determining the nature of a specific treaty, and whether the rights/obligations, that is, the object and purpose, of one treaty can be

91 In this regard the Court relied on the method developed by the European Court in *Mathieu-Mohin and Clerfayt v Belgium* (1988) 10 EHRR 1.

92 Preamble, referring to the 'significance of the African Charter on Human and Peoples' Rights … which recognised the right of every citizen to participate freely in the government of his or her country whether directly or through democratically elected representatives'.

established by the references to the same in another treaty, thus bringing it under the African Court's jurisdiction.[93]

On the face of it this relates to the prominence given to the African Charter in the jurisprudence of the African Court.[94] This hierarchy, however, has no foundation in article 3(1) of the African Court Protocol referring to the 'interpretation and application of the Charter, th[e] Protocol and any other relevant Human Rights instrument ratified by the States concerned'. To extend the Court's material jurisdiction to treaties that merely 'implement' the provisions of the African Charter does not provide any rigour to the material mandate of the Court. It has been suggested, and rightly so, that using the 'intention to implement a provision in the African Charter' test would stretch the Court's jurisdiction too far and could potentially qualify treaties such as bilateral investment treaties as human rights treaties under the Court's jurisdiction, again echoing Heyns's concerns.[95] On the reverse, it would also prevent the Court from applying human rights treaties that protect rights that are not guaranteed in the African Charter, leaving much room for interpretation and legal uncertainty.

3 Lack of an interpretation clause

The discussion in the preceding parts focused on the material jurisdiction of the African Court; while this part focuses on another aspect of the Court's material jurisdiction, namely, its related interpretive competence. This competence outlines the Court's essential mandate to use sources that do not fall within its material jurisdiction to assist in providing meaning and contents to norms that fall within its material jurisdiction. This part focuses specifically on the applicability of articles 60 and 61 of the African Charter.[96]

Because of their overlapping mandates, the principle of complementarity guides the relationship between the African Commission and the African Court.[97] This complementary relationship, as noted under 2.2.4, has had a significant impact on how the Court interprets its material jurisdiction, directing it to use an

93 Waschefort (n 61) 66.
94 See 3.1.
95 Rachovitsa (n 3) 262.
96 It is important to note that the Court's interpretive practice is also covered by general rules of treaty interpretation as set out in arts 31-33 of the VCLT. However, the discussion in this part does not engage with the Court's interpretative methodology in general, but with the applicability of arts 60-61 of the Charter.
97 Preamble and arts 2, 8 and 33 of the African Court Protocol. For a further discussion on complementarity, see A Rudman 'The Commission as a party before the Court – Reflections on the complementarity arrangement' (2016) 19 *Potchefstroom Electronic Law Journal* 3.

approach that more resembles the approach of the Commission under the Charter than one strictly guided by the Protocol.[98] In isolation this approach could be deemed problematic, as the jurisdiction and functioning of the Court, under article 1 of the Protocol, is governed by the Protocol, not the Charter. However, considering the principle of complementarity in more detail, the pragmatic approach by the Court, as is further discussed below, has had the important benefit of creating coherence between the decisions of the Commission on individual communications and the jurisprudence of the Court, critically avoiding 'jurisprudential chaos'.

As a quasi-judicial body, the African Commission determines its material jurisdiction, with reference to individual communications, as a matter of admissibility, under article 56(2) of the African Charter.[99] It makes its decisions on the merits of each case based on the African Charter but may utilise other principles and instruments of an international legal character to determine an individual communication.

The competence of the African Commission is limited to facilitating the implementation of the rights guaranteed in the Charter *vis-à-vis* state parties.[100] In this regard the scope of the Commission's interpretive mandate is set out in articles 60 and 61 of the African Charter; presenting a dual approach, where article 60 specifically refers to international law and human and peoples' rights and article 61 leaves the subject-matter and sources of law open for interpretation. This approach clearly distinguishes the two articles from each other as the instruction in article 60 serves to instruct the Commission to draw inspiration from international human rights treaties beyond its mandate in applying the Charter; while article 61 serves to indicate that the Commission may consider sources outside the human rights domain that can contribute towards the interpretation of the Charter. However, while articles 60 and 61 authorise the African Commission to draw inspiration from other sources of international law in the execution of its mandate and functions, these provisions do not empower it to oversee the application and implementation of other international treaties.[101]

98 Waschefort (n 61) 55.
99 *Gunme & Others v Cameroon* (2009) AHRLR 9 (ACHPR 2009) (*Gunme*) para 71; *Luke Munyandu Tembani & Benjamin John Freeth (represented by Norman Tjombe) v Angola & 13 Others (Luke Tembani*) African Commission on Human and Peoples' Rights 35th Annual Activity Report (2013) paras 79, 89.
100 *Luke Tembani* (n 99) para 130.
101 *Luke Tembani* para 131.

Articles 60 and 61 have assisted the African Commission in progressively interpreting the African Charter, an approach similarly adopted by the African Court.[102] Heyns made the point that article 7 of the Court Protocol would be applied in a similar manner to articles 60 and 61, to determine the applicable sources to which the Court could resort when applying the African Charter, the Court Protocol or any other relevant human rights instrument ratified by the state concerned.[103] Under articles 60 and 61 of the African Charter, as mentioned above, when interpreting the Charter, in addition to a wide range of international and regional instruments, the Commission can also refer to international jurisprudence, the statements and conclusions of UN human rights treaty bodies, soft law and general principles of law. As argued by Heyns, if applied with a similar purpose, article 7 severely reduces the sources of law that the Court has at its disposal when interpreting a provision of human rights law by distinguishing only the provisions of the Charter and other relevant and ratified human rights instruments ratified as valid sources, in comparison to the broad sources set out in articles 60 and 61.[104] This would exclude important sources such as General Comments from different UN treaty bodies, as well as jurisprudence from the European and Inter-American Courts. This would not only result in inconsistencies between the Commission and the Court in terms of the interpretation of the rights in the Charter, as suggested by Heyns, but would also construe the rights in the Charter differently in respect of the different state parties, depending on which treaties each state has ratified at the time of the alleged violation.[105]

Because the African Commission makes recommendations to member states based on its findings, and not as the African Court produces legally-binding judgments, its material jurisdiction has not been as rigorously defined as that of the Court.[106] In contrast, the Court's material jurisdiction, as discussed in detail under 2, is defined by articles 3(1) and 7. To separate this discussion from the preceding analysis, the material mandate of the Court can be divided into jurisdiction over (i) sources, strictly regulated by the Protocol, which the Court can interpret and apply to alleged violations using the hierarchy of sources it has established; and (ii) sources that it can use to interpret the first category of sources. In terms of the latter category, these are sources that can give guidance and inspiration

102 Viljoen (n 5) 325. See eg *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) para 49.
103 Heyns (n 5) 168-169.
104 As above.
105 Heyns (n 5) 169.
106 *Gunme* (n 99) paras 88-97.

in the interpretation of the primary sources. However, these are unregulated in the Protocol.

As mentioned in the introduction, articles 3(1) and 7 of the Protocol create symmetrical material jurisdiction, as both provisions refer to the application of the same sources. This is positive as these statements reinforce one another. However, on the reverse, it is questionable whether both these statements are necessary as they do not distinguish between application and interpretation. As article 7 does not refer to interpretation, or as articles 60 and 61 of the Charter to 'inspiration' or 'consideration', there effectively is a *lacuna* in the Protocol in terms of the scope of the Court's interpretive mandate. This, however, is not uncommon under international law.[107]

As indicated above, it would not be impracticable to use article 7 for the same purpose as articles 60 and 61, as was initially anticipated, as article 7 can only be used to reinforce the statement in article 3(1). Thus, despite the clear instruction in article 1 of the African Court Protocol, the Court has filled the *lacuna* in its interpretive mandate by using articles 60 and 61 of the African Charter.

In *Tanganyika Law Society* the Court set the benchmark for its interpretive scope by supporting its decision to accept the UN Human Rights Committee (Human Rights Committee) General Comment 25 as an authoritative interpretation of ICCPR, by referring to article 60 of the Charter.[108] The Court indicated that in accordance with article 60, General Comment 25 is an instrument that the Court can 'draw from' in its interpretation of ICCPR which reflects the 'spirit' of the African Charter; using the same language and approach as the Commission based on the same source, namely, the African Charter.[109]

As previously discussed, in *Tanganyika Law Society* the African Court determined that it will not resort to the application of treaties

107 Viljoen (n 5) 325. Other regional and international human rights instruments similarly do not encompass interpretive provisions. However, courts and quasi-judicial bodies customarily refer to a wide range of human rights instruments and documents.

108 *Tanganyika Law Society* (n 15) para 107.4. See similar approach in *African Commission on Human and Peoples' Rights v Kenya* (Merits) (2017) 2 AfCLR 9 para 108. In this case the Court relied on the Report of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to identify the characteristics of indigenous peoples. The use of the Report on the Protection of Minorities, for interpretive purposes, was deemed appropriate by the Court 'by virtue of Article 60 and 61 of the Charter, which allows it [referring to the Court] to draw inspiration from other human rights instruments to apply these criteria to this Application'; see also *Libya* (n 35) separate opinion of Ouguergouz J para 7.

109 *Tanganyika Law Society* (n 15) para 107.3.

beyond the Charter when the Charter finds application in a similar manner.[110] Thus, in terms of the application of article 60 the Court pointed out that it has the jurisdiction to apply ICCPR, under article 3(1), and that it uses article 60 to interpret ICCPR through the relevant General Comment of the Human Rights Committee.[111] Nevertheless, as ICCPR and the African Charter present corresponding rights and obligations, such an interpretation is equally imprinted on the Charter.[112]

In *Tanganyika Law Society* the Court moreover established the practice of considering different, non-binding sources for interpretive purposes. In this regard the Court generously referred to the decisions of the Commission,[113] General Comments and views on individual communications of UN treaty bodies,[114] as well as jurisprudence from other regional courts.[115] The Court used these sources to determine both the procedural aspects of the case and the alleged violations.

In *Tanganyika Law Society* the respondent relied on article 13(1) of the African Charter and argued that the right to freely participate in government must be in accordance with domestic law. In this regard the Court referenced and agreed with the findings of the African Commission in *Amnesty International v Zambia*[116] where the Commission concluded that '"claw-back" clauses must not be interpreted against the Charter' and that such clauses must be reflected against international human rights law in line with its mandate under article 60.[117] Conclusively, the reliance on the jurisprudence of the Commission, clearly considering and applying the principle of complementarity, from this point on has permeated the jurisprudence of the Court.[118]

The jurisprudence of the Court further supports the conclusion, as set out above, that article 7 refers to application and not interpretation, but not in the clearest terms. In *Alex Thomas*, as discussed under 2.1, the Court referred to article 7 of the Court Protocol and concluded that it has the mandate to 'interpret article 7(1)(c) of the African

110 See 3.1.
111 *Tanganyika Law Society* (n 15) para 122.
112 See 3.1.
113 *Tanganyika Law Society* (n 15) paras 82.1, 106.1, 109 & 117.
114 *Tanganyika Law Society* (n 15) paras 37 & 107.3.
115 *Tanganyika Law Society* (n 15) paras 37, 82.1, 103, 106.2, 106.4.
116 *Amnesty International v Zambia* (2000) AHRLR 325 (ACHPR 1999) (*Amnesty International*).
117 *Amnesty International* (n 116) para 42 as quoted in *Tanganyika Law Society* (n 15) para 109.
118 See eg the references in *Peter Joseph Chacha v Tanzania* (Admissibility) (2014) 1 AfCLR 398 paras 27, 119, 143 &, separate opinion by Ouguergouz J para 22; and in *Wilfred Onyango* (n 30) paras 59, 83, 89, 99 & 170.

Charter in light of the provisions of article 14(3)(d) of the ICCPR' thus pointing towards an interpretive use of article 7 of the Protocol.[119] However, further on in the case the Court clarifies this statement by indicating that 'even though article 7(1)(c) of the African Charter does not specifically provide for legal aid, the Court can, in accordance with article 7 of the Protocol, *apply* this provision in light of article 14(3)(d) of the ICCPR [emphasis added]'.[120] This conclusion honours both Articles 3(1) and 7, as Tanzania, the Respondent State, has ratified the ICCPR. A similar application of Article 7 is visible in *Wilfred Onyango*, albeit with a different outcome.[121]

The use of Article 7 of the Protocol to support the application of a ratified instrument, only, is also evident in the Separate Opinion of Ouguergouz J in *Tanganyika Law Society*. He uses the reference to Article 7 to flesh out the Respondent's objection that the Treaty establishing the East African Community is not a human rights treaty falling within the ambit of Article 3(1) and 7. In critiquing the majority decisions, the Court, in his opinion, had also to 'determine whether the Treaty establishing the East African Community was *applicable* in the light of Articles 3(1) and 7 of the Protocol'.[122] This clearly refers to the possibility of applying this particular treaty in this particular case rather than the use of this treaty as an interpretive aid.

4 Conclusion

The expressions that 'hindsight is 20/20' and 'hindsight is good, foresight is better' well encapsulate the analysis in this article. In his 2001 article Heyns urged a continuous analysis of the strengths and weaknesses of the African Court 'to emphasise the strengths and to downplay, if not eliminate, possible weaknesses in a pro-active manner'.[123] He also cautioned an approach exclusively relying on the progressive interpretations of a 'creative court' and the 'goodwill of individual judges' to alleviate the ostensible problems related to the material jurisdiction of the Court.[124]

Guided by Heyns's foresight, recognising many – reasonable – concerns about the broad material jurisdiction of the Court and the lack of a specific interpretation clause, this article set out to establish how the Court has approached its material jurisdiction

119 *Alex Thomas* (n 28) para 88.
120 *Alex Thomas* (n 28) para 114 (my emphasis).
121 *Wilfred Onyango* (n 30) para 165.
122 *Tanganyika Law Society* (n 15), separate opinion of Ouguergouz J para 13.
123 Heyns (n 5) 165.
124 Heyns 166.

through an analysis of its originating jurisprudence. This analysis demonstrated the Court's pragmatic approach to its material jurisdiction, firmly grounded in the principle of complementarity. To avoid 'jurisprudential chaos' the Court has methodically strived to harmonise and recognise interpretations provided by the Commission and other human rights bodies to achieve cohesion between the regional and international human rights systems. This shows the Court's willingness to try to counteract the problems that are involved in applying the complex web of state obligations incorporated under the Court's wide material jurisdiction.

In referring to Heyns's argument that the African Charter would become 'just a treaty among many' as alluded to in the title of this article, this is contested by the jurisprudence of the Court. Depending on the nature of the case, the Court, in most cases as shown, has established a clear hierarchy of sources, where the African Charter is the primary source. To some extent, as argued in this article, the Charter may even have gained too much superiority, when reflected against the wording of article 3(1).

Moreover, even though there are some concerns with regard to the disappearance of the distinct 'African' from the continental system, by applying international treaties, possibly succumbing to 'globalisation and universalism in its most pervasive form', there are also some arguments against such a position.[125] First, the method developed by the Court to only have recourse outside the African Charter when a more detailed provision exists in another human rights treaty ratified by the relevant state seems to defeat such a claim. The 'read-together' approach also effectively guards against the total disappearance of the 'African'. Second, the proliferation of topics covered by AU law enables the African Court to refer to AU sources rather than UN sources, or at least to both, preventing the one-sidedness suggested by Heyns.[126] The reverse has also been proven to be true. In scenarios where an international treaty, such as ICCPR, is applied to mitigate claw-back clauses or the International Covenant on Economic, Social and Cultural Rights (ICESCR) is applied to balance the minimalist approach to socio-economic rights

125 This risk is mostly visible in the interpretive practice of the Court. See eg JD Mujuzi 'The African Court on Human and Peoples' Rights and its protection of the right to a fair trial' (2017) 16 *Law and Practice of International Courts and Tribunals* 219.

126 See *Association pour le Progrès et la Défense des Droits des Femmes Maliennes (APDF) and the Institute for Human Rights and Development in Africa (IHRDA) v Mali* (Merits) (2018) 2 AfCLR 380 where the African Women's Protocol was applied alongside CEDAW.

in the African Charter, decreasing the distinct 'African' arguably is favourable to the protection of the human rights of Africans.

In terms of the lack of a specific interpretation clause in the African Court Protocol and the possible use of article 7 for this purpose it is clear that the Court has applied articles 60 and 61 of the Charter to ease interpretation, defeat the limitations in article 7, as suggested by Heyns, and to promote complementarity. There is nothing in the Protocol to support this approach, but one argument in favour of this approach, other than the apparent benefits, is that the Protocol, as adopted under article 66 of the Charter, 'supplements' the provisions of the African Charter and can thus be used for the purpose of interpretation.

In conclusion, it is evident from the discussion in this article that many of the problems presented by Heyns did not materialise due to the African Court's own creativeness. Since it first started defining its material mandate in *Tanganyika Law Society*, it arguably has done its utmost to honour both the wording of the Protocol and the principle of complementarity. However, where the words of Heyns have provided the most chilling prediction is in the domain of lack of ratifications and, lately, in terms of the withdrawals from the Court's personal jurisdiction.[127] In terms of the latter, even though this was not the focus of this article, there may be a link between the way in which the Court has interpreted its material jurisdiction and such withdrawals.[128] Since its adoption 23 years ago, only 32 state parties have ratified the Protocol, and only two ratifications have been registered in the past five years, namely, that of the Democratic Republic of the Congo (DRC) in December 2020 and Guinea Bissau

127 Heyns (n 5) 167.

128 Irrespective of the fact that the Court is vested with a broad material jurisdiction, states, with reference to their domestic authority, have continued to challenge the Court's power to scrutinise domestic laws and their application. A reoccurring challenge in this regard disputes the Court's material jurisdiction based on the argument that it encroaches on domestic jurisdiction and therefore violates the sovereignty of the state. This challenge has taken different forms, where the Court is considered to be acting as a court of first instance, as an appellate court or as a legislative body. In terms of the 'first instance' the argument, it is based on the principle of exhaustion of local remedies to prevent any international court from hearing matters *de novo*. In terms of the latter two, the challenges entail that the Court would either nullify or reform the decisions of domestic courts or effectively produce national legislation. By contesting the Court's material jurisdiction in this regard, states have tried, without much success, to, in different ways, limit the reach of the Court's jurisdiction in terms of domestic law and the Court's perceived meddling in domestic affairs. This challenge is ultimately attempting to protect the sovereignty of the state; and the Court's consistent rejection of this challenge was one of the main factors behind Tanzania's withdrawal of its optional declaration in 2019 and Benin's withdrawal in 2020.

in November 2021.[129] Added to this is the dismal number of states that have accepted and maintained the optional jurisdiction of the Court to hear complaints of individuals and non-governmental organisations (NGOs). Even though Niger and Guinea Bissau recently deposited declarations under article 34(6) of the Protocol, they from part of a group of only eight states that have done so.[130] In this regard Heyns's warning that the 'wider the discretion granted to judges, the more unpredictable the system becomes, and the less likely states are to submit themselves to the system, and to remain committed to its success' prompts us, 20 years later, to once again consider the possibility of reforming the system.

129 https://au.int/sites/default/files/treaties/36393-sl-protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_estab.pdf (accessed 24 June 2021); https://www.african-court.org/wpafc/democratic-republic-of-congo-ratifies-the-protocol-on-the-establishment-of-the-african-court-on-human-and-peoples-rights/ (accessed 12 July 2021).

130 https://www.african-court.org/wpafc/the-republic-of-guinea-bissau-becomes-the-eighth-country-to-deposit-a-declaration-under-article-346-of-the-protocol-establishing-the-court/ (accessed 1 December 2021).