

The African Charter on Democracy, Elections and Governance as a Human Rights Instrument

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Abstract

According to various provisions of the Protocol Establishing the African Court on Human and Peoples' Rights, the court has jurisdiction over the interpretation and / or application of human rights instruments ratified by the states concerned. This article considers whether, in terms of those provisions, the African Charter on Democracy, Elections and Governance (ACDEG) is a relevant human rights instrument over which the court can exercise its jurisdiction. It aims to consider the contours of the main question posed and clarify the relevant aspects in light not only of the court's jurisprudence but also of the overall legal framework of the African Union. In this regard, before drawing appropriate conclusions, it addresses three main questions. What is a human rights instrument? Which elements in the ACDEG clearly relate to human rights? And, what is the court's approach on the issue?

Keywords

Concept of "human rights instrument", human rights provisions in the ACDEG, nexus between human rights and democracy, rule of law and governance, jurisprudence of the African Court, African Charter on Democracy Elections and Governance

INTRODUCTION

The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (10 July 1998) (the Court Protocol) provides in its article 3(1) that: "[t]he jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the [African Charter on Human and Peoples' Rights], this Protocol and *any other relevant human rights instrument* ratified by the States concerned" (emphasis added). A similar provision is found in article 4 of the Court Protocol, which deals with the jurisdiction of the African Court on Human and Peoples' Rights (ACTHPR) in advisory matters and states that, "the Court may provide an opinion on any legal matter relating to the Charter or *any other relevant human rights instruments*" (emphasis added). With

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respect to the law applicable before the ACtHPR, article 7 of the Court Protocol reiterates the same in the following words: “[t]he Court shall apply the provisions of the Charter and *any other relevant human rights instruments* ratified by the States concerned” (emphasis added).

This article considers whether, in terms of these provisions, the African Charter on Democracy, Elections and Governance (the ACDEG) of 30 July 2007 is a “relevant human rights instrument” over which the ACtHPR can exercise its jurisdiction. In other words, can a violation of the ACDEG amount to a violation of human rights that could fall within the ACtHPR’s jurisdiction? Further, can the court also entertain requests for provisions of the ACDEG to be interpreted by way of advisory opinions?

The ACtHPR recently clarified some aspects of this issue following an application brought by a non-governmental organization (NGO) called Actions pour la Protection des Droits de l’Homme (APDH) against Côte d’Ivoire. This case concerned the obligation incumbent on state parties to establish independent and impartial electoral bodies, as provided by article 17(1) of the ACDEG, and the obligation to protect the right to equality before the law and equal protection by the law, as provided, *inter alia*, by article 10(3) of the ACDEG.

This article aims to consider the contours of the main question posed and clarify the relevant aspects, in light not only of the ACtHPR’s jurisprudence, but also of the overall legal framework of the African Union (AU). In this regard, the first question is: what is a human rights instrument? The first section of this article addresses this point. The next section highlights elements in the ACDEG that clearly relate to human rights. The article then analyses the ACtHPR’s approach, leading to appropriate conclusions.

WHAT IS A “HUMAN RIGHTS INSTRUMENT?”

Lack of a statutory definition

The Court Protocol refers to “human rights instrument” without providing a definition of the concept.¹ According to *Black’s Law Dictionary*, “human rights” refer to “freedoms, immunities, and benefits that, according to modern values (especially at an international level), all human beings should be able to claim as a matter of right in the society in which they live”.² In the context of international law, “human rights” are also defined as a “[s]et of fundamental rights and freedoms inherent to the dignity of any human being, and which concern

1 During the discussions preceding the adoption of the Court Protocol in 1997, the African Society of International and Comparative Law raised the issue of what is an “African human rights instrument”, although no provision in this regard was ultimately included in the protocol. See “Comments on the Draft (Nouakchott) Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights” (1997) at 4, 5 and 7 (copy on file with the author).

2 BA Garner *Black’s Law Dictionary* (9th ed, 2009, West Group) at 809.

all human beings”.³ On the other hand, an “instrument” is, according to *Black’s Law Dictionary*, “[a] written legal document that defines rights, duties, entitlements, or liabilities”.⁴ In international law, “instrument” has been defined as generally referring to a “formal act as opposed to a substantive act”.⁵ One could therefore say that a “human rights instrument” is any legal written document pertaining to the fundamental rights and freedoms inherent in the dignity of any human being.

In the context of international law, however, human rights instruments are of two types: treaties generally concluded by states that are legally binding; and declarations usually adopted by international organizations that are not legally binding as such.⁶ The human rights instruments under discussion in the context of the African human rights system and in the specific context of this article only include legally binding international texts such as charters, conventions or protocols. This stems from the reading of articles 3(1) and 7 of the Court Protocol mentioned above, which both refer solely to “human rights instruments *ratified* by the States concerned” (emphasis added). However, it is important to note in this context that these instruments do not all deal with human rights to the same extent and in the same way. This observation raises the issue as to whether any instrument touching on human rights issues deserves to be characterized as a human rights instrument over which the ACHPR can exercise its jurisdiction in both contentious and advisory matters. In other words, to what extent can an instrument dealing with human rights be described as a human rights instrument justiciable before the ACHPR?

The answer to this question will depend on whether one adopts a broad or narrow interpretation of the concept of a human rights instrument.

Broad interpretation

Taking a broad interpretation, any instrument dealing with human rights issues, or making reference to human rights, or whose provisions have a bearing on human rights issues even though they do not deal directly with human

3 J Salmon (ed) *Dictionnaire de Droit International Public* [Dictionary of Public International Law] (2003, Bruylant) at 396 (author’s translation). It is important to note that, apart from individual rights, international law also recognizes some collective rights for groups, such as peoples; see for instance the African Charter on Human and Peoples’ Rights, arts 19–24.

4 See Garner *Black’s Law Dictionary* above at note 2 at 869 (also termed “legal instrument”).

5 Salmon *Dictionnaire*, above at note 3 at 588 (author’s translation). Compare with art 2(1) of the Vienna Convention of 23 May 1969 on the Law of Treaties: “For the purposes of the present Convention: (a) ‘Treaty’ means an international agreement concluded between States in *written form* and governed by international law, whether embodied in a *single instrument* or in two or more *related instruments* and whatever its particular designation” (emphasis added).

6 In the case of the UN system, for instance, see Office of the High Commission on Human Rights “Universal human rights instruments”, available at: <<https://www.ohchr.org/EN/ProfessionalInterest/Pages/UniversalHumanRightsInstruments.aspx>> (last accessed 12 December 2018).

rights, could be considered a human rights instrument, even if its main object and purpose is not the protection of human rights. One case in point is the 11 July 2000 Constitutive Act of the AU (AU Constitutive Act).⁷

In the preamble of that treaty, AU member states proclaim their determination, among other things, “to promote and protect human and peoples’ rights, consolidate democratic institutions and culture, and to ensure good governance and the rule of law”. According to article 3, the AU’s objectives shall include to: “(e) [e]ncourage international co-operation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights ... (h) [p]romote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments”. Under article 4(m) of the AU Constitutive Act, one of the principles in accordance with which the AU shall function is: “[r]espect of democratic principles, human rights, the rule of law and good governance”.

These provisions are the only references to human rights issues in the AU Constitutive Act. The question then arises as to whether the AU Constitutive Act should be considered a human rights instrument merely because it contains a general reference to the principle of respect for human rights. One may argue that it is a human rights instrument because one of the AU’s objectives and founding principles is respect for human rights. This interpretation would be in line with article 31(1) of the Vienna Convention on the Law of Treaties, which provides that “[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*” (emphasis added). One may add that the AU Constitutive Act is also a human rights instrument because, in proclaiming adherence to that principle, it makes reference to the African Charter on Human and Peoples’ Rights (African Charter), which is undoubtedly a human rights instrument.

On the other hand, it may equally be argued that the AU Constitutive Act is not really a human rights instrument since its main objectives and purposes are not to proclaim and guarantee human and / or peoples’ rights, but rather to establish a continental organization. In the same vein, one may further maintain that it is precisely because it is not a human rights instrument that it makes a clear reference to the African Charter and “any other human rights instruments”.

A corollary question is whether, in contentious matters, the AU Constitutive Act could be invoked by an applicant before the ACHPR as the basis to establish human rights violations. In other words, could a party come before the court and plead that a state has violated articles 3 and / or 4 of the AU Constitutive Act and has therefore violated his or her human rights? So far,

7 See also: The OAU Convention on the Prevention and Combating of Terrorism (14 July 1999), preamble; Protocol to the OAU Convention on the Prevention and Combating of Terrorism (8 July 2004), preamble and art 3(1)(a).

the ACtHPR has not yet had an opportunity to pronounce on such allegations. In *Atabong Denis Atemnkeng v African Union*, the applicant submitted that article 34(6) of the Court Protocol (which requires a declaration by the respondent state as a prerequisite for individuals and NGOs to access the court) was inconsistent with the AU Constitutive Act, which upholds fundamental principles such as the promotion of human rights as enshrined in the African Charter.⁸ He prayed the ACtHPR to declare, inter alia, that this article is contrary to the spirit and letter of the AU Constitutive Act and the African Charter and is therefore null and void.⁹ However, in the end, the ACtHPR found that it did not have personal jurisdiction to deal with the matter, since the respondent was not a state, but the AU, which is an international organization.¹⁰

However, the possibility of a situation where human rights violations by state parties could be directly based on the founding act of an international organization is not just theoretical, as has been demonstrated, for example in the case of the East African Community system. In that system, the 30 November 1999 treaty establishing the community provides, inter alia, that one of its founding principles is “the recognition, promotion and protection of human and peoples’ rights in accordance with the provisions of the African Charter on Human and Peoples’ Rights”¹¹ and that one of its operational principles is “the maintenance of universally accepted standards of human rights”.¹² In many applications before the East African Court of Justice (EACJ), complainants have solely invoked these provisions in requesting declarations from the EACJ regarding violations of their human rights. In many cases, the EACJ recognized that it had jurisdiction to deal with alleged violations of the treaty that in the end could amount to human rights violations, and that some human rights violations were direct violations of the treaty itself.¹³

8 Appln 014/2011, judgment of 15 March 2013, paras 1 and 17–24, available at: <<http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%200142011%20Denis%20Atemnkeng%20V.%20African%20Union.pdf>> (last accessed 15 February 2019).

9 Id, para 25.

10 Id, paras 39–40 and 46. See also *Femi Falana v African Union* appln 001/2011, judgment of 26 June 2012, especially paras 63, 67, 70, 73 and 75, available at: <<http://en.african-court.org/images/Cases/Judgment/Judgment%20Application%200001-2011-%20Femi%20Falana%20v.%20The%20AU.%20Application%20no.%200001.2011.EN.pdf>> (last accessed 15 February 2019).

11 East African Community Treaty, art 6(d).

12 Id, art 7(2).

13 See for example *James Katabazi and 21 Others v Secretary General of the East African Community and the Attorney General of the East African Community and the Attorney General of the Republic of Uganda*, 1 November 2007, East African Court of Justice Law Report (EACJLR) (2005–11) 58, para 39; *Plaxeda Rugumba v The Secretary General of the East African Community and the Attorney General of the Republic of Rwanda* EACJLR (2005–11) 226 at 236–38, paras 42, 43 and 45; *Samuel Mukira Mohochi v The Attorney General of the*

The same question arises with respect to the ACtHPR's jurisdiction in advisory matters. Could any entity, entitled to seek an advisory opinion under article 4 of the Court Protocol, request an opinion on the AU Constitutive Act? In other words, could such an entity seek an interpretation of the relevant provisions of the AU Constitutive Act in relation to human rights? Here again, the ACtHPR has not yet had an opportunity to provide such an interpretation. In a request for an advisory opinion, *Rencontre Africaine pour la Defense des Droits de l'Homme (RADDHO)* sought clarifications on some legal issues, based, *inter alia*, on the interpretation of article 4 of the AU Constitutive Act.¹⁴ However once again, the ACtHPR found that it did not have personal jurisdiction to give an opinion, since RADDHO, an NGO not directly recognized by the AU as such, was not entitled to request advisory opinions under article 4 of the Court Protocol.¹⁵

Be that as it may, if the concept of "human rights instrument" is understood in its broad meaning to include any instrument touching on human rights even where the main objectives and purposes of the instrument are not the protection of human rights, the AU Constitutive Act could be validly invoked before the ACtHPR as a basis for findings on human rights violations, and could also be subject to interpretation by the court in advisory matters. In both matters, however, it would surely be a human rights instrument "by default", since many other specific human rights instruments directly address human rights issues.

Narrow interpretation

Taking a narrow meaning, the concept of "human rights instrument" could refer only to instruments whose main object and purpose is the protection and / or promotion of human rights. The relevant instruments can be classified in two categories. The first category comprises instruments that mainly enunciate directly or indirectly the rights recognized for individuals or groups of individuals. Examples of instruments that mainly enunciate human rights directly include: the African Charter (1 June 1981); the African Charter on the Rights and Welfare of the Child (1 July 1990); the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (1 July 2003); and the African Youth Charter (2 July 2006). Instruments that indirectly proclaim human rights are those that mainly prescribe a number of obligations for states towards individuals or groups of individuals within their jurisdiction, obligations from which human and / or peoples' rights can be clearly deduced. This is, for instance, the case with the AU

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Republic of Uganda, 17 May 2013, EACJLR (2005–11) 274 at 281, para 25; *Venant Masenge v The Attorney General of the Republic of Burundi*, 18 June 2014, EACJLR (2012–15) 136 at 141, para 29.

14 Opinion of 28 September 2017, para 5.

15 *Id.*, paras 33–39.

Convention on the Protection and Assistance of Internally Displaced Persons in Africa (23 October 2009) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Older Persons in Africa (13 January 2016). The Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (10 September 1969) is particular in this regard, as it combines the provisions prescribing obligations for states as well as provisions directly proclaiming refugees' individual rights.

The second category comprises instruments that establish institutions with responsibility to monitor compliance with the instruments in the first category. This is the case with some instruments of the first category, such as the African Charter and the African Charter on the Rights and Welfare of the Child. It is also the case with the Court Protocol, the Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008) and the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human and Peoples' Rights (27 June 2014).

The instruments in both categories are clearly primarily regarded as human rights instruments. Logically, they are also the instruments that will naturally be first invoked by applicants before the ACtHPR or by entities requesting advisory opinions. There is no question as to whether or not they are human rights instruments and their status as such has not been questioned.

Intermediate interpretation

Between instruments such as the AU Constitutive Act and instruments such as the African Charter, there is a range of instruments that deal mainly with non-human rights issues, but which, apart from a general reference to the principle of respect for human rights, also proclaim specific human and / or peoples' rights in some of their provisions. Examples of such instruments include: the Cultural Charter for Africa, which somehow recognizes cultural rights,¹⁶ as well as "access of all citizens to education and to culture";¹⁷ and the Charter for African Cultural Renaissance, which, referring to the African Charter, recognizes the same rights¹⁸ and also engages state parties to "promote freedom of expression and cultural democracy, which is inseparable from social and political democracy".¹⁹

Also noteworthy is the AU Convention on Preventing and Combating Corruption, which in its preamble recognizes, among other things, "the need to respect human dignity and to foster the promotion of economic, social and political rights in conformity with the provisions of the African Charter and other relevant human rights instruments". This convention also indicates that one of its objectives is to "promote socio-economic development

16 Cultural Charter for Africa (5 July 1976), preamble.

17 *Id.*, art 2(a).

18 Charter for African Cultural Renaissance (24 January 2006), preamble and art 4.

19 *Id.*, art 3(b).

by removing obstacles to the enjoyment of economic, social and cultural rights as well as civil and political rights”²⁰ and further that one of the principles state parties are committed to follow is “respect for human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments”.²¹ Apart from these general references to respect for human rights, article 14 of the convention directly proclaims the right of any accused person to a fair trial in the following words: “[s]ubject to domestic law, any person alleged to have committed acts of corruption and related offences shall receive a fair trial in criminal proceedings in accordance with the minimum guarantees contained in the African Charter and any other relevant international human rights instrument recognized by the concerned States Parties.”

With respect to all these conventions and treaties, the issue remains the same: can they be invoked as human rights instruments before the ACtHPR? The quick answer to this question is in the affirmative, especially with regard to provisions clearly enunciating a specific human right, such as the right to education and culture, the right to freedom of expression or the right to a fair trial in corruption matters, as indicated above. However, the best example of an instrument that to a large extent combines the substantive provisions on non-human rights issues and clear provisions directly enunciating human rights is without doubt the ACDEG itself.²² Unsurprisingly, indeed, most of the provisions of the ACDEG do not directly relate to human rights per se. They deal with democracy in its broad meaning, including democratic elections²³ and governance.²⁴ They also address the principle of rule of law, which is associated with democracy and good governance.²⁵ However, this article focuses on provisions that deal specifically with human rights.

20 Convention on Preventing and Combating Corruption (11 July 2003), art 2(4).

21 *Id.*, art 3(2).

22 For a general presentation of the ACDEG, see, inter alia: B Tchicaya “La Charte Africaine de la Démocratie, des Élections et de la Gouvernance” [the ACDEG] (2008) *Annuaire Français de Droit International* 515; AM Mangu “African civil society and the promotion of the African Charter on Democracy, Elections and Governance” (2012) 2 *African Human Rights Law Journal* 348; PJ Glen “Institutionalizing democracy in Africa: A comment on the African Charter on Democracy, Elections and Governance” (2012) 5 *African Journal of Legal Studies* 149; S-A Elvy “Towards a new democratic Africa: The African Charter on Democracy, Elections and Governance” (2013) 27 *Emory International Law Review* 41.

23 With respect to democracy, the ACDEG’s preamble dwells on “popular participation”, “consolidation of democracy”, “universal values and principles of democracy”, promotion of “a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies”, “participatory democracy” and enhancing “the election observation mission” (arts 2–4, 11–22 and 32).

24 Concerning the principle of good governance, see *id.*, preamble, arts 2–3 and 27–43.

25 As for the rule of law principle, see *id.*, preamble, arts 2–5, 10, 23–26 and 32.

ACDEG PROVISIONS ON HUMAN RIGHTS ISSUES

There are a substantial number of provisions in the ACDEG that deal directly with human rights issues, either as such, or in the context of the provisions relating to the principles of democracy, good governance or the rule of law. The preamble of the ACDEG clearly refers to human rights in the following paragraphs: “[i]nspired by the objectives and principles enshrined in the Constitutive Act of the African Union, particularly Articles 3 and 4, which emphasise the significance of ... human rights” and “[c]ommitted to promote the universal values and principles of ... human rights and the right to development”.²⁶

According to article 2(1) and (10) respectively, the ACDEG’s objectives include to promote: “adherence, by each State Party, to the universal values and principles of ... respect for human rights” and “the establishment of the necessary conditions to foster citizen ... access to information, freedom of the press”. Under article 3(1), one of the ACDEG’s principles is “[r]espect for human rights”, while, according to article 4(1), “State Parties shall commit themselves to promote ... human rights”. In this regard, article 6 provides that: “State Parties shall ensure that citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility”. For its part, article 7 provides that, “State Parties shall take all necessary measures to strengthen the Organs of the Union that are mandated to promote and protect human rights and to fight impunity and endow them with the necessary resources”. In particular, in its article 8 the ACDEG prohibits all forms of discrimination and requires state parties to protect all vulnerable social groups:

- (1) State Parties shall eliminate all forms of discrimination, especially those based on political opinion, gender, ethnic, religious and racial grounds as well as any other form of intolerance.
- (2) State Parties shall adopt legislative and administrative measures to guarantee the rights of women, ethnic minorities, migrants, people with disabilities, refugees and displaced persons and other marginalized and vulnerable social groups.
- (3) State Parties shall respect ethnic, cultural and religious diversity, which contributes to strengthening democracy and citizen participation.”

In the same vein, article 10(3) specifically proclaims the right to equality before the law and within the law: “State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society”. Article 25(2) addresses the case of suspension of a member state following an unconstitutional change of government, requiring the state to continue to fulfil its human rights obligations:

²⁶ Id, preamble, paras 1 and 5.

“[h]owever, the suspended State Party shall continue to fulfill its obligations to the Union, in particular with regard to those relating to respect of human rights”. For its part, article 27 specifically targets freedom of expression as follows: “[i]n order to advance political, economic and social governance, State Parties shall commit themselves to ... (8) [p]romoting freedom of expression, in particular freedom of the press and fostering a professional media”.

According to article 43, which addresses the right to education, “(1) State Parties shall endeavor to provide free and compulsory basic education to all, especially girls, rural inhabitants, minorities, people with disabilities and other marginalized social groups. (2) In addition, State Parties shall ensure the literacy of citizens above compulsory school age, particularly women, rural inhabitants, minorities, people with disabilities, and other marginalized social groups”. Finally, although article 45 entrusts the AU Commission with responsibility to “act as the central coordinating structure for the implementation of this Charter”, the ActHPR features on the list of AU organs that are supposed to take part in the evaluation of that implementation.

It is thus apparent that the ACDEG not only contains state parties’ commitments to promote and protect human rights in general, but also directly proclaims some specific human rights, such as the right not to be discriminated against, the right to equality before and within the law, the right to freedom of expression and the right to education.

It is not surprising that the ACDEG deals with human rights. This is because human rights are indissociably connected with other values, such as democracy, the rule of law and governance.²⁷ In general terms, good governance is a very broad concept that also encompasses the principle of respect for human rights.²⁸ Furthermore, it is apparent that, while respect for human rights is an autonomous principle in the context of good governance and democracy, it is also a mandatory component of the rule of law, which postulates not only the supremacy of the law, but also that the law in question should protect human rights.²⁹ Under this premise, it would be very difficult

27 See, for instance, Mangu “African civil society”, above at note 22 at 354 and 355. ACDEG, chap 4 (arts 4–10) is meaningfully entitled “Democracy, rule of law and human rights”.

28 According to the World Bank, “good governance entails sound public sector management (efficiency, effectiveness and economy), accountability, exchange and free flow of information (transparency), and a legal framework for development (*justice, respect for human rights and liberties*”, cited in UN Economic and Social Council, Committee of Experts on Public Administration “Definitions of basic concepts and terminologies in governance and public administration: Note by the Secretariat” E/c.16/2006/4 (5 January 2006), para 11 (emphasis added).

29 According to the UN Secretary General, “[t]he ‘rule of law’ is a concept [that] ... refers to a *principle of governance* in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with *international human rights norms and standards*. It requires, as well, measures to ensure adherence to

for an instrument dealing with good governance, democracy and the rule of law to avoid touching on respect for human rights. It is this nexus between human rights, good governance, democracy and the rule of law that explains why the ACDEG inevitably contains provisions on human rights.³⁰

On a particular note, the specific issue of democratic elections is also closely linked with human rights because one of the political rights guaranteed by the African Charter is the right to free participation in the public affairs of one's state, through elections, among other things. Indeed, according to article 13: "(1) [e]very individual shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. (2) Every citizen shall have the right of equal access to the public service of the country".

As detailed below, in contentious matters, the only case the ACTHPR has adjudicated with respect to the ACDEG raised clear issues involving both the provisions of the charter on elections and some provisions of the African Charter including its article 13(1). In advisory matters, the ACDEG has been invoked in one request, but the court did not deal with the merits.

THE ACTHPR'S APPROACH

The ACTHPR's possible approach in advisory matters: The request from *Rencontre Africaine pour la Defense des Droits de l'Homme*

In its request for an advisory opinion, RADDHO also sought clarification on some legal issues, based, *inter alia*, on article 23 of the ACDEG, which deals with sanctions in cases of unconstitutional changes of government.³¹ However, as also indicated above, the ACTHPR found that it did not have *personal* jurisdiction to entertain the request, given that RADDHO did not qualify to make requests for advisory opinions.³²

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the principles of *supremacy of law*, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency": *UN Secretary General Report to the UN Security Council on Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616 (23 August 2004), para 6 (emphasis added).

30 On the nexus between democracy and human rights, see also: PJ Glen "Institutionalizing democracy", above at note 22 at 162; and Elvy "Towards a new democratic Africa", above at note 22 at 55–56 and 82–83. According to Mangu, "[t]he African Democracy Charter complements the African [Human Rights] Charter by adding the right to democracy, free and fair elections and good governance to the human and peoples' rights provided for in the African Charter": Mangu "African civil society", above at note 22 at 351.

31 Advisory opinion 002/2014, 28 September 2017, para 5, available at: <<http://www.african-court.org/en/images/Cases/Judgment/002-2014%20-%20Request%20for%20Advisory%20Opinion%20by%20RADDHO-%20Advisory%20Opinion-28%20September%202017.pdf>> (last accessed 15 February 2019).

32 *Id.*, paras 33–39.

The question arises here as to whether the ACtHPR also has to satisfy itself that it has *material* jurisdiction, in other words to evaluate whether a particular ACDEG provision is a human rights provision before making a substantive interpretation of that provision. In principle, the answer is in the affirmative. According to rule 39(1) of the Rules of Court, applicable by virtue of rule 72³³ of the same rules, “[t]he Court shall conduct preliminary examination of its jurisdiction”. This provision obliges the ACtHPR to determine whether it has jurisdiction in all relevant aspects. In RADDHO’s request for an advisory opinion, the court first considered its personal jurisdiction and, having found that it did not have such jurisdiction, did not consider other aspects of its jurisdiction, including of course its material jurisdiction. This approach shows, conversely, that, had the court found that it had personal jurisdiction, it would also have considered its material jurisdiction. It is thus clear that, in that matter, the ACtHPR would have had to determine whether or not article 23 of the ACDEG is a human rights provision, before giving any substantive interpretation. In this regard, it is worth noting that the ACtHPR struck out another request for an advisory opinion from The Coalition for the International Criminal Court and Others, because “it raises issues of general public international law and not human rights law, and does not specify any provision of the Charter”.³⁴

The ACtHPR’s actual approach in contentious matters: The case of *Actions pour la Protection des Droits de l’Homme v Côte d’Ivoire*

In this case,³⁵ an Ivorian NGO, APDH, lodged an application against Côte d’Ivoire, alleging in particular that that country’s Law No 2014-335 on the composition, organization, duties and functioning of the Independent Electoral Commission (the IEC) does not conform with articles 17 and 10(3) of the ACDEG and article 3 of the Economic Community of West African

33 This rule, which concerns the application in advisory matters of provisions relating to contentious procedure, provides: “The Court shall apply, *mutatis mutandis* the provisions of Part IV of these Rules to the extent that it deems them appropriate and acceptable.”

34 Order 001/2014, 5 June 2015, para 13, available at: <<http://www.african-court.org/en/images/Cases/Advisory%20Opinion/Orders/Order%20-%20Advisory%20Opinion%20001-2014%20-%20Engl..pdf>> (last accessed 15 February 2019). The issues submitted by the authors of the request had to do with the hierarchy between the Rome Statute on the International Criminal Court and decisions of the AU, with respect to the obligation of states to cooperate in the execution of arrest warrants (id, para 5). See also request for advisory opinion from Socio-Economic Rights & Accountability Project, order of 15 March 2013.

35 The ACtHPR’s judgment (18 November 2016) is available at: <http://www.african-court.org/en/images/Cases/Judgment/JUDGMENT_APPLICATION%20001%202014%20-%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf> (last accessed 15 February 2019). Subsequently, the respondent state applied for an interpretation of this judgment, but in its judgment of 28 September 2017 the ACtHPR found the application inadmissible. In any event, the question under discussion here was not part of the application.

States (ECOWAS) Protocol on Democracy and Good Governance (ECOWAS Democracy Protocol).

Merits of the case

First, the applicant was complaining about the unbalanced composition of the IEC, which was allegedly much more advantageous to the ruling coalition and the government, compared with the opposition and potential independent candidates. Article 5 of the impugned law provided that the IEC was composed of eight members from the executive, the legislature and the party or political coalition in power, four members from opposition political parties or groups, one representative of the judiciary and four representatives of civil society. Article 17 of the ACDEG provides that: “State Parties re-affirm their commitment to regularly holding transparent, free and fair elections in accordance with the Union’s Declaration on the Principles Governing Democratic Elections in Africa. To this end, State Parties shall (1) Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections”.

For its part, article 3 of the ECOWAS Democracy Protocol provides that: “[t]he bodies responsible for organizing the elections shall be independent and / or neutral and shall have the confidence of all the political actors. Where necessary, appropriate national consultations shall be organized to determine the nature and the structure of the bodies”.

On the merits, based on the imbalance in the IEC’s composition, the ACTHPR held that, “by adopting the impugned law, the Respondent State violated its commitment to establish an independent and impartial electoral body as provided under Article 17 of the African Charter on Democracy and Article 3 of the ECOWAS Democracy Protocol”.³⁶ The ACTHPR also held that “consequently ... the violation of Article 17 of the African Charter on Democracy affects the right of every Ivorian citizen to participate freely in the conduct of the public affairs of his country as guaranteed by Article 13 of the Charter on Human Rights”.³⁷

Secondly, the applicant was complaining about the alleged violation of the right to equal protection by the law as guaranteed by, inter alia, article 10(3) of the ACDEG, article 3 of the African Charter and article 26 of the International Covenant on Civil and Political Rights (ICCPR). Article 10(3) of the ACDEG provides that: “State Parties shall protect the right to equality before the law and equal protection by the law as a fundamental precondition for a just and democratic society”. For its part, article 3 of the African Charter stipulates that: “(1) [e]very individual shall be equal before the law. (2) Every individual shall be entitled to equal protection of the law”. Article 26 of the ICCPR provides that: “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the

³⁶ Id, para 135.

³⁷ Id, para 136.

law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

In its judgment, the ACtHPR held, based on its previous findings on the unbalanced composition of the IEC that, “in the event that the President of the Republic or another individual belonging to his political family presents himself as a candidate for any election, be it presidential or legislative, the impugned law would place him in a much more advantageous situation in relation to the other candidates”.³⁸ On that second issue, the ACtHPR concluded that: “by not placing all the potential candidates on the same footing, the impugned law violates the right to equal protection of the law as enshrined in the several international human rights instruments mentioned above, especially Article 10(3) of the African Charter on Democracy and article 3(2) of the Charter on Human Rights”.³⁹

Material jurisdiction of the ACtHPR

However, before pronouncing on the merits of the application, the ACtHPR had to decide on its jurisdiction, including its material jurisdiction in terms of article 3(1) of the Court Protocol. As indicated above, this article provides that the ACtHPR’s jurisdiction extends to the interpretation and application of any “relevant human rights instrument ratified by the States concerned”.

In this respect, one of the questions on which the ACtHPR had to make a determination was precisely whether the ACDEG as well as the ECOWAS Democracy Protocol invoked by the applicant were human rights instruments within the meaning of article 3 of the Court Protocol.⁴⁰

After noting the affirmative responses to that question provided both by the AU Commission⁴¹ and the African Institute of International Law⁴² that it had previously consulted,⁴³ the ACtHPR indicated the approach it would adopt to

38 Id, para 150.

39 Id, para 151.

40 Id, para 49.

41 The AU Commission argued that the ACDEG is a human rights instrument because: one of its objectives is to promote respect for human rights (arts 2(1) and 3(1)); and because state parties commit themselves to promote human rights and popular participation through universal suffrage as the inalienable right of the people (art 4), as well as to ensure that their citizens enjoy fundamental freedoms and human rights taking into account their universality, interdependence and indivisibility (art 6). See also id, paras 51–52.

42 The African Institute of International Law also argued that the ACDEG is a human rights instrument because: it is a treaty to implement the subjective rights enshrined in the African Charter; it forms part and parcel of the African human rights architecture; the interstate commitments it contains are positive obligations arising out of political rights and liberties of the individual; and it contains individual rights provisions (brief of amicus curiae, January 2016). See also id, paras 53–55.

43 Id, paras 28–29.

answering the question: “[t]he Court holds 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”.⁴⁴ As an illustration of the provisions enunciating the subjective rights of individuals, the ACtHPR mentioned article 13 of the African Charter,⁴⁵ quoted above. As an illustration of the provisions prescribing mandatory obligations on state parties, the ACtHPR gave⁴⁶ the example of article 26 of the African Charter, which provides that: “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 ACtHPR then underscored the obligation of state parties to the African Charter to recognize the rights, freedoms and duties enshrined in the charter, and to adopt legislative or other measures to give effect to them, as provided under article 1 of the charter.⁴⁷

Having made this distinction as a matter of clarification, the ACtHPR then established the nexus between the obligation to establish independent and impartial electoral bodies prescribed by article 17 of the ACDEG and article 13 of the African Charter, which directly enunciates an individual right:

“The Court 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 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”.⁴⁸

The ACtHPR then concluded in the following words: “[i]n view of the foregoing, the Court ... holds that the African Charter on Democracy and ECOWAS Protocol on Democracy and Governance are human rights instruments within the meaning of Article 3 of the Protocol, and therefore that it has jurisdiction to interpret and apply the same”.⁴⁹

44 *Id.*, para 57.

45 *Id.*, para 59.

46 *Id.*, para 60.

47 *Id.*, para 62.

48 *Id.*, para 63.

49 *Id.*, para 65. Judge Fatsah Ouguergouz’s separate opinion expresses the view that the ACtHPR might have elaborated its reasoning more by underscoring the dialectic link between democracy and respect for human rights and fundamental liberties or freedoms (para 2).

On the whole, when one considers the ACtHPR's position on its material jurisdiction and on the merits of the case, it becomes apparent that, while the ACtHPR clearly recognized that the ACDEG is a human rights instrument, its findings on the violation of articles 17 and 10(3) of that charter were nevertheless connected to the violations of relevant provisions of the African Charter. On the one hand, the ACtHPR deduced the violation of article 13 of the African Charter as a consequence of the violation of article 17 of the ACDEG. On the other, it found a simultaneous violation of article 10(3) of the ACDEG and article 3 of the African Charter.

This raises the question of whether the ACtHPR could have been in a position to refer only to the violations of the ACDEG, or whether it had to link those violations to the violations of the African Charter. In other words, can the ACDEG be read alone when it comes to alleged human rights violations, or does it necessarily have to be read together with the African Charter or any other relevant human rights instrument?

Before answering this question, one has to bear in mind the fact that the ACDEG does not institute the ACtHPR as the body responsible for its interpretation and application,⁵⁰ but considers it merely as one of the organs of the AU that could contribute to the evaluation of the implementation of the ACDEG under the coordination of the AU Commission. While it remains difficult to foresee how a judicial body could play that role, it is clear as a matter of

50 The situation would be different before the ECOWAS Court of Justice, regarding the ECOWAS Democracy Protocol, because that court has a general "competence to adjudicate any dispute relating to ... [t]he interpretation and application of *the Treaty, Conventions and Protocols of the Community...*" (emphasis added): art 3.1 of the Supplementary Protocol of 19 January 2005, amending the Protocol on the Community Court of Justice, new art 9 of that protocol. See for instance the case of *Congrès pour la Démocratie et le Progrès (CDP) and Others v Burkina Faso*. The applicants, political parties that new electoral legislation did not allow to compete in electoral processes, had invoked, inter alia, the violation of art (1)(i) of the ECOWAS Democracy Protocol, which provides, among other things, that political parties "shall participate freely and without hindrance or discrimination in any electoral process". The court decided indeed that Burkina Faso's Electoral Code, as modified by the new law of 7 April 2015, violates the right to participate freely in elections and ordered Burkina Faso to remove all obstacles following upon that modification: judgment of 13 July 2015, para 38, available at: <http://www.courtecowas.org/site2012/pdf_files/decisions/judgements/2015/Aff_CDP_c_1_Etat_du_Burkina.pdf> (last accessed 15 February 2019). On the other hand, it is worth noting that the Pact on Security, Stability and Development in the Great Lakes Region (of 14–15 December 2006) is an example of a treaty that vests (in art 29) the "African Court of Justice" with jurisdiction to settle disputes arising from its interpretation and application, where non-judicial disputes settlement means have failed. Interestingly, one of the protocols to the pact (which are an integral part of it) is the Protocol on Democracy and Good Governance of 1 December 2006. It is however not clear to which African court this refers. See: <<http://www.icjglr.org/images/Pact%20ICGLR%20Amended%2020122.pdf>> (last accessed 15 February 2019).

fact that the ACtHPR is not directly vested with the jurisdiction to interpret and apply the ACDEG.⁵¹

In the circumstances, to answer the question posed above, one should distinguish between three situations. First, when in one or more of its provisions the ACDEG directly proclaims a specific human right, the ACtHPR will certainly have jurisdiction to interpret and apply those provisions, because that clearly falls within the scope of article 3(1) of the Court Protocol. That is actually what the court did in the case under consideration with respect to the alleged violation of article 10(3) of the ACDEG.⁵² In such a situation, the ACtHPR should not need to rely further on the parallel violation of a provision of the African Charter, unless that provision has clearly been invoked by the party concerned, in which case even the invocation of the ACDEG would appear to be superfluous, if the respondent state is party to both instruments.

Secondly, when the provision of the ACDEG that has allegedly been violated does not directly proclaim a specific human right, but entails that its violation will necessarily lead to violations of the human rights guaranteed by relevant human rights instruments, the ACtHPR will have jurisdiction to interpret and apply such provisions, provided there is a clear and necessary connection between the ACDEG provision and the relevant provision of a human rights instrument. For the ACtHPR to do so, it will have to establish this nexus. Again, that is actually what it did in the case under consideration with respect to the alleged violation of article 17 of the ACDEG, which the court linked to the violation of article 13(1) of the African Charter.⁵³

Thirdly, when the ACDEG provision that has allegedly been violated does not directly proclaim a specific human right⁵⁴ and cannot be linked to any specific human right, it is the author's view that the ACtHPR should not have jurisdiction. Much as the ACtHPR's jurisdiction could be extended by way of a purposive interpretation, it cannot be expanded to matters that do not deal directly or indirectly with human rights as such.

51 It is noteworthy that the court to which art 45 of the ACDEG relates is the African Court of Justice and Human Rights, established by virtue of the Protocol on the Statute of the African Court of Justice and Human Rights of 1 July 2008, which has not yet come into force, available at: <https://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf> (last accessed 15 February 2019).

52 *APDH v Côte d'Ivoire*, above at note 35, para 70.

53 *Id.*, paras 64–65. In this case, the applicants formulated their claims in the form of a right to have impartial and independent national electoral bodies (reply, sec B), but the ACtHPR did not use the same language and did not follow the same approach. In his separate opinion, Judge Fatsah Ouguergouz seems to maintain (in para 34) that it was not necessary for the ACtHPR to rely on the African Charter and the ECOWAS Democracy Protocol from the time the court found that the ACDEG was a human rights instrument, and that it would have been sufficient for it to interpret and apply the latter.

54 Some of the provisions that pertain to commitments to promote democracy, good governance and the rule of law, as listed in notes 24–26 above, might be of such a nature.

CONCLUSION

So far as contentious matters are concerned, it is apparent from this article that the ACDEG is a human rights instrument, except in the case of provisions that do not deal directly with human rights issues and cannot in any way be interpreted as linked to human rights issues.

It is therefore clear that the way the ACDEG provisions are interpreted is of paramount importance. In *APDH v Côte d'Ivoire*, which was under consideration in this article, it would appear that the ACtHPR adopted a liberal and purposive interpretation, especially with respect to article 17 of the ACDEG, which, strictly and literally understood, does not explicitly guarantee a human right.

The remaining question is whether the ACDEG has any provisions that could not be linked in one way or another to a human rights issue. Given the close nexus between democracy, governance and the rule of law on the one hand, and human rights on the other, it seems that most of the time there will be a possibility for parties to a case to build the required link. Whether the ACtHPR will accept even the loosest link in this regard will only be known when appropriate cases have been submitted to it. Only the future will tell.

In advisory matters, it seems the ACtHPR would have even more flexibility to interpret the provisions of a human rights instrument such as the ACDEG. This stems from the wording of article 4 of the Court Protocol, which, as indicated above, vests the ACtHPR with the jurisdiction to “provide an opinion on *any legal matter* relating to ... any other relevant human rights instruments” (emphasis added). The scope of this material jurisdiction is so broad that it potentially covers any legal issue that pertains to a human rights instrument.⁵⁵ Since the ACtHPR has demonstrated a liberal and purposive interpretation of what a human rights instrument is, it follows that it could even give its opinion on a provision of such an instrument that does not have a close and direct link with human rights issues. This could be more so, given that, in principle, in advisory matters there are no alleged violations and there is, in any case, no respondent state that could feel directly accused of human rights violations.

55 On the extensive scope of the ACtHPR’s material jurisdiction in advisory matters, see, inter alia, A Ondoua “Article 4: Avis consultatifs” [Article 4: Advisory opinions] in M Kamto (ed) *La Charte Africaine des Droits de l’Homme et des Peuples et le Protocole y Relatif Portant Création de la Cour Africaine des Droits de l’Homme, Commentaire Article par Article* (2011, Bruylant) 1259.