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A LA MEJOR TESIS DOCTORAL A LA PROMOCIÓN DE LOS DERECHOS HUMANOS

The African Court on Human and Peoples' Rights

Juan Bautista Cartes Rodríguez

upna

Universidad Pública de Navarra
Nafarroako Unibertsitate Publikoa

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The Jaime Brunet Foundation, whose legacy resides in the Public University of Navarre, was founded by the express wish of Jaime Brunet Romero with the aim of promoting respect for human dignity, fundamental freedoms, and human rights, as well as the eradication of inhuman and degrading situations and treatment.

Jaime Brunet Romero was born in Bayonne Bayona (France) on the 20 July, 1926 and died on the 4 January, 1992 in San Sebastián (Gipuzkoa). Born into a family of Catalonian entrepreneurs who had settled in Gipuzkoa in the 18th century (where they developed significant industrial activity), he was raised with a liberal outlook and critical of the times in which he lived. He was directed towards a career in Law by his father, Jaime Brunet Goitia, the local leader of the Republican party who became deputy mayor of San Sebastián Town Hall, where his grandfather and great-grandfather had already served as mayor.

His notable passion for reading was accompanied by an interest in learning languages, which allowed him to easily navigate in his numerous travels, taking him, despite the difficulties of his time, to visit more than thirty countries. During these travels, as he confessed, he became aware of the enormous discrimination and violence, the abuse of the powerful over the weak, and the ease with which the most elementary rights of the human person are daily violated. In the last years of his life, his sensitivity to the situation of human rights and the defence of citizens' freedom, also to abuses by the public administration, became his constant concern.

Having no direct descendants, and moved by his feelings that rebelled against unjust actions, he decided to bequeath his fortune to create, upon his death, the foundation that, bearing his name, would be dedicated to rewarding those who, through their work in defence of human rights, became deserving of this recognition. Thus, the Jaime Brunet Romero Foundation was created, with headquarters in the Public University of Navarre, according to his will.

The main activity of the foundation, since 1998, has been the call for the homonymous Award to distinguish the trajectory or work of individuals or institutions that have stood out for the defence of human rights. The award, with a significant financial endowment, has been awarded so far on 24 occasions to internationally renowned individuals and institutions, which in turn has consolidated the renowned notoriety of the award.

Given the significant relationship between the Foundation and Public University of Navarre, it seemed appropriate to better link the connection between the foundational objectives and the university academic activity itself, mainly the research, and within this, that of young researchers in training. In that sense, the Foundation Board approved the creation of an award that recognises doctoral thesis works whose content has a direct relationship with human rights and their defence and promotion.

Apart from the recognition and the financial endowment, the award entails the publication of the doctoral thesis. The copy you have in your hands corresponds to the awarded work in the 2022 call. It is the fifth of a collection that, logically, will be built around the theme of human rights.

From the Brunet Foundation, we are convinced that this initiative will contribute very positively to the foundational purposes, while also allowing the encouragement of many emerging research careers.

Ramón Gonzalo García
President of Jaime Brunet Foundation
Chancellor of Public University of Navarre

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ABBREVIATIONS

ACDEG	African Charter on Democracy, Elections and Governance
ACHR	American Convention on Human Rights
ACHPR	African Charter on Human and Peoples' Rights
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACDEGG	African Charter on Democracy, Elections and Good Governance
AComHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
ESC Rights	Economic, Social and Cultural Rights
HRC	Human Rights Council
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
NGO	Non-Governmental Organization
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
PDGG	Protocol on Democracy and Good Governance
UDHR	Universal Declaration of Human Rights
VCLT	Vienna Convention on the Law of Treaties

PROLOGUE

1. The author has asked me to write the foreword to this book in a gesture of undoubted friendship, as in terms of merit I am certainly not the person best qualified to give an in-depth opinion on the subject in question.

However, the fact that I was part of the tribunal that judged the thesis that would later become this book, which won the Jaime Brunet prize from the Public University of Navarre, enabled me to familiarise myself with the «African Court of Human and Peoples' Rights» and realise how important and appropriate it is to set up a specific jurisdiction for the protection of human rights on the African continent.

As the author rightly analyses, the system of jurisdictional protection of human rights on that continent began with the approval of the African Charter on Human and Peoples' Rights, approved in Nairobi in 1981. However, this did not create a jurisdictional mechanism for the protection of human rights, such as the European Court of Human Rights, created by the Rome Convention in 1950, or the Inter-American Commission on Human Rights and the Court, created by the American Convention on Human Rights.

It was not until 1998, with the approval of the Protocol establishing the African Court of Human and Peoples' Rights, that the definitive step was taken to establish the jurisdictional system for the protection of fundamental rights in Africa, as in Europe and America. But in this case with the interesting addition of the law of peoples, which the author analyses in detail.

The system has been in operation for twenty-five years, and many questions remain in terms of its real effectiveness and, above all, its capacity to take root and be respected in such a conflictive context as the current one, where armed confrontations and purely dictatorial or at least strongly authoritarian systems (if this subtle difference can be accepted) are the daily reality.

This situation, however, is not exclusive to the African continent. We are living through difficult times in terms of respect for and protection of human rights, which all existing systems have to face. More than 55 cases accepted by the Commission and transferred to the Inter-American Court of Human Rights are pending before the Court, but this does not reflect the degree of instability and flagrant violation of human rights in many of the countries of that continent that have accepted the Court's jurisdiction. Perhaps, on the contrary, what the small number of cases evidences is a lack of hope and credibility in the system on the part of the citizenry.

This is not the case in Europe, where the European Court of Human Rights has a very significant number of cases pending resolution, which is constantly growing with the incessant arrival of applications from numerous countries, and especially from those where open conflicts or clearly authoritarian systems, governed by openly xenophobic or extreme right-wing political parties, prevail.

Because whether we like to admit it or not, democracy and respect for the guarantees of the rule of law in Europe are suffering harsh attacks and even being questioned in a way that would have seemed unimaginable less than twenty years ago. The rules and guarantees that we believed to be consolidated as the cornerstones of our model of democratic society are being challenged and even openly violated by governments that constitute the European Union and the Council of Europe, even forcing proceedings to be brought against them in the Court of Justice in Luxembourg.

The hope that emerged after the fall of the Berlin Wall and the collapse of the Soviet system, with the enlargement of the European Union and perestroika in Russia in the 1990s, has given way to a much bleaker picture than expected.

On the one hand, Russia's democratisation process has been truncated, with a gradual personalisation of power and a return to methods reminiscent of the Soviet regime. The separation of powers has collapsed, with the judiciary subservient and submissive to the executive branch; a caricatured Duma formally functions in the hands of the single party, passing repressive laws in the space of twenty-four hours. And accompanying all this disaster is a policy of repression of the most basic public freedoms and of freedom of expression and information, replaced by official propaganda campaigns that intoxicate the population and falsify reality. Today, President Putin's Russia can be described as a dictatorship.

Now that the war in Ukraine has led to a resurgence of the Cold War that has been raging for many years, we are also seeing how, in the field of the protection of fundamental human rights, it is more imperative than ever to respect the rules of international humanitarian law and to ensure that flagrant violations of these rules can be prosecuted in the courts, although this, as we all know, is not easy.

The Russian Federation's expulsion from the Council of Europe has also involved its expulsion from the system of protection granted to its citizens by the European Court of Human Rights. The only possible means of defence against the servility of Russia's national judiciary in the face of the decisions of the new European dictator has been closed to them. This justifiable desire to punish the dictator in the eyes of international public opinion has already had its first undesirable effect on those of his subjects who are still fighting for democracy. Thinking of those who remain there, was it necessary to take this step?

But if this is happening as a consequence of a frustrated democratisation process in the former Tsarist and Soviet Empire, neither can we ignore the worrying signs that gathering like storm clouds over the countries that make up the European Union.

On the one hand, in some of the new democracies that were once Soviet satellite republics, rulers are once again dusting off and applying methods of political behaviour that correspond to the era in which they were undoubtedly formed. Laws are being passed that attack the independence of the judiciary, the right to information is being restricted, and the anti-values of hatred of differences, xenophobia, racism and homophobia are being proclaimed. In others, which until very recently were blameless democracies that even gave lessons to others, clearly xenophobic programmes are being implemented with regard to foreign immigrants, and the principle of international protection for asylum seekers is being undermined, the latter being sent to third countries where their safety and legal protection cannot be guaranteed. I will not continue with the list, but the signs are multiplying everywhere. The knowledge, promotion and defence of democratic values is in full crisis and it is time to react.

2. Recognition of this reality should not, however, plunge us into despair, quite the contrary. We cannot ignore the fact that even in the moments of greatest splendour of our national and regional system of protection of funda-

mental rights there have been deviations and abuses, inevitable perhaps even in the best and most perfect democracy. But the system has worked. Democracy, respect for the separation of powers, public freedoms and fundamental rights of individuals have been a clear and certain sign of the identity and goodness of the European socio-political model that emerged from the Second World War. A system in which the decisions of ordinary courts, constitutional courts and the European Court of Human Rights have always been respected and complied with, even in the most tense moments of collective life.

However, it is precisely the success of this universal system of protection of fundamental rights on our European soil that has led to revisions that are not always fortunate.

My experience as Ombudsman and then Commissioner for Human Rights of the Council of Europe has testified to this reality. In our country, there has always been a tendency to abuse the application for amparo before the Constitutional Court, as if it were just another authority. Over time, the court has not ceased to adopt restrictive measures for filing a writ of amparo and issue resolutions of inadmissibility whose rationale is practically reduced to a ruling of «lack of constitutional content». And the same applies to the appeal of unconstitutionality, which has become, in more than a few cases, the mechanism used to bring before the Court any disagreement with a rule of law, whatever it may be. In many cases, it is not so much the basis of the appeal that is of interest as the fact that it has been lodged, even if the rejection of the appeal comes several years later, when nobody remembers who lodged the appeal and why. In these cases, we are dealing with a simple instrumental use of the Court.

In the case of the European Court of Human Rights, the evolution has been very similar since the Commission that acted as a filter was eliminated and direct access to individual appeals was opened. Overwhelmed, the Court embarked on the same path already taken by Constitutional Court. A single judge to rule on admissibility and decision of rejection for lack of content, without further substantiation.

However, despite these apparently negative signs and indications that it is difficult for the fundamental rights jurisdiction to function effectively, the truth is that these demonstrate that the system works and has credibility among citizens, because its resolutions may be disputed or harshly criticised, but they are complied with. And that is an essential factor in a true democracy and in a state governed by the rule of law.

These are difficult times for the protection of people's fundamental rights in many continents of our battered world. The study in the reader's hands is not only an impeccable and rigorous work of analysis and criticism; it also entails the recognition of a better future that is being built every day. Without rest. It only remains for me to congratulate the author for his work and to thank him for all that he has enabled me to learn, value and reflect upon.

Sotosalbos, 21 April 2023

Álvaro Gil-Robles y Gil-Delgado
Spanish Ombudsman (1988-1993)
and First Commissioner for Human Rights
of the Council of Europe (1999-2006)

INTRODUCTION

I should begin by informing the reader that this monograph is based on a study that began in 2016 and continued as a doctoral research project. All this led to a doctoral thesis, defended on 7 July 2022 at the Complutense University of Madrid, which obtained a grade of outstanding *summa cum laude* (highest grade) and which has been awarded the Jaime Brunet Prize for Doctoral Theses; it should be noted that it was thanks to this prize that the present work arose. Thus, taking into account that the doctoral thesis was nearly 1000 pages in length (written in Spanish), in the following chapters the reader will find the most outstanding legal reasoning and the key results of a research that lasted almost seven years and focused on an exhaustive legal analysis of the African Court on Human and Peoples' Rights (ACtHPR).

This being its object, it is rooted and embedded in International Human Rights Law. Therefore, I can only begin this paper by highlighting the universality, interdependence, indivisibility, inalienability and imprescriptibility of human rights. These rights are inherent to the person, and their ultimate foundation is to be found in the concept of the inherent dignity of every human being.

And if there is no doubt that the *Charter of the United Nations* adopted in San Francisco on 25 June 1945 established the backbone of contemporary International Law, the third paragraph of its Preamble states that it was adopted reaffirming «faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small». This sideratum was taken up and developed in the *Universal Declaration of Human Rights* (UDHR), promulgated by the United Nations General Assembly on 10 December 1948, and one of the antecedents of which was the Spanish School of International Law in the 16th century. Cassin would define it as the

«vast portico of a temple» (Verdoodt, 1963: 316-317)[1], which would constitute a milestone in the evolution of International Human Rights Law, as it was drawn up by representatives from all the continents and regions of the world –including Africa– all of whom, although they came from different social, legal, historical, cultural, economic and even axiological systems, found a common substratum in the promulgation of a list of civil, political, economic, social and cultural rights attributed to the human person. Taking as a starting point, as stated in its first article, that «all human beings are born free and equal in dignity and rights».

It took 18 years for the universal content of the UDHR, or at least part of it, to be reflected in two treaties: the *International Covenant on Civil and Political Rights (*1966) and the *International Covenant on Economic, Social and Cultural Rights (*1966). However, in some cases previously, and in others in parallel, different systems for the protection and promotion of human rights have been set up at regional level with the aim of complementing and completing the work begun at the universal level. In the European continent, the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted in Rome on 4 November 1950, stands out as the backbone of these systems. On the American continent, the *American Convention on Human Rights*, adopted in San José de Costa Rica on 22 November 1969, which has as its direct antecedent the *American Declaration of the Rights and Duties of Man*, adopted at the Ninth International Conference of American States in 1948 in Bogota (Colombia). And on the African continent, the *African Charter on Human and Peoples' Rights* (ACHPR), adopted in Nairobi (Kenya) on 1 June 1981.

Transcending the doctrinal debates on the articulation of cultural relativism in the field of human rights, I agree with Cançado Trindade that «the universality of human rights is enriched by cultural diversity, which, in turn, can *never* be invoked to justify the denial or violation of human rights» (Cançado Trindade, 1998: 5). This was already evident at the World Conference on Human Rights held in the Austrian capital from 14 to 25 June 1993[2]. In fact,

1 Regarding the writings of R. Cassin as drafter of the UDHR, see, among others, «La Déclaration Universelle et la mise en oeuvre des droits de l'homme», *Recueil des Cours de l'Académie de Droit International*, vol. 79, 1951; *La Déclaration Universelle des Droits de l'Homme de 1948*, Académie des Sciences Morales et Politiques, Paris, 1958; «Quelques souvenirs sur la Déclaration Universelle de 1948», *Revue de droit contemporain*, n.º 15, 1968, pp. 1-14.

2 Cf. UN: General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, Doc. A/CONF.157/23.

in the Preamble of the three treaties referred to, express mention is made of the UDHR, thus recognising them as heirs to the content promulgated in the same (Cançado Trindade, 1998)[3].

In turn, correlative to these regional developments, we must take into consideration, as a characteristic of current International Law, the multiplicity of international tribunals in very different fields and matters. This distinction is no exception in International Human Rights Law, as both the European Convention and the American Convention provide for the creation, respectively, of the European Court of Human Rights and the Inter-American Court of Human Rights. For its part, the African Charter does not create a jurisdictional mechanism; it was not until 1998 that the Protocol establishing the African Court on Human and Peoples' Rights was adopted. This is the body that guarantees and controls the African regional human rights system, which, precisely as reflected in the title of this monograph, and as we have already mentioned, is the focus of this monograph.

Based on this pillar, and with the aim of constructing a pedagogical and exhaustive legal work, I have identified four central research questions, each of which has a different chapter devoted to its study. Thus, the first serves as an introductory framework and seeks to respond to how the regional system in which the ACtHPR is inserted functions, with special emphasis on the different treaties adopted and the non-jurisdictional mechanisms of guarantee and control. Bearing this context in mind, we will be in a position to address the following research question, namely, what the most outstanding procedural aspects of the ACtHPR are and how they have been articulated. This will serve as a prelude to identifying and analysing the main lines of jurisprudence adopted by the Court in relation to specific human rights. Finally, having answered the previous questions, it remains to be resolved how reparatory measures have been articulated in the ACtHPR's pronouncements, as well as what follow-up mechanisms have been established in this regard, a question to which chapter four will be devoted. Thus, once the stages of data collection, systematisation, description, analysis and interpretation have been completed, we arrive at a series of critical evaluations which, articulated in the form of conclusions, bring the work to a close.

[3] Cf., respectively, paras. 2, 3, and 6 ECHR; paras. 4 and 5 ACHR; and para. 4 ACHPR, read together with Article 60 of the Charter.

I should not conclude these introductory pages without thanking the many people who have accompanied me over the last few years, especially professors Ana Gemma López Martín, José Antonio Perea Unceta and Hajer Gueldich. Likewise, at an institutional level, I must mention in particular the Oriol-Urquijo University Foundation, which, together with the Complutense University of Madrid, the University of Seville, the Human Rights Centre of the University of Pretoria and the Library of the Peace Palace in The Hague, has been involved in the research project from the outset. This is in addition to a special thanks to those who have made the publication of this work possible: the Brunet Foundation of the Public University of Navarre.

Chapter I
AN APPROACH TO THE AFRICAN SYSTEM FOR THE PROTECTION OF HUMAN AND PEOPLES' RIGHTS

In order to carry out a comprehensive and exhaustive study of the African Court of Human and Peoples' Rights, it is necessary to present and analyse the regional system in which the latter operates, highlighting, in this regard, both its innovations and peculiarities, as well as its various shortcomings. This is all the more necessary given the scarcity of doctrinal pronouncements –not only at the national level, but also at the international level– that examine the matter in a comprehensive and up-to-date manner.

With this in mind, this chapter will begin by analysing the attention paid by the Organisation of African Unity and its successor, the African Union, to the protection and promotion of human rights on the continent. This will serve as a prelude to a discussion of the human rights treaties adopted under its auspices, including the African Charter on Human and Peoples' Rights, the system's overarching treaty. In addition, to analysis of the two non-jurisdictional mechanisms that preceded the creation of the Court: the African Commission on Human and Peoples' Rights and the African Committee of Experts on the Rights and Welfare of the Child.

I. HISTORICAL DEVELOPMENT AND MAIN TREATIES OF THE SYSTEM

As early as 1961, the African Conference on the Rule of Law, organised by the International Commission of Jurists, adopted a declaration –which became known as the «Lagos Law»– urging the governments of the newly independent African states to adopt a human rights convention for the continent, guided

by the spirit of the Universal Declaration of Human Rights, with a court as a mechanism to guarantee and control this convention[1].

Barely two years after that Conference, on 25 May 1963, 32 African states agreed on the founding act of a new international organisation, the Organisation of African Unity (OAU) (Elias, 1965: 243-267; Padelford, 1964: 521-542; Walraven, 1999: 521-542; Welch, 1991: 535-555)[2]. However, its principles and objectives included non-interference in the internal affairs of states and respect for newly acquired sovereignty; they did not include the promotion and protection of human rights in the state sphere, which was predicated only on *international relations* (Langely *et al.*, 1974: 206-232; Dugard, 1967: 157-190)[3].

Thus, the OAU Constitutive Charter was established as an instrument condemning colonialism and the interference and violation of rights by third states, but, contradictorily, it did not prevent the same violations from being committed by the new African leaders against their own population.

Thus there ensued atrocious regimes such as those of the Kenyan Ara Moi, the Zairean Mobutu Sese Seko, the Central African Jean-Bedel Bokassa, the Guinean Macías Nguema or the Ugandan Idi Amin, the latter even presiding over the OAU itself[4]. However, pressure from the international community and the various UN bodies and agencies, the end in 1979 of the last three dictatorial regimes mentioned, together with the growing voices from within the continent, led to an increasingly prominent role for the protection and promotion of human rights in Africa.

This led to the adoption in 1981, under the auspices of the OAU, of the African Charter on Human and Peoples' Rights, the backbone of the African regional human rights system, but which, unlike its predecessors –the European and American systems– would initially only have a Commission, and not a judicial body, as a guarantee and control mechanism[5].

1 Cf. International Commission of Jurists, «Report on the proceedings of the African Conference on the Rule of Law», Lagos (Nigeria), January 3-7, 1961, p. 11.

2 For a study of the role of the Organization of African Unity on the continent, as well as its origin and evolution.

3 Cf. article 2.1.e) and para. 9 of the Preamble of the OAU Charter. However, the OAU did devote special attention to two human rights issues specific to the continent: the fight against *apartheid* and the exercise of the right to self-determination of peoples under colonial domination.

4 During 1975 and 1976.

5 In any case, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969 and in force since 1974, should be mentioned as the first treaty of the system.

Once again, it took a new tragedy, the terrible Rwandan genocide, for the African Heads of State and Government, inspired by the approaching change of millennium, and the end of decolonisation, to decide to renew the objectives and iron out the outstanding deficiencies of the OAU, which was replaced by a new international organisation: the African Union (AU). Created by virtue of the Constitutive Act of 11 July 2000, and which, unlike its predecessor, included among its principles and objectives the promotion and protection of human rights on the continent, respect for democratic principles and the rule of law (Badejo, 2008; Packer & D. Rukare, 2002: 365-379; Maluwa, 2003: 157-170; Nmehielle, 2003: 412-446; Murray, 2004)[6].

It was during this new phase that the African regional system would be further strengthened. Thus, in addition to the African Charter on the Rights and Welfare of the Child, adopted in 1990 and which entered into force in 1999, the African Charter on Human and Peoples' Rights was supplemented by two additional protocols, one of which aimed to create a jurisdictional body responsible for its supervision (adopted in 1998 and in force since 2004[7]), and a second dedicated to women's rights (from 2003, in force since 2005[8]). Furthermore, five additional treaties have been adopted: the African Union Convention on Preventing and Combating Corruption (2003, in force since 2006); the African Youth Charter (2006, in force since 2009); the African Charter on Democracy, Elections and Governance (2007, in force since 2012); the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009, in force since 2012); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons (2016); and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Persons with Disabilities in Africa (2018). The latter two have not yet entered into force.

So, to recapitulate, ten human rights treaties have so far been adopted within the African regional system. Thus, the general treaty, the African Charter on Human and Peoples' Rights, is accompanied by nine special treaties. Of these, two are special treaties in terms of subject matter –the African

6 Cf., e.g. Articles 3. f, g and h; 4. m and p. Regarding the bibliography of the African Union.

7 Cf. Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights.

8 Cf. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).

Union Convention on Preventing and Combating Corruption and the African Charter on Democracy, Elections and Governance– and the rest are special treaties in terms of the particularly vulnerable group to which they are addressed.

The African Charter on Human and Peoples' Rights (hereinafter «ACHPR» «Charter» or «African Charter»), as I have already mentioned, is the backbone treaty of the African regional system (Heyns, 2004: 111-115; Umozurike, 1983: 902-912; Gittleman, 1981: 667-714; Bermejo García, 2012: 18-37; Heyns, 2003: 595-620). Adopted on 1 June 1981, it entered into force in October 1986, when a simple majority of the Member States that made up the then Organisation of African Unity presented their respective instruments of ratification or accession (Art. 63.3). Currently, of the 55 Member States that make up the AU, only Morocco is not a party to the AU[9].

In terms of its structure, the African Charter is divided into three parts: the first (Arts. 1-29), which contains a list of the rights of individuals and peoples (Arts. 21-26) and duties (Arts. 27-29); a second, dedicated to regulating the mechanisms of guarantee and control (Arts. 30-63); and a third in relation to various technical provisions (Arts. 64-68).

As a result of the Africanist conception that inspired the entire drafting process of the Charter, it contains a series of outstanding particularities that would even serve as a model for other regional and universal treaties; particularities already evident in the Preamble of the Charter[10]. Thus, by demon-

9 A state that rejoined in 2017 after being a founding member of the Organisation of African Unity and decided to leave due to the admission of the Sahrawi Arab Democratic Republic. In May 2016, South Sudan became the latest state to ratify the Charter. Information available at: https://au.int/treaties/ratifiedby/14 (Accessed on: 03.03.2023).

10 Thus, it proclaims, among other aspects, that «taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights [...] convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated in their conception [...] convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights; [...] firmly convinced of their duty to promote and protect human and peoples' rights and freedoms and taking into account the importance traditionally attached to these rights and freedoms in Africa». Cf. paras. 5, 8 and 11 of the Preamble of the African Charter.

strating a holistic vision of human rights, the Charter is the first human rights treaty that, in a single document, brings together a detailed list of civil and political rights and economic, social and cultural rights[11]. It also includes, for the first time, a set of rights recognised for peoples[12], and, also for the first time, articulates in a legally binding document the right to development, the right to peace and certain environmental rights (Murray, 2019)[13].

However, along with these innovations, the Charter also contains certain blemishes and omissions. Probably the most notable of these is the existence in the wording of certain precepts –mainly relating to the recognition of civil and political rights– of certain restrictive clauses, known as *claw-back* clauses, which appear to recognise the right in question, but only to the extent that it does not clash with domestic law (Naldi, 2001: 109-118)[14]. Similarly, continuing with the category of civil and political rights, we note the omission of certain rights, such as the prohibition of forced labour or the right to respect for private and family life; as well as the scant regulation of certain precepts in comparison with other human rights treaties, including the right to a fair trial or the rights of expression, association and assembly (Heyns, 2001: 687).

Another of the most significant criticisms of the Charter is linked to the regulation of women's and children's rights, as only one section of a precept (18.3) is devoted to this issue, which in turn is aimed at protecting the family[15]; this has led some authors to maintain that this does nothing more than pre-

11 Cf. Articles 1 to 18 of the African Charter. Moreover, it is not only their incorporation that is taking place, but also a supposed equalisation, since economic, social and cultural rights are not subject to the usual progressive realisation clauses. However, although the African Court has not had the opportunity to pronounce on the matter, the Commission has understood that in their implementation, these rights are subject to such clauses. Cf. ep. 3.1.1.

12 Cf. Articles 19 to 24 of the African Charter.

13 Cf., respectively, Articles 22, 23 and 24 of the African Charter. For a detailed analysis of each of the material provisions of the African Charter.

14 Examples of this can be found in Articles 6, «every individual shall have the right to liberty and to the security of his person. No one may be deprived of his liberty except for reasons and conditions previously *laid down by law»;* 9.2, «every individual shall have the right to express and disseminate his opinions *within the law*»; or 10.1 of the Charter, «every individual shall have the right to free association provided that he *abides by the law*» (emphasis added).

15 Paragraph which states that «the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of women and the child as stipulated in international declarations and conventions».

serve gender roles and does not incorporate an adequate recognition of their rights (Kois, 1997: 92). Finally, among the peculiarities of the Charter is the fact that it does not contain a general derogation clause[16], an issue that has been interpreted in the doctrine both as a significant advance (Mbondenyi, 2011: 140), and as a blemish to be ironed out (Heyns, 2001: 161-162; Saavedra Álvarez, 2008: 671-712).

Therefore, in the structuring instrument of the African regional system, we are faced with a series of extremely important innovations, but also with a list of omissions. However, the latter will resolved, either by the system's guarantee and control mechanisms –mainly through cross-fertilisation (Burgorgue-Larsen & Montoya Cespedes, 2013: 187 *et seq.*)– or through legislation –by adopting new human rights treaties that complement the Charter–. The former question leads us to the following pages.

II. THE SYSTEM'S NON-JURISDICTIONAL MECHANISMS: THE AFRICAN COMMISSION ON HUMAN RIGHTS AND THE AFRICAN COMMITTEE OF EXPERTS ON THE RIGHTS AND WELFARE OF THE CHILD

In contrast to the respective backbone treaties of the European and Inter-American systems[17], the African Charter on Human and Peoples' Rights only contemplates the creation of a quasi-judicial mechanism: the African Commission on Human and Peoples' Rights (hereinafter «ACom-HPR» or «Commission»)[18], which would be accompanied by a second quasi-judicial mechanism by virtue of the the African Charter on the Rights and Welfare of the Child: the African Committee of Experts on the Rights and Welfare of the Child (hereinafter «Committee» or «ACERWC»). Thus, it

16 Unlike the European and American Conventions. Cf. art. 15 ECHR; art. 27 ACHR.

17 Cf. Articles 19 *et seq.* ECHR; 52 *et seq.* ACHR.

18 The African Commission on Human and Peoples' Rights, a human rights body, should not be confused with the AU Commission, which acts as the technical secretariat of the entire international organisation. For its part, the Assembly of Heads of State and Government is the highest organ of the AU, and in the exercise of its functions it is assisted by another organ, the Executive Council, which is composed mainly of the Ministers of Foreign Affairs of the Member States.

was not until 1998 that, in order to strengthen the African system, the treaty establishing a judicial body was adopted, which would begin to function well into the 2000s.

II.1. The African Commission on Human and Peoples' Rights as the first mechanism for guaranteeing and monitoring the system

As has been pointed out, Part Two of the African Charter is devoted to to determining the composition and powers of the Commission, these precepts being complemented by Rules of Procedure of 1988, revised in 1995, 2010 and 2020 (Murray, 2000; Viljoen *et al.*, 2017)[19], as well as by certain Guidelines[20].

The first ordinary session of the Commission was held on 2 November 1987, and its permanent seat was established in Banjul (The Gambia) in 1989. The AComHPR is composed of eleven members of recognised prestige, elected by the Assembly of Heads of State and Government of the AU from a list previously drawn up by the States Parties to the African Charter on Human and Peoples' Rights[21]. The term of office is six years with the possibility of re-election[22]. In turn, the members of the Commission must elect their Chairperson and Vice-Chairperson, who hold office for a period of two years, also with the possibility of re-election[23].

Its functions include both protective and promotional activities, the former including the examination of communications submitted by either States, individuals or NGOs –whether or not they have observer status before the Commission–[24].

19 The 2020 Rules of Procedure of the AComHPR are available for consultation at: https://www.achpr.org/legalinstruments/detail?id=72 (Accessed on: 03.03.2023).

20 These include the Guidelines for National Periodic Reports, 14 April 1984; State Party Reporting Guidelines for Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 24 October 2011; Guidelines on the Submission of Communications, 1 January 2000.

21 Cf. Articles 31 and 33 of the African Charter.

22 Cf. Article 36 of the African Charter.

23 Cf. Article 42 of the African Charter. It should be noted that the Commission must organise four ordinary sessions per year. Cf. Rule 28.1 of the Rules of Procedure of the Commission.

24 The limited budget allocated in 2021 is available at: https://au.int/en/decisions/council (Accessed on: 15.06.2021).

However, although so far only one inter-state communication has been adopted and made public by the Commission –*Democratic Republic of Congo v. Burundi, Rwanda and Uganda (Communication 227/99)*–, the number of individual communications exceeds 240[25]. In this regard, it should not go unnoticed that, despite the limitations on competencies and budgets with which the Commission has had to contend, it has been characterised by the maintenance of actions intended to guarantee human rights on the continent, and has also ironed out some of the most significant shortcomings of the African Charter, as we will have the opportunity to discuss in chapter three. Moreover, with regard to the content of the communications, a more than significant evolution can be seen in the thoroughness and legal soundness of their reasoning.

However, the Commission suffers from a series of limitations, including, in addition to budgetary constraints, the confidentiality requirements of its work until the AU Assembly of Heads of State and Government deems it appropriate[26]. In this regard, it is necessary to highlight the limited involvement (and interest) of the AU's political organs in the work of supporting the Commission, which is mainly evident in two aspects: on the one hand, in the lack of action in proceedings arising from serious or massive violations of human rights in accordance with Article 58 of the African Charter, which has led the Commission, also in such cases, to follow the ordinary procedure. On the other hand, a notorious immobility with regard to the follow-up of communications[27], which is ultimately entrusted to the political organs of the AU (specifically the AU Assembly and the AU Executive Council[28]). This leads to

25 They are available for consultation at: https://achpr.au.int/index.php/en/category/decisions-communications (Accessed on: 03.03.2023). Individual communications are regulated in Articles 54 and 55 of the African Charter and in Rules 115-126 of the Rules of Procedure of the Commission. Inter-State communications can be classified into two types: communication-negotiation and communication-complaint, which are regulated, respectively, in Article 47 of the Charter and Rule 108 of the Rules of Procedure of the Commission, the former; and in Article 47 of the Charter, developed in Rules 109-114 of the Rules of Procedure of the Commission, the latter.

26 Cf. Article 59 African Charter. Thus, certain communications that appear on its website are not available, we understand, in compliance with this confidentiality requirement. Likewise, unlike the Tribunal, there is no updated record of the degree of compliance with the decisions adopted.

27 There are no specific references to such issues in the reports of the Executive Council and the Assembly. Cf. https://au.int/en/decisions/council; https://au.int/en/decisions/assembly (Accessed on: 03.03.2023).

28 Cf. Rule 125.8-10 of the Commission's Rules of Procedure.

a low level of compliance with its decisions and a markedly limited disclosure of non-compliance (Viljoen & Louw, 2007: 1-34).

In addition to all of this, it must be added that such a guarantee-based and expansive interpretation of its powers has been curbed since 2015, following the granting of observer status before the Commission to the NGO «Coalition of African Lesbians (CAL)». As a result of this decision, the AU Executive Council ordered the withdrawal of this status, stating that the quasi-judicial body should comply with this mandate, as its independence is only «functional in nature and not independence from the same organs that created the body»[29]. After an alleged attempt at contempt[30], the statute was finally withdrawn from the NGO. Moreover, in the reform of the Rules of Procedure of 2020, some provisions are observed that are included within this line of limiting the powers of the Commission and reinforcing its subordination to the political organs of the AU[31].

II.2. The African Committee of Experts on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child (ACRWC) devotes its second and third chapters to creating and regulating the competencies of a new quasi-judicial mechanism: the African Committee of Experts on the Rights and Welfare of the Child[32]; these precepts are complemented by the Revised Rules of Procedure and a set of Guidelines[33].

29 Cf. Decision EX.CL/Dec.1015(XXVIII) of June 2015.

30 This led to a new Resolution by the Executive Board, cf. Decision EX.C/Dec.995(XXXII) of January 2018 and Decision EX.CL/Dec.1015(XXXIII) of June 2018.

31 Cf. e.g. the inclusion in Rule 11 of the submission of the Commissioners to the AU Code of Conduct. Likewise, we refer to what is set out in chapter two of this work in relation to the new limitations on the Commission's access to the Court. In any case, in accordance with Rule Three of the Commission's Rules of Procedure, it emphasises that «the African Commission is an *autonomous treaty organ* with the mandate of promoting human and peoples' rights and ensuring the protection of human and peoples' rights in Africa».

32 Cf. Articles 32-45 ACRWC, which are inserted in Part Two of the Charter.

33 The Rules of Procedure of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) were adopted in 2002 and subsequently revised in 2018. The latter include the Revised Guidelines on the Submission of Communications and the Revised Guidelines for the Examination of Communications, both adopted in 2014.

Its first ordinary session took place in 2002 in the Ethiopian capital. To date, however, the Committee has not established its own headquarters. Like the Commission, it is composed of eleven members of recognised prestige elected by the Assembly of Heads of State and Government of the AU. The term of office is five years, with the possibility of re-election[34]. The Chairperson and its two Vice-Chairpersons are elected by the members of the Committee for a two-year term, also with the possibility of re-election[35].

Before considering into its functions, it is worth mentioning that, while I have mentioned the Commission's competence and budgetary limitations, these are even more pressing in relation to the Committee, of which, moreover, there is not as widespread knowledge of its own existence and its tasks on the continent.

Thus, although the African Charter on the Rights of the Child gives it broad competence *ratione personae*, being empowered to receive communications from States, individuals, groups of individuals, NGOs, as well as AU and UN bodies and specialised agencies[36], and although the Committee in deciding on cases has followed a protective interpretation of the precepts of the Charter[37] (largely based on cross-fertilisation with the Commission and bodies of other systems[38]), so far, in its more than 20 years of existence, it has only received seven communications on the merits[39]; no updated information is provided on the degree of compliance[40].

34 Cf. Articles 33 ACRWC.

35 Cf. Rules 6-8 of the Revised Rules of Procedure.

36 Cf. Article 44.1 ACRWC. Section 1.1 of the Revised Guidelines on Submission of Communications. However, unlike the Commission, the Committee has stricter requirements for the submission of communications by NGOs, as they are required to have a status recognised by the AU, a Member State or the UN. Cf. *ibid*.

37 For example, by including for both forced recruitment and voluntary enlistment the age of majority requirement set out in Article 22 ACRWC. Cf. Communication No. 001/Com/001/2005, *Michelo Hunsungule and others (on behalf of children in northern Uganda) v. The government of Uganda* (April 2013), para. 58.

38 Cf. e.g. Communication No. 005/Com/001/2015, *African Centre of Justice and Peace Studies (ACJPS) and People's Legal Aid Centre (PLACE) v. the Government of Republic of Sudan* (May 2018), paras. 37-38, 43, 45, 61, 78, 83, 94 and 97.

39 According to the information available, the number of applications submitted amounts to 16. They are available for consultation at: https://www.acerwc.africa/en/communications/table (Accessed on: 15.06.2021).

40 Cf. the omission of this in the reports of the biannual meetings held by the Committee, available at: https://www.acerwc.africa/en/sessions/table (Accessed on: 03.03.2023).

The same applies to the periodic reports to be submitted every three years by States Parties to the Charter[41], as several States have not yet submitted any report, and a considerable number have only submitted their initial report[42]. Likewise, on the one hand, some of the reports submitted have been evaluated by the Committee up to three years after their submission[43], while, on the other hand, we find States for whom, their respective reports having been submitted years ago, the Concluding Observations issued by the Committee are not currently available; the doubt remains as to whether these remain confidential or whether the reports have simply not yet been evaluated[44].

Thus, there are two options: either strengthen the Committee with funds and staff, and publicise its own existence and functions across the continent; or, as a second option, transfer the Committee's functions to those of the Commission, increase its funds, and opt for a single –but robust– quasi-judicial mechanism in the system.

41 Cf. Article 43.1.b) ACRWC. Likewise, paragraph a) of this provision establishes that the deadline for the submission of the initial report is two years after the entry into force of the Charter for the State concerned.

42 Burkina faso, Cameroon, Guinea, Kenya, Nigeria, Niger, Rwanda, South Africa and Tanzania. Information available at: https://www.acerwc.africa/en (Accessed on: 03.03.2023).

43 For example, in the cases of Burkina Faso and Tanzania, states that submitted initial reports in 2006 and were not assessed until the end of 2009. Cf. https://www.acerwc.africa/en (Accessed on: 03.03.2023).

44 Such is the case of the Libyan State, which submitted its initial report in 2010. Cf. *idem*.

Chapter II
ON THE ARTICULATION OF THE MOST SALIENT PROCEDURAL ASPECTS OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Having examined the human rights system within which the ACtHPR is incorporated, in the following chapters I will examine this judicial body in detail. This body began to function in 2008, once its seat was established in Arusha (Tanzania)[1]. The first known case was *Michelot Yogogombaye v. Republic of Senegal*, on 15 December 2009 (Ntwari, 2010: 233-237)[2].

From a normative point of view, I should begin by pointing out that in addition to the Protocol establishing the ACtHPR adopted in June 1998[3], and as stated in Article 33 thereof, the Court is empowered to draw up its rules of procedure and establish its own procedures; to do so, it must consult the AComHPR «as appropriate»[4]. Although the Court initially adopted Interim Rules of Procedure on 20 July 2008, in compliance with the mandate of Article 33 of the Protocol, and after various joint meetings with the members

1 Cf. «Host Agreement between the Government of the Republic of Tanzania and the African Union on the Seat of the African Court on Human and Peoples' Rights in Arusha», Tanzania, 31 August 2007.

2 It was finally inadmissible as the State of Senegal had not deposited the declaration referred to in Article 34.6 of the ACHPR Protocol to allow individuals and NGOs to file applications before the Court. Cf. ACtHPR, App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal*, Rulings (Jurisdiction), 15 December 2009, para. 46.

3 Cf. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, available at: https://au.int/treaties (Accessed on: 03.03.2023).

4 It should not be forgotten that, in accordance with the eighth preambular paragraph and Article 2 of the Protocol to the ACHPR, the Protocol is intended to *complement and strengthen* the mandate of the Commission.

of the Commission[5], new Rules were adopted on 2 June 2010. These were harmonised with the respective Rules of Procedure of the AComHPR (Naldi, 2014: 366-392)[6]. These regulations were further revised on 1 September 2020[7], and have been in force, in accordance with Rule 92, since 25 September of the same year[8].

In accordance with the first paragraph of Article 11 of the Protocol, the African Court shall be composed of eleven judges who are nationals of AU Member States, elected in their individual capacity from among jurists of high moral standing and recognised competence in the field of human rights. The second paragraph of this provision precludes the possibility of two or more judges being nationals of the same State (Hanffou Nana, 2016; Badugue, 2020; Niyungeko, 2009: 731-738; Ouguergouz, 2006: 213-240; Delas & Ntaganda, 1999: 99-124)[9]. In this way, the African system follows the model envisaged for the Inter-American Court, not establishing a number of judges equal to the number of Member States, as, on the other hand, the European system does (San Martín Sánchez de Muniáin, 1999: 515)[10]. With regard to the duration of the mandate, the eleven judges that make up the ACtHPR are elected for a period of six years, with the possibility of a single re-election[11]. For their part, the eleven judges that make up the African Court must elect their President and a Vice-President, who will hold office for a period of two years, and may be re-elected only once[12].

5 These sessions took place in July and October 2009 in Arusha and Dakar, respectively, and in April 2010 in Arusha. Cf. Rules of Court, p. 1.

6 The Rules can be consulted at: https://www.african-court.org/wpafc/documents/ (Accessed on: 03.03.2023). For an analysis of the Rules and what is new about them.

7 These Rules are available for consultation at: https://www.african-court.org/wpafc/documents/ (Accessed on: 03.03.2023). As was the case in 2010, in 2020 not only the ACtHPR Rules of Procedure were revised, but also the Commission's Rules of Procedure. We have referred to these in the previous chapter.

8 Rules currently available on the Court's website in English, French and Arabic. Cf. https://www.african-court.org/ (Accessed on: 03.03.2023).

9 Cf. art. 11.2 ACtHPR Protocol. The precedence between judges is regulated in Rule 4 of the Rules of Court.

10 Seven judges sit on the IACtHR and forty-seven on the ECtHR. Cf., respectively, Art. 52 American Convention on Human Rights and Art. 20 European Convention on Human Rights. According to San Martín Sánchez de Muniáin, «this seems reasonable, given the high number of States Parties to the African Charter».

11 Cf. Art. 15.1 ACtHPR Protocol. Rule 2.1 of the Rules of Court states that «the newly elected Judges will assume duty on the first day of the first ordinary session following their election».

12 Cf. Art. 21.1 of the ACtHPR Protocol; Rule 13.1 of the Rules of Court.

With regard to its jurisdiction, I should start by pointing out that, as a jurisdictional body, the African Court is attributed jurisdiction to hear applications filed against States that are party to its constitutive Protocol in order to determine violations of the treaties that they have ratified. To this end, four levels must be satisfied: its jurisdiction *ratione materiae,* or by reason of the subject matter; its jurisdiction *ratione personae*, or by reason of the person; its jurisdiction *ratione temporis*, or by reason of time; and its jurisdiction *ratione loci,* or by reason of the place.

Furthermore, once these four levels have been satisfied, a series of additional requirements must be met in order for the merits of the case to be heard by the African Court; I refer to the admissibility requirements of the application.

I will now proceed to an exhaustive analysis of the normative and jurisprudential elements of the ACtHPR in relation to its jurisdiction *ratione materiae* and *ratione personae*, as it is these levels that have been the focus of the judicial body's pronouncements to date. Likewise, given their importance, I will examine the most salient elements of the admissibility requirements of the application, again, from both a normative and jurisprudential point of view. Lastly, I will look at the relationship of complementarity between the Court and the Commission, which could be improved.

However, before undertaking such an analysis, it is not superfluous to make a brief mention of the jurisdiction *ratione temporis* and *ratione loci* of the ACtHPR. Thus, with regard to the former, it should be pointed out that this is one of the most imprecise points in the Court's pronouncements. Therefore, with regard to applications filed by individuals and NGOs, the ACtHPR has been changing the critical date to be taken into account, sometimes referring to the date of ratification of the ACHPR by the respondent State[13], and on other occasions to the date of ratification of the Protocol[14]. On the other hand, as the Court itself has held in various cases, I believe that it should be set at the time when the State makes the declaration of jurisdiction referred to in Article 34(6) of the Protocol,

13 Cf., e.g. App. No. 009/2011, *Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania*, Judgment, 14 June 2013, para. 84; App. No. 030/2015, *Ramadhani Issa Malengo v. United Republic of Tanzania*, Judgment (4 July 2019), para. 24.

14 Cf. App. No. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment (22 March 2018), para. 38; cf. App. No. 053/2016, *Oscar Josiah v. United Republic of Tanzania*, Judgment (28 March 2019), para. 29.

as required by the examination of its jurisdiction *ratione personae* that follows[15]. Likewise, I find that such vagueness also arises when distinguishing between allegations of instantaneous violations and allegations of ongoing human rights violations, as, on occasions, the ACtHPR does not even conduct an analysis of the specific case or specify the legal grounds that lead it to adopt a decision in this regard[16]. This has led different judges in their individual opinions to maintain that «the Court ought to have examined these allegations more closely»[17].

On the other hand, with regard to its jurisdiction *ratione loci*, the Court has maintained that the key element for admitting a case does not reside in the spatial level, but rather in whether the alleged violations have been due to acts or omissions of the respondent state, regardless of the place where these have been committed or where their effects have been evidenced[18]. In any case, given the scarce doctrinal pronouncements on the matter, it is necessary to refer to the future jurisprudence of the Court in order to specify the above.

I. THE EXTENSIVE CONTENTIOUS JURISDICTION *RATIONE MATERIAE* OF THE ACtHPR

One of the most singular features of the ACtHPR is the broad jurisdiction *ratione materiae* that Article 3 of the Protocol attributes to the Court. According to this provision:

> The jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the Charter [ACHPR], this Protocol and *any other relevant Human Rights instrument ratified by the States* concerned[19].

15 Cf. App. No. 040/2016, *Mariam Kouma & Another v Republic of Mali*, Judgment (21 March 2018), para. 27; App. No. 001/2017, *Alfred Agbes Woyome v. Republic of Ghana*, Judgment (28 June 2019), para. 47.

16 *Vid*. e.g. App. No. 022/2015, *Rutabingwa Chrysanthe v. Republic of Rwanda*, Judgment (11 May 2018), para. 19; App. No. 006/2016, *Mgosi Mwita Makungu v. United Republic of Tanzania*, Judgment (7 December 2018), para. 32; App. No. 006/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (4 July 2019), para. 23; App. No. 007/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (4 July 2019), para. 25.

17 *Vid*. e.g. App. No. 003/2011, *Urban Mkandawire v. Republic of Malawi*, Separate Dissenting Opinion of Judges Gérard Niyungeko, and El Hadji Guissé (21 June 2013), para. 9.

18 Cf. App. No. 028/2018, *Bernard Anbataayela Mornah v. Republic of Benin*, Judgment (22 September 2022), paras. 146-157. So far, the only case where the ACHPR has ruled on this issue in detail.

19 Emphasis added.

The same expression is contained in Article 7 of the Protocol, where under the heading «Source of law» it is stated that «the Court shall apply the provision of the Charter and *any other relevant human rights instruments ratified by the States* concerned» (Burgorgue-Larsen & Ntwari, 2019: 860)[20].

As Rachovitsa points out, the *travaux préparatoires* of the Protocol do not provide any information on the reason for such broad competence *ratione materiae*. So, in the author's words:

> Given the lengthy negotiations over the creation of the Court dating back to the 1960s, it is unlikely that Article 3 of the Protocol to the ACHPR was a mistake in the drafting stage. 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 ACHPR) balanced out the Court's unusually broad* jurisdiction (Rachovitsa, 2019: 256).

On the basis of this article, the Court has not only considered itself competent to hear violations of human rights contained in other treaties of the African regional system, but also violations of rights enshrined in treaties of African sub-regional systems, as well as in treaties of the universal system of the UN. Thus, as Ouguergouz points out, «the Protocol does not therefore merely 'complement' the protective mandate of the African Commission as mentioned in its Article 2; it greatly broadens it» (Ouguergouz, 2003: 79-141).

For their part, the ECtHR and the IACtHR only have jurisdiction over the ECHR, together with its Protocols in force, and the latter only over the ACHR and certain treaties of the system, such as the Inter-American Convention on Forced Disappearance of Persons (Article 13). Excluded from the competence *ratione materiae* of the ECtHR, for example, is the European Social Charter, and from the IACtHR, the Protocol of San Salvador –with the exception of the right to education and trade union rights (Article 19)–.

Delving deeper into the analysis of the subject-matter jurisdiction of the ACtHPR, three issues merit close examination. Regarding the *first* of these, in the early years of the Court's operation, there was no consensus among the doctrine as to what was to be understood by «human rights

[20] Emphasis added. In emphasising this characteristic, certain authors have gone so far as to affirm that the ACtHPR has «universal jurisdiction».

instruments». So it was not until *Actions pour la protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire* that the Court ruled on this question in order to determine whether the African Charter on Democracy, Elections and Governance (ACDEG) and the Protocol on Democracy and Good Governance (PDGG)[21] –the former adopted within the AU and the latter within the framework of the Economic Community of West African States (ECOWAS)– could be considered as such in accordance with Article 3 of the Protocol establishing the Court[22]. In this respect, the ACtHPR began its reasoning by stating that:

> In determining whether a Convention is a human rights instrument, it is necessary to refer in particular to *the purposes of such Convention*. Such purposes are reflected either by an express enunciation of the subjective rights of individuals or groups of individuals, or by mandatory obligations on States Parties for the consequent enjoyment of the said rights[23].

It then goes on to argue, with regard to this specific case, that the obligation to establish *independent and impartial* national electoral bodies (Articles 17 ACDEG and 3 PDGG) links to and aims to implement Article 13 of the ACHPR. Thus, in the words of the Court:

> The ACtHPR therefore holds that the obligation on the part of State Parties to the African Charter on Democracy and to the ECOWAS Democracy Protocol to establish independent and impartial national electoral bodies *is aimed at implementing the aforesaid rights prescribed by Article*

21 Cf., respectively, the African Charter on Democracy, Elections and Governance, adopted in Addis Ababa (Ethiopia) on 30 January 2007, in force since 15 February 2012, and the Protocol on Democracy and Good Governance, adopted in Dakar (Senegal) on 21 December 2001, in force since 20 February 2008.

22 For its part, although the Court has not ruled on what is to be understood by «*relevant* Human Rights instrument», in the separate opinion issued by Judge F. Ouguergouz in the case of *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania,* he states that the term «relevant» implies that the Court «would [...] have had to ensure that the said treaty is 'relevant' to the treatment of the matter». *Vid.* App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania,* Separate Opinion of Vice-President Fatsah Ouguergouz (14 June 2013), para. 14.

23 Cf. App. No. 001/2014, *Actions pour la Protection des Droits de L'homme (APDH) v. Republic of Cote d'Ivoire*, Judgment (18 November 2016), para. 57. Please note that we will use the term «Judgment» to refer to decisions on the merits adopted by the ACHPR.

> *13 of the Charter on Human Rights*, that is the right to participate freely in the Government of one's country, either directly or through freely chosen representatives in accordance with the provisions of the law[24].

In this respect, according to authors such as Niyungeko, one needs to ask whether the recognition of the violation of other *human rights instruments must* necessarily be articulated with the respective precept of the ACHPR, or whether the Court considers itself competent to recognise the autonomous violation of the former (Niyungeko, 2019: 78). This has given rise to a doctrinal sector that has maintained the need for a subsequent pronouncement, which, to date, has not taken place (Rachovitsa, 2019: 263 *et seq*.)[25]. In any case, following examination of its jurisprudence, we find that the Court, in different pronouncements, has begun to recognise the violation of treaties and instruments –belonging to the African regional system, as well as the sub-regional and universal systems– without linking them to the respective ACHPR's Article.

Specifically, and to date, there are eight cases in which the ACtHPR has maintained this line of jurisprudence. The first of these was the case of *Anudo Ochieng Anudo v. United Republic of Tanzania*, which dealt with a Tanzanian national whose passport was confiscated and his nationality withdrawn, prior to his deportation to Kenya, which then transferred him back to Tanzanian territory. Taking these facts into account, the Court issued a largely protective pronouncement –although, on the other hand, as we will have the opportunity to see below, a reviewable one–, autonomously recognising the violation of the right to nationality contained in Article 15.2 of the Universal

24 Prior to the above-mentioned judgment, the Court recognised the violation of Art. 66.2.c of the Revised Treaty of the Economic Community of West African States read in conjunction with Art. 9 ACHPR in the cases, App. No. 013/2011, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso,* Judgment (28 March 2014), para. 203.5; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso*, Judgment (5 December 2014), para. 176.3. However, it did not elaborate on why it considered the said Treaty as a human rights instrument for the purposes of Article 3 of the ACtHPR Protocol.

25 This doctrinal sector includes A. Rachovitsa, who goes so far as to affirm that in the case of *Actions pour la protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire,* 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 of the Protocol merits further discussion».

Declaration of Human Rights (UDHR)[26]. Regarding the second, we should turn to the case of *APDF & IHRDA v. Republic of Mali*, which, as I will detail in chapter three, deals with the adoption of a new Malian family law, and where the Court, for the first time, recognised the violation of certain rights contained in other treaties of the African system. Specifically, the Maputo Protocol and the African Children's Charter[27], together, also for the first time, with certain articles of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[28]; among them, the right to marry with the free consent of the parties (Articles 6.b of the Maputo Protocol and 16.1.b CEDAW); prohibition of marital unions under the age of 18 (Articles 6.a Maputo Protocol and 21.2 African Children's Charter); widow inheritance rights on equitable terms (Articles 21 Maputo Protocol and 3 African Children's Charter); prohibition of harmful cultural practices (Articles 2.2 Maputo Protocol, 21 African Children's Charter and 5.a CEDAW); principle of non-discrimination (Articles 2 Maputo Protocol, 3 African Children's Charter and 16.1 CETFDCM); and principle of best interests of the child (Article 4 African Children's Charter). The third pronouncement where the ACtHPR has maintained the aforementioned jurisprudential line can be found in the case of *Sébastien Germain Ajavon v. Republic of Benin (App. No. 013/2017),* which arises from the conviction imposed on S. Ajavon, a Beninese politician and businessman, when he was accused of drug trafficking[29]. In this regard, in addition to the Court recognising that the proceedings before the domestic courts did not comply with the guarantees of the right to a fair trial contained in Article 7 ACHPR –including the right to the presumption of innocence and the right to a defence– it also found violations, for the first time in an autonomous manner, of three articles contained in the

26 Cf. App. No. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania,* Judgment (22 March 2018), para. 132.

27 Cf. respectively the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted on 1 July 2003 in Maputo (Mozambique), which entered into force on 25 November 2005, and the African Charter on the Rights and Welfare of the Child, adopted on 1 July 1990 in Addis Ababa (Ethiopia), which entered into force on 29 November 1999. Their respective texts and the States that have ratified them can be consulted at: https://au.int/en/treaties (Accessed on: 03.03.2023).

28 Cf. Convention on the Elimination of All Forms of Discrimination Against Women, adopted in New York on 18 December 1979 and entered into force on 3 September 1981.

29 Cf. App. No. 013/2017, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment (29 March 2019), paras. 3-8.

International Covenant on Civil and Political Rights (ICCPR)[30]: the right to be assisted by a defence counsel of one's choice (Article 14.3.d), the right to a double degree of jurisdiction in criminal matters (Article 14.5), and violation of the *ne bis in idem* principle (Article 14.7)[31]. Fourthly, we should consider the case of *Suy Bi Gohore Emile & 8 Others v. Côte d'Ivoire*, where the court determined that the electoral body established in Ivorian legislation did not comply with the guarantees of independence and impartiality due to the fact that the party in government was over-represented in its composition, recognising the violation, without linking them to a precept of the ACHPR, of Articles 17 ACDEG and 3 PDGG. To which it added, due to the way in which the adoption of the contested legislation had taken place, the violation of the State's obligation to provide credibility and transparency, as well as to ensure effective citizen participation in the management of public affairs. Obligations contained in Articles 3.7, 3.8 and 13 of the ACDEG, and 3 of the PDGG[32]. Finally, I should refer to four recent cases, *XYZ v. Republic of Benin (059/2019), Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin (062/2019)*, *Houngue Eric Noudehouenou v. Republic of Benin,* and *XYZ v. Republic of Benin (010/2020).* All of these cases were brought against the State of Benin, and will also be examined in the third and fourth chapters. Suffice it to say that they arise from the alleged illegality of the preparation and conduct of the elections held in 2019, the constitutional reform undertaken that same year, and the recent legislative amendments made to the Beninese legal system. In view of these facts, the Court again recognised violations of Articles 17 ACDEG and 3 PDGG, insofar as the electoral body established under Beninese law did not comply with the guarantees of independence and impartiality. This was in addition to the violation of the obligation to guarantee a constitutional review based on national consensus (Article 10.2 ACDEG), and of the right to strike (8.1.d of the International Covenant on Economic, Social and Cultural Rights, ICESCR)[33]. The latter, insofar as, in

30 Cf. International Covenant on Civil and Political Rights, adopted in New York on 16 December 1966, in force since 23 March 1976.

31 *Ibid*. paras 125-215.

32 Cf. App. No. 044/2019, *Suy Bi Gohore Emile & 8 Others v. Côte d'Ivoire,* Judgment (15 July 2020), para. 274.

33 Cf., respectively, App. 059/2019, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 179; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin, Judgment, merits and reparations (04 December 2020), para. 179; App. Republic of Benin*,

particular, in *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, *App. No. 062/2019,* the restrictions on this right contained in Benin's new legislation were expressly invoked[34]. It should be added that in the *Houngue Eric Noudehouenou v. Republic of Benin* case, faced with the express invocation of the precept by the plaintiff, the Court determined that the State had violated the right to the presumption of innocence under Article 11 of the UDHR[35]; not resorting in this regard to Article 7.1.b) ACHPR, which also enshrines this right.

Having said this, it can be stated that in such cases there has been no further pronouncement on what is to be understood by *human rights instruments* in accordance with Articles 3 and 7 of the Protocol establishing the ACtHPR. However, in cases such as *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin (App. 062/2019),* and in relation to the Protocol on Democracy, although the Court bases its pronouncement on the aforementioned case *Actions pour la protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire*, unlike this one, it does not articulate the same with Article 13 of the African Charter, but simply maintains that:

> the ECOWAS Protocol on Democracy *is a human rights instrument* to the extent that it *enunciates human rights for the benefit of individuals or groups* of individuals *and prescribes obligations on State Parties to* ensure the fulfilment of those rights[36].

Therefore, after analysing its jurisprudence, it can be argued that, at present, and at least implicitly, the Court does not require the recognition of the violation of a human rights treaty other than the ACHPR to be linked with the respective

Judgment, merits and reparations (04 December 2020), para. 179; App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 Dec 2020), paras. 99-105 and 123 (ix); App. 010/2020, *XYZ v. Republic of Benin*, Judgment merits and reparations (27 November 2020), para. 159. As for the treaty referred to, the International Covenant on Economic, Social and Cultural Rights, it was adopted in New York on 16 December 1966, and entered into force on 3 January 1976.

34 Cf. App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 Dec 2020), para. 179. Please note that when I add the case number in brackets in the main text, it is because there is more than one case with the same name.

35 Cf. App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 123.xi. Proceeding which I will examine in the following lines.

36 *Vid.* App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 71 and footnote 14 (emphasis added). In this regard, see also App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 26, footnote 4.

precept of the latter. It should be added that in none of the aforementioned decisions does the ACtHPR decide to pronounce on why the UDHR is included in its jurisdiction *ratione materiae*, even though the invocation of this instrument was already included in the plaintiff's allegations[37]. This is an initial indication that the Court's pronouncements on this point could be open to review[38].

Having examined the first of the three questions on which analysis of the competence *ratione materiae* of the ACtHPR sought to focus, the *second is* linked to and builds on what has already been explained. Thus, the reader will have noticed that, on examining the aforementioned line of case law, the Court recognises, without linking them to a precept of the ACHPR, both rights that are not included in it and rights that are. The latter include, on the one hand, the right to be assisted by a freely chosen defence counsel; regarding which, in the case of *Sébastien Germain Ajavon v. Republic of Benin* (*App. No. 013/2017),* the Court recognises the violation of Article 14.3.d ICCPR, when this right is also contained in Article 7.1.c ACHPR. On the other hand, mention should be made of the right to the presumption of innocence, since, in the case of *Houngue Eric Noudehouenou v. Republic of Benin*, the Court found a violation of Article 11 UDHR, and not Article 7.1.b ACHPR (a precept that recognises the same right). Thus, although in both cases we find as a coinciding pattern that the plaintiff expressly based their allegations on these precepts[39], the ACtHPR omits any reference to the aforementioned articles of the African Charter. Even more so when, in a consolidated jurisprudence, it has maintained that in cases in which a human rights instrument or treaty guarantees in the same way the respective right contained in the corresponding article of the ACHPR, «the Court does not deem it necessary to make a ruling on the same allegation in relation to [such a treaty or instrument]»[40].

37 Cf., e.g. the silence in this regard in App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 6, and 25-28.

38 Thus, given the silence of the Court in the corresponding section dedicated to analysing its jurisdiction *ratione materiae*, we must turn to the pronouncement made by the ACtHPR in order to consider that this precept has been violated; a question which we will now examine in more detail.

39 Cf. App. No. 013/2017, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment (29 March 2019), para. 164; App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 6.

40 *Vid*., e.g. App. No. 013/2011, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso,* Judgment (28 March 2014), paras. 170 and 188.

Exploring this area further, such needs for clarification arise not only with respect to the recognition of the (separate) violation of a right of the general treaty of the system (ACHPR) or of other treaties/instruments over which its jurisdiction *ratione materiae* extends, but also in the articulation between the former and the latter. In order to specify what I am referring to, I consider it appropriate to bring up the Court's pronouncements regarding the right to legal assistance; a right which is not expressly recognised in Article 7 ACHPR, but which is recognised in Article 14.3.d ICCPR. Firstly, it should be pointed out that, unlike the right to be assisted by a defence counsel of one's choice (Article 14.3.d ICCPR), the right to a double degree of jurisdiction in criminal matters (Article 14.5 ICCPR) and the *ne bis in idem* principle (Article 14.7 ICCPR), in relation to the right to legal assistance, we do not find any case in which Article 14.3.d ICCPR is recognised to have been violated autonomously. Moreover, indeed, turning to the case law of the ACtHPR, in certain cases, and without providing any explanation, it understands it to fall under Article 7.1.c ACHPR interpreted in the light of Article 14.3.d ICCPR (e.g., *Kenedy Ivan v. United Republic of Tanzania*)[41], and on other occasions it refers exclusively to Article 7.1.c ACHPR) (e.g. *Minani Evarist v. United Republic of Tanzania*)[42], and elsewhere, on the other hand, it recognises the violation of this provision and, in addition, the respective provision of the ICCPR (e.g. *Alex Thomas v. United Republic of Tanzania; Majid Goa Vedatus v. United Republic of Tanzania*)[43]. In the latter case, the applicant had not even proceeded to allege a violation of the universal treaty[44]. However, there are no significant differences in this respect between the various cases referred to. All of them brought against the State of Tanzania, and all of them, where the Court recognises a violation of the right to legal aid, taking into account, on the one hand, the interests of justice and, on the other hand, the financial capacity of the applicant.

41 Cf., e.g. App. No. 025/2016, *Kenedy Ivan v. United Republic of Tanzania*, Judgment (28 March 2019), para. 81.

42 Cf., e.g. App. No. 027/2015, *Minani Evarist v. United Republic of Tanzania*, Judgment (21 September 2018), paras. 66-71, 90.vii.

43 Cf., e.g. App. No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), para. 161.7; App. No. 025/2015, *Majid Goa Vedatus v. United Republic of Tanzania*, Judgment (26 September 2019), para. 99.vi; App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), para. 242.9.

44 Cf., e.g. App. No. 025/2015, *Majid Goa Vedatus v. United Republic of Tanzania*, Judgment (26 September 2019), paras. 66-68.

The reason for this lack of clarity can be found, in part, in the implicit comparison made by the Court between Articles 3 and 7 of its founding Protocol, and Articles 60 and 61 of the ACHPR; precepts of a very different legal nature. Articles 3 and 7 regulate the subject-matter jurisdiction of the Court. Whereas Articles 60 and 61 ACHPR empower it to draw inspiration, when interpreting and applying the treaties included in its jurisdiction *ratione materiae,* from other sources: human rights instruments –both African, universal and regional–, customary norms, general principles of law recognised by African states, judicial precedents, and doctrinal pronouncements, among others. On the other hand, on the basis of an analysis of the cases presented, the Court avoids any mention of Articles 60 and 61, remaining unclear as to when it is basing its decision on the different precepts referred to, which, as I have pointed out, are not comparable.

In addition to what has already been said, it remains unclear why in certain cases the Court proceeds to recognise *motu proprio* the violation of a right contained in a more protective treaty ratified by the State concerned, while on other occasions it does not proceed in the same way. In this regard, we have identified that the Court has only invoked *motu proprio* the violation of Article 14 ICCPR, without justifying the reason for such a position and thus calling into question the principle of legal certainty[45].

Finally, as a *third element* to be analysed, in addition to the already broad competence *ratione materiae* recognised by Article 3 of the Protocol, the Court has maintained an expansive interpretation of its «*competence-competence*»[46], stating with regard to the Universal Declaration of Human Rights that «while [...] is not an international human rights instrument that is subject to ratification by States, [...] *the Declaration has been recognised as forming part of Customary International Law.* As such, the Court is enjoined to interpret and apply it»[47]. Thus, despite the fact that the State concerned has not ratified a treaty in which a

45 Cf. App. No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), para. 161.7; App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), para. 242.9.

46 Principle recognised in Art. 3.2 of the ACtHPR Protocol under the following wording: «in the event of a dispute as to whether the Court has jurisdiction, the Court shall decide».

47 *Vid*. App. No. 005/2015, *Thobias Mango and Another v. United Republic of Tanzania*, Judgment (11 May 2018), para. 33 (emphasis added); App. No. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania,* Judgment (22 March 2018), para. 76.

specific right is recognised, this interpretation opens the door for the Court to have jurisdiction in the case, and to recognise, if necessary, the violation of such a right in the event that it is enshrined in a rule of customary International Law[48].

The first case in which the ACtHPR found a violation of an article of the UDHR was in the above-mentioned case of *Anudo Ochieng Anudo v. United Republic of Tanzania*. Specifically, Article 15(2), which recognises the right not to be arbitrarily deprived of one's nationality. However, the legal reasoning employed by the Court is wholly insufficient, as it generically claims that the UDHR, *in its entirety,* is part of customary International Law[49]. Adding in a footnote a reference to the case *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran)[50], where, although the ICJ refers generically to the UDHR, in no way can a recognition of its customary character be inferred from this pronouncement[51]. Therefore, the statement made by the ACtHPR is, to say the least, controversial in the current state of International Law.

In this respect, we must begin with the *ab initio* non-binding nature of the UDHR, insofar as it was adopted in the form, not of a treaty, but of a resolution adopted by the UN General Assembly (Res. 217 A (III) GA). However, as has been pointed out by authors such as Villán Durán, «over time, the international community has progressively legitimised the moral, political and legal scope of the content of the UDHR» (Villán Durán, 2018). In this sense, Bou Franch states that, at present, the UDHR has changed its legal nature, becoming an «instrument of a normative nature, in the sense that today it is difficult to deny that there is a set of fundamental Human Rights –the doctrine refers to them as the 'hard core'– which form part of general or customary Interna-

48 I cannot find a pronouncement of such a scope that is concretised in the recognition of the violation of a specific human right either in ECtHR or IACHR case law. At least not exclusively on the basis of the existence of an international custom.

49 Cf. App. No. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania,* Judgment (22 March 2018), para. 76.

50 *Ibid*. p. 17, footnote 5, referring to ICJ, *United States Diplomatic and Consular Staff in Tehran* (United States v. Iran), Judgment of 24 May 1980, ICJ *Report*, 1980, p. 43.

51 In fact, in that case the ICJ mentions the UDHR only once in the following terms: «[...] wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, *as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights*» (emphasis added).

tional Law» (Bou Franch & Castillo Daudí, 2014: 64). However, although this «hard core» is debated in current International Law[52], unfortunately we cannot include in it, to quote Villán Durán, «other rights recognised in the UDHR, such as the right to nationality, freedom of movement, the right to property or the right to asylum, [which] were not specified in treaties that specify their content and make them justiciable» (2014: 122).

In view of the above, in my opinion, the Court should have constructed a more solid legal reasoning, analysing, with regard to the specific case (Art. 15.2 UDHR), both the material element –constant and reiterated practice– and the spiritual element –*opinio iuris* or conviction of legal binding force[53]– necessary for the formation of the alleged customary norm. In other words, the Court missed the first phase required in any process of interpretation and application of customary norms: «the determination of their existence»[54].

Moreover, the ACtHPR should have specified whether its interpretation considers that this customary norm has a universal or particular character, since, as the ICJ has pointed out in its consolidated jurisprudence, the burden of proof in the latter case is reversed; it must be proven by the party alleging

52 According to Villán Durán, «the rights to life and integrity of the person, the prohibition of slavery and servitude, the non-retroactivity of criminal law and the freedoms of thought, conscience and religion, as well as the principle of non-discrimination ('hard core' established in Art. 4 of the ICCPR), are generally accepted and are therefore binding on all States as general principles of law or customary international norms» (Villán Durán, 2018, p. 122). For his part, Bou Franch points out that «this set is composed of the right to life, the prohibition of slavery, torture and cruel, inhuman and degrading treatment, prolonged arbitrary detention, and racial discrimination» (Bou Franch & Castillo Daudí, pp. 64-65). Own translation.

53 In this sense the ICJ has underlined that «not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i. e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitua1 character of the acts is not in itself enough. There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty». See ICJ, *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, ICJ *Reports,* 1969, p. 44.

54 According to Fernández de Casadevante, three phases can be distinguished in the interpretative process of the customary rule: «the *determination of its existence*; the *qualification of* such attitudes and behaviours as customary practices; and the *determination of the content* of the rule». Own translation.

it that the State concerned –in this case Tanzania– did not expressly oppose it during the period of gestation of the norm[55].

In any case, a less problematic route, which the Court omitted, would have been to assess in the specific case the possible violation of the principle of non-discrimination enshrined in Article 2 of the African Charter on Human and Peoples' Rights, or its connection with the right to respect for family life (Article 18 ACHPR)[56].

For its part, the second and, to date, last case in which the ACtHPR has autonomously recognised the violation of a precept of the Universal Declaration of Human Rights, is to be found in the aforementioned case of *Houngue Eric Noudehouenou v. Republic of Benin*. In which the plaintiff alleges that the State of Benin has adopted an inter-ministerial decree preventing the issuance of official documents to persons accused (not necessarily convicted) before national courts; which, in turn, hinders the presentation of his candidacy for the 2021 presidential elections[57]. In this regard, the Court, in response to an express invocation by the applicant, simply found a violation of Article 11(1) UDHR (right to the presumption of innocence), without analysing any of the elements set out above[58]. Again, in relation to this case, a less problematic route would have been to recognise the violation of Article 7.b of the African Charter on Human and Peoples' Rights. A Treaty ratified by the State concerned, which expressly recognises this right, as has been applied by the judiciary in a consolidated jurisprudence[59].

In the wake of these considerations, I will conclude the analysis of the Court's jurisdiction *ratione materiae* with three additional clarifications. On the

55 In this regard, the ICJ has held that «*the Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party*. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State» (emphasis added). See ICJ, *Asylum Case* (Colombia v. Peru), Judgment of 20 November 1950, ICJ *Reports*, 1950, p. 276.

56 In the latter sense, cf. ECtHR, *Case of Slivenko v. Latvia (Application No. 48321/99), Judgment of 9 October 2003, paras. 93 et seq. Latvia* (Application No. 48321/99), Judgment of 9 October 2003, paras. 93 *et seq*.

57 Cf. App. No. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 94-98.

58 *Ibid*. paras. 99-105; and 123. ix. Omitting any mention of the UDHR in the analysis of its competence *ratione materiae (*cf. paras. 25-28).

59 I refer in this respect to the discussion in chapter three *above*.

one hand, a doctrinal sector has affirmed that the broad jurisdiction *ratione materiae* attributed to the Court «will cause jurisprudential chaos» (Heyns, 2001: 167), as well as «a fragmentation of international jurisprudence» (Rachovitsa, 2018: 69-88). However, as will be analysed in subsequent chapters of this work, one of the peculiarities of the case law of the ACtHPR is its multiple references to the interpretations adopted by the judicial and quasi-jurisdictional bodies of the universal, regional and sub-regional systems. In doing so, it favours a phenomenon of «cross-fertilisation» that gives rise to a process that is precisely the opposite of the one claimed.

On the other hand, the ACtHPR has maintained a line of jurisprudence in which it has applied the principle of *iura novit curia* in a rather expansive manner, proceeding to admit a case even when the plaintiff had only alleged violations of domestic law. Thus, the Court has gone so far as to state that:

> the Court overrules the [...] objection that its jurisdiction has not been invoked simply because the Applicants have [...] not mentioned the Protocol, the Charter, or any other relevant human rights instruments ratified by the Respondent. The Court has held [...] that *as long as the rights alleged* to have been violated *are protected* by the Charter or any other human rights instrument ratified by the State concerned, the Court will have jurisdiction over the matter (Burgorgue-Larsen & Ntwari, 2019: 859)[60].

Finally, although it has been maintained that all this expansive practice could hinder the formation of an African *corpus juris* (Rachovitsa, 2018: 256 *et seq.*), in my opinion, analysis of the Court's jurisprudence shows that it has sought to safeguard the different specificities of the African system, resorting to instruments from other systems, either to establish a *vis expansiva* of the rights recognised in its own treaties, or, when this has not been possible, directly to recognise the violation of the right contained in the respective instrument in order to maintain a more protective position in the specific case (*pro homine* perspective)[61]. However, I believe that neither of the two approaches is incom-

60 *Vid*. e.g. App. No. 006/2013, *Wilfred Onyango Nganyi & 9 Others v. United Republic of Tanzania*, Judgment (18 March 2016), para. 57 (emphasis added); App. No. 006/2016, *Mgosi Mwita Makungu v. United Republic of Tanzania*, Judgment (7 December 2018), paras. 30-31. To this should be added the procedural flexibility that we have identified when analysing the case law of the ACtHPR throughout this chapter, to which I refer.

61 With regard to this matter, I refer to what has been analysed in the third and fourth chapters.

patible with the formation of a regional *corpus juris*. What is more, this extensive, guarantee-based stance is one of the specificities of the African system itself, thus contributing, through its practice, to the formation of the same[62].

II. THE LIMITATIONS OF CONTENTIOUS JURISDICTION *RATIONE PERSONAE*

Moving on to the competence *ratione personae* of the ACtHPR, it is essential to refer to Article 5 of its constitutive Protocol, a precept that includes the Commission, the States Parties and African intergovernmental organisations among the subjects that are legitimised to access the judicial body. Individuals and NGOs are added to this list, provided that the state against which the complaint is filed has made the declaration of competence referred to in Article 34.6 of the Protocol; and provided that the respective NGO has observer status before the Commission[63].

As of December 2022, 306 cases have been filed by individuals and groups of individuals, 21 by NGOs, and three by the African Commission[64]. To date, however, no cases have been filed by African states or intergovernmental organisations. For this reason, in the following lines I will focus on the Court's pronouncements on the former.

62 It should be noted that no mention has been made under this heading of the Court's pronouncements on the reservations deposited and their problematic nature with regard to its jurisdiction *ratione materiae*, since in none of the cases known to date has this question been raised.

63 The following are entitled to submit cases to the Court: «a. The Commission; b. The State Party which has lodged a complaint to the Commission; c. The State Party against which the complaint has been lodged at the Commission; d. The State Party whose citizen is a victim of human rights violation; e. African Intergovernmental Organizations. 2. African Intergovernmental Organizations. 2. When a State Party has an interest in a case, it may submit a request to the Court to be permitted to join. 3. The 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». A provision whose content is reiterated in Rule 39 of the Rules of Procedure of the ACtHPR.

64 Information available at: https://www.african-court.org/ (Accessed on: 03.03.2023). In particular, I have already noted that the cases brought by the Commission were App. No. 004/2011, *African Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya*; App. No. 002/2013, *The African Commission on Human and Peoples' Rights v. Libya*; and App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*.

II.1. Individuals and NGOs

Considering the preparatory work for the Protocol establishing the Court, the standing of individuals and NGOs became one of the most, if not the most, controversial issue during the drafting process. Thus, Article 6 of the first Draft Protocol, the «Cape Town Draft», granted individuals, NGOs and groups of individuals standing before the Court «on exceptional grounds». However, as can be seen from the reports of the respective sessions, there were different rapporteurs who disagreed with the imprecision and laxity of this provision[65]. For its part, the second Draft Protocol, the «Nouakchott Draft», stated that individuals and NGOs could file an application directly before the Court in «urgent cases or serious, systematic or massive violations of human rights»[66]. This provision was also the subject of dissenting opinions (Ssenyonjo, 2013: 21-28). Finally, in the «Addis Ababa Draft», the formula maintained in the adopted Protocol would be established. Thus, according to Article 5.3:

> The Court may entitle relevant Non Governmental Organizations with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34 (6) of this Protocol.

The latter provision stipulates that:

> 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[67].

From the combined reading of both precepts, the Court has maintained since its earliest jurisprudence that «direct access to the Court by an individual

65 Cf. Doc. OAU/LEG/EXP/AFCHPR/PRO(I) Rev. 1.

66 Cf. Doc. OAU/LEG/EXP/ AFCHPR/PRO(2).

67 In this regard, as Judge Ouguergouz states, «by providing for an optional right of referral to the African Court for individuals and non-governmental organisations, the African human rights protection system thus lies mid-way between the Inter-American system where the individual does not have the right to seize the Inter-American Court, and the current European system in which the individual has direct and automatic access to the European Court». *Vid*. App. No. 003/2014, *Matter of Ingabire Victoire Umuhoza v. Republic of Rwanda*, Individual opinion of Judge Fatsah Ouguergouz on Ruling on Withdrawal of Declaration (11 April 2017), para. 12.

[or NGO] is subject to the deposit by the respondent state of a special declaration authorising such a case to be brought before the Court»[68]. This formulation is thus part of two currents of contemporary International Law. On the one hand, in the emergence of «subjects» other than the state, albeit with a derived and limited international subjectivity[69]. And on the other hand, in the process of humanisation and socialisation that the international legal order is undergoing.

Likewise, the Court thus puts an end to the controversy that arose over the expression «the Court *may* entitle»/«la Cour *peut* permettre» contained in Article 5(3) of the Protocol, which led various authors erroneously to affirm the Court's discretionary power with regard to the filing of applications by individuals and NGOs, despite the fact that the State concerned had made such an additional declaration of jurisdiction (Badugue, 2020). This line of jurisprudence is reflected in the current Rules of the Court (Rule 39.1)[70].

On the other hand, the Court has followed the pronouncements made by the AComHPR in its submissions, and, although the Protocol only expressly refers to individuals and NGOs, it has admitted the standing of groups of individuals[71]. Moreover, the ACtHPR has not required a correspondence between victim and plaintiff[72], and has even gone so far as to allow an *actio popularis* in favour of an unidentified group of persons[73]. Thus, in this area, there is a significant difference with the ECtHR (Fernández de Casadevante Romaní, 211: 203-204)[74].

68 See, e.g. App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal*, Rulings (15 December 2009), para. 24.

69 In this sense, the ICJ pronounced itself in the aforementioned advisory opinion «Reparation for Injuries...», *op. cit.*, pp. 178 *et seq*.

70 For their part, with regard to the interpretation of this precept, it is also worth highlighting the singular position held by Judges Akuffo, Ngoepe and Thompson, for whom Article 34.6 of the Protocol contradicts the African Charter on Human and Peoples' Rights itself, including Articles 1, 2, 7 and 26, among others. *Vid*. App. No. 001/2011, *Femi Falana v. African Union*, Rulings, Dissenting Opinion of Judges J. Mutsinzi, F. Ougouergouw, S. Akuffo (26 June 2012), paras. 11-17.

71 Cf., e.g. App. No. 037/2017, *Boubakar Sissoko et 74 Autres v. Republic of Mali*, Judgment, merits and reparations (25 September 2020).

72 Cf., e.g. App. No. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 58-59. On the concept of victim in the jurisprudence of the ACtHPR, we refer to the discussion in chapter four, *supra*.

73 Cf., e.g. App. No. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment (11 May 2018); Cf. App. 059/2019, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), paras. 54-58. Matters on which we will dwell in chapter three, *supra*.

74 As stated by Fernández de Casadevante, before the ECtHR, standing to bring an action is admitted «provided that there is a particular and personal link between the direct victim and the plaintiff». To which we must add that the ECtHR does not admit a «popular action». Jurisprudentially,

Continuing with the access of individuals before the ACtHPR, two additional issues merit special attention. Firstly, the (contested) practice carried out by the Court when the respondent State has not submitted the aforementioned declaration of jurisdiction. And secondly, the withdrawal of such a declaration by a number of States in recent years; deriving from this the similarly debated interpretation maintained by the ACtHPR in this respect.

Beginning with the first of these questions, the Court, in its first pronouncements, went so far as to issue judicial decisions and concluded by holding that, as long as the respective State had not deposited the declaration referred to in Article 34(6) of the Protocol, it did not have jurisdiction over the case[75]. This procedure was criticised both by the doctrine and by various judges of the Court (Viljoen, 2018: 63-98; Ssenyonjo, 2013: 17-56). Thus, Judge Ouguergouz has maintained in different separate opinions that, taking into account the limited resources, both material and personnel, available to the Court, «since this is a case of manifest lack of jurisdiction of the Court, I consider that the application should have been dismissed out of hand by a simply letter from the Registry»[76]. Paradoxical is the first judgment issued by the Court, *Michelot Yogogombaye v. Republic of Senegal,* where, as the Judge himself states, despite the fact that Senegal had not submitted the respective declaration of jurisdiction, «the Court [...] has taken nearly one year between the date of the receipt of this application at the Registry and the date on which the Court took its decision thereon»[77]. Similar criticisms were raised in *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, *Convention*

cf. e.g. ECtHR, *Case of McCann and Others v. The United Kingdom* (Application n.º 18984/91), Judgment of 27 September 1995.

75 Cf., e.g. App. No. 001/2008*, Michelot Yogogombaye v. Republic of Senegal,* Rulings (15 December 2009). Moreover, what is on every level incongruous, and even as Judge Ouguergouz states «a violation of the adversarial principle (*audiatur et altera pars*), which principle must apply at any stage of the proceeding» is that a judicial decision is adopted without even notifying the respondent State, under the pretext that the latter has not previously made the declaration of jurisdiction. Cf., e.g. App. No. 012/2011, *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (15 December 2011), para. 3; App. No. 002/2012, *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v. Republic of South Africa*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (30 March 2012), para. 5; App. No. 004/2012, *Emmanuel Joseph Uko and Others v. Republic of South Africa*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (30 March 2012), para. 5.

76 *Vid*. App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal*, Rulings, Separate Opinion (15 December 2009), para. 2.

77 *Ibidem*.

Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon, *Emmanuel Joseph Uko and Others v. Republic of South Africa,* and *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v. Republic of South Africa*[78].

However, in contrast to the practice described above, it appears that such cases have been dealt with in recent years by means of simple letters issued to the applicant by the Registry, without the State having even been notified[79]. Even though the reduction in monetary, personnel and time costs are obvious, this procedure, as it is being carried out, hinders the possibility of the Court's jurisdiction being accepted via *forum prorrogatum*[80], and even of the State expressly accepting the Court's jurisdiction *a posteriori,* with regard to the specific case.

In my opinion, both options would be plausible, taking as an interpretative guideline Article 31 VCLT, which, let us recall, must be applied in a unitary manner. Thus, taking into account the textual element, Article 34(6) of the Protocol in its English version states that:

> 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[81].

Moreover, the French version of the Protocol states that:

> *a tout moment à partir de la ratification du présent Protocole*, l'Etat doit *faire une déclaration* acceptant la compétence de la Cour pour recevoir les requêtes énoncées à l'article 5(3) du présent Protocole[82].

78 Cf. App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria,* Rulings, Dissenting Opinion of Judge Fatsah Ouguergouz (23 September 2011); App. No. 012/2011, *Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (15 December 2011), para. 3; App. No. 004/2012, *Emmanuel Joseph Uko and Others v. Republic of South Africa*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (30 March 2012), para. 5; App. No. 002/2012, *Delta International Investments S.A, Mr and Mrs A.G.L De Lange v. Republic of South Africa*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (30 March 2012), para. 5.

79 They do not even appear on the Court's website: https://www.african-court.org/cpmt/decisions (Accessed on: 03.03.2023).

80 As Judge Ouguergouz points out, «*forum prorogatum* or 'prorogation of competence' may be understood as the acceptance of the jurisdiction of an international Court by a State after the seizure of this Court by another State or an individual, expressly or tacitly through decisive acts or an unequivocal behavior». *Vid.* App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (15 December 2009), para. 32.

81 Emphasis added.

82 Emphasis added.

Likewise, we must not overlook the fact that, in accordance with the teleological criterion, and as is clear from its Preamble[83], the Protocol was adopted in order to «ensure, on the one hand, promotion and, on the other, protection of Human and Peoples' Rights, freedom and duties».

Derived from the application of these elements, and guided, in turn, by both the principle of good faith and the principle of the most favourable interpretation, there is no alternative other than to allow both *forum prorrogatum* and express acceptance *a posteriori*. And while it is true that Article 34.6 *in fine* states that «the Court *shall not receive any petition* under article 5 (3) *involving a State Party which has not made such a declaration»,* the Court itself has understood the term *receive*:

> [...] should *not however be understood in its literal meaning as referring to «physically receiving» nor in its technical sense as referring to «admissibility»*. It should *instead be interpreted in light of the letter and spirit of Rule 34 (6) in its entirety* and, in particular, in relation to the expression «declaration accepting the competence of the Court to receive applications (emanating from individuals or NGOs)» contained in the first sentence of this provision[84].

An authoritative interpretation that would serve as a channel for both paths. Moreover, Judge Ouguergouz himself has highlighted such a possibility in several separate opinions[85]. Therefore, when the respondent State, party to the Protocol, has not issued the declaration referred to in Article 34.6, in my opinion, although the ACtHPR does not have to adopt a judgment, it must at least notify the State concerned in order to ensure that both avenues are not curtailed.

In any event, as I have pointed out, the Court has not followed this interpretation. In order for the application to be admitted for processing, the State

83 According to Article 31 VCLT «(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2). *The context for the purpose of the interpretation of a treaty shall comprise*, in addition to the text, *including its preamble* and annexes...» (emphasis added).

84 *Vid.* App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal,* Rulings (15 December 2009), para. 39.

85 Cf., e.g. App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal*, Rulings, Separate Opinion of Judge Fatsah Ouguergouz (15 December 2009), paras. 32 *et seq*; App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria,* Rulings, Dissenting Opinion of Judge Fatsah Ouguergouz (23 September 2011), paras. 8 *et seq*.

concerned is required to present and *deposit* the aforementioned declaration of Article 34.6 of the Protocol. A question that must be derived from its jurisprudence, as its Rules of Procedure make no mention of such a point[86].

Twelve States have so far deposited such an additional declaration: Burkina Faso (1998), Malawi (2008), Mali (2010), Tanzania (2010), Ghana (2011), Ivory Coast (2013), Rwanda (2013), Benin (2016), Tunisia (2017), Gambia (2020), Guinea-Bissau (2021) and Niger (2021)[87]. However, Rwanda proceeded to withdraw its declaration on 1 March 2016. Tanzania followed suit in November 2019, and Benin and Côte d'Ivoire in March and April 2020, respectively[88].

As far as *Rwanda* is concerned, it withdrew this declaration following the case of *Ingabire Victoire Umuhoza v. Republic of Rwanda,* where the plaintiff lived outside Rwanda for 16 years, during which time she collaborated with various Rwandan opposition groups. When she returned to her State of nationality, she intended to set up a political party to contest the 2010 presidential elections against the Rwandan Patriotic Front. However, before the elections took place, she was charged, among others, with the crimes of propagating the ideology of genocide, complicity in acts of terrorism and creation of an armed group; she was eventually sentenced to 15 years imprisonment by the Rwandan Supreme Court[89]. Having exhausted domestic remedies, the applicant decided to bring the case before the ACtHPR, alleging violation of Articles 3 (equality before the law and equal protection of the law), 7 (right to a fair trial), and 9 (freedom of expression) of the ACHPR[90]. However, although the first public hearing of the case was to take place on 4 March 2016, days before, Rwanda notified the

86 Cf., e.g. App. No. 001/2008, *Michelot Yogogombaye v. Republic of Senegal,* Rulings (15 December 2009), para. 39. In view of the above, I urge that the above interpretation be reflected in subsequent revisions of the ACtHPR Rules of Procedure.

87 Information available at: https://www.african-court.org/wpafc/declarations/ (Accessed on: 03.03.2023).

88 This same term is used by the IACHR in the case of *Ivcher Bronstein v. Peru*, Jurisdiction, Judgment of 24 September 1999, Series C No. 54, e.g. para. 51.

89 For the facts of the case before the ACtHPR, as well as its progress through the Rwandan courts, see App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras. 4-8; 10-33; Amnesty International, «*Justice in Jeopardy and the First Instance Trial of Victoire Ingabire*», 2013, AFR Doc. 47/001/2013, available at: https://www.amnesty.org/download/Documents/12000/afr470012013en.pdf (Accessed on: 03.03.2023).

90 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 77.

Court of the withdrawal of the additional declaration of jurisdiction under Article 34(6) of the Protocol (Horace Adjolohoun, 2020: 1-40)[91].

With regard to *Tanzania* –the State where the Court is based, and against which most cases have so far been brought– the catalyst for its decision is to be found in a number of death penalty cases, including *Ally Rajabu & others v. United Republic of Tanzania,* where the ACtHPR found that the automatic imposition of the death penalty for murder under the Tanzanian penal code violated certain precepts of the ACHPR and that the law should be amended[92].

As for *Benin,* in its declaration of withdrawal it expressly invoked the case of *Ghaby Kodeih v. Republic of Benin,* where the Court ordered, as an interim measure in a dispute over the ownership of a piece of land, suspension of the change of ownership of the land until a judgment on the merits was rendered[93]. However, those authors who have analysed the context in which the

91 Tanzania's instrument of withdrawal is available for consultation at: https://www.african-court.org/wpafc/declarations/ (Accessed on: 03.03.2023). This document emphasises the significance of the case mentioned in the withdrawal decision. It is also worth mentioning that a report on such withdrawals has been published on the website of the ACtHPR which, although it deals with the issue in a generic manner, may be interesting to read. Cf. Coalition for an Effective African Court on Human and Peoples' Rights, «African Court Coalition Discussions: States Withdraws From Article 34(6) Of The African Court Protocol», *Official Bulletin*, vol. 1, May 2020.

92 In addition to ordering monetary reparations for the applicants. Cf. Application 007/2015, *Ally Rajabu & others v. United Republic of Tanzania,* Judgment, merits and reparations (28 November 2019), para. 171. See also Application 007/2015, *Ally Rajabu & others v. United Republic of Tanzania,* Ruling, provisional measures (18 March 2016). Tanzania's instrument of withdrawal is available for consultation at: https://www.african-court.org/wpafc/declarations/ (Accessed on: 03.03.2023). It is worth mentioning that in this statement Tanzania alludes to the fact that the Court has not respected the reservation deposited at the time of making the declaration of acceptance of jurisdiction of individuals and NGOs, where it was stated that «such entitlement is only to be granted [...] in adherence to the Constitution of the United Republic of Tanzania» (para. 2). To which one must respond, since the ACtHPR has not done so, with Article 27 VCLT, which, codifying the existing rule of customary International Law on the matter, and under the heading «Domestic law and the performance of treaties», establishes that «a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty». The deposited reservation is available for consultation at: https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and (Accessed on: 03.03.2023).

93 Cf. App. 006/2020, *Ghaby Kodeih v. Republic of Benin, Ruling (provisional measures),* 28 Februaray 2020, para. 48; Application 008/2020, *Ghaby Kodeih Alias Nabih Kodeih v. Republic of Benin*, Ruling (provisional measures), 28 Feb 2020, para. 38. Benin's statement of withdrawal is available for consultation at: https://www.african-court.org/wpafc/declarations/ (Accessed on: 03.03.2023). It is worth mentioning that this statement maintains that, as the subject matter of the dispute is

withdrawal of the declaration took place, argue that the main trigger is to be found in the reparations ordered in the case of *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin, App. NO. 013/2017* (Davi & Amani, 2020). The applicant was a businessman who intended to stand in the 2021 presidential elections, but after being charged with the crime of drug trafficking in Benin, he had to seek political asylum in France. The ACtHPR found that his rights had been violated[94], and ordered a reparation of 30 billion CFA francs[95]. In fact, the same applicant has continued to bring different cases before the Court, some of them leading to quite significant pronouncements by the judicial body[96].

The withdrawal of *Côte d'Ivoire* also focuses on electoral issues. Specifically, its decision derived from the provisional measures ordered by the ACtHPR in the case of *Guillaume Kigbafori Soro et 19 Autres v. Republic of Cote d'Ivoire*, whose main plaintiff, Guillermo Soro, who had been Prime Minister of the country until 2010, and who intended to be a candidate in the elections scheduled for October 2020, was sentenced in a trial *in absentia* to 30 years in prison and five years of disqualification from the exercise of public functions. An arrest warrant was issued against him, without even previous notification of the charges[97]. In this case, the Court adopted as interim measures the suspension of the arrest warrant until a decision on the merits of the case, as well as the release on bail of the remaining detained applicants[98]; the decision of the ACtHPR is currently pending.

of an economic nature, the ACtHPR does not have jurisdiction to rule on it (cf. paras. 3 and 5). This ignores Article 3 of the Protocol establishing the ACtHPR, which gives the Court jurisdiction to hear *any* violation of the rights contained in the ACHPR (among them, the right to property recognised in Article 14), as well as in any other human rights instrument ratified by the State concerned.

94 Among them, Articles 3, 7 and 26 ACHPR. Cf. App. 013/2017, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits (29 March 2019), para. 292.

95 Monetary reparations were also ordered for his wife and children. Cf. App. No. 013/2017, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, reparations (28 November 2019), para. 144.

96 We refer in this respect to the third and fourth chapters, *supra*. Where, among other matters, we will also analyse the Court's jurisprudence in relation to the death penalty.

97 Cf. the applicant's submissions in App. No. 012/2020, *Guillaume Kigbafori Soro et 19 Autres v. Republic of Cote d'Ivoire*, Ruling, provisional measures (22 April 2020), paras. 3-7.

98 *Ibid*. para. 42. The instrument containing Côte d'Ivoire's declaration of withdrawal does not contain any justification for its withdrawal. Available for consultation at: https://www.african-court.org/wpafc/declarations/ (Accessed on: 03.03.2023).

Against this background, I will now focus on the ACtHPR's pronouncement following the withdrawal of Rwanda's declaration in *Ingabire Victoire Umuhoza v. Republic of Rwanda,* insofar as the Court has referred to the pronouncement in that case for the cases brought against the other States that have followed such a course of action[99].

Thus, considering this case, the first, as we have noted, in which the ACtHPR had to rule on the withdrawal of the declaration of jurisdiction in Article 34(6) of the Protocol, the Court upheld the validity of the declaration «by relevant rules governing declarations of recognition of jurisdiction as well as the International Law principle of state sovereignty»[100].

In this regard, the ACtHPR begins by stating that declarations of recognition of jurisdiction are «generally optional in nature». Citing as an example the respective declarations of the ICJ, the IACtHR and the ECtHR[101] –which it equates with the declaration contained in Article 34.6 of the Protocol. It then tersely states that «as such, and being unilateral, the declaration is separable from the Protocol and is therefore subject to *withdrawal independently of the* Protocol»[102].

Once the validity of the exclusive denunciation of the declaration of jurisdiction in Article 34.6 has been determined, the Court goes on to clarify the conditions to which it must be subject. In this regard, the ACtHPR refers to the Vienna Convention on the Law of Treaties[103], to the American Convention, and

99 Cf. e.g. Application No. 004/2015, *Andrew Ambrose Acheusi v. United Republic of Tanzania,* Judgment, merits and reparations (26 June 2020), paras 35-40; Application No. 044/2019, *Suy Bi Gohore Emile & 8 Others v. Republic of Cote d'Ivoire*, Judgment, merits and reparations (15 July 2020), paras 63-70; Application n.° 010/2020, *XYZ v. Republic of Benin,* Judgment, merits and reparations (27 November 2020), paras 2 and 28. Thus, the Court has not provided a specific response to the express arguments invoked in the withdrawal declarations of Tanzania (supremacy of the Constitution) and Benin (lack of jurisdiction of the ACtHPR to hear cases involving economic matters). A course of action that is open to review.

100 *Vid*. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Ruling on Withdrawal of Declaration (3 June 2016), para. 55.

101 Referring to the latter prior to the entry into force of Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, adopted on 11 May 1994 (and in force on 1 November 1998). This Protocol, it should be remembered, abolishes the European Commission of Human Rights, and by virtue of which the jurisdiction of the ECtHR becomes mandatory.

102 *Ibid*. para. 57 (emphasis added).

103 Art. 56.2 VCLT.

to the jurisprudence of the IACHR[104], to maintain that 12 months must elapse for it to have legal effects, insofar as such a period «is essential to ensure judicial security by preventing abrupt suspension of rights which inevitably impact on third parties, in this case, individuals and groups who are rights holders»[105]. Bearing in mind that the declaration of recognition of jurisdiction is a legal act different from that of the treaty –we are dealing, let us recall, with an autonomous unilateral declaration– the Court specifies that the VCLT does not apply directly, but by analogy[106]. For its part, on the basis of the legal principle of non-retroactivity, the ACtHPR affirms that «the Respondent's notification of intention of withdrawal has no legal effect on cases pending before the Court»[107].

Detailed analysis of this reasoning reveals a number of shortcomings resulting from an initial equivalence that does not appear as such. Firstly, with regard to the *extreme* equivalence of the declarations of jurisdiction of the ICJ, the IACtHR and the ECtHR, the ACtHPR seems to overlook, as has been pointed out by the Inter-American Court, following the jurisprudential line of the European Court, the fact that:

> *Any analogy between, on the one hand, the permissive State practice developed under Article 36.2 of the Statute of the International Court of Justice,* and, on the other hand, the acceptance of the optional clause of the compulsory jurisdiction of this Court must be *ruled out*, bearing in mind the special character, as well as the *object and purpose* of the American Convention [...]. Indeed, *the international settlement of human rights cases* (entrusted to tribunals such as the Inter-American and European Courts of Human Rights) *does not admit of analogies with the peaceful settlement of international disputes in purely inter-State litigation* (entrusted to a court such as the International Court of Justice); since, as is widely recognised, these are fundamentally different contexts, States cannot claim to have, in the former context, the same discretion as they have traditionally had in the latter[108].

104 Cf. IACtHR, Case of *Ivcher Bronstein v. Peru*, Jurisdiction, Judgment of 24 September 1999, Series C No. 54, para. 65, where reference is made to the one-year time limit established in Art. 78 ACHR.

105 *Vid*. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Ruling on Withdrawal of Declaration (3 June 2016), para. 67.

106 *Ibid*. paras. 54 and 65.

107 *Ibid*. para. 68.

108 See IACtHR, Case of *Ivcher Bronstein v. Peru*, Jurisdiction, Judgment of 24 September 1999, Series C No. 54, paras. 48-49 (emphasis added). In the same sense, ECtHR, *Case of Loizidou v. Turkey*, Preliminary Objections (Application. No. 15318/89), Judgment of 23 March 1995, paras. 68 and 82.

Secondly, –leaving aside, therefore, the legal regime in force before the ICJ (Briggs, 1998: 275-280; Briggs, 1985: 373-378; Orrego Vicuña, 2002: 463-479; Zimmermann *et al.*, 2019: 762-768)[109]–, and focusing on the declaration of the regional Human Rights Courts, the Inter-American Court has had occasion expressly to pronounce itself in the *Ivcher Bronstein v. Peru* case –a judgment that is even cited by the ACtHPR itself[110]– on the possibility of exclusively denouncing the declaration of recognition of the Court's jurisdiction; maintaining, in this respect, that the denunciation can only be made of the ACHR as a whole. Thus, in the words of the Court:

> A State that has accepted the compulsory jurisdiction of the Inter-American Court [...] becomes bound by the Convention as a whole. The purpose of preserving the integrity of treaty obligations follows from Article 44(1) of the Vienna Convention, which starts precisely from the principle that denunciation (or «withdrawal» from a treaty mechanism) can only be effected in relation to the treaty as a whole, unless the treaty so provides or the Parties agree otherwise. *The American Convention is clear in providing for the denunciation of «this Convention» (Article 78), and not for the denunciation or «withdrawal» of parts or clauses of it, as the latter would affect its integrity.* Applying the criteria enshrined in the Vienna Convention (Article 56(1)), it does not appear to have been the intention of the Parties to allow such a denunciation or withdrawal, nor can the latter be inferred from the nature of the American Convention as a human rights treaty[111].

This position is precisely the opposite of that adopted by the ACtHPR. Without the Court providing any arguments other than the aforementioned debatable comparison, the laxity of which has enabled three other States to follow the same path.

Therefore, effectively following the IACtHR's jurisprudential line would have led the ACtHPR to have to determine whether the Court's Protocol or,

109 In this regard and jurisprudentially, see, e.g. ICJ, *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Judgment of 26 November 1984, ICJ *Reports,* 1984, pp. 392 ff; *Land and Maritime Boundary between Cameroon and Nigeria* (Cameroon v. Nigeria: Equatorial Guinea intervening), Judgment of 11 June 1998, ICJ *Reports,* 1998, pp. 275-295.

110 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Ruling on Withdrawal of Declaration (3 June 2016), para. 63.

111 Cf. IACtHR, Case of *Ivcher Bronstein v. Peru*, Jurisdiction, Judgment of 24 September 1999, Series C No. 54, paras. 50-51 (emphasis added).

as the case may be, the African Charter on Human and Peoples' Rights, can be the subject of a complaint. Given that their respective articles do not expressly provide for such a possibility, it would be necessary to resort to the applicable rules of customary International Law contained in the VCLT. Thus, in the light of Article 56.1 of the VCLT:

> A treaty which does not contain provisions for its termination or provide for denunciation or withdrawal may not be subject to denunciation or withdrawal unless (a) it is established that it was the intention of the parties to admit the possibility of denunciation or withdrawal; or (b) the right of denunciation or withdrawal may be inferred from the nature of the treaty[112].

Regarding the first option, it is clear from the preparatory work of both instruments that the intention was precisely the opposite, that is, not to allow denunciation, as is evident in the drafting process of most of the treaties of the African regional system[113]. With regard to the second, a human rights treaty, by nature, does not entail an intrinsic right of denunciation. A position held, inter alia, by the Human Rights Committee in its General Comment No. 26 (1997)[114]. Therefore, in my opinion, if we really follow the IACtHR's jurisprudential line, it would lead the ACtHPR to maintain that in the African system it is not possible for individuals and NGOs to denounce the declaration of recognition of competence.

112 On the preparatory work on this provision, see International Law Commission, «Draft Articles on the Law of Treaties with commentaries», *Yearbook of the International Law Commission*, vol. 2, 1966, pp. 250-251.

113 In this regard, App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Individual opinion of Judge Fatsah Ouguergouz on Ruling on Withdrawal of Declaration (3 June 2016), para. 27.

114 In which it is stated that «[...] it is clear that the Covenant is not a treaty which, by its nature, entails a right of denunciation. Together with the International Covenant on Economic, Social and Cultural Rights, which was prepared and adopted at the same time as the Covenant, the Covenant codifies in treaty form the universal human rights enshrined in the Universal Declaration of Human Rights, an instrument which, together with the other two, constitutes what is called the 'International Bill of Human Rights'. *Therefore, the Covenant lacks the temporal character of treaties in which the right of denunciation is considered admissible, even though it lacks specific provisions in this regard*». *Vid*. General Comment No. 26, General Comments adopted by the Human Rights Committee, *Continuity of obligations*, 66th session, U.N. Doc. HRI/GEN/1/Rev.7 at 200 (1997), para. 3 (emphasis added).

II.2. The African Commission on Human and Peoples' Rights

As Nmehielle points out, «the importance of the relationship between the Court and the African Commission cannot be overemphasised; it is indeed very vital» (Nmehielle, 2013: 335). Thus, there is no shortage of provisions in the Protocol, the Rules of Procedure of the ACtHPR, and the Rules of Procedure of the Commission that have a bearing on the complementarity between the two organs[115]. Vis-à-vis standing to access the Court, although in the initial Draft Protocol drawn up by the International Commission of Jurists, the failure of the respective State to comply with the Commission's opinion was the only case in which standing was granted, in its final version, all reference to this was omitted (Rudman, 2016: 7-9). The following expression was simply added to the recognition of the Commission as one of the subjects with standing to bring cases before the Court (Article 5.1.a):

> The Rules of Procedure of the Court shall lay down the detailed conditions under which *the Court shall consider cases* brought before it, *bearing in mind the complementarity between the Commission and the Court*[116].

Although in the first years of the Court's operation there was no consensus on the cases in which the AComHPR was empowered to bring cases before the Court (Viljoen, 2004: 24-35; Udombana, 2000: 52-53; Elsheikh, 2002: 252-260; Van Der Mei, 2005: 122-124), the Commission's Rules of Procedure adopted in 2010 –the first to be harmonised with those of the ACtHPR– and in particular its Rule 118, partly clarified the issue.

However, I maintain that such clarification is only *partial*, as the four cases included in the aforementioned Rule were not characterised by their precision[117]. It should be added that neither the subsequent case law of the Com-

115 In this respect, I also refer to the discussion in the last section of this chapter, *supra*. However, we have already stated that the complementarity between the Commission and the Court can be reviewed in certain areas.

116 Emphasis added.

117 According to which, «1. If the Commission has taken a decision with respect to a communication submitted under articles 48, 49 or 55 of the Charter and the Commission considers that the state has not complied or is unwilling to comply with its recommendations in respect of the communication within the period stated in rule 112(2), the Commission may submit the case to the Court pursuant to article 5(1)(a) of the Protocol and inform the parties accordingly. 2. If the

mission, nor that of the ACtHPR, have facilitated their understanding; there have even been occasions on which, when the case was referred to the Court, there was not even an express reference to any of the precepts of Rule 118[118].

It is therefore not surprising that the Commission's Rules of Procedure adopted in 2020 modified this matter. Thus, the provision of reference in the current Rules –Rule 130– has deleted the four cases contained in Rule 118, leaving only one with the following wording:

> The Commission may, *before deciding on the admissibility* of a Communication submitted under Articles 48, 49 or 55 of the Charter, decide that the Communication should be referred to the Court, provided that the respondent State has ratified the African Court Protocol[119].

A provision that applies to both individual and inter-State communications (hence the reference to Articles 48, 49 and 55), the second paragraph of which states that «the Commission shall obtain the *complainant's consent* to any referral to the Court»[120]. This is not specified in the Commission's Rules of Procedure of 2010, nor in the Rules of Procedure of the ACtHPR of the same year[121].

However, I believe that the drafting of this new provision should have combined not only the search for (necessary) simplicity, but also effective com-

Commission has made a request for provisional measures against a state party in accordance with rule 98, and considers that the State has not complied with the provisional measures requested, the Commission may pursuant to article 5(1)(a) of the Protocol, refer the case to the Court and inform the complainant and the state concerned. 196 African Commission on Human and Peoples' Rights 3. The Commission may, pursuant to rule 84(2) submit a case before the Court against a state party if a situation that, in its view, constitutes one of serious or massive violations of human rights as provided for under article 58 of the African Charter, has come to its attention. 4. The Commission may seize the Court at any stage of the examination of a communication if it deems necessary».

118 Specifically in the cases, App. No. 004/2011, *Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiriya;* App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya.*

119 *Vid.* Rule 130.1 of the 2020 Rules of Procedure of the AComHPR.

120 Emphasis added.

121 The third and fourth paragraphs of Rule 130 of the Rules of Procedure of the AComHPR state that: «(3) Pursuant to Article 5(1) (a) of the African Court Protocol the Commission, in referring the Communication, shall become the Applicant to the proceedings before the Court. (4) The Commission shall not consider any communication which is essentially identical to one already decided by the Court».

plementarity between the AComHPR and the ACtHPR. All this for the sake of establishing a system that guarantees the protection of human rights. These objectives have not been achieved, since the Commission has regressed from being empowered to refer a case to the Court under practically any circumstances –and at any stage of the procedure– to being able to bring a case before the Court only before the Commission decides on the admissibility of the communication. Without even providing for an exception for cases of serious or massive human rights violations.

This is one of the most significant restrictions of the new Rules. Even more so, given that the Commission is the principal means of access to the ACtHPR against States that have not deposited the respective declaration of Article 34.6 of the ACtHPR Protocol –currently a majority–[122]. To this must be added, as has been explained in previous pages, the withdrawal of this declaration in recent years by four of the twelve states that had issued it: Rwanda, Tanzania, Ivory Coast and Benin. It should be recalled that without this declaration, individuals and NGOs are not entitled to bring cases before the Court.

In any case, insofar as the provision in question states «before *deciding* on the admissibility», and not «before *considering* on the admissibility», I understand that the Commission is empowered to *consider* the content of the communication, and, if it deems it appropriate, to refer it to the Court –for example, because it appears that the alleged facts are the result of serious or massive violations of human rights–. Provided, however, that it does not enter into a *decision* on admissibility.

However, such an interpretation cannot provide a solution to various cases, including those arising from non-compliance with provisional measures and rulings of the AComHPR, when the State concerned at any stage of the proceedings determines that it will not observe the –already established or future– measures agreed by the Commission, or when, although *a priori* it is not considered as such, in the course of the proceedings, the AComHPR demonstrates that we are dealing with serious or massive human rights vio-

122 As stated above, of the 34 States that have so far ratified the Protocol establishing the ACtHPR, only eight have submitted such a declaration and are currently maintaining it: Burkina Faso (1998), Malawi (2008), Mali (2010), Ghana (2011), Tunisia (2017), Gambia (2020), Guinea-Bissau (2021) and Niger (2021). Information available at: https://www.african-court.org/wpafc/declarations/ (Accessed on: 03.03.2023).

lations. Assumptions, as we have had the opportunity to examine, that were indeed contemplated in the 2010 Rules.

In contrast to the 2010 Rules of Court, a mention of this matter appears in Rule 36.5 of the 2020 Rules. Thus, in accordance with the same:

> The Court, while considering a case *in which the Commission has made a determination*, in application of the Protocol and the Rules, *may review the decision of the Commission*. In such circumstances, the Court may seek clarifications from the Commission as necessary[123].

While the Rules of Procedure of the AComHPR, which are more precise on this point, determine that this body cannot even adopt a decision on the admissibility of the communication, I understand that the first part of the aforementioned provision –«the Court, while considering a case *in which the Commission has made a determination*»– refers to the review of the decision itself to refer the case to the Court[124]. Thus, in relation to the grounds of that decision, and linking it to the last part of the provision, «the Court may seek clarifications from the Commission as necessary».

In any case, bearing in mind the above, I urge that in successive pronouncements some light be shed on the matter by the two bodies –both the Court and the AComHPR–. Let us not forget that these are the bodies that hold the «authoritative interpretation», which, as López Martín points out:

> is that which replaces the authentic interpretation [that which emanates from the authors of the act to be interpreted] when the latter is not possible, either because of interpretative discrepancies between States, or because it concerns a type of treaty that does not allow this type of interpretation, such as human rights treaties (López Martín, 2020: 194-195)[125].

123 For its part, to quote the French version, «dans l'examen d'une requête introduite par la Commission et dans laquelle *celleci a rendu une décision*, la Cour peut, en application du Protocole et du Règlement, *réexaminer la décision de la Commission*. Dans ce cas, la Cour peut demander des clarifications qu'elle juge nécessaires à la Commission» (emphasis added).

124 Emphasis added.

125 Regarding the reason why human rights treaties do not admit an authentic interpretation, as the author points out, «while treaties in general constitute a simple exchange of obligations between States and it is therefore up to them to interpret them, human rights treaties are intended to benefit the persons under their jurisdiction. These treaties are not a network of inter-State exchanges of obligations since they concern the recognition of rights of individuals, i.e. they represent

III. THE REQUIREMENTS FOR ADMISSIBILITY OF THE APPLICATION: NORMATIVE VAGUENESS AND *PRO HOMINE* INTERPRETATION

Having analysed in depth the contentious jurisdiction *ratione materiae* and *ratione personae* before the ACtHPR, in this section I will focus on the requirements that must be met for the merits of the case to be heard by the African Court; I refer, therefore, to the admissibility requirements of the application.

In this respect, the precept of reference is Article 6.2 of the Protocol establishing the Court, which states that «the Court shall rule on the admissibility of cases taking into account the provisions of Article 56 of the Charter»[126]. However, the wording of this provision could be improved, since an initial reading of it suggests that the admissibility requirements are common regardless of the subject of the application[127]. This issue is qualified by Rule 40.2 *in fine* of the Rules of Court, where, once it is pointed out that the application must contain evidence of the exhaustion of domestic remedies, this rule

unilateral commitments made by the State; therefore, the principle of reciprocity between States that marks the interpretation in general does not apply in this case. Moreover, if it were left to the states themselves to interpret these treaties, it is more than likely that, out of self-interest, they would proceed to interpret them in a restrictive manner, which would go against the *principle of the most favourable interpretation* that governs human rights».

126 In turn, Article 6.2 of the Protocol is reflected in Rule 50 of the Rules of Court, which, to a large extent, is similar, although not identical, to Article 56 ACHPR. This will be clarified in the following lines.

127 In the case of the African Commission, while the admissibility requirements set out in Article 56 ACHPR apply to individual communications (cf, Communication No. 290/2004, *Open Society Justice Initiative (on behalf of Pius Njawe Noumeni) v. the Republic of Cameroon* (18 September 2019), para. 75), for inter-State communications those set out in Articles 47-50 ACHPR apply (cf. Communication No. 227/99, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda* (12 October 2013), paras. 51-65). On the other hand, with regard to communications before the African Committee of Experts and Welfare of Children, it is not specified that the admissibility criteria differ depending on the subject exercising standing. Cf. Section IX.1 of the Revised Guidelines for the Consideration of Communications of the African Committee. With regard to the regional human rights courts, in the case of the ECtHR, we must turn to Article 35.1 ECHR, which applies to both inter-State and individual applications, and to Articles 35.2 and 35.3, which apply only to individual applications. The first precept stipulates that «recourse to the Court may be had only after exhausting domestic remedies, as understood according to generally recognised principles of International Law and within four months from the date of the final domestic decision». For their part, only the Commission and the States Parties may submit complaints to the IACtHR. The requirements established in Articles 35 and 36 of the IACtHR Rules of Procedure apply. Before the Inter-American Commission, the requirements appear in Articles 46 and 47 of the ACHR.

specifies that applications presented *by individuals and NGOs* must comply *with the rest of the* admissibility requirements set out in Article 56 of the African Charter on Human and Peoples' Rights. This wording also appeared in the 2010 Rules of Court[128].

From its reading, it appears that the seven admissibility requirements of Article 56 only apply to individual applications. However, an analysis of the case law of the ACtHPR shows that the Court has required compliance with *all* the requirements of Article 56 ACHPR, not only with respect to applications filed by individuals and NGOs, but also with respect to those filed by the Commission[129]. In fact, in cases such as *African Commission on Human and Peoples' Rights v. Republic of Kenya* –which has been submitted by the Commission–, the Court goes so far as to state, without exception, that «in determining *the admissibility of an application*, the Court is guided by Article 6(2) of the Protocol, which provides that, the Court shall take into account the provisions of Article 56 of the Charter»[130]. In any case, insofar as no application has been filed by a State Party or by an African Intergovernmental Organisation, and given that the regulation of this issue could be improved, both in the Protocol and in the Rules of Procedure, we can only wait for future pronouncements to shed some light on the matter.

In any case, it should not be forgotten that the Court has declared itself competent to hear the fulfilment of the seven requirements, whether or not they are in dispute between the parties[131]. Likewise, before analysing them,

128 In this regard, it is also worth mentioning Rule 49 of the Rules of Procedure of the ACtHPR which states that «the Court shall ascertain its jurisdiction and the admissibility of an Application in accordance with the Charter, the Protocol and these Rules».

129 Cf. App. No. 002/2013, *The African Commission on Human and Peoples' Rights v. Libya*, Judgment (3 June 2016), paras. 61 *et seq*; App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya,* Judgment (26 May 2017), paras. 81 *et seq*. In line with the holding *below,* in respect of such cases, the Court has stated that «*even though the rules of admissibility applied by the Commission and this Court are substantially similar*, the admissibility procedures with respect to an Application filed before the Commission and this court are distinct and shall not be conflated. Accordingly, *the Court is of the view that admissibility* and other procedures *relating to a complaint before the Commission are not necessarily relevant in determining the admissibility of an Application before this Court*» (emphasis added). *Vid*. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 78.

130 Emphasis added. *Ibid*. para. 82.

131 Cf. App. No. 003/2011, *Urban Mkandawire v. Republic of Malawi*, Judgment (21 June 2013), para. 37. However, the ACtHPR has sometimes been criticised for not having made use of this prerogative. Cf., e.g. App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin*, Dissenting

it is worth mentioning that, despite the fact that there is no express pronouncement in this regard –and given the silence in the regulations– from an analysis of the case law of the ACtHPR we can maintain that before the judicial body it is not a condition for the admissibility of the application «that the applicant [...] has suffered significant harm», as is required for individual applications presented before the ECtHR after the entry into force of Protocol No. 14 to the ECHR[132]. This is also true for communications submitted to the AComHPR[133].

Taking into account the above, the seven requirements to be fulfilled are as follows:

1. Indicate their authors even if the latter request anonymity;
2. Are compatible with the Charter of the Organisation of African with the present Charter;
3. Are not written in disparaging or insulting language directed against concerned and its institutions or to the Organisation of African Unity;
4. Are not based exclusively on news disseminated through the mass media;
5. Are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. Are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized of the matter; and
7. Do not deal with cases which have been settled by these 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.

Requirements that, in addition to appearing in Article 56 CADHP, are found in Rule 50 of the Rule of Court, without, again, specifying for which type of claims it applies.

Opinion of Justice Chafika Bensaoula (29 March 2019), pp. 1-2. For a comparison in this regard between the ACtHPR, the IACHR and the ECtHR, I refer to the section on exhaustion of domestic remedies, *supra*.

132 In this regard, Article 35 ECHR, which is entitled «Conditions of admissibility», states that «the applicant has not suffered significant harm, unless respect for the human rights guaranteed by the Convention and its Protocols requires an examination of the merits of the application».

133 Information available at: https://achpr.au.int/ (Accessed on: 03.03.2023).

I shall now analyse the last three, as their complexity and legal projection is of greater relevance. However, it is appropriate to make a few brief notes on the first four.

Thus, with regard to the requirement set out in Article 56, the Court, in its jurisprudence, has held that «perpetrator» should be understood to include only the plaintiff and not the victim[134]. For its part, as established in both precepts, and similar to other regional systems, the plaintiff may request the Court that his or her identity not be revealed when there are reasons that so require[135].

With regard to compatibility with the Constitutive Act of the AU or with the ACHPR, I must point out that the wording of Article 56.2 ACHPR is by no means appropriate, as the use of the disjunctive conjunction «or» could lead to the absurdity that the request should be accepted even if it is contradictory to the African Charter. Likewise, it should be added as an additional argument, as has been pointed out by authors such as Odinkalu and Christensen, «[...] because to do otherwise would imply that the OAU Charter is itself a source of rights and guarantees, which it is not» (Odinkalu & Christensen, 1998: 235). Therefore, it is not surprising that in Rule 50.2.(b) of the ACtHPR Rules, the disjunctive conjunction has been replaced by a copulative[136].

In accordance with the Court's jurisprudence, with regard to the requirement of compatibility with the Constitutive Act of the AU, the Court has referred to Articles 3(h) and 4(o) of the Constitutive Act. Which, respectively, enshrine as objectives of the AU «to promote and protect human and peoples'

134 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya,* Judgment (26 May 2017), para. 88. Interpretation which, in contrast to the ambiguity of Article 56.1 ACHPR, was reflected in Rule 40.1 of the 2010 Rules of Court, which stated that «[A]pplications to the Court shall comply with the following conditions: 1. disclose the *identity of the Applicant* notwithstanding the latter's request for anonymity» (emphasis added). On the other hand, Art. 56.1 ACHPR, as well as Rule 50.2.a) of the current Rules of Court, generically require «indicate the *authors* even if the latter request anonymity» (emphasis added).

135 Cf. Application 010/2020, *XYZ v. Republic of Benin,* Judgment (27 November 2020), paras. 9 and 54. Where the Court grants anonymity to the applicant, although without specifying the reasons for its decision.

136 Thus, according to Rule 50.2 of the Rules of Court, «Applications filed before the Court shall comply with all of the following conditions: [...] (b) Are compatible with the Constitutive Act of the African Union *and* with the Charter (emphasis added)». This was also the meaning of Article 40.2 of the 2010 Rules of Court.

rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments»[137]. And as principles, «respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities»[138].

As regards compatibility with the African Charter, the Court has held, in line with its extensive jurisprudential line *ratione materiae,* that the fact that the application does not specifically mention the provisions of the ACHPR does not *per se render* it inadmissible. Provided that the violations of the rights alleged are guaranteed either in the Charter or in any other human rights instrument ratified by the State in question[139]. Adding in subsequent pronouncements that, to this effect, «as long as an Application states facts which revealed a prima facie violation of rights, the Application will be admissible»[140].

Turning to the third requirement, «not to contain derogatory or insulting language», this is not included in the admissibility conditions of other human rights guarantee and control mechanisms[141].

Bearing in mind, on the one hand, the unavoidable right to freedom of expression in a democratic state, and, on the other, that international complaints invoking human rights violations imply, by their very nature, the allegation of inadequate action on the part of the public authorities, this should be interpreted, at the very least, in a restrictive manner (Viljoen, 2012: 315;

137 Cf. App. No. 006/2013, *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania*, Judgment (18 March 2016), para. 79; App. No. 030/2015, *Ramadhani Issa Malengo v. United Republic of Tanzania*, Judgment (4 July 2019), para. 31. In recent pronouncements, the Court has chosen to rely in preference on this precept. Cf., e.g. App. 026/2016, *Benard Balele v. United Republic of Tanzania,* Judgment, merits and reparations (30 September 2021), para. 69; Application 024/2016, *Amini Juma v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 37.

138 Cf. App. No. 017/2015, *Kennedy Gihana and Others v. Republic of Rwanda*, Judgment (28 November 2019), para. 47. Paradoxically, the Court has so far made no reference to the principle enshrined in Art. 4(m) of the Constitutive Act, which expressly refers to «*respect for* democratic principles, *human rights*, the rule of law and good governance» (emphasis added).

139 Cf. App. No. 001/2012, *Frank David Omary and Others v. United Republic of Tanzania*, Ruling on admissibility (28 March 2014), para. 93.

140 *Vid.* App. No. 006/2013, *Wilfred Onyango Nganyi & 9 Others v. United Republic of Tanzania*, Judgment (18 March 2016), para. 79.

141 Among others, neither in the American nor in the European system does such a requirement appear. According to the case law of the ECtHR, if the applicant, once warned, withdraws and stops using the abusive language, the application will not be inadmissible. Cf. ECHR, *Case of Chernitsyn v. Russia* (Application No. 5964/02), Judgment of 6 April 2006, paras. 25-28.

Ouguergouz, 2003: 598; Odinkalu & Christensen, 1998: 255)[142]. This is precisely the criterion that the Court has followed, as, to date, it has not rejected any application on this basis. In this regard, the Court has understood that the mere complaints, perceptions and opinions of the applicant concerning the State and its institutions as a consequence of the circumstances surrounding the case do not amount to derogatory language[143].

Indeed, the ACtHPR has drawn on the Commission's jurisprudence to hold that the language of a statement of claim must be considered derogatory or insulting in very narrowly defined circumstances. That is, «it must be aimed at unlawfully and intentionally violating the dignity, reputation and integrity of a judicial official or body and must seek to pollute the minds of the public»[144]. Thus, the language used must unequivocally demonstrate the plaintiff's intention to discredit and defame the state and its institutions[145], and more lenient on this requirement when the addressee of such statements is a public person, in particular those occupying the highest political offices of the state[146].

In accordance with the fourth requirement, pursuant to Article 56.3 ACHPR and Rule 50.2.d of the Rules of Court, in order to be admissible,

142 For their part, authors such as Ouguergouz describe this criterion as «imprecise», while Odinkalu and Christensen describe it as «dangerously subjective».

143 Cf. App. No. 017/2015, *Kennedy Gihana and Others v. Republic of Rwanda*, Judgment (28 November 2019), para. 52.

144 *Ibid*., para. 53; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso*, Judgment (5 December 2014), para. 70; Communication No. 284/03, *Zimbabwe Lawyers For Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe* (3 April 2009), para. 88. However, the Commission, while receiving significant criticism from the doctrine, has indeed rejected communications alleging such a criterion, for example, in Communication No. 268/03, *Ilesanmi v. Nigeria (*11 May 2005), where the author included among his allegations that «the police and customs officials are corrupt, that they deal with drug smugglers, that they extort money from motorists and added that the President himself was corrupt and had been bribed by the drug smugglers» (para. 38).

145 Cf. App. No. 017/2015, *Kennedy Gihana and Others v. Republic of Rwanda*, Judgment (28 November 2019), para.53. In this vein, AComHPR, Communication 435/12, *Eyob B. Asemie v. The Kingdom of Lesotho (*13 February 2015), paras. 58-60. Similarly, in App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin*, where it was alleged by the respondent State that «the words used by the Applicant are grossly disparaging, dishonourable to the dignity inherent in the function of Benin Head of State», the Court held that «public figures including those who hold the highest government positions are legitimately exposed to criticism such that for remarks to be regarded as being disparaging to them, the remarks must be of extreme gravity and manifestly affect their reputation» (para. 69).

146 Cf. App. No. 037/2017, *Boubakar Sissoko et 74 Autres v. Republic of Mali*, Judgment, merits and reparations (25 September 2020), para. 29.

the application must not be based exclusively on media reports. Nor is such a requirement among the admissibility criteria of its regional counterparts.

To date, only in the case of *Frank David Omary and Others v. United Republic of Tanzania* has the respondent state claimed a breach of this rule. However, the Court found that the newspaper reports of excessive police charges against the applicants were accompanied by other evidence and that the claim should therefore be dismissed[147]. Moreover, it should be mentioned that the Commission, when ruling on this requirement in the case of *Jawara v. Gambia,* has highlighted the importance of the information provided by the media regarding human rights violations, stating that, in certain cases;

> there is no doubt that the media remains the most important, if not the only source of information [...] the issue therefore should not be whether the information was gotten from the media, but whether the information is correct[148].

However, in that case too, the Commission used the «non-exclusivity» criterion –the complainant provided additional evidence in addition to the information reflected in different media– to dismiss the inadmissibility of the complaint[149].

Next, as already mentioned, I will focus in greater detail on the last three requirements for the admissibility of the application, which have been the focus of the decisions of the ACtHPR so far: the prior exhaustion of domestic remedies, the time limit for filing the application and the *ne bis in idem* requirement.

III.1. After exhaustion of domestic remedies

Defined by the International Court of Justice as a principle from which a rule of customary International Law derives[150], the requirement of exhaustion of

147 Cf. App. No. 001/2012, *Frank David Omary and Others v. United Republic of Tanzania*, Ruling on admissibility (28 March 2014), paras. 95-97.

148 See Communication No. 147/95-149/96, *Jawara v. The Gambia* (11 May 2000), paras. 25-26.

149 *Ibid*. para. 27.

150 Cf., e.g. ICJ, *Interhandel* (Switzerland v. United States of America), Judgment of 21 March 1959, ICJ *Report,* 1959, p. 27.

local remedies is, in turn, one of the most important manifestations, first and foremost, of the principle of state sovereignty and, secondly, of the principle of subsidiarity which governs International Human Rights Law. This is so insofar as it makes it possible that, in the first instance, it is the state concerned that must prevent and remedy the human rights violations to which it is internationally bound (Toro Huerta, 2007: 24)[151].

In the same sense, the African Court pronounces, affirming with respect to Article 56.5 ACHPR –the content of which also appears in Rule 50.2.e) of the Rules of Court– that:

> The rule of exhaustion of local remedies reinforces the primacy of domestic courts in the protection of human rights *vis-à-vis* this court and, as such, aims at providing States the opportunity to deal with human rights violations occurring in their jurisdiction before an international human rights body is called upon to determine the responsibility of the States for such violations[152].

However, the wording of these precepts does not seem to me to be in any way correct, since they state that, if domestic remedies exist, and in order for the claim to be admitted, they must be exhausted *unless they are manifestly being unduly prolonged*[153]. It therefore omits the possibility of other cases occurring[154].

151 In turn, it is not surprising that the non-exhaustion of domestic remedies exception is linked to the merits of the case, especially in relation to allegations of violations of the right to a fair trial (art. 7 ACHPR). Cf., e.g. App. No. 006/2013, *Wilfred Onyango Nganyi and 9 Others v. United Republic of Tanzania*, Judgment, 18 March 2016, paras. 85 *et seq*; 117 *et seq*.

152 *Vid*. App. No. 031/2015, *Dismas Bunyerere v. United Republic of Tanzania*, Judgment (28 November 2019), para. 35; App. 029/2015, *Yusuph Hassan v. United Republic of Tanzania*, Ruling, Jurisdiction and Admissibility (30 September 2021), para. 65. Likewise, the African Court has held that the exhaustion of local remedies rule «is one that is recognized and accepted internationally [...] is an exigency of International Law and not a matter of choice». *Vid*. App. No. 009/2016, *Mamadou Diakite and Diakite Habibata B. Guindo v. Republic of Mali*, Judgment, 28 September 2017, paras. 41 and 53.

153 Thus, according to these precepts, the application must be lodged «after exhausting local remedies, if any, *unless it is obvious that this procedure is unduly prolonged* (emphasis added)». The wording of this admissibility criterion in Article 35.1 ECHR is more appropriate, where it is specified that «the Court may be seised only after exhausting domestic remedies, as understood in *accordance with generally recognised principles of International Law*» (emphasis added). In the same sense, cf. art. 46.1.a ACHR.

154 Identical was the wording of Rule 40.5 of the 2010 ACtHPR Rules.

Fortunately, in its jurisprudence, following the position held by its regional counterparts[155], the ACtHPR has held that the remedies to be exhausted must be those considered as *available, sufficient and effective*[156]. In interpreting the first category, the Court has established that a remedy is to be considered as available «when it may be used by the Applicant without impediment. As such, remedies [...] must be available not only in law but also be made available to the applicant»[157]. Regarding the sufficiency of the remedy, the ACtHPR has considered whether it is «[capable of] redressing the complaints»[158]. While its effectiveness, in the words of the Court, «is measured in terms of its ability to solve the problem raised by the Applicant»[159].

Thus, if the appeal in question complies with these requirements, the claimant must, before accessing the ACtHPR, not only file the appeal before

155 Cf. e.g. ECtHR, Case of *Akdivar and Others v. Turkey* (Application n.º 21893/93), Judgment of 16 September 1996, paras. 65-69; ECHR, *Case of Scoppola v. Italy* (Application n.º 10249/03), Judgment of 17 September 2009, paras. 68-71; IACtHR, Caso *Velásquez Rodríguez v. Honduras*, Preliminary Objections, Judgment of 26 June 1987, Series C No. 1, paras. 88 and 91; IACtHR, Case of *Liakat Ali Alibux v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 30 January 2014, Series C No. 276, para. 15.

156 *Vid*. e.g., App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 93; App. No. 006/2016, *Mgosi Mwita Makungu v. United Republic of Tanzania*, Judgment (7 December 2018), para. 41. Cf., respectively, ACHPR, Communication No. 147/95-149/96, *Sir Dawda K. Jawara v. The Gambia (*11 May 2000), para. 32; ACERWC, Communication No. Com/002/2009, *Institute For Human Rights And Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descentin Kenya v. The Government of Kenya (*22 March 2011), para. 28.

157 *Vid*. App. No. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment (28 March 2019), para. 43, where the Court stated that «the fact that neither the Minister of Home Affairs nor the High court responded to the Applicant's requests made it impossible for him to access the appeal remedy. The Court thus finds that though the remedy of the appeal existed, the Applicant was unable to utilise it» (para. 45). Similarly, in App. No. 006/2016, *Mgosi Mwita Makungu v United Republic of Tanzania*, Judgment (7 December 2018), the Court understood that domestic remedies were not available to the Applicant in that «the Applicant was impeded from pursuing the local remedies as a result of the Respondent State's failure to provide him with the certified true copies of the records of proceedings and judgments» (para. 44).

158 *Vid*. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 71, in which the Court held that in the specific case the remedy of review before the Supreme Court of Rwanda was not sufficient in that the complaint raised «concerned alleged substantive violation of the Applicant's human rights and not only allegations of bias or technical and procedural errors». The latter being the scope for which such a remedy was intended. *Idem*.

159 *Vid*. App. No. 013/2011, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v Burkina Faso*, Judgment (28 March 2014), para. 68. Case in which the ACtHPR upheld the effectiveness of the appeal to the Burkina Faso Court of Cassation concerning the alleged murder of journalist R. Zongo and three of his close associates.

the respective domestic court, but also wait for the latter to issue a judgment[160]; compliance with this requirement must be assessed at the time the proceedings before the court begin[161]. Likewise, it is required to have lodged at the domestic level, «in substance, the same complaints as those raised before this Court»[162].

In addition to these requirements, the ACtHPR adds a fourth, that of *not unduly delaying the decision on the appeal*[163], which must be determined taking into account the circumstances of the case[164]. According to the case law of the Court, this has been specified in questions such as the complexity of the case or its procedure, in the conduct of the parties themselves, or in the conduct of the respective national judicial authorities[165]. However, as has been pointed

160 Cf., e.g. App. 010/2018, *Yacouba Traore v. Republic of Mali,* Rulings, jurisdiction (25 September 2020), para. 50.

161 This has been translated, according to the Court's jurisprudence, into the moment at which the application is received by the Registry of the ACtHPR. Cf., e.g. App. 006/2019, *Moussa Kante & 39 Others v. Republic of Mali*, Ruling, jurisdiction and admissibility (25 June 2021), paras. 32, 33 and 36. In any case, in this regard, we note that there is room for improvement in the case law, for example, in Application 020/2019, *Komi Koutché v. Republic of Benin*, Ruling, jurisdiction and admissibility (25 June 2021), paras. 49-50. 49-50, the Court finds that «the Court notes that pursuant to Article 56(6) of the Charter and Rule 50(2) of the Rules, where domestic proceedings are pending, it cannot be seized of the matter *except if the matter is unduly prolonged*» (emphasis added); where other circumstances, including the fact that the appeal lodged is of an extraordinary nature –as the Court itself has recognised in other pronouncements– may prevent the applicant from waiting for the judgment to be delivered. In the latter sense, cf., App. 006/2020, *Ghaby Kodeih v. Republic of Benin*, Ruling jurisdiction and admissibility (30 September 2021), paras. 53, 61-64.

162 *Vid*. e.g. App. No. 020/2019, *Komi Koutché v. Republic of Benin*, Ruling on provisional measures (2 December 2019), para. 49.

163 Cf., e.g. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 93.

164 Cf., e.g. App. 002/2017, *Ernest Karata and 1744 others v. United Republic of Tanzania,* Judgment merits and reparations (30 September 2021), para. 58.

165 Cf. App. No. 040/2016, *Mariam Kouma & Another v. Republic of Mali*, Jugment (21 March 2018), para. 37. Thus, in that case, the Court holds that «the time that elapsed between 24 March, 2014, and 1 July, 2016, the date on which the case was brought to it, corresponds to the period when the Court was awaiting the Applicants' medical evidence so as to assess the harm and quantify the reparation [...] The Court therefore dismisses the Applicants' contention» (paras. 46 and 48). On the other hand, in App. No. 006/2013, *Wilfred Onyango Nganyi & 9 Others v. United Republic of Tanzania*, Judgment (18 March 2016), the Court states that «since the Applicants were arrested and charged before the Respondent's Courts in 2006 until they seized this Court in 2013, and to date, almost ten years since proceedings started, the Respondent's courts have failed to bring finality to the matter. The Respondent's arguments that the delay has been occasioned by applications made by the Applicants for stay of proceedings cannot stand, as it behoves the Courts of

out by, among others, the Inter-American Court[166], this requirement must be understood as included within the aforementioned notion of effectiveness, and not as a requirement separate from it. This has undoubtedly contributed to the fact that both Article 56.5 ACHPR and Rule 50.2(e) of the Rules of Court refer exclusively to undue delay in the resolution of the case as an exception to the prior exhaustion of domestic remedies.

In any event, under certain circumstances, the ACtHPR has recognised that, despite the existence of available, sufficient and effective domestic remedies, the existence of *particular circumstances* exempts compliance with this requirement. Thus, in *Anudo Ochieng Anudo v. United Republic of Tanzania*, the Court held that the applicant's expulsion from the territory of the State concerned made it very difficult to avail himself of domestic remedies, and thus decided to admit the application even though such remedies had not been exhausted[167].

For its part, in addition to the remedy being available, sufficient and effective, the Court has understood that, in accordance with Article 56.5 ACHPR, remedies of an *extraordinary nature* should not be included (Faúndez Ledesma, 2007: 56)[168]. Attributing such a character, *inter alia*, to those that are subject to a political process (*Tanganyika Law Society and Legal and Human Rights Centre*

the Respondent to bring finality to the matter» (para. 94). A similar position is held in App. No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), paras. 57 *et seq*.

166 Cf., e.g., IACtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of 31 August 2001, Series C No. 79, para. 134.

167 Cf. App. No. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment (22 March 2018), paras. 52-53. Similar pronouncements can be found in the jurisprudence of the Commission, ACHPR, Communication No. 71/92, *Rencontre africaine pour la défence des droits de l'Homme (RADDHO) v. Zambia* (31 October 1997), paras. 8 *et seq*; Communication No. 159/96, Union interafricaine des *droits de l'Homme (RADDHO) v. Zambia* (31 October 1997), paras. 8 *et seq*. 159/96, *Union interafricaine des droits de l'Homme, Fédération internationale des ligues des droits de l'Homme, Rencontre africaine des droits de l'Homme, Organisation nationale des droits de l'Homme au Sénégal and Association malienne des droits de l'Homme v. Angola* (11 November 1997), paras. 9 *et seq*. In the same sense, the Court has pronounced that «the interpretation of the rule of exhaustion of local remedies must realistically take into account the context of the case as well as the personal situation of the Applicant». *Vid*. Application No. 065/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin,* Judgment, merits and reparations (29 March 2021), para. 79.

168 Same position held by the ECtHR. Cf. ECtHR, *Case of* Çınar *v. Turkey* (Application No. 28602/95), Decision of 13 November 2003; Case of *Prystavska v. Ukraine* (Application No. 21287/02), Decision on 17 December 2002. Instead, the IACtHR seems to suggest that, on occasion, such remedies should also be exhausted. IACtHR, *Case of Herrera Ulloa v. Costa Rica*, Judgment of 2 July 2004, para. 85.

and Reverend Christopher R. Mtikila v. United Republic of Tanzania)[169], or to a discretionary power (*Ingabire Victoire Umuhoza v. Republic of Rwanda*)[170], or seek to apply to a court for review of its own decision where such a remedy is only available «exceptionally and under [...] restrictive conditions» (*Alex Thomas v. United Republic of Tanzania*; *Mohamed Abubakari v. United Republic of Tanzania*)[171].

Likewise, the Court has reiterated in its case law that those remedies to be exhausted must be *exclusively judicial*[172]. However, in my opinion, the ACtHPR should specify, given that none of its rulings to date have detailed this, that those remedies available through administrative channels that are mandatory must be exhausted in order subsequently to turn to judicial channels.

Moreover, the flexibility with which the application of this rule has been understood can also be seen in relation to other aspects of the Court's case law. Thus, the ACtHPR has held that it is not necessary to file an appeal *if the outcome of the appeal is already known*, for example, because it was previously brought by another individual in relation to the same subject matter[173]. Likewise, the Court has held that, in order to comply with the requirement established in Article 56.5 of the Treaty, it is *not* necessary for the appeal to have been filed in the domestic order *by the same subject* that files the claim, being sufficient that «the Respondent has had an opportunity to deal with such matter through the appropriate domestic proceedings»[174]. This criterion has been followed with respect to the cases presented by the Commission before the ACtHPR.

169 Cf. App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), para. 82.

170 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 72.

171 *Vid*. App. No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), para. 63; App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), para. 72. In any event, we understand that such characteristics would result in the remedy not having the status of available, thus giving rise to an exception in its exhaustion.

172 Cf., e.g. App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), paras. 82 *et seq*; App. No. 006/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (4 July 2019), para. 32; App. No. 031/2015, *Dismas Bunyerere v. United Republic of Tanzania*, Judgment (28 November 2019), para. 36.

173 Cf. App. No. 011/2011, *Rev. Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), para. 82.3; App. No. 001/2014, *Actions pour la protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire*, Judgment (18 November 2016), para. 101 *et seq*.

174 *Vid*. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), paras. 94 *et seq*.

For its part, as has been pointed out, despite the need for the content of the claims in the domestic order to coincide with those invoked in the application before the ACtHPR, the Court, in a consolidated line of case law, has gone so far as to affirm that:

> alleged *violations of fair trial rights* which were *occasioned in the course of his trial and appeals in the domestic courts* [...] form part of the bundle of rights and guarantees that were related to or were the basis of his appeals and which *the domestic authorities had ample opportunity to redress even though the Applicant did not raise them* explicitly[175].

Allegations relating to the right to a fair trial, including denials of free legal aid, particularly in relation to the Tanzanian State[176]. Indeed, in its most recent rulings, the ACtHPR has extended this jurisprudence to other rights beyond the right to a fair trial. Specifically, in *Ernest Karata and 1744 others v. United Republic of Tanzania,* to the right to adequate compensation upon termination of employment. Stating that:

> In respect of the Applicants' claims before this Court, it is to be noted that the bone of contention between the Parties is a labour dispute which coalesces around the alleged failure by the Respondent State to pay the Applicants their terminal dues. While the Applicants did not plead their case before the domestic courts in the same manner that they have done before the Court, it is clear that the alleged violation of their rights was occasioned during the domestic proceedings. [...] The Court reiterates, therefore, that where *an alleged human rights violation occurs in the course of the domestic judicial proceedings, domestic courts are thereby afforded an opportunity to pronounce themselves on possible human rights* breaches[177].

175 *Vid.* App. No. 006/2015, *Nguza Viking and Johnson Nguza v. United Republic of Tanzania*, Judgment (23 March 2018), para. 53 (emphasis added). In the same vein, see, *inter alia*, App. No. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment (7 December 2018), para. 50; App. No. 020/2015, *Livinus Daudi Manyuka v. United Republic of Tanzania*, Judgment (28 November 2019), para. 44.

176 Cf., e.g. App. No. 016/2016, *Diocles William v. United Republic of Tanzania* Judgment (21 September 2018), para. 43; App. No. 014/2015, *Jibu Amir Mussa & Another v. United Republic of Tanzania*, Judgment (28 November 2019), para. 37. Likewise, the Court has also understood included within such a «bundle of rights and guarantees», *inter alia*, «prolonged detention in police custody and illegality and harshness of the sentence imposed on the Applicants». *Vid.* App. No. 005/2015, *Thobias Mango and Another v. United Republic of Tanzania*, Judgment (11 May 2018), para. 45.

177 *Vid.* App. 002/2017, *Ernest Karata and 1744 others v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), paras. 55-57 (emphasis added). In any event, it is reviewable that in certain cases the Court has adopted such jurisprudence without even making an

However, to date, the Court has not followed the Commission's jurisprudential line that relaxes, and even exempts, the exhaustion of domestic remedies for allegations of serious or massive human rights violations[178].

Finally, with regard to the *burden of proof*, in accordance with the jurisprudence of its regional counterparts[179] and of the African Commission itself[180], it falls upon the respondent State, which alleges the existence of this exception, to prove that the applicant did not exhaust the domestic remedies, which met the requirements described above. The burden of proof then shifts to the plaintiff, who must prove either the exhaustion of domestic remedies, or that the requirements of availability, sufficiency or effectiveness were not met, or that there were particular circumstances that exempted him or her from such a requirement.

However, the African Court, as has been pointed out in various individual opinions, has not distributed the burden of proof fairly, exempting in certain cases the respondent State from proving non-exhaustion of domestic reme-

assessment of the violations of rights alleged by the applicant. Cf., e.g. App. 008/2016, *Massoud Rajabu v. United Republic of Tanzania*, Judgment, merits and reparations (25 June 2021), para. 43; App. 023/2016, *Yahaya Zumo Makame v. United Republic of Tanzania*, Judgment, merits and reparations (25 June 2021), para. 47.

178 Cf. AComHPR, Communication No. 54/91-61/91-96/93-98/93-164/97-196/97-210/98, *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union Interafricaine Des Droits De L'Homme And RADDHO, Collectif Des Veuves Et Ayants-Droit, Association Mauritanienne Des Droits De L'Homme v. Mauritania* (11 May 2000), para. 85; Communication No. 245/02, *Zimbabwean Human Rights NGO Forum v. Zimbabwe* (11 May 2006), paras. 69-74. Communication No. 245/02, *Zimbabwean Human Rights NGO Forum v. Zimbabwe* (15 May 2006), paras. 69-72; Communication No. 279/03-296/05, *Sudan Human Rights Organisation & Centre On Housing Rights And Evictions (COHRE) v. Sudan (*27 May 2009), paras. 100-101. By contrast, see, App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), paras. 93 *et seq*.

179 Cf. e.g. with regard to the European system, ECtHR, *Case of Dalia v. France* (Application No. 154/1996/773/974), Judgment of 19 February 1998, para. 38; *Case of Selmouni v. France* (Application No. 25803/94), Judgment of 28 July 1999, para. 76; *Case of Scoppola v. Italy* (Application No. 10249/03), Judgment of 17 September 2009, para. 71; *Case of Mc Farlane v. Ireland* (Application No. 31333/06), Judgment of 10 September 2010, para. 107, e.g., IACtHR, Case of the *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 15 June 2005, Series C No. 124, para. 49; Case of the *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of 23 November 2004, Series C No. 118, para. 135; Case of *Fairén Garbi and Solís Corrales v. Honduras*, Merits, Judgment of 15 March 1989, Series C No. 6, para. 84.

180 Cf. AComHPR, Communication No. 71/92, *Rencontre africaine pour la défence des droits de l'Homme (RADDHO) v. Zambia* (31 October 1997), para. 12; Communication No. 268/03, *Ilesanmi v. Nigeria* (11 May 2005), paras. 46-47.

dies and, therefore, favouring its procedural position[181]. However, this has been resolved in the Court's most recent case law[182].

In relation to this matter, it should also be noted that, while the Inter-American Court has maintained a line of jurisprudence according to which the exception of non-exhaustion of domestic remedies must necessarily be invoked by the plaintiff State, otherwise being understood as a tacit waiver[183], on the other hand, the African Court, like the ECtHR (Pérez de los Cobos, 2017: 15), has held that this exception can be invoked *motu proprio* by the jurisdictional body (*Urban Mkandawire v. Republic of Malawi*[184]). However, it has not yet been clarified –as the ECtHR and the IACtHR have allowed– whether the state concerned may waive its invocation[185]. Similarly, the ACtHPR has not specified the procedural limit within which the respondent State could raise the defence of non-exhaustion of domestic remedies[186]. This comment can be extended to the rest of the admissibility conditions.

III.2. Time limit for bringing an action after exhaustion of domestic remedies

The penultimate of the admissibility requirements, contained in Article 56.6 ACHPR and Rule 50.2(f) of the Rules of Court, is worded as follows: the statement of claim must be filed «within a reasonable time from the date local

181 Cf. App. No. 003/2012, *Peter Joseph Chacha v. United Republic of Tanzania*, Dissenting Opinion of Judge Fatsah Ouguergouz (28 March 2014), paras. 30 *et seq*.

182 Cf., e.g. App. No. 012/2017, *Prof. Lèon Mugesera v. Republic of Rwanda*, Judgment, merits and reparations (27 November 2020), paras. 32 *et seq*.

183 Cf., e.g. IACtHR, Case of *Castillo Paez v. Peru*, Preliminary Objections, Judgment of 30 January 1996, Series C No. 24, para. 40; Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Judgment of 1 February 2000, Series C No. 66, para. 53.

184 Cf. App. No. 003/2011*, Urban Mkandawire v. Republic of Malawi,* Judgment (21 June 2013), para. 37.

185 In this regard, see, e.g., ECtHR, *Cases of De Wilde, Ooms And Versyp v. Belgium* (Application Nos. 2832/66; 2835/66; 2899/66), Judgment of 18 June 1971, para. 55. IACourtHR, Case of *Castillo-Páez v. Peru*, Preliminary Objections, Judgment of 30 January 1996, Series C No. 24, para. 40, such waiver being articulated both tacitly and expressly.

186 In this regard, the IACtHR has held in the case of *Castillo Paez v. Peru*, Preliminary Objections, Judgment of 30 January 1996, Series C No. 24, that «the objection of non-exhaustion of domestic remedies, in order to be timely, must be raised in the early stages of the proceedings, failing which it is presumed that the State concerned has tacitly waived its right to avail itself of it» (para. 40). Before the ECtHR, cf. ECtHR, Case of *Mooren v. Germany* (Application No. 11364/03), Judgment of 9 July 2009, para. 57.

remedies were exhausted or from the date the Commission is seized with the matter». In accordance with the pronouncements of the ACtHPR, the purpose of this requirement is to:

> guarantee judicial security by avoiding a situation where authorities and other concerned persons are kept in a situation of uncertainty for a long time. Also, to provide the Applicant with sufficient time for reflection to enable him appreciate the opportunity of bringing a matter to court if necessary and finally, to enable the Court to establish the relevant facts relating to the matter[187].

Since its earliest jurisprudence, the Court has understood that in the African system, the rule of six months does not apply as a time limit for lodging an application from the exhaustion of domestic remedies. A rule that does apply in the Inter-American system[188], and which, until 1 February 2021, also applied before the ECtHR (after the six-month period from the date of entry into force of Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, 2013[189]). In this regard, the ACtHPR has held that the «reasonableness» referred to in Article 56(6) ACHPR and Rule 50(2)(f) gives it the power to decide on a case-by-case basis, and depending on the specific circumstances, whether or not this requirement is met[190].

187 *Vid.* App. No. 015/2015, *Godfrey Antony and Another v. United Republic of Tanzania*, Judgment (26 September 2019), para. 45.

188 Cf. Art. 46 ACHR. In any case, in certain cases, in view of the particular circumstances that have arisen, this six-month period has been understood in a flexible manner. Cf., e.g. IACtHR, Case of *Artavia Murillo et al. (In Vitro Fertilization) v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2012, Series C No. 257, paras. 35-37.

189 Cf. Arts. 4 and 8 Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 24 June 2013 in Strasbourg, in force as of 1 August 2021.

190 Cf., e.g. App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), para. 83; App. No. 003/2012, *Peter Joseph Chacha v. United Republic of Tanzania*, Ruling on admissibility (28 March 2014), para. 155; App. No. 003/2015, *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*, Judgment (28 September 2017); App. No. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment (22 March 2018), para. 57; App. 029/2015, *Yusuph Hassan v. United Republic of Tanzania,* Ruling, Jurisdiction and Admissibility (30 September 2021), para. 76. Cf. e.g. AComHPR, Communication 308/05, *Michael Majuru v. Zimbabwe* (24 November 2008), para.109.

Thus, the ACtHPR has taken into account issues such as the applicant's imprisonment; their illiteracy; their lack of monetary resources; intimidation and fear of reprisals; their recourse to extraordinary remedies at the domestic level; or their own lack of knowledge of the existence of the Court in order to assess the reasonableness of the period of time elapsed[191]. On the basis of such an individualised analysis, the Court went so far as to affirm that «*the period of five years* [...] in which it was seized *is a reasonable period* within the meaning of article 56.6 of the Charter» (*Christopher Jonas v. United Republic of Tanzania*[192]). The existence of such circumstances and their projection in the specific case must be proved by the applicant[193].

With regard to the commencement of the time limit for filing the application, in accordance with Rule 40.6 of the 2010 Rules of Court, this must be counted –as a first assumption– «from the date local remedies were exhausted»[194], and –as a second assumption, when there are no appeals– «from the date

191 Cf., e.g. App. No. 003/2015, *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*, Judgment (28 September 2017), para. 68; App. No. 046/2016, *APDF & IHRDA v Republic of Mali*, Judgment (11 May 2018), para. 54; App. No. 020/2016, *Anaclet Paulo v. United Republic of Tanzania,* Judgment (21 September 2018), para.49; App. No. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania,* Judgment (28 March 2019), para.55; App. No. 025/2016, *Kenedy Ivan v. United Republic of Tanzania,* Judgment (28 March 2019), para. 53; App. No. 031/2015, *Dismas Bunyerere v. United Republic of Tanzania*, Judgment (28 November 2019), para. 46. On the issue of extraordinary remedies, as discussed below, ACtHPR jurisprudence has been mixed.

192 *Vid*. App. No. 011/2015, *Christopher Jonas v. United Republic of Tanzania*, Judgment (28 September 2017), para. 54 (emphasis added). In fact, so far, only on a couple of occasions has the Court so far dismissed an application for failure to comply with such a requirement. Cf., e.g. App. No. 020/2015, *Livinus Daudi Manyuka v. United Republic of Tanzania*, Judgment (28 November 2019), para. 55.

193 Cf., e.g. App. No. 029/2015, *Yusuph Hassan v. United Republic of Tanzania,* Ruling, jurisdiction and admissibility (30 September 2021), para. 76; App. No. 011/2019, *Yusuph Said v. United Republic of Tanzania*, Ruling, jurisdiction and admissibility (30 September 2021), paras. 44-45; App. No. 008/2016, *Massoud Rajabu v. United Republic of Tanzania*, Judgment, merits and reparations (25 June 2021), para. 51. Although in certain pronouncements the Court simply determines that the respective circumstances invoked by the applicant have not been contested by the State concerned, without specifying whether or not they have been proved by the applicant, and, if so, how such circumstances affect or have affected the fulfilment of the admissibility requirement. More clarity is therefore required in this regard. In this regard, cf. e.g. No. App. 032/2015, *Kijiji Isiaga v. United Republic of Tanzania,* Judgment, Reparations (25 June 2021), para. 55. No. 010/2016, *Hamad Mohamed Lyambaka v. United Republic of Tanzania*, Ruling, admissibility (25 September 2020), paras. 46-52.

194 From the decision App. No. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment (28 March 2019), para. 45, it seems to follow that in cases where, although remedies exist, they are not available, sufficient or effective, this is also the criterion adopted by the ACtHPR. Even so, we must still look to subsequent pronouncements by the Court.

set by the Court as being the commencement of the time limit within which it shall be seized with the matter». Less precise in this regard is Rule 50.2.(f) of the 2020 Rules of the Court, which, as has been pointed out, transfers without any modification the wording of article 56.6 ACHPR, stating that said term must be counted, either «from the time local remedies are exhausted», or «from the date *the Commission is seized* with the matter».

In this regard, one must bear in mind that, although this last precept is appropriate for the procedure before the AComHPR, it is by no means precise for the Court, since, as we have had the opportunity to analyse in chapter two, not all cases brought before the AComHPR have previously passed through the Commission's channel. Therefore, we may find cases in which there are no remedies, or these are not considered to be available, sufficient and effective, and the second scenario may not apply either. It is therefore not surprising that in the case law following the adoption of the 2020 Rules, the Court has continued to apply and refer to the content of Rule 40.6 of the 2010 Rules of the Court[195].

Now, focusing on the first assumption of this provision, the ACtHPR has not followed a uniform case law, holding in certain cases that the starting date of the computation is the date on which the judgment exhausting domestic remedies was adopted. In other cases, it opts for the date on which the judgment was notified to the current plaintiff. It is illustrative in this respect to look at *Christopher Jonas v. United Republic of Tanzania* and *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*. Both brought against the State of Tanzania, both cases in which the respective applicants had been sentenced domestically to 30 years' imprisonment for armed robbery, and in both of which it is alleged that the right to a fair trial before the domestic courts was violated. In the first case, the ACtHPR determined that the date to be taken into account is the date on which the Tanzanian Court of Appeal adopted the judgment exhausting domestic remedies[196], and in the second, it took as a ref-

195 Cf., e.g. App. No. 001/2016, *Chrizostom Benyoma v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 58. Cf., e.g. App. No. 026/2016, *Benard Balele v. United Republic of Tanzania,* Judgment, merits and reparations (30 September 2021), para. 63; App. No. 047/2016, *Ladislaus Onesmo v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 63.

196 Cf., e.g. App. No. 011/2015, *Christopher Jonas v. United Republic of Tanzania*, Judgment (28 September 2017), para. 50.

erence the date on which the judgment, also adopted by the Tanzanian Court of Appeal, was notified to the plaintiffs[197]. If in the first case, without specifying it, it adopts the date of adoption of the judgment because it coincides with the date of notification to the plaintiff. I urge that greater precision be given to this point in subsequent pronouncements.

Similarly, with regard to the filing of extraordinary remedies, the Court, in certain cases, has taken as a reference the date on which these were exhausted by the claimant, while in others, it has taken them into consideration merely to assess the reasonableness of the computation of time. Therefore, by taking as a reference the date on which the ordinary appeals were exhausted, this has resulted in an increase in the period of time until the claim was filed before the ACtHPR. To exemplify the first scenario we turn again to *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*. Taking into account that the second claimant brings an application for review before the Court of Appeal –which has the status of an extraordinary appeal– the Court takes as a reference the date on which the Court dismisses the application (again not the date of service)[198]. On the other hand, in cases such as *Armand Guehi v. United Republic of Tanzania* or *Kenedy Ivan v. United Republic of Tanzania,* where the applicant also files an application for review before the Court of Appeal, the Court adopts as the reference date that of the adoption of the initial judgment delivered by the Court (again not the date of notification, and not the date of the application for review). The same applies to the *Alfred Agbes Woyome v. Republic of Ghana* case concerning the extraordinary remedies present in that case[199].

Given this disparity of criteria, it is true that when the latter has been the interpretation maintained by the ACtHPR, its case law has been uniform in considering the lodging of extraordinary remedies by the claimant as a circumstance to be taken into account to assess the reasonableness of the period of time elapsed[200]. It has also maintained a uniform position in maintaining

197 Cf., e.g. App. No. 003/2015, *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*, Judgment (28 September 2017), para. 64.

198 However, such a position has only been upheld by the Court in a few cases, e.g. *ibid*, para. 65.

199 Cf., e.g. App. No. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment (7 December 2018), para. 55; App. No. 025/2016, *Kenedy Ivan v. United Republic of Tanzania*, Judgment (28 March 2019), para. 52; App. No. 001/2017, *Alfred Agbes Woyome v. Republic of Ghana*, Judgment (28 June 2019), para. 81 *et seq*.

200 *Ibidem*.

that, in the case of the exhaustion of domestic remedies prior to the date on which the respective State made the declaration of recognition of jurisdiction referred to in Article 34(6) of the Protocol, the date to be taken into account should be the latter date and not the former[201].

For its part, with regard to cases in which there are no remedies or these are not considered to be available, sufficient and effective, the Court, drawing on the case law of the ECtHR[202], has held that «the period runs from the date of the act at issue, or from the date of knowledge of that act or its effect on or prejudice to the applicant»[203]. While, in relation to the cases referred to by the Commission, of the three presented so far, the ACtHPR has only analysed this issue in the case of *The African Commission on Human and Peoples' Rights v. Libya (App. No. 002/2013),* holding that the passage of one year, from the State's failure to comply with the provisional measures adopted by the Commission, until the referral of the case to the Court, must be understood, for these purposes, as a reasonable period of time.

III.3. *Ne bis in idem*

The last of the admissibility criteria is set out in Article 56.7 ACHPR and Rule 50.2(g) of the Rules of Court, which requires that the claim:

> 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 Organization of African Unity or the provisions of the Charter.

201 Cf., e.g. App. No. 003/2015, *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*, Judgment (28 September 2017), para. 62; App. No. 011/2015, *Christopher Jonas v. United Republic of Tanzania*, Judgment (28 September 2017), para. 50; App. No. 024/2015, *Werema Wangoko Werema and Another v. United Republic of Tanzania*, Judgment (7 December 2018), para. 47; App. No. 029/2015, *Yusuph Hassan v. United Republic of Tanzania,* Ruling, Jurisdiction and Admissibility (30 September 2021), para. 78.

202 Cf. ECtHR, Case of *Dennis and Others v. United Kingdom (*Application No. 76573/01), Judgment of 2 July 2002, p. 6.

203 *Vid*. App. No. 046/2016, *APDF & IHRDA v Republic of Mali*, Judgment (11 May 2018), para. 51 *et seq*. So far, only in the aforementioned case has the Court acknowledged the absence of remedies and, in turn, made a brief pronouncement on this condition of admissibility.

According to the Court's case law, which in turn cites a Commission ruling, the purpose of this requirement is to:

> [...] ensures that, in this context, no State may be sued or condemned (more than once) for the same alleged violation of human rights. ln effect, this principle is tied up with the recognition of the fundamental *res judicata* status of judgments issued by international and regional tribunals and/or institutions[204].

In this regard, Rule 40.7 of the 2010 Rules of Court provides a more precise definition, insofar as, while the current Rules of Procedure state that the subject matter of the application has not been previously settled in accordance with the principles [...] *of the Charter of the Organisation of African Unity*, the 2010 Rules, on the other hand, refer to *the Constitutive Act of the AU*. It is therefore not surprising that, once again, when analysing the admissibility requirements in the recent case law of the ACtHPR, the Court refers to the content of Rule 40.7 of the former Rules of Court and not to the current Rules[205].

As regards the notion of identity between cases, to this end, the ACtHPR has relied on three elements that must be present together:

> (i) the identity of the parties; (ii) identity of the applications or their supplementary or alternative nature or whether the case flows from a request made in the initial case; and (iii) the existence of a first decision on the merits[206].

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204 *Vid*. App. No. 016/2017, *Dexter Eddie Johnson v. Republic of Ghana*, Judgment (28 March 2019), para. 55; AComHPR, Communication No. 334/06, *Egyptian Initiative for Personal Rights and Interights v. Egypt* (1 March 2011), para. 80; Communication No. 277/03, *Spilg and others v. Botswana* (12 October 2013), para. 96.

205 In fact, the ACtHPR refers to Rule 50.2 of the 2020 Rules of the Court, but carries over the content of the respective Rule from the 2010 Rules of the Court. Cf., e.g. App. 024/2016, *Amini Juma v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 37.

206 *Vid*. App. No. 038/2016, *Gombert Jean-Claude Roger v. Republic of Côte d'Ivoire*, Judgment (22 March 2018), para. 45; App. No. 016/2017, *Dexter Eddie Johnson v. Republic of Ghana*, Judgment (28 March 2019), para. 48, AComHPR, Communication No. 266/03, *Kevin Mgwanga Gunme and others v. Cameroon* (27 May 2009), para. 86. However, with regard to the third requirement, the Commission has not followed a uniform line of jurisprudence, holding in some judgments that, in order to reject a complaint on the basis of Rule 56.7, the international body had to issue a decision on the merits of the case (cf, e.g. Communication No. 277/2003, *Spilg and Mack & Ditshwanelo (on behalf of Lehlohonolo Bernard Kobedi) v. Botswana* (12 October 2013), paras 110-111). While in others it has considered whether the same case had (merely) been brought before an international body (cf. e.g. Communication No. 305/05, *Article 19 and Others v. Zimbabwe* (22 May 2012), para. 98).

The latter does not appear in other regional human rights systems, where the complaint is inadmissible if the same case is pending (cases of *lis pendens*), without the need for a decision on the merits[207].

In turn, as a characteristic of the African system, for the inadmissibility of the application to be declared on the basis of this criterion, the aforementioned precepts require that, once the identity between the cases has been established, the ACtHPR must determine that the international body that had previously heard the case had decided in accordance with the principles of the Charter of the United Nations, the African Charter, or the Constitutive Act of the AU[208]. However, the Court has interpreted such a requirement flexibly, for example by rejecting an application where the same matter had been heard by the Human Rights Committee under the ICCPR, because «the principles contained in the provisions of the ICCPR that the HRC gave its views on are identical to the principles provided for in the provisions of the [African] Charter» (*Dexter Eddie Johnson v. Republic of Ghana*, Judgment, para. 52)[209].

Likewise, in its still scarce jurisprudence, the Court has had the opportunity to shed some light on the undefined relationship between the ACtHPR and the courts of the Sub-Regional Economic Communities (*RECs*) in the case of *Gombert Jean-Claude Roger v. Republic of Côte d'Ivoire*; holding that if the

207 Cf. Article 46.1.(c) ACHR and 35.2.(b) *in fine* ECHR, respectively.

208 As has been explained *below* with regard to Art. 56.2, in my opinion, erroneously, both in Art. 56.7 ACHPR and in Rule 50.2.g) of the 2020 Rules of the Court, a copulative conjunction is included. It states that the complaint should not «deal with cases which have been settled by these States involved in accordance with the principle of the Charter of the United Nations, *or* the Charter of the Organization of African Unity *or* the provision of the present Charter» (emphasis added). Nor did Rule 40.7 of the 2010 Rules of Court resolve this issue.

209 *Vid*. App. No. 016/2017, *Dexter Eddie Johnson v. Republic of Ghana*, Judgment (28 March 2019), para. 52. For its part, in the Commission's more extensive jurisprudential line on Art. 56.7 ACHPR, it has held that «the mechanisms envisaged under Article 56(7) of the Charter must be capable of granting declaratory or compensatory relief to victims, not mere political resolutions and declarations», maintaining that «[the discussion] by the UN Security Council following reports from different organizations, including agencies of the UN itself [...] can thus not be said that the matter has been dealt with or settled as required under Article 56 (7) of the African Charter». See, respectively, AComHPR, Communication No. 279/03-296/05, *Sudan Human Rights Organisation and the Centre on Housing Rights and Evictions v. Sudan* (27 May 2009), para. 105; Communication 301/05, *Haregewoin Gabre-Selassie and IHRDA (on behalf of former Dergue Officials) v. Ethiopia* (12 October 2013), para. 117.

same case has been previously decided by such courts it cannot be heard before the African Court[210].

Since this is the only case so far in which such an issue has arisen, and in which the Court of Justice of the Economic Community of West African States manifestly decided in accordance with the articles of the ACHPR, the question arises whether, in cases where sub-regional courts decide the case on the basis of treaties other than the ACHPR or outside the African regional system, the ACtHPR will also uphold the inadmissibility of the claim. In our view, given the expansive interpretation given by the Court in *Dexter Eddie Johnson v. Republic of Ghana*[211], as long as the decision is based on «the principles» (understood in a broad sense) underlying the ACtHPR, the application will be inadmissible.

IV. THE REQUIRED REVIEW OF COMPLEMENTARITY BETWEEN THE ACTHPR AND THE COMMISSION

One of the pillars on which the Protocol establishing the ACtHPR is based is the complementarity between the Commission, created by virtue of the ACHPR, and the African Court. Thus, from the very beginning of the Protocol –both in its Preamble and in its second article– it is made clear that the Court has been created to complement and reinforce the functions entrusted to the Commission[212].

To this end, the Protocol (Arts. 8 and 33) provides that the rules of procedure of both bodies should be harmonised and should promote complementarity[213].

210 Cf. App. No. 038/2016, *Gombert Jean-Claude Roger v. Republic of Côte d'Ivoire*, Judgment (22 March 2018), para. 69.

211 Cf. App. No. 016/2017, *Dexter Eddie Johnson v. Republic of Ghana*, Judgment (28 March 2019), para. 52.

212 Thus, para. 8 of the Preamble states that «firmly convinced that the attainment of the objectives of the African Charter on Human and Peoples' Rights requires the establishment of an African Court on Human and Peoples' Rights *to complement and reinforce the functions of the African Commission* on Human and Peoples' Rights» (emphasis added); while the second article states that «the Court shall, bearing in mind the provisions of this Protocol, *complement the protective mandate of the African Commission* on Human and Peoples' Rights conferred upon it by the African Charter on Human and Peoples' Rights» (emphasis added).

213 It is also included in Rule 35 of the Rules of Court and in Rule 129.4 of the Commission's Rules of Procedure. It is worth mentioning that practically no information derived from these meetings is included in the respective activity reports submitted by both the AComHPR and the ACtHPR.

Furthermore, it requires the Commission and the Court to meet whenever necessary, and at least once a year (Article 34)[214].

In procedural terms, this complementarity is particularly evident in three specific areas: in the referral of cases from the Commission to the ACtHPR; in the referral of cases from the ACtHPR to the Commission; and, beyond the referral of cases, in the Commission's participation in the proceedings before the Court. These issues are developed both in the Rules of Court and in the Commission's Rules of Procedure, and will be analysed in the following lines[215]. Although I have already mentioned that neither in the respective regulations, nor in the pronouncements of the Court or the Commission, has an issue of such relevance been addressed, to date, with the required precision, exigency and legal solidity. This is undoubtedly one of the elements of the system that needs to be improved.

To this must be added the inexplicable omission of any reference to the African Committee on the Child, one of the system's human rights bodies. Not only is there silence in the Protocol establishing the ACtHPR, but also in all of the Court's Rules of Procedure adopted to date, including the current one[216]. This means that, in this respect, the functioning of the human rights system could be improved, and that in activities and functions in which the Court could make use of the work and experience of the Committee, and vice versa, such symbiosis is wasted.

IV.1. Referral of cases from the Commission to the ACtHPR

In the first section of this chapter, when analysing the parties that have standing to bring cases before the ACtHPR, the referral of cases by the Commission

214 In the same vein, cf. Rule 34 of the ACtHPR Rules of Procedure and Rule 129.1-3 of the Commission's Rules of Procedure.

215 The Rules of Court devote Chapter II of Part IV of the Rules (Rules 34-38) to the complementarity between the Court and the Commission; while the Rules of Procedure of the ACom-HPR devote Part V (Rules 128-135).

216 In the Commission's current Rules of Procedure we do find Rule 137, not present in the 2010 Rules, which generically establishes that «the African Commission shall cooperate with the African Committee of Experts in the execution of their mandate of promoting and ensuring the protection of human and peoples' rights in Africa». Likewise, Rule 30.7 states that the Commission and the Committee may hold joint sessions, although without specifying in which cases these may take place and for what purpose (Rule 28.5).

to the Court was examined in detail. This analysis revealed, on the one hand, the inaccuracies contained in Rule 130 of the Commission's Rules of Procedure in force[217], as well as in Rule 118 of its 2010 Rules. On the other hand, these inaccuracies have not been addressed either by the AComHPR or by the ACtHPR.

Bearing in mind the foregoing, I will dedicate this section to pointing out a series of procedural issues not alluded to there that accompany the content of Rule 130. Thus, it should be made clear that, in accordance with Rule 132 of the AComHPR Rules of Procedure, when the Commission decides to refer a case to the Court, it must designate one or more of its members to exercise the respective representation. In addition, and unless, exceptionally, the AComHPR decides otherwise, they are empowered to adopt all decisions required for the proper processing of the case[218].

With regard to the content of the application filed with the Court, and in accordance with Rule 133, the application must include a summary of the communication filed, as well as the record of the communication. This should specify the names of the Commission's representatives, the date on which the communication was initially submitted, the parties to the proceedings, the facts on which it is based, and the ACHPR provisions alleged to have been violated. It is also required to forward the communication itself, the parties' submissions on admissibility and merits, as well as all evidence and other documents relating to the communication[219].

This information must be complemented by the third and fifth precepts of Rule 36 of the Rules of Court. The first precept adds that, in cases of referral, the Court, if it deems it appropriate, is empowered during the oral phase to hear the individual or NGO that initially submitted the Communication[220].

217 This rule, it should be recalled, greatly restricts the cases that the 2010 Rules of Court contemplated for the Commission to be able to bring a case before the Court. For its analysis, we refer to what is set out in chapter two, *infra*.

218 Cf. Rule 132 of the Rules of Procedure of the AComHPR. Likewise, the first precept *in fine* of said Rule specifies that «the Commissioner(s) so designated shall be assisted by one or more Legal Officer(s) of the Commission's Secretariat and/or experts who shall be designated or appointed by the Commission». In the same vein, cf. Rule 36. 2 of the ACtHPR Rules.

219 Cf. Rule 133 of the Rules of Procedure of the AComHPR. In the same vein, cf. Rule 36.1 of the ACtHPR Rules.

220 In the same vein, Rule 29.3.c of the 2010 ACtHPR Rules.

In this respect, I would find it more correct if this provision had used a less restrictive wording regarding the parties who may be called upon, since, even if such a case has not taken place, the AComHPR is also empowered to refer inter-State communications to the Court[221].

With regard to Rule 36.5, and as a novelty of the current Rules of Court, it specifies that in cases in which the Commission has issued a ruling and the ACtHPR decides to depart from the latter, the Court is empowered to seek clarification from the Commission. However, bearing in mind that, in accordance with Rule 130 of the Commission's Rules of Procedure, the AComHPR can only refer cases to the ACtHPR before deciding on their admissibility, it is my understanding that this provision will not have much scope.

To conclude, as I noted in section two when examining the jurisdiction *ratione personae* of the Court, due to the silence of both the Protocol and the Rules of Court, a question debated among the doctrine has been the nature that the Commission's previous pronouncements should have before the judicial body. In this respect, the ACtHPR has elucidated the question by conferring on itself the competence to conduct an *ex novo* analysis, not only of its jurisdiction *ratione materiae, personae, temporis* and *loci*, as well as the facts and legal grounds, but also in relation to the admissibility requirements of the application, even though these coincide to a large extent with those envisaged for the Commission.

For its part, with regard to the position of the Commission in the proceedings before the Court, it has been held that «the Commission [...] simply becomes a conduit through which the parties to the initial communication reach the Court» (Murray & Long, 2015: 156). This position would be reinforced by Rule 36.3 of the ACtHPR Rules (former Rule 29.3.c), according to which «the Court may also, if it deems it necessary, hear, under Rule 56 of the Rules, the individual or NGO that initiated a communication to the Commission pursuant to Article 55 of the Charter». However, it is not superfluous for

221 The application of this precept is found in the case *African Commission on Human and Peoples' Rights v. Republic of Kenya,* where it is noted that «pursuant to Rule 45(1) and Rule 29 (3) (c) of the Rules, during the public hearing, the Court heard Ms. Lucy Claridge, Head of Law, one of the original complainants in the Communication filed before the Commission». *Vid*. App. 006/2012, *The African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 29.

us to take up the words of Rudman who, qualifying the above, maintains that, given the limited cases in which the Commission has so far decided to refer a case to the Court;

> the Commission's role as a conduit to the Court *is fairly unchartered territory*. There is no guidance in the Rules of the Commission as to whether individual complainants would, as in the Inter-American system, have any influence over the Commission's decision to refer a communication to the Court (Rudman, 2016: 4).

IV.2. Referral of cases from the ACtHPR to the Commission

In the African system, not only is the Commission empowered to bring a case before the ACtHPR, but, conversely, the Court itself can also refer a case to the Commission[222]. The legal basis for this can be found in Article 6 of the Protocol establishing the ACtHPR. This provision is devoted to the conditions of admissibility of the application, and in the last paragraph of which, under a somewhat obscure wording, it is added that «the Court may consider cases or transfer them to the Commission».

Unlike the referrals of cases by the Commission to the Court, in respect of which, at last –albeit with some shortcomings– both the factual circumstances that motivate them and the procedural moment in which the referral must take place have been specified since the 2010 Harmonised Regulations; the opposite channel is not regulated either in the Protocol or in the respective Rules of the AComHPR or the ACtHPR[223]. Nor has this lack of regulation been compensated for by the pronouncements of the Court in this regard, whose jurisprudential line, moreover, which is not at all profuse, should be described, at the very least, as reviewable.

222 This assumption is not contemplated in the current Inter-American system.

223 In this regard, as far as the AComHPR Rules of Procedure are concerned, we must turn to Rule 131.2, which tersely states that «where the Court has transferred a case to the Commission pursuant to Article 6(3) of the African Court Protocol, it shall examine the Communication in conformity with the Charter and the present Rules». With regard to this last provision, it is worth mentioning that, unlike the 2010 Rules (Rule 29.5), the need to consult the parties prior to adopting the referral decision has been added. However, it seems to be inferred from the wording of the provision that their consent is in no way required.

First of all, it should be noted that the ACtHPR lacked jurisdiction *ratione personae* over the four cases which, so far, have been referred to the Commission: cases *Soufiane Ababou v. Peoples' Democratic Republic of Algeria, Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines, Association des Juristes d'Afrique pour Bonne Gouvernance v. Republic of Cote d'Ivoire and Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*[224]. Thus, all these cases have in common that the respective States had not deposited the additional declaration of competence referred to in Article 34(6) of the Protocol. The information provided in the respective orders is scarce to say the least, especially in the latter two cases, which simply state, in the first case, that the plaintiff alleges violation of Articles 2, 4, 5 and 6 ACHPR, and in the second case, violation of Articles 3, 5, 6, 7 and 13.3 ACHPR[225]. For its part, in the case of *Soufiane Ababou v. Peoples' Democratic Republic of Algeria,* it is specified that the complaint is based on the applicant's forced recruitment into the Algerian army, although the human rights violations invoked are not detailed. Nor is the applicant's nationality specified, only that he resides in Wilaya of Cidi Bel Abbes (Algeria)[226]. In the case of *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*, the applicant alleges that after boarding a flight in Nairobi (Kenya) bound for Maputo (Mozambique), the airline *Mozambique Airlines* ended the journey in Pemba (Mozambique), where, despite having the required documentation, he was arrested by the customs authorities, his passport confiscated, subjected to torture, and deported to Dar es Salaam (Tanzania). However, the legal grounds invoked by the applicant are not detailed, if they were invoked at all. Nor is his nationality[227].

224 Cf. App. No. 002/2011, *Soufiane Ababou v. Peoples' Democratic Republic of Algeria,* Judgment (16 June 2011), para. 10; App. No. 005/2011, *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*, Ruling (16 June 2011), para. 8; App. No. 006/2011, *Association des Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d' Ivoire*, Ruling (16 June 2011), para. 9; App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Ruling (23 September 2011), para. 10.

225 Respectively, cf. App. No. 006/2011, *Association des Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d' Ivoire*, Ruling (16 June 2011), para. 1; App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Ruling (23 September 2011), para. 1.

226 Cf. App No. 002/2011, *Soufiane Ababou v. Peoples' Democratic Republic of Algeria,* Judgment (16 June 2011), para. 1.

227 Cf. App. No. 005/2011, *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*, Ruling (16 June 2011), paras. 3-4.

There are at least three points to be made in this regard. Firstly, to quote Judge Fatsah Ouguergouz:

> The transfer to the African Commission of *an application in respect of which the Court found that it manifestly lacks jurisdiction is not founded in law*. I hold that this transfer does not appear to be consistent with Article 6 of the Protocol, when interpreted according to the general rules of interpretation as set out in the 1969 Vienna Convention on the Law of Treaties (emphasis added)[228].

I share this opinion, as neither in the Protocol nor in the Rules of Court do we find the legal basis that justifies the practice followed by the Court. In this regard, the provision in question (Ar. 6.3 of the Protocol)[229], is included in an article entitled «admissibility of cases», and whose immediately preceding paragraph (Ar. 6.2) aims to determine the provision of the ACHPR that the Court must take into account in order to assess the admissibility requirements of the application.

Therefore, a teleological and contextual interpretation of Rule 6.3 means that the verb «may *consider* cases or transfer them to the Commission», due to the procedural stage in which it is framed, must be understood as referring to the merits of the case, i.e. once the ACtHPR has considered both its jurisdiction and the admissibility of the application. Otherwise, such a provision should have been inserted either in Article 2, which deals with the relations between the Court and the Commission, or in Article 3 of the Protocol, which deals with its jurisdiction.

In this regard, I therefore do not share the position of Judge Ouguergouz, who maintains that, in order for cases to be referred to the Commission, only the jurisdiction of the Court must be satisfied, and not the conditions of admissibility of the application[230]. To support his argument, the Judge relies on an interpretation, in my opinion revisable, of the combined reading of Article 6.3 of the Protocol and Rule 119.1 of the 2010 Rules of Procedure of the Commission (now Rule 131). Thus, the latter provision states that:

> [...] where the Court has transferred a communication to the Commission, it shall consider the admissibility of this matter in accordance with Article 56 of the Charter and Rules 105, 106 and 107 of the present Rules.

228 *Vid*. App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria,* Dissenting Opinion of Judge Fatsah Ouguergouz (23 September 2011), para. 12.

229 Unfortunately, the preparatory work on this precept does not shed any light on this.

230 *Ibid*. para. 14.

However, the fact that the Commission must examine the admissibility of the case does not in any way imply that the Court has not done so previously, since both analyses are autonomous in nature. On the other hand, the Judge, as an incidental argument, provides Rule 29.5.(a) of the 2010 Rules of Court (current Rule 38). Therefore, in his opinion;

> the language used in this provision («case», «partie», «the entire pleadings», «summary report») suggests that there is a case pending before the Court. One would also note that where the Court manifestly lacks jurisdiction, there should not be much in the case file. Furthermore, even if the Court's jurisdiction *ratione personae*, *ratione materiae, ratione loci* or *ratione temporis* were highly questionable and that said jurisdiction had been considered in detail by the Court, the part of the case file pertaining to the establishment of the Court's jurisdiction would be of no particular interest for the Commission and should not therefore be communicated to it[231].

However, it should be noted that this provision only supports my interpretation, since, as Ouguergouz rightly points out, it is understood that the documents that the Court is obliged to send to the Commission must be of use to the Commission. On the contraty, the analysis of jurisdiction is by no means coincidental; different rules apply to each. What is similar is the analysis of the conditions for admissibility, the same criteria for which are regulated in Article 56 ACHPR.

Secondly, if it is accepted that, in accordance with its founding treaty, the ACtHPR has jurisdiction to refer the case to the Commission, even without even having jurisdiction to hear it, the Court should in any event have specified under what conditions it decides to refer the case. Even more so, taking into account the aforementioned silence of the Protocol and the respective Rules. On the other hand, in the cases referred by the Court to the AComHPR, it is briefly stated that «in light of the allegations made in the application, this would be an appropriate matter to transfer to the African Commission»[232]. The decision itself does not contain the human rights violations alleged by

231 *Ibid*. para. 19.

232 *Vid*. App. No. 002/2011, *Soufiane Ababou v. Peoples' Democratic Republic of Algeria*, Decision (16 June 2011), para. 12; App. No. 005/2011, *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique* Airlines, Decision (16 June 2011), para. 9; App. No. 006/2011, *Association des Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d' Ivoire*, Decision (16 June 2011),

the petitioners, let alone an analysis of them. Therefore, this time, and in this respect, I once again agree with Judge Ouguergouz when he affirms that:

> reasons be provided for decisions adopted under the above-mentioned provision so as to comply with the requirements of predictability and consistency which are the essential ingredients that underpin the principle of legal certainty which should be guaranteed by the Court at all times[233].

Thus, if the ACtHPR continues to maintain this same line of jurisprudence –in our opinion revisable– according to which the Court is empowered to refer cases to the Commission without having jurisdiction over them, attending, on the one hand, to the interests of justice and, on the other, avoiding a pattern of transfers of cases that saturates the system, a criterion that would seem appropriate to me would be to refer cases where serious or massive violations of human rights are alleged[234].

In any case, it might seem that the extensive jurisprudential line adopted by the Court has been reflected in Rule 38.2 of the 2020 Rules of the ACtHPR, since it specifies that in cases in which the respondent State;

> *has neither ratified the Protocol nor made the Declaration required under Article 34 (6) of the Protocol*, the Registry shall inform the Applicant that *the Court lacks jurisdiction to examine the Application*. In such instance, the Registry shall inform the Applicant that he/she may file his/her matter before the Commission[235].

Thus, *conversely*, for those cases in which the respondent State has ratified the Protocol, but has not submitted the respective Article 34(6) declaration of jurisdiction, the Court could *motu proprio motu* refer the case to the Commission.

Thirdly, it is surprising, to say the least, that given the absence of regulation and precedents, as well as the importance of the matter addressed here

para. 10; App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria* Decision (23 September 2011), para. 11.

233 *Vid.* App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria Decision*, Dissenting opinion of Judge Fatsah Ouguergouz (23 September 2011), para. 24.

234 Judge Fatsah Ouguergouz, for whom, in this regard, the ACtHPR could play the role of an «early warning mechanism», expressed the same opinion. *Ibid.* paras. 27-29.

235 Emphasis added.

(Padilla, 2002: 193)[236], such referrals have been dispatched following a simplified procedure requiring only the signatures of the President and the Secretary of the ACtHPR. Not only depriving the rest of the judges from expressing a calm opinion on the matter, but even without informing the State concerned of the application lodged[237].

In this regard, it should be recalled –as noted in chapter two– that the current Rules of Procedure of the Commission require the consent of the initial communicant for the case to be referred from the Commission to the Court[238]. Although a similar provision does not appear for referrals from the ACtHPR to the Commission, the Rules of Procedure of the ACtHPR nevertheless specify that the Court must consult the parties before taking a decision on whether or not to refer the case. This at least ensures that the State concerned is aware of the application lodged[239].

In addition to the above, it is not clear whether the Court will have any role in the handling of the case before the Commission, beyond the initial transmission of the respective documents and case files[240].

For its part, from the Commission's point of view, it should not be forgotten that these cases do not appear in its database, raising the question of whether they remain confidential, or whether they are still pending. The latter scenario is unlikely, as almost a decade has passed since the Court last made use of this power –bearing in mind that the four referrals took place in 2011–. It is therefore not surprising that this silence is due to the fact that the States concerned have complained to both the Court and the Commission on grounds of their overreaching in the exercise of their functions. This is an additional indication that

236 These issues have been highlighted by the doctrine since the adoption of the Protocol itself. In this sense.

237 It is our understanding that the observations made in chapter two, *infra*, regarding the acceptance of the jurisdiction of the ACtHPR via *forum prorogatum* would also apply in this area. However, in none of the four cases does it appear that the respondent State has been informed in this respect. Cf. App. No. 002/2011, Soufiane Ababou v. Peoples' Democratic Republic of Algeria, Judgment (16 June 2011); App. No. 005/2011, *Daniel Amare and Mulugeta Amare v. Republic of Mozambique and Mozambique Airlines*, Judgment (16 June 2011); App. No. 006/2011, *Association des Juristes d'Afrique pour la Bonne Gouvernance v. Republic of Cote d' Ivoire*, Judgment (16 June 2011); App. No. 008/2011, *Ekollo M. Alexandre v. Republic of Cameroon and Federal Republic of Nigeria*, Judgment (23 September 2011).

238 Cf. Rule 130.2 of the Commission's Rules of Procedure.

239 Cf. Rule 38.1 of the Rules of Court.

240 Cf. Rule 38.1 *in fine of* the Rules of Court.

would endorse the interpretation set out above. In any case, I should emphasise that, once the case has been referred, the Commission should undertake a new examination, both of its jurisdiction and of the admissibility requirements of the communication, as can be deduced from Rule 131.2 of its Rules of Procedure.

An additional question that remains to be clarified is in those cases in which the Commission's analysis results in its lack of competence to hear the merits of the case. In this regard, the ACtHPR should consider whether it could take up the case again –provided that the Court has jurisdiction to hear the merits of the case–, or whether it would conclude the case in the face of the Commission's refusal to do so. The 2010 Rules of Procedure of the Commission would, in my opinion, support the first of these options, insofar as Rule 119.2 *in fine* emphasises that «the Commission *shall immediately transmit* its opinion or its decision on the admissibility [and jurisdiction] to the Court». However, with regard to this expression, the current Rule 131 specifies that it only applies to the cases of Article 6.1 of the Protocol (submission of applications by individuals and NGOs) and not, therefore, to the cases of Article 6.3 (referrals to the Commission)[241]. Therefore, in the absence of a pronouncement in this regard, I do not find a clear guideline, and must await future decisions by the Court.

Likewise, the conditions required for cases initially referred by the AComHPR to the Court to be re-referred back to the Commission also remain unclear, if at all permissible –for this has not yet been the case–. In my opinion, given the breadth of the cases that were contemplated in Rule 118 of the 2010 Rules of Procedure of the AComHPR, it could be possible, and even plausible, for the ACtHPR to sift through and could remand cases initially submitted by the AComHPR. However, in the current Rules, as we have had occasion to study in the previous chapter, the procedural stage –and with it the cases– in which the referral should take place has been significantly restricted. In any case, given the silence of the rules, once again, we must await the authoritative interpretation of the Court[242].

241 Thus, while Rule 119.2 of the 2010 Rules of Procedure of the AComHPR stated that «upon conclusion of the examination of the admissibility of the communication referred *to it under Article 6 of the Protocol*, the Commission shall immediately transmit its opinion or its decision on the admissibility to the Court»; the current Rule 131.1 states that «where, pursuant to *Article 6(1)* of the African Court Protocol, the Commission is requested to give its opinion on the admissibility of a case pending before the Court it shall consider the matter expeditiously» (emphasis added).

242 On what is to be understood by authoritative interpretation in human rights treaties, I refer to the discussion *below*.

IV.3. Involvement of the Commission in the proceedings before the ACtHPR

As can be seen from the analysis carried out in this section, despite the fact that the complementarity between the ACtHPR and the Commission is intended to be one of the backbone pillars of the African system, there are significant inaccuracies and omissions in this area.

Inaccuracies and omissions that I also note, beyond the cases of referral of cases from one body to another –both in the regulatory instruments and in the jurisprudential sphere– with regard to the intervention of the Commission in the proceedings before the ACtHPR. This issue will be the focus of the following lines.

Thus, following the order of the different stages of the process, I fail to understand why, in accordance with the jurisprudence of the Court, and despite the fact that Rule 42.4 of the Rules of Court requires the Registry of the ACtHPR to inform the Commission of the filing of any application, this is not done, or at least not in all cases[243].

Meanwhile, I also detect a loophole –also present in the 2010 Rules of Court– in relation to Rule 48, to which Rule 42 refers. This is because, although this precept states that the Secretariat of the Court will verify with the African Union Commission (the body that functions as the AU Secretariat) whether the respondent State is a party to the Protocol establishing the ACtHPR, and whether, if applicable, it has deposited the declaration of Article 34, there is no provision for the Registry of the Court to verify with the AComHPR whether the NGO filing the application with the Court has observer status with the Commission. This is a pre-requisite for the Court to be able to hear the application, information on which is in the possession of the AComHPR[244].

243 Cf., e.g. App. No. 032/2015, *Kijiji Isiaga v. United Republic of Tanzania*, Judgment (21 March 2018), para. 15; App. 024/2015, *Werema Wangoko Werema & another v. United Republic of Tanzania*, Judgment (07 December 2018), para. 13; App. 003/2015, *Kennedy Owino Onyachi & Another v. United Republic of Tanzania*, Judgment (28 September 2017), para. 15. Remember that under this provision «*the Registrar shall also inform the Commission*, the Chairperson of the AU Commission and through him/her, the Executive Council of the African Union, and all the other State Parties to the Protocol, of the filing of the Application» (emphasis added). On the contrary, if such a precept is complied with (previously appearing in Rule 35) in cases such as App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (07 December 2018), para. 11.

244 On this point, the Court's case law is not uniform, sometimes stating that it has asked the Commission on this point, and other times not determining from where it obtains the infor-

Furthermore, one might also ask why the 2020 Rules –unlike the 2010 Rules[245]– do not require the Commission to be informed of the adoption of interim measures (and the Assembly, the Executive Council and the AU Commission to be informed), when such a procedure is still required for the adoption of judgments and advisory opinions[246]. In fact, the 2010 Rules of Court allow the Commission, in addition to the parties, to request the Court to adopt interim measures; a prerogative that is abolished in the current Rules[247].

Moving on to the analysis of the admissibility of the application, I also fail to understand why the Rules of Court –on this occasion as in 2010– follow a restrictive pattern in this respect, only contemplating that the ACtHPR may request the Commission's opinion on the admissibility of the application for those that have been submitted by individuals and NGOs, and not for the rest of the cases[248].

The same is true for the evidentiary phase. Although, on the one hand, the 2020 Rules of Court has added Rule 36.4, which empowers the ACtHPR to entrust the Commission to carry out fact-finding missions (including *on-site*) in cases in which it is not a party[249], on the other hand, any express reference to the Commission being able to be questioned in the oral phase by the judges of the ACtHPR, to call witnesses and experts, or to request the Court to take evidence considered relevant has been removed[250]. In any case, it does not appear in the Court's pronouncements that these precepts have been applied in practice.

mation. Regarding the first case, see Application 012/2011, *La Convention Nationale des Syndicats du Secteur Education (CONASYSED) v. Republic of Gabon*, Rulings, jurisdiction (15 December 2011), para. 5; regarding the second case, see App. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment, merits and reparations (11 May 2018), paras. 1 and 29.

245 Thus, Rule 51.3 of the 2010 Rules of Court stated that «the Court shall duly notify the parties to the case, *the Commission*, the Assembly, the Executive Council and the African Union Commission of the aforesaid *interim measures*» (emphasis added).

246 Cf. Rules 73.1 and 86.3 of the current Rules of Court.

247 Compare Rule 51.1 of the 2010 Rules of Court with Rule 59.1 of the 2020 Rules of Court. In any event, we have not found that this prerogative has been exercised.

248 Cf. Rule 37.2 of the Rules of Court and Rule 131.1 of the Commission's Rules of Procedure, which refer to Art. 6.1 of the ACtHPR Protocol, which in turn refers to Art. 5.3 of the ACtHPR Protocol.

249 This concept has so far not been used by the Court.

250 Compare Rules 45.1 and 47 of the 2010 Rules of Court with Rules 54.4-5 and 55.1 of the current Rules of Court.

In the case of *Anudo Ochieng Anudo v. United Republic of Tanzania, on the* basis of Rule 45.2 of the 2010 Rules of the ACtHPR (now Rule 55.2[251]), the Court asked the Commission about the regulation of the right to nationality under International Law[252]; however, according to that ruling, the ACtHPR did not receive a reply[253].

To all this must be added a further issue, unnoticed by the doctrine. While the Rules of Court specify that this body shall not hear any case that is either pending before the Court or has already been decided by it (Rules 130.2 and 135), the AComHPR Rules of Procedure only prevent the ACtHPR from hearing cases that are being examined by the Commission, but are silent with respect to those that have already been decided (Rule 37.1). Given the different regulations in both cases, I believe that this could lead to the possibility that a case brought before the Commission, and on which a decision has already been issued, could be brought before the Court again.

All of the above shows that we are dealing with a matter that requires urgent clarification, especially considering that it constitutes an essential pillar of the proclaimed and pursued, although not always achieved, complementarity between the ACtHPR and the Commission. Therefore, its indetermination, *de facto*, has done nothing more than curtail a –more than significant– way of guaranteeing and controlling human rights in the African system.

251 According to this provision, «the Court may, for purposes of obtaining information, request any person *or institution of its choice* to express an opinion or submit a report to it on any specific point» (emphasis added).

252 In this regard, it should be noted that the Commission has produced studies on the subject, such as «The Right to Nationality in Africa» (2015), available at: https://www.achpr.org/legalinstruments/detail?id=52 (Accessed on: 03.03.2023).

253 Cf. App. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment (22 March 2018), para. 20.

Chapter III
HUMAN AND PEOPLES' RIGHTS AS DEFINED IN THE JURISPRUDENCE OF THE AFRICAN COURT

Bearing in mind, on the one hand, that the African Court of Human and Peoples' Rights is established as an organ of guarantee and control of the different treaties over which it has jurisdiction, and, on the other hand, that in applying and supervising such treaties, the task of interpretation is inseparable and evenly matched, I am therefore obliged to perform an exhaustive and systematised analysis of the Court's material jurisprudence, analysing the threefold aspect of supervision, application and normative interpretation; this is precisely the object of study of this chapter.

Thus, following an overview of the African System for the Protection of Human and Peoples' Rights in which the ACtHPR is inserted, and after having examined the most outstanding procedural aspects of the judicial body, a coherent line of research indicates that the next element of study should be the material analysis of its different pronouncements. In these pronouncements, the ACtHPR has adopted, in general terms, as we have already seen, an expansive and protective interpretation of the different recognised rights.

Following the pattern established in the previous chapters, and based on my extensive doctoral research, to which I refer, here I will focus on the most significant jurisprudential lines identified from both a quantitative and qualitative perspective; these are on the rights to a fair trial, freedom of expression, economic, social and cultural rights, the rights of peoples, regulation of the death penalty, and women's and children's rights.

I. THE RIGHT TO A FAIR TRIAL

As with the ECtHR and the IACtHR, a large number of the cases brought before the African Court to date involve allegations of violations of the right to a fair trial –a right recognised in Article 7 of the Charter–. In fact, this is by far the most frequently invoked precept, in addition to being the one with the largest number of cases decided[1]. We find ourselves, as defined by the ACtHPR itself, before a fundamental right[2]; a basic element of the legal system, essential to guarantee the rule of law and eradicate state arbitrariness. In turn, the right to a fair trial stands, on the one hand, as an autonomous right and, on the other, as an instrumental right, insofar as it is an «indispensable prerequisite for the protection of any other right» (Salomón & Blanco, 2012)[3]. It is also a complex right, which is linked to the exhaustion of domestic remedies –as pointed out by Judge Fatsah Ouguergouz[4]– and which includes a set of guarantees and rights, both procedural and substantive, which are set out in the ACHPR as follows:

> Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proved guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal.
>
> No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No pen-

1 See https://www.african-court.org/wpafc/# (Accessed on: 03.03.2023).

2 *Vid*. App. No. 002/2013, *The African Commission on Human and Peoples' Rights v. Libya*, Judgment (3 June 2016), para. 89.

3 *Vid*. No. 003/2012, *Peter Joseph Chacha v. United Republic of Tanzania*, Dissenting Opinion of Judge Fatsah Ouguergouz (28 March 2014), paras. 10-11.

4 In this regard, cf. No. 003/2012, *Peter Joseph Chacha v. United Republic of Tanzania*, Dissenting Opinion of Judge Fatsah Ouguergouz (28 March 2014), paras. 12-13, where the Judge notes that «it indeed behoves on the State Parties and their Executive and Legislative branches to ensure the effective implementation of the provisions of the African Charter [...] The rule of exhaustion of local remedies thus turns the right to a fair trial into a kind of 'pivotal rights', a right which, to a certain extent, serves as a nexus between the domestic and the international legal order». For an analysis of the articulation of the exhaustion of local remedies requirement in the jurisprudence of the ACtHPR, we refer to the discussion in chapter two, *infra*.

> alty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.

Although, in comparison with other human rights treaties, this provision contains significant omissions, the ACtHPR, in another example of cross-fertilisation, has drawn on Article 14 of the ICCPR –defined by the Court itself as «more elaborate»[5]– as well as the jurisprudence of the Human Rights Committee, the ECtHR and the IACHR[6].

Next, following the order presented by the precept, I will detail the Court's interpretation of each of the four elements that, in accordance with *Article 7.1 ACHPR,* make up the right to be heard, in order then to focus on the expansive interpretation mentioned above.

Thus, in the first place, and in accordance with the African Charter, the right to be heard includes the right to an effective remedy before the competent national bodies. The Court has understood this to include both the right to appeal against decisions or acts that violate the rights of individuals, and the obligation of the State, on the one hand, to establish mechanisms for appealing to competent bodies, and, on the other hand, to adopt the necessary measures to facilitate the exercise of this right, for example, by providing copies of the decisions and rulings that are to be appealed[7].

Secondly, the right to have the case heard includes the right to the presumption of innocence, which implies, in the words of the Court, that any person who is charged with a crime has not, *a priori,* committed it until it is so established by a final judgment handed down by a competent court[8]. Moreo-

5 *Vid*. e.g. App. No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), para. 13.

6 In any case, as examined in the previous chapter when analysing jurisdiction *ratione materiae*, the Court does not specify whether, when it invokes a precept of a treaty not belonging to the African system, the legal basis it uses is Articles 3 and 7 of its Protocol, or, on the contrary, Articles 60 and 61 of the ACHPR; precepts of a very different legal nature.

7 Cf. App. No. 006/2016, *Mgosi Mwita Makungu v. United Republic of Tanzania*, Judgment (7 December 2018), para. 57. No. 018/2018, *Jebra Kambole v. The United Republic of Tanzania*, Judgment (15 July 2020), noted that «the right to have one's cause heard does not cease to exist after the completion of appellate proceedings. In circumstances where there are cogent reasons to believe that the findings of the trial or appellate courts are no longer valid, the right to be heard requires that a mechanism to review such findings should be put in place» (para. 96).

8 Cf. App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin,* Judgment (29 March 2019), para. 190.

ver, citing the case law of the ECtHR, the African Court has specified that the presumption of innocence applies not only to criminal proceedings[9], but to all types of proceedings –including administrative ones–[10], and that its violation «may be ascertained even in the absence of final conviction where the judicial decision concerning the person reflects the feeling that he is guilty»[11].

However, in this regard, I cannot fail to mention the aforementioned case of *Houngue Eric Noudehouenou v. Republic of Benin,* in which the applicant alleges that the State of Benin has adopted an inter-ministerial decree preventing the issuance of official documents to persons accused (not necessarily convicted) before national courts; a procedure which, in turn, and in the specific case, hinders the presentation of his candidacy for the 2021 presidential elections[12]. In analysing this allegation, the Court, surprisingly, does not build its argumentation on the basis of its established case law on the right to the presumption of innocence recognised in Article 7(1)(b) of the ACHPR, but, following the applicant's argumentation, recognises that such action by the State of Benin constitutes a violation of Article 11 UDHR[13]. However, the Court, as in the case of *Anudo Ochieng Anudo v. United Republic of Tanzania,* does not articulate why this provision is binding on the state[14]. Therefore, I believe that a more coherent and less conflictive legal construction would have led the Court to recognise a violation of Article 7(1)(b) of the Charter.

The third element is the right to a defence, which the Court has understood to include the principle of equality of arms in all proceedings; the right to be informed in proper and timely fashion of the charges against the accused;

9 With specific reference to criminal proceedings, the Court has noted that «the right to presumption of innocence requires that a person's conviction on a criminal offence which results in a severe penalty and in particular to a heavy prison sentence, should be based on solid and credible evidence». *Vid.* App. No. 053/2016, *Oscar Josiah v. United Republic of Tanzania*, Judgment (28 March 2019), para. 51.

10 Cf. App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin,* Judgment (29 March 2019), para. 192. Alluding to the case, ECtHR, *Case of Allenet De Ribemont v. France* (Application No. 15175/89), Judgment of 10 February 1995, para. 41.

11 Citing ECtHR, *Case of Minelli v. Switzerland* (Application No. 8660/79), Judgment of 25 March 1983, paras. 27 and 37.

12 Cf. App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 94-98.

13 Cf. App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 99-105 and 123 (ix).

14 In this respect, we refer to the discussion in chapter two, *infra*.

the opportunity to prepare an adequate defence, presenting arguments and evidence as deemed appropriate, including the calling of witnesses; the right to an interpreter if the accused does not understand the language in which the proceedings are conducted; the right to be assisted by a defence counsel of his or her choice; and the right to respond to and rebut the evidence and arguments of the opposing party[15], with the court receiving and assessing them in accordance with the law and the principle of fairness[16].

Likewise, the African Court has pointed out that, although the national courts have a wide margin of appreciation regarding the probative value of the evidence provided, and that the ACtHPR is not a court of appeal, this does not prevent it from examining whether such evidentiary examination by the domestic courts is in accordance with the relevant international standards and principles, and, specifically, those established in the African Charter[17]. In this regard, it highlights the Court's pronouncements on domestic convictions arising from punishable acts which carry heavy prison sentences, it being held that, in such cases, the incriminating evidence must be «solid and credible» (e.g. *Mohamed Abubakari v. United Republic of Tanzania*; *Armand Guehi v. United Republic of Tanzania*; *Amini Juma v. United Republic of Tanzania*[18]). Moreover, as a general guideline, the ACtHPR has considered that national judges should not take into account evidence based on visual identification, «[unless] all circumstances of possible mistakes should be ruled out and the identity of the suspect

15 Cf., e.g. App. No. 018/2018, *Jebra Kambole v. The United Republic of Tanzania*, Judgment (15 July 2020), para. 97; App. No. 005/2015, *Thobias Mango and Another v. United Republic of Tanzania*, Judgment (11 May 2018), para. 76; App. No. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (07 December 2018), para. 73; App. 012/2017, *Prof. Lèon Mugesera v. Republic of Rwanda*, Judgment, merits and reparations (27 November 2020), para. 43; App. 054/2016, *Mhina Zuberi v. United Republic of Tanzania*, Judgment, merits and reparations (26 February 2021), paras. 71-74; App. No. 016/2016, *Diocles William v. United Republic of Tanzania,* Judgment (21 September 2018), para. 62.

16 Cf. App. No. 004/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (26 June 2020), para. 54.

17 Cf. App. No. 025/2016, *Kenedy Ivan v. United Republic of Tanzania*, Judgment (28 March 2019), paras. 61-64; App. No. 024/2015, *Werema Wangoko Werema and Another v. United Republic of Tanzania,* Judgment (7 December 2018), para. 60; App. No. 025/2015, *Majid Goa Vedatus v. United Republic of Tanzania,* Judgment (26 September 2019), para. 54.

18 *Vid*. e.g. App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), para. 174; App. No. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment (7 December 2018), para. 105; App. 024/2016, *Amini Juma v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 79.

should be established with certainty» (*Werema Wangoko Werema and Another v. United Republic of Tanzania*, *Kijiji Isiaga v. United Republic of Tanzania*[19]). All this, the Court has understood, takes the form of the impossibility of convicting a subject on the basis of a statement given by a single witness, unless, exceptionally, «all the possibilities of mistaken identity are eliminated and unless the testimony is absolutely unassailable» (*Mohamed Abubakari v. United Republic of Tanzania*[20]). In any case, in this regard, the Court has maintained an imprecise jurisprudence in relation to the normative basis that supports its pronouncements, which has generated criticism among the doctrine, since, as Mujuzi points out, on occasions it does not even establish the element of Article 7 that has been violated (Mujuzi, 2017: 211-212).

Fourthly, and finally, the right to be heard includes the right to be tried within a reasonable time by an impartial tribunal. The ACtHPR has pointed out since the *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso* case that its assessment must be determined on a case-by-case basis, taking into account circumstances such as the complexity of the matter at hand, the conduct of the parties, or the fulfilment of the court's own duty of due diligence[21]. The ACtHPR specifies that impartiality is to be understood as the absence of bias or prejudice in the consideration of a case[22]. Presupposing its existence, so that the contrary fact must not be assumed, but must be irrefutably proven by concrete evidence[23]. This is one of the few occasions on which the Court has referred to the work

19 *Vid*. e.g., App. No. 024/2015, *Werema Wangoko Werema and Another v. United Republic of Tanzania*, Judgment (7 December 2018), para. 60; App. No. 032/2015, *Kijiji Isiaga v. United Republic of Tanzania* (21 March 2018), Judgment, para. 68.

20 *Vid*. App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), para. 175.

21 Cf. App. No. 013/2011, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso,* Judgment (28 March 2014), paras. 91-106. See, also, App. No. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment (28 March 2019), para. 107; App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin*, Judgment (29 March 2019), para. 203; App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania*, Judgment (28 November 2019), para. 64; App. 024/2016, *Amini Juma v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 104.

22 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 81; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 291.

23 Cf., e.g. App. No. 004/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (26 June 2020), paras. 70-71.

of the Commission in relation to the right to a fair trial. Thus, the ACtHPR has referred to the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), which state that the impartiality of a judicial body can be determined on the basis of three relevant facts:

> (i) that the position of the judicial officer allows him or her to play a crucial role in the proceedings; (ii) the judicial officer may have expressed an opinion which would influence the decision-making; (iii) the judicial official would have to rule on an action taken in a prior capacity[24].

Similarly, alongside the work of the Commission, the Court has drawn on the jurisprudence of the UN Human Rights Committee in the case of *Arvo O. Karttunen v. Finland,* which found that impartiality implies that «judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties»[25].

As recognised by the Court itself[26], linked to the concept of impartiality is the concept of independence (González Napolitano, 2015: 71; Larkins, 1996: 605-626; Toharia, 1999: 9-32)[27]. In this regard, *Article 7 should be read in conjunction with Article 26 of the ACHPR*. This provision closes Chapter I of Part One of the African Charter, which recognises judicial independence in the following terms:

> State Parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

The Court has had occasion to shed some light on this precept in two recent cases: *XYZ v. Republic of Benin (App. 010/2020)* and *Sébastien Germain*

24 *Vid*. App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 298, citing ACHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* (29 May 2003), 5.4.

25 *Vid*. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 81, citing HRC, Communication No. 387/1989, *Arvo O. Karttunen v. Finland (Views adopted on 23 October 1992), in UN Doc. Finland* (Views adopted on 23 October 1992), in UN Doc. GAOR, A/48/40(vol. II), para. 7.2.

26 Cf. App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 275.

27 A relationship that has given rise to extensive doctrinal debates.

Marie Aikoué Ajavon v. Republic of Benin (App. 062/2019). Both cases share as a common denominator the allegation of illegality of the constitutional reform adopted in Benin following the face-to-face elections of 2019. In addition, in the second case, the irregularity of the elections themselves is invoked[28]. For their part, insofar as this reform has been endorsed by the Constitutional Court of Benin, the plaintiffs allege the lack of independence of this body. Focusing on the legal construction of the ACtHPR in *XYZ v. Republic of Benin*, the Court begins its reasoning on the premise that the independence of the judiciary is one of the pillars on which any democratic society is based[29], referring to its own case law in *Action pour la protection des droits de l'homme v. Côte d'Ivoire* to argue that the concept of independence implies «the ability of courts to discharge their functions free from external interference and without depending on any other authority»[30]. On the basis of this concept, the ACtHPR specifies that judicial independence is divided into two branches: institutional and individual, both of which are included in Article 26 ACHPR. Thus, while the former refers to the relationship between the judiciary and the executive and legislative powers, the latter refers to the personal independence of judges and magistrates, who can carry out the functions entrusted to them without fear of reprisals[31].

Further elaborating on its reasoning, the ACtHPR maintains that, in order to assess *institutional* independence, aspects such as the establishment of the judicial system as a power separate from the rest of the powers of the

28 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), paras. 3-6; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 3-4. Whereas in *XYZ v. Republic of Benin* the applicant requests anonymity, in *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin,* the applicant is a Beninese national who is a political refugee in France at the time of lodging the application (for both cases, see para. 1).

29 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 61; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 277.

30 *Vid*. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 61, citing App. No. 001/2014, *Actions pour la protection des Droits de l'Homme (APDH) v. Republic of Cote d'Ivoire*, Judgment (18 November 2016), para. 117. In the same vein, App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 277.

31 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 62; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 278.

State without interference or interference from the latter, exclusive jurisdiction in judicial matters, as well as administrative independence and the provision of adequate resources, must be taken into account. With regard to *individual* independence, the Court states that special attention should be paid to the criteria for appointment and term of office, the grounds for revocation, suspension and dismissal, as well as guarantees against external pressure[32]. Having said this, and with regard to the specific case, the ACtHPR understands that the Constitutional Court of Benin fulfils the aspect of institutional independence[33], but not that of personal independence, insofar as there is no legal precept that establishes the conditions under which its members may or may not be re-elected in office; this being left to the discretion of the President of the Republic and the Bureau of the National Assembly[34]. On the other hand, the ACtHPR, in ruling on the *impartiality* of the President of the Constitutional Court, affirms that the allegations that he is a close friend of the President of the Republic, and that, while he was Minister of Justice, he defended the contested constitutional reform, were not sufficient grounds to reverse the presumption of absence of bias or prejudice in the consideration of the case[35].

Controversial reasoning that he goes so far as to qualify in the *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* case, where he adds that «it is therefore undeniable that he had a preconceived opinion and should, for that reason, have recused himself», but that, as long as the body is composed of seven members, «the remarks or opinion of a single judge out of a bench of seven judges cannot, objectively, be considered sufficient to influence the entire Constitutional Court»[36].

32 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 63; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 279-280.

33 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), paras. 64-67; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment merits and reparations (04 December 2020), paras. 281-284.

34 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), paras. 68-72; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment merits and reparations (04 December 2020), paras. 285-290.

35 Cf. App. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), paras. 83-87.

36 *Vid.* App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), paras. 297-300.

Likewise, continuing with the case of *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin, App. 062/2019*, the Court went on to rule on the reform of the system for electing members of the High Council of the Judiciary. In this regard, it begins by emphasising that Article 26 not only guarantees the independence of the judicial bodies, but also of the judicial system as a whole[37]; and then goes on to maintain that the fact that the reform of this system gives the President of the Republic, in addition to being a member of the Council, broad powers to elect other members, represents a breach of the separation of powers and, therefore, a violation of Article 26 of the Charter[38].

Finally, also in relation to this same *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* case, the Court has had occasion to rule for the first time on the *granting of amnesties*. The applicant claims that in the context of the constitutional reform described above, a law was adopted amnestying the crimes committed during the riots that followed the elections held in 2019[39]. However, the Court deals with such an important issue in a couple of paragraphs, articulating it only in relation to the violation of the right to be heard and to an effective remedy before the competent national bodies (Article 7(1)(a) ACHPR)[40]. First, a brief definition of what is meant by amnesty and its implications:

> The Court further underscores that amnesty, cause of extinction of public action, is «the act by which the legislator decides not to prosecute the perpetrators of certain offences». Amnesty therefore constitutes a major obstacle to the referral to criminal courts or to the continuation of an action brought before criminal courts which, adjudicate on the criminal proceedings, and at the same time, rule on civil reparations[41].

37 *Ibid*. para. 310.

38 *Ibid*. paras. 319-325. In this regard, the Court cites the jurisprudence of the African Commission in *Kevin Mgwanga Gunme et. al. v. Cameroon*, where it held that «the doctrine of separation of powers requires the three pillars of the state to exercise powers independently. The executive branch must be seen to be separate from the judiciary, and parliament. Likewise, in order to guarantee its independence, the judiciary, must be seen to be independent from the executive and parliament». *Vid*. ACHPR, Communication 266/03, *Kevin Mgwanga Gunme et. al., v. Cameroon* (27 May 2009), para. 313.

39 Cf. App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 223.

40 Following the applicant's legal argumentation in this respect. *Idem*.

41 *Ibid*. paras 230-231.

Secondly, citing some case law of the African Commission[42], of the UN Committee[43], of the IACtHR[44], and of the ECtHR[45], but without combining them, either with each other or with its pronouncement. And, finally, maintaining that amnesties would only be acceptable if they were accompanied by restorative measures for the benefit of the victims –without defining or specifying this concept–[46]. Since the State of Benin has not adopted such measures, the Court concludes, this amnesty law is a violation of Article 7 ACHPR[47]. We must therefore wait for future pronouncements in order for the ACtHPR to shed more light and legal construction on the matter.

In any case, it is not superfluous to quote the words of Bou Franch, who, after analysing the matter, has argued that:

> The fact is that the consistent practice of States and international organisations, as well as the consistent jurisprudence of national, regional and international commissions and tribunals, demonstrates the existence of two insurmountable limits to the proclamation or granting of amnesties at the end of hostilities in a non-international armed conflict. First, the proclamation or granting of amnesties at the end of a non-international armed conflict must in no case prevent the investigation and, where appropriate, prosecution of those allegedly responsible for committing or ordering the commission of international crimes or serious human rights violations. Secondly, the proclamation or granting of such amnesties should also in no case imply exoneration from criminal responsibility of individuals who have committed or ordered the commission of such atrocities (Bou Franch, 2020: 339).

42 Cf. ACHPR, Communications 54/91-61/91-96/93-98/93-164/97-196/97-210/98 *Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme v. Mauritania (*11 May 2000), para. 83.

43 Cf. UN Human Rights Committee, *Rodriguez v. Uruguay*, Communication No. 322/1988, para. 12.4.

44 Cf. IACourtHR. *Case of Barrios Altos V. Peru*. Merits. Judgment of March 14, 2001. Series C No. 75, para. 41-43; IACourtHR. *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011. Series C No. 221, para. 195; IACourtHR. *Case of Gomes Lund et al. («Guerrilha do Araguaia») v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219, para. 171.

45 Cf. ECHR, *Case of Marguš v. Croatia* (Application No. 4455/10), Judgment of 27 May 2014, para. 139.

46 Cf. App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 238.

47 *Ibid*. paras 238-239.

Having concluded the analysis of the letter of Article 7.1 ACHPR, as noted above, the Court has turned to other human rights treaties and to the interpretation provided by their respective supervisory bodies in order to *fill the omissions* in this provision. Thus, the Court has understood Article 7.1(a) of the ACHPR to include the right to a reasoned pronouncement on the basis of the Principles on the Right to a Fair Trial adopted by the Commission[48], the jurisprudence of the ECtHR[49] and the IACHR[50]. Similarly, the Court has relied on Articles 14(3)(a) and 14(1) of the ICCPR to understand the right to be assisted by an interpreter as included in Article 7(1) of the Charter[51].

The Court has devoted special attention to the *right to free legal aid*, having pointed out from its first judgments that, although this right –unlike the ICCPR, the European Convention and the American Convention[52]– is not expressly contained in the ACHPR, a joint reading of the right to a defence recognised in Article 7.1.c of the Charter and Article 14.3.d of the ICCPR shows that it must be understood as an intrinsic part of the right to a fair trial[53]. Likewise, the Court has detailed its analysis by indicating that two conditions must be cumulatively fulfilled for a person to be entitled to enjoy the right to free legal aid: the interests of justice and his or her economic capacity; both must be determined taking into

48 Cf. AComHPR, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, 2003, Principle A.2.(i), in App. No. 004/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (26 June 2020), para. 63.

49 Cf. ECtHR, Case of *K. K. v. France* (Application No. 18913), Judgment of 10 October 2013, para.52. at *ibid*. para.64.

50 IACtHR, Case of *Barbani Duarte et al. v. Uruguay*, Merits, Reparations and Costs, Judgment of 13 October 2011, Series C No. 234, paras. 183-185 in *idem*.

51 Cf. App. No. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment (7 December 2018), paras. 73-79.

52 Cf., respectively, Articles 14.3.(d) ICCPR, 6.3.(c) ECHR, 8.2.(e) ACHR. In this regard, the Court has referred to pronouncements such as, ECtHR, Case of *Benham v. United Kingdom* (Application No. 19380/92), Judgment of 10 June 1996, para. 59; ECtHR, *Case of Salduz v. Turkey* (App n.º 36391/02), Judgment of 27 November 2008, para. 54; HRC, Communication n.º 377/89, *Anthony Currie v Jamaica* (31 March 1994), para. 13.2, or to the *Guidelines on the Right to a Fair Trial* adopted by the Commission (G) in App. n.º 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), paras. 116-124.

53 Specifically, Article 14.3 ICCPR recognises that «during the trial, everyone charged with a criminal offence shall be entitled, on full equality, to the following minimum guarantees: (d) To be present at the trial and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right to such assistance; and, in *any case where the interests of justice so require, to have legal assistance assigned to him free of charge if he does not have sufficient means to pay for it*» (emphasis added).

account circumstances such as the personal and social situation of the accused, the seriousness of the offence charged, the complexity of the case, or the possible sentence that the commission of the offence entails[54].

Thus, if the two conditions are met, this right must be ensured in all proceedings and, where it is the case, from the moment of arrest[55]. Moreover, the ACtHPR has come to hold in settled case law, starting with *Alex Thomas v. United Republic of Tanzania*, that in criminal proceedings where, if the two conditions are met, the offence is serious and the penalty is high, even without having requested it, the accused is entitled both to be informed and to enjoy the right to free legal aid[56].

Similarly, unlike the ICCPR[57], Article 7 of the Charter is silent on the principle of publicity of hearings and judicial decisions. However, even though the ACtHPR, on the one hand, has recognised that this principle must be understood to be included in this precept, on the other hand, it has invoked the case law of the ECtHR to apply it laxly[58]. Thus, in the case of *Mohamed Abubakari v. United Republic of Tanzania*, the African body held that the fact that a sentence of 30 years' imprisonment was handed down in a judge's chambers was not sufficient reason to consider this principle to have been undermined, due to the small number of courtrooms and the fact that the public could potentially have visited the chambers[59]. This has given rise to dissenting opinions, such as that expressed by Judges Thompson and Ben Achour, which I

54 Cf. App. No. 003/2015, *Kennedy Owino Onyachi and Others v. United Republic of Tanzania*, Judgment (28 September 2017), paras. 104-105.

55 *Ibid*. para. 106; Cf. App. No. 002/2013, *The African Commission on Human and Peoples' Rights v. Libya*, Judgment (3 June 2016), para. 93.

56 Cf. App. No. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), paras. 114-123. See also App. No. 014/2015, *Jibu Amir Mussa & Another v. United Republic of Tanzania*, Judgment (28 November 2019), para. 77; App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), paras. 138-139; App. No. 027/2015, *Minani Evarist v. United Republic of Tanzania*, Judgment (21 September 2018), para. 68; App. 054/2016, *Mhina Zuberi v. United Republic of Tanzania*, Judgment, merits and reparations (26 February 2021), paras. 60-64.

57 Cf. Art. 14.1 *in fine* ICCPR. Cf. also Art. 8.5 ACHR; Art. 6.1 ECHR.

58 Cf. App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), paras. 222-227. Specifically, the Court has turned to the case law of the ECtHR in *Lorenzetti v. Italy*, where it was held that «the requirement whereby a judgment must be rendered in public was interpreted with a measure of flexibility [...] It is necessary to determine in each case in light of the peculiar nature of the relevant procedure and depending on the purport and objective of Article 6.1, the form of publicity to be given to a judgment as provided under the domestic law of a particular State» (para. 37).

59 *Ibid*. paras 226-227.

endorse[60]. In the same vein, the Court held in *Massoud Rajabu v. United Republic of Tanzania* that the non-presence of the plaintiff at the delivery of the domestic judgment because he was not notified does not constitute a violation of his right to a fair trial, since he had the opportunity to defend his allegations and to present the appropriate evidence during the proceedings; in addition, he was notified of the judgment on subsequent days, as well as his right to lodge the appropriate appeals against it[61].

This applies to the first paragraph of Article 7. As for the second paragraph, the Court has so far not developed the latter beyond maintaining that it enshrines the principle of legality, with regard to which it has stressed that the imposition of a sentence is only possible when, in relation to the event in question, a law in force at the time of the commission of the act or omission prescribes it[62]. On the other hand, it is worth mentioning that this provision emphasises the principle of personal liability for one's own actions. Probably, as the doctrine points out, with the aim of putting an end to common practices on the continent regarding the imputation of responsibility and accountability to the tribe or family of the accused (Neff, 1984: 340). In any case, the Court has not yet made an express pronouncement on the matter, so we must heed its future jurisprudence[63].

In turn, while this precept also maintains significant silences, the ACtHPR has understood it to include, on the basis of Article 14.5 ICCPR, the right to a double degree of jurisdiction in criminal matters[64], and, on the basis of Article 14.7 ICCPR, the *ne bis in idem* principle; which, in the words of the Court, entails

60 In their dissenting opinions, the two judges refer to issues such as the jurisprudence of the Human Rights Committee in this regard, the Tanzanian State's own domestic law, the small size of a judge's chambers to potentially accommodate the public, the intimidating effect of being in such a location on both the attending public and the accused, and the fact that, even though the judgment was handed down in these circumstances, it was not made public and available immediately after its adoption. Cf. App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania,* Partly Dissenting Opinion of Judge Elsie N. Thompson; Dissenting Opinion of Judge Rafâa Ben ACHOUR (3 June 2016).

61 Cf. App. 008/2016, *Massoud Rajabu v. United Republic of Tanzania*, Judgment, merits and reparations (25 June 2021), paras. 73-84.

62 Cf., e.g. App. No. 014/2015, *Jibu Amir Mussa & Another v. United Republic of Tanzania*, Judgment (28 November 2019), para. 62.

63 So far, the Court has only incidentally referred to this principle. Cf., e.g. App. No. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), para. 105.

64 Cf. App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin,* Judgment (29 March 2019), paras. 211-215; App. No. 028/2015, *Kalebi Elisamehe v. United Republic of Tanzania*, Judgment (26 June 2020), paras. 69-72.

that «a person cannot be prosecuted and tried twice by the courts of the same State for an offence for which he has been acquitted or convicted»[65]. It should be recalled that, as we had occasion to analyse in chapter two, in the most recent case law of the ACtHPR the violation of both precepts of the Covenant has been recognised autonomously –without linking them to Article 7 ACHPR–[66].

II. RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is recognised in Article 9.2 of the African Charter under the following wording:

> Every individual shall have the right to express and disseminate his opinions within the law.

We are faced with an indispensable right to guarantee a democratic and plural State, for the development and fulfilment of the human being, and, at the same time, an instrumental right for the exercise of multiple other rights (Gearon, 2006; Sánchez González, 1992; O'Flaherty, 2012: 627-654; Bertoni, 2009: 332-352). The African Court has pronounced in this sense, developing the limited Article 9.2 in the following terms:

> The right to freedom of expression is one of the fundamental rights protected by International Human Rights Law, the respect of which is crucial and indispensable for the free development of the human person and to create a democratic society. lt comprises *inter alia*, the freedom to express, and communicate or disseminate information ideas or opinions of any nature in any form and using any means, whether at national or international level[67].

65 *Vid.* App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin,* Judgment (29 March 2019), paras. 178-179. For its part, although to date, all the cases on which the Court has ruled under this heading have dealt with criminal proceedings, it appears from its decisions that, despite the wording of the provision, the guarantees recognised therein are also applicable to other types of proceedings. Cf. App. No. 018/2018, *Jebra Kambole v. The United Republic of Tanzania*, Judgment (15 July 2020), para. 98.

66 Where I also highlighted the imprecise jurisprudential line maintained by the ACtHPR in this respect.

67 *Vid.* App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 132.

We must start by noting that the jurisprudence of the African Court on the right to freedom of expression has been built mainly on the basis of two cases: *Lohe Issa Konate v. Burkina Faso* and *Ingabire Victoire Umuhoza v. Republic of Rwanda*. The first case concerns the domestic conviction of a Burkinabe journalist for publishing several articles denouncing corruption in the state, for which he was sentenced to 12 months imprisonment, a fine, and suspension for three months from the newspaper in which the articles appeared, where he was editor-in-chief[68]. With regard to the second case, it should be recalled that I have also referred to it in the second chapter, since, following the filing of the respective application before the African Court, the State of Rwanda proceeded to withdraw the additional declaration of jurisdiction referred to in Article 34.6 of the Protocol to the ACtHPR. In the present case, the applicant, who intended to run in the Rwandan presidential elections, was accused of delivering a speech propagating the ideology of genocide and compromising public security, and was sentenced to 15 years imprisonment by the Rwandan Supreme Court[69].

It is worth mentioning that it is precisely in relation to these two cases that the Court proceeded to articulate its most precise pronouncement in relation to the so-called *claw-back* clauses.

Thus, as noted in the first chapter, the inclusion in a number of provisions recognising civil and political rights of so-called claw-back clauses has been identified as the most significant shortcoming of the African Charter (Cartes Rodríguez, 2022)[70]. As Heyns notes, such provisions «appear to recognise the right in question, but only to the extent that it does not collide with domestic law». Which, if such an interpretation is followed, would undermine the protection provided by the Charter for the rights concerned (Heyns, 2004: 605). Moreover, such clauses can be found not only in the ACHPR, but also in other treaties of the system, such as the African Charter on the Child[71]. This fact has led the doctrine to include them as one of the singularities –in

68 Cf. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso* (5 December 2014), paras. 1 and 3.

69 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras. 4-8, 120-124.

70 Thus, clauses such as «within the law», «provided for by law», «abides by the law» or «in accordance with the provisions of the law», limit the exercise of the rights contained in a significant number of articles 6 to 13 ACHPR.

71 Cf. e.g. Arts. 6 and 7 ACERWC.

this case to be combated– and which should not go unnoticed in the African system (Hansungule, 2004: 3).

However, the African Commission has interpreted early on that «international human rights standards must always prevail over contradictory national law». Stressing that «the 'clawback' clauses must not be interpreted against the principles of the Charter»[72].

For its part, on this issue, the Court has followed the same line of jurisprudence as the Commission in different decisions[73], finding its most precise and solidly argued pronouncements in the cases of *Lohe Issa Konate v. Burkina Faso,* and *Ingabire Victoire Umuhoza v. Republic of Rwanda*. Both cases concern the *claw-back clause* contained in Article 9.2 ACHPR.

In accordance with ACtHPR case law in such cases, the court has interpreted the expression «within the law» in the light of international human rights standards[74]. In doing so, it has turned not only to the jurisprudence of the African Commission, but also to that of the UN Human Rights Committee, the ECtHR, and the IACtHR, as well as to their respective constituent treaties, thus giving rise to another example of cross-fertilisation between the different systems.

Consequently, resorting to the aforementioned international standards involves, in the Court's words, making the validity of the restrictions conditional upon the fulfilment of three concurrent requirements:

1. Such restrictions must be provided for by law.
2. They must serve a legitimate purpose.
3. They must be necessary and proportionate for a democratic society[75].

72 Respectively, Doc. AHG/215 (XXXV), para. 66; ACHPR, Communication 212/98, *Amnesty International v. Zambia* (5 May 1999), para. 50.

73 For example, in relation to the *claw-back* clause contained in Article 13(1) ACHPR (right to participate in public affairs), see App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), paras. 106-111. On the *claw-back* clause contained in Article 6 ACHPR (right to liberty and security of person), cf. App. No. 020/2016, *Anaclet Paulo v. United Republic of Tanzania*, Judgment (21 September 2018), paras. 64-68.

74 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 133; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso (*5 December 2014), para. 125.

75 *Vid.* App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras. 133 and 134 *in fine*; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso,* Judgment (5 December 2014), para. 125.

Regarding the first requirement, the ACtHPR has understood that the *domestic law* establishing the restriction must be clear, foreseeable, as well as «compatible with the purpose of the Charter and international human rights conventions and has to be of general application»[76].

With regard to the second requirement, the Court has clarified that, although, unlike other human rights treaties, the ACHPR contains a list of precepts that, despite permitting its restriction by law, does not expressly contain a list of *legitimate aims* that delimit such a restriction[77].

In this regard, we must turn to Article 27.2 of the African Charter. This precept establishes that «the rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest»[78]. Therefore, with this interpretation, we find ourselves in the African system before grounds similar to those foreseen in the ICCPR and in the regional human rights treaties[79].

Moreover, in more recent pronouncements, the Court has recognised that other grounds not expressly mentioned in Art. 27.2 ACHPR may give rise to legitimate restrictions. Thus, in relation to the right to freedom of expression, it has included in this list public health, which is expressly included in the ICCPR (Art. 19.3.b), in the ECHR (Art. 10.2) and in the ACHR (Art. 13.2.b)[80]. This differs from the position traditionally held by the Court, in which it had established, following the Commission's jurispru-

76 *Vid*. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 136; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso* (5 December 2014), paras. 129 and 131. In arriving at such an interpretation the Court relies on the jurisprudence of the UN Human Rights Committee, the ECtHR and the IACHR and the African Commission.

77 That is, while, for example, with regard to the right to freedom of expression, Article 19 ICCPR states that the right to freedom of expression «may be subject to certain restrictions, which shall, however, be provided by law and *necessary for: (a) respect of the rights or reputations of others (b) the protection of national security, public order, public health or morals*». Article 9.2 ACHPR merely states that «every individual shall have the right to express and disseminate his opinions *within the law*» (emphasis added).

78 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras. 139-141; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso,* Judgment (5 December 2014), paras. 132-138.

79 Cf. arts. 19.3 ICCPR; 10.2 ECHR; 13.2 ACHR.

80 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 140.

dence, that the only legitimate restrictions were contained in Article 27.2 ACHPR[81].

Finally, with regard to the conditions of *necessity* and *proportionality*, the Court has held that this examination cannot be carried out in a vacuum, but on a case-by-case basis, taking into account the appropriateness of the restriction for the proposed purpose, the possibility of resorting to another less burdensome measure, and balancing the benefit to the common good derived from the restriction against the harm to the right affected[82].

Thus, the Court, in its jurisprudence, has understood that, in cases of murder or armed robbery, the denial of provisional release on bail meets this test, and therefore does not constitute a violation of Article 6 ACHPR (*Anaclet Paulo v. United Republic of Tanzania*[83]); or that the prohibition of independent candidacy in Tanzanian elections, on the other hand, even if such a requirement is established in a law, does not meet the above test and is therefore a violation of Article 13(1) ACHPR (*Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*[84]).

Having said this, we are now in a position to return to the analysis of the decisions of the ACtHPR with respect to the right to freedom of expression.

Beginning with the *ownership of the right*, the Court has held that Article 9.2 of the Charter guarantees the right to freedom of expression to all natural persons, regardless of their profession, and therefore regardless of whether they are considered to be journalists or not[85]. For its part, this right, in the words of the

81 Cf., e.g. App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), paras. 107.1 and 107.2.

82 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras. 142 *et seq*; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso*, Judgment (5 December 2014), paras. 139 *et seq*.

83 Cf. App. No. 020/2016, *Anaclet Paulo v. United Republic of Tanzania*, Judgment (21 September 2018), paras. 67-68.

84 Cf. App. No. 009&011/2011, *Tanganyika Law Society and Legal and Human Rights Centre and Reverend Christopher R. Mtikila v. United Republic of Tanzania*, Judgment (14 June 2013), para. 111.

85 Cf. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso (*5 December 2014), para. 58. It is worth mentioning that, adopting an expansive interpretation, the Court has applied Art. 66.2.c of the Revised Treaty of the Economic Community of West African States –which provides that «[Member States of ECOWAS] undertake (c) to ensure respect for the rights of journalists»– even when the person concerned did not fulfil the administrative conditions necessary for the

ACtHPR, not only covers the broadcasting of information or opinions that are considered inoffensive or favourably received, but also those that could offend the State or part of its population[86]. Similarly, the ACtHPR has recalled that the safeguarding of the right to freedom of expression requires the State to protect it from interference, whether caused by private individuals or by State agents[87].

Despite its importance, the Court has recognised that the right to freedom of expression is not absolute[88], and may be subject to restrictions under certain circumstances. However, as mentioned above, although Article 9 of the Charter contains a *claw-back* clause, the ACtHPR has conditioned the validity of such restrictions on the fulfilment of three concurrent requirements: they must be provided for by law, they must serve a legitimate aim, and they must be necessary and proportionate for a democratic society.

Apart from what has already been noted, it should be added that, with regard to the *conditions of necessity and proportionality*, the African body has stressed that this examination cannot be carried out in a vacuum, but that attention must be paid to the context in which the opinions, manifestations or expressions were issued[89]. Thus, in its jurisprudence, the Court has held that restrictions on freedom of expression may be justified when they compromise public order, national security, health, or public morals[90]. In the case of *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin (App. 062/2019),* it held that the restrictions imposed in the Benin Digital Code pursue a legitimate aim, as «the forms of expression that have been criminalised are those which incite hatred, racism, xenophobia, discrimination and violence [...] in view of the harmful consequences such rhetoric can engender»[91]. On the other hand, the

state level to be considered as a journalist. This provision has been combined with the aforementioned Article 9.2 of the African Charter. Cf., e.g. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso (*5 December 2014), paras. 49-59 and para. 164.

86 App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 143.

87 *Ibid*. para. 132.

88 *Ibid*. para. 133.

89 *Ibid*. para. 144.

90 *Ibid*. para. 140; paras. 134-135; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso (*5 December 2014), paras 134-135; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 123.

91 *Ibid*. paras 126-127. This is the Court's ruling in this case, which, although, as already examined, arises from the 2019 presidential elections and the subsequent constitutional reform taking place, the applicant also alleges a violation of its right to freedom of expression by certain provisions contained in the Benin Digital Code adopted in 2018.

ACtHPR has held that the exercise of freedom of expression deserves a higher degree of tolerance in certain areas, such as a political rally, when the speaker is a representative of the opposition party, or when the addressees are government officials or public figures holding public office, as in *Lohe Issa Konate v. Burkina Faso* and *Ingabire Victoire Umuhoza v. Republic of Rwanda*[92].

Also, in relation to this last requirement, a particular case to which the Court has paid special attention has been the *nature of the sanctions* that go hand in hand with an excess of the exercise of the right to freedom of expression. In this regard, again, the ACtHPR has turned to the jurisprudence of the African Commission, the HRC, the ECtHR, and the IACtHR, to underline the importance of the proportionality of such sanctions[93], and to maintain that they cannot be so severe that they interfere with the very exercise of the right[94]. Moreover, the ACtHPR, following the case law of the ECtHR, has maintained the exceptionality of custodial sentences; civil sanctions must be favoured over criminal sanctions in the case of an abusive exercise of the right to freedom of expression[95]. In this regard, in the case of *Lohe Issa Konate v. Burkina Faso,* the ACtHPR has had occasion to specify what is meant by this exceptionality, stating that it applies to incitement to commit international

92 Cf. App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras.142-161; App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso (*5 December 2014), paras.155-156.

93 Cf. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso (*5 December 2014), paras. 149-154, citing ACHPR, Communication No. 284/03, *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe* (03 April 2009), paras. 176 and 178; ECHR (Application No. 68416/01), *Steel and Morris v. The United Kingdom*, Judgment of 15 May 2005; ECHR (Application No. 181139/91), *Tolstoy Miloslavsky v. The United Kingdom*, Judgment of 13 July 1995; IACHR, Case of *Tristán Donoso v. Panama*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 27 January 2009, Series C No. 193, paras. 119-120. In the same vein, App. No. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), paras. 149 and 162.

94 Cf. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso* (5 December 2014), p. 40. Citing, ACHPR, *Declaration of Principles on Freedom of Expression in Africa,* Principle XII, para. 1; Human Rights Committee, General Observation No. 34, para. 33.

95 Cf. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso* (5 December 2014), p. 43, citing, *inter alia*, ECtHR, *Gavilovic v. Moldova* (Application No. 25464/05), Judgment of 15 December 2009, para. 60; ECtHR, *Cumpana and Mazare v. Romania* (Application No. 33348/96), Judgment of 17 November 2004, para. 115; ECtHR, *Mahmudov and. Agaze v. Azerbaijan* (Application No. 38577/04), Judgment of 27 November 2008, para. 50; ECtHR, *Lehideux et Isorni v. France* (Application No. 24662/94), Judgment of 23 September 1998, para. 57. Case of *Tristán Donoso v. Panama*. Preliminary Objection, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 20.

crimes, or when hatred, discrimination, violence or threats are directed against a person or groups of persons on account of their race, religion or nationality[96]. On the other hand, Judges Akuffo, Ngoepe and Tambala have ruled in separate opinions against the possibility of imposing criminal sanctions in this area irrespective of the gravity of the case, on the grounds that:

> the State's duty to enforce the obligation on an individual under Article 27.2 of the Charter [...] cannot justify the criminalization of expression of speech by way of criminal defamation laws of any kind, whether punishable by incarceration or not. Access to civil action, civil sanction, together with specifically defined crimes for safeguarding national security, public peace and the common interest, should be sufficient[97].

III. ECONOMIC, SOCIAL AND CULTURAL RIGHTS

To quote Cançado Trindade, the individual access to international human rights protection bodies is, without a doubt, the most important legal legacy of the 20th century (Cançado Trindade, 1999: 531-532). However, far from the proclaimed universality, interdependence and indivisibility of all human rights, the scope of protection indicated by Cançado has been radically different depending on whether we are dealing with civil and political rights or economic, social and cultural rights. This division, contrary to the spirit of the UDHR, was manifested in the adoption in 1966 of two different treaties with different systems of control in their application: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

In any case, the *justiciability* of economic, social and cultural rights, understood as the existence of mechanisms to guarantee and control the fulfilment of these rights, has advanced considerably both at the universal level –where we must highlight the adoption in 2008 of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights[98]– and at the Inter-American

96 Cf. App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso,* Judgment (5 December 2014), para. 65.

97 *Vid.* App. No. 004/2013, *Lohe Issa Konate v. Burkina Faso*, Joint Separate Opinion Judges S. A. B. Akuffo, B. M. Ngoepe and D. Tambala (5 December 2014), para. 4. Akuffo, B. M. Ngoepe and D. Tambala (5 December 2014), para. 4.

98 Cf. Optional Protocol to the Covenant on Economic, Social and Cultural Rights of 10 December 2008, entered into force on 5 May 2013.

regional level –where the adoption of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or Protocol of San Salvador of 17 November 1988[99] stands out.

However, with regard to the latter, Article 1, following the pattern established in Article 2 of the ICESCR, subjects the obligations of States parties to a clause of progressive realisation towards the «maximum of available resources and taking into account their stage of development». It should be added that individual complaints are limited to freedom of association (Article 8) and the right to education (Article 13). In accordance with the functioning of the Inter-American regional system, these complaints must be lodged with the Commission. Thus, only in the case of non-compliance with the report issued, and provided that the State concerned has accepted the jurisdiction of the IACtHR, is the Commission empowered to refer the matter to the Court (López Martín, 2011: 27)[100].

Even more limited is the *justiciability* of economic, social and cultural rights in the framework of the Council of Europe, where the 1995 Additional Protocol to the European Social Charter only provides for a system of collective complaints[101]. However, the pioneering jurisprudential line of the ECtHR, since *Airey v. Ireland,* should not go unnoticed[102] in favour of the *justiciability* of such rights: «on the one hand, by making 'extensive' interpretations of some of the civil and political rights included in the Rome Convention in order to understand them as including social rights [...]; on the other hand, by applying the principle of non-discrimination» (López Martín, 2011: 12).

However, it should not be forgotten that before such developments took place, the premise of the indivisibility and interdependence of human rights

99 Cf. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, «Protocol of San Salvador» adopted on 17 November 1988, entered into force on 16 November 1999.

100 Cf. art. 19.6 Protocol of San Salvador; arts. 44 to 51 and 61 to 69 of the American Convention on Human Rights. In any case, as the doctrine points out, in addition, the Protocol of San Salvador «has the merit [...] of finally recognising, with a legally binding character, the economic, social and cultural rights proclaimed in the American Declaration of 1948».

101 Cf. Additional Protocol to the European Social Charter establishing a System of Collective Complaints, adopted in Strasbourg on 9 November 1995, and in force on 1 July 1998.

102 Cf. ECtHR, *Case of Airey v. Ireland* (Application No. 6289/73), Judgment of 9 October 1979, Series A, No. 32, para. 26. Cf., e.g., IACtHR. *Case of Acevedo Buendía et al («Cesantes y Jubilados de la Contraloría») v. Peru*. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of 1 July 2009. Series C, No. 1981, paras. 101-103.

proclaimed in the Universal Declaration of Human Rights was embodied in 1981 in the African Charter. This treaty, for the first time, recognises and integrates a list of civil, political, economic, social and cultural rights, and this particularity is already underlined in its Preamble. It is proclaimed that the Charter was adopted in the conviction that:

> civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights[103].

Furthermore, none of the ESC rights recognised in the ACHPR are limited by the usual progressive realisation clauses, nor are they subject to the availability of resources[104]. Equating, at least *a priori*, their *justiciability* to civil and political rights. This was precisely the tool that the drafters of the Charter found to deal with the socio-economic situation that the continent was facing after the colonial period. Thus, African doctrine emphasises that «African states with their inherited weak economies thought *their primary task was to overcome poverty, disease, malnutrition,* illiteracy...» (Ankumah, 1996: 5; Mbazira, 2006: 333-357). And hence, also, the importance that the Charter gives to the right to development; the first treaty to articulate this right[105].

With regard to the African Commission's pronouncements on the matter, we find divergent lines. Thus, in the communications decided upon, the AComHPR, on the one hand, has been quite reluctant to use concepts such as progressive realisation in relation to ESC rights, and, on the other hand, has stressed that the States Parties have the obligation to respect, protect, promote and realise *all the* rights recognised in the Charter[106]. However, in its most detailed pronouncement on the matter, which can be found in the Princi-

103 *Vid*. para. 8 of the ACHPR Preamble.

104 For its part, it should be noted that both the African Charter on the Child and the Maputo Protocol, treaties over which the Court has jurisdiction *ratione materiae*, recognise both ESC rights and civil and political rights. Likewise, most of the ESC rights recognised are not subject to progressive realisation clauses. As an exception to the general rule, cf. Art. 11.3.b and Art. 13.3 African Charter on the Rights and Welfare of the Child.

105 Cf. first chapter *infra*.

106 Cf. AComHPR, Communication 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (27 October 2001), paras. 43-47.

ples and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010)[107], the Commission has recognised that in order to make ESC rights effective, the available resources of the State must be taken into account, and that, therefore, these are subject to a progressive realisation clause[108].

In any case, taking into account the previous position of other guarantee and control mechanisms, the African body has pointed out that this does not prevent the existence of obligations of immediate demand, such as the safeguarding of the principle of non-discrimination; the respect of a minimum core of obligations in relation to each of the ESCR recognised in the Charter; the obligation to adopt measures for their realisation, and, its counterpart, the prohibition to adopt regressive measures; as well as, to this end, the obligation to provide available, sufficient and effective resources at the domestic level[109].

On the other hand, focusing on the pronouncements of the African Court, practically all of the known cases deal with civil and political rights, due to the fact that the plaintiffs have mainly alleged the violation of these rights[110]. In this respect, its first detailed pronouncement on ESCR can be found in the case of *African Commission on Human and Peoples' Rights v. Republic of Kenya,* where the Court had the opportunity to pronounce itself in relation to Articles 14 (right to property) and 17.2 and 3 (right to culture). This case will be the subject of my analysis in the following section, insofar as these rights have been articulated in their collective aspect[111]. However, as far as this case is concerned, beyond confirming the *justiciability* of ESCR by the Court, and the violation

107 Cf. AComHPR, Principles and guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, November 2010, available at: https://archives.au.int/handle/123456789/2063 (Accessed on: 03.03.2023).

108 Cf. AComHPR, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, 2010, pp. 10-15. In order to sustain such an argument in the referred principles it is simply alleged that «while the African Charter does not expressly refer to the principle of progressive realisation this concept is widely accepted in the interpretation of economic, social and cultural rights and has been implied into the Charter in accordance with Articles 61 and 62 of the African Charter».

109 Cf. AComHPR, Principles and guidelines on the implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights.

110 This is also true for the rest of the organs of the system.

111 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya,* Judgment (26 May 2017), paras. 122-131; 176-190.

of these precepts being recognised in the specific case, given the silence of the ACtHPR, it is not possible to say whether the judicial body will maintain the same position as the Commission with respect to their progressive realisation in relation to the rights recognised in the ACHPR.

Nor has it expressly ruled on this issue in successive pronouncements. However, from its study, it is necessary to highlight the jurisprudence adopted by the Court, also in relation to the interpretation and application of these rights. Thus, together with the aforementioned *African Commission on Human and Peoples' Rights v. Republic of Kenya* case, we must refer to the cases of *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* (App. n.º 013/2017), and *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* (App. n.º 062/2019). In the former recognising a violation of the right to property, and in the latter the right to strike.

Starting with the case of *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin (App. 013/2017)*, the case concerns the conviction of S. Ajavon, a Beninese politician and businessman, on charges of drug trafficking[112]. In this regard, after finding that the proceedings before the domestic courts did not comply with the guarantees of the right to a fair trial recognised in Article 7 ACHPR (including the right to the presumption of innocence and the right of defence)[113], the Court added that the arbitrary withdrawal of the business licences granted to the applicant was a violation of his right to property[114]. However, the ACtHPR did not enter into further articulation of the content of that right, beyond stating that the basis of the violation was «having prevented the Applicant from exercising his commercial activity and to derive income from the said activity»[115].

The Court provided greater precision in the recent case of *Ernest Karata and 1744 others v. United Republic of Tanzania*. In this case, despite the fact that in the specific case it does not recognise a violation of Article 14 ACHPR in the absence of evidence from the plaintiffs[116], it not only invokes its jurisprudence

112 Cf. App. No. 013/2017, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment (29 March 2019), paras. 3-8.

113 *Ibid*. paras 125-215.

114 *Ibid*. paras 266-272.

115 *Ibid*. para. 269.

116 Cf. App. No. 002/2017, *Ernest Karata and 1744 others v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), paras. 95-97.

in the case of *African Commission on Human and Peoples' Rights v. Republic of Kenya,* in which it determines that:

> in its classical conception, the right to property usually refers to three elements namely: the right to use the thing that is the subject of the right (usus), the right to enjoy the fruit thereof (fructus), and the right to dispose of the thing, that is, the right to transfer it (abusus)[117].

It also makes its own the jurisprudence of the African Commission in the case of *Dino Noca v Democratic Republic of Congo,* holding that:

> The right to property includes not only the right of access to one's property and freedom from violation of the enjoyment of such property or injury to it, but also the free possession and utilization and control of such property, in a manner the owner deems adequate[118].

Moreover, and as I have already indicated, mention must be made of the recent case, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin* (App. No. 062/2019). Mr. Ajavon's application was filed after France granted him political refugee status, and its purpose is to challenge, on the one hand, the presidential elections held in that State in April 2019, and, on the other hand, the constitutional reform adopted in November 2019, as well as the adoption of various laws that have been passed in recent years[119]. It will be precisely within the framework of one of these laws that restrictions will be added to the exercise of the right to strike; a right not expressly recognised in the articles of the ACHPR. However, following a line of guaranteeing jurisprudence, and making use of its broad competence *ratione materiae*, the Court began to assess the violation of this right insofar as it is recognised in the ICESCR –a treaty ratified by the State of Benin on 12 March 1992–[120]. Thus, the ACtHPR begins by pointing out that, although it is not expressly stated in the text of the ACHPR, the right to strike could be considered «a corollary of the right to work provided for in Article 15

117 *Ibid*. para. 93

118 Cf. ACHPR, Communication 286/2004, *ACHPR, Dino Noca v. Democratic Republic of Congo* (12 October 2013), para.161, in *ibid*. para.94.

119 Cf. App. No. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin,* Judgment, merits and reparations (04 December 2020), paras. 1, 3 and 4.

120 *Ibid*. para. 27.

of the Charter»[121] ; adding that this right is expressly included in Article 8 of the ICESCR, and therefore falls within its competence *ratione materiae*[122]. Having said this, the Court does not even enter into an examination of the content of the restrictions and prohibitions imposed in the contested legislation in relation to certain professions, but rather, extracting the principle of non-regression from Article 2 of the Covenant, considers that Article 8 of the Covenant has been violated. Thus, in the words of the ACtHPR:

> The Court considers that once a State Party recognises a basic right, any regressive measure, that is to say 'any measure which directly or indirectly marks a step backwards with regard to the rights recognised in the Covenant' is a violation of the ICESR itself. *The Court notes that once it has recognised the right to strike, the Respondent State can only provide a framework for its realisation. Therefore, any act aimed at prohibiting or suppressing it is a breach of the principle of non-regression and constitutes a violation of Article 8 of the* ICESCR[123].

It further argues that only the Beninese Constitutional Court has the power to add prohibitions to the right to organise and the right to strike[124].

It should be noted that the Court does not follow the line of argument of the applicant[125], who bases his allegation on a violation of Convention No. 87 on Freedom of Association and Protection of the Right to Organise, adopted in 1948 within the framework of the International Labour Organisation, to which Benin is also a State party[126]. This would have led the ACtHPR to determine whether this convention is considered a «human rights instrument», and therefore whether it falls within its jurisdiction *ratione materiae* in accordance with Article 3 of its founding Protocol[127].

121 *Ibid*. para. 132

122 *Ibidem*.

123 *Ibid*. paras 137-138 (emphasis added).

124 *Ibid*. para. 139.

125 *Ibid*. para. 129.

126 Cf. International Labour Organisation Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise, adopted at San Francisco on 9 July 1948.

127 I refer to what has already been said in chapter two, *infra*, for a study of this article in connection with the Court's jurisdiction *ratione materiae*. It should be recalled that what the Court means by *human rights instruments* in this respect is not a matter of dispute. Likewise, the observations made there on the revisable jurisprudence of the Court are relevant for the purpose of clarifying when it is applying one precept (which would take us to Art. 3 ACtHPR Protocol), and when it is interpreting one precept *in the light of* another (which would take us to Arts. 60 and 61 ACHPR).

In addition to the above, we cannot overlook the fact that, although, to date, the Court has not recognised a violation of the *right to work* enshrined in Article 15 ACHPR, in different cases, albeit briefly, it has proceeded to outline its content. In this regard, the case of *Mulindahabi Fidèle v. Republic of Rwanda* stands out. This case arises from the claimant's allegation, on the one hand, that he was not notified of his dismissal within the stipulated period and through the competent bodies in accordance with Rwandan law. On the other hand, and in the light of the foregoing, that neither his reinstatement nor the payment of adequate compensation was made[128]. Both of the applicant's allegations are dismissed insofar as the ACtHPR understands that the domestic courts, and in particular the Rwandan Supreme Court, have ordered the payment of adequate compensation[129]. In any case, with regard to the ACtHPR's articulation of the right to work, it is worth mentioning that, although the Court acknowledges that Article 23 UDHR is more exhaustive and protective than Article 15 ACHPR, the judicial body considers that the former has the status of a customary norm, and that its content should be understood as implicit in Article 15 ACHPR[130]. Again, as in the cases of *Anudo Ochieng Anudo v. United Republic of Tanzania* and *Houngue Eric Noudehouenou v. Republic of Benin* –where, it should be recalled, the Court recognised the autonomous violation of certain precepts of the UDHR– without providing greater precision with respect to the customary nature. I therefore refer to the considerations set out there[131].

It is even more precise when it points out –invoking both the jurisprudence of the Inter-American Court and that of the Court of Justice of the Economic Community of West African States[132]– that the right to work entails job security, which implies, in the words of the Court, enjoying legal protection against arbitrary dismissals or dismissals contrary to the legislation in force.

128 Cf. App. No. 004/2017, *Mulindahabi Fidèle v. Republic of Rwanda*, Judgment (merits and reparations), 26 Jun 2020, paras. 91-98.

129 *Ibid*. para. 97

130 *Ibid*. para.89

131 For an analysis of both cases and our legal assessment of the decision of the ACtHPR, I refer to the discussion in the second chapter, *infra*.

132 Respectively, the cases, IACtHR. Case of *Lagos del Campo V. Peru*. Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of 21 November 2018. Series C No. 366; and Claude Akotegnon v. ECOWAS, Judgment No. ECW/CCJ/APP/2017 of 29/6/2018, para. 42.

Thus, when such circumstances occur, it is necessary to provide the worker with adequate compensation[133].

Finally, such a pronouncement must be articulated with the case of *Kennedy Gihana & others v. Republic of Rwanda*, in which the applicant alleges that the arbitrary withdrawal of his passport by the State of Rwanda gave rise to a violation of his right to work. Although the Court rejects this allegation, as the applicant does not provide evidence to support it[134], in an *obiter dictum* it makes part of the content of the Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights (2010) its own, determining that the right to work recognised in Article 15 ACHPR entails the obligation of the State to:

> facilitate employment through the creation of an environment conducive to the full employment of individuals within society under conditions that ensure the realisation of the dignity of the individual. The right to work includes the right to freely and voluntarily choose what work to accept[135].

To recapitulate, the Court has recognised the violation of the right to property (Article 14 ACHPR), the right to culture (Article 17.2 and 3), and the right to strike (Article 8 ICCPR). The former, both in its individual and collective aspects, and the latter in its collective aspect. And, although it has maintained a jurisprudence guaranteeing these rights, it has not yet had the opportunity to rule on whether the ESCR recognised in the ACHPR are subject to a *progressive realisation* clause.

IV. PEOPLES' RIGHTS

The singularities of the African Charter are not limited to the recognition in the same document of civil, political, economic, social and cultural rights, but rather, in addition, amplifying a holistic vision of human rights, it is the first

133 Cf. App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment (merits and reparations), 28 Nov 2019, para. 95.

134 *Ibid*. para. 128-132.

135 Cf. AComHPR, Principles and Guidelines on lmplementation of Economic, Social and Cultural Rights in the ACHPR, para. 58, in *ibid*. para. 131.

international treaty that incorporates a detailed set of «collective or peoples' rights»[136]. Thus, from its Preamble, it is recognised that it is adopted:

> Reaffirming the pledge they solemnly made in Article 2 of the [OAU] Charter to eradicate all forms of colonialism from Africa, *to coordinate and intensify their cooperation and efforts to achieve a better life for the peoples of Africa* [...]; Taking into consideration *the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and peoples' rights* [and] recognizing on the one hand, that fundamental human rights stem from the attitudes of human beings, which justifies their international protection and on the other hand that *the reality and respect of peoples' rights should necessarily guarantee human* rights[137].

In this way, the mandate already contained in Decision 115 (XVI) of the Assembly of Heads of States and Government of the OAU of July 1979, where it was specified that the Draft Charter should enact both human rights and *peoples' rights*, was fulfilled[138]. This uniqueness was articulated in the final text of the ACHPR in the recognition of a detailed set of rights, such as: the right to equality of peoples; the right to their existence, self-determination and freedom from foreign domination; the right to the free disposal of their natural wealth and resources; the right to their economic, social and cultural development; the right to peace and national and international security; and the right to an adequate environment.

136 In the African system, both the Commission and the Court have understood that the concepts of *collective rights* and *peoples' rights* are comparable, since, as we will analyse below, the different meanings of the term *people* and the rights recognised to that effect are always predicated of a collectivity. Cf., e.g. AComHPR, Communication 276/03, *Centre For Minority Rights Development (Kenya) And Minority Rights Group (On Behalf Of Endorois Welfare Council) v. Kenya* (25 November 2003), para. 75; Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria* (27 October 2001), paras. 63-68; Communication 276/03, *Centre for Economic and Social Rights (CESR) v. Nigeria* (27 October 2001), paras. 63-68. 63-68; Communication 276/03 *Centre For Minority Rights Development (Kenya) And Minority Rights Group (On Behalf Of Endorois Welfare Council) v. Kenya* (25 November 2009), para. 149. In any event, African doctrine has significantly preferred the term *peoples' rights* to *collective rights.*

137 ACHPR Preamble, paras. 4-6.

138 Thus, according to the first paragraph of the ACHPR, it is adopted «recalling Decision 115 (XVI) of the Assembly of Heads of State and Government at its Sixteenth Ordinary Session held in Monrovia, Liberia, from 17 to 20 July 1979 on the preparation of «a preliminary draft on an African Charter on Human and *Peoples' Rights*, providing inter alia for the establishment of bodies to promote and protect human and *peoples' rights*» (emphasis added).

In this sense, we cannot fail to cite Mbaye's reflections on the importance of community in African culture and tradition. Thus, for the author:

> Law is not conceived of as a kind of sword placed in the hands of the individual to enable him to defend himself against the group. Rather, it is seen as a set of rules protecting the community of which the individual is a part [...] this African conception of law and human rights should not be interpreted as denying the rights of the individual. *On the contrary, in traditional African society, if the privileged subject of law is the community, the individual keeps his freedom and the specificities of his rights.* It is by a kind of non-definitive renunciation –which he can return to– that the individual is diluted before the community from which he expects in return the satisfaction of his fundamental needs (M'Baye, 1992: 187; Fernández de Casadevante Romaní, 2011: 279).

These should be read in conjunction with those dedicated by Heyns, who, in this respect, adds that:

> clearly, much of the motivation for the recognition of «peoples' rights» lies in the fact that entire «peoples» have been colonised and exploited in African history (Heyns, 2004: 609).

In my opinion, these two statements should not be understood in discordant terms. Thus, the basis of such precepts is to protect and influence the articulation of the community values of *traditional African society,* which, to a large extent, have been curtailed as a result of *colonialism*. In the same vein, I consider that the African Commission pronounced itself in the case of *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*. Thus, by issuing for the first time a pronouncement on article 21 ACHPR –a provision that recognises the right of peoples to the free disposal of their natural wealth and resources– in the words of this organ;

> *the origin of this provision may be traced to colonialism*, during which the human and material resources of Africa were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation. *The drafters of the [African] Charter*

> obviously *wanted* to remind African governments of the continent's painful legacy and *restore co-operative economic development to its traditional place at the heart of African* Society[139].

However, the concept of *people* is not defined throughout the ACHPR, an issue that has led to many divergences in African doctrine (Kiwanuka, 1988: 86-100; Dersso, 2006: 360-364). This is nothing more than a regional extrapolation of the existing controversy over the different meanings of this term in International Law, as well as its –far from simple– differentiation from concepts such as *indigenous population/people*[140] or *minority* (Chinchón Álvarez, 2019: 243-257)[141]. In this respect, the words of Ouguergouz, who, analysing the preparatory works of the Charter, establishes that in the African system the concept of *people* must be understood as «a chameleon-like term [...] whose content varies in nature according to the right which is to be implemented» (Ouguergouz, 2003: 211). In fact, this early interpretation has been adopted by the Court, stating that:

> In general terms, that the Charter does not define the notion of *people*. In this regard, the point has been made that the drafters of the Charter deliberately omitted to define the notion in order to permit a certain flexibility in the application and subsequent interpretation by future users of the legal instrument, the task of fleshing out the Charter being left to the human rights protection bodies[142].

Such flexibility in the interpretation and application of the term *people* has been given concrete expression by the Commission in at least four mean-

139 See AComHPR, Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria,* para. 56 (emphasis added).

140 Both the Commission and the Court use the terms *indigenous people, indigenous population,* and even *indigenous community* interchangeably. Cf., e.g., App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), paras. 64; 106; 112; 127. In the same vein, cf. ACHPR, Communication 276/03, *Centre For Minority Rights Development (Kenya) And Minority Rights Group (On Behalf Of Endorois Welfare Council) v. Kenya* (25 November 2003).

141 On the distinction in International Law between the concepts of «people», «indigenous population» and «minority».

142 *Vid*. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 64.

ings: as the entire population of a state[143]; as a people under colonial domination[144]; as an identity subgroup in relation to the state population as a whole[145]; and as an indigenous population[146].

However, the African Court, until the most recent judgment *Bernard Anbataayela Mornah v. Republic of Benin & 7 others* of December 2022, had only ruled on the concept of people in the sense of indigenous population. It was therefore unavoidable to refer to the case *African Commission on Human and Peoples' Rights v. Republic of Kenya*; a case that arose from the forced eviction of the Ogiek indigenous people from their ancestral lands located in the Mau Forest by the Kenyan government[147]. Thus, the Court, making use of articles 60 and 61 ACHPR, draws on the criteria adopted by the African Commission's Working Group on Indigenous Populations[148], as well as the work of Martínez Cobo as United Nations Special Rapporteur on Minority Issues[149], to establish that there are four relevant factors for a given population to be considered indigenous and, therefore, to be recognised as having the respective rights of the ACHPR:

1. Priority in time in the occupation and use of a territory.
2. Voluntarily perpetuated cultural distinction.

143 Cf., e.g. AComHPR, Communication 227/99, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda,* 29 May 2003, para. 95; Communication 147/95-149/96 *Sir Dawda K. Jawara v. The Gambia*, 11 May 2000, para. 73.

144 Cf., e.g. AComHPR, Communication 155/96 *Social And Economic Rights Action Center (SERAC) And Center For Economic And Social Rights (CESR) v. Nigeria* (27 October 2001), para. 56.

145 Cf., e.g. AComHPR, Communication 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v. Sudan,* paras. 219 *et seq* (27 May 2009); Communication 266/03 *Kevin Mgwanga Gunme et al v. Cameroon* (27 May 2009), para. 179. It is worth noting the words of the Commission in the first of these cases when stating that «in States with mixed racial composition, race becomes a determinant of groups of 'peoples', just as ethnic identity can also be a factor. *In some cases groups of 'a people' might be a majority or a minority in a particular State. Such criteria should only help to identify such groups or sub groups in the larger context of a States' wholesome population*» (emphasis added).

146 Cf., e.g. AComHPR, Communication 276/03 *Centre For Minority Rights Development (Kenya) And Minority Rights Group (On Behalf Of Endorois Welfare Council) v. Kenya* (25 November 2009), paras. 136-162.

147 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), paras. 6-9.

148 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya, Judgment* (26 May 2017), para. 105. In particular, «Advisory Opinion Of The African Commission On Human And Peoples' Rights On The United Nations Declaration On The Rights Of Indigenous Peoples, adopted by The African Commission On Human And Peoples' Rights At Its 41st Ordinary Session Held In May 2007».

149 *Ibid*. para. 106.

3. Self-identification, as well as recognition by state authorities or other groups of their distinctiveness as a collective.
4. Subjection to discrimination, marginalisation or subjugation, whether present or past[150].

However, in an ambiguous manner, this concept corresponds exactly to that adopted by the Daes Rapporteur, without any reference to her work in that decision. Likewise, we find ourselves with a definition that is more restrictive than that set out by Martínez Cobo and by the African Commission, as the former do not require recognition by other groups, or by state authorities, of their distinctiveness as a collectivity (Martínez Cobo, 1987)[151]. Nor does it require priority in the occupation and use of the territory. In this respect, the Commission goes so far as expressly to establish that:

> *in Africa, the term indigenous populations does not mean «first inhabitants»* in reference to aboriginality as opposed to non-African communities or those having come from elsewhere. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as indigene to the Continent[152].

Therefore, I can conclude that the different organs of the African system are interpreting in a divergent manner what is to be understood by *indigenous population/people* in order for their respective ACHPR rights to be recognised. In fact, there have been certain nuances in the articulation of this concept throughout the Commission's jurisprudence, although never to the extent of providing a concept as restrictive as the one adopted by the Court

150 *Ibid*. para. 107.

151 Compare with Martínez Cobo, E/CN.4/Sub. 2/1986/7/Add.4, paras. 379-381; ACHPR, «*Avisory Opinion Of The African Commission On Human And Peoples' Rights On The United Nations Declaration On The Rights Of Indigenous Peoples»,* 2007, p. 4, both cited by the Court and available respectively at https://undocs.org/sp/E/CN.4Sub.2/1986/7/Add.4 and https://www.achpr.org/presspublic/publication?id=49 (Accessed on: 03.03.2023); with E. I. Desa, «Working Paper on the concept of indigenous people», 1996, Doc. E/CN.4/Sub.2/AC.4/1996/2, paras. 60 and 69, available at https://digitallibrary.un.org/record/236429 (Accessed on: 03.03.2023).

152 *Vid*. AComHPR, *Advisory opinion of the African Commission on Human and People's Rights on the United Nations Declaration on the Rights of Indigenous,* 41st Ordinary Session held in May 2007 in Accra, Ghana, para. 13 (emphasis maintained).

(Cartes Rodríguez, 2022). In any case, at this point I consider it appropriate to bring in the words of Viljoen, who reminds us that:

> *The exercise of tagging* a group or claim as «indigenous» *should not take up all our time and energy*. Instead of the conceptual strait-jacket of a meta-narrative of indigeneity, the *focus* should be *on the claims of all marginalized groups*, as they arise in a particular context. The diversity of these claims and their resolutions further belie a one-size-fits-all approach (Viljoen, 2012: 232).

Turning to the material content of the rights of the peoples, in this judgment, having recognised the Ogiek people's status as an indigenous population on the basis of the criteria set out above, the Court proceeds to analyse, for the first time, the allegations of violations of precepts 8, 14, 17, 21 and 22 of the African Charter[153]. This issue will be examined in the following paragraphs because of its importance.

With regard to the first of these, a precept that recognises the right to property, and around which the Court builds its arguments, the judicial body establishes that, although Article 14 is found in the part of the Charter dedicated to individual rights, this right must also be understood and recognised in its collective aspect[154]. In this regard, the Court refers to the United Nations Declaration on the Rights of Indigenous Peoples of 13 September 2007 (Viljoen, 2012: 229-230)[155] to determine that such peoples, as a collectivity, have certain rights over the land they have traditionally inhabited, including the right to occupy, use and enjoy it[156]. Furthermore, despite the fact that Article 14 adds that this right may be subject to restrictions in the general interest of the community, the Court, again, uses the criteria of proportionality and necessity to determine that the Kenyan State had not provided sufficient evidence to justify the denial of access to the Mau Forest to the Ogiek people as a measure

153 The Court also considers that Article 1 (general obligations of States Parties) and Article 2 (principle of non-discrimination) of the African Charter have been violated.

154 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 123.

155 Specifically, Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly on 13 September 2007 in its resolution 61/295 of 13 September 2007 in New York. *Ibid*. paras. 126 and 127. On the reluctance of African states to certain points of this declaration, see Viljoen.

156 Cf. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 128.

that meets this requirement[157]. It should not go unnoticed that the ACtHPR holds that the elements of the right to property attributed to the Ogiek are both *usus* –the right to use– and *fructus* –the right to enjoy its fruit– which in turn presupposes, in the Court's words, the right of access to and occupation of the land. However, it does not expressly pronounce on *abusus* –the right to alienate or transfer it–[158]. This pronouncement must be read in conjunction with the judgment on reparations adopted in 2022, where the Court orders either restitution of the land to the Ogiek or adequate compensation if the former is not possible on the basis of objective and reasoned criteria[159].

For its part, in order to reaffirm the violation of Article 14, the Court adds that the Ogiek people were not previously consulted regarding the expulsion from their lands[160], but neither does it analyse this point nor articulate a right to consultation in relation to Article 14. It can be maintained that, in this respect, at least in the current jurisprudence of the Court, the Inter-American system offers greater protection[161], as does the jurisprudence of the African

157 Indeed, the Court notes that «different reports prepared by or in collaboration with the Respondent on the situation of the Mau Forest also reveal that the main causes of the environmental degradation are encroachments upon the land by other groups and government excisions for settlements and ill-advised logging concessions». Moreover, «in its pleadings, the Respondent also concedes that the Mau Forest degradation cannot entirely be associated or is not associable to the Ogiek people». *Ibid*. para. 130.

158 Noting in this regard that «it follows, in particular from Article 26 (2) of the [UN] Declaration, that the rights that can be recognised for indigenous peoples/communities on their ancestral lands are variable and do not necessarily entail the right of ownership in its classical meaning, including the right to dispose thereof (abusus). [...] This provision places greater emphasis on the rights of possession, occupation, use/utilization of land». *Ibid*. para. 127.

159 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment on Reparations (23 June 2022), paras. 116 and 117.

160 Cf. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 131.

161 The Inter-American Court has gone so far as to establish that «in the case of large-scale development or investment plans [...], the State has the obligation not only to consult [...], but also to obtain their free, informed and prior consent, in accordance with their customs and traditions». Case of the *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 November 2007, Series C No. 172, para. 134. Likewise, it should be noted that in the jurisprudence of the Inter-American Court, having had the opportunity to be more developed, we can find additional elements that provide more guarantees than in the jurisprudence of the African Court, among which is the recognition of the State's duty to delimit indigenous lands; the right to have an adequate procedure for the titling of lands, within a reasonable period of time; or the obligation to carry out environmental impact studies. Cf. IACourtHR, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment of 31 August 2001, Series C No. 79, paras. 152-155; Case of the *Yakye Axa Indigenous Community v.*

Commission (Cartes Rodríguez, 2022). In any case, if we look again at the judgment on reparations, the Court does appear to explore this point in depth, maintaining that «it is a basic requirement of International Human Rights Law that indigenous peoples, like the Ogiek, be consulted in all decisions and actions that affect their lives»[162].

With regard to Article 8 –the provision enshrining freedom of conscience and religion– the Court determined that, similarly to the previous provision, despite being located in the part of the Charter dedicated to individual rights, this article includes the right to worship collectively, the right to establish and maintain places for this purpose, as well as the right to hold ceremonies in accordance with the precepts of each religion or belief[163]. For its part, specifying this pronouncement with respect to indigenous populations, the ACtHPR points out that for these populations, the practice of their religion is intimately related to access to land and the natural environment. This is the case of the Ogiek community, for whom the Mau forest is their spiritual place, the place where their sacred sites are located, and also where they bury their dead in different ceremonies[164]. Therefore, the unjustified expulsion from such lands, requiring the submission of an application to the government authorities and the payment of licenses in order to enter them, is a violation of Article 8 ACHPR[165].

In relation to Article 17 –right to culture–, like Articles 8 and 14, the Court recognises its collective aspect[166]. Likewise, the ACtHPR interprets the term culture in a broad sense, referring to all aspects of the way of life of a

Paraguay, Merits, Reparations and Costs, Judgment of 31 August 2001, Series C No. 79, paras. 152-155. *Paraguay*, Merits, Reparations and Costs, Judgment of 17 June 2005; Series C No. 125, paras. 82-98; Case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits and Reparations, Judgment of 27 June 2012, Series C No. 245, paras. 204-207.

162 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment on Reparations (23 June 2022), paras. 142-144.

163 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 163. In this regard, at the foot of the page, the Court refers to Article 6 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, adopted by the United Nations General Assembly on 25 November 1981 [Resolution 36/55]. Cf. footnote 43.

164 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), paras. 164-165.

165 *Ibid*. paras 166-169.

166 *Ibid*. para. 177.

given group, including its language, symbols, rituals, shared system of values, as well as certain economic activities[167]. In relation to indigenous peoples –referring to the United Nations Declaration on the Rights of Indigenous Peoples (2007)[168], and General Comment No. 21 of the CESCR[169]–, the Court underlines the importance of the preservation of culture for indigenous peoples, highlighting the frequent practices of discrimination or persecution to which they are subjected, as well as their vulnerability[170]. In the specific case of the Ogiek population, the Court determined that their traditions and values are closely related to the Mau Forest and that, however, as previously analysed, the Kenyan State had expelled them without taking into account the criteria of necessity or proportionality, which gives rise to a violation of Article 17 ACHPR[171].

With regard to Article 21 –the right of peoples to freely dispose of their natural wealth and resources– the ACtHPR, without carrying out a detailed analysis, maintains that, insofar as the Kenyan State has violated the Ogiek people's right to the occupation, use and enjoyment of the Mau forest, this, in turn, implies the impossibility of enjoying the food located in those territories, which results in a violation of Article 21 ACHPR[172].

For its part, with regard to the right to development enshrined in article 22 ACHPR –the first treaty to recognise this right– the Court, again, without going into further detail, refers to Article 23 of the United Nations Declara-

167 *Ibid*. para. 179.

168 Specifically, Articles 8(1) and 8(2)(a), which provide that «indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture»; «States shall establish effective mechanisms for the prevention of and redress for any action which has the aim or effect of depriving them of their integrity as distinct peoples or of their cultural values or ethnic identity».

169 Specifically, paragraph 36, which recognises that «the strong collective dimension of the cultural life of indigenous peoples is indispensable for their existence, well-being and integral development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired». *Vid*. Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, Right of everyone to take part in cultural life (article 15, paragraph 1 (a), of the International Covenant on Economic, Social and Cultural Rights, adopted on 21 December 2009.

170 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), paras. 180-181.

171 *Ibid*. para. 182-190.

172 *Ibid*. para. 201.

tion on the Rights of Indigenous Peoples[173], in order to then affirm that the expulsion of the Ogiek people from their ancestral lands and their non-participation in the elaboration and implementation of health, housing and other economic and social programmes that affect them, is a violation of their right to economic, social and cultural development[174].

Finally, although it was not one of the precepts alleged in the application, the ACtHPR, in an *obiter dictum* when dealing with the right to the free disposal of natural wealth and resources, ruled on Article 20 of the Charter –the right to self-determination of peoples–. In this regard, the judicial body specifies that, although the concept of people contained in the ACHPR is applicable to groups or communities identified as part of the population that constitutes a state, «such groups or communities do not call into question the sovereignty and territorial integrity of the State without the latter's consent»[175]. For its part, the Commission, going a step further, has specified in its jurisprudence that the exercise of the right of self-determination enshrined in the Charter can be realised for the different peoples within a State in various forms of government, such as federalism, local government, self-government, or confederation (right of internal self-determination)[176]. However, it has also ambiguously stated in various pronouncements that this applies as long as there is no concrete evidence of human rights violations to such an extent *that the territorial integrity of the state must be called into question* (Cartes Rodríguez, 2022).

Along with the aforementioned *African Commission on Human and Peoples' Rights v. Republic of Kenya,* and turning to the most recent case law of the Court, I cannot fail to mention in this regard the case of *XYZ v. Republic of Benin (App.010/2020). This case concerns* the alleged illegality of the constitutional reform adopted in Benin following the elections of 2019[177]. The Court's

173 This provision states that «indigenous peoples have the right to determine and develop priorities and strategies for the implementation of their right to development. In particular, indigenous peoples have the right to participate actively in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions».

174 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 210.

175 *Ibid*. para. 198.

176 Cf., e.g. AComHPR, Communication 266/03, *Kevin Mgwanga Gunme et. al., v. Cameroon* (27 May 2009), paras. 190 and 191.

177 It should be recalled that, according to the case law of the ACtHPR, there are four cases brought against the State of Benin, based on the alleged illegality of the preparation and conduct of the

ruling, after recognising the violation of various precepts, including the right to information (Article 9.1 ACHPR), the principle of judicial independence (Article 26 ACHPR), and the obligation to ensure that the process of constitutional reform is based on national consensus (Article 10.2 ACDEGG), recognises the violation of various precepts, including the right to information (Article 9.1 ACHPR), the principle of judicial independence (Article 26 ACHPR), and the obligation to ensure that the process of constitutional reform is based on national consensus (Article 10.2 CADBG)[178], the ACtHPR determined that, on the one hand, the right to economic, social and cultural development, enshrined in Article 22.1 ACHPR, and, on the other hand –and for the first time in its jurisprudence– the right to peace and national security, enshrined in Article 23.1 ACHPR, had been violated.

With regard to the right to development, the judicial body, specifying its content with respect to what was already set out in the *African Commission v. Republic of Kenya* case, and taking as a reference the Declaration on the Right to Development, adopted by the UNGA in 1986[179], points out that:

> the right to development is an inalienable human right by virtue of which *every human person* and *all peoples* have the right to participate in and to contribute to economic, social and cultural development in which the political development is a part[180].

It goes on to state that, since the constitutional reform took place without a national consensus, in the Court's words, such a course of action risks constituting a major disruption of Benin's economic, social and cultural development, in violation of Article 22(1) of the Charter[181].

It is worth mentioning that the ACtHPR does not expressly state which meaning of the term *people* it uses when articulating this right. However, we

2019 elections, on the constitutional reform undertaken that same year, as well as on the recent legislative amendments made to its legal system: *XYZ v. Republic of Benin (059/2019), Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin (062/2019), Houngue Eric Noudehouenou v. Republic of Benin,* and *XYZ v. Republic of Benin (010/2020).*

178 Cf. App. No. 010/2020, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), paras. 58-121.

179 Cf. Declaration on the Right to Development, adopted by the UN General Assembly in its Resolution 41/128 of 4 December 1986 in New York.

180 *Ibid*. para. 125.

181 *Ibid*. para. 127.

understand from its pronouncement that it refers to the entire population of the State. This definition of *people* has been used by the Commission in cases such as *Sir Dawda K. Jawara v. Gambia* or *Democratic Republic of Congo v. Burundi, Rwanda, Uganda*[182]. In any case, it should be remembered that, with respect to the right to development, the Charter not only recognises its collective aspect, but also, as stated in Article 22.2 ACHPR, its individual aspect. The paragraph of the Declaration on the Right to Development to which we have just referred, and to which the Court expressly refers in its reasoning, makes the same point. One might ask then whether what the Court considers to have been violated is the right to development articulated with respect to *each of the individuals* who make up the State of Benin. However, I believe that such an interpretation is ruled out insofar as, with the exception of the mention in the aforementioned paragraph, the Court bases its (brief) pronouncement on the basis of Article 22.1 (collective aspect) and not 22.2 ACHPR.

As for the right to peace, I should begin by recalling that the African Charter, together with the right to development, is also the first treaty to expressly recognise this right (Art. 23 ACHPR). The Court, in pronouncing for the first time on this right, begins by pointing out that it entails:

> the absence of worry, turmoil, conflict or violence. Its symbiosis with security contributes to social well-being. Indeed, the assurance of living without danger, without the risk of being affected in its physical integrity and its heritage gives citizens the confidence of national stability[183].

Likewise, the Court continues, taking into account the terms of interdependence and indivisibility, respect for other human rights is a tool for consolidating the right to peace, considering, in this regard, it emphasises, «the full range of rights», not only, therefore, civil and political rights. Thus, in the concrete case, the ACtHPR points out that, insofar as the Beninese constitutional reform has been carried out without the aforementioned national consensus, this is linked to the prohibition of the principle of discrimination and inequality. Principles that, if not respected, can lead to significant human rights violations, and there-

182 Cf. AComHPR, Communication 147/95-149/96, *Sir Dawda K. Jawara v. The Gambia* (11 May 2000), para. 73; Communication 227/99, *Democratic Republic of Congo v. Burundi, Rwanda, Uganda* (29 May 2003), para. 95.

183 *Ibid*. para. 133.

fore represent a direct threat to peace[184]. Thus, taking into consideration such reasoning, the Court concludes that the State of Benin has committed a violation of Article 23(1) ACHPR. Again, without specifying the meaning of the term *people*, I understand that it also refers to the entire population of the State.

In any case, in order to examine the articulation of this right in greater depth, we must turn to the cases of *Houngue Eric Noudehouenou v. Republic of Benin*[185], and *XYZ v. Republic of Benin (App. 059/2019)*[186]; also centred on the various legislative reforms that have been taking place in the State of Benin in recent years. In both cases, the violation of Article 23(1) of the Charter was dismissed insofar as the Court considered that the applicant had failed to provide sufficient evidence.

Turning to the first of the cases, the plaintiff alleges that, following the 2019 municipal and parliamentary elections, shots were fired at demonstrators, resulting in deaths and disturbances. However, although, as mentioned above, the Court rejects the allegation for lack of evidence, the judicial body adds that «the record shows that the disturbance *was temporary and localized*, which cannot constitute a breach of peace and public security»[187]. From which the threshold the Court will maintain in order to consider this right to have been violated in future pronouncements could be derived.

For his part, in relation to the case *XYZ v. Republic of Benin (App. 059/2019)*, the applicant articulates his argument on the basis of the reform of Benin's electoral legislation. Again, although the Court dismisses it for lack of evidence, it incorporates, as a guideline for future rulings, that:

> *serious and massive violations of human rights, especially in the electoral context, can lead to the deterioration of national and international peace and security*. It recalls that situations in which the poor organisation of elections, accompanied by serious and massive violations of human rights, led to disturbances that caused enormous loss of human life and material damage, are in the public domain[188].

184 *Ibid*. para. 134.

185 Cf. App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020).

186 Cf. App. 059/2019, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020).

187 *Vid*. App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 113.

188 Cf. App. 059/2019, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 30.

To all of the above, we must add the recent case of *Bernard Anbataayela Mornah v. Republic of Benin, Burkina Faso, Republic of Cote D'Ivoire, Republic of Ghana, Republic of Mali, Republic of Malawi, Republic of Tanzania, Republic of Tunisia*. This is the first case in which the judiciary pronounced for the first time on the concept of a people under colonial domination. Thus, to recapitulate, only in this case and in *African Commission on Human and Peoples' Rights v. Republic of Kenya* has the Court so far specified the meaning of this concept.

The case of *Bernard Anbataayela Mornah v. Republic of Benin & 7 others* arises from Morocco's reincorporation into the African Union in 2017, since, as a result of this event, the applicant party has submitted to the ACtHPR the demand to decolonise Western Sahara in accordance with International Law in force[189]. To this end, the allegation is, firstly, the obligation of the respondent States to defend the sovereignty, territorial integrity and independence of Western Sahara in accordance with the Constitutive Act of the AU and the ACHPR. Secondly, the obligation to prevent Morocco from continuing to violate the Saharawi people's rights to peace, to dispose of their natural wealth and resources, and to their economic, social and cultural development –all rights recognised in the ACHPR–. And thirdly, and finally, the obligation for a binding resolution to be adopted within the African Union against this situation, in which the appropriate measures should be adopted[190]. As Morocco is not a State party to the African Charter on Human and Peoples' Rights –in fact, it is the only African State that has not yet ratified it– and is therefore not a party to the Protocol establishing the ACtHPR, the complaint was directed against all the States that had deposited the additional declaration of competence in respect of individuals and NGOs at the time of the filing of the complaint[191].

Turning to its ruling on the merits, the Court begins by stating that it is going to rule exclusively on the allegation of the violation of the right to self-determination, while the other allegations derive from this[192]. In this

189 Cf. App. 028/2018, *Bernard Anbataayela Mornah v. Republic of Benin, Burkina Faso, Republic of Cote D'Ivoire, Republic of Ghana, Republic of Mali, Republic of Malawi, Republic of Tanzania, Republic of Tunisia,* Case Summary, paras. 9-11.

190 *Ibidem*.

191 With the exception of Rwanda, which withdrew its declaration under Art. 34.6 on 24 February 2016, which, as I have had the opportunity to point out in chapter two *below,* took effect twelve months after that date.

192 Cf. App. 028/2018, *Bernard Anbataayela Mornah v. Republic of Benin & 7 others,* Judgment (22 September 2022), para. 286.

respect, the Court specifies the importance of this right for the continent and for African society[193]. This is reflected in the fact that Article 20 of the African Charter offers broader protection than the first common article of the ICCPR and the ICESCR. Thus, in the words of the Court, the Charter intertwines the right to self-determination with the right to existence of peoples, which translates into a right to survival as a people. Furthermore, the ACtHPR explicitly incorporates the right of colonised or oppressed peoples to free themselves from the bonds of domination and the right to obtain assistance from States Parties in their struggle for such freedom[194]. Moreover, in accordance with general International Law, the ACtHPR recognises that the right of colonial peoples to self-determination acquires the status of a norm of *jus cogens*, thus giving rise to obligations *erga omnes*.

On the basis of such a theoretical framework, the Court distinguishes between Morocco's international obligations and the obligations of the other African states. Although the Court does not have jurisdiction *ratione personae* over the Moroccan state, it goes so far as to proclaim that the Saharawi Arab Democratic Republic is in a situation of colonial domination, as has been maintained by the AU organs themselves, as well as by the ICJ[195]. This, in turn, is incompatible with the content of Article 20 of the African Charter[196].

Having stated the foregoing, the Court proceeds to determine whether it can be maintained that the respondent States have violated the aforementioned Article 20 by their actions. First, the Court holds that, although Article 20 of the Charter imposes a duty on the respondent States to assist the Sahrawi people in their struggle to achieve full enjoyment of their right to self-determination, it does not require them to adopt a list of specific actions. It is therefore up to the respective states to choose the type of measures to enable the realisation of this right. Among others, as has been communicated by the Respondent States, support of diplomatic efforts to find political solutions within the framework of the AU and the UN[197].

On a second level, in accordance with Article 29 of the Constitutive Act of the AU, the Court holds that the admission of a new State is primarily a

193 *Ibid*. para. 289-290.
194 *Ibid*. para. 295.
195 *Ibid*. paras 301-302. For which cite ICJ, *Advisory Opinion on Western Sahara* (1975), para. 162.
196 *Ibid*. para. 303.
197 *Ibid*. paras 313-315.

matter for the AU Assembly, as is assessing whether or not the candidate State complies with the objectives and principles of the constituent treaty. Moreover, the individual decision of each State does not prejudge the final decision. Therefore, since the Assembly has a legal personality distinct from that of the individual member states, it is not possible to attribute international responsibility to the defendant states[198].

In any event, the ACtHPR concludes that such an admission decision could indeed be incompatible with the Constitutive Act of the AU[199]. However, the Court determines that it does not have jurisdiction *ratione materiae* over the said treaty[200]. On the other hand, this extreme point serves to begin to establish the limits to the very broad competence *ratione materiae* recognised by the judicial body itself.

Thus, in view of the above, the ACtHPR closes with the following reminder paragraph:

> The Respondent States, and indeed, all State parties to the Charter and the Protocol, as well as all Member States of the AU, have the responsibility under International Law, to *find a permanent solution to the occupation and to ensure the enjoyment of the inalienable right to self-determination of the Sahrawi people* and not to do anything that would give recognition to such occupation as lawful or impede their enjoyment of this right[201].

We are therefore faced with a significant pronouncement, as it has served to specify the content of the right to self-determination of peoples under colonial domination contained in Article 20 of the ACHPR, the obligations that fall on the colonial state and on the rest of the African states, and the extent of the judicial body's competence *ratione materiae*. To this must be added the important clarifications made by the ACtHPR with respect to the scope *ratione loci*, already analysed in the second chapter, and to which I refer.

198 *Ibid*. paras 316-320.

199 Thus, its third article includes among its objectives the defence of state sovereignty and the territorial integrity of its Member States (b), as well as the protection and promotion of human and peoples' rights (h). SADR has been a Member State of the OAU since the 1980s. For this reason, Morocco, a founding Member State, decided to leave the African organisation, to which it returned in 2017.

200 *Ibid*. para. 320.

201 *Ibid*. para. 323 (emphasis added).

V. DEATH PENALTY

In addition to the aforementioned case law, it should be noted that, although the ACHPR makes no mention of the death penalty, the ACtHPR has ruled on this issue in conjunction with Article 4 of the said treaty[202]. This is further evidence of the *pro homine* position that the judicial body has been adopting.

In this regard, I should begin by referring to the case of *Ally Rajabu and Others v. United Republic of Tanzania,* which arises from the death sentence imposed on the applicants after they were accused of murder before the domestic courts. Thus, in this case, after the ACtHPR acknowledged the violation of the right to a fair trial enshrined in Article 7 of the ACHPR, the judicial body made its first pronouncement on the question of the death penalty[203].

In this regard, the Court begins by recognising that, although there is a global trend towards the abolition of the death penalty at the current stage of International Law, there is no norm of *jus cogens* which imposes an absolute prohibition of the death penalty[204]. Citing as an example of a global trend towards abolition of the death penalty the *Second Optional Protocol to the International Covenant on Civil and Political Rights*, adopted by the UN General Assembly in its Resolution 44/128 of 15 December 1989, which abolishes the death penalty except for the most serious military offences committed in times of war[205].

While *Additional Protocol No. 6 to the ECHR* of 28 April 1983 provided for the abolition of the death penalty in times of peace[206], *Additional Protocol No. 13 to the ECHR* of 3 May 2002 established the abolition of the death pen-

202 Precept enacting that: «Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right».

203 Cf. App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania,* Judgment (28 November 2019), paras. 59-91.

204 *Ibid*. para. 96.

205 *Ibidem*.

206 Cf. *Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty,* adopted in Strasbourg on 28 April 1983 and entered into force on 1 March 1985. With the exception of Russia, all Council of Europe Member States have ratified the Protocol. Information available at: https://www.coe.int/en/web/conventions/full-list (Accessed on: 03.03.2023).

alty under any circumstances[207]. The reference precept in the Inter-American system is Article 4 of the ACHR, which establishes different limitations on the imposition of the death penalty. Thus, in accordance with it:

> 2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. 3. The death penalty shall not be reestablished in states that have abolished it. 4. In no case shall capital punishment be inflicted for political offenses or related common crimes. 5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. 6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

In the case of the African system, as we have seen, Article 4 of the Charter does not expressly mention the issue of the death penalty (Smit, 2004: 1-16; Chenwi, 2007; 2005: 89-104). However, the Court, in interpreting this provision, has determined that the central question is whether or not the decision imposing the penalty is *arbitrary*[208]. Thus, the ACtHPR has resorted to the pronouncements of the African Commission[209], the UN Human Rights

207 Cf. *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in All Circumstances,* adopted in Vilnius (Lithuania) on 3 May 2002, entered into force on 1 July 2003. To date, the number of States Parties to the Council of Europe that have ratified the latter instrument is 44. Information available at: https://www.coe.int/en/web/conventions/full-list (Accessed on: 03.03.2023).

208 Cf. App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania,* Judgment (28th November 2019), paras. 96 and 98.

209 Cf. AComHPR, *Communication 240/01, Interights Et Al. (On Behalf Of Mariette Sonjaleen Bosch) v. Botswana (20 November 2003), paras. 42-48; communication no. 137/94, 139/94, 154/96, 161/97, International Pen and Others (on behalf of Saro-Wiwa) v. Nigeria (*31 October 1998), paras 1-10 and 103; *Communication 223/98, Forum of Conscience v. Sierra Leone (*6 November 2000), para. 19. However, the Tribunal could have constructed a more complete ruling by referring to General Observation No. 3 on the African Charter on Human and Peoples' Rights on the Right to Life (paras. 22-26); the Study on the Question of the Death Penalty in Africa, prepared by the Work-

Committee[210], and the Inter-American Court[211], to maintain that the arbitrary nature of the death penalty must be determined on the basis of three guarantee criteria that must be met concomitantly: the death penalty must be provided for by law; it must be imposed by a competent court; and its imposition must comply with the guarantees of due process[212].

Special attention has been devoted to the latter requirement, stating that the mandatory imposition of the death penalty in respect of the commission of certain offences –as is the case in Article 197 of the Tanzanian Penal Code[213]– does not meet this requirement, insofar as it:

> [It] does not permit a convicted person to present mitigating evidence and therefore applies to all convicts without regard to the circumstances in which the offence was committed. [...] The court is thus deprived of the discretion, which must inhere in every independent tribunal to consider both the facts and the applicability of the law, especially how proportionality should apply between the facts and the penalty to be imposed. ln the same vein, the trial court lacks discretion to take into account specific and crucial circumstances such as the participation of each individual offender in the crime[214].

ing Group on the Death Penalty in Africa and adopted by the African Commission in 2011; the Kigali Framework Document on the Abolition of the Death Penalty in Africa of September 25, 2009; or the Cotonou Framework Document towards the Abolition of the Death Penalty in Africa of April 15, 2010.

210 Cf. HRC, Communication No. 806/1998, *Eversley Thompson v. St. Vincent & the Grenadines* (18 October 2000), para. 8.2.

211 Cf. IACtHR, Case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Merits, Reparations and Costs, Judgment of 21 June 2002, Series C n.º 94, para. 100; Case of *Boyce et al. v. Barbados*, Preliminary Objection, Merits, Reparations and Costs, Judgment of 20 November 2007, Series C n.º 169. For an analysis of the jurisprudence of the Inter-American Court on the death penalty, see, IACtHRJ, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos n.º 1: Pena de muerte*, 2017.

212 Cf. App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania,* Judgment (28 November 2019), para. 104.

213 According to this provision: «any person convicted of murder shall be sentenced to death».

214 Cf. App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania,* Judgment (28th November 2019), para. 109. In this regard, the Court cites HRC, Communication No. 845/1999, para. 109.*Rawle Kennedy v. Trinidad and Tobago (*2 November 1999), para. 7.3; HRC, Communication n.º 913/2000, *Lawrence Chan v. Guyana* (31 October 2005), para. 6.5. Likewise, the Court, using Article 60 of the African Charter, refers to certain human rights treaties to justify the tendency to impose such restrictions on the imposition of the death penalty (para. 113).

Moreover, the Court, recognising the link between the fourth and fifth articles of the African Charter[215], determines that, in addition to complying with the three aforementioned requirements, the method of execution of the sentence must guarantee, on the one hand, the least possible suffering, and, on the other hand, avoid degrading actions against the condemned person; among which the ACtHPR understands death by hanging to be included[216]. However, unlike the African Commission, the Court has so far avoided requiring the death penalty to be linked to the commission of the most serious crimes[217], as well as expressly excluding its imposition in the case of minors and pregnant women[218]. The latter requirement is recognised in the Maputo Protocol and the African Children's Charter[219].

It is worth mentioning that Judge Blaise Tchikaya, in his separate opinion in the aforementioned case of *Ally Rajabu and Others v. United Republic of Tanzania*, maintains that Article 4 of the African Charter should have been interpreted as not allowing in any way the imposition of the death penalty, as it is «an inhuman treatment and involves psychological torture»[220]. In fact,

215 According to Article 5 of the ACHPR, «every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited».

216 Cf. App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania,* Judgment (28 November 2019), paras. 118 and 119. In the same vein, cf. HRC, General Comment No. 20, 44th Session, 10 March 1992, para. 6; HRC, Resolution 2005/59, Question of Capital Punishment, 58th Session, 20 April 2005, para. 6; Inter-American Commission on Human Rights, Case of *Dave Sewell. Jamaica,* n.º 12.347, Report No. 76/02, Merits, 27 December 2002, para. 118.

217 Cf. AComHPR, *General Comment n.º 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4),* para. 24. In the same sense, art. 4.5 ACHR and art. 6.5 ICCPR.

218 This position differs from that held by the African Commission, which has gone so far as to include among those exempted from the death penalty, in addition to minors under 18 years of age, «pregnant or nursing women, elderly persons or persons with psycho-social or intellectual disabilities». *Vid.* AComHPR, *General Comment n.º 3 On The African Charter On Human And Peoples' Rights: The Right To Life (Article 4),* para.25.

219 In this regard, see, respectively, Articles 5.3 and 4.2(j) of the African Charter on the Child and the Maputo Protocol. In *Ally Rajabu and Others v. United Republic of Tanzania* the Court should have specified whether the applicants had reached the age of 18 at the time of the commission of the offence with which they are charged. On the contrary, nothing is specified. Thus, the Court seems to forget that it has jurisdiction *ratione materiae* over the two Treaties under Articles 3 and 7 of its founding Protocol. For a comparison with other human rights systems, in the same sense, see Art. 4.5 ACHR and Art. 6.5 ICCPR.

220 Cf. App. No. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania*, Separate Opinion by Judge Blaise Tchikaya (28 November 2019), para. 20.

in a change of jurisprudence[221], a similar position seems to be adopted by the Commission in *Interights & Ditshwanelo v. The Republic of Botswana*. A case in which, in ruling on the death sentence as a penalty for the murder committed by the caller, it held that:

> it would itself be arbitrary, given its previous decisions with respect to the death penalty, were the Commission suddenly to determine that the practice of the death penalty in Africa would in all cases be a violation of Article 4. However, given the «evolution of International Human Rights Law and jurisprudence, and State practice», [...] the Commission considers it increasingly difficult to envisage a case in which the death penalty can be found to have been applied in a way that is not in some way arbitrary. As a result, *it is difficult to conceive that, if called upon in future to do so, that the Commission will find that the death penalty, however it is executed, is any longer compatible with the African* Charter[222].

It will therefore be necessary to follow successive pronouncements of the Court to determine whether it follows the same jurisprudential evolution as the Commission. To date, this scenario is unlikely, since, in the second of the cases in which the ACtHPR has addressed this issue, *Amini Juma v. United Republic of Tanzania* –also concerning the application of Article 197 of the Tanzanian Penal Code, and where the applicant was sentenced to death for murder– the Court does not refer to the communication referred to[223], and follows the same line of jurisprudence already initiated in *Ally Rajabu and Others*[224]. Moreover, in that case, none of the judges presented separate or dissenting opinions[225]. In any case,

221 Thus, as stated by the ACtHPR in the case of *Ally Rajabu and Others*, the Court has followed a similar line to that initially adopted by the Commission, since «in the case of *Interights and Others (on behalf of Bosch) v. Botswana*, the African Commission on Human and Peoples' Rights has emphasised two requirements and these are, firstly, that the sentence must be provided for by law, and, secondly, that it must be imposed by a competent court. [...] With greater emphasis on due process, the Commission has also concluded in the case of *Forum of Conscience v. Siena Leone* that 'any violation of the right to life without due process amounts to arbitrary deprivation of life'» (paras. 99 and 100).

222 *Vid.* AComHPR, Communication 319/06, *Interights & Ditshwanelo v. The Republic of Botswana* (18 November 2015), para. 66 (emphasis added).

223 Nor was it alluded to in the case of *Ally Rajabu and Others v. United Republic of Tanzania*.

224 Cf. App. 024/2016, *Amini Juma v. United Republic of Tanzania*, Judgment (merits and reparations), 30 Sep 2021, paras 120-137.

225 Nor did Blaise Tchikaya, who was also one of the judges sitting on the Tribunal in that case. *Ibid*, p. 1.

I understand that the interpretation set out by the Court applies as a common minimum of the system for cases in which the executing State –in this case Tanzania– is not a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, since, if it were, Articles 3 and 7 of the constituent Protocol would empower the ACtHPR to apply this more protective content[226].

VI. WOMEN'S RIGHTS AND CHILDREN'S RIGHTS

Both women and children are vulnerable groups that require special protection under International Human Rights Law because of the greater risk of their rights being violated and because of the disadvantaged starting position they face. This is partly explained either by the position of historical and institutionalised discrimination in which they find themselves, in the case of women, or by the difficulties inherent in defending their rights, in relation to children. Thus, such vulnerability «is associated with a specific condition that allows the individual to be identified as a member of a certain group which, as a general rule, is in conditions of clear material inequality with respect to the majority group» (Beltrão *et al.*, 2014: 14). Bearing in mind the above, taking into account their differences, and bearing in mind their own autonomy in terms of the rights to which they are entitled, I will place them in a single section, insofar as, to date, only in one case –APDF & *IHRDA v. Republic of Mali*– has the Court ruled on the rights of women and minors as a central issue and in a joint manner. It also follows that I bring in this line of jurisprudence, not because of its quantitative, but because of its qualitative significance. This case also provides a glimpse of the broad competence *ratione materiae* of the Court –already mentioned in chapter two– which far transcends the ACHPR.

Having said that, and focusing on the aforementioned case, which arises from the adoption of a new Malian Family Law[227], the ACtHPR, for the first

226 In this regard, I refer to the discussion in chapter two, *infra*.

227 It is worth mentioning that in August 2009, the National Assembly of Mali passed a Family Law –more protective of the rights of women and children–, which, however, did not enter into force due to major protests organised by certain Islamic organisations. For this reason, a new Family Law was drafted and entered into force in 2011, which is the one before the Court. Cf. App. No. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment (11 May 2018), paras. 5-7.

time, ruled on certain precepts of the African Charter on the Rights and Welfare of the Child (ACRWC) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). In particular, and firstly, on the minimum age and the importance of consent to marriage. Secondly, on the inheritance rights of widows and children born out of wedlock. And thirdly, on the elimination of practices or traditions harmful to women and children (Kombo, 2019: 390-412; Ben Achour, 2019: 281-286; Dembele, 2020: 72-85)[228].

In this regard, I should begin by highlighting that in the present case, the ACtHPR adopts a remarkably protective position in which it safeguards human rights in the face of certain Islamic customs and laws that are widespread on the continent. Thus, with its legal construction, the Court makes it clear that the protection of the traditional values to which the African Charter itself alludes in some of its precepts –such as, for example, in Article 18 in relation to the family sphere– is subordinate, in any case, to respect for human rights. This position is similar to that adopted by the Commission, which has gone so far as to specify in its jurisprudence that domestic courts, when applying the *Shari'a,* must take into account the international human rights obligations that the respective state has undertaken, and, specifically, that its provisions cannot be applied to those who do not profess the Muslim faith. Otherwise, this would be a violation of Article 8 ACHPR (freedom of conscience and religion)[229].

Turning to the material content of the first of the issues raised, the minimum age for marriage in the contested Malian legislation was set at 16 for girls and 18 for boys[230]. The law also provided for certain cases in which, with the consent of the mother or father in the case of boys, or of the father alone in the case of girls, marriage was possible from the age of 15 years[231]. In this regard, on the basis of the African Children's Charter and the Maputo Proto-

228 Likewise, as pointed out in the second chapter, *infra*, this is one of the first cases in which, in contrast to the line of jurisprudence that had been maintained, the ACtHPR recognises the violation of precepts contained in treaties other than the ACHPR without linking them to the respective right contained in the Charter.

229 In this regard, see Communication 48/90-50/91-52/91-89/93, *Amnesty International, Loosli Bachelard Committee, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa v. Sudan* (15 November 1999), paras. 73-77.

230 Cf. App. No. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment (11 May 2018), paras. 59 and 77.

231 *Ibid*. paras. 60 and 77.

col, the Court held that the minimum age for marriage, without exception, is 18 years[232]. The Court invoked Article 6(b) of the Maputo Protocol, which sets the minimum age of marriage for women at 18 years, and Articles 2 –definition of a child as a human being under 18 years of age– and 4(1) –principle of the best interests of the child– of the African Children's Charter[233].

Thus, the African Court adopts a more protective position than its regional counterparts (Díez Peralta, 2019: 138 *et seq.*), and than the UN Committees on the Rights of the Child and on the Elimination of Discrimination against Women, insofar as the latter have recently pronounced themselves in favour of allowing, under certain exceptions, child marriage above the age of 16. Thus, in a change of position, General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and General Comment No. 18 of the Committee on the Rights of the Child on harmful practices, jointly adopted in 2014, maintain that:

> the marriage of a mature and capable child under the age of 18 may be permitted, provided that the child is at least 16 years of age and such decisions are made by a judge on the basis of exceptional legitimate grounds defined by law and evidence of maturity[234].

In this respect, the pronouncement of the ACtHPR may be welcome, since, as has been recognised by the Committee on the Elimination of Discrimination against Women itself, marriage at a younger age, given the obligations it entails, hinders, among other aspects, education, affects health, restricts economic autonomy, and limits the development of the personality and independence of the contracting parties, thus negatively affecting them, their family and community[235].

232 *Ibid*. para. 78.

233 Mali has been a State party to the African Children's Charter since 1998 and to the Maputo Protocol since 2005. Information available at: https://au.int/treaties (Accessed on: 03.03.2023).

234 Cf. Joint General Recommendation No. 31 of the Committee on the Elimination of Discrimination against Women and No. 18 of the Committee on the Rights of the Child on harmful practices, 59th session, Doc. CEDAW/C/GC/31-CRC/C/GC/18, 2014, para. 20.

235 In line with the initial stricter position held by the Committee on the Elimination of Discrimination against Women itself, «Article 16, paragraph 2, and the provisions of the Convention on the Rights of the Child *prevent States parties from permitting or recognising marriage between persons who have not attained the age of majority*. In the context of the Convention on the Rights of the Child, «a child means every human being below the age of 18 years unless under the law ap-

However, in view of the above, I note certain inaccuracies in the legal argumentation put forward by the Court. Thus, while the ACtHPR rightly refers in its argument to a violation of the prohibition of non-discrimination, it does not translate this assertion into a concrete violation of a right[236]. In my opinion, with reference to the minimum age stipulated in the Malian law, the ACtHPR should have recognised in its judgment the violation of Article 2 of the Maputo Protocol and Article 3 of the African Charter on the Rights of the Child. The same applies to the principle of the best interests of the child, recognised in Article 4 of the African Children's Charter, to which the Court alludes, but fails to recognise its violation[237]. Moreover, the ACtHPR does not even mention the right of children to the development of their personality, recognised in Article 3.2 of the Maputo Protocol and Article 5.2 of the ACRWC. Nor does it enrich its pronouncement with the existing jurisprudence of the Commission and the Committee[238]. It is worth noting, in this regard, the Joint General Comment on ending child marriage, adopted by both bodies in 2017, which also sets the minimum age for marriage at 18 years[239].

With regard to the second of the issues in question, i.e. consent to marriage, the Family Law established that both religious authorities and civil reg-

plicable to the child, majority is attained earlier». Notwithstanding this definition and bearing in mind the provisions of the Vienna Declaration, *the Committee considers that the minimum age of marriage should be 18 for both men and women. By marrying, both assume important obligations. Consequently, marriage should not be permitted before they have reached full maturity and capacity to act*. According to the World Health Organization, when children, especially girls, marry and have children, *their health can be adversely affected and their education hindered*. As a result, *their economic autonomy is restricted*. This not *only affects women personally, but also limits the development of their skills and independence and reduces employment opportunities, thereby harming their families and communities*» (emphasis added). *Vid*. General Recommendation No. 21 of the Committee on the Elimination of Discrimination Against Women *on equality in marriage and family relations*, 13th session, Doc. A/49/38, 1994, paras. 36 and 37.

236 Cf. App. No. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment (11 May 2018), paras. 78 and 135.v.

237 *Ibid*. paras 72, 78 and 135.v.

238 Cf. e.g. ACERWC, Communication No. 003/Com/001/2012, *The Centre for Human Rights (University of Pretoria) and La Rencontre Africaine pour la Defense Des Droits de l'homme (Senegal) v. The Government of Senegal* (27 July 2012), para.71.

239 Cf. Joint General Comment of the African Commission on Human and Peoples' Rights (AComHPR) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) on ending Child Marriage, available for consultation at: https://www.achpr.org/news/viewdetail?id=18 (Accessed on: 03.03.2023). Likewise, it could have constructed a more coherent pronouncement by at least alluding to the respective precepts of the ACHPR, the main treaty on which the African system is built.

istry officials are authorised to perform marriages. However, the obligation to verify the consent of the parties should only be fulfilled by the latter, and not by the former[240]. Faced with such a differentiation, the ACtHPR emphasised the requirement freely to choose a spouse and to enter into marriage with the full consent of both parties, thus declaring that Articles 6(a) of the Maputo Protocol and 16(1)(b) of the Convention on the Elimination of All Forms of Discrimination against Women, which recognise these rights, were violated[241].

As for the inheritance rights of widows and children born out of wedlock, the third issue, the Malian Family Law enacted that, in the absence of any other legal regime or notarised document, custom and religious law became the *de facto* applicable regime. This means in most cases that women inherit half as much as men, and that children born out of wedlock are entitled to inherit only if their parents deem it appropriate[242]. Again, the ACtHPR held that this aspect of the law was contrary to the Malian State's international human rights obligations, and emphasised the requirement freely to choose one's spouse and to enter into marriage with the full consent of both parties, thereby violating Articles 6(a) of the Maputo Protocol and 16.1(b) of the Convention on the Elimination of All Forms of Discrimination against Women[243].

However, I believe that the Court would have adopted a more coherent position if, in addition to Article 3 of the African Children's Charter, it had referred to Article 2 of the Maputo Protocol, which also enshrines the principle of non-discrimination, in this case against women[244]. Likewise, although in its argumentation, the ACtHPR refers to the principle of the best interests of the child, in its ruling, the Court fails to recognise the violation of Article 4 of

240 Cf. App. No. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment (11 May 2018), paras. 91-92.

241 *Ibid*. paras. 90 and 135.vi. It should be noted that Mali has been a State party to the Convention on the Elimination of All Forms of Discrimination Against Women since 1985. Information available at: https://www.un.org/womenwatch/daw/cedaw/states.htm (Accessed on: 03.03.2023).

242 *Ibid*. paras 111 and 112.

243 *Ibid*. paras. 90 and 135.vi.

244 It is worth mentioning that, in any case, the Court acknowledges in paragraph 135.ix that the contested legislation violates the right to non-discrimination of women and children, referring both to the Maputo Protocol and the African Children's Charter, as well as to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). However, it makes no reference to what specific aspect of the legislation gives rise to such a violation, which should have been specified.

the African Charter on the Child, when it would also have been appropriate to include it among the violated precepts. This criticism can also be extrapolated to the previous case[245].

In any case, the Court goes further, and affirms that the declared violations relating to the minimum age for marriage, the absence of consent and inequality in the inheritance rights of widows and children born out of wedlock, are, in turn, a violation of the obligation of the State of Mali to eradicate practices or traditions that are harmful to women and children. This obligation is contained in the African Children's Charter (Articles 1.3 and 21), in the Maputo Protocol (Article 2) and in the Convention on the Elimination of All Forms of Discrimination against Women (Article 5.a)[246].

However, once again, we see inconsistencies that could easily be resolved in order to avoid a somewhat chaotic picture of the ACtHPR's pronouncement. For, although, as I have explained, at the end of the judgement, the Court enters into an assessment of the obligation to eradicate practices or traditions that are harmful to women and children (paras. 116-125), I do not understand why, when analysing the minimum age for marriage, it initially enters into an assessment of this aspect (para. 78, referring to Article 21 of the ACRWC), and even acknowledges a violation of this obligation in the judgment (para. 135.v), while, on the other hand, when examining the regulation of matrimonial consent and the inheritance rights of the widow and children, it makes no reference to this precept.

One could add to this, also predictable for the entirety of its pronouncement, that the Court, in articulating its legal reasoning, only adheres, as far as the African system is concerned, to the Children's Charter and the Maputo Protocol. It would not have been superfluous –in order to build a coherent whole, and given that this is the first time it has ruled on the matter– to have alluded to the respective precepts of the African Charter. It should be remembered that this is the treaty on which the regional system is based[247].

245 While the ACtHPR acknowledged a violation of the principle of the best interests of the child in its argumentation on the minimum age for marriage and inheritance rights, but not in the judgment, there is no reference to the principle of the best interests of the child in relation to the question of matrimonial consent. Cf. *ibid*. paras. 78 and 135.v.; paras. 115 and 135.vii.

246 *Ibid*. paras 125 and 135 viii.

247 These include Articles 4, 5, 18 CADHP.

Chapter IV
REPARATIONS ADOPTED BY THE AFRICAN COURT AND THE ENFORCEMENT OF ITS JUDGEMENTS

The breach of an international obligation by a State –whether it derives, *inter alia*, from a violation of a human rights treaty provision, a customary norm, or an autonomous unilateral declaration issued by a Head of State, Head of Government or Minister for Foreign Affairs– gives rise to an internationally wrongful act, generating international responsibility[1]. The primary obligation of the State incurring such an internationally wrongful act is the obligation to make reparation[2].

Bearing in mind the above, and having already analysed the material scope of the ACtHPR's case law in the previous chapter, in order to carry out as exhaustive a study as possible of the ACtHPR, it is now necessary to focus on the case law on reparations ordered by the judicial body. First of all, this prompts analysis of the concepts of reparation and of victim as developed by the ACtHPR, the guiding principles which, according to the pronouncements of the ACtHPR, should govern in this area, as well as the different reparation modalities adopted by the Court. Having examined this, I will proceed to examine the follow-up mechanisms to ensure the execution of the ACtHPR's judgments and the degree of compliance with the latter.

1 Cf. ILC, Article 1 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd session (A/56/10) and annexed by the GA in Resolution 56/83 of 12 December 2001.

2 In addition to the obligation of cessation and the guarantee of non-repetition. Cf. Articles 28-31 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.

I. ON THE CONCEPT OF REPARATION IN THE JURISPRUDENCE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

To begin this chapter, we must start from the existence in general International Law of a principle according to which any damage caused as a consequence of the breach of an international obligation must be adequately remedied. This principle was recognised by the PCIJ in the *Factory at Chorzów case*, when it stated that:

> It is a principle of International Law that a breach of an undertaking carries with it an obligation to make reparation in an appropriate form. Reparation is therefore the indispensable complement to a breach in the application of a convention and there is no need for it to be indicated in the convention itself[3].

And it has been recognised, not only by the IACtHR (e.g. *Case of the Constitutional Tribunal v. Peru*[4]) and the ECtHR (e.g., *Case of Guiso-Gallisay v. Italy*[5]), but also by the African Court, which, from its earliest jurisprudence on reparations, expressly invokes both the *Chorzów Factory* case and its content (e.g. *Rev. Christopher Mtikila v. United Republic of Tanzania, Judgment on Reparations; Mohamed Abubakari v. United Republic of Tanzania*)[6].

This principle has also been enshrined in the normative texts of International Human Rights Law, with the victim's right to reparation being recognised in many different treaties, both universal and regional. Among the former,

3 *Vid*. PCIJ, *Factory at Chorzów* (Germany v. Poland), Judgment of 26 July 1927, PCJI *Reports*, 1927, p. 21. Cf., e.g., *Advisory Opinion on Reparation for Injuries Suffered in the Service of the United Nations*, 11 April 1949, p. 184, as well as being embodied in Article 31 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

4 Cf. IACHR, *Case of the Constitutional Tribunal V. Peru*. Merits, Reparations and Costs. Judgment of 31 January 2001. Series C, No. 71, para. 118. In the same sense, see also IACtHR, Case of Ivcher Bronstein v. Peru. *Case of Ivcher Bronstein v. Peru*. Merits, Reparations and Costs. Judgment of February 6, 2001. Series C No. 74, para. 177; Case of Suárez Rosero v. Peru. *Case of Suárez Rosero v. Ecuador. Ecuador*. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44, para. 40.

5 Cf., e.g. ECtHR, *Case of Guiso-Gallisay v. Italy* (Application No. 58858/00), Judgment of 22 December 2009, paras. 49-51.

6 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 27; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Reparation (4 July 2019), para. 20.

in Article 9.6 of the International Covenant on Civil and Political Rights, in Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and in Article 39 of the Convention on the Rights of the Child. And, within the latter, Article 41 of the European Convention on Human Rights and Article 61(1) of the American Convention on Human Rights.

Although the African Charter on Human and Peoples' Rights does not expressly include this right in its articles, it does appear in Precept 27.1 of the Protocol establishing the Court[7].

Thus, on the basis of this provision, the Court has been taking on board the legacy of the bodies that preceded it and, specifically, IACtHR jurisprudence, in order to build a right to full, fair and just reparation.

As for the *concept of reparation*, to date, it has not been defined in ACtHPR case law. Only in cases such as *Mohamed Abubakari v. United Republic of Tanzania*, does the Court succinctly state that «the expression 'remedy all violations established' should mean to erase the effects of the violations established», but without constructing a comprehensive argument of this concept[8]. Reference should be made in in this regard to a minor document –not comparable in importance–, namely the Fact Sheet on Filing Reparation Claims (2019, revised October 2020), which states that:

> Reparations render justice by removing or minimising the consequences of the wrongful act and by preventing and deterring violations. In practice, the obligation translates to specific actions: 3 (1) to take appropriate measures to prevent violations; (2) to investigate violations effectively, promptly, thoroughly and impartially and take action against the perpetrators; (3) to provide effective justice to victims of human rights violations; and (4) Reparation includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. The overarching goal of these forms of reparation is to provide healing for victims of human rights violations[9].

7 Thus, Article 27.1 of the Protocol states that «if the Court finds that there has been violation of a human or peoples' rights, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation». For an analysis of this article, I refer to the discussion in this chapter, *supra*.

8 *Vid*. App. 002/2017, *Mohamed Abubakari v. United Republic of Tanzania*, Interpretation of The Judgment of 3 June 2016 (28 September 2017), para. 39.

9 *Vid*. *Fact Sheet on Filing Reparation Claims*, Adopted during the Fifty-Third Ordinary Session Of the African Court on Human and Peoples' Rights, Arusha, Tanzania (10 June-5 July 2019, revised October 2020), pp. 2-3.

Unlike the IACtHR and, subsidiarily, the ECtHR, where there has been a considerable jurisprudential evolution in the area of reparations, in the case of the African Court this evolution has not been so marked, because, taking advantage of its later entry into operation, from the outset it has drawn from the experience of its predecessors (García Roca and E. Carmena Cuenca, 2017: 213-228)[10]. Thus, taking on board the development that has been taking place in International Human Rights Law and, specifically, the jurisprudence of various courts –mainly the IACtHR–[11], the ACtHPR adopted a *pro homine* position from its very first judgment on the matter (*Rev. Christopher Mtikila v. United Republic of Tanzania),* granting measures of satisfaction and guarantees of non-repetition[12]. Thus, recognising that the prohibition of independent candidacies in the Tanzanian electoral legislation entailed a violation of both the right of association contained in Article 10 ACHPR and the right to political participation contained in Article 13.1 ACHPR, the Court ordered, firstly, and as a guarantee of non-repetition, the amendment of the electoral legislation in this regard[13]. And, secondly,

10 It should not go unnoticed that, under a jurisprudence of guarantees, the IACHR has maintained that article 63.1 of the American Convention stands as a customary norm, «which is, moreover, one of the fundamental principles of the current law of nations»; building from this article a line of jurisprudence based on the concept of integral reparation of the damage caused to the victim (*restitutio in integrum*). For its part, as far as the ECtHR is concerned, it initially opted for declaratory judgments on the violations that had occurred, leaving the condemned states free to use the means to comply with the ruling. Compensatory reparations were added to this, making use of Article 41 ECHR. However, in recent times, the ECtHR has moved closer to the praxis of the Inter-American Court, specifying and developing the reparations ordered.

11 As will be specified throughout this chapter, I have found that the African Court has taken the judgments of the Inter-American Court as a reference point in the following areas: diversity of reparatory modalities; recognition that a conviction, *per se*, may constitute a sufficient measure of satisfaction for the victim; concept of victim; definition of moral damages; evidentiary element of reparations, and, specifically, the existence of a presumption in relation to moral damages; award of costs as an integral element of reparation; cases in which it is necessary to order guarantees of non-repetition; and criteria that must be met to order the release of the victim as a restitutionary measure. For its part, the African Court has adopted the case law of the ECtHR in matters such as the concept of victim; to determine that a legal person can also suffer moral damages and, therefore, require reparation; to reinforce its pronouncements in cases in which the ACtHPR considers it necessary to reopen the domestic proceedings or even to initiate a new trial as a reparatory measure; and in the criteria that must be met to order the release of the victim as a form of restitution.

12 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (13 June 2014), paras 27-45.

13 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (13 June 2014), paras. 43 and 46(iv).

and as a measure of satisfaction, the publication of a summary of the judgment on the merits adopted by the ACtHPR, both in the Official State Gazette and in a newspaper of wide national circulation[14]; as well as its publication in its entirety on an official State website for a period of one year[15].

For its part, its second judgment on reparations was handed down in the case of *The beneficiaries of the late Norbert, Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina,* which involved the death of a journalist and his companions, when the former was at the time investigating various opaque government plots. The ACtHPR found that the State failed to act with due diligence in arresting, detaining and trying those responsible for the deaths, resulting in a violation of the right to a fair trial recognised in Article 7 of the ACHPR. In relation to what interests us here, the Court ordered as reparation measures, for the first time, the payment of compensation for moral damages to the next of kin of the deceased (wives, children and first-degree ascendants)[16], as well as, as a measure of satisfaction, the publication of a summary of the judgment on the merits[17], and as a guarantee of non-repetition, the reopening of the case in the domestic order[18]. All this together with an order for costs[19].

Its third judgment on reparations was adopted in the case of *Lohe Issa Konate v. Burkina Faso*, which stems from the conviction imposed by the national courts on a Burkinabe journalist for publishing various articles denouncing corruption in the state. In this case, after recognising the violation of the right to freedom of expression contained in article 9.2 of the ACHPR[20], the Court, for the first time, granted a compensatory measure: the erasure of the journalist's criminal record[21]. To this is added compensation for material damages for different concepts: for the earnings lost as a result of his

14 *Ibid*. paras 45(i) and 46.5(i).

15 *Ibid*. paras 45(ii) and 46.5(ii).

16 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), paras. 32-62 and 111.i-ii). As we will have the opportunity to examine below, to date, it is in this case that the Court has had the opportunity to pronounce in more detail on the concept of victim.

17 *Ibid*. para. 100 and 111(ix).

18 *Ibid*. para. 109 and 111(x).

19 *Ibid*. paras. 73-94 and 111.vi and vii).

20 For an analysis of the substantive content of this case, see the discussion in chapter three, *infra*.

21 Cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (03 June 2016), paras 19-24 and 60(i).

imprisonment, for the six-month suspension of the newspaper for which he worked, for the travel expenses incurred by his family members to the prison where he was imprisoned, and for the medical expenses arising from his stay there[22]. This, together with compensation for the moral damage caused to his family (wife and children), and to himself[23], the publication of a summary of the judgement of the ACtHPR[24], and the requirement that Burkinabe legislation be amended to ensure that the penalties imposed for exceeding the right to freedom of expression meet the criteria of necessity and proportionality[25].

In these three judgments –in the first two in particular– there are constant references to the jurisprudence of other human rights bodies, with allusions to IACtHR jurisprudence occupying a pre-eminent position. Thus, references to the IACtHR stand out in questions such as the concept of indirect victim[26], the concept and criteria for assessing compensation for material damages[27], as well as for non-pecuniary or moral damages[28], for considering the publication of a judgment as a measure of satisfaction[29], to consider the award of costs

22 *Ibid*. paras. 25-51 and 60(iii)-(iv).

23 *Ibid*. paras 52-59 and 60(v).

24 *Ibid*. para. 60(viii).

25 This measure of reparation has already been granted in the judgment on the merits. In this regard, cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment, merits (05 December 2014), paras 165-166 and 176(viii); App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (03 June 2016), para. 24.

26 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 48.

27 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 6; citing IACtHR. *Case of Bámaca Velásquez v. Guatemala*. Reparations and Costs. Judgment of 22 February 2002. Series C No. 91, para. 43; and IACourtHR. Case of *García Cruz and Sánchez Silvestre v. Mexico*. Merits, Reparations and Costs. Judgment of 26 November 2013. Series C No. 273, para. 212.

28 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 35; citing IACtHR. *Case of the «Street Children» (Villagrán Morales et al.) v. Guatemala*. Reparations and Costs. Judgment of 26 May 2001. Series C No. 77, para. 84. In this regard, see also, App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 27; citing IACtHR. *Case of Cantoral Benavides V. Peru*. Reparations and Costs. Judgment of 3 December 2001. Series C No. 88, para. 53.

29 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 98; citing IACtHR. *Case of Plan de Sánchez Massacre v. Guatemala*. Reparations. Judgment of 19

as an integral part of the reparation concept[30], or to grant as a guarantee of non-repetition the reopening of the trial in the domestic order, in the latter case, referring to the jurisprudence of the Human Rights Committee and that of the African Commission[31].

Therefore, without prejudice to the detailed analysis that will follow in the following sections, an examination of these first judgments on reparations reveals the two considerations mentioned above: on the one hand, the guarantee-based jurisprudence on reparations that the ACtHPR has adopted from the outset, and secondly, its recourse to cross-fertilisation with the jurisprudence of other human rights bodies in order to achieve this purpose. In this way, this line simply continues what has already been analysed in the previous chapters.

That said, and turning to the normative texts of the African Court, the precept of reference in matters of reparations is the aforementioned Article 27.1 of its Constitutive Protocol, which –with somewhat unfortunate wording– states:

> If the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation[32].

November 2004. Series C No. 116, para. 102-103, and IACtHR. *Case of Heliodoro Portugal v. Panama. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 248.

30 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 39; citing IACtHR. *Case of Garrido and Baigorria v. Argentina. Argentina*. Reparations and Costs. Judgment of 27 August 1998. Series C No. 39, para. 79.

31 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), paras. 105-106, citing, *inter alia*, HRC, *Bozize v. Central African Republic*, Communication No. 428/1990, U.N. Doc. 428/1990, U.N. Doc. CCPR/C/50/D/428/1990 (1994), para. 7; ACHPR, Communication 288/04, *Gabriel Shumba v. Zimbabwe* (02, May 2012), para. 194. It should be noted that both the African Commission and the Committee have adopted a jurisprudence that guarantees reparations. The former in recent decades and the latter since its first communications. For an analysis of this, I refer to my doctoral dissertation, «El Tribunal Africano de Derechos Humanos y de los Pueblos», UCM, 2022.

32 In the same vein, to quote the French text: «Lorsqu'elle estime qu'il y a eu violation d'un droit de l'homme ou des peuples, la Cour ordonne toutes les mesures appropriées afin de remédier à la situation, y compris le paiement d'une juste *compensation ou* l'octroi d'une *réparation*» (emphasis added).

This provision should be read in conjunction with Rule 69.3 of the Rules of Court, which states that:

> The Court shall rule on the request for reparation [...] by the same decision establishing the violation of a human and/or peoples' right or, if the circumstances so require, by a separate decision[33].

I maintain that the wording of the former is somewhat unfortunate, since by using the copulative conjunction it seems to imply that compensation and reparation are two alternative or exclusive modalities, when in fact the former is the genus and the latter the species[34]. In any case, as I have pointed out, both precepts have allowed the Court to construct a fairly protective line of jurisprudence, which will be examined in depth in the following pages.

II. GUIDING PRINCIPLES IN RESTORATIVE MATTERS

In interpreting Article 27 of its founding Protocol, the ACtHPR has enunciated four principles that should govern any ruling on reparations, with the cases of *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin (App. 013/2017)* and *Kennedy Gihana & others v. Republic of Rwanda* including its most detailed argumentative construction on the matter[35]. In the first case, where the plaintiff was accused of drug trafficking and sentenced to 20 years in prison and a heavy fine[36], the reparation is articulated as a consequence of the recognition of the

33 Formerly Rule 63 of the 2010 Rules of Court.

34 This derives both from Principle 18 of the Basic Principles on the Right of Victims to Reparation, which states that victims [...] should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective *reparation,* as laid out in principles 19 to 23, which include the following forms: restitution, *compensation*, rehabilitation, satisfaction and guarantees of non-repetition» (emphasis added); as of Article 34 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, which states that «full *reparation* for the injury caused by the internationally wrongful act shall take the form of restitution, *compensation* and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter» (emphasis added).

35 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras 15-20; App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment on Merits and Reparations (28 November 2019), paras 133-139.

36 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits (29 March 2019), para. 8.

violation of the right to a fair trial in the domestic order (Article 7 ACHPR), the right to property (Article 14 ACHPR) –as his licenses to operate as a businessman were arbitrarily withdrawn–, and the right to judicial independence (Article 26 ACHPR)[37]. For its part, in the second case, in view of the arbitrary withdrawal of the applicant's passport, the Court considers that there has been a violation of the rights to freedom of movement (Article 12 ACHPR) and political participation (Article 13.1 ACHPR)[38].

Taking into account the above, as a first principle, the Court has indicated that the State that commits an internationally wrongful act has the obligation to make full reparation for the consequences arising therefrom, in such a way that the reparation covers all the damages suffered by the victim[39].

Derived from the above, and as a second principle, the ACtHPR specifies that, since the purpose of reparation is *restitutio in integrum*, as far as possible, all the consequences derived from the unlawful act must be reversed or rendered ineffective, seeking to re-establish the state that would presumably have existed if that act had not been committed. To this end, in addition to restitution –either alone or in combination– the Court has included compensation, rehabilitation, satisfaction and guarantees of non-repetition as reparation measures[40].

As a third principle, in this instance related to the burden of proof, it is for the applicant to demonstrate the existence of a causal link between the viola-

37 *Ibid*. para. 292. For an analysis of this case with respect to the right to property, the right to a fair trial, and judicial independence, I refer to the discussion in chapter three, *infra*.

38 Cf. App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), paras 3-4 and 153.

39 Cf. App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 16; App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda, Judgment, merits and reparations (28 November 2019), para. 136. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), para. 136. In this regard, in App. 013/2011, *The beneficiaries of the late Norbert, Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (5 June 2015), para. 60, the ACHPR sets out this principle by referring to the jurisprudence of the Permanent Court of International Justice –PCIJ, *The factory at Chorzow*, Judgment of 13 September 1928, Series A, No. 17, p. 47– and of the IACtHR –IACtHPR. *Case of Goiburú et al. v. Paraguay. Paraguay*. Merits, Reparations and Costs. Judgment of 22 September 2006. Series C No. 153, para. 143–.

40 Cf. App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 19; App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), paras 137-138. Each of these reparative modalities in the Court's jurisprudence will be analysed below.

tion and the alleged harm[41]. However, the burden of proof can be shifted to the State concerned under certain circumstances, for example «where the applicant can demonstrate that the other party has more, or exclusive access to relevant information about the case»[42]. For its part, when referring to the causal link, the ACtHPR has held, drawing on the jurisprudence of the IACtHR, that:

> Reparations must have a causal link with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the respective damages. Therefore, the Court must observe this concurrence in order to rule properly and in accordance with the law[43].

As an exception, there are moral damages, in relation to which the Court understands, also following the jurisprudence of the IACtHR, that, if the violation of some of the rights of the Charter is recognised, there is a presumption of the existence of such damages[44].

Finally, the ACtHPR has affirmed that the awarding of concrete reparations for human rights violations must be made on a case-by-case basis, taking into account the particularities and circumstances of the case[45].

On the basis of such principles, and in line with the above-mentioned case law, in the case of *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin (App. 013/2017)*, the ACtHPR awarded the applicant compensation for non-material damages to the applicant and his family (wife and children), as well as compensation for the expenses incurred for his exile in France, for the income lost from his business activity, for the decrease in the value of his company's shares due to the charge of drug trafficking, and for the procedural costs

41 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 17; App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), para. 139.

42 Cf. ACtHPR, «Fact Sheet on Filing...», *op. cit.*, p. 5.

43 *Vid.* App. 013/2011, *The beneficiaries of the late Norbert, Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (5 June 2015), para. 24; citing the IACtHR in *Ticona Estrada et al. v. Bolivia*. Merits, Reparations and Costs. Judgment of 27 November 2008 (para. 110).

44 Cf. App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 89; App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment on Merits and Reparations (28 November 2019), para. 139. For a detailed analysis of this matter, see *above*.

45 Cf. App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 20.

incurred in the domestic proceedings[46]. The Court also ordered the State to reinstate his licences so that he could continue to carry out his work, together with the lifting of the embargo on his accounts[47], and the annulment of the conviction[48]. It added, as a guarantee of non-repetition, the reform of Beninese legislation so that effective appeals can be lodged against the sentences adopted by the Anti-Economic Crimes and Terrorism Court[49]. For its part, in the case of *Kennedy Gihana & others v. Republic of Rwanda,* the ACtHPR determined that the State of Rudanda, as a restitution measure, should return the victim's passport to him, in addition to paying him compensation for moral damages[50].

In addition to the above, it is also worth mentioning that the precepts intended to regulate the reparations procedure are scarce and, furthermore, have been applied by the ACtHPR in flexible fashion. The starting point is the aforementioned Rule 69.3, which establishes that the Court will rule on reparations, either in the same decision in which it establishes the violation of a human right, or, if the circumstances so require, in a subsequent ruling; in any event, in this second case, reparations are also generally included in the judgement on the merits. This provision, in turn, refers to Rule 40.4, which specifies that the plaintiff must include in the statement of claim its requests for reparations, and the supporting documents and other appropriate evidence must be provided in the statement of claim itself or within the time limit set by the Court[51]. For its part, according to Rule 44.1, the respondent state must respond on the issues of admissibility, jurisdiction, merits and reparations within 90 days of receiving the claimant's allegations[52].

46 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 144.

47 *Ibid*. para. 144. A.2).vi.

48 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits (29 March 2019), para. 292.xxiiii; App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras. 12-13 and 144.

49 *Ibid*. para. 144.A.2).vii.

50 Cf. App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), paras 153.vii and ix.

51 In the 2010 Rules of Court, the provision in question established that «the amount of the reparation and the evidence relating thereto *may be submitted subsequently* within the time limit set by the Court» (Rule 34.5 *in fine*). Thus, it did not require that the evidence be submitted, in any event, in the same statement of claim.

52 In the 2010 Rules of Court, the time limit to respond was shorter, 60 days, and it was not specified that the respondent State was obliged to make a decision on reparations at this stage of the proceedings. Cf. Rule 37 of the 2010 Rules of Court.

Faced with this scant regulation, it should first be pointed out that the Court has understood the need for a separate ruling on reparations when the parties have not alluded to this issue in the main judgment (e.g. *Rev. Christopher Mtikila v. United Republic of Tanzania*[53]), when they have not provided sufficient evidence (e.g. *Lohé Issa Konaté v. Republic of Burkina Faso*), or when, in its opinion, it is necessary to hear the parties at greater length (e.g. The beneficiaries of the Republic of Burkina Faso, *Lohé Issa Konaté v. Republic of Burkina Faso*[54]), or when, in their view, it is necessary to hear the parties at greater length (e.g. *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*[55]). Such case law was summarised in *Armand Guehi v. United Republic of Tanzania*[56].

III. THE NOTION OF VICTIM IN THE JURISPRUDENCE OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

The most detailed pronouncement on the notion of victim can be found in the aforementioned case *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*[57], where the Court, invoking IACtHR jurisprudence, specifies that all aspects of reparation, including the specific identification of the victims, are regulated not by the domestic law of the State concerned, but by International Law[58].

53 Cf., e.g. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment, merits (13 June 2014), para. 124 *in fine*. In the same vein, App. 018/2015, *Benedict Daniel Mallya v. United Republic of Tanzania*, Judgment (merits), 26 Sep 2019, paras 71-72.

54 Cf., e.g. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment, merits (5 December 2014), para. 174.

55 Cf., e.g., App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment, merits (24 June 2014), para. 202; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Merits (3 June 2016), para. 237.

56 Cf. App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (7 December 2018), para. 155.

57 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), paras. 45 *et seq*. Recall that we have already had occasion to refer to the reparations granted by the ACtHPR in that case, in this same chapter, *infra*.

58 *Ibid*. paras. 53 and 54. Citing the Inter-American Court in the cases, Inter-American Court of Human Rights. *Case of Caracazo v. Venezuela*. Reparations and Costs. Judgment of August 29,

Likewise, taking ECtHR case law as a reference, the ACtHPR has determined that the victims of human rights violations can be both natural and legal victims[59]; the former category should be understood to include both direct and indirect victims. In this regard, for the first and, to date, the only time in its jurisprudence, the Court, in the aforementioned case, proceeded to specify these concepts by referring to the Basic Principles on the Right to a Remedy and Reparation of 2005; specifically to its eighth paragraph, in which it states that:

> Victim' means any person who has suffered harm, individually or collectively, including physical or mental injury, emotional suffering, economic loss or substantial impairment of his or her fundamental rights, through acts or omissions that constitute a gross violation of International Human Rights Law [...]. Where appropriate [...] the term *victim* shall also include the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation[60].

For its part, again taking as a reference IACtHR jurisprudence[61], in its pronouncements, the Court has recognised as indirect victims ascendants and

2002. Series C No. 95, para. 77; *Case of Montero Aranguren et al (Retén de Catia) v. Venezuela*. Preliminary Objection, Merits, Reparations and Costs. Judgment of July 5, 2006. Series C No. 150, para. 117; where it establishes that «[the] obligation to make reparations, which is regulated in all aspects (scope, nature, modalities and determination of the beneficiaries) by International Law, cannot be modified or breached by the obligated State by invoking provisions of its domestic law».

59 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 65. Citing in this regard ECHR, *Comingersoll S. A. v. Portugal (*Application No. 35382/97), Judgment of 6 April 2000, para. 35.

60 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 47. Matter in respect of which it also cites, albeit at footnote, the jurisprudence of the Human Rights Committee (Communication 035/1978, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, 9 April 1981, para. 9,2), and of the ECtHR (*Case of Aslakhanova and Others v. Russia* Applications Nos. 2944/06, 8300/07, 50184/07, 332/08, 42509/10, First Section, 18 December 2012, para. 133).

61 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 48, where it alludes to cases such as IACtHR. *Case of Bulacio v. Argentina*. Merits, Reparations and Costs. Judgment of 18 September 2003. Series C No. 100, para. 85; *Case of Loayza Tamayo v. Peru*.

descendants of first degree, siblings and spouses; in cases such as violations of the right to a fair trial (e.g. *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso*; *Mohamed Abubakari v. United Republic of Tanzania*[62]), impairment of the physical integrity and dignity of the person (e.g *Lucien Ikili Rashidi v. United Republic of Tanzania*[63]), unlawful arrests (e.g. *Robert J. Penessis v. United Republic of Tanzania*[64]), and unjustified restriction of the right to freedom of expression (e.g. *Ingabire Victoire Umuhoza v. Republic of Rwanda*[65]). At least by awarding in almost all such cases compensation for non-material damages[66]. In any case, it is significant that, given the extensive family ties present on the continent, the Court has opted for a strict criterion, limiting the circle of beneficiaries of reparations to first-degree relatives (Shanas & Streib, 1967). Likewise, unlike the IACtHR and the ECtHR, to date the Court has not awarded reparations to dependents of the direct victim or to those who have suffered harm when assisting the victim.

On the other hand, for the first time, in the case of *African Commission on Human and Peoples' Rights v. Republic of Kenya,* the Court has proceeded to award collective reparations, specifically to the Ogiek indigenous community. It is worth mentioning that in the judgment on reparations in this case,

Peru. Reparations and Costs. Judgment of 27 November 1998. Series C n.º 42, para. 92; *Case of Chitay Nech et al. v. Guatemala*. *Guatemala*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 25 May 2010. Series C No. 212, para. 220. Regarding this last case, in a footnote, the ACtHPR quotes the following words of the IACHR «the Court has held that the violation of the right to mental and moral integrity of the *next of kin of victims of certain human rights violations such as enforced disappearance* can be declared by *applying a rebuttable presumption in respect of mothers and fathers, daughters and sons, husbands and wives, and permanent partners* (hereinafter 'next of kin'), provided that this responds to the particular circumstances of the case. With respect to such immediate family members, it is up to the State to rebut this presumption» (emphasis added).

62 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 50: App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Reparation (4 July 2019), para. 94. v.

63 Cf. App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment on Merits and Reparations (28 March 2019), para. 160 xi.

64 Cf. App. 013/2015, *Robert J. Penessis v. United Republic of Tanzania*, Judgment on Merits and Reparations (28 November 2019), para. 168 xi.

65 Cf. App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), para. 74. iii.

66 Cf., e.g. App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Reparation (4 July 2019), paras. 59-64.

the Court maintains that the concept of victim «is not limited to individuals and that, *subject to certain conditions*, groups and communities may be entitled to reparations meant to address collective harm»[67]. And, although it does not specify the guidelines to satisfy the fulfilment of such conditions, it does seem to maintain that indigenous communities, by the mere fact of being recognised as such, fulfil the latter in any case[68].

Thus, the ACtHPR follows the guideline already set out in the Fact Sheet on Filing Reparation Claims where it is stated that:

> cases that come before the Court may involve one or more victims, and sometimes groups of victims. In cases involving one or more victims, each person may experience different forms and degrees of harm that should be individually appreciated. *Victims may also be entire communities, peoples' or groups with a common identity, ethnicity, religion, language or other common distinguishing physical, social, cultural characteristic that links the group. Indigenous peoples and other minority groups are examples of* these[69].

Therefore, we find a differentiation with respect to the jurisprudence of the UN bodies, and a homogenisation with respect to the IACtHR and the AComHPR, insofar as the former, unlike the latter, have not proceeded to grant reparations to the community as a whole, but to each of its individual members (Cartes Rodríguez, 2022)[70].

67 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment on Reparations (23 June 2022), para. 44 (emphasis added). For an overview of this issue, it is useful to refer to the analysis of the ACtHPR's jurisprudence on the rights of «peoples» in chapter three, *infra*.

68 In order to maintain that indigenous communities have the right to reparation, the Court refers to Article 28 of the UN Declaration on the Rights of Indigenous Peoples, to the 2005 Basic Principles on the Right to a Remedy and Reparation and to the document «Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms» of the Sub-Commission on Prevention of Discrimination and Protection of Minorities (UN Commission on Human Rights). Cf, respectively, *ibid.*, paras. 39, 43 and footnote 22.

69 Cf. ACtHPR, *Fact Sheet on Filing Reparation Claims*, adopted during the Fifty-Third Ordinary Session of the African Court on Human and Peoples' Rights, Arusha, Tanzania (10 June-5 July 2019, revised October 2020), p. 3 (emphasis added).

70 Cf., e.g. in relation to collective property, IACtHR. *Case of the Garífuna Triunfo de la Cruz Community and its members v. Honduras*. Merits, Reparations and Costs. Judgment of 8 October 2015. Series C No. 305, paras. 259-264; IACtHR. *Case of the Saramaka People v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 28, 2007. Series C No. 172, para. 194;

Having analysed the concept of victim in the decisions of the ACtHPR, I will now examine the different reparation measures granted by the Court, which range from restitution and compensation to rehabilitation and guarantees of non-repetition, including satisfaction.

IV. MODALITIES OF REPARATION ADOPTED BY THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Reparation comprises different forms of redress, which, being complementary to each other, seek comprehensive reparation of the damage caused to the victim[71]. Thus, the ACtHPR has pointed out that «the reparation [...] must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed»[72].

The Court has included among such reparatory measures: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition[73]. Although

IACtHR. *Case of the Kuna de Madungandí and Emberá de Bayano Indigenous Peoples and their members v. Panama. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of 14 October 2014. Series C No. 284, paras. 232-233. Regarding the recognition of collective juridical personality, IACtHR. *Case of the Kaliña and Lokono Peoples v. Suriname. Suriname*. Merits, Reparations and Costs. Judgment of 25 November 2015. Series C No. 309, para. 279. Regarding the Commission's jurisprudence in this regard, see ACHPR, Communication 155/96, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria (*27 October 2001), p. 9.

71 Cf., e.g. App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), para. 19; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Reparation (4 July 2019), para. 19; App. 009/2015, *Lucien Ikili Rashidiv. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), para. 116.

72 Cf. App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), para. 20; App. 004/2015, *Andrew Ambrose Cheusi v. United Republic of Tanzania*, Judgment on Merits and Reparations (26 June 2020), para. 139.

73 Cf., e.g, App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Reparation (4 July 2019), para. 21; Application 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (4 July 2019), para. 13. For its part, to reinforce its position on the granting of different reparation modalities, the Court in cases such as *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso,* also cites, among others, the jurisprudence of the IACHR. Specifically the cases, IACtHR. Case of *Castillo Páez v. Peru*. Reparations and Costs. Judgment of 27 November 1998. Series C No. 43, para. 48 and 51; *Case of Barrios Altos v. Peru*. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87, para. 25; and *Case of Caracazo v. Venezuela. Venezuela*. Reparations and Costs. Judgment of August 29, 2002. Series C No. 95, para. 77. Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso,* Judgment on Reparations (05 Jun 2015), para. 29, footnote 9.

these measures coincide with those indicated in the Basic Principles on the Right to a Remedy and Reparation (2005), to date the ACtHPR has not, however, expressly referred to this instrument in this regard. On the other hand, it has referred to the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001), specifically Article 34, which states that «full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter»[74]. This is despite the fact that this provision does not include all the forms of reparation granted by the Court, and this is despite what is stated in Article 55[75]; the *lex specialis* in the UN framework being the Basic Principles on the Right to a Remedy and Reparation.

For its part, it is worth mentioning that, in certain pronouncements, some of these modalities seem to be forgotten. Thus, in the case of *Ingabire Victoire Umuhoza v. Republic of Rwanda*, after citing the International Court of Justice in the case with which we began this chapter –the *Factory at Chorzów* case– where the ICJ held that «reparation must, as far as possible, erase all the consequences of the wrongful act and restore the state which would presumably have existed if that act had not been committed»[76], the ACtHPR indicates that «[thus] reparation must, in particular, include *restitution*, *compensation* and *rehabilitation* of the victim, as well as *measures to ensure non-recurrence of the violations*, taking into account the circumstances of each case»[77]; thus omitting measures of satisfaction. In this regard, the Fact Sheet on Filing Reparation Claims before the Court is more precise. This document states that «there are *five* internationally recognized forms of reparations»[78]; and goes on to define each of the reparatory measures[79].

74 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso,* Judgment on Reparations (05 Jun 2015), para. 29.

75 This provision specifies that «these articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act, the content of the international responsibility of a State or the manner of its implementation are governed by special rules of International Law».

76 *Vid*. PCIJ, «Factory at Chorzów...», *op. cit.,* p. 47; in App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), para. 20. This ICJ jurisprudence is embodied in one of the guiding principles that guide the action of the ACtHPR in matters of reparations, as we have had occasion to examine in this same chapter, *infra*.

77 *Ibid*. (emphasis added).

78 Cf. ACtHPR, «Fact Sheet on Filing...», *op. cit.,* p. 4 (emphasis added).

79 *Ibid*. pp. 4-5.

In the Court's jurisprudence, therefore, we find ourselves in the presence of compensatory measures classified by the doctrine as «individual» and «general» (García Roca & Cuenca, 2017: 215 *et seq.*; Cruz, 2010: 110 *et seq.*). Thus, if restitution, compensation, rehabilitation and satisfaction fall into the first category, the purpose of which is to compensate the victim for the harm caused, guarantees of non-repetition fall into the second, insofar as their direct purpose is not to compensate the victim in the specific case, but to safeguard the future of the human rights treaty in question, thus seeking to guarantee its effectiveness. Unlike the ICJ, the regional human rights courts do have the competence to adopt these latter measures[80].

I shall now proceed to analyse ACtHPR case law of the with regard to the reparation measures granted. To this end, insofar as the Court has not followed a uniform order in its various rulings, I will follow the order established in the UN Principles. That is, restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition[81]. By way of example, in cases such as *Lucien lkili Rashidi v. United Republic of Tanzania*, *Ally Rajabu & others v. United Republic of Tanzania*, or *Andrew Ambrose Cheusi v. United Republic of Tanzania*, the Court first deals with compensation measures. Whereas in cases such as *Lohé Issa Konaté v. Republic of Burkina Faso* and *Armand Guehi v. United Republic of Tanzania*, it starts with reparatory measures[82].

However, it is worth mentioning beforehand that, beyond the specific compensatory measures, although it is true that in the jurisprudence of the African Court we do not find merely declaratory judgments[83], in certain cases it has left

80 In relation to the ACtHPR, see Preamble to the Protocol to the Tribunal, para. 8 and Article 2.

81 Cf. Principles 18 *et seq.* of the Basic Principles on the Right to a Remedy and Reparation.

82 Cf. App. 009/2015, *Lucien lkili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), paras 121 *et seq.*, App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), paras 138 *et seq*, App. 004/2015, *Andrew Ambrose Cheusi v. United Republic of Tanzania*, Judgment, merits and reparations (26 June 2020), para. 149 *et seq.*; App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (3 June 2016), paras. 19 *et seq.*; App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (7 December 2018), para. 160 *et seq.* We also note that in various judgments the Court designates the respective heading «satisfaction» and on other occasions with the specific reparatory measure «publication of the judgment». The same applies to other forms of reparation. Cf. e.g. App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), para. 150.

83 At the very least, the Court pronounces by postponing its decision on reparations to a later pronouncement. Cf., e.g. App. 013/2011, *Abdoulaye Nikiema, Ernest Zongo, Blaise Ilboudo & Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, Judgment (28 March 2014), paras. 203.6 and 7.

in the hands of the condemned State the specific measures to repair the damage caused, using formulae of the following tenor: «to take all appropriate measures within a reasonable time frame to remedy all the violations established»[84]. This has meant that, on occasions, the respective States have presented requests for interpretation so that the Court can direct compliance in the specific case (cf., for example, *Mohamed Abubakari v. United Republic of Tanzania*[85]). In any event, also in such cases, the ACtHPR usually offers the victim the possibility of providing new evidence for a subsequent and specific ruling on reparations[86].

IV.1. Restoration to the situation before the violation

As noted in the previous section, the ACtHPR has established that, since the purpose of reparation is *restitutio in integrum*, as far as possible, all the consequences deriving from the unlawful act must be reversed or rendered ineffective, in order to re-establish the state that would presumably have existed if the act had not been committed[87].

Although the Court has not defined the concept of restitution in its jurisprudence, the Fact Sheet on Filing Reparation Claims states that «restitution is the act of ending any ongoing violations and restoring the victim, to the greatest extent possible, to his or her original situation before the commission of the human rights violation»[88].

Analysis of its rulings reveals that release from prison has been by far the most restitutionary measure most frequently requested by the applicant.

84 Cf., e.g., App. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 227.3.iii.

85 Cf. App. 002/2017, *Mohamed Abubakari v. United Republic of Tanzania*, Interpretation of The Judgment of 3 June 2016 (28 September 2017), where the Court finds that «the most appropriate form of remedy for violation of the right to a fair trial is to act in such a way that the victim finds him/herself in the situation that he/she would have been had the violation found not been committed. To attain this objective, the United Republic of Tanzania has two options: it should either reopen the case in compliance with the rules of a fair trial or take all appropriate measures to ensure that the Applicant finds himself in the situation preceding the violations», para. 33.

86 Cf., e.g. App. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment (26 May 2017), para. 227.3.v.

87 Cf., e.g. App. 025/2015, *Majid Goa Vedastus v. United Republic of Tanzania*, Judgment, merits and reparations (26 Sep 2019), para. 82.

88 Cf. ACtHPR, «Fact Sheet on Filing...», *op. cit.*, p. 5.

However, the Court has held that this can only be granted in compelling or exceptional circumstances[89]. A position, indeed, that the African Court shares with the IACtHR and the ECtHR, as pointed out in the case of *Diocles William v. United Republic of Tanzania*[90]. And although in its first cases (*Alex Thomas v. United Republic of Tanzania*; *Mohamed Abubakari v. United Republic of Tanzania*) such a statement was not specified[91], in successive pronouncements (*Armand Guehi v. United Republic of Tanzania*), the ACtHPR has indicated that such circumstances must be determined on a case-by-case basis, taking into consideration, principally, the proportionality between the measure of reinstatement requested and the extent of the violation established[92]. Thus, in the words of the Court, such a measure could be granted, for example, when the applicant's detention or conviction is based entirely on arbitrary considerations (*Majid Goa Vedastus v. United Republic of Tanzania*; *Kalebi Elisamehe v. United Republic of Tanzania*); for which, again, it takes as a reference the jurisprudence of the IACtHR and the ECtHR[93].

In any event, the ACtHPR has been rather reluctant to grant the victim's release from prison as a restitutionary measure. In fact, to date, I find that only in the cases of *Robert J. Penessis v. United Republic of Tanzania* and *Kennedy Owino Onyachi & Another v. United Republic of Tanzania* has the Court ordered such a measure. The first, taking into consideration that even the respondent State did not contest that the victim had been in prison for over six years more than

89 Cf. App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment on Merits (20 November 2015), para.157; Cf. App. 016/2016, *Diocles William v. United Republic of Tanzania,* Judgment, merits and reparations (21 September 2018), paras 100-102.

90 Cf. App. 016/2016, *Diocles William v. United Republic of Tanzania,* Judgment, merits and reparations (21 September 2018), para102; citing ECHR, *Case of del Rio Prada v. Spain (*Application No. 42750/09), Judgment, 10 July 2012, para 139; ECHR, *Case of Assanidze v. Georgia* (Application No. 71503/01), Judgment, 8 April 2004, para 204; IACtHR. *Case of Loayza Tamayo V. Peru*. Merits. Judgment of 17 September 1997. Series C No. 33, para. 84.

91 Cf. App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (20 November 2015), para.157; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania,* Judgment (3 June 2016), para.234.

92 Cf. App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (7 December 2018), para. 164.

93 Cf. App. 025/2015, *Majid Goa Vedastus v. United Republic of Tanzania*, Judgment, merits and reparations (26 Sep 2019), para. 93; App. 028/2015, *Kalebi Elisamehe v. United Republic of Tanzania,* Judgment, merits and reparations (26 Jun 2020), para. 111; alluding to the IACtHR cases. *Case of Loayza Tamayo V. Peru*. Merits. Judgment of 17 September 1997. Series C No. 33, para. 84, and ECHR, *Case of del Rio Prada v. Spain (*Application No. 42750/09), Judgment, 10 July 2012, para. 139.

he should have been[94]. The second, taking into account, in addition to the nature of the violations acknowledged, that the Tanzanian State had not taken any measures to remedy them, that the victim had already served 18 of the 30 years of his sentence, and that as a Kenyan national he was in prison far from his family[95].

On the other hand, in other cases, such as *Diocles William v. United Republic of Tanzania*, the Court did not grant such a measure even though it acknowledged that the victim was not provided with free legal aid, that she was prevented from calling her witnesses, and that she was convicted on the basis of contradictory evidence[96]. Similarly, in *Alex Thomas v. United Republic of Tanzania* and *Mohamed Abubakari v. United Republic of Tanzania,* although the ACtHPR acknowledged that the trial that established the domestic conviction did not comply with fair trial guarantees, and that the victims had been in prison for 20 and 18 years respectively, the Court did not order their release[97]. This course of action has generated dissenting opinions, to which Iadhere, as there is no doubt that such compelling and exceptional conditions are present in these cases[98].

The same restrictive pattern observed in relation to release from prison can also be seen in relation to other restorative measures. Thus, only rarely, and generally at the initiative of a party, has the Court agreed to set aside the judgment handed down in the domestic order (*Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin, App. No. 013/2017*[99]), to restore the victim's

94 Cf. App. 013/2015, *Robert J. Penessis v. United Republic of Tanzania*, Judgment, merits and reparations (28 November 2019), paras 163.

95 Cf. App. 003/2015, *Kennedy Owino Onyachi & Another v. United Republic of Tanzania*, Judgment on Reparations (30 September 2021), para. 65.

96 Cf. App. 016/2016, *Diocles William v. United Republic of Tanzania,* Judgment, merits and reparations (21 September 2018), 103-104.

97 Cf. App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment on Merits (20 November 2015), paras 157-158; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment (3 June 2016), paras 234-235.

98 Cf. App. 005/2013, *Alex Thomas v. United Republic of Tanzania,* dissident Opinion by Elsie Nwanwuri Thompson & Rafaâ BEN Achour (20 November 2015), paras 1-9; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania,* Dissident Opinion by Rafaâ Ben Achour; Dissident Opinion by Elsie Nwanwuri Thompson (3 June 2016), paras 3-9 and 11-19, respectively. In the latter case, alluding to the cases IACourtHR. *Case of Loayza Tamayo V. Peru*. Merits. Judgment of September 17, 1997. Series C No. 33, paras 5 and 84, and ECHR, *Case of del Rio Prada v. Spain (*Application No. 42750/09), Judgment, 21 October 2013, p. 51 para. 3.

99 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment (29 March 2019), para. 292. xx.ii; App. 016/2016, *Diocles William v. United Republic of Tanzania*, Judgment, merits and reparations (21 September 2018), para. 100.

passport (*Kennedy Gihana & others v. Republic of Rwanda*[100]), to unfreeze their accounts (*Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin, App. No. 013/2017*[101]), order the expungement of their criminal record (*Lohé Issa Konaté v. Republic of Burkina Faso*[102]), allow the victim to enter national territory after being deprived of their nationality and arbitrarily expelled (*Anudo Ochieng Anudo v. United Republic of Tanzania*[103]) or return the Ogiek people's land (*African Commission on Human and Peoples' Rights v. Republic of Kenya*[104]).

Behind this line of jurisprudence lies an argumentative position that differs from that adopted by other human rights guarantee and control bodies, including the IACtHR. Thus, while for the Inter-American Court, restitution is the principal means of reparation, for the African Court, such a reparatory measure is only applicable when other measures, such as compensation, are not relevant or sufficient[105]. However, I understand that this clashes head-on with another of the lines of jurisprudence of the ACtHPR already mentioned, according to which the ultimate aim of reparation is to reverse or render ineffective all the consequences derived from the unlawful act[106]. For I do not find a more suitable method for this purpose, where possible, than restitution itself.

On the other hand, another assessment that must be made of the Court's jurisprudence on this matter is that it has ruled on certain cases stating that, since it is not a court of appeal, it is not within its competence to grant certain reparatory measures. Among them, ordering the modification of domestic legislation, annulling sentences, or even deciding on the release of the victim (cf. e.g. *Ally Rajabu and Others v. United Republic of Tanzania; Armand Guehi v. United Republic of Tanzania; Ingabire Victoire Umuhoza v. Republic of Rwanda; Lohe*

100 Cf. App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), paras 147-148 and 153. ix.

101 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras 106-121 and 144.2.vi.

102 Cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (3 June 2016), paras. 23 and 60.i.

103 Cf. App. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania,* Judgment (22 March 2018), paras 132.ix.

104 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment on Reparations (23 June 2022), paras. 116-117.

105 Cf. App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), para. 142.

106 We refer to the discussion *below*.

Issa Konate v. Burkina[107]); when, both in previous and subsequent decisions, it proceeds in the opposite direction, attributing itself such competence[108]. If this were to happen again, the ACtHPR would have to explain why it follows different criteria.

IV.2. Compensation for material and non-material damage

This is the modality of which the Court has made the most use, having specified from its first judgements that compensation must cover all damage caused, whether material or moral[109]. This categorisation will be used in this section.

IV.2.1. Compensation for damage to property

In order to determine what is to be understood by material damage, the Court has turned to the definition provided by the *Dictionnaire de droit international public*, where it is stated that «material damage is one that affects economic or material interest, that is, interest which can immediately be assessed in monetary terms»[110]. Likewise, the ACtHPR has supplemented this definition with that provided by the IACtHR, which maintains that this concept is to be understood as «the loss or detriment to the victims' income, the expenses incurred as a result of the facts and the consequences of a pecuniary nature

107 Cf. App. 007/2015, *Ally Rajabu and Others v. United Republic of Tanzania*, Judgment (28 November 2019), paras. 154-155; App. No. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (7 December 2018), para. 163; App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment (24 November 2017), para. 167; App. 004/2013, *Lohe Issa Konate v. Burkina Faso,* Judgment (3 June 2016), para. 24.

108 In this sense, we refer to what will be analysed in the following lines of this chapter.

109 This is one of the occasions when the Court cites the Draft Articles on State Responsibility, specifically Article 31.2, «injury includes any damage, whether material or moral...», when it could have referred to specific human rights instruments. Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 26.

110 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 27.

that have a causal link with the facts of the case *sub* judice»[111]. As well as with that provided by the PCIJ in *Factory at Chorzów* (Germany v. Poland), where the Court held that reparation may include «payment of a sum corresponding to the value which a restitution in kind would bear»[112].

In *Christopher Mtikila v. United Republic of Tanzania*, the Court has sought to differentiate its pronouncement from the line that had been maintained by the Commission, according to which, in cases in which the Commission determines that the victim is entitled to compensation, it does not specify the different factors to be taken into account in determining the amount, but rather leaves this to the discretion of the respondent State[113].

In this sense, and adopting a position similar to that of the IACHR[114], the African Court has so far understood the following six concepts to be included in the amount of compensation: firstly, *consequential damage*. Thus, in cases such as *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin* (*App. 013/2017),* where, let us recall, the plaintiff was convicted of drug trafficking in the internal order, with recognition of, among others, the violation of his right to a fair trial (Article 7 ACHPR), the ACtHPR determined that the State of Benin should compensate the victim for the loss of value of the shares of his companies as a result of his indictment and subsequent conviction for drug trafficking, as well as the arbitrary suspension of the respective business licenses[115]. Secondly, *loss of profits*. For example, in the aforementioned case of *Lohé Issa Konaté v. Republic of Burkina Faso,* which resulted from the conviction imposed by the national courts on a Burkinabe journalist for publishing various articles denouncing corruption in the State, the Court, in recognis-

111 App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 29, citing IACtHR. *Case of Bámaca Velásquez v. Guatemala*. Reparations and Costs. Judgment of 22 February 2002. Series C No. 91, para. 43; and IACourtHR. *Case of García Cruz and Sánchez Silvestre v. Mexico*. Merits, Reparations and Costs. Judgment of 26 November 2013. Series C No. 273, para. 212.

112 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 29, citing PCIJ, *Factory at Chorzów* (Germany v. Poland), Judgment of 26 July 1927, PCJI *Reports*, 1927.

113 Cf. App. 011/2011, *Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 29. Recall that the reparations awarded by the Court in this case have been analysed in this same chapter, *infra*.

114 *Ibidem*.

115 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras. 30-36.

ing a violation of his right to freedom of expression contained in Article 9.2 ACHPR, for the first time, awarded compensation for material damages due to loss of earnings, both because he was unable to carry out his work due to his imprisonment and because of the six-month suspension of the newspaper where he worked[116]. Thirdly, the *loss of employment opportunities*. In this regard, turning again to *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin (App. 013/2017),* the Court found that his indictment and subsequent conviction in the domestic order resulted in a contract to which the victim was to be a party being cancelled[117]. In this regard, it is worth mentioning that the Court refers to the case law of the French Court of Cassation to determine that the concept of loss of opportunity should be understood as «the deprivation of a potential with a reasonable probability and not a certainty. lt is necessary for the damage suffered to have removed the probability that a positive event will occur or that a negative event will occur»[118]. Fourth, the *costs of medical services*, such as those incurred by the victim while in prison in *Lohé Issa Konaté v. Republic of Burkina Faso* and *Wilfred Onyango & Others v. United Republic of Tanzania*[119]. Fifthly, the costs and expenses arising from the *legal proceedings* which took place at the domestic level; among which the ACtHPR understands them to include lawyers' fees (*Wilfred Onyango & Others v. United Republic of Tanzania*), expenses for the issuing of certain documents (*lngabire Victoire Umuhoza v. Republic of Rwanda*), or transport to the court (*The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso*)[120]. And, sixthly and lastly, the expenses derived from *other pecuniary concepts*, which do not fall into any of the previous categories. Among them, the expenses generated by the victim in exile (*Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin, App. No. 013/2017*), or

116 Cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (3 June 2016), paras 37-41.

117 Cf. App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras. 43-66.

118 *Ibid*. para. 56.

119 Cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (3 June 2016), para. 50; App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations (4 July 2019), para. 33.

120 Cf., respectively, *ibid*. paras 46-53; App. 003/2014, *lngabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), paras 38-40; App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise IIboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), paras 88-94.

travel expenses incurred by the arrested person's family members to visit him/her in prison (*Lohé Issa Konaté v. Republic of Burkina Faso*)[121]. On the other hand, although the applicant has claimed compensation for damage to the life project, unlike the IACtHR, the African Court has not, to date, awarded an amount for this concept. In this regard, the ACtHPR has simply alleged insufficient evidence; it should be noted that the plaintiff himself has invoked the jurisprudence of the Inter-American Court (*Alex Thomas v. United Republic of Tanzania; Mohamed Abubakari v. United Republic of Tanzania*)[122].

In a similar vein, the Fact Sheet on Filing Reparation Claims states that, after defining the concept of material damages as «the financial loss of the victim, including any expenses incurred and any special or consequential damages, as a result of the violation», in a non-exhaustive list, it indicates that loss of income or loss of future earnings, loss of property, loss of opportunity, and medical and other expenses may be included in this definition[123].

As regards the *burden of proof* of material damage, the Court, in established case law, has determined that it is for the victim to prove the link between the unlawful act and the damage caused. They also has the burden of proof with regard to the justification of the amount invoked[124]. Thus, depending on the circumstances of the case, the ACtHPR has accepted, among other documents, invoices (*Lohé Issa Konaté v. Republic of Burkina Faso*[125]), delivery notes or commercial licences (*Wilfred Onyango & Others*

121 Cf., respectively, App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras. 74-82; App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (3 June 2016), para. 49. Again, it should be noted that we have already had occasion to dwell on these cases when considering the respective issues in the previous chapters from both a substantive and procedural point of view.

122 Cf. App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment on Merits (4 July 2019), paras. 18-28; App. 007/2013, *Mohamed Abubakari v. United Republic of Tanzania*, Judgment on Reparation (4 July 2019), paras. 26-36. Thus, in the first of the aforementioned cases, it is stated in the judgment that «the Applicant claims that his life plan has been severely disrupted and that he has been unable to achieve his plans and goals as a result of his arrest, trial and imprisonment. *The Applicant relied on the Inter-American Court of Human Rights' case of Loayza-Tamayo v. Peru to support the claim that he is entitled to reparations for the loss of his life plan*» (para. 20, emphasis added).

123 *Vid.* ACtHPR, «Fact Sheet on Filing...», *op. cit.*, p. 4.

124 Cf., e.g. App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (4 July 2019), para. 14; App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), para. 116; App. 005/2015, *Thobias Mango & Another v. United Republic of Tanzania*, Judgment on Reparations, 02 Dec 2021, para. 32.

125 Cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso*, Judgment on Reparations (3 June 2016), paras. 50.

v. United Republic of Tanzania[126]), and copies of airline tickets, copies of balance sheets, or copies of letters concerning a cancellation of negotiations on future business activities (*Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin, App. NO. 013/2017*[127]). It bases its decisions on the principles of fairness and proportionality[128].

In accordance with its most recent jurisprudence, the Court has had occasion to rule on cases in which victims may encounter difficulties in providing evidence, either because it is difficult to access or because it is destroyed. Thus, in circumstances in which files and archives are destroyed when a house burns down, or, in the specific case, when the victim is arrested, detained, and arbitrarily expelled from the territory of the State, without being able to return to it, questions such as:

> the internal consistency, the level of detail, and the plausibility of the applications vis-à-vis the evidence as a whole. It is also common to award some reparations in fairness, even where documentation of damages is incomplete or non-existent, particularly where it is logical that at least some damages would have been incurred as a direct result of the violations established[129].

It is worth mentioning that in order to construct such a pronouncement in the case of *Anudo Ochieng Anudo v. United Republic of Tanzania*, in addition to turning to the IACtHR[130], the ACtHPR has taken as a reference the jurisprudence of the International Criminal Court in the case of *Prosecutor v. Katanga*[131]. This, in addition to representing a concretisation of the phenomenon of cross-fertilis-

126 Cf. App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations, 4 July 2019, para. 37.

127 Cf. App. 013/2017, Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), paras. 40, 51 and 79-81.

128 Cf., e.g. *ibid*., para. 66; App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 87.

129 Cf. App. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment (reparations), 02 Dec 2021, para. 32.

130 *Ibid*. Citing IACtHR. *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations. Judgment of November 19, 2004. Series C No. 116, paras. 267-278; IACtHR. Case of *the «Mapiripán Massacre» v. Colombia. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 266.

131 Cf. App. 012/2015, *Anudo Ochieng Anudo v. United Republic of Tanzania*, Judgment on Reparations (02 December 2021), paras. 31 and 32, citing International Criminal Court, *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Order for Reparations pursuant to Article 75 of the Statute (24 March 2017), paras. 39 and 47.

ation between different international tribunals, demonstrates the independence of the African Court with respect to the AU's political organs, while the latter continue to insist on the withdrawal of African states from the ICC[132].

Returning to the matter at hand, one aspect on which the Court has focused is that of specifying the currency in which the amount of compensation should be fixed. In this respect, there are quite a few cases in which the claimant requests that the reparation be established in dollars or euros. However, the Court has determined that, whenever possible, compensation should be made «in the currency in which loss was incurred»[133]. For this purpose, it has referred to the place of nationality and residence of the victim, as well as to the place where the damage actually occurred[134]. In any event, the ACtHPR has specified that the victim should not have to bear disadvantageous currency fluctuations[135].

Finally, in the most recent case of *African Commission on Human and Peoples' Rights v. Republic of Kenya*, the Court, having recognised the concept of collective victim in relation to the Ogiek indigenous community, proceeds to award compensation for both material and non-material damages. In this regard, following the example of the Inter-American Court, the Court ordered the establishment of a community development fund where the compensation would be deposited[136]. Likewise, the Kenyan State was ordered to coordinate the constitution of a committee in charge of supervising the management of the fund. This committee must include adequate representation from the indigenous community[137].

132 Cf. Executive Council, Thirty-Sixth Ordinary Session, 06-07 February 2020, Addis Ababa, EthiopiaEX.CL/Dec. 1091(XXXVI), 2.ii; Assembly of the Union, Thirty-Third Ordinary Session 09-10 February 2020, Addis Ababa, Ethiopia, Assembly/AU/Dec.789(XXXIII), 2.b). Specifically, by upholding in both documents «the need for all Member States, in particular, those that are also State Parties to the Rome Statute, to continue to comply with Decisions Assembly/AU/Dec.622(XXVIII) (January 2017)». In which it adopted «the ICC Withdrawal Strategy [...] and calls on Member States to consider implementing its recommendations» (paras. 6 and 8).

133 Cf., e.g. App. No. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment (28 March 2019), para. 120; App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), para. 137.

134 Cf., e.g. App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), paras. 45.

135 Cf., e.g. App. No. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment (28 March 2019), para. 120.

136 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment on Reparations (23 June 2022), paras. 155 and 72.

137 *Ibid*. para. 156.

IV.2.2. Compensation for non-material damage

As regards moral damages[138], the Court has referred to it as «[the one that causes] suffering and afflictions to the victim, emotional distress to the family members as well as non-material changes in the living conditions of the victim, if alive, and the family. Moral damages are not damages occasioning economic loss»[139]. Likewise, citing ECtHR case law, the African Court has specified that this type of damage can be caused to both natural and legal persons[140]. In any case, it should be noted that a more detailed definition appears in the Fact Sheet on Filing Reparation Claims, where it is pointed out that such damages can also be suffered by indirect victims, stating that:

> Compensate for the loss in dignity and reputation of the victim, as well as mental and emotional harm. An award of non-pecuniary damages is intended to compensate victims for this suffering, including the psychological harm, anguish, grief, sadness, distress, fear, frustration, anxiety, inconvenience, humiliation, and reputational harm caused by the violation. In addition to these emotional harms, non-pecuniary awards may also compensate a victim for the effect of the violation or crime on his or her family life and relationships. The next of kin are frequently awarded non-pecuniary damages, particularly when the family member is removed from the family, such as through prolonged detention, disappearance, or death[141].

138 Bearing in mind the categorisation of international human rights law as *lex specialis*, it must be made clear that different rules apply in general International Law. Thus, in this field, non-pecuniary damage is damage to the dignity of the state when its sovereignty is violated. Compensation for such non-pecuniary damage is not possible other than symbolic compensation. In turn, turning to other human rights courts, such as the IACtHR, the latter has been adopting the concepts of «immaterial» or «moral» damage indistinctly. Cf., e.g. IACtHR. *Case of Cuscul Pivaral et al. v. Guatemala*. *Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of 23 August 2018. Series C No. 359, para. 235-239.

139 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), paras. 34-35, for which the ACHPR has expressly alluded to the jurisprudence of the IACtHR, *Case of the «Street Children» (Villagrán Morales et al.) v. Guatemala*. Reparations and Costs. Judgment of 26 May 2001. Series C No. 77, para. 84. On other occasions, the Court also refers to the concept provided by the *Dictionnaire de droit international public* by J. Salmon, «Moral damages is defined as one that affects the reputation, sentiments, or affection of a natural person who enjoys diplomatic protection or who can be sued». *Vid.* App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (5 June 2015), para. 27.

140 *Ibid*. paras 65-67, citing ECtHR, *Case of Comingersoll S.A. v. Portugal (*Application No. 35382/97), Judgment of 6 April 2000, para. 35.

141 See ACtHPR, «Fact Sheet on Filing...», *op. cit.*, p. 4.

With regard to the *burden of proof*, the Court departs from the pattern that governs material damages and establishes that, once the violation of some of the rights of the Charter has been recognised, there is a presumption of the existence of such damages, with the burden falling on the respondent State to prove the contrary[142]. Thus, again, it takes as a reference IACtHR jurisprudence, going so far as expressly to invoke the case of *Caracazo v. Venezuela*, in which it is held that there is «the presumption that human rights violations and the configuration of a situation of impunity in relation to them cause pain, anguish and sadness, both to the victims and their families»[143]. However, it should be borne in mind that a significant jurisprudential change has taken place in this respect. Thus, in the first case in which it ruled on reparations (*Rev. Christopher Mtikila v. United Republic of Tanzania*), the Court, unlike the cases that would follow, applied the same rule to moral damages as it did to material damages[144]; while in the following judgments its case law on the existence of such a presumption is already consolidated[145].

With regard to the *criteria for determining the amount* of compensation, the ACtHPR has based its decisions on the principle of equity, taking into account the circumstances of each case[146]. Thus, the African body takes as its starting point IACtHR jurisprudence, which in this regard has stated that:

> given that it is not possible to assign a precise monetary equivalent to non-pecuniary damage, it can only be compensated, for the purposes of full reparation to the victim, through the payment of a sum of money or

142 Cf., e.g. *idem*; App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (4 July 2019), para. 14.

143 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (5 June 2015), para. 55 citing IACtHR. *Case of Caracazo V. Venezuela*. Reparations and Costs. Judgment of 29 August 2002. Series C No. 95, para. 50. Likewise, in a footnote, it also refers to other cases of the Court where this same jurisprudence is maintained, among them, IACtHR. *Case of Loayza Tamayo V. Peru*. Reparations and Costs. Judgment of 27 November 1998. Series C No. 42, para. 140. For an analysis of the IACtHR jurisprudence in this regard, see F. Novak, «The system of reparations...», *op. cit.*, p. 145.

144 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 37.

145 Cf. e.g. App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), paras 146-150; App. 054/2016, *Mhina Zuberi v. United Republic of Tanzania*, Judgment, merits and reparations, 26 Feb 2021, para 96.

146 Cf., e.g. App. 011/2015, *Christopher Jonas v. United Republic of Tanzania,* Judgment on Reparations (25 September 2020), para. 23; App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 49.

> the delivery of goods or services that can be valued in money, as *the Court may determine in a reasonable application of judicial discretion and in terms of equity* [...][147].

And on this basis it assesses factors such as the degree of suffering, distress or humiliation to which the victim was subjected (Sébastien *Germaine Marie Aikoué Ajavon v. Republic of Benin, App. 013/2017*[148]); whether the non-material damage has been caused over a long period of time (*Armand Guehi v. United Republic of Tanzania*[149]); or whether the violation of the Charter provision giving rise to the non-material damage has a significant impact on the outcome of the trial to which the victim was subjected domestically (*Wilfred Onyango & Others v. United Republic of Tanzania*[150]). In this regard, one case to which the Court has paid particular attention has been the non-material damage caused to the victim by the excessive prolongation of a death sentence. Thus, the ACtHPR has cited ECtHR case law in understanding that the factors to be taken into account include, in addition to the time taken to pass the final sentence and for it to be carried out, the method used, as well as the age, mental state and personal characteristics of the condemned person (*Ally Rajabu & others v. United Republic of Tanzania)*[151].

In specifying these criteria in the monetary amount of compensation, I note that the Court has adopted a coherent and protective line of jurisprudence, awarding different amounts depending both on the human right violated and the circumstances in which it took place[152]. Likewise, the ACtHPR

147 *Ibid*. para. 49. In the latter case, alluding to the jurisprudence of the Inter-American Court in *Goiburú et al. v. Paraguay. Paraguay*. Merits, Reparations and Costs. Judgment of 22 September 2006. Series C No. 153, para. 156.

148 Cf. App. 013/2017, *Sébastien Germaine Marie Aikoué Ajavon v. Republic of Benin*, Judgment on Reparations (28 November 2019), para. 94.

149 Cf. App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (7 December 2018), para. 180.

150 Cf. App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations (4 July 2019), paras 62-63, in relation to the undue prolongation of a trial for 30 months.

151 Cf. App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), paras 146-150; citing ECHR, *Case of Soering v. The United Kingdom* (Application No. 14038/88), Judgment of 07 July 1989.

152 Unlike other courts that have awarded a fixed amount regardless of the human right violated, for example, the ECtHR in its first judgments on the matter. Cf. J. García Roca, and E. Carmena Cuenca, «Hacia una globalización...», *op. cit.,* pp. 213-215.

has fixed, in addition to the principal amount, default interest in the event of non-compliance[153]. The same pattern has been set for compensation for material damages[154]. However, in certain cases we find that, taking into account the seriousness of the breach determined, the amount of compensation is decidedly low. For example, in *Armand Guehi v. United Republic of Tanzania*, the Court awarded the victim $500 for non-pecuniary damages after he had been detained for 10 days without food and a bed[155].

The ACtHPR has generally adopted the practice of awarding a lump sum[156], and only in the case of *Robert J. Penessis v. United Republic of Tanzania,* did the Court combine a fixed sum with monthly periodic amounts until the State put an end to the cause of the non-pecuniary damage; in the specific case, the victim's release from prison[157]. However, it is worth highlighting the particular characteristics of this case. Which, it should be remembered, stems from the arrest, imprisonment and subsequent conviction of the plaintiff for alleged illegal entry into Tanzania. And where the Court determined that his right to nationality (Article 5 ACHPR read in conjunction with Article 15 UDHR) and his right to liberty and security of person (Article 6 ACHPR), among others, had been violated; in addition to recognising that he remained in prison despite having served the sentence stipulated by the domestic courts[158]. However, I find that, in recent cases, where the ACtHPR also went so far as to

153 Cf., e.g. App. No. 025/2016, *Kenedy Ivan v. United Republic of Tanzania*, Judgment on Merits and Reparations (28 March 2019), para. 98.vii; App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), para. 74 iii. and iv. Although it is true that, in certain pronouncements, this practice has not been uniform, finding cases in which no default interest is set in the event of non-compliance. Cf., e.g., App. No. 020/2016, *Anaclet Paulo v. United Republic of Tanzania*, Judgment (21 September 2018), paras. 111 vi. and vii.

154 Cf. App. 003/2014, *Ingabire Victoire Umuhoza v. Republic of Rwanda*, Judgment on Reparations (7 December 2018), para. 74 ii. and iv.

155 Cf. App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment, merits and reparations (7 December 2018), paras. 126-127 and 180. Compare with the large amount of compensation awarded for moral damages in other cases, cf. e.g., App. No. 013/2017, *Sébastien Germain Ajavon v. Republic of Benin,* Judgment (28 November 2019), para. 95. For a detailed analysis of the violations recognised in both cases, see chapter three, *infra*.

156 Cf., e.g. App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), para. 119.

157 Cf. App. 013/2015, *Robert J. Penessis v. United Republic of Tanzania*, Judgment, merits and reparations (28 November 2019), paras 149 and 168.x.

158 Cf. App. 013/2015, *Robert J. Penessis v. United Republic of Tanzania*, Judgment, merits and reparations (28 November 2019), para. 168.v. and vi.

order the release of the victim –because, in addition to the nature of the violations acknowledged, the State had not taken any measures to redress them, the victim had already served 18 of the 30 years of his sentence, and being a Kenyan national he was in prison far from his family– the Court does not require periodic monthly amounts until his release[159]. Therefore, insofar as this measure aims to compel the condemned state to comply with the reparations ordered, in addition to the default interest, the African organ could consider making greater use thereof[160].

Finally, as has already been noted, the ACtHPR has held in consolidated case law that compensation for non-pecuniary damages also covers the next of kin as indirect victims[161]. Having recognised as such, depending on the particularities of the case, the spouse, siblings, ascendants and descendants of the first degree[162]. As a *sine qua non* condition, the Court has required proof of kinship, an affidavit before the Court or affidavit being insufficient[163], but requiring, taking as an example the case of *Wilfred Onyango & Others v. United Republic of Tanzania*;

> for the spouses, they should produce a marriage certificate or any other equivalent proof, and children have to produce a birth certificate or any other equivalent evidence to show proof of their filiation. As regards fathers and mothers, they must produce an attestation of paternity as well as a birth certificate or any other equivalent proof[164].

159 Cf. App. 003/2015, *Kennedy Owino Onyachi & Another v. United Republic of Tanzania*, Judgment on Reparations (30 September 2021), para.79 vii.

160 Likewise, and as an example, such a practice could also have been followed in App. No. 017/2015, *Kennedy Gihana and Others v. Republic of Rwanda*, Judgment on Merits and Reparations (28th November 2019), until the State had restored to the victim the passport that was arbitrarily taken away. Cf. para. 153. ix.

161 Cf., e.g. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 June 2015), para. 49. In this regard, I refer to the concept of victim discussed in this chapter, *infra*.

162 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (5 June 2015), para. 111.ii; App. 006/2015, *Nguza Viking (Babu Seya) & Another v. United Republic of Tanzania*, Judgment on Reparations (8 May 2020), para. 50; App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment on Reparations) (04 July 2019), paras 49-60.

163 Cf. App. 024/2016, *Amini Juma v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 161.

164 *Vid.* App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations (4 July 2019), para. 71.

Although it is true that, in the absence of such documents, the Court has accepted that domestic courts, or the State concerned itself, have recognised the alleged relationship of kinship (*Lucien Ikili Rashidi v. United Republic of Tanzania*)[165]. However, in order to grant compensation, the Court has not required concrete evidence of the damage caused –for example, expert medical reports–, maintaining a fairly protective as well as flexible jurisprudence, and assessing under its own reasoning the casual link between the concrete violation of the human right and the damage caused to the indirect victim (Novak, 2018: 145)[166]. In fact, in its most recent case law, the ACtHPR has gone so far as to affirm that, once kinship is established, the presumption of the existence of non-pecuniary damages also extends to the victim's next of kin. It holds that this presumption does not apply beyond such relatives, since «for other categories of indirect victims, there must be proof of the moral prejudice suffered» (*Thobias Mango & Another v. United Republic of Tanzania*)[167]. In any case, as I have pointed out, in ACtHPR case law I have not yet found recognition of moral damages to indirect victims that the Court does not consider to be their next of kin. Therefore, I must refer to future pronouncements to clarify the evidentiary requirements in this regard.

IV.3. Victim rehabilitation measures

This is the form of reparation for which there are the fewest pronouncements in ACtHPR case law. While its concept has not been defined by the judicial body either, by referring to the Fact Sheet on Filing Reparation Claims, rehabilitation measures must be understood as those whose purpose is to provide reparation:

> to restore the victim's health and well-being through the provision of medical and psychological care as well as legal and social services. It includes the provision of on-going social, medical, legal and/or psychological care

165 Cf. App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment on Merits and Reparations (28 March 2019), para. 137.

166 *Ibid*. paras 132-138; App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations (4 July 2019), paras 70-74. Same approach as that adopted by the Inter-American Court.

167 *Vid*. App. 005/2015, *Thobias Mango & Another v. United Republic of Tanzania*, Judgment on Reparations (02 December 2021), para. 83. In the same vein, cf. Application 047/2016, *Ladislaus Onesmo v. United Republic of Tanzania*, Judgment, merits and reparations (30 September 2021), para. 89.

> to victims. It also includes measures to restore the dignity and reputation of victims. Although individualized, rehabilitation measures are designed to redress the physical or psychological harm to victims[168].

In fact, it is only in the recent case of *Prof. Lèon Mugesera v. Republic of Rwanda* that the Court has granted rehabilitation measures as reparation. In this case, the Court recognises that, in addition to the violation of the right to a fair trial (Article 7 ACHPR), while he was in prison to be tried for the alleged commission of crimes of genocide, on the one hand, he was subjected to cruel, inhuman and degrading treatment (Article 5 ACHPR), and, on the other hand, his life and mental health were seriously threatened (article 4 ACHPR). In view of these circumstances, the Court orders the State of Rwanda to appoint an independent doctor to assess the applicant's state of health and to determine the measures necessary to assist him[169].

IV.4. Victim satisfaction measures

Again, in the absence of a definition in the jurisprudence of the ACtHPR, we find this concept specified in the Fact Sheet on Filing Reparation Claims, which states that «satisfaction refers to reparations awards that concede and acknowledge that the harm occurred. They aim to end continuing abuses, and to restore the dignity and reputation of the victim»[170].

Referring to IACtHR jurisprudence, the ACtHPR has established that a conviction *per se* can constitute a sufficient measure of satisfaction for the victim (*The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*[171]). However, either

168 *Vid.* ACtHPR, «Fact Sheet on Filing...», *op. cit.*, p. 5.

169 *Vid.* App. 012/2017, *Prof. Lèon Mugesera v. Republic of Rwanda*, Judgment, merits and reparations (27 November 2020), paras 162-163 and 177.xvii.

170 *Vid.* ACtHPR, «Fact Sheet on Filing...», *op. cit.*, p. 5.

171 Cf., e.g. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para.98, specifically citing IACtHR. *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations. Judgment of 19 November 2004. Series C No. 116, paras. 102-103; IACHR. *Case of Heliodoro Portugal v. Panama*. *Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C No. 186, para. 248.

motu proprio, or on the initiative of a party, in a significant number of cases, the ACtHPR has granted as a measure of satisfaction the publication of the judgment or an official summary thereof in the Official State Gazette[172], in newspapers with wide national circulation[173], and/or on the website of the Ministry of Justice of the State concerned. In the latter case, in most cases, the publication is fixed for a period of one year[174].

According to ACtHPR case law, publication of the judgment is of particular importance in cases of gross or systematic violations of human rights, when the respondent State has not complied with a previous order in relation to the same case, or when it is necessary to raise awareness or sensitise public opinion[175]. Thus, the Court has held that a systematic violation deserving of such publicity occurred in *Lucien Ikili Rashidi v. United Republic of Tanzania* and *Ally Rajabu & others v. United Republic of Tanzania*. Regarding the former, in relation to the method and manner in which body cavity searches are carried out by the State Security Forces and Corps at the entrance and exit of Tanzanian prisons[176]; the Court having determined that this practice constitutes a violation of the rights to personal integrity and dignity, recognised, respectively, in Articles 4 and 5 of the ACHPR[177]. Regarding the second, concerning the illegality of the mandatory imposition of the death penalty for certain

172 Cf., e.g. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), paras 45 and 46.5.

173 Cf., e.g. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 111.ix; App. 011/2011, Rev. Christopher Mtikila v. United Republic of Tanzania, Judgment on Reparations (14 Jun 2013), paras. 45 and 46.5.

174 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 45; App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment on Merits (4 July 2019), para. 74. Turning to the jurisprudence of the IACtHR, the ACtHPR has recalled that this practice is also carried out by the Court. Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), footnote 35; specifically, alluding to the *Cases Masacre Plan de Sánchez v. Guatemala*. Reparations. Judgment of 19 November 2004. Series C No. 116, paras 102-103; IACtHR. *Case of Heliodoro Portugal v. Panama. Panama.* Preliminary Objections, Merits, Reparations and Costs. Judgment of August 12, 2008. Series C, No. 186, para. 248.

175 Cf. App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations (4 July 2019), para. 86.

176 Cf. App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), paras 148 and 152.

177 *Ibid*. paras 86-54, 160.v. and 160.vi.

crimes[178]; the African judicial body having established that this provision of Tanzanian law violates the right to life and the dignity of the person (Articles 4 and 5 of the ACHPR)[179].

Similarly, the Court has also understood the need to publish the judgment according to the profile of the victim, the nature of the domestic proceedings, the media coverage of the case in the State concerned, or when it affects a significant part of the population of a State[180]. In relation to the last of these issues, the ACtHPR has expressly referred to the case of *Jebra Kambole v. United Republic of Tanzania*[181], which, it should be recalled, arose from the existence of a constitutional provision that restricted the transparency of the Tanzanian elections, preventing domestic courts from investigating the election of a presidential candidate after the electoral commission had declared a winner. Thus, the ACtHPR acknowledged that such a provision violated the principle of non-discrimination (Article 2 ACHPR) and the right to a fair trial (Article 7 ACHPR)[182].

In this respect, one aspect of its jurisprudence that could be reviewed relates to the language in which the judgment is to be published. Thus, on most occasions, the Court determines that the judgment must be published in English or French, and there are even quite a few cases in which the language of publication is left to the discretion of the State concerned. This is particularly important when the violations are of a systematic nature, affect large segments of the population, or directly affect the population using such languages.

In this sense, until now, only in the matter *Rev. Christopher Mtikila v. United Republic of Tanzania*, the Court has ordered that the publication be made, in addition to English, in Swahili. On the other hand, in the cases *Lucien Ikili Rashidi v. United Republic of Tanzania* and *Ally Rajabu & others v. United Republic of Tanzania*, also concerning the Tanzanian State, and in which the Court even recognises that we are dealing with systematic violations of human rights, it

178 Cf. App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), para. 166.

179 Cf. App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), para. 171.viii. and ix.

180 Cf. App. 006/2015, *Nguza Viking (Babu Seya) & Another v. United Republic of Tanzania*, Judgment on Reparations (8 May 2020), para. 65.

181 Cf. App. 018/2018, *Jebra Kambole v. United Republic of Tanzania*, Judgment, merits and reparations (15 July 2020), para. 122.

182 For an analysis of the rights violated in this case, I refer to chapter three, *infra*.

corrresponds to the State to decide the language in which the publication is to be made[183].

On the contrary, one aspect in which we see an improvement in the Court's pronouncements is related to the content of such publications, insofar as, although in its first decisions, the ACtHPR only ordered the publication of the judgment on the merits, but not that on reparations –its importance being equivalent to the previous one[184]–, in subsequent pronouncements, and adopting a uniform practice, it has ordered the publication of both texts[185].

IV.5. Cessation and guarantees of non-repetition

In established case law, the ACtHPR has noted that guarantees of non-repetition are intended to address human rights violations of a structural and systematic nature[186]. However, the Court has clarified that in certain cases such reparation measures may also be granted where individual violations continue or are likely to recur[187].

183 Cf., respectively, App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 45; App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), para. 153; and App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), para. 167.

184 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 Jun 2013), para. 45.

185 Cf., e.g. App. 005/2013, *Alex Thomas v. United Republic of Tanzania*, Judgment (4 July 2019), para. 74.

186 Cf., e.g. App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment on Merits and Reparations (7 December 2018), para. 191; for which it cites the jurisprudence of the IACtHR, *Case of the «Street Children» (Villagrán Morales et al.) v. Guatemala*. Reparations and Costs. Judgment of 26 May 2001. Series C No. 77; and General Comment No. 4 of the African Commission, General Comment No. 4 *on the African Charter on Human and Peoples' Rights: the Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5)*, 4 March 2017. As an example of systematic and structural violations requiring guarantees of non-repetition, the Court includes two cases already referred to when analysing measures of satisfaction: App. 009/2015, *Lucien Ikili Rashidi v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), paras 146-149; and App. 007/2015, *Ally Rajabu & others v. United Republic of Tanzania*, Judgment, merits and reparations (18 November 2019), paras 162-163.

187 *Ibid*. For example, in relation to the latter aspect, for failing to comply with the Court's previous judgement in relation to the same case. Cf. App. 001/2015, *Armand Guehi v. United Republic of Tanzania*, Judgment on Merits and Reparations (7 December 2018), para. 191. For its part, a similar description is detailed in the *Fact Sheet Sheet on Filing Reparation Claims*, where it is noted that

Among the guarantees of non-repetition ordered by the Court, those aimed at modifying the domestic legislation of the respondent State are particularly noteworthy. In this sense, the degree of autonomy admitted by the ACtHPR varies from case to case, in some which the judicial body simply includes a generic statement ordering the adoption of constitutional, legislative and other measures necessary to redress the violations declared (*Rev. Christopher Mtikila v. United Republic of Tanzania*[188]); in others, in a slightly more precise manner, it refers to the aspect of the legislation to be amended *(Lohé Issa Konaté v. Republic of Burkina Faso; Houngue Eric Noudehouenou v. Republic of Benin*[189]); and in others, on the other hand, it establishes the specific precept to be revised (*APDF & IHRDA v. Republic of Mali and Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin, App. 046/2016*[190]).

Apart from changes in legislation, I have only found one case, *APDF & IHRDA v. Republic of Mali*, in which the Court has provided for the education of society on human rights as a guarantee of non-repetition[191]. A case we have had the opportunity to examine in detail in the previous chapter, and where the Court, faced with the approval of a new family law in Mali, ruled on the minimum age and the importance of consent to marriage, on the inheritance rights of widows and children born out of wedlock, and on the elimination of practices or traditions that are harmful to women and children.

For its part, in *African Commission on Human and Peoples' Rights v. Republic of Kenya,* the Court considered as a guarantee of non-repetition the recognition of the Ogiek as an indigenous community, the establishment of a con-

«guarantees of non-repetition seek to prevent the commission of similar human rights violations, whether against the same or multiple victims. These measures are rooted in the recognition that human rights violations frequently arise from a larger context of abuse that must be systemically changed in order to prevent future harms». *Vid.* ACtHPR, «Fact Sheet on Filing...», *op. cit.,* p. 5.

188 Cf. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 June 2013), para. 42.

189 Cf. App. 004/2013, *Lohé Issa Konaté v. Republic of Burkina Faso,* Judgment (5 December 2014), para. 178.8; App. 003/2020, *Houngue Eric Noudehouenou v. Republic of Benin*, Judgment, merits and reparations (04 December 2020), para. 123. ix.

190 Cf. App. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment, merits and reparations (11 May 2018), para. 130; App. 062/2019, *Sébastien Germain Marie Aikoué Ajavon v. Republic of Benin*, Judgment, merits and reparations, 04 Dec 2020, paras. 369. xxiv.1 and 2; 369.xxv. In the same vein, App. 059/2019, *XYZ v. Republic of Benin*, Judgment, merits and reparations (27 November 2020), para. 179. xii.

191 Cf. App. 046/2016, *APDF & IHRDA v. Republic of Mali*, Judgment, merits and reparations (11 May 2018), para. 131.

sultation mechanism in matters concerning them and the restitution of their lands[192]. With regard to the latter, the Court went so far as to specify that, in the event of failure to reach an agreement between the State and the community, the former should pay adequate compensation[193].

Likewise, in only two other cases, *The beneficiaries of the late Norbert Zongo and others v. Republic of Burkina Faso* and *Wilfred Onyango & Others v. United Republic of Tanzania*, has the ACtHPR had occasion to order measures directly aimed at the cessation of the offence, basing its decision on the case law of the African Commission[194] and the UN Human Rights Committee[195]. The purpose of these measures was, respectively, to reopen investigations to find those responsible for the murder of N. Zongo and his companions[196], and to provide legal assistance to the victim in the internal proceedings underway[197].

IV.6. Ordering the defendant to pay the costs of the proceedings

There is a specific type of reparatory measures aimed at covering lawyers' and experts' fees, as well as other expenses arising directly from the legal pro-

192 Cf. App. No. 006/2012, *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment on Reparations (23 June 2022), para. 150.

193 *Ibid*. paras 116-117.

194 Alluding, *inter alia*, to AComHPR, Communication 288/04, *Gabriel Shumba v. Zimbague* (30 June 2017), para. 194, in App. 013/2011, *The beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 106.

195 Holding that «the State party should investigate the events complained of and bring to justice those held responsible for the author's treatment; it further is under an obligation to take effective measures to ensure that similar violations do not occur in the future». *Vid*. HRC, Commission 428/1990, *M'Boissona v Central African Republic*, 7 April 1994, para. 7, in App. 013/2011, *The beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), para. 105.

196 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo, Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 Jun 2015), paras 103-104 and 109.

197 Cf. App. 006/2013, *Wilfred Onyango & Others v. United Republic of Tanzania*, Judgment on Reparations (18 March 2016), para. 193. ix-x. In any event, I understand that measures that the Court considers to be restitutionary also aim at the cessation of the violation. As an example, restitution of the passport arbitrarily taken away from the victim. Cf. App. 017/2015, *Kennedy Gihana & others v. Republic of Rwanda*, Judgment, merits and reparations (28 November 2019), paras 147-148 and 153. ix.

ceedings. These are the costs of the proceedings or procedural costs. As maintained by one doctrinal sector, with which I am in agreement, these should not be understood as a form of compensation, but as an autonomous reparatory measure which derives from a general (procedural) principle of International Law, insofar as it is present in all domestic systems[198].

Citing IACtHR jurisprudence, the Court has recognised its inclusion in the concept of reparation[199], leaving its analysis for the last section of its pronouncements[200]. However, in contrast to the position of the guarantor, which, in general terms, has been the backbone of its decisions on reparations, in this matter we see a certain distance from the principle of *pro homine*.

The precept in question is Rule 32.2 of the Rules of Court, according to which, «unless otherwise decided by the Court, each party shall bear its own costs, if any»[201]. This rule has been interpreted restrictively, generally imposing on the plaintiff the payment of its costs even when they have been recognised as a victim. I believe that such a practice leads to a double penalisation of the victim, avoids addressing the imbalance of power between the parties inherent in international human rights protection proceedings, and even leads to potential victims deciding not to invoke their right to justice and reparation.

Moreover, although the Court has rightly required evidence to justify such costs[202] –for which it has again taken as a reference IACtHR jurisprudence[203]–, I do not see a uniform jurisprudence in this regard, since in various judgments it refuses to impose costs on the State without even analysing this matter (*Christopher Jonas v. United Republic of Tanzania; Kenedy Ivan v. United*

198 A. G. López Martín has expressed his opinion along these lines.

199 Cf., e.g. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 June 2015), paras. 79-80; citing various IACHR cases, including *Goiburú et al. v. Paraguay. Paraguay*. Merits, Reparations and Costs. Judgment of 22 September 2006. Series C No. 153, para. 180.

200 In this respect, I refer to what is set out in this chapter, *infra*.

201 *Vid*. Rule 32.2 of the Rules of Court. In the 2010 Rules, cf. Rule 30.

202 Cf., e.g. App. 011/2011, *Rev. Christopher Mtikila v. United Republic of Tanzania*, Judgment on Reparations (14 June 2013), para. 40; App. 005/2015, *Thobias Mango & Another v. United Republic of Tanzania*, Judgment, reparations (02 December 2021), para. 39.

203 Cf. App. 013/2011, *The beneficiaries of the late Norbert Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso*, Judgment on Reparations (05 June 2015), para. 82; citing IACtHR. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 21, 2007. Series C No. 170, para. 277.

Republic of Tanzania[204]). And on the few occasions in which it has granted such a request, the victim had not made allegations in this regard (*Minani Evarist v. United Republic of Tanzania*[205]), or had done so incompletely (*Anaclet Paulo v. United Republic of Tanzania*[206]); which has generated dissenting opinions among the judges, to which I adhere[207]. It could therefore be argued that the Court has room for improvement in the argumentative and legal soundness of its rulings on costs.

V. THE ENFORCEMENT OF JUDGEMENTS HANDED DOWN BY THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

Having analysed the reparations granted by the ACtHPR as a consequence of the violation of an international obligation, i.e. the violation of a provision of a human rights treaty ratified by the State concerned, I will now look at the mechanisms provided within the framework of the African Court to guarantee the enforcement of its judgments. To this end, I will first examine the anticipated procedure in this regard, and then analyse the degree of compliance with the judgments handed down.

V.1. The procedure for ensuring the enforcement of judgments adopted by the African Court on Human and Peoples' Rights

In accordance with the Protocol establishing the ACtHPR, the judgment issued, which must include a reasoned pronouncement of the judgment adopted[208], is

204 Cf., e.g. App. No. 011/2015, *Christopher Jonas v. United Republic of Tanzania*, Judgment (28 September 2017), para. 98; App. No. 025/2016, *Kenedy Ivan v. United Republic of Tanzania*, Judgment, merits and reparations (28 March 2019), paras. 95-97.

205 Cf. App. No. 027/2015, *Minani Evarist v. United Republic of Tanzania*, Judgment, merits and reparations (21 September 2018), paras. 66.

206 Cf. App. No. 020/2016, *Anaclet Paulo v. United Republic of Tanzania*, Judgment (21 September 2018), paras. 108-110.

207 Cf. App. No. 027/2015, *Minani Evarist v. United Republic of Tanzania*, Dissenting Opinion of Justices Ângelo Vasco Matusse, Ben Kioko, Stella Isibhakhomen Anukam and Tujilane Rose Chizumila (21 September 2018), para. 1-11.

208 Cf. Article 28.6 Regulation of the ACtHPR.

binding[209], final, and unappealable[210]. Mandatory, insofar as its non-compliance constitutes an internationally wrongful act for the condemned State, which generates its international responsibility[211]. Final and unappealable, in the sense that the decision adopted has *the force of res judicata*, and cannot be subject to appeals before other instances, with the exception of the appeal for interpretation and the application for review before the ACtHPR itself[212]. Likewise, in addition to the specific case with respect to the State or States concerned, the judgments of the ACtHPR acquire the value of res judicata *erga omnes*, insofar as the rest of the States that have ratified the ACHPR, or, where applicable, the other treaties of the system, must take it into account in order to interpret the obligations they have assumed in this respect (Fernández de Casadevante Romaní, 2011: 209).

For its part, although it is not expressly established, neither in its Protocol nor in its Rules of Procedure, it should be added that the judgments of the ACtHPR are not enforceable, but declaratory, a feature it shares with the rest of the international tribunals, with the exception of the International Court of Justice, which is nothing more than an expression of the decentralised nature of the legal order of International Law (López Martín, 2020: 192). Thus, the ACtHPR does not have an enforcement mechanism with coercive powers to ensure compliance with its decisions –a mechanism which the ICJ does have, as embodied in the United Nations Security Council– but which is left to the good faith of the states themselves, who must *implement* the necessary measures in their domestic order. Hence the importance of the different monitoring mechanisms to ensure the enforcement of judgments provided for in the framework of the ACtHPR.

In this regard, therefore, we must turn to Precepts 29 and 31 of the Protocol. The first of these –which briefly outlines the enforcement procedure– indicates who must be informed of the judgment and which organ is responsible for enforcing the latter: after the adoption of the judgment, it must be notified to the parties and to the AU Executive Council, and it must be transmitted to the African Commission and to the other AU Member States, with the

209 Cf. Article 30 Protocol; Rule 72.2 ACtHPR Rules; Art. 1 *in fine* ACHPR.

210 Cf. Article 28.2 *in fine;* Rule 72.1 ACtHPR Rules.

211 Cf. Article 1 of the *Draft Articles on Responsibility of States for Internationally Wrongful Acts (*AG/56/83).

212 Cf. Arts. 28.3 and 28.4 ACtHPR Protocol; Rules 77 and 78 of the ACtHPR Rules.

Executive Council supervising the enforcement of the judgment on behalf of the Assembly[213]. In addition to this brief regulation, Article 31 specifies that, in addition to the notification of the judgment, the annual report that the Court must submit to the Assembly must indicate, in particular, those cases in which the State concerned *has not complied with the* decisions of the ACtHPR. In this regard, we have to take into consideration that, in accordance with article 9.2 of the Constitutive Act of the AU, the Assembly has delegated its functions to the Executive Council as far as this report is concerned. Therefore, the Tribunal must now submit it to the Executive Council[214].

In this regard, the doctrine has expressed doubts about the role that the ACtHPR should play in the enforcement procedure. Specifically, whether its task is limited to merely informing the Executive Council and the Assembly, or whether, to a greater or lesser extent, it is also responsible for supervising compliance with judgments (Murray *et. al.*, 2017: 153, 159; San Martín Sánchez de Muniáin, 1999: 524 *et seq*; Cole, 2010: 23-45; Martorana, 2009: 583-610)[215].

While in the 2010 Regulation the question remained unresolved, the 2020 Regulation does clarify this issue, opting for the first of the options. Thus, the provision in question is Rule 81 of the Court, which, under the revealing heading «Procedure for Monitoring Compliance with Decisions of the Court», consists of five paragraphs. Under the first of these, the state concerned must send the Court a report on compliance with the decisions ordered, a report that must also be transmitted to the plaintiff. In order to assess compliance, and in accordance with the second paragraph, the Court is empowered to supplement the data obtained from other reliable sources of information. The third paragraph adds that, in the event of a dispute over compliance with such decisions, the ACtHPR may, among other measures, decide to hold a hearing, at the end of which the Court will rule and, if nec-

213 On the functions attributed to the two institutions, see, among others, our study in «El Tribunal Africano de Derechos Humanos y de los Pueblos», Universidad Complutense de Madrid, Doctoral Dissertation, 2022.

214 A provision which states that «the Assembly may delegate any of its powers and functions to any organ of the Union». In this sense, cf. e.g. Executive Council, *Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Second Ordinary Session, 22-26 January 2018, Addis Ababa (Ethiopia). Doc. EX.CL/1057(XXXII), para. 3.

215 Cf. Executive Council, *Comparative Study on the Monitoring and Reporting Mechanisms of Relevant International and Regional Courts on Human Rights*, Doc. EX.CL/1126 (XXXIV), Annex 2, 2019, pp. 44 and 47. In 2017, Murray favoured the first of the options.

essary, adopt a new order to ensure compliance. Finally, the fourth and fifth paragraphs state that, if the State concerned fails to comply, the Court shall report to the Assembly, and shall provide all necessary information for the enforcement of its decisions.

A number of considerations must be made on reading this article. Firstly, it should be pointed out that this provision is not limited to judgments, but is applicable to all binding decisions of the Court –hence the title of the article–. This includes, therefore, orders for interim measures. Secondly, the provisions contained in this Article do not generally reflect the practice of the ACtHPR. Thus, to date, as far as has been made public, the Court has not organised any hearings concerning the enforcement of its decisions. Likewise, apart from the aforementioned annual reports, only in one case, *The African Commission on Human and Peoples' Rights v. State of Libya,* have I found that the ACtHPR has adopted an express resolution urging the Assembly to enforce compliance with its decisions –in the specific case, regarding the provisional measures ordered–. A case which, let us recall, concerns the arrest and sentencing to death of Saif al-Islam Gaddafi following the Arab uprisings of 2011[216]. Proceeding which shows that, when there is a will to do so, the Court has more means at its disposal than it has been using. Finally, it would not have been superfluous for the 2020 Rules to specify that the Assembly has delegated the aforementioned functions to the Executive Council.

In any case, I believe that this modification of the Rules –which is in line with the draft proposal on the monitoring of the enforcement of judgments, which is currently being outlined[217]– is more than welcome, as it clarifies and strengthens the action of the ACtHPR, which, in contrast to the political bodies, has adopted a more active position in this regard.

Thus, these organs, the AU Executive Council and the AU Assembly, despite the fact that the Protocol gives them a decisive role in the execution of judgments, have hardly acted in the more than ten years that the Court has

216 Cf. ACtHPR, *Interim Report of the African Court notifying the Executive Council of non-compliance by the Libyan State* (17 May 2013), para 8.

217 Cf. Decision Ex.Cl/Dec.806 (XXIV), para. 9; Executive Council, *Draft Framework for Reporting & Monitoring Execution of Judgments and other Decisions of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019, Addis Ababa (Ethiopia), Doc. EX-.CL/1126 (XXXIV). However, it should be pointed out that, on the one hand, this proposal dates back to 2014 and that, on the other hand, in my doctoral research I have detected certain inaccuracies in the 2019 Draft, to which I refer.

been in operation. Without even having established the competent departments or sections to carry out the function entrusted to them[218].

Again, beyond generic allegations in which the Executive Council either «urges Member States to continue to contribute to AfCHPR and comply with its Decisions»[219], or «urges all Member States [...] to co-operate fully with the Court in the exercise of its mandate, to assure the proper administration of justice»[220], only in the aforementioned case *The African Commission on Human and Peoples' Rights v. State of Libya,* and motivated by the close relationship of the Gaddafi family with the African leaders, has this body expressly referred to the non-compliance of the Libyan State –both with regard to the orders for provisional measures and the judgement on the merits–. In this regard, it has used expressions along the following lines:

> calls upon Member States to comply with the Orders of AfCRHPR in accordance with the Protocol of the Court *and urges in particular the State of Libya to implement the Order of the* Court[221].

Moreover, in 2018, the Permanent Representatives Committee itself –the body responsible for preparing the work of the Executive Council and adopting its instructions[222]– even issued the following pronouncement urging the Court to avoid publicising non-compliant states:

218 This issue is specified in the proposal for improvement, which is examined in more detail in «El Tribunal Africano de Derechos Humanos y de los Pueblos», Universidad Complutense de Madrid, Doctoral Dissertation, 2022.

219 Cf. e.g. Executive Council, *Decision on the 2015 Activities of the African Court on Human and Peoples' Rights*, Twenty-Eighth Ordinary Session, 23-28 January 2016, Addis Ababa (Ethiopia), Doc. EX.CL/939(XXVIII), para. 6.

220 Cf. e.g. Executive Council, *Decision on the 2013 Activity Report of the African Court on Human and Peoples' Rights*, Twenty-Fourth Ordinary Session, 21-28 January 2014, Addis Ababa (Ethiopia), Doc. EX.CL/825(XXIV), para. 3.

221 Cf. Executive Council, *Decision on the 2016 Activity Report of the African Court on Human And Peoples' Rights*, Thirtieth Ordinary Session, 25-27 January 2017, Addis Ababa (Ethiopia), Doc. EX.CL/999(XXX), para. 4 (emphasis added). In a similar vein, cf. Executive Council, *Decision on the Mid-Term Activity Report of the African Court On Human And Peoples' Rights*, Twenty-Fifth Ordinary Session, 20-24 June 2014, Malabo (Equatorial Guinea), Doc. EX.CL/857(XXV), para. 4; Executive Council, *Decision on the Mid-Term Activity Report of the African Court On Human And Peoples' Rights*, Thirty-First Ordinary Session, 27 June-1 July 2017, Addis Ababa (Ethiopia), Doc. EX.CL/1029(XXXI), para. 5.

222 Cf. AU, *African Union Handbook 2021*, 8th edition, Abis Ababa/Wellington, 2020, p. 50.

> *The naming and shaming of Member States should be avoided to the extent possible as this does not create a conducive environment between the Court and Member States*. In this regard, it was proposed that the Court should have other channels of dialogue with Member States on challenges being faced by the Court[223].

In order to go deeper into this matter, I must refer to the 2018 Annual Activity Report of the ACtHPR, which states that, indeed, at the Thirty-second Ordinary Meeting of the Executive Council held in January 2018 in Ethiopia, which took place after the adoption of the aforementioned report of the Permanent Representatives Committee, the AU organ adopted the *sine die* decision not to mention the names of the non-compliant States. To this should be added the fact that the Court's Activity Report states –while it is omitted in the Report derived from the Executive Council meeting– that, during the adoption of this decision, the President of the ACtHPR intervened to express his opposition to it, as, in his opinion, it went against the spirit of the aforementioned articles 29 and 31 of the Protocol establishing the ACtHPR. This was stated in the following terms:

> [S]uch a decision would be *contrary to the spirit and letter of Article* 31 of the Protocol and would *undermine the effectiveness of the Court in particular, and the African human rights protection system as a whole* [...]. The Court is of the view that the Executive Council decision EX.CL/Dec.994(XXXII) adopted at its 32nd Ordinary Session not mentioning names of countries that do not comply with the Court's *judgments does not give Council the opportunity to effectively monitor execution of those judgments on behalf of the Assembly as mandated under Article 29 of the Protocol*. Furthermore, since Council communicates to the Assembly through decisions, the Assembly has no way of knowing that Council has discharged its mandate[224].

If we consider the latest decisions adopted by the Executive Council, when assessing the annual activity report presented by the ACtHPR, not only has it not specifically named the non-compliant States –a procedure which, as we have

223 *Vid*. Permanent Representatives *Committee*, *Report of the Thirty-Fifth Ordinary Session of the PRC*, PRC/Rpt (XXXV)Rev.1 (2018), para. 110.xiii. (emphasis added).

224 *Vid*. Executive Council, *Activity Report on the 2018 African Court on Human and Peoples' Rights,* Thirty-Fourth Ordinary Session, 07-08 February 2019, Addis Ababa (Ethiopia), Doc. EX.CL/1126(XXXIV), paras. 51 and 52.

pointed out, with exceptions, had been the usual practice– but it has omitted to include any (generic) reference to this matter, as it had been doing[225]. Moreover, it has reinforced the position of the States, as it has gone so far as to state that the ACtHPR in its activity reports should reflect the comments and responses provided by the States to the non-compliance determined by the Court, using the following formula: «urges the Court to reflect, in its Activity Report, comments and responses provided by Member States on the alleged non-execution of Court orders»[226]. This is worrying for the pro-future effectiveness of the African system (Burgorgue-Larsen & Ntwari, 2019: 877); even more so when we have identified a similar pattern with respect to the Commission[227].

V.2. Level of compliance with the judgments of the African Court on Human and Peoples' Rights

As a result of the above, the only source of information on compliance with decisions issued by the ACtHPR is obtained from the annual reports that are submitted to the Executive Board, generally with greater precision each year.

However, in this regard, we should note an initial assessment, since the categorisation that has been used by the Court since its 2019 Activity Report –full *compliance*, *partial compliance*, *non-compliance*– is not even defined in any of its rulings. However, after analysing its decisions, I agree with Murray that the criterion used seems to reside in whether the State concerned complies with all, some, or none, respectively, of the orders (reparations) issued[228].

225 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), paras. 1-12; Executive Council, *Decision on the 2019 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Sixth Ordinary Session 06-07 February 2020 Addis Ababa (Ethiopia), Doc. EX.CL/1204(XXXVI), paras 1-12; Executive Council, *Decision on the 2018 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019 Addis Ababa (Ethiopia), Doc. EX.CL/1126(XXXIV), paras 1-7.

226 *Vid*. Executive Council, *Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Third Ordinary Session 28-29 June 2018 Nouakchott (Mauritania), Doc. EX.CL/1088(XXXIII), para. 3.

227 Cf. «El Tribunal Africano de Derechos Humanos y de los Pueblos», Universidad Complutense de Madrid, Doctoral Dissertation, 2022.

228 Cf. R. Murray *et. al.,* «Monitoring implementation...», *op. cit.,* p. 162.

To date, according to the information provided on the Court's website, the latest report available corresponds to the year 2021. However, as proof that there is room for improvement in terms of systematisation, clarity and precision, in order to know the cases in which the State has complied with all the decisions of the ACtHPR, we must refer to the *2018 Activity Report*. In this regard, we find that in two cases the State concerned has complied with all the reparations ordered: *The beneficiaries of the late Norbert-Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso,* and *Lohé Issa Konaté v. Republic of Burkina Faso*. The first concerns the death of a journalist and his companions, the former at the time investigating various opaque government plots. The second case concerns the conviction imposed by the national courts on a Burkinabe journalist for publishing several articles denouncing corruption in the state. In the case of the former, Burkina Faso has paid full compensation, reopened domestic proceedings, and published the summary of the ACtHPR ruling[229]. This case was already listed as fulfilled in the 2017 Report[230]. With regard to the second case, Burkina Faso has also amended its defamation legislation to make it compatible with Article 9 ACHPR, paid compensation, expunged the victim's criminal record, and published the summary of the judgment in accordance with the Court's instructions[231].

For its part, turning to the *2019 Report*, in which, as I have said, the categorisation *full compliance*, *partial compliance*, *non compliance* appears for the first time, of the 19 cases examined, in 16 the State concerned has not complied

229 Cf. Executive Council, *Decision on the 2018 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019 Addis Ababa (Ethiopia), Doc. EX.CL/1126(XXXIV), pp. 9-11. Doctrinally, on the few studies that, to date, analyse the enforcement of ACtHPR judgments and the procedure to execute its judgments, cf. L. Roger-Claude, «From Commitment to Compliance: Enforceability of Remedial Orders of African Human Rights Bodies», *Brooklyn Journal of International Law,* vol. 41, n.º 1, 2015, pp. 99-152; R. A. S. Morhe and R. O. Mensah, «State Compliance with Decisions of the African Court: The Case of Alfred Agbesi Woyome v Ghana», *African Human Rights Yearbook*, vol. 3, 2019, pp. 435-455; A. E. Etuvoata, *The role of civil society in improving compliance with the decisions of the African human rights supervisory mechanisms*, Doctoral dissertation, University of Pretoria, 2019.

230 Cf. Executive Council, *Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Third Ordinary Session 28-29 June 2018 Nouakchott (Mauritania), Doc. EX.CL/1088(XXXIII), para. 3.

231 Cf. Executive Council, *Decision on the 2018 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019 Addis Ababa (Ethiopia), Doc. EX.CL/1126(XXXIV), pp. 13-18.

with any of the Court's orders[232]. In another three cases, partial compliance with the judgement has been achieved. Among them is the case of *The Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania,* where the Court considered contrary to the ACHPR the requirement imposed by Tanzanian law that all *candidates* for presidential, parliamentary and local elections must be *members of a political party*. In this regard, it is specified that Tanzania has argued that the required amendment of the legislation requires the holding of a referendum, which has not yet been called[233]. On the other hand, in relation to the two remaining cases –*Wilfred Onyango & Others v. United Republic of Tanzania; Mohamed Abubakari v. United Republic of Tanzania*– the report issued does not provide further information as to why they fall into this category[234].

In the *2020 Report*, of the 26 cases examined, 21 fall into the category of non-compliant and five into the category of partially compliant. In relation to the latter, in addition to the three referred to in the 2019 report –The *Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania, Wilfred Onyango & Others v. United Republic of Tanzania, and Mohamed Abubakari v. United Republic of Tanzania*– for which the same information appears there[235], the other two cases added to the category of partial compliance are *Actions Pour la Protection des Droits de L'Homme v. Côte d'Ivoire,* and *Suy Bi Gohore v. Republic of Cote d'Ivoire.* Both cases concern, it should be recalled, the composition of the Ivorian Independent Electoral Commission. As a result of the first case, after the Court acknowledged that it did not meet the requirements of impartiality and independence, the Ivorian State proceeded to adopt a new

232 Cf. Executive Council, *Decision on the 2019 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Sixth Ordinary Session 06-07 February 2020 Addis Ababa (Ethiopia), Doc. EX.CL/1204(XXXVI), pp. 18-22.

233 *Ibid*. pp. 18-19. In fact, as no measures have been taken to comply with the reparations granted by the Court, at least not in the Report, I do not understand the reason for their inclusion in the *partial compliance* category.

234 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), pp. 18-19. Although the 2018 Report already stated in the *Wilfred Onyango case* that the State of Tanzania was preparing new legislation on free legal aid. Doc. EX.CL/1126(XXXIV), pp. 18-19.

235 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), pp. 18-19.

law, which is challenged in the second case. In this regard, the Court finds that, although some progress has been made, there is still an over-representation of government representatives in the commission, and the legislation has not been processed in a transparent manner and with the participation of civil society[236].

My analysis coincides with the most up-to-date information provided to date, which is contained in the *Court's Strategic Plan for the years 2021-2025* (2021), which states that in 2020 the percentage of cases complied with by States amounted to 7% of the total, that of partially complied cases to 18%, and that of non-compliance to 75%[237]. However, neither the source, nor the cases, nor even the number of cases was reflected, only percentages. Our analysis shows that these figures come from the 26 cases that appear in the 2020 annual report, to which are added the two cases already complied with by Burkina Faso (included in the 2018 report, but not in the following ones). So the resulting percentage would be 7.14% of cases complied with (corresponding to two cases), 17.8% of cases partially complied with (corresponding to five cases), and 75% of cases not complied with (corresponding to 21 cases).

Burkina Faso was thus the only State that had complied with all the convictions handed down by the Court: *The beneficiaries of the late Norbert-Zongo Abdoulaye Nikiema alias Ablasse, Ernest Zongo and Blaise Ilboudo v. Republic of Burkina Faso* and *Lohé Issa Konaté v. Republic of Burkina Faso*. Tanzania had partially complied with three judgments and had failed to comply with 14. In the first category were *The Tanganyika Law Society and Legal and Human Rights Centre v. United Republic of Tanzania, Wilfred Onyango & Others v. United Republic of Tanzania,* and *Mohamed Abubakari v. United Republic of Tanzania*. And in the second, the cases of *Alex Thomas v. United Republic of Tanzania*, *Nguza Viking (Babu Seya) & Another v. United Republic of Tanzania*, *Kennedy Owino Onyachi & Another v. United Republic of Tanzania*, *Anudo Ochieng Anudo v. United Republic of Tanzania, Kijiji Isiaga v. United Republic of Tanzania, Diocles William v. United Republic of Tanzania, Anaclet Paulo v. United Republic of Tanzania*, *Minani Evarist v. United Republic of Tanzania, Majid Godoy v. United Republic of Tanzania, Majid Godoy v. United Republic of Tan-*

236 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), pp. 20-21, 26-27.

237 Cf. ACtHPR, *African Court on Human and Peoples' Rights Strategic Plan 2021-2025: Deepening trust in the African Court by enhancing its efficiency and effectiveness*, June 2021, para. 95.

zania, Majid Godoy v. United Republic of Tanzania, Majid Godoy v. United Republic of Tanzania, Majid Godoy v. United Republic of Tanzania. United Republic of Tanzania, *Majid Goa Vedastus v. United Republic of Tanzania*, *Ally Rajabu & others v. United Republic of Tanzania*, *Robert J. Penessis v. United Republic of Tanzania*, *Armand Guehi v. United Republic of Tanzania*, *Mgosi Mwita Makungu v. United Republic of Tanzania*, *Lucien Ikili Rashidi v. United Republic of Tanzania*, *Kenedy Ivan v. United Republic of Tanzania*. Côte d'Ivoire has partially complied with two judgments: *Actions Pour la Protection des Droits de L'Homme v. Côte d'Ivoire* and *Suy Bi Gohore v. Republic of Cote d'Ivoire*. Kenya had failed to comply with a judgment: *African Commission on Human and Peoples' Rights v. Republic of Kenya*. Libya had failed to comply with a judgment: *The African Commission on Human and Peoples' Rights v. State of Libya*. Rwanda has failed to comply with two judgements: *Ingabire Victoire Umuhoza v. Republic of Rwanda*, and *Kennedy Gihana and Others v. Republic of Rwanda*. Mali had failed to comply with one judgment: *APDF & IHRDA v. Republic of Mali*. And Benin had failed to comply with a judgment: *Sebastien Germain Ajavon v. Republic of Benin (App. 053/2016)*[238].

However, in the latest report available to date, published in December 2022 and corresponding to the year 2021, the inclusion of cases following the categorisation set out in previous –*full compliance*, *partial compliance*, *non-compliance*– is no longer specified[239]. This again shows a lack of systematisation that must be resolved by the judiciary.

It is true that the causes of non-compliance are complex, among them: the particular sensitivity of the subject matter of the respective case[240]; the nature of the reparations ordered and the lack of internal mechanisms for their execution; the impunity of the non-compliant State in the face of the inaction of the AU's political organs and, in general, of the international community; the lack of knowledge of the Court's decisions among civil society, the press and human rights organisations on the African continent; the lack of institutional stability; and the deficient democratic and legal state of the condemned

238 Let us recall, as a guideline, that the case law of the ACtHPR has been analysed in the second chapter from a jurisdictional and procedural perspective, in the third chapter from a material perspective, and in this chapter, *infra*, from a reparatory perspective.

239 Cf. Executive Council, *Report of the African Court on Human And Peoples' Rights 2021*, Fortieth Ordinary Session, 20 January-03 February 2022, Addis Ababa, Ethiopia.

240 We see a clear example of this in the various cases in which five states have withdrawn the additional declaration to Article 34(6) of the Court's Protocol. In this respect, I refer to the discussion in the second chapter *below*.

State (Viljoen & Louw, 2007; Okoloise, 2018: 27-57; Murray & Long, 2015) (Kunz, 2019: 1129-1163; Dutton, 2012: 1-66; Anagnostou, 2013; Hillebrecht, 2009: 362-379)[241]. However, it is no less true that the ACtHPR still has ample room for manoeuvre in terms of supervising compliance with its decisions. This is true in at least six respects.

Firstly, by verifying the veracity of the information provided by the convicted state, not limiting itself to simply forwarding the data provided by the latter to the Executive Council and giving the victim a greater role, as occurs in the Inter-American system. Thus, in the 2020 Activity Report, the Court acknowledges that «it relies almost exclusively from the Report of the Government and reaction of Applicant thereto»[242]. However, significant progress has been made in this regard, since also in this report, in relation to the cases of *Actions Pour la Protection des Droits de L'Homme v. Côte d'Ivoire* and *Suy Bi Gohore v. Republic of Cote d'Ivoire,* the Court expressly takes into account the observations provided by the victim to determine the degree of compliance[243]. In the same vein, Rule 81 of the 2020 Rules expressly empowers the Court to supplement the information from other reliable sources. In addition, the proposal for improvement submitted in 2019 empowers the Court to conduct *on-site* visits, or to convene a hearing on monitoring compliance with the judgment, either *motu proprio* or at the request of a party[244].

In this regard, it should be borne in mind that a more precise analysis of the degree of compliance would modify the data and percentages analysed above. In the specific case, and taking into account the information available to us, this would translate into a decrease in the ratio of cases of non-compliance. Thus, everything seems to indicate that Burkina Faso's compliance with the two aforementioned issues is faithful[245]. While with regard to those included in

241 These issues have been analysed in detail by African doctrine, mainly when studying the degree of compliance with the Commission's decisions. Causes, some of them also present in the European and Inter-American regional system.

242 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), p. 13, footnote 5.

243 *Ibid*. pp. 20, 21 and 26.

244 Cf. Executive Council, *Draft Framework for Reporting & Monitoring Execution of Judgments and other Decisions of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019, Addis Ababa (Ethiopia), Doc. EX.CL/1126 (XXXIV).

245 See, e.g. http://www.acthprmonitor.org/implementation-of-the-judgments-of-the-african-court-on-human-and-peoples-rights/ (Accessed on: 03.03.2023)

the category of «non-compliance», by taking as a reference mainly the information provided by the sentenced State, there are occasions on which, despite the fact that the latter has complied with the measures ordered, at least partially, by not having communicated them to the Court, they have not been taken into account to determine the degree of compliance. For example, we can look to the cases of *The African Commission on Human and Peoples' Rights v. State of Libya* and *Ingabire Victoire Umuhoza v. Republic of Rwanda*. In both of which the State decided to release the victim from prison. Regarding the former, the ACtHPR acknowledged in the 2018 Activity Report that the media have corroborated this information[246], but as of 2020 the State of Rwanda has still not communicated it to the Court and remains in the category of unfulfilled cases[247].

Secondly, in addition to taking up the model implemented in previous reports and not reversing the practice followed, one aspect on which the ACtHPR has focused in its reports is that of determining whether or not the State concerned has complied with its decisions on time. Even more so, when late compliance, on numerous occasions, has the same effects as non-compliance. In fact, contrasting the deadline given in the judgments with the annual reports, it seems that the Court goes so far as to include cases in the *full compliance/partial compliance* categories irrespective of whether the respective state has complied belatedly. Therefore, more rigour is needed in this respect.

Thirdly, by adopting, within its competencies, a more proactive stance on non-compliance, rather than a merely reactive one. This would take the form, for example, of bringing non-compliance to the attention of the AU bodies when necessary, rather than waiting for the adoption of the annual report. Thus, so far, as has been explained, the Court has only issued an express decision in the case of *The African Commission on Human and Peoples' Rights v. State of Libya*[248]. Other necessary measures would be the creation of a database on its website, as presented by the IACtHR and the ECtHR, where the degree

246 Cf. Executive Council, *Decision on the 2018 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019 Addis Ababa (Ethiopia), Doc. EX.CL/1126(XXXIV), p. 21.

247 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), pp. 18 and 22.

248 Cf. ACtHPR, *Interim Report of the African Court notifying the Executive Council of non-compliance by the Libyan State* (17 May 2013), para 8.

of compliance with the decisions handed down is specified in an updated manner, as well as the discernment of non-compliance according to the seriousness of the cases, both in the proposed database and in the report sent to the Executive Council, since with the existing information the political bodies cannot be aware of such extremes and, therefore, act when required to do so. The latter measure is contained in the 2019 proposal[249].

Fourthly, and related to the above, the Court could designate a specific department or section tasked with both supervising compliance with its decisions and serving as a liaison between the ACtHPR, the States and the political organs of the AU. This measure is contemplated both in the proposal that I will analyse in the following section and in the Court's Strategic Plan[250]. In any case, although the 2016 Activity Report already highlighted the need to create a mechanism responsible for monitoring compliance[251], both in the 2019 and 2020 Reports, it is clear that progress has been limited[252].

Fifthly, in order to guarantee the implementation of all the measures outlined above, as well as to strengthen the independence and the proper performance of the Court's work, adequate resources, both material and human, are required. This is precisely one of the most repeated demands since the ACtHPR began to carry out its functions[253]. This is linked to the judicial body's requirement to create a specific fund dedicated to its sustainability. To

249 Cf. Executive Council, *Draft Framework for Reporting & Monitoring Execution of Judgments and other Decisions of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019, Addis Ababa (Ethiopia), Doc. EX.CL/1126 (XXXIV).

250 Cf. ACtHPR, *African Court on Human and Peoples' Rights Strategic Plan 2021-2025: Deepening trust in the African Court by enhancing its efficiency and effectiveness*, June 2021, p. vii.

251 Cf. Executive Council, *Decision on the 2016 Activity Report of the African Court on Human And Peoples' Rights*, Thirtieth Ordinary Session, 25-27 January 2017, Addis Ababa (Ethiopia), Doc. EX.CL/999(XXX), para. 46.

252 Cf. Executive Council, *Decision on the 2019 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Sixth Ordinary Session 06-07 February 2020 Addis Ababa (Ethiopia), Doc. EX.CL/1204(XXXVI), para. 63; Executive Council, *Decision on the Activity Report of the African Commission on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1259(XXXVIII), para. 43.

253 Cf. e.g. Executive Council, *Decision on the 2010 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 24-26 January 2011, Addis Ababa (Ethiopia), EX Doc. EX.CL/650(XVIII), para. 89. 89; Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), para. 45.

date, this has not been authorised by the AU's political bodies[254]. Furthermore, although the Statute on the Establishment of a Legal Assistance Fund for AU Human Rights Bodies (2016) entered into force in January 2016, its implementation is still pending[255]. To which must be added the need for the Court to detail and update the destination and amounts of the different budget items granted, transparency being an essential pillar for the credibility of the system.

Finally, since the Court has taken the jurisprudence of the IACtHR as a model in many different areas, one possibility would be to adopt the doctrine of conventionality control followed by this Court. A doctrine that this judicial body articulates in the following terms:

> When a State has ratified an international treaty such as the American Convention, its judges, as part of the State apparatus, are also subject to it, which obliges them to ensure that the effects of the provisions of the Convention are not undermined by the application of laws contrary to its object and purpose, and which lack legal effect from the outset. In other words, the judiciary must exercise a kind of «conventionality control» between the domestic legal norms that apply in concrete cases and the American Convention on Human Rights. In this task, the Judiciary must take into account not only the treaty, but also the interpretation given by the Inter-American Court, the ultimate interpreter of the American Convention[256].

This is based, in the words of the IACtHR, «on the principle of complementarity (subsidiarity), which informs the Inter-American Human Rights System across the board», insofar as the latter is «an adjuvant or complementary to the [protection] offered by the domestic law of the American States». This task is incumbent on all levels of the administration of justice within the

254 Cf. Executive Council, *Decision on the Activity Report of the African Court on Human and Peoples' Rights,* Thirty-Second Ordinary Session, 22-26 January 2018, Addis Ababa (Ethiopia), Doc. EX.CL/1057(XXXII), para. 56.

255 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), para. 44.

256 *Vid*. IACourtHR. *Case of Almonacid Arellano et al. v. Chile. Chile*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 124. For an analysis of the jurisprudence of the IACHR in relation to the control of conventionality, see IACtHR *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos n.º 7: Control de Convencionalidad*, San José de Costa Rica, 2021.

scope of their respective competences, not only in the supreme courts (Canosa Usera, 2015: 62-63)[257].

In any case, and in this regard, the judicial dialogues organised by the ACtHPR on a regular basis[258], the training courses for judges and magistrates from different African States on the development of the Court's jurisprudence[259], as well as the proposal to institutionalise an African judicial network to promote cooperation between judicial institutions and bodies under the auspices of the African Union are more than welcome[260].

To this must be added the necessary cooperation between the AU organs and bodies with competence in the field of human rights, not only between the Court, the Commission and the Committee –which, as I have shown throughout this study, could be improved– but also between them and the Economic, Social and Cultural Council, the AU Commission, the Pan-African Parliament, the Peace and Security Council or the AU Commission on International Law[261]. In addition to the need to enhance dialogue and cooperation, at the sub-regional level, with the African Economic Communities[262], and, at the universal level, with the various UN bodies, funds, programmes, commis-

257 See, respectively, IACtHR. *Case of the Santo Domingo Massacre v. Colombia*. Preliminary Objections, Merits and Reparations. Judgment of November 30, 2012. Series C No. 259, para. 142; IACourtHR. *Case of Órdenes Guerra et al. v. Chile. Chile*. Merits, Reparations and Costs. Judgment of 29 November 2018. Series C No. 372, para. 135. For its part, in the European system, «as the ECtHR does not impose full conventionality control that would convert the conventionality block (Convention, protocols and doctrine of the ECtHR) into a canon for the domestic prosecution of international norms and that would ultimately entail the non-application or annulment of the inappropriate national norm, conventionality control in Europe is much more modest than in the Inter-American system, and, of course, than the control of communitarianism in the application of European Union law».

258 Cf. *Final Report of the First African Judicial Dialogue on the «Relevant Aspects Regarding the Judiciary in the Protection of Human Rights in Africa»*, 2012, *Final Report of the Second African Judicial Dialogue on the Theme «Connecting National and International Justice»*, 2015; *Final Report on Third African Judicial Dialogue on the Theme «Improving Judicial Efficiency in Africa»*, 2017.

259 In 2022, it was planned for September. Information available at ACtHPR, *Annual Procurement Plan for 2022*, 2021, https://www.african-court.org/wpafc/category/annual-procurement-plan/ (Accessed on: 03.03.2023).

260 Cf. Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), paras. 21, 22 and 43.

261 In this regard, I refer to my analysis in «El Tribunal Africano de Derechos Humanos y de los Pueblos», Universidad Complutense de Madrid, Doctoral Dissertation, 2022.

262 *Ibidem*.

sions, departments and offices working in Africa on human rights, creating synergies in order to promote and protect human rights on the continent.

This concerns the lines of action of the Court, as an organ of the AU. As for the *African Union* itself, in addition to providing the necessary legislative and budgetary framework for the above to take place, it is essential to comply with the mandate established in its constitutive treaty, as well as that set out in the Protocol of the ACtHPR, and in its implementing regulations; in particular, with regard to the monitoring of the decisions issued by the judicial body. And although the binding nature of the decisions issued by its highest organs is controversial[263], using Article 23.1 of the Constitutive Act of the AU, they can make compliance with the obligations undertaken in the field of human rights conditional on the imposition of internal sanctions, such as the denial of the right to participate in official meetings, the right to vote, the right to present candidates, or the right to participate in the different funds available to the AU. This also leads us to conclude that, given the reform of the Constitutive Act of the AU that took place in 2003, it would not be superfluous to contemplate a new amendment to the said treaty whereby the highest organs of the AU would be expressly empowered to adopt decisions of a general, binding and directly applicable nature in each Member State, in order to articulate and provide a legal basis for the actions provided for in Articles 4(h) and 23.2 of the Constitutive Act of the AU.

At the level of the European Union, in addition to strengthening relations of dialogue with all the actors involved, as well as to influence knowledge of the continent's reality, I consider it appropriate to make both development cooperation and the conclusion of trade treaties conditional on human rights and democracy clauses. While a new partnership agreement that will constitute the legal framework for the EU's relations with the seventy-nine African, Caribbean and Pacific (ACP) countries –as well as a specific protocol for Africa– is currently taking shape, I consider that it should transcend the provisions of Article 96 of the current *Cotonou Agreement* (2000)[264], expressly including the suspension of the agreements reached if the states do not comply

263 *Ibidem*.

264 It can be consulted at: https://eur-lex.europa.eu/legal-content/ES/ALL/?uri=CELEX-%3A22000A1215%2801%29 (Accessed on: 03.03.2023). This provision is entitled «Essential elements: consultation procedure and appropriate measures as regards human rights, democratic principles and the rule of law».

with the conventional obligations they themselves have undertaken in terms of human rights, using it as an element of pressure when necessary. Likewise, the EU's budgetary contributions to the AU's human rights bodies in general, and to the ACtHPR in particular, could at least be increased. To this could be added the provision of specific budget allocations for National Human Rights Institutions, NGOs and other civil society associations dedicated to promoting human rights in the African region. All of this under the premises of transparency and efficiency. Moreover, the EU has recently pledged 150 billion euros to meet the goals of the 2030 Agenda and the African Union's Agenda 2063, so I see no reason why specific allocations for the African regional human rights system should be envisaged[265]. I also consider it necessary to value the actions of those States that comply with their international human rights obligations, for example, by making them participants in the benefits of multilateralism, and, in particular, by encouraging their presence and participation in forums such as the G20, or by signing preferential partnership agreements with them.

This is also true for Spain, since, to date, no budget allocation has been earmarked to strengthen and promote the development of the African Court's activities. In fact, not even the regional system is mentioned in the current Africa Plan (2019), nor in its action programme, Africa Focus 2023 (2021)[266]. Even more so when one of its principles of action is the protection and promotion of human rights on the continent. Undoubtedly, there is a need for greater knowledge of its functioning, its actions, and even its very existence.

It is therefore my understanding that the joint adoption of these measures will contribute to achieving 30% compliance with the decisions adopted by the Court. Target set in the Strategic Plan 2021-2025[267].

265 Information available at: https://www.consilium.europa.eu/es/meetings/international-summit/2022/02/17-18/ (Accessed on: 03.03.2023).

266 Cf. Ministry of Foreign Affairs, European Union and Cooperation, *III Africa Plan: Spain and Africa: challenge and opportunity*, Madrid, March 2019. The III Africa Plan is currently being implemented under the *Foco Africa 2023* action programme, in such a way that it «constitutes the projection of the foreign action in Africa of all the government's institutional actors and its implementation in actions until the end of the current legislature in 2023». Own translation. More information can be found at https://www.fiiapp.org/foco-africa-2023-continente-del-futuro/ (Accessed on: 03.03.2023).

267 Cf. ACtHPR, *African Court on Human and Peoples' Rights Strategic Plan 2021-2025: Deepening trust in the African Court by enhancing its efficiency and effectiveness*, June 2021, para. 103.

On the other hand, it should be borne in mind that the characteristics of judgments referred to at the beginning of this chapter are shared with provisional measures. In this sense, the procedure contemplated in Rule 81 of the Rules of Court covers all binding decisions, including, therefore, both judgments and *orders for provisional measures*. And to determine the degree of compliance with them, again, we have no other source of information than that provided by the Court in its annual activity reports. Thus, the 2021 Annual Report contains information on 27 cases in which the Court has ordered interim measures. However, in none of them has the respective State complied[268]. The same is true of previous years' reports[269].

For its part, insofar as the practice followed so far by the judicial body –although not expressly specified– is that, once the ACtHPR issues the judgment on the merits and/or reparations, not only does it cease to monitor compliance with the provisional measures, but it also omits any reference to them –even for statistical purposes. This means that we cannot assess the degree of compliance, or, at least, without this being partial. To give an example, the 2017 Activity Report states in the *Armand Guéhi v Tanzania case* that the State of Tanzania has not complied with the interim measures granted[270]. Once the judgment ordering reparations is handed down, and once the established time period has elapsed, the Court goes on to determine non-compliance with the reparations, as we find in the 2019 and 2020 Reports, but all reference to compliance or non-compliance with the provisional measures adopted in that case is deleted[271].

Similarly, it appears that the Court relies exclusively on the information provided by the State, if any, and not on other sources. In addition, the infor-

268 Cf. Executive Council, *Report of the African Court on Human And Peoples' Rights 2021*, Fortieth Ordinary Session, 20 January-03 February 2022, Addis Ababa, Ethiopia.

269 Cf. e.g. Executive Council, *Decision on the 2019 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Sixth Ordinary Session 06-07 February 2020 Addis Ababa (Ethiopia), Doc. EX.CL/1204(XXXVI),

270 Cf. Executive Council, *Decision on the 2017 Activity Report of the African Court on Human and Peoples' Rights,* Thirty-Third Ordinary Session 28-29 June 2018 Nouakchott (Mauritania), Doc. EX.CL/1088(XXXIII), p. 12.

271 Cf. Executive Council, *Decision on the 2019 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Sixth Ordinary Session 06-07 February 2020 Addis Ababa (Ethiopia), Doc. EX.CL/1204(XXXVI), p. 21. 21; Executive Council, *Decision on the 2020 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Eight Ordinary Session Videoconference, 03-04 February 2021, Addis Ababa (Ethiopia), Doc. EX.CL/1258(XXXVIII), p. 24.

mation provided is generally very limited. Thus, if we turn, for example, to the 2018 Report in relation to the *Dexter v. Ghana* case, the Court determines that «the Respondent filed a Report on the Implementation of the Order for Provisional Measures and this was transmitted to the Applicant for information»[272]; without specifying what specific measures had been reported by the State of Ghana. Nor what was the response of the applicant, if any, since the following year the Court ruled that the application was inadmissible as it did not meet the admissibility requirements, and any reference to the matter was omitted from the subsequent reports.

That said, I can only maintain that there is a need for greater clarity, systematisation and precision in this area. According to the Strategic Plan 2021-2025 of the ACtHPR, as of December 2020, 10% of the provisional measures adopted by the Court had been complied with[273]. A higher percentage, it should be recalled, than for compliance with judgments. However, while the figures given for the latter are the source of the figures, the same cannot be said for the latter.

272 *Vid*. Executive Council, *Decision on the 2018 Activity Report of the African Court on Human and Peoples' Rights*, Thirty-Fourth Ordinary Session 07-08 February 2019 Addis Ababa (Ethiopia), Doc. EX.CL/1126(XXXIV), p. 55.

273 Cf. ACtHPR, *African Court on Human and Peoples' Rights Strategic Plan 2021-2025: Deepening trust in the African Court by enhancing its efficiency and effectiveness*, June 2021, para. 97.

CONCLUSIONS

I. It was within the framework of the OAU that the confluence of different factors at the end of the 1970s led to the idea, already enunciated in the Law of Lagos, of adopting an African human rights convention, under the title of the *African Charter on Human and Peoples' Rights* (1981). This was a general treaty of the system and a milestone in the promotion and protection of human rights on the continent. Thus, from its study, I can conclude that the singularities of the ACHPR will become the distinguishing characteristics of the African system itself, and the following have been identified: firstly, in order to deal with the socio-economic situation that the continent was facing after the colonial period, to unite and equalise civil and political rights and, for the first time, economic, social and cultural rights in a single treaty. Secondly, the inclusion, also for the first time in a treaty, of a detailed set of rights recognised for «peoples»; including the right to an adequate environment, the right to peace, and the right to development. The latter recognised in both: its individual and collective aspects. And, thirdly, the express recognition that the mechanisms for guaranteeing and controlling the ACHPR take into consideration other sources, both African and from other systems, when interpreting its precepts. From my analysis, it is clear that these characteristics will not only be reflected in the rest of the treaties and instruments adopted after the Charter, but that some of them will go beyond the African system to be incorporated –or to reinforce already existing patterns– in other systems.

However, in addition to these singularities, which undoubtedly represent progress in the promotion and protection of human rights, there are other controversial features, such as the absence of a general derogation clause and the imposition of a series of duties on the individual; a whole chapter is devoted to the latter. In addition to a manifestly regressive feature, such as the incorporation of *claw-back* clauses in the wording of some of the recognised rights.

II. Most of the special treaties –five out of seven– have been adopted under the auspices of the African Union, an heir organisation to the OAU, but not analogous to it. Thus, in its founding treaty, and unlike the OAU, the protection and promotion of human rights will be recognised among its objectives and principles. Focusing on these treaties, although they do not appear expressly in the African Charter, or appear in a tangential manner, analysis of them reveals a series of characteristic and recurrent lines that, in my opinion, also make them stand out as specificities of the system itself, and that are united to those already mentioned. These include the special attention given to certain vulnerable groups, as well as the importance given to HIV/AIDS, unconstitutional changes of government, and the fight against corruption. In addition, they incorporate certain precepts, either currently offering protection unparalleled in any other human rights system, or which, at the time of their adoption, were not comparable to other instruments, and which have served as a basis for those adopted subsequently.

Together with these guarantee-based characteristics, with regard to the omissions and deficiencies of the different special treaties, I have detected as a common pattern, firstly, the contemplation of limited guarantee and control mechanisms, and the improvement in the regulation of their tasks. Secondly, the omission of certain rights and freedoms enacted in the treaties of the universal system as well as the scant articulation between these and the treaties themselves. To which could be added the imprecise enunciation of some of the recognised rights.

III. Linked to the above, the African Charter on Human and Peoples' Rights, unlike the ECHR and the ACHR, only provides for the creation of the African Commission on Human and Peoples' Rights (AComHPR) as a guarantee and control mechanism, and not a jurisdictional body. However, despite the ambiguous competencies attributed to it by the ACHPR, the confidentiality to which its work has been subjected, its budgetary and personnel limitations, and the control exercised in recent years by the AU's political bodies, the AU has been characterised by its dedication to the promotion and protection of human rights on the African continent, with a prominent role played by individual communications, which amount to more than 240.

IV. The only special treaty in the system that provides for its own guarantee and monitoring body is the African Charter on the Rights and Welfare

of the Child (1990), which establishes the creation of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC), a body that did not become operational until 2002. My analysis shows that in recent years there has been an increase in the activity of the ACERWC, and that, in general terms, it can be categorised as a guarantor of children's rights. However, taking into account its confidentiality, budgetary and personnel limitations –it does not even have own headquarters–, considering that, since its creation, it has only dealt with the merits of seven communications, weighing up the overlap between the mandate of the Commission and the Committee –without any guidelines having been established in this matter– and given that the complementarity between the Committee and the Commission is minimal, I understand that two options are available: either strengthen the Committee with funds and staff, and publicise its own existence and functions across the continent; or, as a second option, transfer the Committee's functions to those of the Commission, increase its funds, and opt for a single –but robust– quasi-judicial mechanism in the system.

V. Against this background, in addition to calling for the adoption of an African human rights convention, the Lagos Law urged that it should include the creation of a judicial body. However, when the ACHPR was adopted in the 1980s, this demand was not heeded. In theory, this was to give due consideration to negotiation and conciliation in African culture; in practice, it was because African leaders were unwilling to have their newly acquired state sovereignty limited by an international court. It took another decade before a confluence of national, regional and international factors led to the adoption of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights (1998). This body did not become operational until 2008.

Moving on to the contentious jurisdiction of the ACtHPR, one of the most outstanding elements that I have identified of this judicial body is its broad competence *ratione materiae*, which extends to all human rights instruments ratified by the State concerned. From this work, one can affirm that the Court considers itself competent to recognise the violation of a treaty without linking it to the violation of a right of the ACHPR, even going so far as to rule on the violation of certain precepts of the UDHR. Therefore, the ACtHPR can be established as the appropriate mechanism to compensate for the deficiencies of guarantee and control present in the treaties, both in the

universal system, as well as in the African regional and sub-regional systems. And although, according to a doctrinal sector, this expansive practice could hinder the formation of an African *corpus juris*, in my opinion, an analysis of the Court's jurisprudence shows that it has sought to safeguard the different specificities of the system. What is more, this approach, which is both protective and extensive, is evinced as one of the specificities of the African system itself, thus contributing, through its practice, to the formation of this system.

VI. As far as its jurisdiction *ratione personae* is concerned, the Commission, States Parties, and African intergovernmental organisations have standing to access the Court. Individuals and NGOs are added to this list, provided that the state against which the application is lodged has made the declaration of jurisdiction referred to in Article 34(6) of the Protocol. Therefore, in this sense, the African system is halfway between the European system, which allows direct access by individuals to the ECtHR, and the Inter-American system, which only considers the IAComHR and the States Parties as active subjects before the IACHR.

Focusing on the requirements that must be fulfilled in order for the African Commission to bring cases before the ACtHPR, the AComHPR Rules of Procedure of 2010, although with an improvable degree of precision and systematicity, empowered the AComHPR to refer a case to the ACtHPR under practically any circumstances and at any stage of the proceedings. However, in this matter, we are confronted with one of the most significant restrictions –if not the most significant– of the 2020 AComHPR Rules of Procedure. Insofar as its Rule 36.5 only empowers it to bring a matter before the Court exclusively before the same Court decides on the admissibility of the communication. This means, on the one hand, a curtailment of the main means of access to the ACtHPR for individuals and NGOs with respect to those States that have not submitted the declaration of jurisdiction under Article 34.6 of the Protocol. On the other hand, it limits the possibility of achieving real complementarity between the two bodies. In any case, this option has hardly been used so far. It has only been employed on three occasions by the Commission under the 2010 Rules, and neither the case law of this body, nor that of the Court, has contributed to facilitating the understanding of the different cases that were envisaged, but rather the opposite. And if the Commission's channel has hardly been used, African States Parties and intergovernmental organisations have not yet brought any case before the ACtHPR.

VII. Conversely, the subjects that have so far submitted the greatest number of applications to the Court have been individuals (301) and NGOs (21). This is but another example of the process of humanisation and socialisation that the international legal order and its praxis are undergoing. The Court has followed the pronouncements maintained in its communications by the Commission, and despite the fact that the Protocol only expressly refers to individuals and NGOs, it has admitted the active legitimacy of groups of individuals. Furthermore, the Court has not required correspondence between the victim and the plaintiff, and has even gone so far as to allow an *actio popularis* in favour of an unidentified group of people. Therefore, in this matter, I identify a separation from the ECtHR.

Two additional issues merit comment in this regard. Firstly, the practice carried out by the Court when the respondent State has not submitted the aforementioned declaration of jurisdiction, since the judicial body has dispatched the applications by means of simple letters issued by the Secretariat, without the State concerned having even been notified in this regard. This procedure, in my opinion, curtails the possibility of the Court's jurisdiction being accepted via *forum prorrogatum*, and even of the State expressly accepting the Court's jurisdiction *a posteriori*, with respect to the specific case. Secondly, the withdrawal of the declaration of jurisdiction by a number of states in recent years. Specifically, four of the 12 States that have deposited it: Rwanda (2016), Tanzania (2019), Benin (2020), and Côte d'Ivoire (2020). This present paper shows that, with the exception of the Tanzanian case, a series of decisions by the Court guaranteeing the rights of opposition party leaders can be seen as a common precedent. We also find that such action can be framed within a more general trend that is reflected both in African sub-regional courts as well as in the universal criminal sphere, with the withdrawal of certain African states from the ICC. In some cases, this has ultimately borne fruit, and the respective judicial body has been dismantled (as in the case of the SADC Court), but in most cases, to date, this scenario has not been reached. This would also apply to the ACtHPR, since, after these four withdrawals, two States –Niger and Guinea-Bissau– have proceeded in 2021 to present the aforementioned declaration of jurisdiction; Guinea-Bissau at the same time as it proceeded to deposit the instrument of ratification of the Protocol. In any case, of the 31 States Parties to the Protocol establishing the Court, only 25% of States have deposited a declaration of jurisdiction, so there is ample room to extend –and work to extend– what has become the main means of access to the Court.

VIII. As a common guideline, it is clear from this study that the Court has adopted a jurisprudence that guarantees the seven admissibility requirements contained in Article 56 ACHPR, albeit with certain inaccuracies. In the case of the first, that of identification of the perpetrators, despite the doctrinal debates, in accordance with the decisions of the ACtHPR, this concept must be understood to mean the plaintiff, and not the victim, when the two subjects do not coincide. With regard to the compatibility of the application with the Constitutive Act of the AU and the ACHPR, the Court has held that the application will be admitted insofar as the alleged facts reflect human rights violations, without the need, therefore, for the applicant to invoke specific provisions of human rights treaties. With regard to the third requirement, that is, not to contain derogatory or insulting language, the ACtHPR has held that such language occurs in very limited cases, where there is an unequivocal intention to discredit the respondent State or its institutions. In fact, our research concludes that, to date, the Court has never dismissed a claim for non-compliance. The same applies to the fourth admissibility requirement, according to which the claim must be inadmissible if it is based exclusively on media reports. The fifth requirement is the prior exhaustion of domestic remedies. In this sense, the wording of the provision is not accurate, as it only provides, as an exception to compliance with it, that there is manifestly an undue prolongation of such remedies. However, in accordance with the case law of the ACtHPR, I find that the judicial body has followed the position held by its regional counterparts, and has specified that the remedies that must be exhausted are those considered to be available, sufficient and effective. Adding a fourth, which is that there should be no undue delay. However, in line with the jurisprudence of courts such as the IACtHR, we understand that this requirement must be understood to be included in the aforementioned notion of effectiveness, and not as a separate requirement. With regard to the sixth requirement, lodging the claim within a reasonable period of time after the exhaustion of domestic remedies, the Court has departed from its regional counterparts, and has held that this reasonableness must be assessed depending on the specific circumstances of the case, which has led it in certain cases to admit a claim after a period of five years has elapsed since the exhaustion of domestic remedies. To conclude, we are faced with the *ne bis in idem* requirement. In addition to the identity of parties and subject matter, as a specificity of the African system, I have identified that for the claim to be inadmissible, not only is the same case pending (a case of lis pendens), but there must also be a decision on the merits.

For its part, the precept requires that the matter has been decided in accordance with the principles of the UN Charter, the ACHPR, or the Constitutive Act of the AU. However, in the case law of the ACtHPR, I have found an extensive interpretation of the wording of this provision, which dismisses an application as long as the case has been decided on the basis of a human rights treaty. To which, therefore, I must add that before the African judicial body it is not a condition for the admissibility of the application that the applicant has suffered significant harm, as is required for individual applications before the ECtHR.

IX. One of the pillars that the 1998 Protocol seeks to establish is complementarity between the ACtHPR and the AComHPRC. In addition to the referral of cases from the Commission to the Court, this takes the form of the transfer of cases from the Court to the Commission and, beyond the referral of cases, the participation of the AComHPR in the proceedings before the Court. However, this paper shows that the articulation of this area –both in theory and in practice– is one of the most significant shortcomings of the system. Thus, while I have already had occasion to refer to the regulation of the cases of referral by the Commission to the Court, the opposite route is set out in the obscure and terse Article 6 of the Protocol, which has not been clarified either in the implementing regulations of the Court or in its case law. For its part, with regard to the Commission's participation in the proceedings before the Court, my study has also found imprecision and restrictions of great significance. These include, firstly, in contrast to the 2010 Rules of Procedure of the AComHPR, the fact that it is impossible for the Commission to request the Court to adopt interim measures, and the AComHPR is not even required to be informed of the adoption of such measures. Secondly, also in contrast to the 2010 Rules of Procedure, it is impossible for the Commission to be questioned in the oral phase by the judges of the Court, nor can it, during the examination, question witnesses or experts, or request the taking of evidence. In any case, I have not identified any case in which these powers have been exercised in practice.

To all of this must be added the complete omission of complementarity between the Court and the Committee, not only in the Protocol, but also in the implementing regulations. Both bodies fail to take advantage of the work carried out by the other, and, ultimately, this shows that there is room for improvement in the African system with respect to the systematisation

and efficiency between its different bodies. This also serves to reinforce our proposal to abolish the Committee, as an independent body, and integrate its functions into those of the Commission.

X. Turning to the material scope of the Court's pronouncements, another of the main conclusions reached through this research is the guarantee-based jurisprudence that adopted by the ACtHPR when interpreting and applying the particular aspects of the system. To a large extent, it has resorted to cross-fertilisation with the regional and universal systems, without this hindering the formation of an African *corpus juris* that preserves its own specificities.

Concretising the aforementioned assertion, in the face of one of the most deficient elements, both in the ACHPR and in the majority of treaties in the system, such as the presence of *claw-back* clauses, the Court has conditioned their validity on compliance with three requirements: the restrictions must be provided for in a law; they must serve a legitimate purpose; and they must be necessary and proportional for a democratic society. Likewise, one cannot ignore the fact that, through its pronouncements, the ACtHPR has promoted the *justiciability* of ESCR, and making use of its broad competence *ratione materiae*, the judicial body has resorted to treaties of the universal system ratified by the defendant State in order to go beyond the limited list of such rights recognised in the ACHPR. In addition, following the innovative line established in the ACHPR, it has recognised and articulated a detailed set of rights for peoples.

At the same time, the Court has been filling the different normative deficiencies present in the treaties of the system through the aforementioned cross-fertilisation. In this sense, mention must be made of the right to a fair trial, recognised in Article 7 of the ACHPR; a right whose violation has been invoked more often than not, and in respect of which there are more cases that have been resolved. In this way, the judiciary has incorporated in this precept the right to a reasoned pronouncement, the right to a double degree of jurisdiction in criminal matters, the principle of publicity of hearings and judicial decisions, the *ne bis in idem* principle, and the right to legal assistance.

Likewise, in the face of the ACHPR's silence, the Court has issued prominent pronouncements. Suffice it to point to its jurisprudence on the death penalty, where the ACtHPR has emphasised that what is prohibited on the basis of article 4 of the ACHPR is an arbitrary deprivation of the right to life, and has demanded three concomitant requirements: the death sentence must

be provided for by law, it must be established by a competent court, and its imposition must comply with the guarantees of due process. To which the Court has added that the method of execution must ensure the least possible suffering and avoid degrading actions against the person.

Moreover, making use of its broad competence *ratioene materiae*, with regard to women's rights and children's rights, the ACtHPR has left no doubt that certain Islamic customs and laws present on the continent must, in any case, be subordinated to respect for human rights. This position has also been followed by the Commission.

However, entering deeper into the deficiencies identified, I must highlight, as it affects the entire system and the different lines of jurisprudence analysed, the omission of, or at least the scarcity of references to, the previous work of the Commission and the Committee, which reiterates the necessary complementarity between the AU's different human rights bodies, already evidenced from a normative point of view, and now from a jurisprudential point of view. Moreover, this omission is bidirectional.

XI. One of the main conclusions drawn from this work is that the Court, since its initial pronouncements, has taken on board the jurisprudential evolution of its regional counterparts in reparation matters, particularly the IACtHR, in order to adopt a *pro homine* position in this regard. In this way, it has followed –and complemented– the line adopted in its pronouncements on procedural and material issues. The same procedure is followed by the ACERWC and by the Commission. However, with regard to the latter body, we can see a considerable evolution in its jurisprudence, going from decisions in which it merely declared the violation of the rights recognised in the ACHPR, to granting comprehensive reparations.

XII. The ACtHPR has built its reparation jurisprudence upon a series of principles. Thus, the judicial body has determined that the State that commits an internationally wrongful act has the obligation to make full reparation for the consequences arising therefrom, in such a way that the reparation covers all the damage suffered by the victim. Therefore, since the purpose of reparation is *restitutio in integrum*, as far as possible, all the consequences deriving from the wrongful act must be reversed or rendered ineffective. Turning to the burden of proof, the general rule is that it is for the plaintiff to prove the existence of a causal link between the violation and

the alleged harm. Whereas the granting of specific reparations arising from human rights violations must be made on a case-by-case basis, taking into account the circumstances of the case.

XIII. As far as the established procedure is concerned, the ACtHPR is empowered either to grant reparations in the same judgment on the merits or to grant them in a subsequent decision. My analysis shows that this second option takes place when the parties have not alluded to this issue in the main judgment, when they have not provided sufficient evidence, or when, in the opinion of the judicial body, it is necessary to hear the parties at greater length. Likewise, I have identified a rather lax jurisprudence regarding the time limits for accepting new allegations and evidence in reparatory matters. Therefore, in this sense, I have identified a backbone line that transcends different areas of its jurisprudence, as this same pattern has been evident with respect to the admissibility of the claim and the allegation of human rights violations.

XIV. The Court has determined that all aspects of reparation, including the specific identification of victims, are to be regulated by International Law. The ACtHPR has included both natural and legal persons as victims. Within the first category, it includes not only direct victims, but also indirect victims, among whom it has recognised first-degree ascendants and descendants, siblings and spouses. However, taking into account the extensive family ties present on the continent, it is significant that the Court has opted for a strict concept of family. For its part, the ACtHPR has specifies that a victim can be understood to mean a community as a whole. This represents a position similar to that adopted by the IACtHR and the AComHPR, and a departure from that established by the UN bodies, which, in such cases, have proceeded to grant reparations to each of the members of the community.

XV. Concretising the affirmation of the *pro homine* position adopted by the Court in matters of reparation, the judicial body has granted the five modalities foreseen in the *Basic Principles on the Right to a Remedy and Reparation* (2005), not having found in its jurisprudence any case in which the Court has limited itself to adopting a merely declaratory judgment recognising the violation. However, the granting of certain reparatory measures takes precedence over others.

In this sense, compensation is the form of reparation most frequently used by the Court, including both material and non-material damages. With regard to the second category, following the jurisprudence of the IACtHR, the Court has maintained that, unlike its position with regard to material damages, when the violation of a right is recognised, there is a presumption of the existence of such damages; the burden of proving the contrary falls on the State. The judicial body has recognised that the recipient of the amounts derived from non-pecuniary damages is not only limited to the direct victim, but also to the next of kin, as indirect victims. Thus, provided that proof of kinship is provided, the aforementioned presumption also extends to the latter.

As regards measures of satisfaction, again on the basis of IACtHR case law, the ACtHPR has held that a conviction may constitute *per se a* sufficient measure of satisfaction for the victim. However, in numerous cases the Court has awarded the publication of the judgment or a summary of the judgment as a measure of satisfaction. According to ACtHPR case law, such a measure is of particular importance in cases of serious or massive human rights violations, when the State concerned has not complied with a previous order in relation to the same case, or when it is necessary to raise public awareness or sensitise public opinion. However, as a counterpoint, we find that the linguistic diversity present on the continent is not taken into due consideration by the Court when establishing such a measure.

XVI. On the other hand, in contrast to the extensive use of the previous modalities, with regard to restitution to the situation prior to the violation, although the most requested measure has been the release of the victim, my study shows that the Court has maintained a fairly strict jurisprudential line that has led it to grant this on only two occasions. This procedure is also applicable to the rest of the restorative measures. The reason for this situation is the position adopted by the ACtHPR, according to which such a reparatory measure is only applicable when other measures, such as compensation, are not relevant or sufficient. However, I believe that this contradicts another of its aforementioned lines of jurisprudence, according to which the ultimate aim of reparation is to reverse or render ineffective all the consequences derived from the unlawful act, as I cannot identify find a more suitable method to fulfil this purpose, when possible, than restitution itself.

In terms of cessation and guarantees of non-repetition, measures aimed at modifying the domestic legislation of the convicted State stand out. However, beyond these, there are only a few cases aimed at the cessation of the offence,

and one case, *APDF & IHRDA v. Republic of Mali*, in which the Court has established the education of society as a measure of non-repetition.

Finally, one of the most deficient aspects in this area is evident in the awarding of costs, since, in most cases, the Court has refused to impose costs on the State, sometimes without even considering the arguments invoked. This may discourage potential victims from seeking the Court's protection in the knowledge that they will have to bear the costs of the proceedings in any case. Continuing with the inaccuracies, it should be stressed that the references by the Commission and the Committee to the reparatory case law of the ACtHPR are scarce to say the least, and the same is true of the ACtHPR with respect to both bodies. This once again demonstrates the necessary complementarity between the different bodies of the system.

XVII. Another of the central conclusions to which my study has led has identification of the need to review –from both a normative and practical perspective– the follow-up mechanisms to ensure the execution of the judgments of the ACtHPR. This affirmation can also be extended to both the African Commission and the Committee. In addition, although I note improvements in the 2020 Regulation that strengthen and clarify the action of the ACtHPR, I have not yet found that they have been applied in practice. In addition, a proposal is currently being drafted to improve the mechanisms for monitoring the decisions of the African Court. However, I have identified a series of shortcomings in this proposal that do not correspond to the years employed in its drafting Even more so when, after passing through the ACtHPR, the proposal is still awaiting approval by the AU's political bodies. Likewise, focusing on these bodies, I have identified a remarkable immobility; they have hardly acted despite the extensive competences attributed to them by the regulations. In fact, in recent years, the AU's political bodies have yielded to the requests of non-compliant states not to have their names reflected in the decisions and documents issued. This is worrying for the pro-future effectiveness of the African system; even more so since I have identified a similar pattern with regard to the Commission. The exception is the case of *The African Commission on Human and Peoples' Rights v. State of Libya,* where not only the political bodies –due to the close relationship between the Gaddafi family and African leaders– but also the Court itself adopted a more active position than usual. This ultimately resulted in the release of Saif al-Islam Gaddafi. A course of action that exemplifies that, when there is a determination, the system works properly.

XVIII. The situation described above leads me to affirm that the only source to which we can turn to ascertain the degree of compliance with the decisions issued by the Court are the various annual reports that the judicial body submits to the Executive Committee. A source, however, that requires urgent systematisation, accuracy and clarity. Even more scarce is the information provided on the degree of compliance with the decisions issued by the Commission, and practically non-existent with respect to the Committee.

Focusing on the African Court, my analysis shows that of the 28 cases that had been concluded by the Court by 2020, two cases have been fully complied with –both by Burkina Faso (corresponding to 7% of the total)–, four have been partially complied with –two by Côte d'Ivoire and two by Tanzania (corresponding to 18% of the total)– and the remaining cases remain in the non-compliant category (75%). Information on provisional averages is more limited. In any case, I have not found any case in which the State concerned has reported compliance with the provisional measures issued within the stipulated period. All of this demonstrates that African States are not only quite reluctant to comply with the protective and expansive interpretation adopted by the African Court, but also with the conventional obligations that they themselves have ratified, and inrespect to which they have committed to compliance. However, it should be borne in mind that we are faced with a non-negligible compliance ratio. On the one hand, bearing in mind that we are in the early years of the judicial body's operation. And, on the other hand, that, even with recourse to established mechanisms, such as the IACHR, the ratio is limited, and does not correspond to the impact of its activity upon the continent. In the specific case, as of 31 December 2020, 40 cases had been completed out of the 237 on which it had proceeded to supervise the sentences handed down. This represents 16% of the total.

Although the causes of non-compliance are complex, and affect different actors, and at very different levels, as far as the ACtHPR is concerned, I believe that the judicial body should adopt a more proactive position with regard to non-compliance and not a merely reactive one; giving a greater role to the victim and to the work carried out by other entities, such as NGOs and National Human Rights Institutions. Likewise, I consider it convenient to create a database on its website where the degree of compliance with its decisions is systematically and updated, and where non-compliance is distinguished depending on the seriousness of the cases, so that the AU's political bodies can act accordingly. To this must be added the need, on the one hand, to involve

the judiciary of the States Parties, at all levels, in the promotion and protection of human rights, as well as in the implementation of the ratified treaties; and, on the other hand, the need to build a network of contacts and cooperation with different bodies, institutions and entities at the national, regional and international levels involved, making the very existence of the system known, as well as its functioning, and making use of the work carried out by these bodies, institutions and entities. In addition, detailed and up-to-date information must be provided on the amount and destination of the different budget items granted, as transparency is an essential pillar for the credibility of the system.

XIX. From all of the above, it is clear that, although the challenges that the ACtHPR had to face, not only after its creation, but also prior to the adoption of the Protocol, as well as during its implementation, were numerous and of great importance, I have shown that the judicial body has performed more than significantly in recent years; firstly, by limiting the restrictive elements present in the system; secondly, by adopting a protective and *pro homine* interpretation at a procedural and material level –which is therefore the backbone of all of its jurisprudence–; thirdly, by recognising that it is heir to the development of International Human Rights Law, but without restricting African specificities and particularities; and fourthly, by ultimately contributing with its actions to the virtuous circle of economic, social and cultural development, peace, security, stability, the fight against impunity, human rights, and the rule of law. Moreover, although I have identified deficiencies and challenges of great relevance, and at very different levels, these are no more overwhelming than those that humanity, and specifically Africa and its people, have already had the opportunity to overcome. I am therefore convinced that the ACtHPR will play a key role in the future of the continent, and we hope that this paper will contribute, albeit minimally, to that end.

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JURISPRUDENCE OF THE AFRICAN COURT OF HUMAN AND PEOPLES' RIGHTS

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REGULATIONS AND DOCUMENTATION OF THE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS

1. Constitutive Treaty

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