The Subject-Matter Jurisdiction and Interpretive Competence of the African Court on Human and Peoples' Rights in Relation to International Humanitarian Law

Gus Waschefort
LLB (Pretoria) PhD (SOAS); g.waschefort@essex.ac.uk.
Senior lecturer, School of Law and Human Rights Centre, University of Essex; Extraordinary Lecturer, Centre for Human Rights, University of Pretoria
https://orcid.org/0000-0002-2174-0353

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 (IHL), and the related issue of the Court's interpretive competence. It is argued that the Court is indeed competent to directly apply norms of IHL. However, the circumstances under which it can do so are limited to two instances: (i) where IHL norms are incorporated by reference into applicable human rights treaties; and (ii) in the likely scenario that the Court regards some IHL conventions as having a human rights character, the primary rules of the applicable IHL obligations must entail an individual right. Whether a given IHL 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 IHL, determining the extent to which the Court can rely on the interpretation of IHL in applying human rights norms remains pertinent. In this regard it is argued that the Court can rely on IHL 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). Secondly, the Court has an implied power to interpret IHL in applying human rights treaties, as this power is necessary for the Court to discharge its mandate.

1. Introduction

There is general agreement that international human rights law (IHRL) and international humanitarian law (IHL) co-apply during situations of armed conflict, and that their co-application is such that at times IHRL norms are applied in a modified manner so as to ensure their mutual consistency with IHL.[1] A key example in this regard is the application of the right to life in a manner consistent with IHL-compliant lethal targeting during situations of armed conflict.[2] Accordingly, human rights enforcement mechanisms, such as those forming part of the European and Inter-American human rights systems, have recognized the need for contextual interpretation and application of IHRL norms, consistent with the co-application of IHL.[3] 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.[4]

[1] 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* 501 525-527; and C Greenwood 'Human Rights and Humanitarian Law - Conflict or Convergence' (2010) 43 *Case W. Res. J. Int'l L.* 491 503-508.

[2] *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (n 1 above) para 25.

[3] For detailed analysis for 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) 365 365-394; 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) 333 333-364.

[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.

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 IHL 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 IHL 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.[5] Yet, the regulation of armed conflict in Africa, as well as the role of IHL in the African system, has received very little scholarly attention.[6] The prevalence of armed conflict in Africa does not in and of itself inform the appropriateness or desirability of the African Court directly applying IHL instruments, but does speak to the 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 IHL, 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".[7] 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 clarification of the status of IHL under the Court's mandate. Indeed, the African Commission on Human and

[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 has discussed IHL in an African context, (n 5 above) 593-624; Viljoen has focused on an institutional perspective of IHL in the African system, as well as discussing the contributions of the African system to the development of IHL, while Hailbronner has focused more on the normative dimensions to the relationship between IHL and IHRL 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 E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 303-332; F Viljoen 'Africa's contribution to the development of international human rights and humanitarian law' (2001) 1 *African Human Rights Law Journal* 18-38; 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* 339-364.

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

Peoples' Rights (African Commission) failure to adequately serve the needs of victims of armed conflict should not be replicated by the Court.[8] 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 (Court Protocol), direct access to the Court for individuals and non-governmental organizations (NGO) is afforded only in respect of states party who has entered an optional declaration.[9] To date, 10 states have ever made such declarations (Benin, Burkina Faso, Côte d'Ivoire, Gambia, Ghana, Malawi, Mali, Rwanda, Tanzania, and Tunisia).[10] However, Rwanda, Tanzania, Benin and Côte d'Ivoire, have all issued notices withdrawing their declarations.[11] More than 90% of finalized cases that were admissible were instituted on the basis of such direct access.[12] In fact, Tanzania has been respondent in more than half of the Court's finalized, 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.[13] 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 IHL as fully justiciable, without adequate consideration of the legal-technical

[8] Notwithstanding the prevalence of armed conflict on the African continent, and the Commission's express powers to rely on IHL in interpreting the Charter, as provided for in arts 60 & 61 of the African Charter, the Commission has directly relied on IHL 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) 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 (accessed 27 May 2020).

[10] 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-de-la-cour-africaine-les-clarifications-du-ministre-alain-orounla/; Côte d'Ivoire: http://www.gouv.ci/_actualite-article.php?recordID=11086; (all 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, for example, *Armand Guehi v. Tanzania* (7 December 2018) App. No. 001/2015 para 31-34 (*Guehi* case); and *Ally Rajabu v. Tanzania* (28 November 2019) App. No. 007/2015 para 21-31.

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 UN human rights mechanisms engaging in IHL interpretation, precisely on the basis that these states argue IHL to be beyond the remit of the relevant mechanisms.[14] 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, and thereby confirming its legitimacy.

The African Court has the opportunity to develop a sound and consistent approach regarding IHL 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 IHL.[15] They appear to have avoided difficult questions regarding the impact of IHL on the application of human rights norms during armed conflict, rather than concluding that IHL does indeed 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 IHL principles.[16] In stark contrast, in the wake of the ICJ confirming the co-application of IHL and IHRL during situations of armed conflict during 1996,[17] the Inter-American Commission on Human Rights (Inter-American Commission) begun directly applying principles of IHL.[18] However, as Shelton submits, over time the approach of these mechanisms has somewhat converged – the European and Inter-American Courts have shown greater willingness

[14] For 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'' 19 (2008) *European Journal of International Law* 183.
[15] Shelton (n 3 above) 365-394; and Oellers-Frahm (n 3 above) 333-364.
[16] *Hassan v. United Kingdom* ECHR (16 September 2014) App. No. 29750/09 para 76-77.
[17] *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* (n 1 above) para 25.
[18] Cerna identifies the impact of the 1996 ICJ finding by highlighting that during 1995 the Commission's findings in regards to situations of armed conflict were silent on the applicability of IHL, whereas, by 1997, the Commission began directly applying IHL. For example, in the *Milk* case, the Commission found a violation of common art 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 *J. Int'l Human. Legal Stud*. 3 31, fn 94.

to engage with IHL progressively, while the Inter-American Commission has restrained itself in this regard.[19]

This contribution is organized 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 refers to state's parties IHL 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 IHL. The last section considers the subject-matter jurisdiction and interpretive competence of the African Court as far as IHL is concerned.

2. The Legal Consequences of Reference to IHL in Human Rights Treaties

It is not uncommon for human rights treaties to contain provisions that refer to IHL 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 IHL relevant to the child.[20] 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, which provides:

> The 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 IHL obligations, the consequences of reference to women and children's rights declarations and conventions follows the same legal contours as reference to IHL. The Commission has interpreted article 18(3) as incorporating the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) by reference into the African Charter in its entirety.[21] Accordingly,

[19] Shelton (n 3 above) 371.
[20] Art 38(1) CRC.
[21] F Viljoen *International human rights law in Africa* (2012) 253.

even states party to the African Charter who are not party to CEDAW incurs the totality of obligations in terms of CEDAW. Moreover, they are obliged to report on the implementation of CEDAW to the African Commission.[22] By extension of logic, it is reasonable to assume that a communication submitted before the Commission, based on an alleged violation of CEDAW, may be admissible, as it will be consistent with the Charter.[23] This illustrates the importance of this issue for present purposes. If reference to IHL obligations are regarded as incorporating those obligations into a treaty in respect of which the African Court has subject-matter jurisdiction, the Court will also have jurisdiction in respect of the referenced IHL obligations.

The remainder of this section firstly considers the requirements and consequences of incorporation by reference in the law of treaties; secondly, the legal consequences of references to IHL obligations in human rights treaties; and finally, the implications for enforcement mechanisms.

2.1 Incorporation by reference in the law of treaties

Incorporation by refence involves reference within 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 instrument, without reproducing its content.[24] To those bound by the incorporating instrument, the source of the obligation is thus 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.[25] 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

[22] African Commission, Guidelines for National Periodic Reports (1989), part VII.
[23] Art 56(2) African Charter.
[24] JM Keyes Statute 'Incorporation by Reference in Legislation' (2004) 25(3) *Statute Law Revie*w 180; FS Boyd 'Looking Glass Law: Legislation by Reference in the States' (Summer 2008) 68 *Louisiana Law Review* 1201 1210; HR Read 'Is Referential Legislation Worth While' (1941) *Minnesota Law Review* 261 263-266.
[25] See for example, CT Carr 'Legislation by Reference and the Technique of Amendment' (1940) 22(1) *Journal of Comparative Legislation and International Law* 12 12-18; Keyes (n 24 above) 180.

legislation to external documents for purposes other than incorporating the referenced material, for example, informational and amendatory references.[26] 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…"[27] In regards to the intention to incorporate, we find that sometimes implicit incorporation is sufficient.[28] 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.[29] 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 have held: "If there is uncertainty as to what is the document to which the reference is made, no doubt the regulation would be invalid".[30]

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".[31] 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:[32]

[26] Boyd (n 24 above) 1205-1210.
[27] FLA. STAT. § 2.01 (2007).
[28] See, for example, *Wigram v. Fryer* (1887) 36 Ch.D. 87, 56 L. J. Ch. 1098, also discussed by Read (n 24 above) 266.
[29] Boyd (n 24 above) 1213.
[30] *Wright v. T.I.L. Services Pty Ltd* [1956] SR (NSW) 413 at 421.
[31] Art 8*bis* Rome Statute.
[32] Art 15(1) European Convention.

> 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 has labelled the reference to "other obligations under international law", as "incorporation by reference".[33] However, he argues that such obligations are limited to conventions to which the state is party.[34] These suggestions are mutually exclusive – the purpose of incorporation by reference is precisely that the incorporating instrument becomes the source of the obligation, making it irrelevant whether states parties are bound by the referenced material. In contrast, Meron adopts the correct legal position, as his analysis is premised in the understanding that when a provision is properly incorporated into a treaty, states party are bound by that provision, regardless whether they are party to the incorporated treaty.[35] Buergenthals' 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 an incorporation by reference, and that it is indeed limited to conventions to which the state is party.[36]

In the context of treaty law, the question 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 is referenced, but not properly 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.[37] 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

[33] T Buergenthal 'International and Regional Human Rights Law and Institutions: Some Examples of Their Interaction' (1977) 12 *Tex. Int'l L. J.* 321 324
[34] Buergenthal (n 33 above) 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.
[37] Art 34 VCLT.

incorporation by reference will compel a conclusion that broad references to IHL, without identifying the relevant IHL obligations with some degree of specificity, nor clearly articulating an intention to incorporate, will not amount to an 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.[38] 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 is not equally regarded as incorporated. However, a range of other international declarations, which predates the African Charter, also provides for the protection of the rights of women and the child, yet the Committee does not regard these to have been incorporated into the African Charter.[39]

2.2 Reference and recognition of external IHL obligations

The African Charter does not make reference to IHL at all, nor does it contain a derogation clause whereby IHL is referenced indirectly. However, a number of regional African human rights treaties does include such provisions, and they often contain more extensive reference to IHL than conventions at the universal level or those emanating from other regional systems.[40] 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 (Maputo Protocol); and the Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). Each of these treaties provides that states party undertake to "respect and ensure respect for rules of international humanitarian

[38] For an opposing view, see Viljoen (n 21 above) 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 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.
[40] No convention within the European system contains direct references to IHL, and within the Inter-American system it is only art 29 of the Convention on Protecting the Human Rights of Older Persons of 2015 that does so. However, this convention has not generated any relevant practice.

law" relevant to the subject-matter of the given treaty.[41] The genealogy of this provision is important in determining it's consequences. As previously noted, the first expression of this provision came in the CRC, which provides "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" (own emphasis).[42] The *travaux préparatoires* indicate that the words "applicable to them" was specifically inserted to make clear that "States are not obliged to respect 'rules of law' contained in treaties to which they are not a Party".[43] As such, the source of legal obligation remains the IHL conventions to which the state in question is party, and not the provision of the human rights treaty referencing IHL.[44]

In all three relevant African instruments, the words "applicable to them" was omitted in the general obligation to respect and ensure respect for IHL, raising the question 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 IHL conventions to which the state in question is party, as is the case with the CRC. Numerous further references to IHL are found in the African Children's Charter and the Maputo Protocol. However, these provisions expressly indicate that the referenced IHL obligations emanate from the IHL treaties the relevant state has ratified.[45] As such, these provisions clearly have no incorporating effect, and requires no further discussion.

The Kampala Convention also contains a number of provisions referencing IHL, including the general obligation to respect and ensure respect for IHL.[46] 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 organized armed groups that

[41] Art 22(1) African Children's Charter; art 11(1) Maputo Protocol; and art 3(1)(e) Kampala Convention.
[42] Art 38(1) CRC.
[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 https://www.ohchr.org/Documents/Publications/LegislativeHistorycrc2en.pdf Para 126 (accessed 10 January 2020).
[44] M Drumbl & 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.
[45] Arts 22(3) & 23(1) African Children's Charter; and art 11(2) Maputo Protocol.
[46] Arts 3(1)(e), 4(4)(b) & 5(8) Kampala Convention references.

are distinct from the armed forces of the state".[47] Article 7(3) provides, specifically: "The 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 IHL by reference. The provision prohibits members of armed groups from engaging in a closed list of nine specific categories of conduct against IDPs: carrying out arbitrary displacement; hampering protection and assistance; denying the right to live in satisfactory conditions; restricting freedom of movement; recruitment of children; forcible recruitment, hostage taking, sexual slavery and trafficking; impeding humanitarian assistance; harming humanitarian personnel or resources; violating the civilian and humanitarian character of places of shelter.[48]

The purpose of incorporating IHL 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 IHRL, which traditionally requires states to be the conduits of obligation for non-state entities.[49] Second, while the prohibited conduct is identified, the developed law emanating from IHL 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 part in hostilities under any circumstances".[50] 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 to the Protection of Victims of International Armed Conflicts (API), or article 4(3)(c) of Protocol II Additional to the Geneva Conventions on to 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

[47] Art 1(e) Kampala Convention.
[48] Art 7(5) Kampala Convention.
[49] In regards 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) 523-544. In regards to IHL creating obligation for armed groups, see, for example, J Kleffner 'The applicability of the law of armed conflict and human rights law to organized armed groups' in E de Wet & J Kleffner (eds) *Convergence and conflicts of human rights and international humanitarian law in military operations* (2014) 49-64; M Sassòli *How does law protect in war? Volume* (2011) 347-349.
[50] Art 7(5)(e) Kampala Convention.

of protection than both Protocols.[51] However, the incorporation of IHL is useful in providing unambiguously for these obligations to apply to armed groups. In this instance, the intention to incorporate is clearly expressed through the words "shall be governed by" IHL, and the referenced material is sufficiently identified as those parts of IHL 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 IHL 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 against armed groups before the African Court, it is rather unlikely that the Court will apply IHL in this context.

The question remains what the legal consequences are where reference to IHL is made, but IHL 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.[52] The Committee made reference to IHL in its analysis of the right to education, on the basis of article 22(1) of the African Children's Charter, which provides: "State Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child."[53] In regards to the equivalent provision in the 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".[54] However, the Committee went further. In interpreting the right to education in light of applicable IHL, the Committee recognized that, "the principle of distinction under international humanitarian law demands that educational facilities are protected as long as they are civilian objects".[55] However, on the basis of available evidence the Committee could not "fault the margin of appreciation with which the State planned

[51] Art 22(2) African Children's Charter.
[52] Communication 1/2005, *Hansungule and others v. The Government of Uganda*, twenty first Ordinary Session of the African Committee of Experts on the Rights and Welfare of the Child, para 5.
[53] *Hansungule* communication para 66.
[54] R Brett 'Child Soldiers: Law, Politics and Practice' (1996) 4 *Int'l J. Child. Rts.* 115 116.
[55] *Hansungule* communication para 67.

and conducted its military operations that could qualify as an indiscriminate attack on schools".[56] As such, the Committee used a rather generic reference to IHL obligations (contained in article 22) as a vehicle through which to engage in contextual analysis that considers the impact of IHL on the state in giving effect to its human rights obligations.

Reference to IHL obligations in human rights treaties can have significant implications for the African Court. Where IHL obligations are both referenced and incorporated, as with article 7 of the Kampala Convention, the relevant IHL 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 IHL obligations, without incorporating these obligations, have value in acknowledging the relevance of IHL as well as the nexus between the observance of IHL 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. The Interpretive Competence of African Quasi-Judicial Mechanisms in Relation to IHL

The Court Protocol is not a self-contained treaty, but instead, forms part of the African Charter regime. Moreover, the complimentary relationship that the African Court shares with the African Commission is confirmed in the Court Protocol.[57] As a complimentary mechanism, the African Commission and its established practice and jurisprudence has bearing on an enquiry into the African Courts interpretive competence

Interpretation clauses contributes 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, provides:[58]

[56] *Hansungule* communication para 68.
[57] Arts 2 & 8 Court Protocol.
[58] Art 46 African Children's Charter.

> 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 Organization 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 IHL is indeed included in its scope, it then has to be by virtue of regarding IHL as part of "international law on human rights". In the *Hansungule* communication the Committee premised its discussion of IHL on article 22, which expressly references IHL obligations, and not the interpretation clause.[59] The Committee did reference the interpretation clause in the admissibility section of the finding, to justify its reliance on findings of the African Commission.[60] While not definitive, this suggests that the Committee did not regard the interpretation clause as also providing an authority to interpret IHL, and by extension that IHL does not form part of "international law on human rights" for purposes the interpretation clause.

The interpretation clause of the African Charter is two-tiered, and provides:[61]

> The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members.
>
> The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by member states of the Organization of African Unity, African practices consistent with international norms on human and people's rights, customs generally accepted as law, general principles of law recognized by African states as well as legal precedents and doctrine.

[59] *Hansungule* communication para 66.
[60] *Hansungule* communication para 24.
[61] Art 60 & 61 African Charter.

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 whether the first tier implicitly includes IHL is mooted by the second tier, which is open-ended, and contains no limitations in regards to the subject-matter of the sources of law taken into consideration. IHL conventions are undoubtedly captured in the second tier of the interpretation clause. The two tiered approach serves an organizational 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 in regards to IHL. For the most part, the Commission has limited itself to confirming the applicability of all Charter rights during situations of armed conflict.[62] However, in *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda* (*DRC c*ommunication), the Commission engaged in a more substantive analysis of specific IHL standards for the first time.[63] The *DRC* communication was an inter-state communication, relating to "grave 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 of 1998.[64] 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.[65]

The Commission frequently relied on the interpretation clause of the Charter both in regards 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 IHL, and

[62] See further, Viljoen 'an institutional approach' (n 6 above) 306-308; and Hailbronner (n 6 above) 347-348.
[63] *Democratic Republic of the Congo v. Burundi, Rwanda and Uganda* (2004) AHRLR 19 (ACHPR 2003) (*DRC* communication).
[64] *DRC* communication para 3-7.
[65] *DRC* communication para 3-9.

did not fall within the mandate of the Commission. In this regard, the Commission held that:[66]

> 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 Commission confirmed that the Geneva Conventions and API "constitute part of the general principles of law recognized by African States";[67] and further confirmed that IHL conventions "fall on all fours with the category of special international conventions".[68] While the Commission indicated that IHL is merely to be taken into consideration in the "determination" of the case,[69] it engaged in detailed analysis of specific IHL provisions throughout the finding.

The Commission's approach has led to divergent views as to whether it went beyond its authority to consider IHL conventions as subsidiary measures to determine the principles of law. Viljoen has argued that the Commission appropriately sought interpretive guidance from IHL, in finding violations of human rights law.[70] IHL 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.[71] He highlighted that the Commission confirmed "a definite dividing line between the 'province' of IHL, on the one hand, and the human rights 'mandate' of the Commission",[72] on the other, suggesting IHL conventions do not form part of "international law on human and peoples' rights".[73] Accordingly, he concluded that the Commission held that it is not empowered to find violations of IHL, but it is empowered to rely on IHL in interpreting the rights within its subject-matter jurisdiction.[74] Hailbronner disputes this conclusion – she focuses strongly on the Commission's detailed analysis of IHL, which at times

[66] *DRC* communication para 64.
[67] *DRC* communication para 70.
[68] *DRC* communication para 78.
[69] *DRC* communication para 70.
[70] Viljoen 'an institutional approach' (n 6 above) 314.
[71] Viljoen 'an institutional approach' (n 6 above) 317.
[72] Viljoen 'an institutional approach' (n 6 above) 308.
[73] This conclusion is also supported by Hailbronner (n 6 above) 346.
[74] Viljoen 'an institutional approach' (n 6 above) 308.

is done without reference to rights contained in the African Charter.[75] For example, the Commission found that taking article 56 of API and article 23 of Hague Convention (II) into account, as read with the African Charter's interpretation clause (articles 60 and 61), that the besiegement of a hydroelectric dam in Lower Congo province, amounts to a violation of the African Charter.[76] However, the Commission does state in a later paragraph that the besiegement of the dam amounts to a violation of the right to property under the African Charter.[77] Hailbronner argues that during its analysis, the Commission ocellated between applying IHL directly, and merely relying on IHL for interpretive purposes.[78] 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".[79]

The Commission limited its finding to violations of the African Charter.[80] Viljoen is correct in concluding that the direct application of IHL does not fall within the mandate of the Commission. Hailbronner exaggerates the implications of the Commission's detailed interpretation of IHL – regardless of the extent of discussion of IHL, the Commission did not purport to find a violation of IHL. However, her critique of the Commission for poorly articulating its reasoning is well founded. Both Viljoen and Hailbronner suggested 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").[81]

This erroneous interpretation is based on the Commission stating, "the Respondent States are in violation of the Charter with regard to the just noted article 23".[82] The "just noted article 23" refers to article 23 of the Hague Convention II, and not article 23

[75] Hailbronner (n 6 above) 350-352.
[76] *DRC* communication para 83-84. It is interesting to note that the Commission did not explicitly address the status of the Hague Convention (II) under art 61 of the Charter, as it did in regards to the Geneva Conventions and Optional Protocols.
[77] Art 14 African Charter, *DRC* communication para 88.
[78] Hailbronner (n 6 above) 349.
[79] Viljoen 'an institutional approach' (n 6 above) 314, quoted in Hailbronner (n 6 above) 350
[80] *DRC* communication operative paragraph. The 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.
[81] Hailbronner (n 6 above); 350 Viljoen 'an institutional approach' (n 6 above) 316
[82] *DRC* communication para 80.

of the 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 in regards 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 as "supportive of the Commission's stance".[83] 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".[84] This suggests that the Commission linked article 14, the right to property, to the besiegement of the dam.[85]

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

> …the failure to grasp an underlying distinction: international humanitarian law is built upon neutrality or indifference as to the legality of the 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*.[86]

The existence of an international armed conflict (IAC) in the DRC at the time is a precondition to the application of API and Hague Convention (II) to the besiegement

[83] *Prosecutor v. Zejnil Delalic et al* (16 November 1998) ICTY-IT-96-21-T (*Celebici* case) cited in *DRC* communication para 85.
[84] *Celebici* case para 587, cited in *DRC* communication para 85.
[85] See also, *DRC* communication para 88.
[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.

of the dam. Moreover, "the legality of the war itself" is irrelevant in determining the lawfulness of the besiegement of the dam under IHL. 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 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 IHL provisions is non-sensical, and not supported by the finding of the Commission.

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

4. The African Court on Human and Peoples' Rights

There are three avenues through which the African Court can engage with IHL: 1) through reference to IHL in the substantive norms of relevant human rights treaties; 2) by way of its subject-matter jurisdiction; and 3) through its interpretive competence.

With regard to the first category, it is important to recall that, where there is a proper incorporation by reference of IHL obligations into a human rights treaty in respect of which the Court may exercise subject-matter jurisdiction, the Court will have jurisdiction in respect of the incorporated IHL obligations. On the other hand, reference to IHL obligations which are not incorporated, serves to acknowledge the relevance of IHL to the rights under discussion, as well as the nexus between the observance of IHL and the enjoyment of human rights, and provides a basis upon which to engage in contextual analysis that considers the impact of IHL on the state in giving effect to its human rights obligations. However, as the above discussion of 'reference to IHL 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".[87] 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 section will consider the extent to which the subject-matter jurisdiction of the Court includes IHL; and thereafter, the interpretive competence of the Court with respect to IHL.

4.1 Subject-Matter Jurisdiction

Upon adoption of the Protocol leading commentators were divided on the question 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 be ratified by the parties before the Court.[88] On the other end of the spectrum, concern was expressed regarding the implications of such broad subject-matter jurisdiction.[89] 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,[90] or even more

[87] Art 3(1) Court Protocol.
[88] See, amongst others, M Mutua 'The African Human Rights Court: A Two-Legged Stool?' (1999) 21 *Hum. Rts. Q.* 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(2) *Law & Practice of International Courts and Tribunals* (2017) (2017) 186 193.
[90] F Viljoen (n 21 above) 435-436; Heyns (n 89 above) 165-171.

restrictively, to treaties "that make express provision for adjudication by the … Court".[91]

It is clear that only treaties that are ratified by the states concerned fall within article 3. However, the Court has made some questionable assertations 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.[92] 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.[93] More recently, in *Robert John Penessis v. Tanzania*, the 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.[94] 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".[95] More recently, the Court found it lacked subject-matter jurisdiction in regards 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.[96] 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 that 'relevant' simply relates to whether the substance of the treaty reflects the violations of rights alleged in a given matter. The Court has, for example, consistently exercised subject-matter jurisdiction in respect of the ICCPR.

4.1.1 The Nature and Character of "Human Rights Instruments" under the Court Protocol

[91] Heyns (n 89 above) 168.
[92] *Anudo Ochieng Anudo v. Tanzania* (22 March 2018) App. No. 012/2015 para 132(v).
[93] *Anudo* case para 76.
[94] *Robert John Penessis v. Tanzania* (28 November 2019) App. No. 013/2015 paras 85 & 103.
[95] *Penessis* case para 168(v).
[96] *Sebastien Germain Ajavon v. Benin* (28 March 2019) App. No 013/2017 at para 45.

The legal consequences of a breach of a norm of international law is determined by the primary rule of the norm.[97] For present purposes, we can distinguish between: 1) norms of which the primary rule entails human rights for individuals; 2) norms of which the primary rule entails individual rights not of a human rights character; and 3) norms of which the primary rules do not entail individual rights, but only state responsibility. The Court Protocol does not alter the nature of primary rules contained in third treaties, for example, IHL treaties. The consensual nature of treaty obligations dictates that states are only bound 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 Court cannot apply norms the primary rules of which do not entail individual rights. However, where a norm does indeed provide 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* case), the Court first engaged directly with questions as to whether a particular treaty or treaty provision qualifies as a "human rights treaty".[98] 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 Charter on Democracy) and the ECOWAS Protocol on Democracy and Good Governance (ECOWAS Protocol).[99] In considering whether these instruments are included in the scope of article 3 of the Court Protocol, the Court held that:[100]

> … in 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.

[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. No. 001/2014.
[99] *APDH* case para 3 & 20.
[100] *APDH* case para 57.

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.[101] 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 Court illustrates what it means with 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.[102] Article 13(1) provides "every citizen shall have the right to participate freely in the government of his country…", and article 26 provides, "states parties to the present Charter shall have the duty to guarantee the independence of the Courts…". Curiously, the Court never identifies either a provision that enunciates specific rights, or 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 Court was confronted with the question whether a norm that enunciates a subjective right amount 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.[103] In regards to the alleged failure to provide consular assistance, the applicant relied upon article 36(1)(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".[104] In

[101] See, Viljoen (n 21 above) 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.
[102] *APDH* case para 59-60.
[103] *Guehi* case para 9.
[104] *Guehi* case para 35.

particular, it provides that the authorities of the arresting state will "inform the person concerned without delay of his rights under this sub-paragraph".[105]

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.[106] The ICJ characterized 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 amount to human rights.[107] In the *Avena* case, Mexico argued that article 36(1) amounts to a human right, and that as such, this right should be guaranteed in the territory of all states party, 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".[108] The ICJ held that:[109]

> 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 found, at least in *obiter dictum*, that the individual rights espoused in article 36(1) are not human rights.[110] 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 refence 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 characterizing the said right as a human right. Significantly, the Court focused its analysis on whether article 36(1) of the VCCR

[105] Arts 36(1)(b) & (c) VCCR.
[106] *LeGrand (Germany v. United States of America)* (27 June 2001) (2001) ICJ Reports 466 para 77.
[107] *LeGrand* case para 78.
[108] *Avena and Other Mexican Nationals (Mexico v. United States of America)* (31 March 2004) (2004) ICJ Reports 2004 12 para 124.
[109] *Avena case* para 124.
[110] Rachovitsa (n 101 above) 265.

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

Unfortunately, in the *Guehi* case the African Court never analyzed, nor answered, the question whether article 36(1) of the VCCR amounts to a human rights treaty for purposes of article 3 and 7 of the Court Protocol. While the Court recognized 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",[111] it did not recognize a right to consular assistance, as such. 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 the ICCPR, also guarantee the rights under article 36(1) of the VCCR.[112] This is a spurious claim, given that neither the African Charter nor the 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 Court concluded that it had subject-matter jurisdiction in relation to the African Democracy Charter and the ECOWAS Protocol, as the relevant obligations of these treaties are "aimed at implementing the rights prescribed by article 13 of the African Charter".[113] 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 Charter on Democracy, nor the

[111] *Guehi* case para 95.
[112] *Guehi* case para 37-38.
[113] *APDH* case para 63.

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 of rights. The Court's judgment leaves open the question 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 article 3, as they provide for obligations for the consequent enjoyment of rights, the Court relied on the European Court's judgment in *Mathieu-Mohin and Clerfayt v. Belgium* (*Mathieu-Mohin*).[114] In *Mathieu-Mohin* it was alleged that Belgium was acting in violation of article 3 of Protocol I to European Convention, which provides "The 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 1-4 "shall be regarded as additional Articles to the Convention and all the provisions of the Convention shall apply accordingly".[115] 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.[116] 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 Courts 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

[114] *Mathieu-Mohin and Clerfayt v. Belgium* ECHR (2 March 1987) Series A 113, para 46-51.
[115] Art 5 Protocol 1 European Convention.
[116] See further, Rachovitsa (n 101 above) 262-262.

provision falls within its jurisdiction. The existing jurisprudence allows few definitive conclusions to be reached. The conclusions that can be reached, includes, the inclusion of UN human rights treaties and treaties of RECs as "relevant" human rights treaties; and that "human rights instrument" includes not only treaties that enunciate rights, but also those that create mandatory state obligations for the consequent enjoyment of rights. However, the 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 in which a norm that is expressed as a mandatory obligation for the consequent enjoyment of a right, does indeed amount to an individual right, is rare. 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 IHL conventions may be regarded as "human rights instruments" for purposes of articles 3 and 7.

4.1.2 IHL 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".[117] Sassòli *et al* confirms that in regards to IHL, "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".[118] The traditional approach suggests that, while individuals are the beneficiaries of many IHL 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 IHL 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 IHL obligation do indeed confer individual rights.[119]

[117] R Provost *International Human Rights and Humanitarian Law* (2002) 28-30.
[118] M Sassòli (n 49 above) 387.
[119] See for example, T Meron 'The Humanization of Humanitarian Law' (2000) 94(2) *American Journal of International Law* 239 275.

The dissenting and sperate opinions of Judges Koroma and Cançado Trindade, respectively, in the *Jurisdictional Immunities* case of the ICJ, illustrates well the depth of disagreement on this issue. Judge Cançado Trindade opined, that both article 3 of Hague Convention (IV) as well as article 91 of API "confer the right to reparation at international level to victims of those grave breaches";[120] while Judge Koroma is of the view that nothing in either convention supports this proposition.[121] On the municipal plane, the courts of the Netherlands and Greece recognize individual rights conferred by IHL, yet, the courts of Japan and the United States studiously rejects such claims.[122]

The International Law Commission's (ILC) commentaries to the Draft articles on Responsibility of States for Internationally Wrongful Acts of 2001 (Draft Articles), recognizes 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".[123] Moreover, the ILC commentary clarifies that the question whether persons or non-state entities are entitled to invoke responsibility on their own account, will be determined by the particular primary rule.[124] In reference to the Draft Articles and ILC commentaries, Sassòli concludes that individuals are beneficiaries of IHL obligations. Moreover, as a matter of substantive law, some provisions of conventional IHL affords individual victims a legal entitlement.[125] He 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 IHL does not recognize a "general rule excluding members of armed forces from protection against violations by members of the same armed

[120] *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* (3 February 2012) (2012) ICJ Reports 99, dissenting opinion of Judge Cançado Trindade, para 70.
[121] *Jurisdictional Immunities* case (n 120 above), separate opinion of Judge Koroma, para 9.
[122] For further discussion, see L Hill-Cawthorne 'Rights under International Humanitarian Law' (2018) 28(4) *European Journal of International Law* 1187 1206-1207.
[123] Art 28 Commentaries to the Draft Articles (n 97 above) 87-88, para 3.
[124] Art 33(2) Commentaries to the Draft Articles (n 97 above) 95, para 4.
[125] M Sassòli 'State responsibility for violations of international humanitarian law' (2002) 84 *International Review of the Red Cross* 401 418-419.

force".[126] 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 own force violations. While this issue has generated much debate, there is growing recognition of own force violations in IHL.[127] This would not be possible, if one adheres strictly to the traditional conception of IHL.

The traditional perspective of IHL rests on attributing certain characteristics to IHL, as a regime. For example, according to Hill-Cawthorne whether one adheres to the traditional perspective, or instead recognizes the individual rights perspective, rests on differences of opinion regarding the *raison d'être* of IHL.[128] 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 IHL, but instead the legal character of the individual norm in question.[129]

It is clear that there is significant support for the view that the primary rules of some norms of conventional IHL does indeed provide for individual rights. However, as Sassòli suggests, this determination is to be made with reference to the specific norm in question.[130] The existence of individual rights in IHL 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 IHL norms as forming part of its subject-matter jurisdiction. Firstly, it will have to determine that the object and purpose of the relevant IHL treaties include the advancement of human rights. Secondly, it will have to

[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"* No. ICC-01/04-02/06 OA5 (15 June 2017) para 63-64.
[127] See, for example, 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*.
[128] Hill-Cawthorne (n 122 above) 1191-1195.
[129] Sassòli (n 125 above) 418-419.
[130] Sassòli (n 125 above) 418-419.

determine that the primary rules of the individual IHL norms it seeks to apply does in fact entail an individual right. To do so, the Court cannot adopt the traditional approach to IHL, as discussed above. Given its finding *APDH*, it is likely that the Court will regard the object and purpose of IHL obligations, particularly those relevant to the protection of victims 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 IHL would agree that the number of such IHL obligations is extremely limited. The Court can thus properly exercise subject-matter jurisdiction over a limited number of IHL obligations.

4.2 Competence of the African Court to interpret IHL

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

Article 7 of the Court Protocol is titled "sources of law", and provides 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 "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.[131]

[131] 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".[132] The only reading that gives effect to both provisions, without rendering one redundant, is that article 7 is in fact not an interpretation clause. Articles 3 and 7 define separate, but closely related matters: article 3 does not state explicitly which legal sources the Court is empowered to apply, but instead defines the nature of "cases and disputes" that falls 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 Court Protocol is silent on interpretation, as I conclude, two possibilities remain upon which the Court may legitimately draw on IHL in discharging its mandate to apply human rights norms. First, interpretive competence can potentially be sourced externally. Secondly, 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 Court Protocol empowers the Court to apply the provisions of the African Charter, the Court is entitled to apply articles 60 and 61 of the Charter (interpretation clause, discussed above) in determining its interpretive competence.[133] On the other hand, Heyns argued that articles 60 and 61 of the African Charter defines only the interpretive competence of the Commission.[134] A purely textual interpretation of the African Charter compels a conclusion that articles 60 and 61 applies only to the Commission. However, the Court and Commission exists within the same treaty regime – indeed, the Court Protocol is a Protocol to the African Charter, and the Court "complement the protective mandate of the African Commission … conferred upon it by the African Charter".[135] This complementary

[132] *United States – Standards for Reformulated and Conventional Gasoline* (29 April 1996) AB-1996-1 WTO Appellate Body 23.
[133] A Stemmet 'A Future African Court for Human and Peoples' Rights and Domestic Human Rights Norms' (1998) 23 *South African Yearbook of International Law* 233 239. Hailbronner has made substantially the same argument (n 6 above) 353.
[134] Heyns (n 89 above) 169.
[135] Art 2 Court Protocol.

relationship is reaffirmed in article 8 of the Court Protocol, providing for the consideration of cases. Moreover, beyond conceptual complementarity, there exists significant mechanical integration between the Court and 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.[136] A situation in terms of which the African Court and 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 harmonized treaty regime. As such, a teleological interpretation suggests that articles 60 and 61 indeed also applies to the Court. This raises the question whether the Court can only rely on articles 60 and 61 when applying the Charter, or will it 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 being, the Commission is empowered to draw on the sources listed in articles 60 and 61, whether it is applying the Charter or any other convention within its subject matter jurisdiction, such as the Maputo Protocol. Yet, other mechanisms that may apply the Charter as part of their jurisdiction, such as the Economic Community of West African States (ECOWAS) Community Court of Justice, cannot rely on articles 60 and 61 to inform their interpretive competence.[137] Instead, such mechanism's jurisdiction and interpretive competence is to be determined by their constitutive treaty. The conclusion that articles 60 and 61 apply also to the 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 Charter, or any other convention.

[136] Art 6 Court Protocol.
[137] For the jurisdiction and competence of the ECOWAS Community Court of Justice, see Protocol A/P.I/7/91 on the Community Court of Justice, as amended by Supplementary Protocol A/SP.1/01/05 on the Community Court of Justice.

Starting with its first judgment on the merits, the Court endorsed this interpretation. Relying on the Charter's interpretation clause, the Court held that the ICCPR is an "instrument adopted by the United Nations on human and peoples' rights", and as such, the Court can "draw inspiration" from it in its interpretation of the Charter.[138]

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".[139] While the Court has often rendered judgments related to human rights violations during situations of armed conflict, for a long time it showed reluctance to interpret IHL 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 IHL instead of the European Convention.[140] 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".[141] 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.[142]

The European Court's power to interpret IHL in the absence of an express authorization is an implied power. In the *Reparations for Injuries* opinion, the ICJ held:

---

[138] *Mtikila v. United Republic of Tanzania* (14 June 2013) App. No. 009/2011 & 011/2011 (consolidated) para 107. For a more recent endorsement of this interpretation, see *Frank David Omary and Others v. Tanzania* (28 March 2014) App. No. 001/2012 para 73.
[139] *Demir and Baykara v.Turkey* ECHR (12 November 2008) App. No.34503/97 para 67.
[140] *Hassan* case para 76.
[141] *Hassan* case para 77.
[142] *Hassan* case para 104.

> Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.[143]

There is ongoing 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 organization, or, more narrowly, from an express provision in the relevant treaty.[144] 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 Organization 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 Organization"[145] The European Court's implied powers can 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 IHL 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 IHL in applying the treaties within its subject-matter jurisdiction, as these powers can be implied from articles 3 and 7 of the Court Protocol. Thus, the Court's competence to interpret IHL, 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 Charter applies to the Court, advocated for above.

5. Conclusion

[143] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion* (11 April 1949) (1949) ICJ Reports 174 at 182.
[144] J Klabbers *An introduction to international institutional law*, 3rd ed, (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.

The purpose of this article is to explore the status of IHL with respect to the mandate of the African Court, and particularly the extent to which the Court is empowered to directly apply IHL, on the one hand, and rely on IHL as an interpretive aid in applying human rights norms, on the other. Should all of IHL fall within the subject-matter jurisdiction of the Court, the question as to the Court's interpretive powers in relation to IHL would fall away. However, as the above analysis shows, this is not the case. While IHL is not altogether excluded from the Court's subject-matter jurisdiction, the number of IHL 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 IHL in the interpretation and application of human rights norms remains. To this end, the Court does indeed have the competence to do so.

IHL obligations may form part of the Court's subject-matter jurisdiction in two circumstances. First, where IHL obligations have been incorporated in an applicable human rights treaty by reference, as is for example the case with the Kampala Convention. Secondly, should the Court regard the object and purpose of specific IHL treaties as including the achievement of human rights, which is likely, and the primary rules of the relevant IHL obligations entail an individual right (which is rather uncommon). However, where IHL obligations become justiciable before the Court as a result of incorporation by reference, it is not required that the primary rules of the relevant IHL obligation entail individual rights. This is so because the relevant IHL provisions are incorporated into a human rights treaty, as if 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 Court Protocol does not contain an interpretation clause. Nevertheless, the Court is empowered to rely on IHL in its interpretation and application of human rights norms. This power can 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. Secondly, the Court has implied powers to use IHL 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 Court should take proper account of jurisprudential developments within the relevant treaty framework that it is applying. For example, should the Court apply the ICCPR it should, to the extent possible, guard against reaching conclusions inconsistent with the relevant jurisprudence of the Human Rights Committee. Not doing so would run the risk of enhancing institutional fragmentation, and thus negate legal certainty as to the human rights obligations of member states.