

“The Subject Matter Jurisdiction of the African Court of Human and Peoples’ Rights”

I. Introduction

Jurisdictional provisions are usually considered one of the most important issues of a treaty as they will determine who might bring a case before the African Court and what types of human rights violations that Court would examine.

The European Court of Human Rights (ECHR), Inter-American Court of Human Rights (IACHR) and the African Court of Human and Peoples’ Rights (AfCHPR) are all authorized not only to deliver judgments in contentious cases but also to respond to requests for advisory opinions. The former function involves the court's power to adjudicate on contentious cases relating to claims that a state party has committed a human rights violation. The latter involves the court's power to issue interpretative opinions and offer legal advice on a certain legal subject. It should be noted that the court's jurisdiction is not unlimited. The court can only deal with the authorized scope of rights (subject-matter jurisdiction), receive contentious complaints and advisory requests from authorized actors (personal jurisdiction), and accept cases that meet all authorized admissibility criteria.

II. Subject Matter Jurisdiction of the African Court

Before the African Court, two provisions are central when it comes to its subject matter jurisdiction:

Pursuant to Art. 3 (1) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights (I will refer to it as African Court Protocol) “[t]he 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.”

Article 7 lays down that “[t]he Court shall apply the provision of the Charter and any other relevant human rights instruments ratified by the States concerned.”

Article 3 (1) therefore goes even further than its European and American counterparts: While Article 32 (1) of the European Convention provides that the ECHR's jurisdiction covers all matters concerning the interpretation and application of the European Convention and its

protocols, Article 62 (3) of the American Convention affirms that the IACHR's jurisdiction comprises all cases concerning the interpretation and application of the American Convention. The African Protocol, by contrast, extends the jurisdiction of the African Court to include all cases concerning the interpretation and application of the African Charter, the Protocol and any other relevant human rights instruments ratified by the states concerned.

While the first two legal bases (the Charter and the Protocol) are not surprising, the third certainly is. At first glance, this provision seems to enlarge the subject matter of the African Court in contentious cases to include all other human rights instruments.

The use of qualifiers such as "relevant," "ratified," "human rights" and "by the state concerned," however, may also be interpreted to limit the Court's subject matter jurisdiction.

1. "Ratified"

The most important qualifier is "ratified," which implies that the instruments referred to must be treaties, not merely declarations or other non-binding legal texts or instruments. African human rights treaties, such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, the 1990 African Charter on the Rights and Welfare of the Child and the 2003 Protocol to the African Charter on the Rights of Women in Africa, should be considered first. Indeed, the second draft protocol (the so-called Nouakchott Draft Protocol) restricted the term "other treaties" to exactly this group by including the word "African" before "human rights instrument".

The OAU/AU's inclusion in the African Court's jurisdictional scope seems understandable considering the problematic dispute resolution mechanisms inherent in many of these treaties, such as the OAU Refugee Convention's lack of a dispute settlement mechanism.

Moreover, because the African Children's Committee's mandate is so similar to that of the African Commission, it seems only logical to supplement and reinforce its protective mandate by introducing the African Court as a judicial body with competence over its provisions.

2. "human rights"

Article 3(1) further restricts the treaties to "human rights" treaties. Some treaties adopted under OAU auspices have a significant bearing on human rights, but are not human rights instruments in the narrow sense of that phrase. While many multilateral treaties can be seen as embodying reciprocal obligations (a matrix of bilateral obligations, so to speak), this image or conceptualization does not work with modern

human rights treaties (like the European Convention on Human Rights) where the dominant obligation relates to how a country treats its own citizens.

Thus, AU treaties such as the 1968 African Convention on the Conservation of Nature and Natural Resources and the 1977 Convention for the Elimination of Mercenarism in Africa are not included in the African Court's jurisdiction under Article 3. Although these treaties place obligations upon states that have important human rights implications, they do not provide for human rights in the sense of direct entitlements or subjective rights available to individuals.

3. "by the states concerned" and the omission of "African"

The omission of "African" (before "human rights instruments"), which was included in the Nouakchott Draft Protocol, suggests that the Court can adjudicate matters arising under UN human rights treaties to which AU members, who are also UN members, are parties.

The phrase "by the States concerned" implies that an individual communication may be directed to the African Court on the basis of a UN human rights treaty if the respondent state has ratified it. This is unique to the African Court and gives judges a very broad mandate. This might suggest that even (sub-) regional instruments, such as the ECOWAS treaty, could become justiciable. Nevertheless, it may render the work of the Court more complicated and less predictable, compared to a specific and clear subject-matter jurisdiction assigned to the European and Inter-American Court. This may also lead to divergence in jurisprudence and to forum-shopping where quasi-judicial and judicial institutions are compared and played off against one another. Additionally, it would allow individuals to submit cases on the basis of UN treaties, such as the Covenant on Economic, Social and Cultural Rights, which ordinarily prohibit the submission of individual communications.

A solution might be to interpret "States concerned" as all state parties to the Protocol, not only the state against which the complaint is brought. Such a reading would at least restrict the African Court's jurisdiction in contentious cases to UN treaties ratified by all state parties to the Protocol.

4. Article 34(6) Protocol and the access to the court

Although the question of how to access the Court will be the topic in a few moments (after a well-deserved coffee break) and seems to be unrelated to the subject matter jurisdiction at first sight, it nevertheless plays an important role to understand the entire dimension of the

subject matter jurisdiction. The reason for this rests – almost unnoticeable – with Article 34(6) of the Protocol.

This provision reads:

“At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5 (3) of this Protocol. The Court shall not receive any petition under article 5 (3) involving a State Party which has not made such a declaration.”

In order to understand this provision’s essence, it is important to grasp the entire concept of the Court’s *ratione personae*:

There are two roads leading to the African Court. The main road runs through the African Commission. Individuals are not allowed to submit cases; the African Commission and the respondent state act as gatekeepers. In that regard, the African human rights system basically applies a similar approach to the Inter-American human rights system: Individual petitions can only go to the courts after the admissibility phase and the merits phase conducted by the Commission. It is then up to the Commission to submit the case to the Court. The same applies to NGOs.

The second road leads directly to the African Court. According to Article 5 of the Protocol, the African Court can directly receive a complaint from a state whose citizen is victim of a human rights violation. For states, access to the Court is automatic upon a state’s ratification of the Protocol. However, basically in all of the existing regional human rights systems states rarely initiate cases against one another regarding human rights violations. One of the reasons is that states may be reluctant that the relationship between them and the respondent state would be affected. Another reason is that doing so may have a negative impact since they may face retaliatory actions from neighbouring states.

Fortunately, the road that leads directly to African Court can – despite everything I previously said – also be used by individuals and NGOs. This, however, is subject to an “opting in” declaration by the State Party concerned and this is where the subject matter jurisdiction of the Court comes into play. According to Article 5 (3) “[t]he Court may entitle relevant Non Governmental organizations (NGOs) with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.”

The phrase "may entitle" should not be read to give the African Court additional discretion to refuse hearing a case. Granting the African Court a discretionary power of refusal would be unduly burdensome on individuals because they would be required to jump two procedural hurdles: the state’s acceptance of the optional Article 34(6) mechanism and the African Court's discretionary approval. This discretionary

language is rooted in the drafting history of the Protocol and was introduced when direct access was at the African Court's discretion. However, since direct access became subject to an optional state declaration, the drafters' failure to remove the language appears to be a mere oversight. Therefore, the provision should be interpreted to place authorization for direct access "within the sole domain" of state parties.

With regard to subject matter jurisdiction, a state that has not accepted the optional individual complaints procedures under Article 34(6) may find that the African Court usurps jurisdiction against it under Article 3. However, it is more likely that the extended jurisdiction based on Article 3 runs at idle, since making the optional Article 34(6)-declaration does not seem very attractive to states. Out of the 26 states who ratified the Protocol, only 6 States – namely Burkina Faso, Ghana, Malawi, Mali, Tanzania and Rwanda (less than 10% of the State parties to the African Charter) – had made a declaration by January 2013 allowing NGOs and individuals direct access to the court. In fact, only recently prior and during the 24th AU Summit in February this year the Coalition for an Effective African Court on Human and Peoples' Rights tried to impress on AU state members the importance of ratification and declaration under Article 34 (6) of the Protocol in terms of access to justice and making the African Court on Human and Peoples' Rights more effective.

The extended jurisdiction of Article 3 applies only to those states that actually made the opt-in declaration. Otherwise, cases must first be presented to the Commission using its normative legal framework, which is the African Charter; only violations of the African Charter may be brought before the African Commission. According to Article 56(2) of the African Charter on Human and People's Rights, "Communications relating to Human and Peoples' rights [...] received by the Commission, shall be considered if they [...] [a]re compatible with the Charter of the Organisation of African Unity or with the present Charter [...]." Moreover, despite the phrase "the State shall make a declaration" in Article 34 (6), read in its context and in light of its drafting history, it becomes clear that filing such a declaration is optional.

III. Conclusion and Comparison to the Arab Court

There are different legal systems operating in different African States, ranging from the common law, civil law and Islamic law systems to various customary laws. The differences in the processes and procedures of these legal systems may give rise to varying understandings and application of human rights. In that regard, there are striking similarities between the African human rights system on the one hand and the Arab human rights system on the other. It should not be overlooked that the

Arab world is, in many important ways, one of the most diverse regions in the world. It therefore goes without saying that the establishment of an Arab Court on Human Rights is highly welcomed in order to universalize human rights in the Arab World and ensure their enforcement. At the same time, the challenges that will have to be dealt with on the long road to an Arab Human Rights system shall not be underestimated. As I have illustrated with regard to the African Court, an effective human rights instrument must go beyond empty promises and depends on many factors.

The provisions on the subject matter jurisdiction of the Protocol to the African Charter and the Draft Statute of the Arab Court share some common characteristics as Article 16 of the latter reads: “The Court shall have jurisdiction over all cases and litigation arising from the application and interpretation of the Arab Charter on Human Rights or **any other Arab treaty in the field of human rights to which the disputing States are party.**” In comparison to the wording of Article 3 (1) of the African Protocol, which refers to “and any other relevant Human Rights instrument ratified by the States concerned”, it becomes apparent that Article 16 Draft Statute of the Arab Court did not go through the process its African counterpart did, when it was decided to delete the word “African” and allow the Court to adjudicate matters arising under UN human rights treaties to which AU members are parties.

Moreover, the restriction to Arab treaties in the field of human rights stresses the importance of full conformity to these instruments with universal human rights standards. In other words, it might render the entire provision on subject matter jurisdiction ineffective, if treaties mentioned do not comply with universal human rights standards. Any provision on subject matter jurisdiction would be meaningless without the right to life and the prohibitions on capital punishment, the prohibition of cruel, inhuman or degrading punishment, the equality of men and women, and the right to freedom of thought, conscience and religion. By contrast, the jurisdiction of the African Court is wider than that of the other regional human rights courts. This broad jurisdiction serves in a way as a test to those countries that have adopted sophisticated strategies to beat international human rights mechanisms to escape scrutiny. Many African states have been known to ratify international human rights treaties either because of internal or external pressure or for international public relations. The broad jurisdiction of the Arab Court would also expose those states that took ratification as a public relations exercise.

Beyond these political implications, a broad jurisdiction is particularly important and encouraging because a person whose rights are not adequately protected in the African Charter can easily hold the state concerned accountable by invoking another treaty to which that state is a party - either at UN level or sub-regional level.

This, of course, stands and falls with the access to the Court. When it comes to human rights promotion and protection, individuals have become the centre of the judicial process. In the areas of human rights law, the state-centric paradigm that states are the only subjects does not stand any longer. Despite all diversity and political power struggles, the drafters of the African Court Protocol introduced a mechanism to provide both individuals and NGOs with direct access to the African Court. Although this could only be achieved through a detour via an opt-in provision, it strengthens the position of the individual within the African human rights system.

The Draft Statute of the Arab Court does not provide for individuals to have direct access to the Court but confers this right to “[a] State party, whose subject claims to be a victim of a human rights violation” pursuant to Article 19 (1). One of the objections to granting individuals access to the jurisdiction human rights courts usually is that it would effectively open its floodgate of claims, making it administratively impossible for a human rights court to handle. As a matter of fact, the caseload should never be overlooked during the process of establishing a court. However, this is not a matter of direct access of the victims to the court but rather a procedural and organizational issue.

It therefore serves as a positive sign and a step in the right direction that Article 19 (2) Draft Statute of the Arab Court of Human Rights allows “State parties to accept, when ratifying or acceding to the Statute or at any time later, that one or more NGOs that are accredited and working in the field of human rights in the State whose subject claims to be a victim of a human rights violation have access to the Court.” This provision certainly echoes Article 5 (3) of the African Protocol, where the competence of the African Court to receive NGO petitions is made contingent upon a declaration by states parties accepting such competence. Compared to individuals, NGOs usually have more extensive resources to investigate and file complaints. Their participation does not only assist the victims to fight justice for themselves, but also help the Court perform its mandate, not to mention that sometimes NGOs are also victims of human rights violations.

However, measured against the expectation to create effective human rights mechanism, this provision appears to be a Potemkin Village, obfuscating the flaws within the Arab Court’s jurisdiction. As it is the case with the African Court, states still do not consider such an opt-in

declaration as anything useful or desirable. That the Arab Court falls short of the human rights protection, unlike the African Court, this is also due to the effective role that is played by the African Commission. This means that the Arab Human Rights Committee might also need to be strengthened as is the case with the African Commission. The concept of having the African Commission as a gatekeeper for most submissions to the African Court can certainly be debated with a view to conferring the individual with direct access to the Court. However, the Commission's role in protecting and promoting universal human rights cannot be overstated, especially within an environment where political power struggles and the fact that different legal systems operate in different states, exacerbate the work of human rights bodies. (For instance, after finding that the applications by either individuals or NGOs manifestly lacked jurisdiction against respondent States, because these had not made optional declarations under Article 34(6), the African Court has transferred some applications to the African Commission.) By contrast, the Arab Committee is not competent to receive and adjudicate individual complaints on violations of the Charter's rights. The competencies of the Committee are limited to receiving and examining reports from LAS States and issuing recommendations. This reduces the effectiveness of the Arab Court to a large extent.

Despite some of its shortcomings and flaws, the African Human rights system and especially the functioning of the African Court, can serve as a model for the Arab Court, as it worked out a system of human rights promotion and protection that might not be perfect but effective, considering the challenges it faces. Amongst other things, this is due to the provision on subject matter jurisdiction, which rest upon an interplay between the African Court and African Commission on Human and Peoples' Rights. Before both the African and Arab Court it would be desirable to establish a system of better access to the Court for individuals and NGOs. In light of the above, the hope of human rights efficiency that inspired the establishment of the Arab Court would be better fulfilled if individuals and NGOs were given automatic or compulsory access to the Court. States could, in that case, get an opportunity to opt out of such compulsory access, instead of the 'opting-in' approach of Article 34(6) of the Protocol.