

University of Groningen

On New “Judicial Animals”

Rachovitsa, Adamantia

Published in:
Human Rights Law Review

IMPORTANT NOTE: You are advised to consult the publisher's version (publisher's PDF) if you wish to cite from it. Please check the document version below.

Document Version
Early version, also known as pre-print

Publication date:
2018

[Link to publication in University of Groningen/UMCG research database](#)

Citation for published version (APA):

Rachovitsa, A. (2018). On New “Judicial Animals”: The Curious Case of an African Court with Material Jurisdiction of a Global Scope . Human Rights Law Review.

Copyright

Other than for strictly personal use, it is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), unless the work is under an open content license (like Creative Commons).

Take-down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

Downloaded from the University of Groningen/UMCG research database (Pure): <http://www.rug.nl/research/portal>. For technical reasons the number of authors shown on this cover page is limited to 10 maximum.

**On New “Judicial Animals”:
The Curious Case of an African Court with Material Jurisdiction of a Global Scope**

Dr Adamantia Rachovitsa*

Abstract

The paper aims to think anew about the jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights ('Court'). The Court, based in Arusha, enjoys a distinctive contentious jurisdiction which extends to the interpretation and application of any other relevant human rights instrument ratified by the States concerned. The Court's striking features set it apart from human rights bodies and most international courts. The Court's jurisdiction has been received with scepticism and fear arguing that, if the Court extends its jurisdiction over treaties other than the African Charter on Human and Peoples' Rights, this will lead to jurisprudential chaos and will undermine the formation of the African *corpus juris*. The article discusses the case law of the Court since 2013, when the Court started functioning, and it argues that these concerns are over-emphasised. The analysis underlines the shifting authority of specialised and/or regional courts; the need not to overstress but to appreciate positively instances of divergence; and the consideration of new conceptual and geographical *topoi*, in which international law is to be found and produced.

KEYWORDS: judicial dispute settlement, international courts, African Court on Human and Peoples' Rights, jurisdiction *ratione materiae*

1. Introduction

The paper discusses and aims to think anew about the jurisdiction *ratione materiae* of the African Court on Human and Peoples' Rights ('Court' or 'ACtHPR'). The Court, based in Arusha, enjoys a distinctive contentious jurisdiction. Article 3(1) Protocol to the African Charter on Human and Peoples' Rights ('ACHPR') reads

The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned.¹

* Assistant Professor of Public International Law, Law Faculty, University of Groningen, The Netherlands. Email: a.rachovitsa@rug.nl.

¹ African Charter on Human and Peoples' Rights, 1981, Organisation of African Unity, CAB/LEG/67/3 rev. 5 (1982) 21 ILM 58 ('ACHPR' or 'Charter'); Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, 1998 ('Protocol to the ACHPR').

Article 7 Protocol to the ACHPR (sources of law) reads in identical terms.² The distinctiveness of the ACtHPR's jurisdiction lies in the fact that its mandate extends to the interpretation and application of any other relevant human rights instrument ratified by the States concerned. In contrast, the jurisdiction of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights is limited to matters concerning the interpretation and application of the European Convention on Human Rights ('ECHR')³ and the Inter-American Convention on Human Rights ('IACHR'), respectively.⁴ Equally narrow is the competence of the United Nations ('UN') human rights bodies each of which have been entrusted with monitoring a given treaty. Consequently, the ACtHPR deviates from the "prototype" of the jurisdiction of a human rights court/body. The ACtHPR's striking features set it apart also from most international courts,⁵ arguably qualifying it as a new "judicial animal" that introduces a variance in 'judicial genome mapping'.⁶

The ACtHPR's jurisdiction to apply, find a violation of, and monitor any other relevant human rights instrument ratified by the States concerned has been received with scepticism and fear. International law scholars, especially (African) scholars writing extensively over the years on the African system on human rights, treat Article 3(1) Protocol to the ACHPR as a problematic occurrence, a flaw in the design, or even a mistake in the drafting process.⁷ They argue that if the Court extends its jurisdiction over treaties other than the ACHPR, this will lead to jurisprudential chaos⁸ and will undermine the formation of the African *corpus juris*.⁹ However, the ACtHPR has proved itself willing to exercise its material jurisdiction to the fullest possible extent. It regularly examines and pronounces on breaches of UN, regional and sub-regional treaties on human rights, and orders States to comply with their obligations under

² 'The Court shall apply the provisions of the Charter and any other relevant human rights instruments ratified by the States concerned'.

³ 1950, ETS 5. Article 32.

⁴ 1969, OAS TS 36. Article 62.

⁵ Romano, 'The Proliferation of International Judicial Bodies: The Pieces of the Puzzle' (1999) 31 *New York University Journal International Law & Policy* 709 at 721-722. See also Alter, Helfer and McAllister, 'A New International Human Rights Court for West Africa: The ECOWAS Community Court of Justice' (2013) 107 *American Journal International Law* 737 at 738.

⁶ Higgins, 'Foreword' in Sands, Mackenzie and Shany (eds), *Manual on International Courts and Tribunals*, 1st edn (1999) at vii.

⁷ Viljoen, *International Human Rights Law in Africa*, 2nd edn (2012) at 439, footnote 185.

⁸ Heyns, 'The African Regional Human Rights System: In Need of Reform?' (2001) 2 *African Human Rights Law Journal* 155 at 167.

⁹ *Ibid.*; Mujuzi, 'The African Court on Human and Peoples' Rights and Its Protection of the Right to a Fair Trial' (2017) 16 *Law & Practice of International Courts and Tribunals* 187 at 193.

those treaties. Curiously, not much has been written since 2013, when the Court started functioning and delineating the contours of its jurisdiction.¹⁰

This paper discusses the case law of the Court since 2013, and the ways in which it has construed its jurisdiction. The case law of the Economic Community of West African States Community Court of Justice (ECCJ) is also brought into specific parts of the discussion, for the purpose of further illuminating the ACtHPR's practice. Contrary to mainstream scholarship, the paper submits that the ACtHPR's different treaty design forms new opportunities and introduces a welcome difference in judicial dispute settlement. A large part of the criticism and scepticism towards the Court's broad jurisdiction has inherited a tradition of exaggerated and counterproductive anxiety regarding where the limitations of a specialised and/or regional court lie — even when, as is the case of the ACtHPR, the court is explicitly authorised to interpret and apply other treaties. This anxiety is connected to the limitations of the jurisdiction of regional and/or specialised international courts (on human rights) and the (alleged) ensuing risks of interpreting and developing international law.

It should be noted that the ACtHPR forms part of a series of developments in the judicial settlement of international disputes. Although the multiplication of international courts has taken place to a great extent on the basis of “templates” used to design other courts,¹¹ novelties have found their way onto this legal landscape. Such novelties include the emergence of blended models of adjudication;¹² the creation of courts melding economic and human rights matters into a single jurisdiction;¹³ and the establishment of international courts on human

¹⁰ Some few, recent works are: Viljoen, ‘Understanding and Overcoming Challenges in Accessing the African Court on Human and Peoples’ Rights’ (2018) 67 *International Comparative Law Quarterly* 63; Alter, Gathii and Helfer, ‘Backlash against International Courts in West, East and Southern Africa: Causes and Consequences’ (2016) 27 *European Journal International Law* 293; Mujuzi, supra n 9; Zschirnt, ‘Locking in Human Rights in Africa: Analyzing State Accession to the African Court on Human and Peoples’ Rights’ (2018) 19 *Human Rights Review* 97; Ondo, ‘Les Opinions Séparées des Juges à la Cour Africaine des Droits de l’Homme et des Peuples’ (2015) 104 *Revue Trimestrielle des Droits de l’Homme* 941.

¹¹ For example, international economic courts tend to follow the model of either the Court of Justice of the European Union or the World Trade Organisation, and international human rights courts follow the old or the new model of the ECtHR. See Romano, Alter and Sebregondi, ‘Illustrations: A Reader’s Guide’ in Romano, Alter and Shany (eds), *The Oxford Handbook on International Adjudication* (2014) 27 at 30; Alter, *The New Terrain of International Law - Courts, Politics, Rights* (2014) at 87-91.

¹² For instance, the options under UN Convention on the Law of the Sea (UNCLOS) (1982, 1833 UNTS 3) to resort to the International Court of Justice or the International Tribunal on the Law of the Sea or to a (special) arbitral tribunal; see Articles 287 and 288 UNCLOS. Another example is the World Trade Organisation model under the Dispute Settlement Understanding, which ranges from arbitration to the Appellate Body. See, in general, on the developments which seem to (partly) change the physiognomy of dispute settlement: Murphy, ‘International Judicial Bodies for Resolving Disputes between States’ in Romano, Alter and Shany, supra n 11, 181 at 192-193, 203; and Sands, ‘Introduction and Acknowledgments’ in Mackenzie, Romano, Shany, Sands (eds) *Manual on International Courts and Tribunals*, 2 edn (2010) at xii-xiii.

¹³ For example, the Economic Community of West African States Community Court of Justice (Articles 9(1) and 16 Protocol A/P.1/7/91 on the Economic Community Court of Justice, 6 July 1991) or the African Court of Justice and Human Rights. See footnote 21.

rights, which are entrusted to exercise their jurisdiction over more than one human rights treaty.¹⁴ It is puzzling to account for the emergence of these new institutions within the context of the existing categories of dispute settlement.¹⁵ The question, therefore, is whether we are to discuss and assess novel institutions against only the criteria and experience of existing bodies, or shall we also account for and appreciate the foregoing bodies in new light. The present discussion should also be read in light of the question of whether we duly value difference and particularity, in times of emphasising convergence and harmonisation across human rights treaties and the jurisprudence of international courts and bodies.¹⁶

The following analysis is structured in three parts. The second part elucidates the meaning of the qualifications attached to the ACtHPR's jurisdiction as per Article 3(1) Protocol to the ACHPR. The meaning of a 'human rights treaty' presents itself with some surprising difficulties. The construction of the Court's jurisdiction needs to be cautiously grounded in the text of its constitutive instruments while, concurrently, limitations on the ACtHPR's jurisdiction cannot be presumed to exist, given the Court's obligation to fulfil its mandate. The third part of this analysis critically assesses the arguments that the Court's broad jurisdiction leads to "jurisprudential chaos". This vague claim is tied to three concrete legal issues: first, the anxiety of forum shopping; second, the anxiety that the ACtHPR — a regional and specialised international court — monitors other human rights treaties; and third, the anxiety of undermining African human rights law, by either risking its specificity or by fragmenting it. The present author argues that these concerns are over-emphasised. The discussion underlines the shifting authority of specialised and/or regional courts; the need not to overstress but to appreciate positively instances of divergence; and the consideration of new conceptual and geographical *topoi*, in which international law is to be found and produced.

Still, some of the legal issues raised regarding the ACtHPR's wide jurisdiction contain merit. Interestingly, the case law of the ACtHPR suggests that it may be developing a policy

¹⁴ In addition to the ACtHPR, the Economic Community of West African States Community Court of Justice and the Arab Court on Human Rights also share this feature. According to Article 16(1) of the Statute of the Arab Court of Human Rights (which has not started functioning yet) the Court has jurisdiction 'over all suits and conflicts resulting from the implementation and interpretation of the Arab Charter of Human Rights, *or any other Arab convention in the field of Human Rights involving a member State.*' (emphases added); adopted by the Council of the League of Arab States, Ministers of Foreign Affairs during its (142) session by Resolution 7790, available at: https://www.acihr.org/texts.htm?article_id=44&lang=ar-SA (last accessed 12 August 2018) (this is an unofficial translation).

¹⁵ Romano, 'A Taxonomy of International Rule of Law Institutions' (2011) 2 *Journal of International Dispute Settlement* 241 at 248.

¹⁶ For example, Buckley, Donald and Leach (eds), *Towards Convergence in International Human Rights Law - Approaches of Regional and International Systems* (2016); Special Issue - Symposium on Comparing Regional Human Rights Regimes, Çalı, Madsen and Viljoen, 'Comparative Regional Human Rights Regimes: Defining a Research Agenda' (2018) 16 *International Journal of Constitutional Law* 128.

of judicial self-restraint by not examining all of the claims submitted by applicants regarding violations of other human rights treaties. Procedural economy, the court's competence in shaping the subject of a dispute, and the possibility of making a choice of applicable law are distinct bases upon which propriety considerations could be introduced to the exercise of the Court's jurisdiction. Finally, the risk of undermining the specificity of African human rights law is a valid concern but it is shown that this risk is more likely to materialise not as a result of the ACtHPR's broad jurisdiction, but in the context of the interpretation process.

The paper concludes by underlining that we cannot conceptualise the new and novel according to the standards of the old and prevalent. It is not only that we need to think anew about a different international court — the ACtHPR; conversely, the ACtHPR is also an invitation to rethink how we approach both old and new international courts and to pave new ways forward in international judicial settlement.¹⁷

2. Clarifying the ACtHPR's Jurisdiction to Interpret and Apply *Other* Human Rights Treaties

The preparatory work of the Protocol to the ACHPR does not give any indication of why the Court was entrusted with such a broad mandate.¹⁸ Given the lengthy negotiations over the creation of the Court dating back to the 1960s,¹⁹ it is unlikely that Article 3 Protocol to the ACHPR was a mistake in the drafting stage.²⁰ This conclusion is also supported by the equally wide jurisdiction accorded to the African Court of Justice and Human Rights, which will merge in the future the African Court of Justice with the African Court on Human and Peoples' Rights.²¹ The drafters, perhaps, thought that the requirement to make a separate optional declaration accepting the Court's competence (under Article 34(6) of the Protocol to the

¹⁷ Murray perceptively criticises how international lawyers have failed to focus on and use African institutions as positive examples in human rights law and international adjudication; see Murray, 'International Human Rights: Neglect of Perspectives from African Institutions' (2006) 55 *International Comparative Law Quarterly* 193.

¹⁸ Viljoen, *supra* n 7 at 439.

¹⁹ For a brief historical overview see Krisch, 'The Establishment of an African Court on Human and Peoples' Rights' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1998) 713 at 716-717.

²⁰ Viljoen suggests this, *supra* n 7 at 439, footnote 185.

²¹ Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the eleventh ordinary session of the African Union Assembly, 2008, not in force, https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (last accessed 12 August 2018). The Protocol to the ACHPR was replaced by the Protocol on the Statute of the African Court of Justice and Human Rights on 1 July 2008 merging the African Court on Human and Peoples' Rights and the Court of Justice of the African Union into one single court. However, the Protocol on the Statute of the African Court of Justice and Human Rights is not in force yet. See, in general, Viljoen, *supra* n 7 at 435-439. Article 28 reads: "All legal disputes concerning, among others, the interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights ratified by the States Parties concerned; any question of international law".

ACHPR) balanced out the Court's unusually broad jurisdiction. Thirty out of fifty-four African States have ratified the Protocol to the ACHPR,²² and only seven thus far (Burkina Faso, Malawi, Mali, Tanzania, Ghana, Côte d'Ivoire and Benin) have consented to the Court's competence to receive complaints from individuals and NGOs.²³

This section argues that the text of Article 3(1) Protocol to the ACHPR leaves little room to question the Court's material jurisdiction to decide complaints regarding an alleged violation of a human rights treaty in Africa (regional or sub-regional) or at the UN level.²⁴ Various arguments have been put forward to limit the Court's mandate to hear such complaints, but a restrictive construction of the Court's jurisdiction *ratione materie* cannot be presumed, since this would prevent the Court from discharging its role.

2.1 The Meaning of 'a Human Rights Instrument *Ratified* by the States Concerned'

Article 3(1) Protocol to the ACHPR clearly stipulates that the Court may exercise its jurisdiction over any other relevant human rights instrument insofar as it is *ratified* by the State(s) concerned. Applicants have brought complaints regarding alleged violations of the Universal Declaration on Human Rights (UDHR), even though the UDHR is not a treaty.²⁵ The Court's has treated such complaints inconsistently. Although the Court in *Tanganyika Law Society* did not rule out the possibility of examining such complaints,²⁶ it subsequently maintained that it lacked jurisdiction to entertain a claim concerning an alleged breach of the UDHR while the UDHR can still be used as a source of inspiration for interpreting the Charter.²⁷ However, in 2018 the Court found that the deprivation of the applicant's nationality was contrary to Article 15(2) UDHR, and it declared a violation in the operative provisions of its judgment.²⁸

²² Information available at: <http://www.african-court.org/en/index.php/2-uncategorised/948-other-relevant-documents> (last accessed 12 August 2018).

²³ Rwanda withdrew its 2013 declaration in February 2016. The withdrawal took effect in March 2017, information available at: <http://www.african-court.org/en/index.php/2-uncategorised/948-other-relevant-documents> (last accessed 12 August 2018).

²⁴ Cf. Article 16(1) of the Statute of the Arab Court of Human Rights which refers only to 'any other Arab convention in the field of human rights' (emphasis emphases).

²⁵ For example, ACtHPR, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso* 28 March 2014. A list of all judgments by the ACtHPR is available at: <http://www.african-court.org/en/index.php/cases?4ea03332baad719f3a6b2ef8c979f25c=08339bd4cc7974b465c7358d9ecc78ed> (last accessed 12 August 2018).

²⁶ ACtHPR, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v United Republic of Tanzania* 14 June 2013 at para 122.

²⁷ ACtHPR, *Frank David Omary and Others v The United Republic of Tanzania* 28 March 2014 at paras 19, 72-73.

²⁸ ACtHPR, *Anudo Ochieng Anudo v United Republic of Tanzania* 22 March 2018 at paras 88, 132(v).

2.2. The Meaning of the Qualifications 'States Concerned' and 'Relevant'

An argument raised with regard to limiting the material jurisdiction of the Court concerns the construction of the qualification 'instrument ratified by *the States concerned*' (emphasis added) as referring to instruments ratified by *all* parties to the Protocol to the ACHPR, and not only by the respondent State before the Court.²⁹ This idea cannot be supported by reference to the Court's constitutive instruments. A careful reading of the Protocol demonstrates that the expressions 'State(s) concerned'³⁰ and 'States parties to the Protocol'³¹ are employed in different ways — even within the context of a single provision (i.e. Article 25). If Article 3(1) had meant to set the requirement that all State parties to the Protocol need to have ratified a human rights treaty, this would have been stated so explicitly.

It has also been suggested that the term 'relevant' concerns only treaties that explicitly provide in their text that they are subject to the Court's jurisdiction.³² This suggestion, however, is refuted by the fact that neither the African Charter nor the Protocol point in this direction; additionally, the ordinary meaning of the term 'relevant' refers to the subject matter of the complaint brought before the Court and the human rights involved therein.³³ This, of course, does not answer the question of how one is to determine which human rights treaties are relevant. Although the meaning of the term 'relevant' appears to be uncomplicated, this is misleading.³⁴ For purposes of the present discussion, it suffices to underline that it can be a burdensome task for the Court to research systematically all possible relevant human rights treaties in every single case. The applicants' claims and submissions can be useful in this regard.

²⁹ Viljoen, *supra* n 7 at 438. The Convention on the Rights of the Child (1989, 1577 UNTS 3) (CRC) would still fall under the Court's jurisdiction.

³⁰ Article 7 (sources of law) and Article 3 (jurisdiction); Article 25; Article 26.

³¹ Article 12, Article 25(1), Article 30, Article 35(1).

³² Heyns, *supra* n 8 at 168.

³³ Cf. the use of the term 'relevant' in Articles 5 and 31 (3)(c) Vienna Convention Law Treaties in which it refers to the subject matter of a treaty or a treaty provision. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009) at 433.

³⁴ For detailed discussion on how the ECtHR has (not) addressed in its case law the issue of what rules of international law are relevant, see Rachovitsa, 'Fragmentation of International Law Revisited: Insights, Good Practices and Lessons to be Learned from the Case Law of the European Court of Human Rights' (2015) 28 *Leiden Journal International Law* 863 at 876-879.

2.3 Back to the Basics: What is a Human Rights Treaty (within the Meaning of Article 3 Protocol to ACHPR)?

Certain qualifications attached to the Court's contentious jurisdiction under Article 3 Protocol to the ACHPR may appear straightforward, but they are surprisingly challenging. This is the case with the expression 'human rights treaty'. The Court had the opportunity early on in its case law to interpret and apply treaties whose *human rights* classification was under dispute. In *Tanganyika Law Society*, the respondent State, Tanzania, argued that the 1993 Revised Treaty of the Economic Community of West African States³⁵ is not a human rights treaty within the meaning of Article 3 Protocol and, therefore, it did not fall under the Court's jurisdiction. The Court did not address Tanzania's objection. However, the Vice-President of the Court, Fatsah Ouguergouz, devoted the greater part of his Separate Opinion to this issue.³⁶ The main thrust of the Vice-President's position was that the Court should have drawn a distinction between treaties which mainly dealt with the protection of human rights *and* treaties which addressed other matters but contained provisions relating to human rights. Treaties of the latter category placed obligations on State parties without necessarily according subjective rights to individuals.³⁷

The Court scrutinised the matter of the meaning of a 'human rights treaty' in *Actions pour la Protection de Droits de l'Homme*.³⁸ In this, the pressing question was whether the African Charter on Democracy, Elections and Governance³⁹ and the ECOWAS Protocol on Democracy and Good Governance supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management and Resolution⁴⁰ were human rights instruments within the meaning of Article 3 Protocol to the ACHPR.⁴¹ According to the Court, this question should be answered by examining the purpose(s) of these treaties. Such purposes 'are reflected either by an express enunciation of the subjective rights of individuals or by mandatory obligations on State parties for the consequent enjoyment of the said rights.'⁴² The conclusion was that these treaties qualified as human rights treaties because the State parties' obligation to establish

³⁵ 1993, 2373 UNTS 233 ('ECOWAS Revised Treaty').

³⁶ Separate Opinion of Vice-President Fatsah Ouguergouz in *Tanganyika Law Society*, supra n 26 at para 1.

³⁷ Ibid. at para 15.

³⁸ ACtHPR, *Actions pour la Protection des Droits de l'Homme (APDH) v Republic of Cote d'Ivoire* 18 November 2016.

³⁹ 2007 ('African Charter on Democracy'), available at: <https://au.int/en/treaties/african-charter-democracy-elections-and-governance> (last accessed 12 August 2018).

⁴⁰ Protocol A/SP1/12/01 (2001) ('ECOWAS Democracy Protocol').

⁴¹ *Actions pour la Protection des Droits de l'Homme*, supra n 38 at para 49.

⁴² Ibid. at para 57.

independent and impartial electoral bodies is aimed at implementing the human rights provided under the ACHPR.⁴³ This reasoning is tenuous, and prompts the following observations.

First, it is not clear from *Actions pour la Protection de Droits de l'Homme* how the Court inferred that States' obligations under these two treaties are aimed at implementing rights provided in the ACHPR. The ECOWAS Democracy Protocol furnishes no obvious link with human rights, neither in the preamble nor in its main text. The African Charter on Democracy does contain certain references to the promotion of human rights in connection with good governance and democracy, although these references are vague.⁴⁴ Moreover, even though member States to the African Charter on Democracy have undertaken the obligations to implement it in accordance with respect for human rights and democratic principles (Article 3(1)) and to ensure that citizens enjoy human rights (Article 6), there is no specific mention of the ACHPR or human rights, such as the right to political participation. There is little, if any, evidence to substantiate the ACtHPR's position that the obligation incumbent on State parties to the African Charter on Democracy to establish independent and impartial electoral bodies *is aimed at implementing human rights under the ACHPR*. The commitment of the State parties to the African Charter on Democracy to hold regular, transparent, free and fair elections (Article 17), and to implementing said Charter in accordance with the principle of effective participation of citizens in democratic and development processes and in the governance of public affairs (Article 3(7)), are not compelling arguments in themselves either.

Second, even if the Court's conclusion were sound and well-reasoned, the fact that a treaty and/or a treaty provision was intended to implement a human right is not, on its own, a determinative criterion for establishing that a given treaty is a human rights treaty. For instance, if a bilateral investment treaty implements aspects of the right to property, does this make it a human rights treaty within the meaning of Article 3 Protocol to the ACHPR?

Third, the Court cross-referenced the *Mathieu-Mohin and Clearfayt v Belgium* judgment by the ECtHR, which reached a similar conclusion with respect to Article 3 of the first Additional Protocol to the ECHR (Article 3 AP1).⁴⁵ This case concerned the question of whether Article 3 AP1 gave rise to individual rights that are automatically conferred on

⁴³ Ibid. at para 63. See also the arguments put forward by the African Institute for International Law when asked by the Court to give its legal view on the issue; *ibid.* at paras 53-54.

⁴⁴ The fifth preambular paragraph states that the member States of the AU are 'Committed to promote the universal values and principles of democracy, good governance, human rights and the right to development'. Article 2(1) reads 'The objectives of this Charter are to: [...] Promote adherence, by each State Party, to the universal values and principles of democracy and respect for human rights'. Article 4(1) reads 'State Parties shall commit themselves to promote democracy, the principle of the rule of law and human rights.'

⁴⁵ 1952, ETS 009. *Actions pour la Protection des Droits de l'Homme*, *supra* n 38 at para 64.

everyone, or gave rise only to obligations between States.⁴⁶ The ECtHR in *Mathieu-Mohin and Clearfayt* and by the ACtHPR in *Actions pour la protection de droits de l'homme* may have reached the same conclusion, but the text of the treaties concerned and the courts' reasoning differ substantially. In contrast to the ACtHPR's reasoning, the ECtHR showed clear evidence confirming that Article 3 AP1 confers rights on individuals.⁴⁷

Since the ACtHPR has not elucidated questions which go directly to the core of its material jurisdiction in a satisfactory fashion, the meaning of 'human rights treaty' in the context of Article 3 Protocol merits further discussion. The analysis below highlights criteria that are more concrete by drawing a distinction between treaties whose main purpose is the protection of human rights, and treaties that contain provisions relating to human rights although this is not their main purpose.

2.3.1 A Treaty Whose Main Purpose Is the Protection of Human Rights

A valid starting point for a discussion of the meaning of 'human rights treaty' under Article 3 Protocol is to examine the object and purpose of a given treaty. A treaty may have more than one object and purpose.⁴⁸ The purpose of a treaty refers to its *raison d'être* — the reason(s) it was created in the first place — whereas the object of a treaty refers to the reciprocal exchange of rights and obligations among parties to the treaty.⁴⁹ If the protection of human rights is a treaty's main purpose (or one of its main purposes), the treaty falls under the ACtHPR's jurisdiction *ratione materiae* (subject, of course, to the other qualifications set out in Article 3 Protocol).

2.3.2 The Object of a Treaty: A Treaty Whose Main Purpose Is not the Protection of Human Rights but Contains Provisions Relating to Human Rights

The next question is whether a treaty can be regarded as a human rights treaty for the purposes of Article 3 Protocol even if its main purpose is not the protection of human rights.⁵⁰

⁴⁶ ECtHR, *Mathieu-Mohin and Clearfayt v Belgium* 2 March 1987 (Plenary) at para 48. Article 3 AP1 reads 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'

⁴⁷ *Ibid.* at para 49. Article 5 of the Protocol provides that the provisions of Articles 1, 2, 3 and 4 shall be regarded as additional articles to the ECHR. The ECtHR also highlighted that Article 3 AP1 is of great importance to fulfilling the aim of the ECHR as reflected in the preamble, according to which fundamental human rights are best maintained by an effective political democracy *ibid.* at para 47.

⁴⁸ Villiger, *supra* n 33 at 427.

⁴⁹ *Ibid.* at 248-249; Boisson de Chazournes, La Rosa and Moise Mbengue, 'Article 18' in Corten and Klein (eds), *The Vienna Conventions on the Law of Treaties — A Commentary* (2011) 369 at 383-388.

⁵⁰ Viljoen, *supra* n 7 at 436.

The ACtHPR, in *Actions pour la Protection de Droits de l'Homme*, stated that if a treaty provision expressly confers subjective rights on individuals, or if such rights derive from obligations incumbent on States, then this treaty falls under its jurisdiction. The IACtHR's approach lends further support to this position. The IACtHR, in the Advisory Opinion '*Other Treaties*' Subject to the Consultative Jurisdiction of the Court, was asked to clarify its advisory function with regard to interpreting 'other treaties concerning the protection of human rights in the American states'.⁵¹ It opined that a treaty is subject to its advisory jurisdiction as long as it contains provisions concerning human rights, even if the protection of human rights is not one of that treaty's main purposes.⁵² Nonetheless, the pronouncements of the IACtHR should be appreciated with the caveat that the IACtHR endowed itself with a wide jurisdiction in the exercise of its advisory function.⁵³ One should be cautious with "transplanting" its reasoning when discussing the contentious jurisdiction of the ACtHPR.

Turning now to the precise criteria for determining when such a treaty can be regarded as a human rights treaty, certain scholars have asserted that even when a treaty is not a human rights treaty, it may still have a human rights dimension or human rights implications.⁵⁴ Similarly, the IACtHR held that it is empowered to invoke any treaty insofar as it has a bearing upon, affects, or is of interest to the protection of human rights.⁵⁵ But how is one to establish and assess such human rights implications, or the human rights dimensions of a non-human rights treaty? Almost any treaty, including a trade agreement, has certain implications concerning human rights. Is this a sufficient basis for the ACtHPR to exercise jurisdiction over such treaties? If one follows this line of thought, the ACtHPR could, in practice, hear complaints regarding alleged violations of potentially unlimited number of treaties. Consequently, the foregoing considerations are not particularly helpful, since they establish only a tenuous connection with the concept of a human rights treaty. One way forward is to

⁵¹ According to Article 64(1) IACHR, 'The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states.'

⁵² IACtHR, Advisory Opinion, '*Other Treaties*' Subject to the Consultative Jurisdiction of the Court (Article 64 American Convention on Human Rights) 24 September 1982 at para 11; IACtHR, Advisory Opinion, *The Right to Information on Consular Assistance in the Framework of Guarantees of the Due Process of Law* 1 October 1999 at paras 72, 76.

⁵³ Concurring Opinion of Judge Cancado Trindade in *The Right to Information on Consular Assistance*, supra n 52 at para 29.

⁵⁴ Naldi and 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 Human Rights* 431 at 435 (footnote 26); Van Der Mei, 'The New African Court on Human and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' (2005) 18 *Leiden Journal International Law* 113, at 119-120 (footnote 46); Heyns, supra n 8 at 167.

⁵⁵ *The Right to Information on Consular Assistance*, supra n 52 at paras 72, 76.

focus on the object of the treaty by relying on specific treaty provisions, rather than on a treaty's human rights implications in the abstract.⁵⁶

The matter is straightforward when a treaty contains provisions which confer direct entitlements and claims on individuals. However, this does not necessarily mean that these individual rights also qualify as human rights. A relevant example is the interpretation of Article 36(1) of the Vienna Convention on Consular Relations (VCCR), which concerns the privileges relating to a consular post and, in particular, issues of communication and contact with nationals of the sending State who are in prison, custody or detention.⁵⁷ The International Court of Justice (ICJ) in the *LaGrand* case, having found that Article 36 VCCR confers rights on individuals, concluded that those rights are not human rights.⁵⁸ The ICJ reaffirmed in an *obiter dictum* in the *Avena* case that neither the text, nor the object and purpose of the VCCR, nor any indication in the *travaux préparatoires* supported the argument that the VCCR confers human rights on individuals.⁵⁹ Interestingly, the IACtHR, in *The Right to Information* Advisory Opinion, found that the rights contained in Article 36 VCCR are human rights.⁶⁰ Therefore, there are instances in which it is not clear whether individual rights are human rights.

It can be equally difficult to assess whether or not a treaty that imposes specific obligations on State parties confers specific rights and claims on individuals. Even if the fulfilment of these obligations leads to the enjoyment of specific rights and individuals benefit from the application of a treaty,⁶¹ it does not always follow that individuals derive these rights. States may undertake to comply with treaty obligations in relation to individuals without conferring direct entitlements on them.⁶² This is a matter to be decided on a case-by-case basis by ascertaining the object of the treaty and interpreting the exchange of rights and obligations among State parties. A relevant example is whether the African Union Convention on Preventing and Combatting Corruption⁶³ confers rights on individuals and, consequently, whether it can be considered a human rights instrument according to Article 3 Protocol to

⁵⁶ Viljoen, supra n 7 at 436-438.

⁵⁷ 1963, 596 UNTS 261.

⁵⁸ *LaGrand* case (*Germany v United States of America*), Judgment, 27 June 2001, ICJ Rep. 2001, p. 466 at para 78.

⁵⁹ *Case concerning Avena and Other Mexican Nationals* (Mexico v United States of America), Judgment, 31 March 2004, ICJ Rep. 2004, p. 12 at para 124.

⁶⁰ *The Right to Information on Consular Assistance*, supra n 52 at paras 83-84, 85-87.

⁶¹ *Actions pour la Protection des Droits de l'Homme (APDH)*, supra n 38 at para 57.

⁶² *Case concerning Avena and Other Mexican Nationals*, supra n 59 at para 139. Simma, 'Human Rights Treaties' in Besson and d'Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (2017) 872 at 879-881.

⁶³ 2003, available at: <https://au.int/en/treaties/african-union-convention-preventing-and-combating-corruption> (last accessed 12 August 2018) ('AU Convention on Corruption').

ACHPR. It has been argued that although provisions of the AU Convention on Corruption are framed mostly as obligations placed on States, these obligations correspond to rights that can be claimed by individuals.⁶⁴ At first glance, the protection of human rights does not appear to be one of the main purposes of the AU Convention on Corruption. The preamble contains references to 'removing obstacles to the enjoyment of economic, social and cultural rights' (eleventh paragraph), and the explicit reference to respect for human rights and the African Charter (fourth paragraph). Nonetheless these references are very vague, and more importantly they do not establish the promotion of human rights as one of the purposes of the AU Convention on Corruption. It is rather the promotion of socio-economic development, which, in turn, is supported by the removal of obstacles to the enjoyment of human rights.⁶⁵ Still, there are indications that the object of the treaty furnishes a link to human rights. Pursuant to Article 3(2), State parties to the AU Convention on Corruption undertake to respect human and peoples' rights in accordance with the ACHPR and other relevant human rights instruments. More specifically, Articles 13(3) and 14 provide the right to a fair trial, and Article 12(4) provides aspects of the right to freedom of expression. However, with the exception of these two rights one cannot make a convincing argument with regard to inferring, in general, individual rights from State obligations enshrined in the AU Convention on Corruption.

To conclude, Article 3(1) Protocol to the ACHPR does not leave much room to question the Court's jurisdiction to decide complaints concerning other human rights treaties. Despite the arguments that have been put forward in international law scholarship, one cannot presume a restrictive construction of the Court's jurisdiction *ratione materiae*. A more systematic and rigorous examination of the meaning of 'human rights treaty' is expected of the Court, especially since this is a prerequisite to exercise its material jurisdiction. When a treaty does not have the protection of human rights as one of its main purposes, a vague discussion concerning the human rights implications or dimension of that treaty is not informative in practice. The focus should rather be placed on the object of the treaty and specific treaty provision(s) in order to examine, first, whether a treaty provision that imposes specific obligations on States confers specific rights on individuals, and second, whether such individual rights qualify as human rights.

⁶⁴ Viljoen, *supra* n 7 at 436.

⁶⁵ According to Article 2(4), one of the objectives of the Convention is to 'promote socio-economic development by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights'.

3. The Anxiety of “Jurisprudential Chaos”

Despite strong concerns encouraging the Court to refrain from exercising its jurisdiction over human rights treaties ratified by African States⁶⁶ or to tailor its mandate to the narrow scope of the African Commission’s jurisdiction examining only alleged violations of the ACHPR,⁶⁷ the ACtHPR has proceeded to fully explore the scope of its material jurisdiction. Having discussed the meaning of the qualifications attached to the Court’s jurisdiction, this section addresses scholars’ fears, namely that allowing complaints of violations of a variety of human rights treaties to be brought before the Court will lead to ‘jurisprudential chaos’.⁶⁸ Jurisprudential chaos is a vague claim. The analysis in this section ties this claim to three concrete legal issues underpinning the debate: first, the anxiety of forum shopping in light of the multiplicity of international courts; second, the anxiety of the ACtHPR monitoring other human rights treaties; and third, the anxiety of threatening African human rights law. The analysis finds that the jurisprudential chaos claim generally reflects an anxiety associated with repeatedly exaggerated concerns regarding the limits of the jurisdiction of regional and/or specialised international courts, and the ensuing risks to interpreting and developing international law. However, some of the concerns raised merit further discussion.⁶⁹ The case law of the Court suggests that it may be developing a policy of judicial self-restraint by not examining all of the submissions of the applicants regarding violations of other human rights treaties. The case law of the ECCJ is also brought into specific aspects of the discussion, in order to shed some light on the ACtHPR’s practice.

3.1 The Anxiety of Forum Shopping

The material jurisdiction of the ACtHPR allows applicants to submit complaints regarding alleged violations of other human rights treaties in any of the following (non-exhaustive) scenarios:

- a) An applicant may bring a case claiming a violation of a right which is not protected under the ACHPR but is envisaged by another treaty ratified by the State concerned,

⁶⁶ Heyns, *supra* n 8 at 168.

⁶⁷ Viljoen, *supra* n 7 at 438. According to Article 2 Charter and Article 8 Protocol to the Charter, the African Court complements the protective function of the Commission. However, pursuant to Rule 29 of the Rules of Procedure of the Court (April 2010, Arusha) this complementary relationship has no impact on the scope of the complaint, the Court’s jurisdiction or the laws applicable when the Commission refers a case to the Court. Moreover, if this line of reasoning were to be followed, it would also entail different treatment of applications before the Court depending on whether a case had been referred by the Commission or submitted by other parties in accordance with Article 5 Protocol.

⁶⁸ Heyns, *supra* n 8 at 167.

⁶⁹ Van der Mei, *supra* n 54 at 119-120; Krisch, *supra* n 19 at 722-724.

such as the right to housing under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁷⁰

- b) An applicant may rely on and allege a breach of a right which, although envisaged in the ACHPR, is formulated in another treaty in a manner that ensures a higher level of protection. This may be due to a broader protective scope of this right, or a more restricted limitation attached thereto.⁷¹ *Lohé Issa Konaté* is a case in point.⁷²
- c) An applicant may claim a violation of a human right which is protected in the same way under both the ACHPR and another treaty, but no mechanism is envisaged or is available to the applicant under that other treaty. For example, many cases have already been brought against Tanzania with regard to violations of the International Covenant on Civil and Political Rights (ICCPR),⁷³ since Tanzania has not ratified the first Optional Protocol to the ICCPR.⁷⁴
- d) Finally, an applicant may choose to bring a complaint before the ACtHPR (instead of or in addition to another international body) as part of a litigation strategy (i.e. considerations of physical proximity to a forum and litigation costs).⁷⁵

The Court's case law demonstrates that applicants are familiar with the claims and arguments that they can raise in connection with other human rights treaties. The Court has examined alleged violations of a series of treaties, including the ICCPR,⁷⁶ the ICESCR,⁷⁷ the ECOWAS Revised Treaty,⁷⁸ the African Charter on Democracy,⁷⁹ the ECOWAS Democracy Protocol,⁸⁰ the Convention on the Elimination of All Forms of Discrimination Against Women

⁷⁰ 1966, 993 UNTS 3.

⁷¹ Mbondenyi, 'Invigorating the African System on Human and Peoples' Rights through Institutional Mainstreaming and Rationalisation' (2009) 27 *Netherlands Quarterly Human Rights* 451 at 470; Udombana, 'Toward the African Court on Human and Peoples' Rights: Better Late than Never' (2000) 3 *Yale Human Rights & Development Law Journal* 45 at 91.

⁷² ACtHPR, *Lohé Issa Konaté v Burkina Faso* 5 December 2014. See also ACtHPR, *Ingabire Victoire Umuhoza v Republic of Rwanda* 24 November 2017 at paras 133, 136, 140 (confirming the *Lohé Issa Konaté* case).

⁷³ 1966, 999 UNTS 171.

⁷⁴ *Tanganyika Law Society*, supra n 26; ACtHPR, *Alex Thomas v United Republic of Tanzania* 20 November 2015; ACtHPR, *Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania* 18 March 2016; ACtHPR, *Mohamed Abubakari v United Republic of Tanzania* 3 June 2016; *Frank David Omary and Others*, supra n 27.

⁷⁵ Viljoen, supra n 7 at 438; Helfer, 'Forum Shopping for Human Rights' (1999) 48 *University of Pennsylvania Law Review* 285.

⁷⁶ *Tanganyika Law Society*, supra n 26 at para 76; *Lohé Issa Konaté*, supra n 72 at para 9; *Alex Thomas*, supra n 74; *Mohamed Abubakari*, supra n 74; *Actions pour la Protection des Droits de l'Homme*, supra n 38; *Abdoulaye Nikiema and Others*, supra n 25.

⁷⁷ *Frank David Omary and Others*, supra n 27 at para 76; ACtHPR, *African Commission on Human and Peoples' Rights v Republic of Kenya* 26 May 2017 at para 2.

⁷⁸ *Lohé Issa Konaté*, supra n 72 at para 12; *Abdoulaye Nikiema and Others*, supra n 25.

⁷⁹ *Actions pour la Protection des Droits de l'Homme*, supra n 38.

⁸⁰ *Ibid.*

(CEDAW),⁸¹ the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women (Maputo Protocol)⁸² and the African Charter on the Rights and Welfare of the Child.⁸³

There are instances in which applicants have submitted violations of other relevant human rights instruments ratified by the States concerned without invoking a violation of the Charter. In the *Frank David Omary* and *Alex Thomas* cases, the applicants argued a violation of the UDHR without mentioning any right under the Charter. The Court clarified that although it had no jurisdiction over the UDHR, it did have jurisdiction to decide complaints concerning either the Charter or other relevant human rights treaties (or both).⁸⁴ On other occasions, the applicants submitted their complaints without referring to specific treaties. Tanzania, in the *Wilfred Onyango Nganyi* and *Kennedy Owino Onyachi* cases, raised preliminary objections *ratione materiae* arguing that the applicants had not invoked any human rights treaties.⁸⁵ The Court maintained that the factual basis of the alleged violations was sufficient to ascertain whether the complaints fall within the scope of specific rights under the Charter or other human rights treaties.⁸⁶ In *Kennedy Owino Onyachi*, the Court found, on its own initiative, that the applicants' submissions contained alleged violations of the Charter and the ICCPR (even though the Court did not proceed to discuss the ICCPR on the merits).⁸⁷ This is a sound approach, since questions pertaining to the jurisdiction *ratione materiae* of international courts are examined *proprio motu*.⁸⁸ However, in the recent *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa v Republic of Mali* judgment, the Court examined and decided alleged violations of other treaties on human rights without bringing the ACHPR into play.⁸⁹ It is the

⁸¹ 1979, 1249 UNTS 13. ACtHPR, *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa v Republic of Mali* 11 May 2018 at paras 9, 95, 125, 135.

⁸² 2003, Adopted by the 2nd Ordinary Session of the Assembly of the African Union, available at: <http://www.achpr.org/instruments/women-protocol/> (last accessed 12 August 2018). *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes*, supra n 81 at paras 9, 78, 95, 115, 125, 135.

⁸³ 1990, CAB/LEG/24.9/49. Ibid. at paras 9, 78, 115, 125, 135.

⁸⁴ *Frank David Omary and Others*, supra n 27 at paras 74, 76; *Alex Thomas*, supra n 74 at para 45.

⁸⁵ *Wilfred Onyango Nganyi & 9 Others*, supra n 74 at para 52; ACtHPR, *Kennedy Owino Onyachi and Others v United Republic of Tanzania* 28 September 2017 at paras 35-36.

⁸⁶ *Wilfred Onyango Nganyi & 9 Others*, supra n 74 at paras 57-58; *Kennedy Owino Onyachi and Others*, supra n 85 at paras 35-36, 156-157. See also *Frank David Omary and Others*, supra n 27 at paras 74, 76; *Alex Thomas*, supra n 74 at para 45; ACtHPR, *Peter Joseph Chacha v United Republic of Tanzania* 28 March 2014 at para 114.

⁸⁷ *Kennedy Owino Onyachi and Others*, supra n 85 at paras 35-36.

⁸⁸ Shelton, 'Jura Novit Curia in International Human Rights Tribunals' in Boschiero et al (eds), *International Courts and the Development of International Law — Essays in Honour of Tullio Treves* (2013) 189.

⁸⁹ *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes*, supra n 81 at para 135.

first case in which the Court decided a complaint strictly on the basis of other treaties on human rights without implicating the Charter.

It becomes clear that the ACTHPR can be — and, indeed, is — used as a forum for bringing complaints regarding other human rights treaties. The argument against this practice is that the existence and use of multiple venues for adjudicating international (human rights) claims may lead courts to favour approaches to tailor their “clientele”, and may increase the risk of conflicting judgments.⁹⁰ Forum shopping has acquired a negative connotation, even though it is at least equally arguable that the term forum shopping is misleading and it does not belong to the lexicon of international law due to the latter’s decentralised nature.⁹¹ Choice of forum is the inevitable consequence of the specialisation and deepening of international law coupled with the multiplicity of international courts and other bodies. The multiplicity of international courts embodies the complexity of relations between States (and other actors).⁹² Increasing third-party settlement of international disputes through law-based forums makes (human rights related) disputes justiciable, and paves the way for authoritative pronouncements of international law. The risk of diverging interpretations of the law is largely exaggerated.⁹³ Choice of forum enables creativity through dialogue among courts.⁹⁴ The possibility of multiple international courts being able to hear a dispute (or aspects thereof) not only proves beneficial to the individuals concerned, but also entails a healthy level of competition among courts, thereby improving the quality of their rulings and encouraging them to keep an eye on one another.⁹⁵ It is frequently argued that States could take advantage of differing views of international courts and bodies on human rights by acknowledging the milder view, and the

⁹⁰ For example, Speech by His Excellency Judge Gilbert Guillaume, President of the International Court of Justice, to the Sixth Committee of the General Assembly of the United Nations, *The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order*, 27 October 2000 available at: <http://www.icj-cij.org/files/press-releases/1/3001.pdf> (last accessed 12 August 2018) at 3-4.

⁹¹ Separate Opinion of Judge Cancado Trindade in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010, p. 639 at para 240.

⁹² Brownlie, ‘Blaine Sloan Lecture — The Peaceful Settlement of International Disputes in Practice’ (1995) 7 *Pace University School of Law International Law Review* 257 at 276.

⁹³ Address to the Plenary Session of the General Assembly of the United Nations by Judge S.M. Schwebel, President of the International Court of Justice, 27 October 1998, available at: <http://www.icj-cij.org/files/press-releases/7/3007.pdf> (last accessed 12 August 2018) at 4.

⁹⁴ Kingsbury, ‘Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?’ (1999) 31 *New York University Journal International Law & Policy* 679 at 681-682, 686; Abi-Saab, ‘Fragmentation or Unification: Some Concluding Remarks’ (1999) 31 *New York University Journal International Law & Policy* 919 at 925; Brownlie, *supra* n 92; Murungi and Gallinetti, ‘The Role of Sub-Regional Courts in the African Human Rights System’ (2010) 13 *SUR — International Journal on Human Rights* 119 at 131.

⁹⁵ Pauwelyn and Salles, ‘Forum Shopping before International Tribunals: (Real) Concerns, (Im)Possible Solutions’ (2009) 42 *Cornell International Law Journal* 77 at 80; Brownlie, *supra* n 92 at 276; Meron, *Human Rights Law-making in the United Nations* (1986) at 241.

lowest common denominator in human rights protection.⁹⁶ Yet, there is no State practice or precedent to support this claim.⁹⁷

There is little evidence regulating the phenomenon of bringing multiple claims over the same or a similar matter, successively or simultaneously, before different bodies.⁹⁸ In the absence of explicit regulation of choice of forum by States (i.e. by inserting a specific treaty clause), States and individuals may exercise all options available to them, including choice of forum, simultaneous petitioning and successive petitioning.⁹⁹ The ACHPR is interpreted as allowing all these options, with the exception of cases that have been settled by the States involved (Article 56(7) ACHPR).¹⁰⁰ This suggests that the admissibility criterion requires not only the finality of the settlement, but also settlement on an inter-State level (thereby excluding claims by individuals against the State).¹⁰¹ Moreover, successive petitioning concerning claims under the ICCPR is permitted; is not allowed only if it is shown that the *same matter* is not being examined under another procedure *concurrently*.¹⁰²

3.2 The Anxiety of Monitoring Other Human Rights Treaties

The ACHPR systematically applies and finds violations of other human rights treaties, including regional, sub-regional and global. It also monitors their implementation, and orders the respondent States to comply with their respective obligations. Some examples from the case law are the following. In *Lohé Issa Konaté*, the Court found that Burkina Faso's Penal

⁹⁶ For instance, Meron, *supra* n 95.

⁹⁷ Helfer, *supra* n 75 at 357-358. Helfer correctly highlights the fact that a State would not be able to pursue the lower denominator among different rulings and interpretations by different courts and bodies since, in most cases, human rights treaties contain a more favourable protection clause preventing States from restricting the enjoyment or exercise of any right or freedom recognised in treaty A by virtue of another treaty. Interestingly, this does not apply in the case of the ACHPR since the African Charter is one of the very few human rights treaties which does not contain a more favourable protection clause. However, if a State party to the Charter is also a party to another human rights treaty containing such a clause, then that State would be obliged not to invoke a lower level of protection with regard to its obligations under that treaty. For examples of more favourable protection clauses, see Article 5(2) ICCPR, Article 5(2) ICESCR and Article 41 CRC.

⁹⁸ Lowe, 'Overlapping Jurisdictions in International Tribunals' (1999) 20 *Australian Yearbook of International Law* 191 at 201; Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2004).

⁹⁹ Helfer, *supra* n 75 at 304.

¹⁰⁰ Article 56(7) ACHPR sets as an admissibility requirement that 'communications relating to Human and Peoples' rights referred to in Article 55 received by the Commission, shall be considered if they [...] do not deal with cases which have been *settled by those States involved* in accordance with the principles of the Charter of the United Nations, or the Charter of the Organisation of African Unity or the provisions of the present Charter' (emphasis added).

¹⁰¹ Helfer, *supra* n 75 at 306.

¹⁰² Article 5(2)(a) Optional Protocol to the ICCPR (1996, 999 UNTS 171) reads 'The Committee shall not consider any communication from an individual unless it has ascertained that [...] the same matter is not being examined under another procedure of international investigation or settlement'.

Code (prescribing custodial and non-custodial sentences for defamation), as well as the sentencing of the applicant to imprisonment and excessive fines, were contrary not only to the requirements of Article 9 Charter but also to Article 19 ICCPR and Article 66(2)(c) ECOWAS Revised Treaty concerning the rights of journalists.¹⁰³ In another 2017 freedom of expression case, Rwanda was held in violation of both Article 9(2) Charter and Article 19 ICCPR.¹⁰⁴ In *Actions pour la Protection des Droits de l'Homme*, the Court proclaimed that Côte d'Ivoire violated its obligations both to establish impartial and independent electoral bodies and to provide equal protection under the law, as enshrined in Article 3 ACHPR, Articles 10(3) and 17 African Charter on Democracy, Article 3 ECOWAS Democracy Protocol and Article 26 ICCPR.¹⁰⁵ Côte d'Ivoire was ordered to bring its domestic law in compliance with the requirements of these treaties. In *Anudo Ochieng Anudo*, Tanzania was found to have arbitrarily expelled the applicant in violation of Article 7 Charter and Article 14 ICCPR.¹⁰⁶ In a different cluster of cases, Tanzania's systematic failure to protect various aspects of the right to a fair trial led to a violation of Article 7 ACHPR and Article 14 ICCPR.¹⁰⁷ In 2018, the domestic legislation of the Republic of Mali was found inconsistent with the State's obligations under CEDAW,¹⁰⁸ the Maputo Protocol,¹⁰⁹ and the African Charter on the Rights and Welfare of the Child.¹¹⁰ The Court ordered the Republic of Mali to amend its domestic law in conformity with the standards set by the foregoing treaties.

It is worthwhile to note that the ECCJ, in tune with the ACtHPR, construes its material jurisdiction to include alleged violations of the UDHR¹¹¹ and UN human rights treaties to

¹⁰³ *Lohé Issa Konaté*, supra n 72 at paras 164, 167, 170, 176.

¹⁰⁴ See also *Ingabire Victoire Umuhoza*, supra n 72 at paras 163, 173(ix).

¹⁰⁵ *Actions pour la Protection des Droits de l'Homme*, supra n 38 at paras 135, 151.

¹⁰⁶ *Anudo Ochieng Anudo*, supra n 28 at paras 106, 132(vii).

¹⁰⁷ The rights to be heard and to defend oneself, to be tried within a reasonable length of time and to free legal aid in *Alex Thomas*, supra n 74 at para 124. See also ACtHPR, *Interpretation of the Judgment of 20 November 2015 — Alex Thomas v United Republic of Tanzania* 28 September 2017 at paras 38-39. The obligation to provide free legal assistance and to communicate all the elements of the charge to the applicant in a timely manner in *Mohamed Abubakari*, supra n 74 at paras 145, 161.

¹⁰⁸ *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes*, supra n 81 at paras 9, 95, 125, 135.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.* at paras 9, 78, 115, 125, 135.

¹¹¹ ECCJ, *Essien v The Republic of The Gambia and Another* 14 March 2007 at paras 1, 11 available at: <http://www.chr.up.ac.za/index.php/browse-by-institution/ecowas-ccj/305-the-gambia-essien-v-the-republic-of-the-gambia-and-another-2007-ahrlr-131-ecowas-2007-.html> (last accessed 12 August 2018).

A list of all judgments by the ECCJ are available at: http://www.courtecowas.org/site2012/index.php?option=com_content&view=article&id=157&Itemid=27 (last accessed 12 August 2018). Some of the Court's judgments from 2004 to 2009 are not available on the Court's website. From 2004 to 2009 the Court's judgments have been published in an official reporter (2004–2009 Community Court of Justice ECOWAS Law Report), but it is not widely available and it is not available to the author either. Selected decisions are available on other online databases, including the Centre for Human Rights,

which ECOWAS member States are parties,¹¹² such as the ICCPR,¹¹³ the ICESCR,¹¹⁴ the CAT¹¹⁵ and the CEDAW.¹¹⁶ The *SERAP* case is the only instance in which a State challenged the ECCJ's jurisdiction *ratione materiae*.¹¹⁷ Nigeria argued that the ECCJ did not have jurisdiction to adjudicate on alleged violations of ICCPR and ICESCR because, first, the Nigerian Constitution recognises only the jurisdiction of Nigerian courts over the ICCPR and second, the ICESCR is not justiciable. The ECCJ dismissed the objection by stating that '[B]y establishing the jurisdiction of the Court, [the Member States parties to the Revised Treaty of ECOWAS] have created a mechanism for guaranteeing and protecting human rights within the framework of ECOWAS so as to implement the human rights contained in all the international instruments they are signatory to'.¹¹⁸

The prospect of UN human rights treaties being justiciable and enforceable by a regional human rights court is a source of uneasiness, to say the least. Entrusting such a task to a regional human rights court is 'highly unusual'.¹¹⁹ Yet, the ACtHPR has clear jurisdiction to apply and monitor UN human rights treaties (if ratified by the State concerned).¹²⁰ The same can be said for the ECCJ, which has also been subject to criticism for exercising its jurisdiction over UN treaties.¹²¹ The ACtHPR's jurisdiction *ratione materiae* deviates from the "prototype" of the contentious jurisdiction of international courts on human rights, which is typically limited to the interpretation and application of a specific regional treaty. For this reason the ACtHPR does not sit well within the existing categories of adjudicative bodies¹²² and, consequently, the relevance of arguments concerning other international courts should not be

University of Pretoria, African Human Rights Case Law Database. Unless indicated otherwise, all judgments cited herein are available at the Court's website.

¹¹² ECCJ, *Sikiru Alade v Nigeria* 11 June 2012 (judgment unavailable to the author) as discussed in Ebobrah, 'Human Rights Developments in African Sub-Regional Economic Communities during 2012' (2013) 12 *African Human Rights Law Journal* 178 at 203; ECCJ, *SERAP v Nigeria* 14 December 2012 at para 28.

¹¹³ ECCJ, *Pawimondom v Togo* 19 February 2018 (in French) at 3; ECCJ, *Jerome Bougouma and Others v Burkina Faso* 19 February 2018 (in French) at 3; ECCJ, *Nosa Ehanire Osaghae v Nigeria* 10 October 2017 at para 3.

¹¹⁴ ECCJ, *Synecoci v Côte d' Ivoire* 19 February 2018 (in French) at 3; *Nosa Ehanire Osaghae*, supra n 113 at para 3.

¹¹⁵ *Pawimondom*, supra n 113 at 3; ECCJ, *Dorothy Chioma Njemanze and 3 Ors v Nigeria* 12 October 2017 at 2-3.

¹¹⁶ *Dorothy Chioma Njemanze and 3 Ors*, supra n 115; ECCJ, *Mahamoudou and Others v Mali* 7 May 2016 (in French) at para 20; ECCJ, *Koraou v Niger* 27 October 2008 at para 28, available at: <http://www.chr.up.ac.za/index.php/browse-by-institution/ecowas-ccj/379-niger-koraou-v-niger-2008-ahrlr-ecowas-2008.html> (last accessed 12 August 2018).

¹¹⁷ Ebobrah, 'Dual Mandate, Caried Authority: The Skewed Authority of the ECOWAS Community Court of Justice' iCourts Working Paper Series No. 57 (2016) at 12.

¹¹⁸ *SERAP*, supra n 112 at para 29.

¹¹⁹ Heyns, supra n 8 at 167.

¹²⁰ Viljoen, supra n 7 at 438.

¹²¹ Ebobrah, supra n 112 at 203.

¹²² Romano, supra n 15 at 245. Romano, Alter and Shany, 'Mapping International Adjudicative Bodies, the Issues and Players' in Romano, Alter and Shany, supra n 11, 3 at 9-10.

taken for granted when addressing the ACtHPR. The following discussion engages with the question of whether concerns raised with regard to the jurisdiction of the ACtHPR have certain merit or merely project anxieties from dissimilar contexts, and, if yes, to what extent.

3.2.1 Towards a World Court on Human Rights based in Arusha?

One may argue that as far as African States are concerned, the ACtHPR functions as a World Court on human rights based in Arusha.¹²³ Ideas about consolidating human rights monitoring mechanisms into a single judicial body — a World Court on human rights — have been debated for decades.¹²⁴ Clearly the design of the ACtHPR is not what was expected by many, but it is an intriguing design in international judicial adjudication. It creates a mechanism which does not consolidate monitoring mechanisms (as the envisaged World Court on Human Rights does), but consolidates human rights obligations of State parties under the auspices of a single judicial body on a regional level. The ACtHPR is ‘the judicial arm of the panoply of human rights agreements concluded under the aegis of the United Nations’.¹²⁵ Notably this model is expected to be strengthened, since the future African Court of Justice and Human Rights is entrusted¹²⁶ not only with all legal disputes concerning the interpretation and the application of the Charter and any other legal instruments relating to human rights ratified by the States Parties concerned, but also with legal disputes concerning any question of international law.¹²⁷ In this context, three main reasons may be discerned for treating the broad jurisdiction of the ACtHPR as a problem, rather than a welcome variance, in dispute settlement.

The first reason for being distrustful toward the ACtHPR’s jurisdiction lies in the authority of a *regional* court to apply, declare violations of, and monitor UN treaties.¹²⁸ The function of an international court on a regional level or a given geographical area casts doubt

¹²³ Meron, *supra* n 95. On the recurring theme on the need, desirability and feasibility for a World court on human rights see Subedi, *The Effectiveness of the UN Human Rights System — Reform and the Judicialisation of Human Rights* (2017) at 239-243; Kozma, Nowak and Scheinin, ‘A World Court of Human Rights - Consolidated Draft Statute and Commentary’ (2010) available at: <http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Scheinin/ConsolidatedWorldCourtStatute.pdf> (last accessed 12 August 2018); and Alston, ‘Against a World Court for Human Rights’ (2014) 28 *Ethics & International Affairs* 197.

¹²⁴ Meron, *supra* n 95.

¹²⁵ Romano, *supra* n 5.

¹²⁶ According to Article 9 of the Statute of the African Court of Justice and Human Rights, the Protocol and the Statute annexed to it shall enter into force thirty (30) days after the deposit of the instruments of ratification by fifteen Member States. Six member States have ratified thus far, information available at: https://au.int/sites/default/files/treaties/7792-sl-protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_3.pdf (last accessed 12 August 2018).

¹²⁷ Article 28 Protocol on the Statute of the African Court of Justice and Human Rights, *supra* n 21.

¹²⁸ Separate Opinion of Vice-President Fatsah Ouguergouz, *supra* n 36 at para 16; Mbondenyi, *supra* n 71 at 470.

onto its relevance at a global level.¹²⁹ An early and characteristic case in point was the Central American Court of Justice. In 1944, Manley Hudson strongly opposed the creation of a regional international court of general jurisdiction, because it would allegedly give rise to ‘a particularistic development of international law’,¹³⁰ and it would risk the primacy and universality of general international law.¹³¹ This mindset is also reflected in the way that scholars and practitioners systematise international courts, dividing them on the basis of their regional and universal jurisdiction, respectively.¹³² However, not everybody currently sees these developments in a negative light.¹³³ As will be discussed below, regional and specialised developments, as well as pronouncements of *all* international courts, inform (general)international law.¹³⁴ This strongly suggests the need for a more nuanced approach regarding the value and relevance of judgments and pronouncements by regional international courts.

A second reason for treating the ACtHPR’s jurisdiction as a problematic circumstance rests upon the prevailing view that *specialised* international courts create risks for diverging interpretations of international law. For this reason, specialised international courts should not extend their pronouncements beyond matters which ‘do not lie within the specific purview of [their] jurisdiction’.¹³⁵ In the context of the present discussion, this entails that the ACtHPR should refrain from exercising its jurisdiction over other treaties on human rights.¹³⁶ This line

¹²⁹ Farrell, ‘Distribution’ in Schabas and Murphy (eds), *Research Handbook on International Courts and Tribunals* (2017) 337 at 346.

¹³⁰ Hudson, *International Tribunals - Past and Future* (1944) at 179.

¹³¹ *Ibid.* at 179.

¹³² For example, Tomuschat, ‘International Courts and Tribunals’, Max Planck Encyclopaedia of Public International Law (last updated February 2011); Janis (ed), *International Courts for the Twenty-First Century* (1992), parts II and III; French, Saul and White (eds), *International Law and Dispute Settlement: New Problems and Techniques* (2010), part III; Schermers and Blokker, *International Institutional Law: Unity within Diversity* (2011).

¹³³ For example, Higgins, ‘The ICJ, the ECJ, and the Integrity of International Law’ (2003) *52 International Comparative Law Quarterly* 1 at 14-15.

¹³⁴ There is no well-established definition of the notion of general international law. According to the International Law Commission (ILC) (M. Koskenniemi, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission Finalized, UN Doc A/CN.4/L.682 (2006) at para 493), general international law includes customary international law, general principles of law within the meaning of Article 38(1)(c) of the Statute of the ICJ, and principles of the legal process. General international law may arguably include certain treaties (especially codification conventions) which are law-making in nature and well-ratified on a global basis — such as the UN treaties discussed herein — without implying that all widely ratified treaties are part of general international law. See Wood, ‘The International Tribunal for the Law of the Sea and General International Law’ (2007) *22 International Journal Marine & Coastal Law* 351 at 354-355. Cf. Tomuschat, ‘General International Law: A New Source of International Law?’ in Pisillo Mazzeschi and De Sena (eds), *Global Justice, Human Rights and the Modernisation of International Law* (2018) 185.

¹³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at para 403.

¹³⁶ Ebovrah, *supra* n 112 at 203.

of thinking reflects the insistence to underline the alleged risks posed by international courts entrusted with interpreting, applying, and monitoring a specific treaty and/or subject area, because they ‘could lead to the destruction of the very foundation of international law’.¹³⁷ The main concern is that different interpretations of similar or identical rules of international law can undermine the integrity of general international law, and the overall consistency of international law. This anxiety is all the more pronounced with respect to international courts on human rights, which are typically regional and specialised in scope.¹³⁸ *Lex regionis* and *lex specialis* have been formulated and developed as conjoined twins, and have defined the identity of (and role served by) human rights courts. Nonetheless, this view disregards first that the concept of divergence is over-emphasised, and second, that the distinction between courts of general jurisdiction and courts entrusted with specialised and/or regional jurisdiction is elusive, if not artificial.¹³⁹

As far as the first point on over-emphasising divergence, it regularly gets overlooked that different interpretations and even divergences qualify as natural and welcome occurrences of the nature and function of international law. The starting point of this discussion should be that two international courts disagreeing over the content of rules of international law is a healthy phenomenon.¹⁴⁰ In fact, given the nature of international law and in the absence of explicit regulation by States, ‘there can be as many judicial interpretations as there are [international] courts’.¹⁴¹ Moreover, looking for and highlighting a handful of instances of divergences and/or disagreements¹⁴² over-stresses the phenomenon and distorts the overall picture of communication and coordination among international courts.¹⁴³ It is also crucial how one appreciates divergence. There is a thin line separating divergence from the development of international law (or the potential to develop international law).¹⁴⁴ The *Loizidou* and *Tadić* cases are the most well-cited examples of giving rise to wrong and impermissible divergences

¹³⁷ Oda, ‘The International Court of Justice from the Bench’ (1993) 244 *Hague Recueil des Cours* 9 at 145. Cf. Caminos, ‘The Growth of Specialised International Tribunals and the Fears of Fragmentation of International Law’ in Boschiero et al (eds), supra n 88 55. See also Guillaume, supra n 90 and Schwebel, supra n 93; Schwebel’s position is admittedly much more nuanced.

¹³⁸ Romano, supra n 15 at 266; Schabas, ‘Introduction’ in Schabas and Murphy, supra n 129, 1 at 20.

¹³⁹ Bodeau-Livinec and Giorgetti, ‘Developing International Law at the Bar - A Growing Competition among International Courts and Tribunals’ (2016) 15 *The Law and Practice of International Courts and Tribunals* 177 at 185.

¹⁴⁰ Schwebel, supra n 93 at 4.

¹⁴¹ Besson, ‘Legal Philosophical Issues of International Adjudications — Getting Over the *Amour Impossible* between International Law and Adjudication’ in Romano, Alter and Shany, supra n 11, 413 at 425.

¹⁴² Shany, supra n 98 at 20-30. See for discussion Brown, ‘Review Essay — The Proliferation of International Courts and Tribunals: Finding Your Way through the Maze’ (2002) 3 *Melbourne Journal International Law* 453.

¹⁴³ Higgins, ‘A Babel of Judicial Voices? Ruminations from the Bench’ (2006) 55 *International & Comparative Law Quarterly* 791 at 797.

¹⁴⁴ Oellers-Frahm, ‘Proliferation’ in Schabas and Murphy, supra n 129, 299 at 321.

to (general) international law.¹⁴⁵ However, in retrospect *Loizidou*¹⁴⁶ is not treated anymore as a divergence to the ICJ's *Advisory Opinion on Reservations to the Genocide Convention*,¹⁴⁷ but as having paved the way for the enrichment of international law.¹⁴⁸ The *Tadić* case is treated by many as hardly a drama,¹⁴⁹ given the different relevant contexts of the jurisdictions of and cases before the ICJ and International Criminal Tribunal for the Former Yugoslavia, respectively.

Returning to the second point on the implications of distinguishing between courts of general jurisdiction and courts entrusted with specialised and/or regional jurisdiction, there is a growing acceptance of the role and value of regional and/or specialised courts and other bodies. The main frame of reference of this line of thinking is that international courts have much to learn from each other¹⁵⁰ and that each international court, in one way or another, applies the law whose content has been influenced by other international courts as well as other bodies.¹⁵¹ The ICJ, in a departure from its long-standing practice, now openly acknowledges and appreciates the authority of regional and special international courts.¹⁵² The ICJ affirmed their contribution to ascertaining the formation and content of customary international law,¹⁵³

¹⁴⁵ For example, Guillaume, *supra* n 90 at 4-6; Jennings, 'The Judiciary, International and National and the Development of International Law' (1996) 45 *International & Comparative Law Quarterly* 1 at 6.

¹⁴⁶ *Loizidou v Turkey*, 23 April 1995 (Grand Chamber) at paras 67-84.

¹⁴⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep. 1951, p. 15.

¹⁴⁸ Joint Separate Opinion of Judge Higgins, Judge Kooijmans, Judge Elabary, Judge Owada and Judge Simma, in *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda)* (New Application: 2002), Judgment, Jurisdiction of the Court and Admissibility of the Application, 3 February 2006, ICJ Rep. 2006, p. 6 at para 23; Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *Leiden Journal International Law* 745 at 747; Thirlway, 'The Proliferation of International Judicial Organs and the Formation of International Law' in Heere (ed), *International Law and the Hague's 750th Anniversary* (1999) 433 at 437-438. The ILC Guide to Practice on Reservations to Treaties also affirm this. See Report of the ILC on the Work of its 63rd session, GA, Official Records, 66th Session, Supplement No. 10, Addendum 1, UN Doc. A/66/10/Add. 1, Guideline 1.3.2, Guideline 2.1.2 and accompanied commentary.

¹⁴⁹ *Prosecutor v Tadić*, Appeals Chamber, IT-94-1-AR72, Interlocutory Appeal on Jurisdiction, 8 September 1995 at para 11. Cf *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, Judgment, Merits, I.C.J. Rep. 1986, p. 14 at para 222; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, *supra* n 135 at para 403. Higgins, *supra* n 143 at 795.

¹⁵⁰ Separate Opinion of Judge Cancado Trindade, *supra* n 91 at para 238.

¹⁵¹ Schwebel, *supra* n 93 at 4; Cançado Trindade, 'The Development of International Human Rights Law by the Operation and the Case Law of the European and Inter-American Courts of Human Rights' (2004) 25 *Human Rights Law Journal* 157 at 158.

¹⁵² Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 *Journal International Dispute Settlement* 1 at 12-14.

¹⁵³ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99, at paras 72, 73, 76, 78, 90. See also the draft conclusions of the ILC on identification of customary international law International Law Commission, 70th Session, Identification of customary international law - Statement of the Chair of the Drafting Committee, Mr. Charles Chernor Jalloh, 25 May 2018, Draft Conclusion 13, available at: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2018_dc_chairman_statement_icil.pdf&lang=E (last accessed 12 August 2018). Conclusion 13 reads 'decisions of international courts and tribunals, in

to discerning general principles,¹⁵⁴ and to interpreting international treaties. In 2010, within the context of interpreting the ICCPR, the ICJ stated that '[a]lthough the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe *great weight* to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty'.¹⁵⁵ The Court used the views of the CAT Committee to interpret the CAT,¹⁵⁶ the views of the Human Rights Committee's (HRC) to interpret the ICCPR,¹⁵⁷ and the views of the African Commission on Human Rights to interpret the ACHPR.¹⁵⁸ Interestingly, in order to confirm its construction of the ACHPR, the Court gave due regard to the case law of both the ECtHR and IACtHR.¹⁵⁹

The foregoing points demonstrate that the possibility of different interpretations of UN and other treaties by the ACtHPR or the alleged risk to the coherence of international (human rights) law¹⁶⁰ should not be overemphasised. Such concerns can be mitigated as much as possible by way of interpretation and cross-judicial dialogue.¹⁶¹ In line with this, the ACtHPR gives extensive discussion to the views of UN bodies¹⁶² and the jurisprudence of other human rights courts.¹⁶³ The ECCJ also follows the same approach.¹⁶⁴

particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules'. The decisions' value primarily depends on the quality of reasoning and on how they were received by States and future case law.

¹⁵⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Compensation, Judgment, I.C.J. Reports 2012, p. 324 at paras 13, 18, 24, 33, 40, 56.

¹⁵⁵ *Ahmadou Sadio Diallo*, supra n 91 at para 66 (emphases added).

¹⁵⁶ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422 at paras 100-102.

¹⁵⁷ *Ahmadou Sadio Diallo*, supra n 91 at para 67.

¹⁵⁸ *Ibid.* at para 67.

¹⁵⁹ *Ibid.* at paras 67, 68. See also Separate Opinion of Judge Cancado Trindade, supra n 91 at paras 232, 237.

¹⁶⁰ Ebobrah, supra n 112 at 203.

¹⁶¹ For detailed discussion on how the ACtHPR interprets the ACHPR by taking other international rules into account see Rachovitsa, 'The African Court on Human and Peoples' Rights: A Uniquely Equipped Testbed for (the Limits of) Human Rights Integration?' in Bribosia, Rovine and Correa s(eds), *Human Rights Tectonics — Global Dynamics of Integration and Fragmentation* (Intersentia, in press 2018).

¹⁶² On the ACtHPR taking into consideration of General Comments by the HRC and the ICESCR Committee as authoritative statements on the interpretation of the provisions of the respective UN treaties see *Tanganyika Law Society*, supra n 26 at para 107.4; *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 77 at para 181.

¹⁶³ On the ACtHPR giving due regard to the case law of the ECtHR and the IACtHR see *Lohé Issa Konaté*, supra n 72 at paras 147-154, 158-163; *Wilfred Onyango Nganyi & 9 Others*, supra n 74 at paras 136-154; *Alex Thomas*, supra n 74 at paras 146-147; *Tanganyika Law Society*, supra n 26 at para 82.1; *Actions pour la Protection des Droits de l'Homme*, supra n 38 at para 95; *Mohamed Abubakari*, supra n 74 at paras 25-27.

¹⁶⁴ Taking cognisance of the practice of the HRC (e.g. ECCJ, *Benson Olua Okomba v Benin* 10 October 2017 at 24); the case law of the ECtHR (e.g. *Benson Olua Okomba*, *ibid.* at 10, 13, 15, 16-17, 23; *Dorothy Chioma Njemanze and 3 Ors*, supra n 115 at 34, 37; ECCJ, *The Incorporated Trustees of Fiscal and Civic Right Enlightenment Foundation v Nigeria* 7 June 2016 at 44-46); or the case law of the IACtHR (e.g. *Benson Olua Okomba*, *ibid.* at 10-11, 23; *Dorothy Chioma Njemanze and 3 Ors*, supra n 115 at 32, 39).

Finally, a third reason for being particularly reluctant to entertain the possibility that a regional international court may monitor UN treaties concerns specifically the *conceptual and geographical topos* of the ACtHPR. The authority of regional bodies to construe international law brings to the fore informal hierarchies among said international courts, and the structural imbalance entrenched in the Euro-centred map of the international law landscape.¹⁶⁵ The fixity of cities and spaces of delivering international justice, and developing international law, is well reflected in the very limited number and geographical worldwide scope of those cities in which these processes take place.¹⁶⁶ The “law of Geneva” and the “law of The Hague” assign international law a location, and narrate a specific story of progress.¹⁶⁷ This inhibits us from giving due regard to the seemingly unlikely places in which international law may be found.¹⁶⁸ The ACtHPR can be seen as part of a different plausible map of international law,¹⁶⁹ supporting a plurality of loci for experimenting with, and articulating, variant designs. As far as our perception is concerned, there is a geographical and conceptual distance to bridge between envisaging Geneva as the seat of the proposed World Court on Human Rights on the one hand,¹⁷⁰ and accepting the possibility that Arusha is the seat of the World Court on Human Rights for African States, on the other hand. Bridging this gap challenges us to rethink human rights law and institutions.¹⁷¹ Murray has perceptively highlighted that international human rights law and international human rights scholars have focused primarily on European and Western sources and neglected other jurisdictions. Western scholars give the impression that one has little to learn from African institutions and their experiences, under the pretexts that the ACtHPR is a young institution, ineffective, or irrelevant.¹⁷² One should add to this that it is not only Western scholars but also African scholars who do not seem to value the unique features and potential of the ACtHPR; they focus, instead, on the alleged risks posed by the diversion from the mainstream “model(s) of success” of regional human rights courts as well as, in general, the “templates” of designing mechanisms of international judicial dispute settlement.¹⁷³

¹⁶⁵ Pearson, ‘Spaces of International Law’ (2008) 17 *Griffith Law Review* 489 at 496.

¹⁶⁶ *Ibid.* at 498.

¹⁶⁷ Koller, ‘... and New York and The Hague and Tokyo and Geneva and Nuremberg and ...: The Geographies of International Law’ (2012) 23 *European Journal International Law* 97 at 98. See also how, more broadly, the ordered categories of dispute settlement tell a powerful story in Romano, *supra* n 15 at 243.

¹⁶⁸ Pearson, *supra* n 165 at 490.

¹⁶⁹ *Ibid.* at 498.

¹⁷⁰ Article 2 draft Statute of the World Court on Human Rights, *supra* n 123.

¹⁷¹ Murray, *supra* n 17 at 197.

¹⁷² Murray, *supra* n 17 at 193, 195.

¹⁷³ Alter, Helfer, and McAllister, *supra* n 5 at 779 is a rare example of scholars who embrace the potential of the ongoing ‘natural experiment’ in judicial dispute settlement in the African continent.

3.2.2 Introducing Propriety Considerations in Exercising the ACtHPR's Jurisdiction?

Interestingly, the ACtHPR may be developing a policy of exercising judicial restraint when exercising its jurisdiction over other human rights treaties. The Court proclaimed that it is not necessary to consider alleged violations of the ICCPR if it has already ruled on similar alleged violations under the relevant provisions of the Charter.¹⁷⁴ In this way, the Court seems to prioritise alleged violations under the Charter, but no criteria are articulated on when it is *unnecessary* to examine other treaties. In other instances, the Court simply did not address the applicants' claims regarding alleged violations of the ICCPR and the ICESCR, without elaborating on the reasons that it failed to do so.¹⁷⁵ The Court maintains an inconsistent practice regarding the examination of similar or identical provisions given under different human rights treaties. For example, in the cases of *Lohé Issa Konaté* and *Ingabire Victoire Umuhoza*, the Court found that Article 19 ICCPR had been breached, whereas in *Aboulaye Nikiema and Others* the Court deemed the examination of the alleged violation of Article 19 ICCPR unnecessary.¹⁷⁶ Another cluster of cases concerning the right to free legal assistance under the right to a fair trial provide further evidence of the discrepant case law. In its 2015 judgment in the *Alex Thomas* case, the ACtHPR found that Tanzania had failed to comply with its obligations under both the Charter and the ICCPR.¹⁷⁷ The subsequent *Wilfred Onyango Nganyi* case mentions a violation *only* of the Charter.¹⁷⁸ Finally, in the 2016 *Mohamed Abubakari* judgment, the Court framed the question before it as being one of whether the State was compliant with Article 7 Charter *and* Article 14 ICCPR, and proceeded to affirm that by failing to provide free legal assistance, Tanzania was in violation of both Article 7 Charter and Article 14 ICCPR.¹⁷⁹ On the other side of the spectrum, in the recent *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes (APDF) and The Institute for Human Rights and Development in Africa v Republic of Mali*, judgment the Court decided solely on alleged violations of other treaties on human rights without bringing the ACHPR into play.¹⁸⁰

¹⁷⁴ *Tanganyika Law Society*, supra n 26 at para 123; *Aboulaye Nikiema and Others*, supra n 25 at paras 115-117, 118, 157, 170, 188.

¹⁷⁵ ACtHPR, *The African Commission on Human and Peoples' Rights v Libya* 3 June 2016 at para 77; *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 77 at para 2.

¹⁷⁶ *Lohé Issa Konaté*, supra n 72 at para 176; *Ingabire Victoire Umuhoza*, supra n 72 at para 173(ix); *Aboulaye Nikiema and Others*, supra n 25 at para 188.

¹⁷⁷ *Alex Thomas*, supra n 74 at para 124.

¹⁷⁸ *Wilfred Onyango Nganyi & 9 Others*, supra n 74 at para 184.

¹⁷⁹ *Mohamed Abubakari*, supra n 74 at paras 140, 145.

¹⁸⁰ *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes*, supra n 81 at paras 9, 78, 95, 115, 125, 135.

It is notable that the ECCJ also appears to introduce certain caveats to the human rights treaties that it is willing to discuss. In a more rigorously articulated justification compared to the ACtHPR, the ECCJ, in *SERAP*, stated that '[V]arious articles of different instruments sanction the same rights, the said instruments may, as far as those specific rights are concerned, be considered *equivalent*. It suffices therefore to cite the one which affords more effective protection to the right allegedly violated'.¹⁸¹ The term 'equivalent' denotes norms which are identical or similar, but whose interpretation is subject to the structure, aim, specificities and development of their normative context.¹⁸² Contrary to the ACtHPR, which favours the application of the Charter over other human rights provisions, the ECCJ prefers to apply the more favourable treaty. The ECCJ's tendency to focus on the more favourable provision may be due to the fact that it does not have a constitutive catalogue of human rights, as the ACtHPR does. That said, since the 2012 *SEPAP* judgment, the ECCJ has given no indication that it actually applies this statement in practice. In instances in which many treaties were applicable to the facts of a case, the ECCJ found violations of a variety of human rights treaties and instruments (i.e. the Charter, the ICCPR, CEDAW, or even the UDHR) *in a cumulative fashion*, without choosing the more favourable and/or equivalent treaty provision.

The inconsistent case law of both courts does not allow for definite conclusions to be drawn as to whether they actually apply the foregoing caveats to the exercise of their jurisdiction over treaties on human rights. It is possible that the two courts will create judicial policies introducing propriety considerations, so as not to examine all relevant human rights treaties. It is not uncommon for international courts to limit the scope of a ruling without examining all submissions raised by the applicants or all possible legal bases. Different legal justifications may be furnished to justify such a judicial practice. First, international courts may do this due to reasons of procedural economy, or due to their reluctance to address a particular question,¹⁸³ as long as a court's approach is not unduly reductive.¹⁸⁴ Second, international courts have the power to decide the scope of a claim, by determining how the legal grounds establishing their jurisdiction and the nature of the claims shape the subject of a dispute.¹⁸⁵ A court has the power to ascertain its competence to entertain a legal claim which means that,

¹⁸¹ *SERAP*, supra n 112 at para 92 (emphasis added).

¹⁸² Broude and Shany, 'The International Law and Policy of Multi-Sourced Equivalent Norms' in Broude and Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (2011) 1 at 5, 9.

¹⁸³ Harris et al (eds), *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights*, 3rd edn (2014) at 821-822 (concerning Article 14 ECHR).

¹⁸⁴ Partly Dissenting Opinion of Judge Keller in ECtHR, *Sükran Aydın and Others v Turkey* 27 May 2013 at para 3.

¹⁸⁵ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Merits, Judgment, 4 June 2008 [2008] ICJ Rep. 177 at paras 70-75; Kolb, *The International Court of Justice* (2013) at 188-190.

even though it has jurisdiction to decide a complaint, it may deem it inappropriate to exercise said jurisdiction.¹⁸⁶ Third, such a practice may relate to making a choice of applicable law in cases in which many rules are applicable. This is not necessarily an issue of *lex specialis*, but rather an issue of ‘locating the corpus of law at the heart of a difficult issue’.¹⁸⁷ An example of this is the *Legality of the Threat or Use of Nuclear Weapons*, in which the ICJ answered the question of the legality of nuclear weapons not by reference to human rights law (right to life under the ICCPR) or principles of environmental law, but in connection to *jus in bello*.¹⁸⁸ This was not an application of *lex specialis*, but a question of what norm and/or body of law is the most relevant to the matter as it was submitted to and construed by the ICJ. In light of the distinctive material jurisdiction of the ACtHPR extending over a variety of human rights treaties, one could argue that the ACtHPR may develop a practice of “calibrating” the dispute and finding the heart of the matter brought before it.¹⁸⁹

Nonetheless, such a practice presents a number of difficulties. It is not an easy task to make and justify a choice of the human rights treaty, against which an applicant’s complaint shall be assessed. If the ACtHPR or the ECCJ proceed with adopting such a practice, it is strongly advisable that they elaborate on specific criteria as to whether or not a complaint under a human rights treaty should be examined. This is dictated by considerations of legal certainty and equal treatment of the applicants. The ACtHPR has implied that the Charter is at the foreground in its judgments, whereas the ECCJ has stated that it will prioritise the more favourable treaty provision — even though both courts do not seem to follow their statements of principle. Furthermore, one needs to keep in mind the implications of such choices: there is the possibility of unduly reducing the scope of the Court’s jurisdiction *ratione materiae*, on the one hand; and the risk of (under)developing the standards of the ACHPR and a regional *corpus juris*, on the other hand.

¹⁸⁶ Although the ICJ usually considers the propriety of exercising its jurisdiction in its Advisory Opinions or in cases of *forum prorogatum*, propriety considerations can be relevant in contentious proceedings too. See Thirlway, *The Law and Procedure of the International Court of Justice* (2013) at 1658-1662. *Certain Questions of Mutual Assistance in Criminal Matters*, supra n 185 at paras 70-75.

¹⁸⁷ Higgins, supra n 143 at 792.

¹⁸⁸ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226 at paras 23-34.

¹⁸⁹ *SERAP*, supra n 112 at para 93.

3.3 The Anxiety of Threatening African Human Rights Law

3.3.1 Undermining the Specificity of African Human Rights Law

Heyns argues that the broad jurisdiction of the ACtHPR poses a risk to the specificity of the ACHPR because the latter becomes but one treaty among others before the ACtHPR.¹⁹⁰ Although he does not clarify in what way this is a risk, it is likely he means that the Court may be satisfied with finding violations of other treaties at the expense of developing the Charter's standards, and nurturing an African human rights jurisprudence.¹⁹¹ This is a valid concern. The Court's case law evidences that the Charter is at the core of its legal reasoning, and it systematically discusses alleged violations of the Charter *hand in hand with other treaties*, as shown in section 3.2. Nonetheless, this was not the case in the 2018 *Association Pour le Progrès et la Défence des Droits des Femmes Maliennes* judgment. In this instance, the Court found Mali in breach of its obligations under the CEDAW, the Maputo Protocol, and the African Charter on the Rights and Welfare of the Child, without making any effort *proprio motu* to identify relevant provisions of the Charter, or to link the Charter with the facts of the case and the applicant's submissions. One may argue that the Court preferred to focus on specialised treaties regarding women's and children's rights, but still, the Court should have furnished a link with States' obligations under the Charter too. It should be noted that on this occasion, most of the treaties that the Court discussed (besides the CEDAW) are African treaties, and hence, the Court is still developing the African *corpus juris*.

Creating a "variable geometry" of State parties' obligations is another point raised regarding the undermining of African human rights by the Court's broad jurisdiction. According to this argument, if the obligations of State parties differ depending on what other human rights treaties a given respondent State has ratified,¹⁹² this may result in a "variable geometry" of obligations of African States under the Charter and, therefore, inhibit the construction of an African human rights *corpus juris*. This is not a significant problem (or even a problem in the first place), given that international law in its essence consists of many different variable geometries of international obligations. It is possible for the Court to develop the *corpus juris* of African human rights while considering and monitoring the implementation of specific treaties, with regard to the specific respondent State(s) in each case.

¹⁹⁰ Heyns, *supra* n 8 at 167.

¹⁹¹ Viljoen and Baimu, 'Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004) 22 *Netherlands Quarterly Human Rights* 241 at 253.

¹⁹² Heyns, *supra* n 8 at 167. See also Mujuzi, *supra* n 9 at 193.

The risk of undermining the specificity of African human rights law is more likely to materialise not as a result of the ACtHPR's broad jurisdiction, but in the context of the interpretation process.¹⁹³ The ACtHPR's systematic reliance on the case law of the European and Inter-American Courts of Human Rights may, in certain instances, raise the question of whether such influence can be disproportionate. Conceptualising the development of the ACHPR within the context of international human rights law is a challenging task for a young international court. On the one hand, it is expected of the ACtHPR to take into consideration, and benefit from, the long-standing jurisprudence of other regional human rights courts or the views of UN bodies. On the other hand, coordination and convergence with global and other regional standards should not lead to neglecting the development of a regional (African) human rights' understanding, the contours of which have already been established by the African Commission.¹⁹⁴ This specificity is rooted in the unique characteristics of human rights in the design of the ACHPR, including the equal weight accorded to civil and political rights, economic, social and cultural rights and also peoples' rights, as well as the local (legal) reality in State parties to the ACHPR. This particularity gives rise to, and justifies, different interpretations of specific human rights (compared to how the same or identical rights are interpreted under other treaties).¹⁹⁵

In this regard, the ways in which the ACtHPR selects and uses relevant international instruments and views of other monitoring bodies and international courts when construing the Charter is an important factor. A few concrete examples are called for. When the ACtHPR is in the process of discerning the ordinary meaning of a provision in the ACHPR its starting point and primary focus should be the text of the ACHPR, without resorting prematurely to the case law of the ECtHR regarding the interpretation of an equivalent right under the ECHR. This is what happened in *Wilfred Onyango Nganyi*, when the ACtHPR, in establishing the meaning of 'trial within a reasonable time' under Article 7(1)(d) ACHPR, took recourse to the criteria of reasonableness developed throughout the extensive case law of the ECtHR.¹⁹⁶ Moreover, the ACtHPR should engage in its reasoning with both the global and other regional standards in a balanced and consistent manner — especially if the respondent State is bound

¹⁹³ Rachovitsa, *supra* n 161.

¹⁹⁴ Perrin, 'African Jurisprudence for Africa's Problems: Human Rights Norm Diffusion and Norm Generation Through Africa's Regional International Court' (2015) *American Society International Law Proceedings* 32 at 32-33.

¹⁹⁵ Brems, *Human Rights: Universality and Diversity* (2001) at 116-117, 126-128, 133-136.

¹⁹⁶ *Wilfred Onyango Nganyi & 9 Others*, *supra* n 74 at paras 136-154; Mujuzi, *supra* n 9 at 218.

by said global standard(s).¹⁹⁷ Otherwise, the ACtHPR runs the risk of 'Europeanising' or 'Inter-Americanising' its jurisprudence,¹⁹⁸ in the sense of overemphasising the relevance and influence of other regional human rights treaties. One should also be mindful that the criteria set out by the jurisprudence of other international courts need to be tailored and applied in light of local circumstances and legal reality in African countries. In *Mohamed Abubakari*, the fact that the judgment was not delivered publicly should have arguably been given more weight in the assessment of the alleged violation of the right to a fair trial under the ACHPR since, unlike in Europe, it is not common practice in many African States to have immediate access to the text of the judgment.¹⁹⁹

Moreover, it is arguable that the ACHPR in the *Association Pour le Progrès et la Défense des Droits des Femmes Maliennes* judgment case should have brought into play the ACHPR and, more specifically, it should have engaged with the question of whether and, if yes, how the duties of individuals toward the community (Articles 27 and 29 ACHPR) could have a legal relevance to the interpretation of women's and children's rights.

Another example of the potentially problematic use of other international instruments and views of other bodies when interpreting the Charter is the ways in which the ACtHPR addresses peoples' rights under the ACHPR, since '[C]ontrary to other human rights instruments, the ACHPR establishes the link between the right to life and the inviolable nature and integrity of the human being',²⁰⁰ and violations of economic, social and cultural rights may engender conditions unfavourable to a decent life. In the *African Commission on Human and Peoples' Rights v Republic of Kenya* case, the Ogiek people claimed that limited access to and removal from their ancestral home amounted to a violation of the community's right to decent survival, under Article 4 ACHPR. Even though the ACtHPR recognised the Ogiek as an indigenous population, and it held that the expulsion of the Ogiek from their ancestral lands against their will and without prior consultation violated their communal ownership rights under the right to property, it left unclear whether this violation was pronounced with regard to the individual members of the Ogiek or the Ogiek as a people.²⁰¹ In that judgment, the

¹⁹⁷ This was underlined in the Partly Dissenting Opinion of Vice-President, Justice Thompson in *Mohamed Abubakari*, supra n 74 at paras 9-10 and the Dissenting Opinion of Judge Rafâa Ben Achour, *ibid.* at paras 15-17.

¹⁹⁸ Mujuzi, supra n 9 at 218-219.

¹⁹⁹ *Ibid.*

²⁰⁰ *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 77 at para 152.

²⁰¹ The ACtHPR reserved its judgment on reparations, which is currently pending. See *African Commission on Human and Peoples' Rights v Republic of Kenya*, supra n 77 at paras 128-131, 223. Cf. *African Commission on Human and Peoples' Rights, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* 27 October 2001 at paras 60-67 in which the African Commission acknowledged

ACtHPR took cognisance of the practice of the African Commission, the views and General Comment of the ICESCR Committee and the case law of the IACtHR. This leaves one but to wonder to what extent the practice of these bodies is of sufficient relevance to the ACHPR's broader and more promising provisions, which are not to be found in other human rights treaties.²⁰²

3.3.2 Fragmenting African Human Rights Law

Whereas the previous analysis addressed how the ACtHPR may raise legal concerns regarding its engagement with other human rights treaties, the present subsection focuses on the alleged risk of undermining the Charter due to differing interpretations of the Charter by the ACtHPR and the ECCJ. This brings to the foreground the regional vis-à-vis the sub-regional levels of analysis.

In the absence of a catalogue of human rights in the ECOWAS Revised Treaty, the ECCJ decides human rights complaints by adopting the Charter as its standard of assessment.²⁰³ It maintains that the Charter instantiates the 'African regional human rights framework'.²⁰⁴ The ECCJ's interpretation, application and monitoring of the Charter is seen by some as leading to possibly diverging interpretations or conflicting judgments, and hence fragmentation of African human rights law.²⁰⁵ Moreover, the ACtHPR and the ECCJ could, in theory, impose different obligations upon States which have accepted the ACtHPR's competence to receive individual complaints and are also ECOWAS member States.²⁰⁶ Finally, this could also mean that the same matter may be submitted consecutively before both courts. The ACHPR,

that the Ogoni peoples' right to property, right to housing and right to a dignified life were violated as *collective* human rights.

²⁰² Cf. IACtHR, *Kaliña and Lokono Peoples v Suriname* 25 November 2015 at paras 107-114; Partially Dissenting Opinion of Judge Alberto Pérez Pérez, *ibid.* at para 9.

²⁰³ According to Article 19(1) Protocol (A/P.1/7/91 on the Economic Community Court of Justice, 6 July 1991) the ECCJ 'shall apply the Treaty, the Rules of Procedure and, as necessary, Article 38 ICJ Statute'. The ECCJ established its jurisdiction over the ACHPR by reference to Article 4(g) of the 1993 Revised Treaty of ECOWAS, which reads: 'the High Contracting Parties, in pursuit of the objectives stated in Article 3 of the Treaty solemnly affirm and declare their adherence to the following principles: [...] (g) recognition, promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights'.

²⁰⁴ ECCJ, *Omar Jallow v Gambia* 10 October 2017 at 10. See also ECCJ, *Ugokwe v The Federal Republic of Nigeria* 7 October 2005 at para 29 available at: <http://www.chr.up.ac.za/images/files/documents/africancases/institution/ecowas/Jerry%20Ugokwe%20v%20Nigeria.pdf> (last accessed 12 August 2018).

²⁰⁵ For example, Ebobrah, 'Critical Issues in the Human Rights Mandate of the ECOWAS Court of Justice' (2010) 54 *Journal African Law* 1 at 14.

²⁰⁶ Four out of the seven ECOWAS member states are also subject to the ACtHRP's jurisdiction: Benin, Burkina Faso, Côte d'Ivoire, Ghana and Mali.

however, does not have a provision precluding this scenario, and the Statute of the ECCJ prohibits only the *concurrent* submission of an application concerning the same matter before another international court.²⁰⁷

It is striking how this discussion transplants the arguments and anxieties from the context of general bodies/global courts vis-à-vis regional/specialised courts into the context of regional vis-à-vis sub-regional courts on human rights. First, it is assumed that any tensions and different approaches in the case law of the ACtHPR and the ECCJ are negative, even though as previously discussed, such differences can be productive and meaningful, and in any event, not detrimental. Another recurring theme revolves around the protection of the integrity of the global and regional standards which are allegedly threatened by the regional/specialised and sub-regional courts, respectively. One cannot fail to notice the irony of scholars who argue that the inclusion of other (non-African treaties) into the jurisdiction of the ACtHPR undermines the specificity of African human rights law (as discussed in the previous subsection) and, at the same time, dismiss the opportunity to have two African courts enhancing the specificity of the regional bill of rights. The dominant perception in international law is that other bodies should not engage with, construe or monitor other treaties; and that the global or regional courts and standards are challenged or undermined by the regional and sub-regional courts and standards, respectively.²⁰⁸ Our frame of reference should not be that a court holds a monopoly over its constitutive treaty. Neither the ACHPR nor the Protocol establishing the ACtHPR confer exclusive jurisdiction to ACtHPR.²⁰⁹ Our starting point should be, instead, that international courts have a “shared ownership” over the regional bill of rights and pursue a common endeavour.²¹⁰

Crucially, there is nothing in the case law of the courts to substantiate the concern about lowering the standards of the regional bill of rights.²¹¹ On the contrary, the two courts seem to share a vision of exercising a “shared ownership” over the regional bill of rights which sets the minimum standard. The use and application of the Charter by the ECCJ strengthens the clarity

²⁰⁷ Article 10(d) of Supplementary Protocol A/SP.1/01/05 Amending Protocol A/P.1/7/91 relating to the Economic Community Court of Justice, 19 Jan 2005. Cf. Article 6(2) Protocol to the ACHPR and Article 56(7) ACHPR. See discussion in Murungi and Gallinetti, supra n 94 at 126.

²⁰⁸ Viljoen, supra n 7 at 496, suggests that the ‘subregional courts follow the African Court’s interpretation, when such an interpretation exists, or by working a system of referral to the African Court for interpretative guidance’. Murungi and Gallinetti, supra n 94 at 135 argue that the ACHPR is in a hierarchical position vis-à-vis sub-regional human rights instruments and, hence, the use of the ACHPR by the ECCJ blurs the normative hierarchy.

²⁰⁹ Ebobrah, supra n 117 at 11. See also in general Besson, supra n 141 at 425.

²¹⁰ Helfer, supra n 75 at 349-353.

²¹¹ Murungi and Gallinetti, supra n 94 at 130.

of international law and deepens human rights protection.²¹² In general, the overlap between the UN covenants and regional and sub-regional human rights law, and their respective monitoring bodies, enhances the influence of the UN covenants in the domestic sphere of African States and consolidates human rights standards.²¹³ The courts' systematic engagement with UN treaties, the references to and use of the practice of the HRC and the case law of other regional courts on human rights point toward this direction.²¹⁴ In addition to this, important and interesting issues (some of which have not found their way before the ACtHPR yet) are being litigated before the ECCJ,²¹⁵ since the ECCJ enjoys a broad jurisdiction and grants direct access for individuals without a requirement to exhaust domestic remedies.²¹⁶ The subject matter of cases heard by the ECCJ spans across slavery, electoral systems and the right to political participation; independence of the judiciary; gender-based discrimination with regard to inheritance rules; reparation for terrorism victims and procedural aspects of the right to life; effective remedy; self-determination and natural resources.

As long as the ECCJ gives due regard to the pronouncements of the ACtHPR and the African Commission, any tensions or differing interpretations shall be mitigated appropriately. This, of course, goes both ways — the ACtHPR also needs to take the ECCJ's judgments into account with regard to the ECCJ's pronouncements on both the Charter and other regional and sub-regional treaties and instruments on human rights which form the African *corpus juris*. The continental ACtHPR regularly applies and declares violations of regional treaties such as the African Charter on Democracy,²¹⁷ and sub-regional treaties, including the ECOWAS Revised Treaty,²¹⁸ the ECOWAS Democracy Protocol²¹⁹ and the Protocol to the African Charter on Human and Peoples' Rights of Women in Africa.²²⁰ The absence of any discussion on why it is only a sub-regional but not a regional court on human rights that may undermine

²¹² Alter, Helfer, and McAllister, *supra* n 5 at 778; Ebobrah, 'Litigating Human Rights before Sub-Regional Courts in Africa: Prospects and Challenges' (2009) 17 *African Journal of International & Comparative Law* 79 at 88.

²¹³ Besson, 'The Influence of the Two Covenants on States Parties Across Regions: Lessons for the Role of Comparative Law and of Regions in International Human Rights Law' in Moeckli and Keller (eds), *The Human Rights Covenants at 50 - Their Past, Present, and Future* (2018) 243 at 261-262, 269-273.

²¹⁴ See footnotes 161–164 and accompanying text.

²¹⁵ Alter, Helfer, and McAllister, *supra* n 5 at 738.

²¹⁶ Cf. Article 10(d) of Supplementary Protocol A/S P.1/01/05 Amending Protocol A/P.1/7/91 relating to the Economic Community Court of Justice, 19 Jan 2005 with Article 6(2) Protocol to ACHPR in conjunction with Article 56(5) and (6) ACHPR and Rules 34 and 40, Internal Rules of the ACtHPR, *supra* n 67.

²¹⁷ *Actions pour la Protection des Droits de l'Homme*, *supra* n 38.

²¹⁸ *Lohé Issa Konaté*, *supra* n 72 at para 12; *Abdoulaye Nikiema and Others*, *supra* n 25.

²¹⁹ *Actions pour la Protection des Droits de l'Homme*, *supra* n 38. See *Jerome Bougouma and Others*, *supra* n 113 at 3.

²²⁰ *Dorothy Chioma Njemanze and 3 Ors*, *supra* n 115 at 2–3.

the African *corpus juris* reinforces the argument that unfounded, informal hierarchies among international courts are very well entrenched in the way we survey the legal horizon.

4. Conclusions

The ACtHPR's distinctive jurisdiction to interpret, apply and monitor not only the ACHPR, but also other human rights treaties, gives rise to a unique institutional design in judicial adjudication. It is expected that the subject matter of the complaints brought before the Court will further diversify in the future, and that the Court will have more opportunities to clarify the scope of its jurisdiction, as well as to nurture the specificities of the ACHPR and the African *corpus juris*.

The present author does not find it, in principle, problematic that the UN and other treaties may be justiciable and enforceable by a regional and specialised court on human rights, since the ACtHPR has specifically been endowed with the authority to do so. More generally, international courts should have as their frame of reference a vision of "shared ownership" over international law. The analysis demonstrated that many international courts, including the ICJ, are gradually adopting this framework. The possibility of divergent interpretations of similar or identical rules of international law is largely overstressed in legal scholarship. Moreover, differences in courts' approaches also need to be appreciated as being productive and meaningful and, in any event, not that detrimental.

Although many of the concerns expressed by international law scholars regarding the exercise of the Court's jurisdiction are generally overemphasised, the Court's jurisdiction is not without issues to address. The analysis highlighted certain difficulties regarding the concept 'human rights treaty' as a prerequisite for the Court to exercise its jurisdiction. The introduction of propriety considerations to the ACtHPR's jurisdiction is not deemed necessary or desirable. The Court does not have a consistent case law, either. However, should the Court proceed with adopting a judicial policy of not examining all complaints concerning other human rights treaties, it is strongly advised to clarify concrete criteria for making such a choice. Finally, the development of the ACHPR's standards and the construction of a regional human rights *corpus juris* have nothing to fear from the wide jurisdiction of the ACtHPR (or the ECCJ); rather, the Court be cautious of the relevance and weight attached to other treaties, and the jurisprudence of other international courts and bodies in the context of the interpretation process of the Charter.

A critical factor that will determine the Court's role, the development of a sustainable jurisprudence, compliance on behalf of the respondent States and a possible increase of the number of States accepting the Court's jurisdiction is the quality of its judgments.²²¹ This includes the clarity of its reasoning, and the comprehensiveness of the grounds of its decisions. The Court needs to address all points raised by the parties to a case in a satisfactory manner, and to properly deal with issues pertaining to its jurisdiction.²²²

²²¹ For the ECtHR, see Merrills, *The Development of International Law by the European Court of Human Rights*, 2nd edn (1993) at 21; for the ICJ, see Lauterpacht, *The Development of International Law by the International Court* (1958) at 37-44 and Damrosch, 'Article 56' in Zimmermann, Tomuschat and Oellers-Frahm (eds), *The Statute of the International Court of Justice — A Commentary*, 2nd edn (2012) 1366, at 1374-1375.

²²² Murray, 'A Comparison between the African and European Courts of Human Rights' (2002) 2 *African Human Rights Law Journal* 195 at 220.