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# AFRICAN HUMAN RIGHTS LAW JOURNAL

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To cite: 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* 41-77  
<http://dx.doi.org/10.17159/1996-2096/2020/v20n1a2>

## The subject-matter jurisdiction and interpretive competence of the African Court on Human and Peoples' Rights in relation to international humanitarian law

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**SUMMARY:** *The African Court on Human and Peoples' Rights has a uniquely broad subject-matter jurisdiction that includes any 'relevant human rights instrument ratified by the states concerned' (article 3 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights). This article considers the extent to which the Court's subject-matter jurisdiction includes international humanitarian law, and the related issue of the Court's interpretive competence. It is argued that the Court indeed is competent to directly apply norms of international humanitarian law. However, the circumstances under which it can do so are limited to two instances, namely, (i) where international humanitarian law norms are incorporated by reference into applicable human rights treaties; and (ii) in the likely scenario that the Court*

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*regards some international humanitarian law conventions as having a human rights character, the primary rules of the applicable international humanitarian law obligations must entail an individual right. Whether a given international humanitarian law obligation entails an individual right is to be determined on a case-by-case basis and, in any event, such instances will be rare. As a consequence of the limited circumstances under which the Court can directly apply international humanitarian law, determining the extent to which the Court can rely on the interpretation of international humanitarian law in applying human rights norms remains pertinent. In this regard it is argued that the Court can rely on international humanitarian law in the application of human rights norms on two bases. First, considering the complementary relationship the Court has with the African Commission, the Court can rely on the African Charter's interpretation clause (articles 60 and 61). Second, the Court has an implied power to interpret international humanitarian law in applying human rights treaties, as this power is necessary for the Court to discharge its mandate.*

**Key words:** *African Court on Human and Peoples' Rights; subject-matter jurisdiction; international humanitarian law; complementarity; contextual interpretation*

## 1 Introduction

There is general agreement that international human rights law and international humanitarian law co-apply during situations of armed conflict, and that their co-application is such that at times international human rights law norms are applied in a modified manner so as to ensure their mutual consistency with international humanitarian law.<sup>1</sup> A key example in this regard is the application of the right to life in a manner consistent with international humanitarian law – compliant lethal targeting during situations of armed conflict.<sup>2</sup> Accordingly, human rights enforcement mechanisms, such as those forming part of the European and Inter-American human rights systems, have recognised the need for contextual interpretation and application of international human rights law norms, consistent

<sup>1</sup> See *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (8 July 1996) (1996) ICJ Reports 226 para 25. Key contributions include N Lubell 'Challenges in applying human rights law to armed conflict' (2005) 87 *International Review of the Red Cross* 737-738; C Droege 'Elective affinities? Human rights and humanitarian law' (2008) 90 *International Review of the Red Cross* 525-527; and C Greenwood 'Human rights and humanitarian law – Conflict or convergence' (2010) 43 *Case Western Reserve Journal of International Law* 491-503-508.

<sup>2</sup> *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (n 1) para 25.

with the co-application of international humanitarian law.<sup>3</sup> However, as these mechanisms have a patently human rights mandate and usually a narrow subject-matter jurisdiction limited to their own treaty regimes, they have adopted different approaches in this regard. These approaches are informed by each mechanism's defined competence and implied powers. In contrast to similar mechanisms, the subject-matter jurisdiction of the African Court on Human and Peoples' Rights (African Court) extends to 'any other human rights instrument' ratified by the parties before the Court.<sup>4</sup>

As the African Court is still in its formative years, many questions remain as to the approach it will adopt regarding its expansive subject-matter jurisdiction, including whether international humanitarian law conventions may be regarded as 'human rights instruments', and thus be open to application by the Court as part of its judicial function. Equally, the interpretive competence of the African Court with regard to international humanitarian law remains the subject of speculation and debate. These issues are of great significance, as Africa is the continent worst affected by armed conflict in the post-World War II era.<sup>5</sup> Yet, the regulation of armed conflict in Africa, as well as the role of international humanitarian law in the African system, has received very little scholarly attention.<sup>6</sup> The prevalence of armed conflict in Africa does not in and of itself inform the appropriateness or desirability of the African Court directly applying international humanitarian law instruments, but does speak to the

3 For a detailed analysis of the Inter-American system, see D Shelton 'Humanitarian law in the Inter-American human rights system' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 365; and for the European system, see K Oellers-Frahm 'A regional perspective on the convergence and conflicts of human rights and international humanitarian law in military operations: The European Court of Human Rights' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 333.

4 Art 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights of 1998.

5 G Waschefort 'African and international humanitarian law: The more things change, the more they stay the same' (2016) 98 *International Review of the Red Cross* 593 595.

6 Waschefort discussed international humanitarian law in an African context; Waschefort (n 5) 593; Viljoen focused on an institutional perspective of international humanitarian law in the African system, as well as discussing the contributions of the African system to the development of international humanitarian law, while Hailbronner focused more on the normative dimensions to the relationship between international humanitarian law and international human rights law in the context of the African system. See F Viljoen 'The relationship between international human rights and humanitarian law in the African human rights system: An institutional approach' in De Wet & Kleffner (n 3) 303; F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18; M Hailbronner 'Laws in conflict: The relationship between human rights and international humanitarian law under the African Charter on Human and Peoples' Rights' (2016) 16 *African Human Rights Law Journal* 339.

inevitability of the Court being confronted with these issues. The importance of adopting a sound and consistent approach regarding the African Court's mandate and interpretive competence, including regarding international humanitarian law, cannot be overstated, as it arises not only at the level of individual cases, but also with respect to the very sustainability of the Court.

The core values of the African Court include ensuring 'equal access to all potential users of the Court, [and being responsive] to the needs of those who approach the Court'.<sup>7</sup> To achieve this, and indeed to achieve its mandate, the Court must ensure that potential litigants have appropriate guidance in determining which matters are properly justiciable before the Court, and have confidence in the consistency with which the Court will proceed in such matters. For the millions of victims of armed conflict on the African continent this specifically includes the clarification of the status of international humanitarian law under the Court's mandate. Indeed, the failure of the African Commission on Human and Peoples' Rights (African Commission) to adequately serve the needs of victims of armed conflict should not be replicated by the Court.<sup>8</sup> The Court can only achieve this through the development of a rigorous body of jurisprudence.

The African Court finds itself at a critical juncture. The sustainability of the Court depends on it attracting a sufficient number of admissible cases. While 30 states have ratified the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), direct access to the Court for individuals and non-governmental organisations (NGOs) is afforded only in respect of state parties that have entered an optional declaration.<sup>9</sup> To date, 10 states have made such declarations (Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania and Tunisia).<sup>10</sup> However, Rwanda, Tanzania, Benin and Côte d'Ivoire have all issued notices withdrawing their declarations.<sup>11</sup> More than

7 <https://www.african-court.org/en/index.php/about-us/mandate-vision-mission-values> (accessed 27 May 2020).

8 Notwithstanding the prevalence of armed conflict on the African continent, and the African Commission's express powers to rely on international humanitarian law in interpreting the African Charter, as provided for in arts 60 & 61 of the Charter, the Commission has directly relied on international humanitarian law interpretation in only one communication (*Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003)).

9 Art 5(3) read with art 36(4) African Court Protocol. For ratification status, see [https://www.african-court.org/en/images/Basic%20Documents/Ratification\\_and\\_Deposit\\_of\\_the\\_Declaration\\_final-May-2020.pdf](https://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf) (accessed 27 May 2020).

10 [https://www.african-court.org/en/images/Basic%20Documents/Ratification\\_and\\_Deposit\\_of\\_the\\_Declaration\\_final-May-2020.pdf](https://www.african-court.org/en/images/Basic%20Documents/Ratification_and_Deposit_of_the_Declaration_final-May-2020.pdf) (accessed 27 May 2020).

11 Tanzania: <https://twitter.com/AfrimechsHub/status/1201572103176302592>; Benin: <https://www.banouto.info/article/POLITIQUE/20200423-retrait-du-bnin>

90 per cent of finalised cases that were admissible were instituted on the basis of such direct access.<sup>12</sup> In fact, Tanzania has been the respondent in more than half of the Court's finalised admissible cases. It appears that there has been some dissatisfaction along the lines that the Court is overstretching its mandate. In particular, Tanzania has objected to the Court exercising jurisdiction in a number of cases on the basis that the Court is exceeding its mandate in either acting as a court of first instance or an appellate court.<sup>13</sup> While the merits of Tanzania's objections are beyond the scope of the present discussion, they do indicate that states' tolerance for perceived excesses in the Court exercising its mandate is very low. Should the Court regard international humanitarian law as fully justiciable, without adequate consideration of the legal-technical implications, the Court will likely open itself to further criticism on the basis of overstretching its mandate, which may result in further backlash. This concern is not purely theoretical as states, particularly the United States of America, have expressed their dissatisfaction with United Nations (UN) human rights mechanisms engaging in international humanitarian law interpretation, precisely on the basis that these states argue international humanitarian law to be beyond the remit of the relevant mechanisms.<sup>14</sup> The answer is not for the African Court to adopt a defensive posture, bending to the anticipated whim and will of states, but instead to recommit itself to rendering high-quality judgments, staying within its current mandate, thereby confirming its legitimacy.

The African Court has the opportunity to develop a sound and consistent approach regarding international humanitarian law earlier in its life cycle than its sister courts in Europe and the Americas. The European Court of Human Rights (European Court) and the Inter-American Court of Human Rights (Inter-American Court) both initially took a cautious and reluctant approach to their interpretative competence in relation to international humanitarian law.<sup>15</sup> They appear to have avoided difficult questions regarding the impact of international humanitarian law on the application of

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de-la-cour-africaine-les-clarifications-du-ministre-alain-orounla/; Côte d'Ivoire: [http://www.gouv.ci/\\_actualite-article.php?recordID=11086](http://www.gouv.ci/_actualite-article.php?recordID=11086) (accessed 27 May 2020).

12 <https://www.african-court.org/en/index.php/cases/2016-10-17-16-18-21> (accessed 27 May 2020).

13 See, eg, *Armand Guehi v Tanzania* (7 December 2018) App 1/2015 paras 31-34 (*Guehi*); and *Ally Rajabu v Tanzania* (28 November 2019) App 7/2015 paras 21-31.

14 For a detailed discussion, see P. Alston et al 'The competence of the UN Human Rights Council and its Special Procedures in relation to armed conflicts: Extrajudicial executions in the "war on terror"' (2008) 19 *European Journal of International Law* 183.

15 Shelton (n 3) 365; Oellers-Frahm (n 3) 333.

human rights norms during armed conflict, rather than concluding that international humanitarian law indeed does impact upon the manner in which human rights are given effect to. It was only in 2014 with the *Hassan* case that the European Court for the first time truly informed its application of a human rights norm with reference to international humanitarian law principles.<sup>16</sup> By stark contrast, in the wake of the International Court of Justice (ICJ) confirming the co-application of international humanitarian law and international human rights law during situations of armed conflict during 1996,<sup>17</sup> the Inter-American Commission on Human Rights (Inter-American Commission) began directly applying principles of international humanitarian law.<sup>18</sup> However, as Shelton submits, over time the approach of these mechanisms has somewhat converged – the European and Inter-American Courts have shown a greater willingness to engage with international humanitarian law progressively, while the Inter-American Commission has restrained itself in this regard.<sup>19</sup>

This contribution is organised into three parts. The first part considers the implications for the subject-matter jurisdiction and interpretive competence of the African Court, of provisions in human rights treaties that refer to state parties' international humanitarian law obligations. The second part focuses on the interpretive competence of the African Commission and the African Committee of Experts on the Rights and Welfare of the Child (African Children's Committee) in respect of international humanitarian law. The last part considers the subject-matter jurisdiction and interpretive competence of the African Court as far as international humanitarian law is concerned.

## 2 Legal consequences of reference to international humanitarian law in human rights treaties

It is not uncommon for human rights treaties to contain provisions that refer to international humanitarian law obligations. The first to have done so is the UN Convention on the Rights of the Child (CRC), which requires parties to respect rules of international humanitarian

16 *Hassan v United Kingdom* ECHR (16 September 2014) App 29750/09 paras 76-77.

17 *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion (n 1) para 25.

18 Cerna identifies the impact of the 1996 ICJ finding by highlighting that during 1995 the Commission's findings with regard to situations of armed conflict were silent on the applicability of international humanitarian law, whereas by 1997 the Commission began directly applying international humanitarian law. Eg, in the *Milk* case the Commission found a violation of Common Article 3 to the Geneva Conventions of 1949. See CM Cerna 'The history of the Inter-American system's jurisprudence as regards situations of armed conflict' (2011) 2 *Journal of International Humanitarian Legal Studies* 31 fn 94.

19 Shelton (n 3) 371.

law relevant to the child.<sup>20</sup> Interestingly, the legal consequences of such references have received very little attention. Yet, these consequences can be very far-reaching, as is illustrated by the African Commission's interpretation of article 18(3) of the African Charter on Human and Peoples' Rights (African Charter), which provides that '[t]he state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions'. While this provision does not refer to international humanitarian law obligations, the consequences of reference to women's and children's rights declarations and conventions follows the same legal contours as reference to international humanitarian law. The Commission has interpreted article 18(3) as incorporating in its entirety the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by reference into the African Charter.<sup>21</sup> Accordingly, even states party to the African Charter that are not party to CEDAW incurs the totality of obligations in terms of CEDAW. Moreover, they are obliged to report to the African Commission on the implementation of CEDAW.<sup>22</sup> By extension of logic it is reasonable to assume that a communication submitted before the African Commission, based on an alleged violation of CEDAW, may be admissible as it will be consistent with the African Charter.<sup>23</sup> This illustrates the importance of this issue for present purposes. If reference to international humanitarian law obligations is regarded as incorporating those obligations into a treaty in respect of which the African Court has subject-matter jurisdiction, the Court will likewise have jurisdiction in respect of the referenced international humanitarian law obligations.

The remainder of this part in the first instance considers the requirements and consequences of incorporation by reference in the law of treaties; second, the legal consequences of references to international humanitarian law obligations in human rights treaties; and, finally, the implications for enforcement mechanisms.

## 2.1 Incorporation by reference in the law of treaties

Incorporation by reference involves reference in one legal instrument (the incorporating instrument) to the content of a separate, pre-existing document (the referenced material), with the purpose of making the referenced material part of the incorporating

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20 Art 38(1) CRC.

21 F Viljoen *International human rights law in Africa* (2012) 253.

22 African Commission, *Guidelines for National Periodic Reports* (1989), part VII.

23 Art 56(2) African Charter.

instrument, without reproducing its content.<sup>24</sup> To those bound by the incorporating instrument, the source of the obligation thus is the incorporating instrument, not the referenced document. The doctrine of incorporation by reference is well established in the common law tradition, and is used in different contexts, such as the law of succession, commercial contracts and legislative enactments.<sup>25</sup> As a legislative technique referential legislation is commonly used to incorporate treaties into domestic law. For example, article 7 of the Diplomatic Privileges and Immunities Act 1967 of Australia references and incorporates articles 1 and 22 to 24 of the Vienna Convention on Diplomatic Relations into Australian law. Reference is often made in legislation to external documents for purposes other than incorporating the referenced material, for example, informational and amendatory references.<sup>26</sup> As such, for incorporation by reference to occur, the referenced material has to be both referenced and incorporated. No clear criteria have developed across different legal systems for incorporation by reference, and the issue is to be determined on a case-by-case basis. In some instances the referenced material is very broadly defined, for example, in Florida state, still-in-force legislation incorporates 'the common and statute laws of England which are of a general and not a local nature ... down to the 4th day of July, 1776'.<sup>27</sup> With regard to the intention to incorporate, one finds that implicit incorporation sometimes is sufficient.<sup>28</sup> However, in such instances the material will generally only be deemed incorporated if it is necessary to consult the referenced material to determine the meaning of the referencing legislation.<sup>29</sup> It is submitted that the degree of specificity of the referenced material, and the extent to which the intention to incorporate is clearly articulated, are relational. That is to say, where the referenced material is broadly defined, the intention to incorporate will need to be expressly articulated, and *vice versa*. As far as the identification of the referenced material is concerned, the New South Wales courts in Australia held that '[i]f there is uncertainty as to what is the document to which the reference is made, no doubt the regulation would be invalid'.<sup>30</sup>

24 JM Keyes 'Incorporation by reference in legislation' (2004) 25 *Statute Law Review* 180; FS Boyd 'Looking glass Law: Legislation by reference in the states' (2008) 68 *Louisiana Law Review* 1201-1210; HE Read 'Is referential legislation worthwhile' (1941) 25 *Minnesota Law Review* 263-266.

25 See eg CT Carr 'Legislation by reference and the technique of amendment' (1940) 22 *Journal of Comparative Legislation and International Law* 12-18; Keyes (n 24) 180.

26 Boyd (n 24) 1205-1210.

27 FLA STAT § 2.01 (2007).

28 See, eg, *Wigram v Fryer* (1887) 36 ChD 87, 56 LJCh 1098, also discussed by Read (n 24) 266.

29 Boyd (n 24) 1213.

30 *Wright v TIL Services Pty Ltd* [1956] SR (NSW) 413 421.



The practice of incorporation by reference frequently occurs in treaty law, for example, the Rome Statute of the International Criminal Court (Rome Statute) defines an ‘act of aggression’ as ‘the use of armed force by a state ... in any ... manner inconsistent with the Charter of the United Nations’.<sup>31</sup> No criteria for incorporation by reference have developed in treaty law, and this issue has received scant attention in the literature. However, some discussion has taken place regarding the derogation clause of the European Convention on Human Rights (European Convention), which provides:<sup>32</sup>

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention ... provided that such measures are not inconsistent with its other obligations under international law.

Buergenthal labels the reference to ‘other obligations under international law’ as ‘incorporation by reference’.<sup>33</sup> However, he argues that such obligations are limited to conventions to which the state is party.<sup>34</sup> These suggestions are mutually exclusive – the purpose of incorporation by reference precisely is that the incorporating instrument becomes the source of the obligation, making it irrelevant whether state parties are bound by the referenced material. In contrast, Meron adopts the correct legal position, as his analysis is premised on the understanding that when a provision is properly incorporated into a treaty, state parties are bound by that provision, regardless of whether they are party to the incorporated treaty.<sup>35</sup> Buergenthal’s use of ‘incorporation by reference’ seems to be a more informal use of this terminology. In any event, it is clear that article 15 of the European Convention does not amount to incorporation by reference, and that indeed it is limited to conventions to which the state is party.<sup>36</sup>

In the context of treaty law, the question of whether incorporation by reference has occurred is not simply a matter of interpretation, but is one that strikes at the heart of the consensual nature of treaty obligations. The recognition of legal obligations emanating from provisions of a treaty that are referenced but not properly

31 Art 8bis(2) Rome Statute.

32 Art 15(1) European Convention.

33 T Buergenthal ‘International and regional human rights law and institutions: Some examples of their interaction’ (1977) 12 *Texas International Law Journal* 321-324.

34 Buergenthal (n 33) 324-325.

35 T Meron ‘Norm making and supervision in international human rights: Reflections on institutional order’ (1982) 76 *American Journal of International Law* 754-764.

36 This is clear in terms of the provision’s language, referring to ‘its [the state’s] other obligations under international law’. See also S Wallace *The Application of the European Convention on Human Rights to military operations* (2019) 193.

incorporated would conflict with the principle *pacta tertiis nec nocent nec prosunt* (a treaty does not create obligations for third states without their consent) for states that are not party to the referenced treaty.<sup>37</sup> Where a provision is properly incorporated by reference, this principle is not relevant, as ratification of the incorporating treaty amounts to an expression of consent. Even a liberal interpretation of the requirements of incorporation by reference will compel a conclusion that broad references to international humanitarian law, without identifying the relevant international humanitarian law obligations with some degree of specificity, nor clearly articulating an intention to incorporate, will not amount to incorporation by reference. Moreover, due to their potential for constant evolution, it is doubtful that norms of customary international law can be incorporated by reference.

Accordingly, the African Commission's approach to the incorporation of CEDAW into the African Charter is not good in law.<sup>38</sup> CEDAW is not identified with sufficient specificity, and the intention to incorporate is not clearly expressed. The Commission's interpretation rests largely on the fact that CEDAW predates the African Charter (which would be required for incorporation by reference). As the CRC postdates the African Charter, it equally is not regarded as incorporated. However, a range of other international declarations, which predate the African Charter, likewise provide for the protection of the rights of women and children, yet the African Children's Committee does not regard these as having been incorporated into the African Charter.<sup>39</sup>

## 2.2 Reference to and recognition of external international humanitarian law obligations

The African Charter does not make reference to international humanitarian law, nor does it contain a derogation clause whereby international humanitarian law is referenced indirectly. However, a number of regional African human rights treaties include such provisions, and they often contain more extensive reference to international humanitarian law than conventions at the universal

37 Art 34 Vienna Convention.

38 For an opposing view, see Viljoen (n 21) 253.

39 Langley suggests that it is not only CEDAW that is incorporated, but also the Convention on the Political Rights of Women and the Declaration on the Elimination of Discrimination Against Women. However, this view is not consistent with the practice of the African Commission. See W Langley 'The rights of women, the African Charter, and the economic development of Africa' (1987) *Boston College Third World Law Journal* 217.

level or those emanating from other regional systems.<sup>40</sup> These include 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); and the Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Each of these treaties provides that state parties undertake to 'respect and ensure respect for rules of international humanitarian law' relevant to the subject-matter of the given treaty.<sup>41</sup> The genealogy of this provision is important in determining its consequences. As previously noted, the first expression of this provision appeared in CRC, which provides that 'States Parties undertake to respect and to ensure respect for rules of international humanitarian law *applicable to them* in armed conflicts which are relevant to the child'.<sup>42</sup> The *travaux préparatoires* indicate that the words 'applicable to them' were specifically inserted to make it clear that 'states are not obliged to respect "rules of law" contained in treaties to which they are not a party'.<sup>43</sup> As such, the source of legal obligation remains the international humanitarian law conventions to which the state in question is party, and not the provision of the human rights treaty referencing international humanitarian law.<sup>44</sup>

In all three relevant African instruments the words 'applicable to them' were omitted in the general obligation to respect and ensure respect for international humanitarian law, raising the question of whether the legal consequences are affected. As these provisions clearly do not amount to an incorporation by reference, the effect is that the source of the obligation remains the international humanitarian law conventions to which the state in question is party, as is the case with CRC. Numerous further references to international humanitarian law are found in the African Children's Charter and the African Women's Protocol. However, these provisions expressly indicate that the referenced international humanitarian law obligations emanate from the international humanitarian law treaties

40 No convention within the European system contains direct references to international humanitarian law, and within the Inter-American system only art 29 of the Convention on Protecting the Human Rights of Older Persons of 2015 does so. However, this Convention has not generated any relevant practice.

41 Art 22(1) African Children's Charter; art 11(1) African Women's Protocol; and art 3(1)(e) Kampala Convention.

42 Art 38(1) CRC (my emphasis).

43 'Legislative history of the Convention on the Rights of the Child, Volume II' Office of the United Nations High Commissioner for Human Rights (2007) HR/PUB/07/1 para 126, <https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf> (accessed 10 January 2020).

44 M Drumbi & J Tobin 'Article 38: The rights of children in armed conflict' in J Tobin (ed) *The UN Convention on the Rights of the Child: A commentary* (2019) 1503 1516.

that the relevant state has ratified.<sup>45</sup> As such, these provisions clearly have no incorporating effect, and require no further discussion.

The Kampala Convention likewise contains a number of provisions referencing international humanitarian law, including the general obligation to respect and ensure respect for international humanitarian law.<sup>46</sup> Article 7 of the Kampala Convention is titled 'Protection and assistance to internally displaced persons in situations of armed conflict'. This provision applies only to armed groups, which are defined as 'dissident armed forces or other organised armed groups that are distinct from the armed forces of the state'.<sup>47</sup> Article 7(3) provides specifically that '[t]he protection and assistance to internally displaced persons under this article shall be governed by international law and in particular international humanitarian law'. This language is suggestive of an intention to incorporate international humanitarian law by reference. The provision prohibits members of armed groups from engaging in a closed list of nine specific categories of conduct against internally-displaced persons: carrying out arbitrary displacement; hampering protection and assistance; denying the right to live in satisfactory conditions; restricting freedom of movement; the recruitment of children; forcible recruitment, hostage-taking, sexual slavery and trafficking; impeding humanitarian assistance; harming humanitarian personnel or resources; and violating the civilian and humanitarian character of places of shelter.<sup>48</sup>

The purpose of incorporating international humanitarian law appears to be motivated by two factors: first, the objective of creating obligations directly for armed groups, instead of relying on the 'respect, protect and fulfil' framework of international human rights law, which traditionally requires states to be the conduits of obligation for non-state entities.<sup>49</sup> Second, while the prohibited conduct is identified, the developed law emanating from international humanitarian law is to be applied to give substantive effect to the prohibitions. For example, the prohibited conduct includes 'recruiting children or requiring or permitting them to take

45 Arts 22(3) & 23(1) African Children's Charter; art 11(2) African Women's Protocol.

46 Arts 3(1)(e), 4(4)(b) & 5(8) Kampala Convention.

47 Art 1(e) Kampala Convention.

48 Art 7(5) Kampala Convention.

49 With regard to the state obligation to protect human rights in relation to the actions of non-state entities, see N Rodley 'Non-state actors and human rights' in S Sheeran & N Rodley (eds) *Routledge handbook of international human rights law* (2013) 523. With regard to international humanitarian law creating obligations for armed groups, see, eg, J Kleffner 'The applicability of the law of armed conflict and human rights law to organized armed groups' in De Wet & Kleffner (n 3) 49-64; M Sassòli *How does law protect in war?* (2011) 347-349.

part in hostilities under any circumstances'.<sup>50</sup> The question as to the age threshold and standard of the applicable obligation is then to be answered, depending on the nature of the conflict, with reference to article 77(2) of Protocol I Additional to the Geneva Conventions on the Protection of Victims of International Armed Conflicts (API), or article 4(3)(c) of Protocol II Additional to the Geneva Conventions on the Protection of Victims of Non-International Armed Conflicts (APII). Ironically, the prohibition of child use and recruitment contained in the African Children's Charter provides for a higher standard of protection than both Protocols.<sup>51</sup> However, the incorporation of international humanitarian law is useful in providing unambiguously for these obligations to apply to armed groups. In this instance, the intention to incorporate is expressed clearly through the words 'shall be governed by' international humanitarian law, and the referenced material is sufficiently identified as those parts of international humanitarian law that regulate the nine forms of prohibited conduct.

### 2.3 Implications for enforcement mechanisms

The Kampala Convention undoubtedly falls within the jurisdiction of the African Court. As such, the incorporated international humanitarian law obligations will likewise fall within the jurisdiction of the Court when the Court applies article 7 of the Kampala Convention. However, as proceedings cannot be instituted before the African Court against armed groups, it is rather unlikely that the Court will apply international humanitarian law in this context.

The question remains as to what the legal consequences are where reference to international humanitarian law is made, but international humanitarian law is not incorporated. The African Children's Committee's first individual communication has bearing on this question. The *Hansungule* communication related to alleged children's rights violations in the context of the conflict between the Ugandan armed forces and the Lord's Resistance Army.<sup>52</sup> The Children's Committee made reference to international humanitarian law in its analysis of the right to education, on the basis of article 22(1) of the African Children's Charter, which provides that 'State Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed

50 Art 7(5)(e) Kampala Convention.

51 Art 22(2) African Children's Charter.

52 Communication 1/2005, *Hansungule & Others v The Government of Uganda* 21st ordinary session of the African Committee of Experts on the Rights and Welfare of the Child para 5.

conflicts which affect the child'.<sup>53</sup> With regard to the equivalent provision in CRC, Brett suggests that '[t]he logical interpretation ... is that it simply reinforces the obligations of states to abide by the humanitarian law by which they are already bound'.<sup>54</sup> However, the Children's Committee went further. In interpreting the right to education in light of applicable international humanitarian law, the Committee recognised that '[t]he principle of distinction under international humanitarian law demands that educational facilities are protected as long as they are civilian objects'.<sup>55</sup> However, on the basis of available evidence the Committee could not 'fault the margin of appreciation with which the state planned and conducted its military operations that could qualify as an indiscriminate attack on schools'.<sup>56</sup> As such, the Committee used a rather generic reference to international humanitarian law obligations (contained in article 22) as a vehicle through which to engage in contextual analysis that considers the impact of international humanitarian law on the state in giving effect to its human rights obligations.

Reference to international humanitarian law obligations in human rights treaties can have significant implications for the African Court. Where international humanitarian law obligations are both referenced and incorporated, as with article 7 of the Kampala Convention, the relevant international humanitarian law obligations are brought squarely within the subject-matter jurisdiction of the Court, but only when applying the provision of the Convention containing the reference. Reference to international humanitarian law obligations, without incorporating these obligations, has value in acknowledging the relevance of international humanitarian law as well as the nexus between the observance of international humanitarian law and the enjoyment of human rights. Moreover, the Court can use such references as an additional basis to engage in a contextual interpretation of the relevant human rights norm.

### **3 Interpretive competence of African quasi-judicial mechanisms in relation to international humanitarian law**

The African Court Protocol is not a self-contained treaty but, instead, forms part of the African Charter regime. Moreover, the

53 *Hansungule* (n 52) para 66.

54 R Brett 'Child soldiers: Law, politics and practice' (1996) 4 *International Journal of Children's Rights* 115 116.

55 *Hansungule* (n 52) para 67.

56 *Hansungule* para 68.

complimentary relationship that the African Court shares with the African Commission is confirmed in the Court Protocol.<sup>57</sup> As a complimentary mechanism, the African Commission with its established practice and jurisprudence has a bearing on an enquiry into the African Court's interpretive competence.

Interpretation clauses contribute to the institutional competence of human rights enforcement mechanisms, by providing for external sources upon which the mechanism may rely in informing its interpretation of the rights that fall within its jurisdiction. The African Children's Charter's interpretation clause, which provides for the interpretive competence of the African Children's Committee, states as follows:<sup>58</sup>

The Committee shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organisation of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions.

The scope of this clause does not expressly include parts of international law other than 'international law on human rights'. If international humanitarian law indeed is included in its scope, it then has to be by virtue of regarding international humanitarian law as part of 'international law on human rights'. In the *Hansungule* communication the African Children's Committee premised its discussion of international humanitarian law on article 22, which expressly references international humanitarian law obligations, and not the interpretation clause.<sup>59</sup> The Committee did reference the interpretation clause in the admissibility section of the finding, to justify its reliance on findings of the African Commission.<sup>60</sup> While not definitive, this suggests that the Committee did not regard the interpretation clause as also providing authority to interpret international humanitarian law and, by extension, that international humanitarian law does not form part of 'international law on human rights' for purposes of the interpretation clause.

The interpretation clause of the African Charter is two-tiered, and provides:<sup>61</sup>

57 Arts 2 & 8 African Court Protocol.

58 Art 46 African Children's Charter.

59 *Hansungule* (n 52) para 66.

60 *Hansungule* para 24.

61 Arts 60 & 61 African Charter.

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the parties to the present Charter are members.

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

The first tier largely mirrors the interpretation clause of the African Children's Charter, and focuses specifically on 'international law on human and peoples' rights'. The question of whether the first tier implicitly includes international humanitarian law is mooted by the second tier, which is open-ended, and contains no limitations with regard to the subject-matter of the sources of law taken into consideration. International humanitarian law conventions undoubtedly are captured in the second tier of the interpretation clause. The two-tiered approach serves an organisational function, distinguishing between the ability of the Commission to 'draw inspiration from' other human rights instruments on the one hand, and to 'take into consideration' sources not of a human rights character, that may assist in interpreting relevant human rights norms.

### 3.1 Practice of the African Commission

The African Commission has limited practice with regard to international humanitarian law. For the most part the Commission has limited itself to confirming the applicability of all Charter rights during situations of armed conflict.<sup>62</sup> However, in *Democratic Republic of the Congo v Burundi, Rwanda and Uganda (DRC)* the Commission for the first time engaged in a more substantive analysis of specific international humanitarian law standards.<sup>63</sup> The *DRC* communication was an inter-state communication, relating to 'grave

<sup>62</sup> See further Viljoen (2014) (n 6) 306-308; and Hailbronner (n 6) 347-348.

<sup>63</sup> *Democratic Republic of the Congo v Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) (*DRC*).



and massive violations of human and peoples' rights' committed by the armed forces of the respondent states on the territory of the DRC between August and November 1998.<sup>64</sup> The DRC's allegations primarily implicated the armed forces of Uganda and Rwanda, and alleged violations of a range of provisions of the African Charter, the International Covenant on Civil and Political Rights (ICCPR), the Geneva Conventions of 1949, as well as API and APII.<sup>65</sup>

The African Commission frequently relied on the interpretation clause of the Charter both in regard to the admissibility of the matter as well as the merits. The respondent states argued that the matter was inadmissible as it related to alleged violations of international humanitarian law, and did not fall within the mandate of the Commission. In this regard, the Commission held:<sup>66</sup>

The effect of the alleged activities ... fall not only within the province of humanitarian law, but also within the mandate of the Commission. The combined effect of Articles 60 and 61 of the Charter compels this conclusion; and it is also buttressed by Article 23 of the African Charter.

The African Commission confirmed that the Geneva Conventions and API 'constitute part of the general principles of law recognised by African States',<sup>67</sup> and further confirmed that international humanitarian law conventions 'fall on all fours with the category of special international conventions'.<sup>68</sup> While the Commission indicated that international humanitarian law is merely to be taken into consideration in the 'determination' of the case,<sup>69</sup> it engaged in a detailed analysis of specific international humanitarian law provisions throughout the finding.

The African Commission's approach has led to divergent views as to whether it went beyond its authority to consider international humanitarian law conventions as subsidiary measures to determine the principles of law. Viljoen argues that the Commission appropriately sought interpretive guidance from international humanitarian law, in finding violations of human rights law.<sup>70</sup> International humanitarian law provisions were used to give 'concrete content to the rather abstract notions' of some features of the African Charter, for example, in the context of the Commission's analysis of the dumping of bodies and mass burials.<sup>71</sup> Viljoen highlights that the Commission

64 *DRC* (n 63) paras 3-7.

65 *DRC* paras 3-9.

66 *DRC* para 64.

67 *DRC* para 70.

68 *DRC* para 78.

69 *DRC* para 70.

70 Viljoen (2014) (n 6) 314.

71 Viljoen (2014) 317.

confirmed ‘a definite dividing line between the “province” of international humanitarian law, on the one hand, and the human rights “mandate” of the Commission’,<sup>72</sup> on the other, suggesting that international humanitarian law conventions do not form part of ‘international law on human and peoples’ rights’.<sup>73</sup> Accordingly, he concludes that the Commission held that it is not empowered to find violations of international humanitarian law, but it is empowered to rely on international humanitarian law in interpreting the rights within its subject-matter jurisdiction.<sup>74</sup> Hailbronner disputes this conclusion – she focuses strongly on the Commission’s detailed analysis of international humanitarian law, which at times is done without reference to rights contained in the African Charter.<sup>75</sup> For example, the African Commission found that taking article 56 of API and article 23 of the Hague Convention (II) into account, as read with the African Charter’s interpretation clause (articles 60 and 61), the besiegement of a hydro-electric dam in Lower Congo province amounted to a violation of the African Charter.<sup>76</sup> However, the Commission states in a later paragraph that the besiegement of the dam amounts to a violation of the right to property under the African Charter.<sup>77</sup> Hailbronner argues that during its analysis the Commission oscillated between applying international humanitarian law directly, and merely relying on international humanitarian law for interpretive purposes.<sup>78</sup> She expressly disputes Viljoen’s conclusion that ‘the African Commission has found only violations of human rights law, but in so doing, has sought interpretive guidance from international humanitarian law’.<sup>79</sup>

The African Commission limited its finding to violations of the African Charter.<sup>80</sup> Viljoen is correct in concluding that the direct application of international humanitarian law does not fall within the mandate of the Commission. Hailbronner exaggerates the implications of the Commission’s detailed interpretation of international humanitarian law – regardless of the extent of discussion of international humanitarian law, the Commission did

72 Viljoen 308.

73 This conclusion is also supported by Hailbronner (n 6) 346.

74 Viljoen (2014) (n 6) 308.

75 Hailbronner (n 6) 350-352.

76 *DRC* (n 63) paras 83-84. It is interesting to note that the African Commission did not explicitly address the status of the Hague Convention (II) under art 61 of the African Charter, as it did in regard to the Geneva Conventions and Optional Protocols.

77 Art 14 African Charter; *DRC* (n 63) para 88.

78 Hailbronner (n 6) 349.

79 Viljoen (2014) (n 6) 314, quoted in Hailbronner (n 6) 350.

80 *DRC* (n 63) operative paragraph. The African Commission found violations of arts 2, 4, 5, 12(1) and (2), 14, 16, 17, 18(1) and (3), 19, 20, 21, 22, and 23 of the African Charter.

not purport to find a violation of international humanitarian law. However, her critique of the Commission for poorly articulating its reasoning is well founded. Both Viljoen and Hailbronner suggest that the Commission's analysis of the besiegement of the dam links article 56 of API and/or article 23 of Hague Convention (II) to article 23 of the African Charter (providing for 'the right to national and international peace and security').<sup>81</sup>

This erroneous interpretation is based on the African Commission stating that 'the Respondent States are in violation of the Charter with regard to the just noted article 23'.<sup>82</sup> The 'just noted article 23' refers to article 23 of the Hague Convention II, and not article 23 of the African Charter. Indeed, article 23 of Hague Convention II was discussed just prior to the sentence containing the words 'just noted'. This leaves open the question as to which provision of the Charter the respondent states had violated with regard to the besiegement of the dam. The subsequent paragraph of the finding cites the *Celebici* case of the International Criminal Tribunal for the Former Yugoslavia (ICTY) as 'supportive of the Commission's stance'.<sup>83</sup> The relevant paragraph of the *Celebici* case upon which the Commission relied relates to the obligation of parties to conflict in relation to the private and public property of an opposing party, and specifically provides that 'private property must be respected and cannot be confiscated ... pillage is formally forbidden'.<sup>84</sup> This suggests that the Commission linked article 14, the right to property, to the besiegement of the dam.<sup>85</sup>

This aspect of the Commission's finding is awkwardly drafted, leading to ambiguity, but from an international humanitarian law perspective this issue is important to address. Both articles 56 of API and 23 of Hague Convention (II) are quintessential international humanitarian law provisions. International humanitarian law is premised on the equality of belligerents, and thus operates without distinction as to wrongfulness in engaging in armed conflict. Along these contours, Schabas notes that the difficulty with reconciling international human rights law and international humanitarian law lies in

the failure to grasp an underlying distinction: international humanitarian law is built upon neutrality or indifference as to the legality of the

<sup>81</sup> Hailbronner (n 6) 350; Viljoen (2014) (n 6) 316.

<sup>82</sup> *DRC* (n 63) para 80.

<sup>83</sup> *Prosecutor v Zejnir Delalic & Others* (16 November 1998) ICTY-IT-96-21-T (*Celebici* case) cited in *DRC* (n 63) para 85.

<sup>84</sup> *Celebici* case (n 83) para 587, cited in *DRC* (n 63) para 85.

<sup>85</sup> See also *DRC* (n 63) para 88.

war itself. Human rights law, on the other hand, views war itself as a violation. There is a human right to peace. Because of this fundamental incompatibility of perspective with regard to *jus ad bellum*, human rights law and international humanitarian law can only be reconciled ... if human rights law abandons the right to peace and develops an indifference to the *jus ad bellum*.<sup>86</sup>

The existence of an international armed conflict in the DRC at the time is a precondition to the application of API and the Hague Convention (II) to the besiegement of the dam. Moreover, 'the legality of the war itself' is irrelevant in determining the lawfulness of the besiegement of the dam under international humanitarian law. In contrast, the wrongfulness of the respondent states engaging in an armed conflict in the DRC is central in determining a violation of the right to international peace and security. The African Commission did find a violation of article 23 of the African Charter, but this aspect to the analysis is dealt with separately to the issue of the besiegement of the dam. Moreover, the Commission's analysis and application of the right to national and international peace and security is done with direct reference to the prohibition on the use of force, and the associated UN Charter use of force regime. Therefore, suggesting that article 23 of the African Charter can be interpreted and applied in light of the referenced international humanitarian law provisions is nonsensical, and not supported by the finding of the African Commission.

The African Charter's interpretation clause affords the African Commission the interpretive competence to refer to international humanitarian law extensively, but no mandate to apply international humanitarian law directly. The scope of articles 60 and 61 may have consequences for the African Court. This will be discussed further below.

#### 4 African Court on Human and Peoples' Rights

There are three avenues through which the African Court can engage with international humanitarian law, namely, (i) through reference to international humanitarian law in the substantive norms of relevant human rights treaties; (ii) by way of its subject-matter jurisdiction; and (iii) through its interpretive competence.

86 WA Schabas '*Lex specialis?* Belt and suspenders? The parallel operation of human rights law and the law of armed conflict, and the conundrum of *jus ad bellum*' (2007) 40 *Israel Law Review* 603.

With regard to the first category, it is important to recall that where there is a proper incorporation by reference of international humanitarian law obligations into a human rights treaty in respect of which the African Court may exercise subject-matter jurisdiction, the Court will have jurisdiction in respect of the incorporated international humanitarian law obligations. On the other hand, reference to international humanitarian law obligations that are not incorporated serves to acknowledge the relevance of international humanitarian law to the rights under discussion, as well as the nexus between the observance of international humanitarian law and the enjoyment of human rights, and provides a basis upon which to engage in contextual analysis that considers the impact of international humanitarian law on the state in giving effect to its human rights obligations. However, as the above discussion of 'reference to international humanitarian law in human rights treaties' specifically considered the African Court, there is no need for further consideration here.

In contrast to other human rights enforcement mechanisms, the African Court is endowed with a uniquely broad subject-matter jurisdiction, which extends 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'.<sup>87</sup> Subject-matter jurisdiction determines which legal norms a given mechanism is empowered to apply as part of its judicial function, whereas the interpretive competence of a mechanism speaks to its competence to use sources not within its subject-matter jurisdiction to aid in giving meaning to the legal norms that are within its subject-matter jurisdiction. This part will consider the extent to which the subject-matter jurisdiction of the African Court includes international humanitarian law and, thereafter, the interpretive competence of the Court with respect to international humanitarian law.

#### **4.1 Subject-matter jurisdiction**

Upon the adoption of the African Court Protocol, leading commentators were divided on the question of whether the subject-matter jurisdiction of the African Court should be interpreted broadly or more restrictively. At one end of the spectrum, the apparent breadth of subject-matter jurisdiction was hailed, and it was argued that the only real restriction would be that the instrument in question

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<sup>87</sup> Art 3(1) African Court Protocol.

be ratified by the parties before the Court.<sup>88</sup> On the other end of the spectrum, concern was expressed regarding the implications of such broad subject-matter jurisdiction.<sup>89</sup> To mitigate these implications, it was argued, the African Court should interpret restrictively what are 'relevant' treaties, so as to limit the Court to African regional human rights treaties<sup>90</sup> or, even more restrictively, to treaties 'that make express provision for adjudication by the ... Court'.<sup>91</sup>

It is clear that only treaties that are ratified by the states concerned fall within article 3. However, the African Court has made some questionable assertions regarding the status of the Universal Declaration of Human Rights (Universal Declaration) of 1948. In its analysis in *Anudo Ochieng Anudo v Tanzania* the Court acknowledged that the Universal Declaration is regarded as forming part of customary international law.<sup>92</sup> However, in the operative part of the judgment, the Court ultimately found a violation of the right to nationality under article 15(2) of the Universal Declaration, without referencing either customary international law or a Charter provision.<sup>93</sup> More recently, in *Robert John Penessis v Tanzania*, the African Court again considered article 15(2) of the Universal Declaration. While the Court restated that the Universal Declaration forms part of customary international law, it considered the right to nationality in the Universal Declaration in light of article 5 of the African Charter.<sup>94</sup> The Court ultimately found a violation of the right to nationality 'as guaranteed by Article 5 of the Charter and Article 15 of the UDHR'.<sup>95</sup> More recently the Court found that it lacked subject-matter jurisdiction in regard to an alleged violation of the French Declaration of the Rights of Man and of the Citizen of 1789, as this declaration is not a human rights instrument open to ratification by states.<sup>96</sup> Finally, the African Court has not directly addressed the issue as to the meaning and importance of the word 'relevant' in article 3. Its practice indicates

88 See, among others, M Mutua 'The African Human Rights Court: A two-legged stool?' (1999) 21 *Human Rights Quarterly* 342-354; J Mubangizi & A O'Shea 'An African Court on Human and Peoples' Rights' (1999) 24 *South African Yearbook of International Law* 256-268; 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* 431.

89 C Heyns 'The African regional human rights system: In need of reform?' (2001) 2 *African Human Rights Law Journal* 155-165-171; MJ 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* 186-193.

90 Viljoen (n 21) 435-436; Heyns (n 89) 165-171.

91 Heyns (n 89) 168.

92 *Anudo Ochieng Anudo v Tanzania* (22 March 2018) App 12/2015 para 132(v).

93 *Anudo* (n 92) para 76.

94 *Robert John Penessis v Tanzania* (28 November 2019) App 13/2015 paras 85 & 103 (*Penessis*).

95 *Penessis* (n 94) para 168(v).

96 *Sebastien Germain Ajavon v Benin* (28 March 2019) App 13/2017 para 45.

that 'relevant' simply relates to whether the substance of the treaty reflects the violations of rights alleged in a given matter. The Court, for example, has consistently exercised subject-matter jurisdiction in respect of ICCPR.

#### **4.1.1 Nature and character of 'human rights instruments' under the African Court Protocol**

The legal consequences of a breach of a norm of international law are determined by the primary rule of the norm.<sup>97</sup> For present purposes, we can distinguish between (i) norms of which the primary rule entails human rights for individuals; (ii) norms of which the primary rule entails individual rights not of a human rights character; and (iii) norms of which the primary rules do not entail individual rights but only state responsibility. The African Court Protocol does not alter the nature of primary rules contained in third treaties, for example, international humanitarian law treaties. The consensual nature of treaty obligations dictates that states are bound only by the scope and content of norms to which they agreed. As such, regardless of how broad the Court Protocol purports to frame the Court's subject-matter jurisdiction, the African Court cannot apply norms the primary rules of which do not entail individual rights. However, where a norm indeed provides for individual rights, the Court has a margin of discretion as to how broad it interprets whether these rights amount to 'human rights'.

In the matter of *APDH v Côte d'Ivoire* (APDH) the African Court first engaged directly with questions as to whether a particular treaty or treaty provision qualifies as a 'human rights treaty'.<sup>98</sup> The APDH, an Ivorian NGO, alleged that structural changes to the Ivorian Independent Electoral Commission (IEC) were inconsistent with the requirements of independence and impartiality as provided for in the African Charter on Democracy, Elections and Governance (African Democracy Charter) and the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance (ECOWAS Protocol).<sup>99</sup> In considering whether these instruments are included in the scope of article 3 of the African Court Protocol, the African Court held:<sup>100</sup>

97 Art 33(2) Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) *Yearbook of the International Law Commission* 2001, Vol II, Part Two 95, para 4.

98 *Actions pour la Protection des Droits de l'Homme v Côte d'Ivoire* (18 November 2016) App 1/2014 (APDH).

99 APDH (n 98) paras 3 & 20.

100 APDH para 57.

[I]n determining whether a convention is a human rights instrument, it is necessary to refer in particular to the purposes of such convention. Such purposes are reflected 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.

This formulation suggests that the determinative factor is the 'purposes' of the treaty. These purposes are to be determined on the basis of expressly-enunciated rights, or mandatory obligations resulting in the enjoyment of such rights. There is debate as to whether the human rights character of an instrument is to be determined by the instrument holistically, or in relation to a given provision.<sup>101</sup> The emphasis on the purposes of the instrument suggests that the focus is not on individual norms, but on the holistic character of the instrument. Nevertheless, the use of the plural suggests that the instrument can have more than one purpose.

The African Court illustrates what it means by the 'express enunciation of the subjective rights', as well as 'mandatory obligations' for the enjoyment of rights, by reference to articles 13 and 26 of the African Charter, respectively, not by reference to either instrument under consideration.<sup>102</sup> Article 13(1) provides that '[e]very citizen shall have the right to participate freely in the government of his country', and article 26 provides that '[s]tates parties to the present Charter shall have the duty to guarantee the independence of the Courts'. Curiously, the Court neither identifies a provision that enunciates specific rights, nor creates mandatory obligations for the consequent enjoyment of rights, in either treaty.

### *Express enunciation of subjective rights of individuals*

To date the only matter in which the African Court has been confronted with the question of whether a norm that enunciates a subjective right amounts to a human right is that of *Armand Guehi v Tanzania (Guehi)*. The material facts of this case related to the conviction and capital sentence of an Ivorian national in Tanzania for the murder of his wife. The alleged violations related to fair trial rights, the right to property, treatment in detention and the failure to provide consular assistance.<sup>103</sup> With regard to the alleged failure to provide consular assistance the applicant relied upon article 36(1)

<sup>101</sup> See Viljoen (n 21) 437; and 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* 255 262.

<sup>102</sup> *APDH* (n 98) paras 59-60.

<sup>103</sup> *Guehi* (n 13) para 9.



(b) and (c) of the Vienna Convention on Consular Relations (VCCR), which relates to the facilitation of 'the exercise of consular functions relating to nationals of the sending state'.<sup>104</sup> In particular, it provides that the authorities of the arresting state will 'inform the person concerned without delay of his rights under this sub-paragraph'.<sup>105</sup>

The ICJ had twice previously been called upon to determine whether article 36(1) of the VCCR amounts to a human right, and both these matters related to capital sentences in relation to foreign nationals. In *Le Grand* the ICJ held that article 36(1) provides for obligations owed by the receiving state both to the individual as well as the sending state.<sup>106</sup> The ICJ characterised the obligations owed to the individual as 'individual rights', a violation of these rights were found to have occurred, and on this basis the ICJ held it not necessary to determine whether these individual rights amounted to human rights.<sup>107</sup> In the *Avena* case Mexico argued that article 36(1) amounted to a human right and that, as such, this right should be guaranteed in the territory of all state parties, and that this right 'is so fundamental that its infringement will *ipso facto* produce the effect of vitiating the entire process of the criminal proceedings conducted in violation of this fundamental right'.<sup>108</sup> The ICJ held:<sup>109</sup>

Whether 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.

Some commentators have concluded that the ICJ, at least in an *obiter dictum*, found that the individual rights espoused in article 36(1) are not human rights.<sup>110</sup> However, this interpretation is not supported by the judgment. The Court expressly held that it need not decide on the human rights character of article 36(1). The Court's reference to Mexico's conclusions not being supported by the text and *travaux préparatoires* appear to relate more to the contention regarding the effect of violating the right to consular access and assistance than to characterising the right as a human right. Significantly, the Court focused its analysis on whether article 36(1) of the VCCR provides

<sup>104</sup> *Guehi* para 35.

<sup>105</sup> Arts 36(1)(b) & (c) VCCR.

<sup>106</sup> *LeGrand (Germany v United States of America)* (27 June 2001) (2001) ICJ Reports 466 para 77.

<sup>107</sup> *LeGrand* (n 106) para 78.

<sup>108</sup> *Avena & Other Mexican Nationals (Mexico v United States of America)* (31 March 2004) (2004) ICJ Reports 2004 12 para 124 (*Avena*).

<sup>109</sup> *Avena* (n 108) para 124.

<sup>110</sup> *Rachovitsa* (n 101) 265.

individual rights, and not whether the VCCR, as a convention, is a human rights treaty.

Unfortunately, in the *Guehi* case the African Court neither analysed nor answered the question of whether article 36(1) of the VCCR amounts to a human rights treaty for purposes of article 3 and 7 of the African Court Protocol. While the Court recognised that the applicant claimed that the lack of consular assistance ‘deprived him of the possibility to enjoy assistance from his country with respect to the protection of his fair trial rights’,<sup>111</sup> it did not as such recognise a right to consular assistance. Instead, the Court determined that consular assistance ‘touches on certain privileges whose purpose is to facilitate the enjoyment by individuals of their fair trial rights’, and determined that article 7(1)(c) of the African Charter, read with article 14 of ICCPR, also guarantees the rights under article 36(1) of the VCCR.<sup>112</sup> This is a spurious claim, given that neither the African Charter nor ICCPR affords a right to consular assistance. Ultimately, the Court found that it had subject-matter ‘jurisdiction to examine the applicant’s allegation based on the above-mentioned provision of the [African] Charter’. The Court’s finding on the merits likewise proceeds on the basis that article 7(1)(c) of the African Charter encapsulates the allegations made on the basis of the VCCR, and the Court thus only applied the African Charter.

### ***Mandatory obligations for the enjoyment of rights***

In the *APDH* case the African Court concluded that it had subject-matter jurisdiction in relation to the African Democracy Charter and the ECOWAS Protocol, as the relevant obligations in these treaties are ‘aimed at implementing the rights prescribed by article 13 of the African Charter’.<sup>113</sup> Moreover, it found violations of both treaties. The reasoning that a given treaty is aimed at implementing the rights contained in a third treaty, and as a result is brought within the subject-matter jurisdiction of the Court, is not expressly captured in the Court’s framework on mandatory obligations, as set out above. Moreover, it is questionable whether the purposes of a treaty can be determined by rights contained in a third treaty. It is striking that the Court never considered any provision from either the African Democracy or the ECOWAS Protocol, in analysing its subject-matter jurisdiction. It also never clearly links either the enunciation of specific rights or mandatory obligations on state parties with the enjoyment

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111 *Guehi* (n 13) para 95.

112 *Guehi* paras 37-38.

113 *APDH* (n 98) para 63.

of rights. The Court's judgment leaves open the question of whether the primary rules of the relevant provisions of either the African Democracy Charter or the ECOWAS Protocol provide for individual rights.

In support of its position that the relevant treaties are included in the scope of its jurisdiction, the African Court relied on the European Court's judgment in *Mathieu-Mohin and Clerfayt v Belgium* (*Mathieu-Mohin*).<sup>114</sup> In *Mathieu-Mohin* it was alleged that Belgium was acting in violation of article 3 of Protocol I to the European Convention, which provides that '[t]he High Contracting Parties undertake to hold free elections'. The European Court dismissed an argument that article 3 does not create individual rights, but merely state obligations, on the basis that the Preamble to the Protocol ensures 'the collective enforcement of certain rights and freedoms other than those already included in Section I of the Convention', and the fact that the Protocol explicitly provides that articles 1 to 4 'shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly'.<sup>115</sup> What the African Court failed to appreciate is that there is a material distinction between a given obligation simply resulting in the factual better enjoyment of individual rights; and an obligation the primary rule of which provides for an individual right. In *Mathieu-Mohin* the European Court expressly confirmed that the relevant provision fell within the latter category. In *APDH* this was not considered at all.<sup>116</sup> Therefore, a treaty provision does not have to expressly enunciate rights to entail individual rights. However, it is not enough that it merely provides for obligations that result in the better enjoyment of rights factually. The primary rules of these obligations must include legal entitlements for the individual, as was the case in *Mathieu-Mohin*.

There is a severe lack of rigor and specificity in the African Court's jurisprudence regarding its subject-matter jurisdiction to date – the Court has failed to develop a systematic approach or framework to be applied to determine whether a given treaty provision falls within its jurisdiction. The existing jurisprudence allows few definitive conclusions to be reached. The conclusions that can be reached include the inclusion of UN human rights treaties and treaties of regional economic communities (RECs) as 'relevant' human rights treaties; and that 'human rights instrument' includes not only treaties that enunciate rights, but also those that create mandatory

114 *Mathieu-Mohin and Clerfayt v Belgium* ECHR (2 March 1987) Series A 113, paras 46-51 (*Mathieu-Mohin*).

115 Art 5 Protocol 1 to European Convention.

116 See further Rachovitsa (n 101) 262.

state obligations for the consequent enjoyment of rights. However, the African Court should clarify at the earliest opportunity that it is not the form of expression that determines whether the norm presents an individual right but, instead, it is the primary rule of the specific norm that is determinative. Additionally, the circumstances are rare in which a norm that is expressed as a mandatory obligation for the consequent enjoyment of a right indeed amounts to an individual right. Finally, it is not sufficient that a norm contained in a treaty provides for an individual right, but the purposes of the treaty is determinative as to whether it falls within the Court's subject-matter jurisdiction. The focus of the enquiry will now shift to consider whether international humanitarian law conventions may be regarded as 'human rights instruments' for purposes of articles 3 and 7.

#### 4.1.2 *International humanitarian law conventions as 'relevant human rights instruments'*

Provost calls for an 'interpretation of humanitarian law norms as standards of treatment or conduct rather than as rights of protected persons'.<sup>117</sup> Sassòli et al confirm that with regard to international humanitarian law 'the majority view is that the state responsible for the violation has to compensate the state injured by the violation; it does not confer a right to compensation on the individual victims of violations'.<sup>118</sup> The traditional approach suggests that, while individuals are the beneficiaries of many international humanitarian law provisions, they do not have associated individual rights. Instead, these obligations, and the concomitant legal entitlements, are owed *inter partes*. This traditional approach would then imply that international humanitarian law obligations cannot fall within the subject-matter jurisdiction of the African Court, as their primary rules do not entail individual rights. However, there is growing support for the idea that some international humanitarian law obligations indeed confer individual rights.<sup>119</sup>

The dissenting and separate opinions of Koroma and Cançado Trindade JJ, respectively, in the *Jurisdictional Immunities* case of the ICJ illustrates well the depth of disagreement on this issue. Cançado Trindade J was of the view that both article 3 of Hague Convention (IV) as well as article 91 of API 'confer the right to reparation at

<sup>117</sup> R Provost *International human rights and humanitarian law* (2002) 28-30.

<sup>118</sup> Sassòli (n 49) 387.

<sup>119</sup> See, eg, T Meron 'The humanisation of humanitarian law' (2000) 94 *American Journal of International Law* 275.

international level to victims of those grave breaches',<sup>120</sup> while Koroma J is of the view that nothing in either convention supports this proposition.<sup>121</sup> On the municipal plane, the courts of The Netherlands and Greece recognise individual rights conferred by international humanitarian law, yet the courts of Japan and the United States studiously reject such claims.<sup>122</sup>

The Commentaries of the International Law Commission (ILC) to the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Draft Articles) recognise that 'an internationally wrongful act may involve legal consequences in the relations between the State responsible for that act and persons or entities other than States'.<sup>123</sup> Moreover, the ILC Commentary clarifies that the question of whether persons or non-state entities are entitled to invoke responsibility on their own account will be determined by the particular primary rule.<sup>124</sup> With reference to the Draft Articles and ILC Commentaries Sassòli concludes that individuals are beneficiaries of international humanitarian law obligations. Moreover, as a matter of substantive law, some provisions of conventional international humanitarian law afford individual victims a legal entitlement.<sup>125</sup> Sassòli suggests that the problem in giving effect to these legal entitlements is mostly procedural, as individuals do not have standing to access traditional implementation machinery. This approach is also reflected in the International Law Association's Declaration of International Law Principles on Reparation for Victims of Armed Conflict of 2010.

The ICC recently held that international humanitarian law does not recognise a 'general rule excluding members of armed forces from protection against violations by members of the same armed force'.<sup>126</sup> The notion of own force violations is incompatible with a framework premised solely on obligations owed *inter partes* – state responsibility is premised on injury caused to the state towards whom an obligation is owed as a result of an internationally wrongful act. Surely an adversarial party is not injured as a result of

120 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)* (3 February 2012) (2012) ICJ Reports 99 (*Jurisdictional Immunities*), dissenting opinion of Cançado Trindade J, para 70.

121 *Jurisdictional Immunities* (n 120), separate opinion of Koroma J, para 9.

122 For further discussion, see L Hill-Cawthorne 'Rights under international humanitarian law' (2017) 28 *European Journal of International Law* 1206-1207.

123 Art 28 Commentaries to the Draft Articles (n 97) 87-88 para 3.

124 Art 33(2) Commentaries to the Draft Articles (n 97) 95 para 4.

125 M Sassòli 'State responsibility for violations of international humanitarian law' (2002) 84 *International Review of the Red Cross* 418-419.

126 *Prosecutor v Bosco Ntaganda, Judgment on the appeal of Mr Ntaganda against the Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9* ICC-01/04-02/06 OA5 (15 June 2017) paras 63-64.

own force violations. While this issue has generated much debate, there is growing recognition of own force violations in international humanitarian law.<sup>127</sup> This would not be possible if one strictly adheres to the traditional conception of international humanitarian law.

The traditional perspective of international humanitarian law rests on attributing certain characteristics to international humanitarian law as a regime. For example, according to Hill-Cawthorne whether one adheres to the traditional perspective, or instead recognises the individual rights perspective, rests on differences of opinion regarding the *raison d'être* of international humanitarian law.<sup>128</sup> In contrast, Sassòli takes a more measured approach, in determining that whether or not a given norm present standards of treatment of which individuals are both beneficiaries and rights holders is not dependent on overarching characteristics of international humanitarian law, but instead the legal character of the individual norm in question.<sup>129</sup>

It is clear that there is significant support for the view that the primary rules of some norms of conventional international humanitarian law indeed provide for individual rights. However, as Sassòli suggests, this determination is to be made with reference to the specific norm in question.<sup>130</sup> The existence of individual rights in international humanitarian law does not necessarily imply that these are human rights. Moreover, as the Court held in *APDH*, the purposes of the convention should be determinative – this can be read, in more traditional international law language, as the object and purpose of the treaty. The Court will thus have to clear two hurdles in order to regard specific international humanitarian law norms as forming part of its subject-matter jurisdiction. First, it will have to determine that the object and purpose of the relevant international humanitarian law treaties include the advancement of human rights. Second, it will have to determine that the primary rules of the individual international humanitarian law norms it seeks to apply in fact entail an individual right. To do so, the Court cannot adopt the traditional approach to international humanitarian law, as discussed above. Given its finding in *APDH*, it is likely that the Court will regard the object and purpose of international humanitarian law obligations, particularly those relevant to the protection of victims

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127 See, eg, J Kleffner 'Friend or foe? On the protective reach of the law of armed conflict' in M Matthee et al (eds) *Armed conflict and international law: In search of the human face* (2013) 285-302; PV Sellers 'Ntaganda: Re-alignment of a paradigm' (2018) *International Institute of Humanitarian Law* 1.

128 Hill-Cawthorne (n 122) 1191-1195.

129 Sassòli (n 125) 418-419.

130 As above.

of armed conflict (the law of Geneva), to include the advancement of human rights. However, even the most arduous supporter of the existence of individual rights in international humanitarian law would agree that the number of such international humanitarian law obligations is extremely limited. The Court thus can properly exercise subject-matter jurisdiction over a limited number of international humanitarian law obligations.

## 4.2 Competence of the African Court to interpret international humanitarian law

The conclusions reached above, namely, that the African Court has a narrow potential to apply international humanitarian law as part of its subject-matter jurisdiction, have the implication that a need remains for the Court to be able to have recourse to international humanitarian law more broadly in the interpretation and application of human rights norms. Also, international humanitarian law interpretation will often have a bearing on the application of a human rights obligation, without international humanitarian law being directly applied.

Article 7 of the African Court Protocol is titled 'Sources of law', and provides that the Court '*shall apply* the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned'. In distinction, article 3 is titled 'Jurisdiction' and provides that 'the jurisdiction of the Court *shall extend to* all cases and disputes submitted to it concerning the interpretation and application of ... any other relevant human rights instrument ratified by the states concerned'. Deeming article 7 to be an interpretation clause, as most commentators do, leads to the absurd conclusion that the interpretation clause is superfluous, as the Court is mandated to directly apply each of the sources included in the presumed interpretation clause. Moreover, the lack of power on the part of the Court to interpret sources other than 'relevant human rights instruments' may detrimentally act as an incentive to interpret more expansively exactly what such relevant instruments are.<sup>131</sup>

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<sup>131</sup> The Court's conclusion that the treaties under consideration in the *APDH* case were included in the meaning of art 3 was based on tenuous reasoning. Throughout the Court's analysis, the relevant obligations are used as a basis to interpret the right to political participation in terms of art 13 of the African Charter. This approach is more reminiscent of drawing inspiration from a source of law in terms of an interpretation clause or implied powers than applying a treaty. As such, had this option been available to the Court more expressly, it may rather have relied on these treaties for interpretation.

The principle of effectiveness in treaty interpretation provides that ‘interpretation must give meaning and effect to all terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses ... to redundancy or inutility.’<sup>132</sup> The only reading that gives effect to both provisions, without rendering one redundant, is that article 7 in fact is not an interpretation clause. Articles 3 and 7 define separate but closely-related matters: Article 3 does not explicitly state which legal sources the Court is empowered to apply, but instead defines the nature of ‘cases and disputes’ that fall within the Court’s jurisdiction. In contrast, article 7 states explicitly which legal sources the Court ‘shall apply’ – indeed, such use of peremptory language makes it abundantly clear that article 7 is not an interpretation clause.

If the African Court Protocol is silent on interpretation, as I conclude, two possibilities remain upon which the Court may legitimately draw on international humanitarian law in discharging its mandate to apply human rights norms. First, interpretive competence can potentially be sourced externally. Second, interpretive competence may form part of the implied powers of the institution.

#### 4.2.1 *Interpretive competence founded on external sources*

Stemmet suggested that as article 7 of the African Court Protocol empowers the African Court to apply the provisions of the African Charter, the Court is entitled to apply articles 60 and 61 of the African Charter (interpretation clause, discussed above) in determining its interpretive competence.<sup>133</sup> On the other hand, Heyns argued that articles 60 and 61 of the African Charter define only the interpretive competence of the African Commission.<sup>134</sup> A purely textual interpretation of the African Charter compels a conclusion that articles 60 and 61 apply only to the African Commission. However, the African Court and African Commission exist within the same treaty regime – indeed, the Court Protocol is a Protocol to the African Charter, and the Court ‘complement[s] the protective mandate of the African Commission ... conferred upon it by the African Charter’.<sup>135</sup> This complementary relationship is reaffirmed in article 8 of the African Court Protocol, providing for the consideration

<sup>132</sup> *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) AB-1996-1 WTO Appellate Body 23.

<sup>133</sup> A Stemmet ‘A future African Court for Human and Peoples’ Rights and domestic human rights norms’ (1998) 23 *South African Yearbook of International Law* 239. Hailbronner (n 6) 353 has made substantially the same argument.

<sup>134</sup> Heyns (n 89) 169.

<sup>135</sup> Art 2 African Court Protocol.



of cases. Moreover, beyond conceptual complementarity, there exists significant mechanical integration between the Court and the Commission. For instance, the Court Protocol incorporates by reference the admissibility criteria applicable to the Commission, and provides that the Court may request the opinion of the Commission as to whether a given matter is admissible before the Court.<sup>136</sup> A situation in terms of which the African Court and African Commission cannot rely on the same tools in their interpretation and application of the African Charter enhances the risk for institutional fragmentation, and stands at odds with the notion of a harmonised treaty regime. As such, a teleological interpretation suggests that articles 60 and 61 indeed also apply to the Court. This raises the question of whether the African Court can rely only on articles 60 and 61 when applying the African Charter, or whether it will also be able to do so when applying other conventions within its jurisdiction.

As mentioned above, interpretation clauses by nature are constitutional, not legislative. They define part of the institutional competence of a mechanism, and do not contribute normatively to the relevant convention. The implication is that the African Commission is empowered to draw on the sources listed in articles 60 and 61, whether it is applying the African Charter or any other convention within its subject-matter jurisdiction, such as the African Women's Protocol. Yet, other mechanisms that may apply the African Charter as part of their jurisdiction, such as the ECOWAS Community Court of Justice, cannot rely on articles 60 and 61 to inform their interpretive competence.<sup>137</sup> Instead, such mechanisms' jurisdiction and interpretive competence are to be determined by their constitutive treaty. The conclusion that articles 60 and 61 apply also to the African Court does not change the nature of these provisions as constitutional. Therefore, they contribute to the institutional competence of the Court to rely on the listed sources, regardless of whether it is applying the African Charter or any other convention.

Starting with its first judgment on the merits, the African Court endorsed this interpretation. Relying on the African Charter's interpretation clause, the Court held that ICCPR is an 'instrument adopted by the United Nations on human and peoples' rights' and,

<sup>136</sup> Art 6 African Court Protocol.

<sup>137</sup> For the jurisdiction and competence of the ECOWAS Community Court of Justice, see Protocol A/P.1/7/91 on the Community Court of Justice, as amended by Supplementary Protocol A/SP.1/01/05 on the Community Court of Justice.

as such, the Court can ‘draw inspiration’ from it in its interpretation of the African Charter.<sup>138</sup>

#### 4.2.2 *Implied interpretive competence*

The European Convention does not contain an interpretation clause, yet the Court has maintained that it ‘never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein’.<sup>139</sup> While the Court has often rendered judgments related to human rights violations during situations of armed conflict, for a long time it showed a reluctance to interpret international humanitarian law in a manner that would impact on how it applies European Convention rights. However, in the *Hassan* case the European Court had to determine whether the capture and subsequent detention of the applicant’s brother by British forces in Iraq was contrary to article 5 of the European Convention. Article 5 provides for a closed list of exceptions to the general prohibition of the deprivation of liberty. While it was common cause that the basis for detention was security, such security detention is not included within the listed exceptions to article 5. The United Kingdom argued that that the Court should not exercise jurisdiction during the ‘active hostilities phase of an international armed conflict’, as the state’s conduct is regulated by international humanitarian law instead of the European Convention.<sup>140</sup> The Court rejected this argument, confirming that ‘the Convention cannot be interpreted in a vacuum and should so far as possible be interpreted in harmony with other rules of international law of which it forms part’.<sup>141</sup> Ultimately, the Court found no violation of article 5 on the basis that the grounds for deprivation of liberty under article 5 should accommodate security detention as provided for in the Third and Fourth Geneva Conventions.<sup>142</sup>

The European Court’s power to interpret international humanitarian law in the absence of express authorisation is an implied power. In the *Reparations for Injuries* opinion the ICJ held that ‘[u]nder international law, the Organisation must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it

138 *Mtikila v United Republic of Tanzania* (14 June 2013) App 9/2011 & 11/2011 (consolidated) para 107. For a more recent endorsement of this interpretation, see *Frank David Omary & Others v Tanzania* (28 March 2014) App 1/2012 para 73.

139 *Demir and Baykara v Turkey* ECHR (12 November 2008) App 34503/97 para 67.

140 *Hassan* (n 16) para 76.

141 *Hassan* para 77.

142 *Hassan* para 104.

by necessary implication as being essential to the performance of its duties'.<sup>143</sup>

There is on-going debate as to how broadly such implied powers are to be interpreted. This issue turns on whether the powers in question are to be implied from the functions and objectives of the organisation or, more narrowly, from an express provision in the relevant treaty.<sup>144</sup> Akande submits that in order for the implied power to be deemed essential, the ICJ has generally taken the position that 'the power to be implied would enable the Organisation to function to its full capacity as expressed in its objects and purposes; in other words that the implied power would promote the efficiency of the Organisation'.<sup>145</sup> The European Court's implied powers may be inferred from the more narrow formulation, in that it is implied in the Court's power to hear individual applications in terms of article 34 of the European Convention.

If the power to have recourse to international humanitarian law is essential to the performance of the European Court's mandate as a court of human rights, the same holds true of the African Court. As with the European Court, even a narrow approach to implied powers will allow for the African Court to be guided by international humanitarian law in applying the treaties within its subject-matter jurisdiction, as these powers may be implied from articles 3 and 7 of the African Court Protocol. Thus, the Court's competence to interpret international humanitarian law, and norms belonging to other areas of international law, emanates both from articles 60 and 61 of the Charter, as well as the Court's implied powers. However, these are not alternative arguments. Instead, the Court's implied interpretive competence lends further credence to the teleological interpretation that articles 60 and 61 of the African Charter apply to the Court, as advocated above.

## 5 Conclusion

The purpose of this article is to explore the status of international humanitarian law with respect to the mandate of the African Court, and particularly the extent to which the Court is empowered to directly apply international humanitarian law, on the one hand,

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143 *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (11 April 1949) (1949) ICJ Reports 174 182.

144 J Klabbbers *An introduction to international institutional law* (2015) 56-62.

145 D Akande 'The competence of international organizations and the advisory jurisdiction of the International Court of Justice' (1998) 9 *European Journal of International Law* 437 444.

and to rely on international humanitarian law as an interpretive aid in applying human rights norms, on the other. Should all of international humanitarian law fall within the subject-matter jurisdiction of the Court, the question as to the Court's interpretive powers in relation to international humanitarian law would fall away. However, as the above analysis shows, this is not the case. While international humanitarian law is not altogether excluded from the Court's subject-matter jurisdiction, the number of international humanitarian law norms that it can potentially apply directly is very limited. Accordingly, in order for the Court to be able to properly fulfil its human rights mandate during situations of armed conflict, the need to be able to draw on international humanitarian law in the interpretation and application of human rights norms remains. To this end, the African Court indeed has the competence to do so.

International humanitarian law obligations may form part of the African Court's subject-matter jurisdiction in two circumstances: first, where international humanitarian law obligations have been incorporated in an applicable human rights treaty by reference as is, for example, the case with the Kampala Convention. Second, should the Court regard the object and purpose of specific international humanitarian law treaties as including the achievement of human rights, which is likely, and the primary rules of the relevant international humanitarian law obligations entail an individual right (which is rather uncommon). However, where international humanitarian law obligations become justiciable before the Court as a result of incorporation by reference, it is not required that the primary rules of the relevant international humanitarian law obligation entail individual rights. This is so because the relevant international humanitarian law provisions are incorporated into a human rights treaty, as though they appear as rights in that human rights treaty. The fact that the norm entails an individual right comes as a consequence of the norm forming part of a human rights treaty.

Contrary to the majority view, I have concluded that the African Court Protocol does not contain an interpretation clause. Nevertheless, the Court is empowered to rely on international humanitarian law in its interpretation and application of human rights norms. This power may be traced to two sources. First, on the basis of teleological interpretation, informed by the complimentary relationship the Court enjoys with the Commission, the African Charter's interpretation clause applies also to the Court. Second, the Court has implied powers to use international humanitarian law as an interpretive aid. Practically, the Court may be guided by the African Charter's interpretation clause in devising its interpretive strategy

under its implied powers. This would result in the Court adopting a consistent approach. However, there is a caveat. The African Court should take proper account of jurisprudential developments within the relevant treaty framework that it is applying. For example, should the Court apply ICCPR it should, to the extent possible, guard against reaching conclusions inconsistent with the relevant jurisprudence of the Human Rights Committee. By not doing so it would run the risk of enhancing institutional fragmentation, and thus negate legal certainty as to the human rights obligations of member states.